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ORIGINAL SCIENTIFIC ARTICLE

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DOCUMENT SERVING THE CONCLUSION OF A CONTRACT AND CONVEYANCE OF A RIGHT: INTERWEAVING OF THE ROMAN AND GREEK LEGAL TRADITIONS IN BYZANTINE PRIVATE LAW

Abstract: *The purchase contract, often referred to as sale and purchase (πρᾶσις καὶ ἀγορασία) as an illustration of its twofold nature derived from the Roman legal tradition, or simply as sale (πρᾶσις), is suitable for analyzing different legal issues. In light of typical Byzantine document named πρατήριον ἔγγραφον, we aim to define the nature of purchase contract in this medieval legal system. Diplomatic formulae contain data about consensus of contractual parties, as well as the fact that a document was drafted "for security", which raises the question of solemnity of this contract. The role the deed has is also discussed in the paper, as in some cases it is uncertain whether the composition and delivery of the document also implied the passing of title. Applied methodological approach takes into account the linguistic interpretation of documentary clauses and legal provisions in codes, and relies on comparative-historical method.*

Key words: Byzantine law, ancient Greek law, Roman law, ownership, Byzantine documentary practice, *traditio ficta.*

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1. Introduction

In Byzantine legal sources, we encounter illustrative examples of the pre-Byzantine legal tradition – the ancient Roman and the ancient Greek tradition, with different consequences in terms of the conclusion of a Purchase contract, its liability, and also the passing of title. Therefore, the first part of this research will be dedicated to the conclusion of a Purchase contract. Besides the simple meeting of the minds of the contractual parties and providing specific performance, parties enter into the Purchase by drafting a document. Actually, drafting (or, in some cases, issuing) a document, with technical characteristics, called a written instrument, is the mode of concluding a purchase contract that is encountered in the medieval period, especially in regards to purchases with highly valuable subjects. The second topic is the role of a document – written instrument in a process called *traditio ficta*, which replaces the actual physical *modus acquirendi* and by which the vendor acquires a right *via* a constructive delivery of document.

This article, therefore, combines two different yet visibly connected issues concerning the Purchase contract. However, some questions specifically closely related to the Purchase contract in Byzantium had to be disregarded on this occasion: the questions of defects in the merchandise and legal deficiencies, *arrha* (earnest money), sale on credit, sale with deferred delivery, confirmation of purchase, purchase of titles and functions, purchase of animals, *laesio enormis*, etc.

While the first issue was recognized in different studies on Byzantine private law,[1] the second problem was merely outlined.[2] Only two separate works deal directly with the problem of *traditio per cartam* (παράδοσις

1 Lingenthal, Z. von, 1892, *Geschichte des Griechisch-Römischen Rechts*, Berlin, Weidmann, pp. 299–301; Nörr, D., 1966, Die Struktur des Kaufes nach den byzantinischen Rechtsbücher, *Byzantinischen Forschungen*, 1, pp. 230–259; Margetić, L., 1971, O javnoj vjeri i dispozitivnosti srednjovjekovnih notarskih isprava s osobitim obzirom na hrvatske primorske krajeve, *Radovi JAZU*, 4, pp. 5–80, precisely, pp. 53–60; Соловјев, А., 1927, Уговор о куповини и продаји у средњовековној Србији, *Архив за йравне и друшшвене науке,* 15, pp. 429–448, precisely, pp. 434–436; briefly Saradi, H., 1999, *Notai e documenti greci dall'età di Giustiniano al XIX secolo. I Il sistema notarile bizantino (VI–XV secolo)*, Milano, Giuffrè, pp. 213–216; partially Sargentli, M., 1982, La compravendita nel tardo diritto romano indirizzi normativi e realta sociale, *Studi Arnaldo Biscardi*, t. II, pp. 341–364.

2 However, the topic is nicely covered in the research field of Western Roman law. In this occasion, I will highlight one domestic article, Sič, M., 2004, Translativno dejstvo ugovora o kupoprodaji u zapadno rimskom vulgarnom pravu i zadržavanje ovog koncepta u savremenim pravnim sistemima, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 38, 3, pp. 285–311.

