Routledge-Giappichelli Studies in Law

INDIVIDUAL WILL AND THE CIVIL LAW TRADITION

RETHINKING LEX PRIVATA

Edited by

Tommaso dalla Massara

G. Giappichelli Editore

ROUTLEDGE

This volume sets out to explore the relationship between individual will (*voluntas*) and the legal rule. What unfolds in the following pages is a wide-ranging itinerary, moving between past and present, most notably ancient Rome and the contemporary world.

The guiding question is as radical as it is enduring: in what way can *voluntas* (a psychological impulse internal to the individual) come to determine the legal rule? European private law tradition rests on the premise that legally binding acts – contract and will, to mention only two paradigmatic cases – derive their force from individual will. From the Roman sources arises, with exemplary force, the notion of *lex privata*: the idea that private will itself may generate binding legal norms.

Such a premise immediately leads to further questions. Above all, it compels reflection on the authenticity of that will: what if *voluntas* is compromised? The law of defects (*error*, *dolus*, *metus*) opens the problem of whether distorted or corrupted will can truly sustain the validity and effects of a legal rule.

The reflections gathered in this book approach the European civil law tradition as a broad and unified phenomenon, one in which law is inseparably bound to the historical and cultural contexts in which it takes shape.

Tommaso dalla Massara is Full Professor of Law at Roma Tre University. His research has long focused on the foundations and models of the European civil law tradition; he is author of numerous monographs and essays in Roman law and private law. He also serves as editor of academic book series with leading publishers and sits on the editorial boards of several distinguished international journals.

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

Individual Will and the Civil Law Tradition

Rethinking Lex Privata

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

Individual Will and the Civil Law Tradition

Rethinking Lex Privata

Edited by

Tommaso dalla Massara

Coordinated by

Marta Beghini and Carlo De Cristofaro

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

G. Giappichelli Editore

First published 2026
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

and by G. Giappichelli Editore
Via Po 21, Torino – Italia

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
A catalogue record for this book has been requested

ISBN: 978-10-411-3438-1 (hbk-Routledge)
ISBN: 978-10-411-3451-0 (pbk-Routledge)
ISBN: 978-10-036-6986-9 (ebk-Routledge)
ISBN: 979-12-211-1602-1 (hbk-Giappichelli)

DOI: 10.4324/9781003669869

Typeset in Simoncini Garamond
by G. Giappichelli Editore, Turin, Italy

The title has been subjected to a peer review process prior to publication.

Financed by the funds of the Project of Relevant National Interest (PRIN) 2022 - 2022R739JM "The regulatory will" with contributions from the following research units: CUP F53D23003650006 - Department of Law of the Roma Tre University (funded by the European Union – NextGenerationEU, Mission 4, Component 1); CUP J53D23005830008 - Department of Law of the Cattolica University of Milan (National Recovery and Resilience Plan (PNRR), Mission 4 "Education and Research" – Component 2 "From Research to Business", funded by the European Union – NextGenerationEU – Investment 1.1); CUP D53D23007410006 - Department of Legal Sciences of the University of Salerno (funded by the European Union – NextGenerationEU, Mission 4, Component 2 – Investment 1.1).

CONTENTS

page

CONTRIBUTORS

Giulia Bazzoni, Research Fellow (University of Verona)

Marta Beghini, Researcher (Roma Tre University)

Federica Bertoldi, Associate Professor (Roma Tre University)

Maria Vittoria Bramante, Associate Professor (Pegaso University)

Francesco Castronovo, Research Fellow (Milano Cattolica University)

Augusto Chizzini, Full Professor (Milano Cattolica University)

Tommaso dalla Massara, Full Professor (Roma Tre University)

Martina D'Onofrio, Tenure Track Researcher (University of Milano-Bicocca)

Carlo De Cristofaro, Research Fellow (University of Salerno)

Edoardo Ferrante, Full Professor (University of Torino)

Sara Galeotti, Associate Professor (Roma Tre University)

Mauro Grondona, Full Professor (University of Genova)

Alessio Guasco, Associate Professor (Giustino Fortunato University)

Mauro Orlandi, Full Professor (LUISS Guido Carli University)

Paola Pasquino, Tenure Track Researcher (University of Cassino and Lazio Meridionale)

Fabrizio Piraino, Full Professor (University of Palermo)

Silvia Romanò, Research Fellow (University of Bologna)

Margherita Scognamiglio, Full Professor (University of Salerno)

Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

Chapter 9

ERROR AND CONTRACTUAL *SYNÁLLAGMA* IN ULPIAN'S THOUGHT

Sara Galeotti

ABSTRACT: *This research examines the tension between the subjective intention of contracting parties and its objective expression, focusing on the legal remedies designed to reconcile the mistaken party's will with the legitimate expectations of third parties who rely on the external declaration. Special attention is given to cases of dissent (*dissensus*) concerning the* res *in contracts of sale (Ulp. D. 18.1.9 pr.; D. 18.1.9.2; D. 18.1.14), and to various forms of error related to the appearance of the* merx *– including* error in corpore*,* error in materia*, and* error in qualitate*.*

KEYWORDS*:* Error – Lex contractus – *Mistake* – *Contract of sale.*

1. Mistake in Roman private law: Rethinking a 'difficult topic'

While in the very act no one is conscious of the greatness of his sin, but later on he sees.
Menandr. fr. 448 K.

Long described as a 'difficult topic' by Peter Birks in the notes to one of his lectures on sale (Birks 2014, 76), the issue of mistake in classical Roman law has occupied the centre of Romanist discourse for more than a century (Lawson 1936; Voci 1937; Flume 1951; Wolf 1961; Wieacker 1963; Diesselhorst 1970; Schermaier 1992, 115 ff.; Apathy 1994; Harke 2005; Cardilli 2020, 135).

The theme, moreover, transcends the traditional confines of the discipline, acquiring centrality in 20th century legal theory. Drawing from the Pandektistik and its notion of *Rechtsgeschäft*, modern jurisprudence has adopted a markedly voluntaristic conception of the «juridically acting subject», (Voci 1937, 10) assigning to the concept of *Irrtum* an autonomous normative regime within the broader framework of contractual invalidity (Miquel 1963, 79 ff.; Cardilli 2020, 135, 139 f.).

The axiological shift that accompanied the rise of the conceptual

DOI: 10.4324/9781003669869-13

framework grounded in Winscheid's dichotomy between *Motivirrtum* and *Erklärungsirrtum* (Winscheid 1891, 194 ff.) has left a lasting imprint on scholars of Roman law (Voci 1937, 8; Miquel 1963, 98; Zimmermann 1992, 585 f.; Cardilli 2020, 135 ff.). Even today, much of the literature continues to grapple with the legacy of a nomenclatural system whose appeal remains undeniable, yet whose analytical effectiveness in capturing the empirical and case-based methodology characteristic of the *scientia iuris* of the Romans remains markedly inadequate.

The *reductio ad unitatem* undertaken in the wake of Savigny – deeply influenced by a voluntaristic paradigm – tends to flatten the rich and stratified landscape revealed by the sources. Far from pointing to a uniform treatment of *error*, these texts bear witness to a differentiated, context-sensitive treatment of the phenomenon, one that evolved significantly over time.

Rethinking the problem of mistake in Roman private law (Cardilli 2020, 135) thus entails moving beyond the reified taxonomies that have long dominated scholarly interpretations of juristic solutions. It demands a renewed focus on elements such as the safeguarding of underlying structure of interests shaped by the parties within a legal framework governed by *Typenzwang* – elements that are inevitably sidelined when the analysis remains confined to a paradigm centred exclusively on individual *voluntas* (Cardilli 2020, 137 f.).

That said, my aim here is not to engage with the complex and multifaceted body of theory surrounding *Irrtum und Rechtsgeschäft* (Zitelmann 1879) or *Irrtum bei Vertragsschluss* (Diesselhorst 1970; Schermaier 2014), nor to survey the various positions advanced by leading scholarship on the subject (Harke 2005, 17 ff.). Such an undertaking would far exceed the scope and methodological economy of the present inquiry.

What I propose to do, with more modest ambition, is to analyse the complex relationship between *consensus* and *error* in Ulpian's reflections concerning the contract of sale (*emptio venditio*) – specifically, the *tópoi* through which he appears to draw a distinction between *substantia/materia* and *qualitas* when, perhaps responding to a disappointed buyer, he reflects on the characteristics of the contractual object that prove decisive for identification of the *causa negotii*.

