

THE ORIGIN OF CONTRACT<sup>1</sup>*H. van den Brink**Rotterdam*

## I

The characteristic element of contracts is the mutual consent of the contracting parties. *Consensus* is considered the decisive feature, not only in modern jurisprudence; in the often quoted definition of *pactio*, laid down by Ulpian, the Roman jurist, consent between parties is also regarded as the essential factor: "*Pactio est duorum pluriumve in idem placitum et consensus*".<sup>2</sup> In a law enacted by Emperor Leo in 472 A.D., moreover, the formal requirements for the *stipulationes* were abolished and only *consensus contrahentium* was retained as a prerequisite.<sup>3</sup> In our search for the origin of contract, therefore, we must attempt to trace the moment when Roman jurisprudence created the concept of "agreement". Tracing the origin of the recognition of *consensus* as an essential element of all agreements is a difficult<sup>4</sup> but interesting undertaking, important to those engaged in studying the history of the modern law of obligations.<sup>5</sup> It has been suggested that this origin should be placed after the close of the classical era. It coincides with the moment when *pactio* and *stipulatio* became closely related,<sup>6</sup> although earlier developments possibly pointed in the same direction. The interpolations of the well-known fragment from the Digests, attributed

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<sup>2</sup> D. 2.14.1.2.

<sup>3</sup> C. 8.37.10; Just. Inst. 3.15.1.

<sup>4</sup> Cf. Fritz Raber, *Hoc animo dare*, in *Tijdschrift voor Rechtsgeschiedenis* 33 (1965), pp. 51-55.

<sup>5</sup> Cf. Johannes Bärmann, *Pacta sunt servanda, Considérations sur l'histoire du contrat consensuel*, in *Revue internationale de droit comparé* 13 (1961), pp. 26-31.

<sup>6</sup> Salvatore Riccobono, *Stipulation and the theory of contract*, ed. J. Kerr Wylie and B. Beinart, Amsterdam—Cape Town 1957, p. 202. Max Kaser, *Das römische Privatrecht II*, München 1959, p. 279.

to Sextus Pedius,<sup>7</sup> have a fascinating history. However, it falls outside the scope of my lecture.

I intend to discuss a much earlier period. The search for the origin of contract may also be formulated in a different manner: how did relationships arise, in actual situations, which we would now regard as agreements? It is a fact that purchase, hiring and leasing, bailment and other forms of agreements existed long before Roman jurists began to systematize the law of contract. The formulation of a more abstract theory was based on these special forms of contract. The subject of my lecture today is the origin and earliest development of these legal transactions. In this context, attention should be paid to aspects older in origin than the *consensus contrahentium*: why, for instance, were some contracts governed by the *bona fides* whereas others were not? And why were some contracts unilateral while others were not?

## II

Law is a social factor; it is society's answer to new socio-economic phenomena. As Arthur Diamond<sup>8</sup> rightly put it: "The history of primitive contract is the history of primitive commerce". We should therefore start our enquiry with an examination of social needs in ancient Rome.

One of our points of departure should be the fact that in the sixth century B.C., the inhabitants of Rome acquired Attic vases. The considerable number of Greek vases dating from the period after 575 B.C. is an indication of the existence of direct and regular exports from Greece to Rome.<sup>9</sup> How did the Romans obtain this pottery? There must have been a moment when Romans encountered non-Romans; the vases cannot have been the spoils of war because Rome had not yet reached its phase of expansion. The contracts system of developed Roman law does not provide an answer because consensual purchase was a transaction of a later

<sup>7</sup> D. 2.14.1.3; Julius C. van Oven, D. 2.14.1.3: quid dixit, quid sensit Pedius?, in IVRA 4 (1953), pp. 114-123.

<sup>8</sup> Arthur S. Diamond, *Primitive law, past and present*, London 1971, p. 4 and p. 379.