δι' ἐγγράφου) in Byzantine law. The pioneering article on the subject was Francesco Brandileone's.[3] Brandileone's studious work covers all aspects of this legal issue based on then-available legal sources. Approximately half a century later, Panagiotis Zepos published an additional contribution to this subject.[4] Alexander Soloviev, in his prolific and diverse academic career, touched on this topic in his study dedicated to the Purchase contract in medieval Serbian law, which is mostly adopted from Byzantine law.[5]

However, numerous researchers were conscious of these problems and addressed them in their studies. The issue of *traditio per cartam* in Byzantine law was brought to light by Zachariä von Lingenthal in his general interpretation of Byzantine law.[6] The same questions were recognized by G. Ferrari.[7] Franc Dölger drew attention to them in his *Byzantinische Diplomatik*,[8] as well as in his *Besprechungen* of H. Steinacher's study "Die antiken Grundlagen der frühmittelalterlichen Privaturkunden".[9] Another notable study, on the Byzantine notary system, was written by H. Saradi, and it discusses the drafting of an act, as well as its handover to the parties.[10] Đ. Bubalo explored the same issue in the Serbian medieval system, highlighting the legal aspects of these problems, which are, in some cases, similar to Byzantine law.[11] Last but not least, there is the contribution of L. Bénou about the nature of different Byzantine legal issues.[12]

The sources this analysis draws on are the documents archived in the Athonite monasteries, published in the Archive de l'Athos series during the last and this century. The Purchase contract is well-represented in the Greek monasteries' archives, particularly in the 13th–15th centuries. On the other hand, in several cases, the legal stipulations compiled in official and private legal codices contain relevant material for this analysis.

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3 Brandileone, F., 1904, La „traditio per cartam" (παράδοσις δι' ἐγγράφου) nel diritto bizantino, *Studi in onore di Vittorio Scialoja*, pp. 2–26.

4 Ζεποῦ, Π., 1951, Ἡ παράδοσις δι᾽ ἐγγράφου ἐν τῷ βυζαντινῷ καὶ τῳ μεταβυζαντινῷ δικαίῳ, *Τόμος Ἀρμενοπούλου,* pp. 185–226.

5 Соловјев. А., 1927, p. 434.

6 Lingenthal, Z. von, 1892, pp. 293, 294.

7 Ferrari, G., 1910, *I documenti greci medioevali di diritto privato dell' Italia meridionale*, Leipzig, B. G. Teubner, pp. 57–62.

8 Dölger, F., 1956, *Byzantinische Diplomatik*, Ettal, Buch–Kunstverlag, p. 343.

9 Dölger, F., 1929–30, H. Steinacher – Die antiken Grundlagen der frühmittelalterlichen Privaturkunden (Beschprechungen), *Byzantinische Zeitschrift*, 29, pp. 324–329.

10 Saradi, H., 1992, *Le notariat byzantine du IXe au XVe siècles*, Athènes, Université nationale d'Athènes, Facultè des lettres, pp. 177–207; Saradi, H., 1999, pp. 85–104.

11 Бубало, Ђ., 2004, *Срйски номици*, Византолошки институт САНУ, pp. 215–220.

12 Bénou, L., 2004, Pour une nouvelle histoire du droit Byzantin, théorie et pratique juridiques au XIVe siècle, Paris, Pierre Belon, p. 248.

2. Writing a Document for the Purpose of the Conclusion of a Contract

2.1. As it is known, the contract called *emptio venditio* became quite frequent around the 3rd century A.D. During the classical period, the contract of purchase was concluded by the mere agreement of the seller and buyer on the essential matters of the contract – the item/items as the subject of the contract or/and the price; the Purchase contract was a consensual contract in Roman law.[13] However, it seems that the nature of this contract suffered some changes during the Later Roman Empire, when, on some occasions, the written instrument became one of the requirements for its conclusion (based on stipulations gathered in Codex Theodosianus),[14] hence, the contract became solemn. On the contrary, it seems that ancient Greek contract ὠνί-πρᾶσις did not know of any judicial obligation prior to exchange of goods and price by the seller and purchaser, retrospectively.[15] To mark this unique nature of Greek purchase, German scholar Fritz Pringsheim used the phrase "Greek law of Sale".

In Byzantine law, as early as the time of Emperor Justinian I, stipulations provide an alternative choice between concluding a contract by meeting of the minds of the contract parties or in writing.[16] The common interpretation of these stipulations enhances formalism in regards to the contract put in writing.[17] Therefore, when the parties opt for drafting, it

13 *Cf.* Gaius III, 135–137.

14 See: Vuletić, V., 2012, Nastanak i razvoj rimske prodaje: trijumf načela konsensualnosti, *HARMONIUS – Journal of Legal and Social Studies in South East Europe*, 1, pp. 123 sqq.