2. Protection of the buyer and *aliud pro alio*

In contracts governed by *iudicia bonae fidei* – particularly in the contract of sale – the synallagmatic nature of the structure of the obligational nexus, which is crucial to both the teleological profile of the agreement and the configuration of interests from which it originates, finds expression in the

procedural mechanisms employed to ensure that the *causa* of the contract is effectively realized for both parties (Vacca 1994[97], 32; Vacca 1995, 2 f., 18 ff.; Vacca 1998, 146 f., 150; Vacca 1999, 71 ff. and fnn. 15 and 17). This reciprocity also informs the assessment of the legal relevance of a 'false' or inaccurate or misaligned representation of factual reality – captured by the *prudentes* through verbal formulations that are never unequivocal (*e.g.*, *aliud pro alio venisse videtur*, *de alio sentiam, tu de alio*, *de alio sensero, tu de alio*) [1] – from which arises the interest in preserving the typical profile of the economic transaction (Frier 1983, 270 and fn. 48).

The procedural and substantive function of good faith (*bona fides*) underlies the solutions crafted to rationally safeguard the *synállagma* of the contract. Defined concretely by legal science through the assessment of the interdependence of reciprocal obligations (Stolfi 2004; Schermaier 2005, 44 ff.), good faith acts as the technical-legal mechanism by which socio-economic values are transposed into the contractual domain. Within the judicial decision-making, it performs a mediating role, bridging abstract legal norms and the concrete realities of everyday life.

To examine the conceptual role of mistake in Ulpian's elaboration of *consentire* (lit. to feel/to perceive jointly) in the context of sale, it is necessary to begin with a well-known passage. There, the Severan jurist, while illustrating the remedy available to a dissatisfied buyer, underscores the nuanced complexity of the obligation placed upon the seller. This complexity is embodied in the idea of *rem praestare*, understood as the «guarantee of conformity with respect to any impediment to the peaceful enjoyment of the sold item in accordance with its economic purpose». This passage marks the culmination of a layered interpretive trajectory, most likely grounded in the jurisprudential debates of the 1st century AD (Voci 1937, 250 ff.; Medicus 1962, 131 and 154 f.; Apathy 1994, 101 ff.; Vacca 1995, 2 f., 19 f. and fn. 35; Schermaier 1998, 241 ff.; Vacca 1998, 145): [2]

---

[1] See, besides Ulpian in D. 18.1.9.2, Paul. 72 *ad ed.* D. 45.1.83.1: *Si Stichum stipulatus de alio sentiam, tu de alio, nihil actum erit*, and Ven. 1 *ad ed.* D. 45.1.137.1: *Si hominem stipulatus sim et ego de alio sensero, tu de alio, nihil acti erit: nam stipulatio ex utriusque consensu perficitur.*

[2] See, *e.g.*, Ulp 1 *ad ed. aed cur.* D. 21.1.1.9: *Apud Vivianum quaeritur, si servus inter fanaticos non semper caput iactaret et aliqua profatus esset, an nihilo minus sanus videretur. et ait Vivianus nihilo minus hunc sanum esse: neque enim nos, inquit, minus animi vitiis aliquos sanos esse intellegere debere: alioquin, inquit, futurum, ut in infinito hac ratione multos sanos esse negaremus ut puta levem superstitiosum iracundum contumacem et si qua similia sunt animi vitia: magis enim de corporis sanitate, quam de animi vitiis promitti. interdum tamen, inquit, vitium corporale usque ad animum pervenire et eum vitiare: veluti contingeret phrenitikó, quia id ei ex febribus acciderit. Quid ergo est? Si quid sit animi vitium tale, ut id a venditore excipi oporteret neque id venditor cum sciret pronuntiasset, ex*

> Ulp. 32 *ad Sab.* D. 19.1.11.1: *Et in primis sciendum est in hoc iudicio id demum deduci, quod praestari convenit: cum enim sit bonae fidei iudicium, nihil magis bonae fidei congruit quam id praestari, quod inter contrahentes actum est. Quod si nihil convenit, tunc ea praestabuntur, quae naturaliter insunt huius iudicii potestate.*
>
> It is important to note that this action extends to everything for which the parties have agreed to be responsible; for it is an equitable action, and what can be more agreeable to equity than to give effect to the intentions of the contracting parties? In the absence of any agreement, the measure of their responsibility will be the obligations that naturally fall within the scope of this action (trans. Mackintosh 1892, 157).

At the opening of his commentary on the *actio ex empto*, Ulpian sheds light – through a stratified hermeneutic lens – on the influence exerted by the parties' regulatory will in shaping the specific profile of the obligations incumbent upon the seller. In keeping with the Roman legal perspective, this reconstruction takes as its starting point what emerges in the context of the *iudicium empti*: the initial premise emphasizes the centrality of the agreements concluded at the moment of contract constitution (*quod praestari convenit*), followed by a pointed invocation of the *bonae fidei* character of the *actio empti*, which requires the judge to assess the debtor's duty of performance according to substantiative standards of fairness and loyalty (Stolfi 2004, 86 ff.; dalla Massara 2007, 281 f., 297 ff.; Cardilli 2008, 39 f.).

The regulatory dimension of what was intended,[3] filtered through the interpretive canon of good faith (*bona fides*) – which ensures its full implementation – thus determines both the operative content and the normative extent of the binding effects.

Particularly significant, within the framework of this analysis, is Ulpian's concluding statement: in the absence of specific agreements by the parties

---

empto eum teneri. 10. *Idem Vivianus ait, quamvis aliquando quis circa fana bacchatus sit et responsa reddiderit, tamen, si nunc hoc non faciat, nullum vitium esse: neque eo nomine, quod aliquando id fecit, actio est, sicuti si aliquando febrem habuit: ceterum si nihilo minus permaneret in eo vitio, ut circa fana bacchari soleret et quasi demens responsa daret, etiamsi per luxuriam id factum est, vitium tamen esse, sed vitium animi, non corporis, ideoque redhiberi non posse, quoniam aediles de corporalibus vitiis loquuntur: attamen ex empto actionem admittit*; Pomp. 9 *ad Sab.* D. 19.1.6.4: *Si vas aliquod mihi vendideris et dixeris certam mensuram capere vel certum pondus habere, ex empto tecum agam, si minus praestes. Sed si vas mihi vendidieris ita, ut adfirmares integrum, si id integrum non sit, etiam id, quod eo nomine perdiderim, praestabis mihi: si vero non id actum sit, ut integrum praestes, dolum malum dumtaxat praestare te debere. Labeo contra putat et illud solum observandum, ut, nisi in contrarium id actum sit, omnimodo integrum praestari debeat: et est verum. Quod et in locatis doliis praestandum Sabinum respondisse Minicius refert*.

[3] See above, Galeotti, particularly 55 ff.

intended to fill, in a supplementary fashion, the gaps ungoverned by the original *conventio*, one may assert in court any obligation that *naturaliter* falls within the operative scope of the *actio ex empto*. In other words, the Roman seller could be summoned to court whenever a circumstance arises that objectively undermines the functional reciprocity inherent the *synállagma*, understood as the functional interdependence of the contractual performances (du Plessis 2006).

Can a 'false' representation of the characteristics of the object sold be regarded as a circumstance that impedes the realization of the natural content of the economic transaction? Should the seller be held liable for it? And if so, under what conditions?

In reconstructing the evolution of the dogmatic parameters underpinning concrete legal solutions, citing the *formula* of the *actio ex empto* (Lenel 1927, 299) proves particularly useful in tracing the stages of a doctrinal evolution that begins with an initial understanding of *aliud pro alio* as an instance of objective non-performance, and culminates, in Ulpian, in arguments that that progressively elevate to the volitional core of the agreement (*id quod actum est*):

> *Quod Aulus Agerius de Numerio Negidio hominem quo de agitur emit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, eius iudex Numerium Negidium Aulo Agerio condemnato; si non paret absolvito.*
>
> Whereas Aulus Agerius bought the man who is the subject of the action from Numerius Negidius, which matter is the subject of the action, whatever on account of that matter Numerius Negidius ought to give to or do for Aulus Agerius in good faith, for the value of that let the judge condemn Numerius Negidius to Aulus Agerius; if it does not appear, let him absolve (trans. Birks 2014, 66).

The *demonstratio* – since A.A. purchased the *res* from N.N. – compels the interpreter to assess scenarios in which the buyer has received a good that does not conform to their expectations. This inquiry is shaped by at least two fundamental questions: under which conditions can it be affirmed that the sale was validly concluded? And what must the plaintiff establish in order to succeed in their claim?