<sup>9</sup> Einar Gjerstad, *Early Rome IV (2)*, *Synthesis of archaeological evidence*, Lund 1966, pp. 514 ff, p. 582; by the same author: *Legends and facts of early Roman history*, Lund 1960-1961, p. 19.

date while other known forms of contract do not apply here. In other spheres, too, there is the same apparent lack of legal institutions, at least by our present-day standards. The urbanisation of Rome also had other effects (or causes) than overseas trade. The Romans became tremendously active in building after 575 B.C. (according to Einar Gjerstad's chronology).<sup>10</sup> The Romans gradually replaced their simple huts by dwellings built on stone foundations, with walls of sun-dried bricks, revetted with painted stucco and covered by tiled roofs. They also erected public buildings, both sacred and profane. This building activity in itself required a certain degree of professionalism; the period of domestic industry was a thing of the past. What does this imply, for example, as regards labour? There is, it is true, evidence of contacts with Etrurian towns and artists but Roman craftsmen probably contributed to the building projects as well. According to Einar Gjerstad, artists may have moved about from place to place, as was often the case. It should also be borne in mind that slavery was becoming increasingly important. In order to avoid a lengthy discussion of these factors, it is useful to draw attention to another aspect of this building activity: the transport and supply of building material for, say, a major engineering project such as the city wall which was partly made of cappellacio blocks. The supply of food to the city's population also required transport. In short, the hiring of draught cattle must have been known to the ancient Romans. This is confirmed by certain passages in the *Institutes* of Gaius.<sup>11</sup> Despite these considerations, it is generally assumed that the appropriate form of contract, *locatio conductio*, as a consensual contract, dates back to a later period.

Let us, first of all, consider the problem of trade, both overseas and within Rome or Latium and Etruria. It is generally assumed that this stage of development was still characterised by direct and informal exchange of goods for goods, i.e. barter.<sup>12</sup> Marcel

<sup>10</sup> Einar Gjerstad, *op. cit.*, p. 581.

<sup>11</sup> Horst Kaufmann, *Die altrömische Miete, Ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatliche Vermögensverwaltung*, Köln—Graz 1964, pp. 31–32, p. 35 jo. p. 44.

<sup>12</sup> Cf. John M. Kelly, *A hypothesis on the origin of mutuum*, in *The Irish Jurist* N.S. 5 (1970), p. 161 and note 53.

Mauss<sup>13</sup> deserves praise for having been the first to draw attention to an alternative solution: exchange of gifts. I therefore assume that these two types of transaction have left their marks on the Roman law of contract.

There are various arguments—apart from indirect demonstration—in support of the assumption that exchange of goods was found at that time. The fact that the Romans themselves considered exchange (*permutatio*) to be older than purchase<sup>14</sup> is not decisive. The most important argument in favour is the occurrence of a relic of this cash-barter in later Roman law: the *mancipatio*.<sup>15</sup> This consisted of the receiver declaring to be the owner of the object transferred, as a token of which he seized the object. The act partly derives its name from this gesture. Next, the receiver offered something in return: according to Gaius' description,<sup>16</sup> he handed over a piece of bronze, formerly a weighed quantity of metal (the scales are a relic of that particular phase) and—I assume—prior to that the object of the exchange itself. Indeed, there is no reason to believe that the action of weighing the metal was the earliest phase. One commodity was exchanged for another. *Mancipatio* as a purchase paid in cash (German: *Barkauf*) is later than 300 B.C. There was no Roman coinage before the third century B.C.<sup>17</sup> It was only later that money, *aes grave* or *aes signatum*, became accepted as the prevalent medium of payment. *Aes rude*, rough pieces of bronze without any stamp, is much older as a medium of exchange<sup>18</sup>; in the beginning of the first millennium B.C., bronze was already being used for this purpose. At the same time, however, cattle remained a standard of value. It was not until the fifth century that the use of *aes rude* had become so common that it completely

<sup>13</sup> Marcel Mauss, *The Gift. Forms and functions of exchange in archaic societies*, transl. Ian Cunnison, London 1970; on ancient Rome pp. 47-53.

<sup>14</sup> Gai. Inst. 3.141.

<sup>15</sup> György Diósdí, *Ownership in ancient and preclassical Roman law*, Budapest 1970, pp. 64-72; p. 126: "mancipatio (...) in its primitive form it was in most respects a contract of sale typical for the peoples of early antiquity".

<sup>16</sup> Gai. Inst. 1.119.

<sup>17</sup> Rudi Thomsen, *Early Roman coinage*, vol. III (Synthesis II), Aarhus 1961, pp. 151 ff. and 257 ff.