15 Ancient Greeks usually used the term ὠνή (or ὠνή– πρᾶσις), whereas the acquisition of ownership was the predominant factor in terms of this contract, see: Pringsheim, F., 1950, *The Greek Law of Sale*, Weimar, Hermann Böhlaus Nachfolger, pp. 111 sqq; 243 sqq. However, some scholars disagree with Pringsheim on this topic, as there are many examples that ancient Greeks knew for consensuality in contracts (ὁμολογία), see: Cohen, E., Consensual contracts at Athens, in: Rupprecht, H. A., 2006, *Symposion 2003. Vorträge zur griechischen und hellenistischen Rech*, Vienna, Verlag der Österreichischen Akademie der Wissenschaften, pp. 73–92.

16 Iust. Institut. III, 23 (edition: 12. Krüger, P., 1867, *Imperatoris Iustiniani Institutiones*, Berlin, Weidmann). "Emptio et venditio contrahitur, simulatque de pretio convenerit... In his autem quae scriptura conficiuntur non aliter perfectam esse emptionem et venditionem constituimus, nisi et instrumenta emptionis fuerint conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta. donec enim aliquid ex his deest, et poenitentiae locus est et potest emptor vel venditor sine poena recedere ab emptione". *Cf.* CJ 4, 21, 17 (edition: Krüger, P., 1877, Codes Iustinianus, Berlin, Weidmann).

17 However, Nörr in his study proposed a different interpretation of those provisions, based on a *scholia* where purchase with a written instrument is also considered as a

seems that the written form has a constitutional meaning: consequently, if there are some formal deficiences in it, the purchase will be void. The complete picture emerges from the stipulation enacted in 528 A.D., compiled in the *Codex Justinianus*. According to it, different contracts, including the contract of sale (*Contractus venditionum vel permutationum vel donationum*), when put in writing (*cum scriptura*), are supposed to undergo a special procedure known in the scholarship as execution.[18] The text of the provision closely describes this formality. In terms of a document written *per alium*, the instrument should contain a signature. If a document is drafted by a notary, a *tabellion*, it has to go through the actions of *completio* and *absolutio* (CJ. 4, 21, 17, pr), explained in the text below.

This is the origin of the later Byzantine legislation on this topic. Several legal codes included it and upheld the division Emperor Justinian I proclaimed, so it is not unusual to find a similar or exactly the same outline in the later legislation. The list of notable stipulations that inform us about the nature of the Purchase contract in Byzantine law is presented below. It can be remarked that the place and time of the creation of the codices in which the stipulations were compiled vary.

> Ἔγγραφος καὶ ἄγραφος πρᾶσις καὶ ἀγορασία ἐπὶ οἱῳδήποτε εἴδει καὶ πράγματι τῆς τιμῆς στοιχουμένης συνίσταται ἀδόλῳ τῶν συναλλασσόντων συμφωνίᾳ. ἡνίκα οὖν ἡ τιμὴ τῷ πράτῃ, τὸ δὲ εἶδος τῷ ἠγορακότι δοθῇ, τὴν τοιαύτην πρᾶσιν ἐκ μεταμέλου ἑνὸς αὐτῶν μὴ ἀνατρέπεσθαι.[19]
>
> *The contract of purchase and sale with any given subject, either accompanied with a document or not, is concluded once the contractual parties make an honest agreement. When the price is paid to the vendor, and the item handed over to the purchaser, the purchase cannot be overturned.*[20]

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consensual contract, see: Nörr, D., 1966, pp. 233; Margetić, L., 1971, p. 55; 17; Margetić, L., Boras, M., 1980, *Rimsko privatno pravo*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, pp. 269–270; Vuletić, V., 2012, pp. 127–128.

18 Dölger, F., 1929–30, p. 325; Zulueta, F., *Roman Law of Sale*, Oxford, Clarendon Press, 1945, p. 24.

19 Ecloga, 9,1 (edition: Burgmann, L., 1983, *Ecloga – das Gesetzbuch Leons III und Konstantinos' V*, Frankfurt am Main, Löwenklau Gesellschaft e.V).

20 For the Serbo-Croatian translation, see: Margetić, L., 1980, p. 69. The last part of the quotation is translated very differently. To translate ἀνατρέπεσθαι, Margetić used the verb *poništiti* (to annul). The difference is major: if the contract cannot be annulled, it will be regarded as valid. If the contract in this situation cannot be overturned, it means that the purchase is effectuated and that the action of handing over the price and the item is the act of the perfectuation of this contract and not its conclusion. In that sense, this provision reveals the consensual nature of purchase, not its real

[...] Συνίσταται δὲ καὶ ἐγγράφως, καὶ ἀγράφως. Καὶ ἡ μὲν ἐγγράφως, συνίσταται ἅμα τελεσθῆναι τὸ συμβόλαιον• ἡ δὲ ἀγράφως, ἅμα τὸ ὁρισθῆναι καὶ τυπωθῆναι τὸ τίμημα.[21]

The sale can be concluded either in writing or orally. While the one in writing takes effect at the moment when the instrument is finalized, the other, without an instrument, (is concluded) at the moment when the price is set and accepted.