Regarding the first question, it must be assumed that the *res* (which must be susceptible of economic circulation) is clearly identified and exists in the material world – either at the time of the contract's conclusion or at a future moment – since the socio-economic function of the contract, which justifies and sustains the interdependence of reciprocal performances, presupposes

as a typical effect that the seller transfers to the buyer peaceful enjoyment of the *merx* that forms the object of the *conventio*.

The rule *nulla venditio sine re quae veneat* – «There is no sale without the thing that is sold» (Pomp. 9 *ad Sab.* D. 18.1.8 pr.) –, which likely originated in a period when sales occurred solely for ready money, and which persists in the consensual contract due to its initial proximity to the act of real conveyance, exerted – as will be demonstrated – considerable influence on juristic reflections regarding mistake in contracts of sale (Miquel 1963, 79; Apathy 1994, 108 ff.). Indeed, the *scientia iuris* is called upon to determine in which cases a misrepresentation of the object – especially its material constitution – may be deemed functionally equivalent to the non-existence or indeterminacy of the contractual item (*res*), thereby resulting in the nullity of the transaction (Lawson 1936, 80 f.; Apathy 1994, 98 ff.; Birks 2014, 77).

Addressing the second question demands an analysis that goes beyond the content of the *demonstratio* in the formula, focusing instead on the *intentio* (*i.e.*, the claim's substantive foundation): where a valid *conventio* exists, the buyer must ground their claim either in the terms originally negotiated and formalised (*id quod actum est*) or in consolidated mercantile usage. These elements delineate the scope of the *oportere ex fide bona* obligation resting upon the seller.

Faced with the practical problem of identifying situations in which the contractual action could be effectively pursued, Roman legal doctrine initially seems to have relied on the procedural elasticity of the *iudicium empti* to address the problem of *aliud pro alio* not as a *Konsensproblem* but rather as a case of non-performance (the good does not exist) or at variance with the agreed *id quod actum est* (the good lacks the promised qualities). The focus – so it seems to me – was on the performance of the seller's obligation viewed through the lens of contractual fairness rather than formal legal intention (Apathy 1994; Vacca 1999, 72 f.; Schermaier 2014, 850 f.).

According to this original approach, the seller should answer under *ex empto* for the buyer's dissatisfaction due to discrepancies between the delivered good (*merx tradita*) and what was originally agreed, provided that the sale was *cum re*. If the *merx*, even in the smallest part, did not exist in nature, the contract – being void *ab initio* – could lacked the capacity to ground a transfer of ownership, and restitution of the price paid (*pretium*) would be pursued via an action of strict law (*condictio*), no differently from the case in which a *datio ob rem* was not followed by the agreed counter-performance.

3. *Error*, meaning, choice

Since the half of the 2nd century AD, cases of *aliud pro alio* began to be examined through a lens which, while not entirely disregarding procedural implications, appears to transcend a merely procedural framework. A notable indication of this shift is found in an excerpt from Pomponius (D. 44.7.57),[4] not without suspicion of interpolation (Lotmar 2019, 31 and fn. 61; Schiavone 2005, 195), where the Antonine jurist highlights *error* as a form of unconscious dissent.

What kind of legal transaction could be conceived – Pomponius suggests, or even Quintus Mucius (Stolfi 2018), albeit confined to *societas* – if beneath the façade of an apparent convergence (*Konvergenzprozess*) there exists a reciprocal *aliud sentire* arising from a distorted cognitive perception of reality, which permeates the genesis of the legal transaction? The *sentire de alio* of one party, contrary to the veritable will of the other, would predictably yield *nihil actum*.

The verb *sentire*, which concretely evokes the perceptual realm, when transposed to an intellectual plane (do opinions not ultimately derive from sensations?), conveys the notion that no agreement arises unless the parties' respective legal intentions (*voluntates*) converge upon a shared object. A deviation from the agreed terms, a *falsa existimatio*, thus becomes juridically relevant even prior to the moment of contractual execution, reaching back to the foundational moment of the contract itself. The problem of *aliud pro alio* would therefore originate from the tension between the subjective representation and the objective content of the obligation.

This new hermeneutic perspective evidently rests on a conceptual reassessment of *consensus*, which, moving beyond its role as an organizing category in the Gaius-based systematics, becomes an element capable of integrating the *contrahere* with the expression of an intentional and binding *voluntas* (MacMillan 2010, 14 f.).

The good-faith interpretation of *id quod actum est*, which delimits the scope of the *oportere* obligation, thus requires the jurist to look beyond the mere words (*verba*) that embody the parties' commitment in order to access the (shared) intention that should underpin the genesis of the contractual bond – in short, to define the *quid* upon which the wills have effectively converged and that therefore affects the substance of the relationship (du Plessis 2006).

Of course, this does not mean that Julian, Marcellus, or Ulpian – among

[4] Pomp. 36 *ad Quint. Muc.* D. 44.7.57: *In omnibus negotiis contrahendis, sive bona fide sint sive non sint, si error aliquis intervenit, ut aliud sentiat puta qui emit aut qui conducit, aliud qui cum his contrahit, nihil valet quod acti sit. Et idem in societate quoque coeunda respondendum est, ut, si dissentiant aliud alio existimante, nihil valet ea societas, quae in consensu consistit.*

the jurists who paid particular attention to the issue of *error* in relation to consent – anchored their *responsa* in speculative psychology. The primary reference point remains the contractual action, and the investigation into the parties' will serves the purpose of establishing the existence of a shared content capable of producing binding effects (*lex contractus*), which governs the transaction protected as typical.

This progressive refinement in the analysis of *quid actum sit*, directed toward unveiling the actual meeting of wills, and this rational mode of interpretation that leads the interpreter beyond the contractual text to focus on the consensual element, likely originates from a very specific cultural *humus* (Schermaier 2014, 852 f.). More precisely, I refer to the reflection inaugurated by Socratic intellectualism and further developed in Platonic and, above all, Aristotelian thought on the psychology of human action, particularly concerning the relationship between will (*voluntas*), knowledge/comprehension, and rational choice.[5]

It is useful, in this regard, to recall what is stated at the beginning of the third book of the *Nicomachean Ethics*, where Aristotle examines precisely the concepts of voluntary and involuntary action:

> Since that which is done by force or by reason of ignorance is involuntary, the voluntary would seem to be that of which the moving principle is in the agent himself, he being aware of the particular circumstances of the action (…). At any rate choice involves reason and thought. Even the name (προαίρεσις) seems to suggest that it is what is chosen before other things (trans. Ross 2009).[6]

In Aristotle's thought, a voluntary action is characterised by a rational choice concerning the means employed to achieve a specific end, emanating from an agent who is autonomous in will and fully aware of the concrete circumstances surrounding the action. While there exists a close connection between will/*voluntas* and choice, these notions are not synonymous. Choice is subsequent to deliberation – a process that refines the simple conscious inclination toward an object (βούλησις) by subjecting it to the scrutiny of reasoned judgment (βουλή), entailing a careful assessment of the advantages and disadvantages of a given desire (ὄρεξις). Only at the conclusion of this process can that act of trust in the reliance on the rational self-determination of the subject occur, which we call 'choice' and which leads us to translate an intellectual movement into physical action. Ultimately, it is in προαίρεσις – the hinge between volition and cognition – that the full juridical and moral appropriation

[5] See above, Galeotti, particularly 51 ff.

[6] Arist. *EN* III.1 1111a (20-23)-2 1112a (15-18).

of action by the subject is realised: where the intellect, in other words, becomes action.

> We deliberate not about ends but about means. For a doctor does not deliberate whether he shall heal, nor an orator whether he shall convince, nor a statesman whether he shall produce law and order (…). Having set the end, they consider how and by what means it is to be attained (trans. Ross 2009).[7]

Aristotle's argument is clear and systematic: will is understood as rationally structured desire, insofar as it identifies and is directed toward an end, whereas προαίρεσις entails a calculated deliberation focused on the means appropriate to achieving the identified objective. Given that the ultimate goal of human life is happiness, there exists an intermediate level at which the specific aims of each practical discipline are situated – for instance, the healing of the patient in medicine, persuasion in rhetoric, and the governance of citizens in politics – these ends are realised through the rational selection of appropriate means. To choose poorly, that is, to fail to adequately weigh the foreseeable consequences of one's actions, is to move away from the attainment of the goal and, if harm is caused to others, to incur legal and moral liability. It is important, however, to distinguish between two cases: one in which *error* derives from the agent's negligent failure to account for all relevant circumstances; and another in which such circumstances remain unknown to the agent with no culpable omission. In this latter scenario, the event caused cannot be said to express the agent's true will (Manthe 1996, 5 f.).

Building on these premises, Aristotle's theoretical framework articulates a conception of justice (δικαιοσύνη) that is both distributive and corrective (Manthe 1996, 3 f.) – an understanding that profoundly influenced Roman legal thought and is epitomized in the well-known maxim, attributed notably to Ulpian among others,[8] *suum cuique tribuere* (Manthe 1996, 1 ff.; Santucci 2018, 63 ff.; Santucci 2024, 75 f.).[9] The essence of justice lies in rendering to each individual what is due according to law and equity, whether honors or burdens, rewards or punishments (d'Ors 1953, 284 f.; Villey 1956, 364 f.; Falcone 2007, 136 ff. and fn. 7; Santucci 2024, 75). In this context, sanctioning voluntary actions that cause harm to another member of the community

---

[7] Arist. *EN* III.3 1112b (10-16).

[8] Ulp. 1 *reg.* D. 1.1.10 pr.: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi.* 1. *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*; Triph. 9 *disput.* D. 16.3.31.1: *… Et probo hanc esse iustitiam, quae suum cuique ita tribuit, ut non distrahatur ab ullius personae iustiore repetitione.*

[9] See above, Galeotti, particularly 51 f., 61 ff.

serves to rectify a disturbance which, if left unchecked, would threaten social harmony.

As Aristotle further elaborates in the *Nicomachean Ethics*:

> But in associations for exchange this sort of justice does hold men together – reciprocity in accordance with a proportion and not on the basis of precisely equal return. For it is by proportionate requital that the city holds together. Men seek to return either evil for evil (…) or good for good – and if they cannot do so there is no exchange, but it is by exchange that they hold together (trans. Ross 2009). [10]

In Aristotle's ethical framework, justice governs a relational syntax in which the structure of human agency is central, characterized by the interplay between principles and the circumstances surrounding the act. Will/*voluntas*, whose role in the determination of conduct is subordinated to rational cognition in the governance of conduct, does not constitute a psychic function independent from cognition: as Aristotle suggests, one cannot *velle* without knowing. Consequently, one who is ignorant – provided such ignorance is not self-imposed – cannot be regarded as having 'truly' willed.

When Pomponius declares the *voluntas errantis* to be null, [11] or when Julian, in addressing the modifiability of jurisdictional competence, identifies *error* as a limit to the binding effects of the parties' agreement, [12] are they not, in effect, appealing to the Aristotelian understanding of ἁμαρτία as παραλογισμός – a cognitive process that, by deviating παρὰ τὸν λόγον, fails to culminate in an act of true understanding (γνῶσις)?

This possibility cannot be excluded. Nevertheless, the weight of philosophical influence – at most a resource, not a normative methodology, for the learned jurist – must not be misunderstood. The shift from an *interpretatio* of contractual acts based strictly on verbal expression to one centered on *mens et voluntas*, though certainly nurtured by the intellectual *humus* outlined above, ultimately unfolds within the heuristic and discursive strategies internal to the *scientia iuris*. That is to say, it unfolds through processes of juridical typification that convert raw events into legal categories, abstracting

---

[10] Arist. *EN* V.5 1132b (31-36)-1133a (1).

[11] Pomp. 34 *ad Sab.* 39.3.20: *Sed hoc ita, si non per errorem aut imperitiam deceptus fuerit: nulla enim voluntas errantis est.*

[12] Ulp. 2 *omn. trib.* D. 2.1.15: *Nec enim ferendus est qui dicat consensisse eos in praesidem, cum, ut Iulianus scribit, non consentiant qui errent: quid enim tam contrarium consensui est quam error, qui imperitiam detegit*?; Ulp. 3 *ad ed.* D. 5.1.2 pr.: … *error enim litigatorum, ut Iulianus quoque libro primo digestorum scribit, non habet consensum.* See also Plat. *Rep.* I 330a-332c; Cic. *de inv.* 2.160, and *Reth. ad Her.* 3.2.3.

them from their empirical contingency. In its development as a scientific discourse, the juridical culture of the first two centuries of the Common Era could not ignore the vitality of contemporary philosophical debate surrounding what we might call a *Willenstheorie*, and thus inevitably engaged with its themes and questions (Schermaier 2014, 848 f., 852 f.).

The identification of the origin of a given conceptual nucleus – such as the notion of conscious volition as the foundation of individual responsibility, in both juridical and ethical dimensions – constitutes only the starting point of the inquiry. Once its provenance has been established, what becomes crucial is the reconstruction of the function and semantic density that such an element acquires within the theoretical horizon and argumentative structure of the discourse in which it is employed.

To paraphrase Plutarch, it is not enough to appropriate Peripatetic categories and logical frameworks to be a philosopher;[13] yet that very terminology and those frameworks can be integrated into juridical reasoning, contributing to the development of novel conceptual paradigms (Schiavone 2005, 162 f.). One such example, as will be examined, is found in Ulpian's reflection on *error* in the context of *emptio venditio*.

4. *Error* and *conventio*

In Ulpian's conception of *contrahere*, shaped on the one hand by the consensualism of Pedius and on the other by the causalism of Aristo (Schiavone 2005, 359), *error* becomes relevant insofar as it concerns an essential component of the contractual structure the parties intended to establish. If one or both parties hold a mistaken understanding of reality that prevents the realization of the contract's typical purpose, the agreement is incapable of producing valid binding effects.

Given that the defining causa of *emptio venditio* lies in the reciprocal exchange of a *res* for a price, it is essential that the parties reach agreement on both the object and the price. As Ulpian aptly observes, however, such agreement presupposes a preliminary intellectual operation – *consentire*, that cognitive process by which the will is brought into harmony with understanding:

> Ulp. 4 *ad ed.* D. 2.14.1.3: *Conventionis verbum generale est ad omnia pertinens, de quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt: nam sicuti convenire dicuntur qui ex diversis locis in*

[13] Gell. 9.2.4: *"Video," inquit Herodes, "barbam et pallium, philosophum nondum video…"*; Plut. *Quaes. Conv.* 7.6.3 (709b).

unum locum colliguntur et veniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est in unam sententiam decurrunt.

Conventio (literally, 'coming together') is a general word covering all things agreed to by those who deal with one another in order to contract and transact affairs. People who are gathered and come from different places to one place are said to 'come together' (*convenire*), and they resemble those who from different mental impulses agree on one thing, *i.e.*, come to one way of thinking (trans. Frier 2021, 7).

The term *conventio*, defined as «that upon which those who undertake acts between themselves in order to contract or settle agree», denotes precisely the product of an inner convergence of juridical consent among multiple parties – a meeting of minds. Ulpian's metaphor emphasizes the tangible, almost muscular concreteness of this movement: individuals *conveniunt*, he writes, when they move from diverging intentionalities toward a shared judgment, much like travellers coming from different places who ultimately arrive at the same point (Frier 2021, 7; Falcone 2019, 203).

More precisely, Ulpian's emphasis on the *unum* as the objective outcome of *consentire* reveals a distinctive focus not so much on *consensus* as an ordering category to be contrasted with other structural elements of the contract – such as the *res*, the *verba*, or the *litterae* – but rather on the internal *substantia* of the consensual act itself. This act is conceived as a perfect alignment between the parties' perception and volition, a moment in which intention (*voluntas*) and understanding fully coincide in a moment of juridical unity/unification (Falcone 2019, 211).

As previously noted through the citation of Julian's *dictum*, it is especially from the 2nd century AD onward that *scientia iuris* begins to articulate the phenomenon of *error* in terms of an opposition between *consensus/consentire* (shared intention) and *dissentire* (disjunction of wills) – that is, based on the presence or absence of an actual uniformity, or more precisely, a unity of will and perception between the contracting parties. This dichotomy is developed, among others, by Ulpian with respect to any element of the contractual content, including – at a preliminary level – the very recognition of the contractual typus *in fieri*.

On this point, a particularly significant textual reference can be found in:

Ulp. 28 *ad Sab.* D. 18.1.9 pr.: *In venditionibus et emptionibus consensum debere intercedere palam est: ceterum sive in ipsa emptione dissentient sive in pretio sive in quo alio, emptio imperfecta est. Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putasti, quia in corpore dissensimus, emptio nulla est. Idem est, si ego me Stichum, tu*

Pamphilum absentem vendere putasti: nam cum in corpore dissentiatur, apparet nullam esse emptionem.