[...] τῇ δὲ ἐγγράφῳ πράσει οὐχ ὕυτω προσγενήσεσθαι λέγομεν, αλλὰ καὶ τὰ σύμβολα τῆς πράσεως καὶ τῆς ἀγορασίας συγγράφεσθαι δεῖ, καὶ οἰκείᾳ χειρὶ τοῦ πιπράσκοντος δυναμοῦσθαι, ἢ ὑπογραφῇ ἑτέρου, ἐὰν μὴ ὁ πράτης γινώσκῃ γράμματα.[22]

In the case of the sale being accompanied by a written instrument, we say it will not come to be in that way, but the instrument of sale and purchase needs to be drawn up and validated by the hand of the vendor himself or signed by another if the vendor does not know the letters.

Ἡ πρᾶσις καὶ ἀγράφως καὶ ἐγγράφως γίνεται. ἔχει δὲ τὸ τέλειον ἡ μὲν ἔγγραφος ἅμα τῷ συμβόλαιον τελεσθῆναι, τουτέστιν ἅμα τῷ πληρωθῆναι τὸ γράμμα τὸ ἐπὶ τῇ συμφωνίᾳ γινόμενον• ἡ δὲ ἄγραφος ἅμα τῷ ταχθῆναι καὶ δοθῆναι τὸ τίμημα.[23]

A sale can be concluded either orally or in writing. The sale with a document is effectuated once the instrument is finalized, i.e. as soon as the document concerning the agreement is drawn up; the sale conducted orally is concluded once the price is set and handed over.

Ἐπὶ δὲ τῆς ἐγγράφου οὐχ ἑτέρως τὸ τέλειον προσγενήσεσθαι λέγομεν τῇ πράσει καὶ τῇ ἀγορασίᾳ, εἰ μὴ τὰ συμβόλαια τῆς πράσεως συγγραφῇ ἤ οἰκείᾳ χειρὶ τοῦ πιπράσκοντος ἤ ὑπὸ ἑτέρου μὲν γραφῇ, ὑπογράφῃ δὲ ὁ πιπράσκων.[24]

In the case of a sale that occurs with a signed instrument, we say that it will not come to the completion of the sale and purchase unless the instruments of the sale are drawn up either by the hand of the vendor himself or by another, provided that the seller signs.

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nature, and is in harmony with the previous sentence. Burgmann also translated the provision in this manner, see: Burgmann, L., 1983, p. 205; Nörr, D., 1966, p. 239, also understands it like this.

21 Πόνημα Ἀτταλειώτου, τιτλ. ια' (edition: Zepos, J., Zepos, P. 1962d, *Jus Graecoromanum*, Vol. VII, Aalen, Scientia).

22 Prochiron Legum, ζ' (edition: Brandileone, F., Puntoni, V., 1895, *Prochiron legume, publicato secondo il Codice vaticano Greco 845*, Roma, Forzani e.c).

23 Synopsis Minor, ισ' (edition: Zepos, J., Zepos, P., 1962c, *Jus Graecoromanum*, Vol. VI, Aalen, Scientia.).

24 Ἑξάβιβλος, III, γ' (edition: Πιτσάκης, Κ. Γ., 1971, Κ. Ἀρμενοπούλου. Πρόχειρον νόμων ἢ Ἑξάβιβλος, Αθήνα, Δωδώνη).

> [...] ἐπὶ δὲ τῆς ἐγγράφως γινομένης οὐχ ἑτέρως τό τέλειον προσγενήσεσθαι λέγομεν τῇ πράσει καὶ τῇ ἀγορασίᾳ εἰ μὴ καὶ τὰ συμβόλαια τῆς πράσεως συγγραφῇ ἢ οἰκείᾳ χειρὶ τοῦ πιπράσκοντος, ἢ ὑπὸ ἑτέρου μὲν γραφῇ, ὑπογράψῃ δὲ ὁ πιπράσκων• εἰ δὲ διὰ ταβελλίονος γίνεται καὶ κόμπλα παρακολουθήσει προταχθείσης ὑπογραφῆς καὶ τοῦ συμβολαίου[...] [25]
>
> *In the case of a sale that occurs with a signed instrument we say that it will not come to the completion of the sale and purchase unless the instruments of the sale are drawn up either by the hand of the seller himself or by another, provided that the seller signs it; if the sale is done through a notary then compla*[26] *will follow after the instrument has been drafted and signed.*

To summarize, one can infer that, under these provisions, one contract could be created with or without the action of drafting (a document). When a document is drafted, it must be without any legal deficiencies – hence the form must be respected, because any defects imply not only the imperfection of the document as evidence but also that the legal deed is void.

2.2. As highlighted above, unlike the Romans, the ancient Greeks were familiar with other concepts of legal binding in Purchase contract.[27] As it is generally thought, in their understanding a Purchase contract had a synallagmatic nature,[28] which was afterwards also accepted in Roman law. The contract was created once one of the contractual parties performed. In matters of Purchase, that performance is usually paying the price.[29] This was closely related to the concept of a Purchase contract done for ready money.[30] It is also believed that this was the nature of the contract in Greco-Roman Egypt, which can be attested in proto-Byzantine documents.[31]

This is how Byzantine stipulations illustrate this issue.

> Ἄγραφος πρᾶσις καὶ ἀγορασία συνίσταται ἀδόλῳ τῶν συναλλασσόντων συμφωνίᾳ ἐπὶ ῥητοῦ τιμήματος χρυσικῇ ποσότητι· ὁπόταν γάρ

25 Prochiron, XIV, 1 (edition: Zepos, J., Zepos, P., 1962a, *Jus Graecoromanum*, Vol. II, Aalen, Scientia).

26 Notary's unique sign.

27 Pringsheim, F., 1950, p. 47.

28 Τὸ συνάλλγμα usually denotes a mutual or reciprocal agreement whereby each contractual party is obliged to provide certain duty.

29 Or handing over the item, if it is a permutation (exchange) instead of a Purchase.

30 Pringsheim, F., 1950, pp. 179 sqq.

31 Taubenschlag, R., 1955, *The Law of Greco-Roman Egypt in the Light of the Papyri*, *332 B.C.–640 A.D.*, Warszawa, Państwowe wydawnictwo naukowe, p. 326.

τὸ τίμημα τῷ πράτῃ καταβληθῇ καὶ τὸ πράγμα τῶ ἠγορακότι παραδοθῇ, ἡ πρᾶσις συνίσταται. Καὶ ἐκ μεταμέλου ἑνὸς αὐτων τὴν τοιαύτην πρᾶσιν μὴ ἀνατρέπεσθαι.[32]

Sale and purchase without a written instrument are concluded by means of an honest agreement between the parties in trade on the stated price in money; when the price is paid to the vendor and the item handed over to the purchaser, the sale is concluded. And this sale is not to be overturned because of the regret of one of the parties.[33]

Thus, in this example, not only that the synallagmatic, double-binding nature of purchase is enhanced, but the contract itself is concluded at a very different moment than in the previous cases. According to the text of this stipulation found in *Ecloga Privata Aucta* (9th century), the purchase contract is a real contract, concluded when the subject of a contract is handed over from one party to the other. This is an example of the solemnity in contract of purchase in Byzantine law, on which grounds some authors consider Byzantine purchase as an innominate real contract.[34] Other authors, like Pringsheim, see in these stipulations the definitive dominance of the Hellenic element in Byzantine law (instead of the Roman), as the moment of handing over the subject of sale – the moment of transferring the ownership – was in the focus of the legislator. Therefore, a sale was considered only as an instrument of acquisition and not as a binding contract, like in the classical world.[35]

The same rule concerning the ἄγραφος πρᾶσις is stated in *Synopsis Minor*, a compilation from the 13th century. Therefore, a sale without a written instrument is concluded as a real contract, again similarly to the ancient Greek contract of sale, as Pringsheim viewed it.[36]

[...] ἡ δὲ ἄγραφος ἅμα τῷ ταχθῆναι καὶ δοθῆναι τὸ τίμημα.[37]

A sale conducted orally is concluded once the price is set and handed over.

2.3. The idea of the real nature of a purchase contract is upheld by the information in the documents. One rather frequent clause in the late Byzantine documents reports on this action, sometimes with a detailed

32 Ecloga privata aucta, ι᾽ (edition: Zepos, I., Zepos, P., 1962c).

33 *Cf.* Freshfield, E. H., 1927, *A Revised manual of Roman law: founded upon the Ecloga of Leo III and Constantine V, of Isauria, Ecloga Privata Aucta*, Cambridge, Cambridge University Press, pp. 89–91.