> In sales and purchases it is obvious that agreement (*consensus*) must occur. But the sale is incomplete if they disagree on (the fact of) the purchase itself, or on the price, or on something else. Therefore, if I thought that I bought the Cornelian farm and you thought that you sold the Sempronian, there is no sale because we disagreed on the object of sale (*in corpore*). Likewise, if I thought (I purchased) Stichus, and you that you sold the absent (slave) Pamphilus; for since there is disagreement on the object of sale, there is clearly no sale (trans. Frier 2021, 205).

Ulpian develops the problem of the divergence between the parties' wills through a refined semantics of *sentire* – articulated in terms of *consensus* and *dissentire* – offering an interpretive key that reaches to the very core of contractual dynamics (Flume 1951, 248 ff.; Frier 1983, 259 ff.; Zimmermann 1992, 587 ff.). As the outcome of an intellectual process, *convenire* always entails a *reductio ad unitatem* of individual intentions. If the wills of the parties deviate independently – that is, if they err, in the strict sense – there can be no *idem sentire* that may constitute a valid *lex contractus*, whether this pertains to the identification of the contractual type or to a particular element of the broader configuration of interests expressed therein (Zimmermann 1992, 588; Schanbacher 2011, 532. *Contra* Wolf 1961, 23 ff., 99 f., 135 f.).

What, then, occurs when there is disagreement regarding the determination of the object of sale – when the subjective presupposition of *conventio* is absent, namely the formation of a shared perception and intentional alignment (*consensus*) between the parties concerning the item to be exchanged for a price?

In the case discussed by Ulpian, the buyer intends to acquire a specific tract of land (or a particular slave), while the seller intends to alienate a different one; since there is no convergence on the same *res*, their *sentire* is incapable of generating any binding effect under legal order, as the discord directly affects the *causa* of the contract itself (Frier 1983, 261 f.). One might say that neither party truly manifests a legally relevant *voluntas* toward the transaction as structured, since neither can derive any utility from it. In other words, the issue arises upstream of the identification of the object to be transferred – a necessary condition for the synallagmatic contract to possess the economic and social content that the legal order protects – and instead involves how the parties perceive and engage with the material reality (Zimmermann 1992, 589).

It will not escape the reader's attention that the scenarios addressed by Ulpian presuppose, albeit implicitly, the material absence of the object of the

transaction (Harke 2005, 27; MacMillan 2010, 19 f.). What rendered the archaic cash sale – rooted in a demand for physical immediacy – ultimately unworkable resurfaces in the context of the consensual contract: although the actual presence of the object is no longer requisite, the absence of a shared intellectual framework renders genuine agreement equally unattainable (Wolf 1961, 47 f.; Frier 1983, 262 f.). At that point, it matters little whether the misunderstanding stems from excessively vague declarations (Pringsheim 1935, 363; Flume 1951, 246 ff.) or whether the *error* is unilateral: expressions such as *putare emere* or *putare vendere* describe intentions that, if they fail to converge on the same object, cannot generate any contractual bond capable of producing binding legal consequences (Wolf 1961, 44 ff.; Wieacker 1963, 389 ff.; Wunner 1964, 163 ff.; Frier 1983, 261 f.; Zimmermann 1992, 589 f.).

The shift in the hermeneutic paradigm, which now places greater emphasis on the volitional and cognitive dimension encapsulated in the concept of *conventio*, nonetheless remains embedded – let it be duly noted – within a private law system governed by the *Typenzwang*.[14] Moreover, the transition from *mancipatio* to *emptio venditio* does not alter the fundamental economic rationale of the contractual scheme, which remains the exchange of a specified thing for a price.

5. Misrepresentation and *dissensus*

There are instances in which the precise identification of the *res* proves insufficient to secure the fulfilment of the interest structure embedded in the contract. This occurs when specific qualities of the purchased good – regarded as essential for the constitution of the contractual causa and presumed by one or both parties to be present – are in fact absent (Zimmermann 1992, 592 f.).

Notably, when the mistake is predominantly unilateral – as is frequently the case with the buyer – it raises the question of how to reconcile the protection of the *emptor* (who fails to derive the intended benefit from the transaction due to the absence of expected qualities) with the imperative of preserving the structural integrity of the contractual relationship.

An important precedent for what will later become Ulpian's reflection on this matter can be found in Julianus:

> Iul. 3 *ad Urs. Fer.* D. 18.1.41.1: *Mensam argento coopertam mihi*

[14] With regard to testamentary provisions, see Beghini, in this book.

ignoranti pro solida vendidisti imprudens: nulla est emptio pecuniaque eo nomine data condicetur.

> You unknowingly sold me, also unaware, a silver-plated table as a solid one: there is no sale and money paid on this account can be recovered by a *condictio* (trans. Frier 2021, 211).

The jurist describes a scenario in which both parties are mistaken as to the material composition of the *merx*: the buyer intends to acquire a solid silver plate; the seller, due to his own negligence (Galeotti 2025), believes he has provided such an item, which is later revealed to be merely silver-plated. Julianus concludes that the *emptio* must be considered null and void, and that the buyer is entitled to an action at strict law to recover the price paid.

According to the jurist's reading, a shared error concerning the characteristics of the object of sale (*res*) would appear to produce the same effects as a *venditio sine re*: although the parties' wills do formally converge, the transaction is devoid of causal efficacy, since the contract – concluded over something that does not exist (the solid silver plate) – is incapable of producing the typical effects of the transaction. The *error*, one might say, undermines the causal *consensus*, turning it into an illusory *consensus* (Schanbacher 2011, 524 ff.; Schermaier 2014, 855).

In my view, however, Julianus' – or perhaps rather Urseius' (Guarino 1946, 48 ff.; Paricio Serrano 2023, 60; Galeotti 2025) – *opinio* should not be understood as a general treatment of *error in materia* or *substantia*, but rather as a more nuanced reflection on the objective dimension of the *causa* underpinning the synallagmatic structure of the contract. Specifically, it concerns the ability of the *iudicium empti* (more precisely, the shaping of the *condemnatio ex fide bona*) to uphold the contractual equilibrium in accordance with the criteria of *bonum et aequum*. Should the contractual remedy be available even in the absence of *dolus in contrahendo*, where the deception arises solely from the item's appearance and results in the delivery of a materially different or inferior good from what the buyer had anticipated?

There is, undoubtedly, no single definitive answer: only a constellation of factual elements that the interpreter must examine in order to construct a solution consistent with the *corpus* of responses previously developed in analogous cases.

The assessment is therefore guided by a series of diagnostic questions aimed at capturing the context: Did the *merx* present misleading attributed? Could a reasonably attentive buyer or seller have perceived its actual composition? Was the essence of the item detectable through the exercise of reasonable care?

In the case at hand, we are dealing with a plate which, at first glance,

appears to be made of solid silver. As Julianus characterizes the *emptor* as *ignorans*, we may infer that the *error* was not reasonably avoidable. Conversely, the seller's mistake seems attributable to culpable behaviour (*imprudentia*): perhaps he possessed the means to ascertain the actual composition of the *res*, yet behaved carelessly; perhaps he could have consulted an expert, but failed to do so. What is certain is that he preferred to rely on appearances, without verifying the substantial composition of the item (Galeotti 2025).

The position in which the *venditor* of the plate finds himself is thus different both from that of a fraudulent seller (*qui sciens vendidit…*), and from that of the innocent seller of a defective item (*qui ignorans vendidit…*):[15] in the latter case, after all, the buyer's failure to obtain the expected benefit from the transaction could not be traced to the vendor's conduct (Flume 1934, 329; Medicus 1962, 130; Vacca 1999, 91 ff.).

The Roman jurist's perspective is best appreciated by transitioning from substantive to procedural analysis.

Suppose the sale (*emptio*) was considered valid, and that the *imprudens* merchant of D. 18.1.41 was sued under the *actio ex empto* for having failed to correctly identify the material composition of the plate: if his 'lightness' (*i.e.*, negligence) were deemed *dolus in contrahendo*,[16] he could face a *condemnatio* for the amount of the *id quod interest emptoris non decipi* (Talamanca 1993, 440 ff.). He would thus have been required to pay the buyer a sum greater than the price he had received, while, since the validity of the transfer remained unaffected, the *merx* would have remained with the purchaser.

No matter how reprehensible the merchant's conduct appear from the standpoint of *virtus* or *fides* (Schulz 1934, 151 ff.), even the strictest Stoic would have acknowledged that the result fell short of the principles of *bonum*

---

[15] Ulp. 32 *ad ed.* D. 19.1.13 pr.: *Iulianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto: ait enim, qui pecus morbosum aut tignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id ita esse scissem: si vero sciens reticuit et emptorem decepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morbosi pecoris perierunt, quod interfuit idonea venisse erit praestandum.*

[16] See Pomp. 9 *ad Sab.* D. 19.1.6.4: *Si vas aliquod mihi vendideris et dixeris certam mensuram capere vel certum pondus habere, ex empto tecum agam, si minus praestes. Sed si vas mihi vendidieris ita, ut adfirmares integrum, si id integrum non sit, etiam id, quod eo nomine perdiderim, praestabis mihi: si vero non id actum sit, ut integrum praestes, dolum malum dumtaxat praestare te debere. Labeo contra putat et illud solum observandum, ut, nisi in contrarium id actum sit, omnimodo integrum praestari debeat: et est verum. Quod et in locatis doliis praestandum Sabinum respondisse Minicius refert.*

et *aequum*, given that the seller endured a financial detriment wholly disproportionate to his actual actions.

Nor, for that matter, would requalifying the seller's *imprudentia* as mere *ignorantia* yield a fairer result. If the plate – despite its lesser intrinsic value – had been deemed fit for ordinary use, and no express warranty had been given by the merchant (Talamanca 1993, 414 f. and fn. 1155, 442, fn. 1443 e 1445; Schermaier 2005, 42 f.; Vacca 2007, 171 f.; Frier 2021, 298), the buyer could not claim breach of the seller's duty to ensure full availability and usability of the item sold (*habere licere*).

Even assuming the buyer were granted the *actio empti* on grounds of the good's «lack of integrity» (Talamanca 1993, 445 and fn. 1467; Vacca 1999, 93 f., fn. 56, 101 ff.; Vacca 2007, 169 ff.), the vendor's liability would be limited to compensating the difference between the *pretium* paid and the amount that would have been paid had the defect been known. This would result in a reduced profit margin for the seller, reflecting the buyer's diminished interest in the transaction. Nevertheless, the negligent seller would still retain a certain – albeit modest – gain from the deal.

Conversely, the *emptor*, having overpaid for an inferior good, would not only suffer a financial loss, but would incur both an economic loss and a qualitative disappointment (Galeotti 2025).

The fact that the imbalance arising from the failure of reciprocal performance could not be rectified through a good faith interpretation of the contract – specifically, by leveraging the flexibility inherent in the *condemnatio* under the *actio empti* – would hardly have escaped Julian's notice. In reflecting on the causa of the synallagmatic exchange and the remedial options available, the jurist may well have deemed nullity a preferable course to preserving the economic transaction (Frier 1983, 265, 267).

It should be noted, however, that the outcome would likely have been different had the discrepancy between the market value of the good and the price paid worked to the buyer's advantage – for example, if a plate sold as silver-plated had turned out to be solid silver. In such a case, the issue previously discussed – namely, the imputation of the consequences of one party's *imprudentia* to the non-negligent counterpart – would not have arisen: in accordance with the principle of *suum cuique tribuere* (Betti 1942[47], 144 and fn. 15; Betti 1962, 270, 333, 338, 384; Santucci 2024, 70 ff.), the merchant – having set the *pretium* himself – would have had no one to blame but his own carelessness (Frier 2021, 195 f.).

If correct, this reconstruction would demonstrate how the reflection on the issue of common *error* (*in materia/substantia*) followed a substantially coherent development from Julian to Ulpian (Galeotti 2025, 378 ff.):

> Ulp. 28 *ad Sab.* D. 18.1.14: *Quid tamen dicemus, si in materia et qualitate ambo errarent? Ut puta si et ego me vendere aurum putarem et tu emere, cum aes esset? Ut puta coheredes viriolam, quae aurea dicebatur, pretio exquisito uni heredi vendidissent eaque inventa esset magna ex parte aenea? Venditionem esse constat ideo, quia auri aliquid habuit. Nam si inauratum aliquid sit, licet ego aureum putem, valet venditio: si autem aes pro auro veneat, non valet.*
>
> But what will we hold if both parties are mistaken on the material and a characteristic (*materia* et *qualitas*)? For example, if I thought that I sold, and you that you bought, gold, when it was (in fact) bronze? For instance, co-heirs sold to one heir, for a substantial price, a bracelet said to be of gold, and it was (subsequently) found to be mostly bronze? It is settled that there is a sale because it had some gold. For, if something is gilded, the sale is valid even if I thought it (solid) gold; but if bronze is sold as gold, it is not valid (trans. Frier 2021, 211).

In my humble assessment, the case of the gold-plated bracelet – believed to be, and sold as, gold – only apparently constitutes a sort of overruling (Cornioley 1968, 280 ff.; Zimmermann 1992, 595; Frier 2021, 211) of Julian's *opinio*; nor is it necessary to invoke «abstract philosophical considerations» (Talamanca 1993, 327 f.) to explain its rationale – at least not as a guiding principle (Schanbacher 2011, 528 ff.).

In the case examined by Ulpian, both seller and buyer appear to have been unaware of the actual material composition of the *merx*, whose accurate classification in light of its typical economic function within market exchange, plausibly as personal ornamentation – would not have been compromised by the presence of a lesser amount of precious metal than the parties had anticipated. The lower intrinsic value of the *viriola* (gold-plated rather than solid gold) would, however, have implied a market price substantially below that which was agreed upon.

The subsequent discovery of this discrepancy, while not retroactively undermining the contractual *causa*, nonetheless raised the issue of the objective imbalance between the correlative performances arising from the contract of sale (*emptio venditio*).

Building on what had already been suggested by the jurisprudence of the Hadrianic age (Vacca 2007, 170 ff.), it is therefore plausible to assume that the *actio empti* would, where appropriate, have been granted to allow the disappointed buyer to recover part of the price paid (Zimmermann 1992, 589): should the defect in the good prove such as to diminish its market value, it would have been contrary to the standards of *aequitas* embedded within the legal order for the seller – even if without fault – to be unjustly

enriched. At the same time, it would have appeared equally unfair to nullify the effects of the contract altogether, thereby depriving the good-faith seller of even a minimal profit.

If, however, the bracelet contained no gold whatsoever – and given that the precious nature of the item represented a decisive factor in the structure of interests the *emptor* sought to realise through the contract of sale – the alternatives offered by the *condemnatio* in the *iudicium bonae fidei* would not have sufficed to resolve the matter equitably: the buyer would have received too much (in the event of a *condemnatio* for the *id quod interest* against the merchant), or too little (if the seller were ordered to pay only the difference in market value).

«There is no contract without a shared content – that is, without an object upon which the parties have reached an *idem sentire*», states Ulpian. It follows that an agreement concerning a *merx* unfit to realise the typical *causa* of sale (the exchange of a thing for a price) because it is *falsa* – in the logical and ontological sense of 'not being' – would likewise be incapable of generating obligations (Schermaier 1992, 130). To bind the parties to their mutual misapprehension would entail an irreconcilable conflict both with the principle that ties the validity of the *emptio venditio* to the existence and marketability of the *res* (Flume 1951, 249 ff.), and with the notion of *iustitia* immanent in the positive legal order – a standard plausibly grounded in an ethical-epistemological model that excludes liability for unintentional deception.

Why, then, invoke Aristotle at this point – especially when, as I believe has been demonstrated, the solution offered by Ulpian arises entirely from internal legal reasoning?

For now, I might respond that, insofar as the *iudicium ex empto* permits the development of a «logic of equity and plausibility», it should not be surprising if arguments that resonate with shared meanings – precisely because they are rooted in a *zeitgebundene Weltsicht* – also underpin Ulpian's interpretation of the contract of sale (Schermaier 1992; Schermaier 2014, 857).

The analysis of another fragment, in which the Tyrian jurist engages with the problem of *error* concerning the material composition of the *merx*, should help to clarify more precisely what I mean.