34 Nörr, D., 1966, p. 241.

35 Pringsheim, F., 1950, p. 182.

36 Pringsheim, F., 1950, p. 180; Nörr, D., 1966, p. 249.

37 Synopsis Minor, ις΄ (edition: Zepos, I., Zepos, P., 1962c).

description. Mostly, it reports when and how the purchaser delivered the money, whether in installments or in a single payment, whether only the principal was paid and other modalities.

In the presented examples of this *formula*, as well as in almost every other case, one can read that money was handed over to the vendor, *verbatim*, "from (the purchaser's) hands to (the vendor's) hands", and in the presence of witnesses.

> ἐλάβομεν ἀφ' ὑμῶν ὑπὲρ τελείας τιμῆς αὐτῶν, καθὼς ἀμφότεροι ἠρέσθημεν, νομίσματα ὑπέρπερα πεντηκοντατέσσαρα ἀπαραλείπτως καὶ χεροδότως [...] [38]
>
> συνυρέσθημεν ἀμφότερα τὰ μέρη ὑπέρπυρα διὰ δουκάτων οὐγγίας εἰκοσσιτέσσαρας, ἃ καὶ ἐλάβομεν χειροδότως [...] [39]
>
> ἔλαβον δὲ τὰ τοιαῦτα ὑπέρπερα ἀφ' ὑμῶν χειροδότως [...] [40]

To support this view, we could mention yet another type of *formula*, found in many documents but especially in the work of the Metropolis of Serres. Occasionally, they state that the document is being drafted for security reasons, τὸ παρὸν γράμμα δι' ἀσφάλειαν, obviously to prove and guarantee the previously concluded agreement.

To conclude, once it has been established that most purchase contracts were effectuated before drafting an act, and most of them included clauses about the real nature of this contract in Byzantine law, it is clear that the document itself had the meaning of a subsequent draft. It seems that the character of the purchase contract, relying on the information found in the documents, was such that it belonged to the group of real contracts. However, confronted with various legal compilations, where the compilers were sometimes ignorant about these issues, a scholar might easily get another impression.

3. Writing a Document in Service of the Passing of Title

The second issue in this article concerns the role of a document in the legal procedure of transferring a right. Producing a paper or, more

38 Chilandar I, № 25, l. 22 (edition: Živojinović, M., Giros, C., Kravari, V., 1995, *Actes de Chilandar*, Vol. I, Paris, P. Lethielleux).

39 Lavra III, № 143 (edition: Lemerle, P. *et al.*, 1979, *Actes de Lavra*, Vol. III, P. Lethielleux, Paris).

40 Iviron III, № 84 (edition: Lefort, J. *et al.*, 1994, *Actes d'Iviron*, Vol. III, P. Lethielleux, Paris).

precisely, delivering of a paper to the contractual parties, may have the meaning of *perfectio* or fulfillment of a legal deed. To begin with, we are here discussing the *ius in re* or ownership – δεσποτεία over immovable property and chattels, and the same question could be raised in case of other real rights in Byzantine law – easements (δουλεία), emphyteusis (ἐμφύτευσις), superficies (ὑπερῶον, σουπερφίκιον), mortgage and pledge (ἐνέχυρον, ὑποθήκη).

After the difference between *res mancipi* and *res nec mancipi* disappeared from Roman law, to alienate or transfer a legal title from the previous owner to the new owner, besides having a proper contract, there should be a physical transfer – *corpus*.[41] Yet there were alternative ways to handle this rule. Legal historians are familiar with the terms *traditio longa manu*, *traditio brevi manu*, *constitutum possessorium*, *traditio symbolica*, and the one most relevant to this topic, *traditio ficta*.

The last one, *traditio ficta*, denotes only constructive delivery of goods, where also the production, issuance or drafting of an act, can substitute a real-life transfer of things or entering into possession, and is sufficient for the passing of title. This is called *traditio per chartam* (*tradicio per instrumentum*) or, in Greek, παράδοσις δι' ἐγγράφου.[42] Dispositive acts, documents that serve as instruments of conveyance, are traditionally marked as *cartae* and distinguished from *notitiae*, with the character of a piece of evidence.[43] Ancient Greek law on sale, unlike the Roman, did not require *traditio* for the transfer of ownership.[44] Law of Greco–Roman Egypt knew for conveyance done by a public deed (καταγραφή), that is when the deed is drawn by public functionaries.[45]