The idea that the intrinsic qualities of the good being sold must be correctly represented by the parties – on pain of nullifying the economic transaction, insofar as such qualities affect the causal determination of the contractual *synállagma* – forms the core of:

> Ulp. 28 *ad Sab.* D. 18.1.9.2: *Inde quaeritur, si in ipso corpore non erratur, sed in substantia error sit, ut puta si acetum pro vino veneat, aes pro auro vel plumbum pro argento vel quid aliud argento simile, an emptio et*

venditio sit. Marcellus scripsit libro sexto digestorum emptionem esse et venditionem, quia in corpus consensum est, etsi in materia sit erratum. Ego in vino quidem consentio, quia eadem prope οὐσία *est, si modo vinum acuit: ceterum si vinum non acuit, sed ab initio acetum fuit, ut émbamma, aliud pro alio venisse videtur. In ceteris autem nullam esse venditionem puto, quotiens in materia erratur.*

If there is no *error* as to the thing itself but rather a mistake as to *substantia*, is there *emptio-venditio* or not? As where vinegar is sold for wine, bronze for gold or lead, or something else similar to silver, for silver. Marcellus in book 6 of his *Digesta* says the sale holds good, because there is *consensus* as to the thing itself though *error* as to the *materia*. I myself agree as to the wine since the essence is the same, at least if the vinegar was indeed soured wine. Yet if it was not sound wine but vinegar *ab initio*, one thing would seem to have been sold for another. For the rest I think the sale is void as often as there is a mistake as to material (trans. Birks 2014, 77 f.).

The fragment presents, among other scenarios, the case of someone who purchased the liquid contained in certain vessels believing it to be wine, only to later discover it was vinegar. According to Marcellus, there would be no reason to question the validity of the sale once agreement had been reached regarding the *merx* – namely, the wine jars. By invoking a term that, on a concrete level, most closely evokes the notion of tangible substance,[17] the Antonine jurist appears to privilege the *quid actum* over the *effectum*: in his view, the fact that the contents of the vessels (the *corpus* subject to the sale) turned out to be of inferior quality than presumed would not undermine the 'causal *consensus*'.

Ulpian, following a line of thought that originates with Aristo and draws from the Aristotelian model a notion of *synállagma* not confined to the objective structure of the contract but rather centred on its rebalancing function (Schiavone 2005, 359), appears – at least to my reading – to privilege the configuration of interests embodied in the *conventio*. He thereby conditions the validity of the sale on the attainment of an outcome aligned with the economic function of the contract. Ulpian thus introduces a significant distinction: it is one thing for the vinegar to result from the natural fermentation of the original product (Frier 1983, 268 ff.; Zimmermann 1992, 592; Apathy 1994, 147 f.); quite another for it to be the condiment known as *émbamma*,

[17] See Lucr. 1.304: *tangere enim et tangi, nisi corpus, nulla potest res*; Sen. *ep.* 106.4: *Bonum facit; prodest enim; quod facit corpus est. Bonum agitat animum et quodam modo format et continet, quae [ergo] propria sunt corporis. Quae corporis bona sunt corpora sunt; ergo et quae animi sunt; nam et hoc corpus est.*

an entirely artificial substance. In the former case, Marcellus' *responsum* would be correct – there would be a correspondence between the *merx* delivered, though of inferior quality, and the one agreed upon (Schermaier 2014, 855). In the latter, however – resembling the situations addressed in D. 18.1.9 pr. or D. 18.1.14 (the bronze bracelet sold as a *viriola aurea*) – the proposed solution would not lead to an equitably satisfactory outcome.

6. The past speaks with its own voice

As clearly shown by the foregoing analysis, Ulpian assigns equal importance to the agreement on the material composition of the object as to its mere identification, recognizing that the *substantia* of the *merx* can fundamentally alter its socio-economic function and, in doing so, bear significant consequences for the synallagmatic *causa*. Consequently, it becomes imperative to establish clear evaluative criteria that go beyond mere contingency, providing the interpreter with concrete reference points for determining the 'reality' of a *res*. This determination, in turn, is pivotal in shaping the legal effects of *error* within the contractual framework.

Ultimately, addressing the philosophical inquiry into «what makes a thing that thing?» becomes a necessary precondition for any coherent juridical assessment.

Especially in D. 18.1.9.2, although the topical nature of the argument is beyond doubt, the terminology employed by Ulpian reveals a clear connection with the dialectic between essence and accidents, which lies at the core of Aristotelian metaphysics (Wolf 1961, 139 ff.; Nicholas 1962, 178; Schermaier 1992, 153; MacMillan 2010, 20; Schermaier 2014, 856. *Contra* Schanbacher 2011, 536 ff.). The importance attributed by the jurist to *error in substantia* (or *materia*), at least, emerges subtly from his recourse to the term οὐσία, arguably more appropriate than its Latin equivalent to express the ontological dimension of the proposed solution. As the first of Aristotle's categories, οὐσία designates the '*quidditas*' the primary nature of a thing considered 'in itself' (καθ'αὐτό). From this perspective, the vocabulary employed by Ulpian is not merely a description of material data but a valorisation of the intellectual process accompanying the identification of the object of negotiation through the abstraction of the «constants of its being». As demonstrated, in the absence of an *idem sentire* regarding the *res*, the object of the sale may be said to be legally non-existent; the same conclusion, however, does not necessarily follow in cases of dissent concerning the *qualitas*, which merely predicates or specifies contingent attributes of the underlying substance.

These cursory references to the Peripatetic tradition are not intended –

as previously emphasized – to suggest that philosophy provides a diagnostic tool for the *prudens iuris* (Harke 2005, 49). Rather, what Ulpian seems to pursue is the conceptual form, articulated in Aristotelian thought and situated beyond the strict boundaries of legal dogmatics: a cognitive construct capable of expressing an immutable and unambiguous «state of being», whose heuristic utility sustains the development of a distinctly juridical reasoning (Miquel 1963, 94 ff., 99).

Striking a balance between opposing demands through the concrete determination of the criteria of *bonum* and *aequum* would not be possible without a skilful and consistent recourse to shared premises. As an interpreter of the *Zeitgeist* in terms of selecting the tools to exercise his directive action, the jurist both shapes and is shaped by the sociocultural context within which he operates.

«To explain Ulpian by Ulpian (and Aristotle)», [18] in conclusion, appears to me the only viable path for reconstructing the jurist's reflection on *error* in consensual sale without distortion. Only in this way can one grasp the *ratio decidendi* of his *responsa*, in which the emphasis placed on the volitional dimension of contractual agreement consistently serves to safeguard the synallagmatic structure of the contract – both at the stage of formation and in the realization of its underlying function.

References

Apathy P. (1994), "Sachgerechtigkeit und Systemdenken am Beispiel der Entwicklung von Sachmängelhaftung und Irrtum beim Kauf im klassischen römischen Recht", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 111, 95-154.

Betti E. (1942[1947]), *Istituzioni di diritto romano*, I, 2nd ed., Padova, Cedam.

Betti E. (1962), *Istituzioni di diritto romano*, Vol. II, Padova, Cedam.

Birks P., Descheemaeker E. (eds.) (2014), *The Roman Law of Obligations*, Oxford, Oxford University Press.

Cardilli R. (2008), "Il problema della resistenza del tipo contrattuale nel diritto romano tra *natura contractus* e *forma iuris*", in R. Fiori (ed.), *Modelli teorici e metodologici nella storia del diritto privato*, Napoli, Jovene, 1-75.

Cardilli R. (2020), "Philipp Lotmar e la dottrina dell'errore", in *Tesserae iuris*, 1(1), 135-151.

[18] The exegetical statement of Porphyr. *quaest. Hom.* 297.16 Schrader, Ὅμηρον ἐξ Ὁμήρου σαφηνίζειν ('to make clear/interpret Homer from Homer'), is a probable Aristarchian maxim.

Cornioley P. (1968), "*Error in substantia, in materia, in qualitate*", in *Studi in onore di G. Grosso*, Vol. II, Torino, Giappichelli, 251-295.

d'Ors Á. (1953), "Aspectos objetivos y subjetivos del concepto de *ius*", in G. Lavaggi (ed.), *Studi in memoria di E. Albertario*, Vol. II, Milano, Giuffrè, 279-299.

dalla Massara T. (2007), "Garanzia per evizione e interdipendenza delle obbligazioni nella compravendita romana", in L. Garofalo, *La compravendita e l'interdipendenza delle obbligazioni nel diritto romano*, Vol. II, Padova, Cedam, 277-310.

Diesselhorst M. (1970), "Zum Irrtum bei Vertragsschluß", in D. Liebs (ed.), *Sympotica Franz Wieacker sexagenario Sasbachwaldeni a suis libata*, Göttingen, Vandenhoeck & Ruprecht, 180-211.

du Plessis P.J. (2006), "The Roman Concept of *lex contractus*", in *Roman Legal Tradition*, 3, 79-94.