However, in Emperor Justinian's legislation, the act of conveyance could be seen in the description of a purchase, in the so-called notary's *completio* (τελείωσις) and the contractual parties' *acceptatio* and *absolutio*

41 Gaius, III, 139 (edition: Studemund, G., Krüger, P., 1923, *Gaius: Gaii Institutiones*, Berlin, Weidmann).

42 The same term, παράδοσις, was used in ancient Greek laws to mark *traditio.* However, unlike in the Roman contract of sale, in Greek ones the transfer of possession was not required, but the transfer of ownership depended on payment alone (see: Pringsheim, F., 1950, p. 219). Was this maybe the foundation of this institute in Byzantine law? This situation was different in Greco-Roman Egypt, for further reading see: Arangio Ruiz, V., 1927, *Lineamenti del sistema contrattuale nel diritto del papyri,* Milano, Pubblicazioni della Università Cattolica del Sacro Cuore, pp. 25 sqq.

43 After Brunner, H., 1877, Carta und Notitia: ein Beitrag zur Rechtsgeschichte der germanischen Urkunde, *Theodori Mommseni Scripserunt Amici,* pp. 570–589, accepted by Redlich, O., 1911, *Die Privaturkunden des Mittelalters*, München–Berlin, Oldenbourg, pp. 4 sqq.

44 Pringsheim, F., 1950, p. 219.

45 Taubenschlag, R., 1955, p. 322.

(ἀπόλυσις). In other words, once the notary completes the act, usually by providing his unique final sign (*compla*; κόμπλα or, in other sources, *signum notarii*), and the parties accept it, the contract is created and perfectuated, and so the title is transferred from the previous owner to the new owner. In Byzantine legal sources, a document with this characteristic is called *τὸ συμβόλαιον.*[46]

The only major difference to earlier legislation we notice in the said Greek stipulations concerns the person that is drafting the document. Only in one place there is a mention of a notary, ταβελλίονος, as in the other provision it is clear that the vendor is the one who writes the act and ratifies it with his own hand; exceptionally, if the vendor is illiterate, another person does this in his stead. In these cases, it seems that the transition of an act means the transition of a real right.

As scholars have stressed, documents that have the aim of transferring a right usually contain a declaration that the previous owner grants free and unimpeded possession to the buyer.[47] One particular act can be used in order to illustrate this issue: a purchase contract from the early 14th century, in which the vendor, the clergyman Kyriakós, assigns the right of ownership over one field to the monks of the Vatopedi monastery. The vendor claims that he alienates the land *via* his document, with all the entitlements the owner in effect has.

> ἐγχωρῶ αὐτοῖς διὰ του παρόντος μου γράμματος ἐπιδράξασθαι τὸ τοιοῦτον χωράφιον', [...], 'καὶ ἐφεῖται τοῖς τελείοις δεσπόταις ποιεῖν[48]

Besides these examples[49], Byzantine documentary practice knows for παραδοτικὰ γράμματα, documents of conveyance, which could be used,

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46 See: Wall, N. van der, 1999, Les termes techniques greques dans le langue des juristes Byzantins, *Subseciva Groningana*, 6, pp. 127–141, more precisely, pp. 130–133. Even though it had a different meaning in ancient Greek and Ptolemaic law, as van der Wall explains (Wall, N. van der, 1999, pp. 130–133), see also: Taubenschlag, R., 1955, *The Law of Graeco-Roman Egypt in the Light of the Papyri*, Warszawa, Państwowe Wydawnictwo Naukowe, pp. 294–295; Knopf, E., 2005, *Contracts in Athenian law*, doctoral dissertation, City University of New York, pp. 51–105.

47 Byzantine diplomatic *formulae* usually speak about βεβαίωσις, a warranty. This formula has legal implications. In law, in terms of the purchase contract, there are traditionally two types of warranty – against eviction and against secret defects. In ancient Greek law, the term βεβαίωσις also described this double warranty. Moreover, the Greek vendor himself became βεβαιωτής if failed to warrant the buyer's ownership, as he fell under the action called δίκη βεβαιώσεος (Pringsheim, F., 1950, pp. 429 sqq). The same diplomatic formulae can be found in a proto-Byzantine document from Egypt (see: Taubenschlag, R., 1955, p. 326).