Falcone G. (2007), "*Ius suum cuique tribuere*", in *Annali del Seminario giuridico dell'Università di Palermo*, 52, 133-176.

Falcone G. (2019), "Riflessioni sulla *conventio* in D. 2.14.1.3", in *Annali del Seminario giuridico dell'Università di Palermo*, 62, 195-217.

Flume W. (1951), "Irrtum und Rechtsgeschäft im römischen Recht", in *Festschrift für F. Schulz*, Vol. I, Weimar, Hermann Böhlaus Nachfolger, 209-252.

Flume W. (1934), "Zum römischen Kaufrecht", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 54, 328-335.

Frier B.W. (1983), "Roman Law and the Wine Trade: The Problem of «Vinegar Sold as Wine»", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 100, 257-295.

Frier B.W. (2021), *A Casebook on the Roman Law of Contracts*, Oxford, Oxford University Press.

Galeotti S. (2025), "L'apparenza delle cose. Errore e sinallagma contrattuale nella riflessione di Ulpiano", in *Seminarios Complutenses de derecho romano*, 38, 347-389.

Guarino A. (1946), *Salvius Iulianus. Profilo bibliografico*, Catania, Crisafulli.

Harke J.D. (2005), *«Si error aliquis intervenit». Irrtum im klassischen römischen Vertragsrecht*, Berlin, Duncker & Humblot.

Lawson F.H. (1936), "*Error in Substantia*", in *Law Quarterly Review*, 52(1), 79-105.

Lenel O. (1927), *Das «Edictum Perpetuum». Ein Versuch Zu Seiner Wiederherstellung*, 3rd ed., Leipzig, Bernhard Tauchnitz.

Lotmar P. (aut.), Fargnoli I. (ed.) (2019), *Das römische Recht vom Error*, Vol. I, Frankfurt am Main, Vittorio Klostermann.

Mackintosh J. (1892), *The Roman Law of Sale: With Modern Illustrations: Digest XVIII, 1 and XIX*, 1: *Trans. with Notes and References to Cases and the Sale of Goods Bill*, Edinburgh, Clark.

MacMillan C. (2010), *Mistakes in Contract Law*, Oxford-Portland, Hart Publishing.

Manthe U. (1996), "Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes, I: Die Mathematisierung durch Pythagoras und Aristoteles", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 113, 1-31.

Medicus D. (1962), *«Id quod interest». Studien zum römischen Recht des Schadensersatzes*, Köln, Böhlau.

Miquel J. (1963), "Una aportación al estudio del *error in substantia* en la compraventa", in *Anuario de Derecho Civil*, 16(1), 79-99.

Nicholas B. (1962), *An Introduction to Roman Law*, Oxford, Clarendon Press.

Paricio Serrano F.J. (2023), *Salvio Juliano. Vida del jurista y político*, Madrid, Marcial Pons.

Pringsheim F. (1935), "The Inner Relationship between English and Roman Law", in *Cambridge Law Journal*, 5(3), 347-365.

Ross W.D. (trans.), Brown L. (ed.) (2009), *Aristotle. The Nicomachean Ethics*, Oxford, Oxford University Press.

Santucci G. (2018), *Il sistema aperto del diritto romano. Antologia di testi*, Torino, Giappichelli.

Santucci G. (2024), *Chi è causa del suo mal pianga se stesso. Emilio Betti e «quel senso di autoresponsabilità, che i romani mostrano così vivo»*, Bologna, il Mulino.

Schanbacher D. (2011), "Ulpians Lehre vom *error in substantia* und die stoische Ontologie", in K. Muscheler (ed.), *Römische Jurisprudenz. Dogmatik, Überlieferung, Rezeption. Festschrift für D. Liebs zum 75. Geburtstag*, Berlin, Duncker & Humblot, 521-542.

Schermaier M.J. (1992), *«Materia». Beiträge zur Frage der Naturphilosophie im klassischen römischen* Recht, Wien-Köln-Weimar, Böhlau.

Schermaier M.J. (1998), "Auslegung und Konsensbestimmung. Sachmängelhaftung, Irrtum und anfängliche Unmöglichkeit nach römischem Kaufrecht", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 115, 234-288.

Schermaier M.J. (2005), "Mistake, Misrepresentation and Precontractual Duties to Inform: The Civil Law Tradition", in R. Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law*, Cambridge, Cambridge University Press, 39-64.

Schermaier M.J. (2014), "*Philosophari necesse est, sed paucis*: Juristisches und

philosophisches zum Irrtum bei Vertragsschluss", in *Fundamina*, 20(2), 847-857.

Schiavone A. (2005), *«Ius». L'invenzione del diritto in Occidente*, Torino, Einaudi.

Schulz F. (1934), *Prinzipien des römischen Rechts*, Berlin, Duncker & Humblot.

Stolfi E. (2004), *«Bonae fidei interpretatio». Ricerche sull'interpretazione di buona fede tra esperienza romana e tradizione romanistica*, Napoli, Jovene.

Stolfi E. (2018), "Commento ai testi. F. 73 – D. 44.7.57", in J.-L. Ferrary, A. Schiavone, E. Stolfi (eds.), *Quintus Mucius Scaevola. Opera,* Roma, «L'Erma» di Bretschneider, 333-334.

Talamanca M. (1993), *s.v.* "Vendita (dir. rom.)", in *Enciclopedia del diritto*, Vol. XLVI, Milano, Giuffrè, 303-475.

Vacca L. (1994[1997]), "Ancora sull'estensione dell'ambito di applicazione dell'*actio empti* in età classica", in *Iura*, 45, 35-73, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 29-65.

Vacca L. (1995), "Sulla responsabilità *ex empto* del venditore nel caso di evizione secondo la giurisprudenza tardo-classica", in *Seminarios Complutenses de derecho romano*, 7, 297-326, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 1-27.

Vacca L. (1998), "Profili della 'risoluzione' nella *emptio venditio* e nella *locatio conductio rei*", in A. Dufour, B. Winiger (eds.) *Pacte, convention, contrat. Mélanges en l'honneur du P.B. Schmidlin*, Bâle-Frankfurt am Main, Helbing & Lichtenhahn, 121-145, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 125-151.

Vacca L. (1999), "Risoluzione e sinallagma contrattuale nella giurisprudenza romana dell'età classica", in L. Vacca (ed.), *Il contratto inadempiuto. Realtà e tradizione del diritto contrattuale europeo. Atti del III Congresso internazionale Aristec (Ginevra, 24-27 settembre 1997)*, Torino, Giappichelli, 23-59, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e responsabilità. Concetti romani e dogmatiche attuali*, new ed. rev. – from which I have quoted, Torino, Giappichelli, 67-106.

Vacca L. (2007), "Sul rischio del locatore nella *locatio conductio rei*", in E. Nicosia (ed.), *Studi per Giovanni Nicosia*, Vol. VIII, Milano, Giuffrè, 305-332, reprinted in L. Vacca (aut.) and B. Cortese (ed.) (2015), *Garanzia e*

responsabilità. Concetti romani e dogmatiche attuali, new ed. rev. – from which I have quoted, Torino, Giappichelli, 153-175.
Villey M. (1956), "*Suum jus cuique tribuens*", in E. Volterra (ed.), *Studi in onore di P. de Francisci*, Vol. I, Milano, Giuffrè, 361-371.
Voci P. (1937), *L'errore nel diritto romano*, Milano, Giuffrè.
Wieacker F. (1963), "Irrtum, Dissens, oder gegenstandslose Leistungsbestimmung", in *Mélanges Ph. Meylan*, Vol. I. *Droit romain*, Lausanne, Imprimerie Centrale de Lausanne, 383-408.
Winscheid B. (1891), *Lehrbuch des Pandektenrechts*, Vol. I, 7th ed., Frankfurt am Main, Rütten & Loening.
Wolf J.G. (1961), *Error im römischen Vertragsrecht*, Köln-Graz, Böhlau.
Wunner S.E. (1964), *«Contractus». Sein Wortgebrauch und Willensgehalt im klassischen römischen Recht*, Köln, Böhlau.
Zimmermann R. (1992), *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Cape Town, Juta (München, Beck).
Zitelmann E. (1879), *Irrtum und Rechtsgeschäft. Ein psychologisch-juristische Untersuchung*, Leipzig, Duncker & Humblot.