48 Vatopedi I, no. 37, l. 11–12.

49 For further reading see: Pringsheim, F., 1950, pp. 222–223, on earlier Byzantine (5th and 6th century) documents and *formulae* on *traditio*.

at least hypothetically, for transferring a right. If we pay closer attention to one particular act, the last will of *ieromonachos* Kalinikos, described as παράδοσις,[50] we could question some information. As the document states, Kallinikos had already joined (προσεκυρώθη)[51] the said estates to the Chilandar monastery by a previous act. However, with this additional act, the estates were handed over to the monastery. Similarly, the document of *protos* Gervasios, described as παράδοσις καὶ ἀφιέρωσις, allows the following interpretation: it seems to have the meaning of both a bequest and an instrument of acquisition.[52]

4. Conclusion

The nature of contracts in Byzantine law has been rarely discussed. Plenty of studies have been written about the contract of purchase in classical Roman and Justinian's law, but the different and sometimes conflicting information from the Byzantine era did not permit definitive answers to this question.

Byzantine codes on this theme encompass already familiar provisions and legal institutes. There are few novelties. The attention of the lawgiver was focused on the notary system, the mechanism which produces a written instrument, but not on the act of concluding the contract itself. Strangely enough, even the purchase of an estate was not in the main focus of the legislator.

Taking into account that the nature of the purchase contract has not been explicitly analyzed and the medley of different provisions of the codes, the only relevant sources must be the documents themselves. Relying on the facts they provide, and perusing diplomatic *formulae*, we can get a more accurate picture of the nature of the purchase contract in later Byzantine law. The document itself cannot be the main evidence in favor of the formalism of the Byzantine purchase agreement, especially because documents tend to show local variations. It seems that the Byzantine purchase contract preserved the real form, probably through the law of the Hellenistic era, which entails that the contract is concluded when one of

50 Chilandar II, № 92 (edition: Živojinović, M. *et al.*, *Actes du Chilandar*, Vol. II, Paris, P. Lethielleux, in preparation). Curtesy of Mme Mirjana Živojinović, member of Serbian Academy of Sciences and Arts.

51 See: Chilandar II, № 73, l. 12.

52 Chilandar II, no. 129; see: Матовић, Т., 2017, *Завештања у архивама светогорских манастира* (*XIII–XV* век), doctoral dissertation, Faculty of Law, University of Belgrade, p. 155.

the contractual parties performs his duty, being usually the payment of the price by the purchaser.

The second question that we have posed in this article was previously mainly researched by Western scholars, as they studied *Vulgarrecht* and early medieval documents. It can be said that the issue of the παράδοσις δι'ἐγγράφου was not sufficiently highlighted in the field of Byzantine studies, we believe, due to the lack of information in the sources. However, Athonite documents suggest that the *formulae* describing the act of transfer could be considered relevant evidence to comment on this legal institute. Additionaly, the data about the behavior of the buyer and the seller in sometimes extensive documents point to the moment of the passing a title ("from now on", ἀπὸ τοῦ νῦν). Therefore, studying the documents and tracing the origins of numerous clauses, distinguishing those that had lost any actual legal meaning from others could shed a new light in the research of Byzantine legal history and Byzantine documentary practice as well. Through this research our understanding of ancient Roman and Greek heritage in Byzantium is more visible, to the contrary, authentic legal phenomena also became comprehended.

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DOKUMENT U SLUŽBI ZAKLJUČENJA UGOVORA I PRENOSA PRAVA: PREPLITANJE RIMSKE I GRČKE PRAVNE TRADICIJE U VIZANTIJSKOM PRIVATNOM PRAVU

Tamara Ilić

APSTRAKT

Kupoprodajni ugovor, u grčkim dokumentima nazvan *πρᾶσις καὶ ἀγορασία,* prema svojoj dvostrukoj prirodi, ili samo *πρᾶσις*, prigodan je za analizu različitih pravnih pitanja. Istražujući vizantijski tipski dokument *πρατήριον ἔγγραφον* u radu želimo da istražimo prirodu kupoprodajnog ugovora u tom pravnom sistemu. Diplomatičke formule sadrže podatke o saglasnosti volja ugovornih strana, kao i frazu da je dokument sastavljen „radi sigurnosti", što dovodi u pitanje formalnost tog pravnog posla. U radu je takođe razmatrana uloga dokumenta u sticanju, odnosno prenosu stvarnog prava, s obzirom na to da je sporno da li sastavljanje i predaja dokumenta impliciraju i te radnje. Metodološki pristup podrazumeva jezičko tumačenje klauzula i tipiziranih diplomatičkih formula u dokumentima, kao i odredaba u pravnim zbirkama, koje dopunjuje komparativno-istorijski metod.

Ključne reči: vizantijsko pravo, antičko grčko pravo, rimsko pravo, pravo svojine, vizantijska diplomatika, *traditio ficta*.

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