<sup>18</sup> Thomsen, *op. cit.*, pp. 200 ff. and 258/259; cf. Andreas Alföldi, *Zur Struktur des Römerstaates im 5. Jahrhundert v. Chr.*, in *Les origines de la république romaine*, Genève 1967, p. 267/268.

superseded cattle as a means of payment. Although *mancipatio* as an action *per aes et libram* is very old, it does not specifically differ from barter which must have continued to exist alongside it. The absence in ancient Rome of a technical term, or a derivative of it, for this exchange of goods for goods could be used as a counter-argument.

In the older sources, the use of *permutatio* to mean barter is the exception rather than the rule.<sup>19</sup> *Mancipatio* is not the general term for this cash-barter; it referred to the particular manner in which certain goods (*res mancipi*) were alienated. The special significance of these goods in the ancient community required the presence of five citizens (*testes*) as a precondition to *mancipatio*. John Kelly,<sup>20</sup> however, claims to have found the Latin term for this simultaneous conveyance of goods in exchange for other goods: *mutuum*. This word reflects the most characteristic element: the mutuality or reciprocity of the transaction.

The direct exchange of goods cannot really be regarded as the incipient stage of the law of contract since the mere fact that the creation of an obligation and the discharge of it happened to coincide is still too abstract an event to have legal implications. Yet, certain aspects of the transaction help us to gain a better insight into later rules concerning the law of purchase contracts. The simultaneous and reciprocal transfer of goods, following an introductory dialogue (i.e. the preliminary agreement) justifies our first conclusion: that parties were only bound to exchange goods such as they existed then and there. There was no legal tie between the parties and no such tie was created at the moment of transfer. No reference was made to the obligation to make the buyer owner of the object, to guarantee him against eviction, or to make the transferor liable for latent defects. Consequently, these additional obligations had to be stipulated separately, a

<sup>19</sup> Kelly, *op. cit.*, p. 161.

<sup>20</sup> Kelly, *op. cit.*; cf. Diamond, *op. cit.*, p. 385: "When a large estate disposed of its produce, say, its present produce of oil, to another estate which would deliver a quantity of its produce of corn after next harvest, this credit-barter was recorded in a loan-tablet. It was not a sale. In Rome, indeed, the transaction retained the name of *mutuum* ("exchange", "barter") in classical times".

procedure which also continued to exist afterwards. This has been pointed out before by Alan Watson.<sup>21</sup>

A second aspect is the rule that ownership was not passed on with delivery unless the price had been paid or a security had been given. This rule is a very ancient one<sup>22</sup>; it was recorded in the Law of the Twelve Tables.<sup>23</sup> It confirms, moreover, the assumption that simultaneous exchange was considered a prerequisite for the transaction.

This aspect leads us to a third observation. Obligations cannot be said to have existed until exchanges ceased to be direct and overt, and a delay was granted to the receiving party before supplying a commodity or a sum of money in return (i.e. credit). The result of such a transaction was that the receiving party was obliged to perform in return (i.e. by delivery or payment). The situation in which one of the parties owes the other an equivalent commodity or service is the characteristic feature of the earliest real contract. It accounts for the surprising and clearly inappropriate Latin term for this form of contract: *mutuum*. Originally a technical term for the traditional exchange of goods, *mutuum* also became to indicate an exchange involving a delay before the receiving party reciprocated. It finally came to refer to the credit (loan) itself. We owe this suggestion to John Kelly. This interpretation does not only account for the name of the contract: in complete contradiction to the real meaning of the term *mutuum*, this Roman contract of loan for consumption was unilateral. This is reminiscent of the earlier stage of development in which one party had already performed his part of the bargain at the conclusion of the contract. I intend to demonstrate in the course of this lecture that *mutuum* is the only real contract leading to an *iudicium stricti iuris*.

We may add a fourth observation. It follows from what I have said before that there was no great need for witnesses to be present when exchange took place. Nevertheless, we know that in *mancipatio*, a particular form of barter, the presence of witnesses was

<sup>21</sup> Alan Watson, *The origins of consensual sale: a hypothesis* in *Tijdschrift voor rechtsgeschiedenis* 32 (1964), p. 248.

<sup>22</sup> Alan Watson, *The law of obligations in the later Roman republic*, Oxford 1965, p. 64.

<sup>23</sup> Cf. Robert Feenstra, *Reclame en revindication*, Haarlem 1949, pp. 96 and 289.

required. This would constitute a valid counter-argument, if it were not for the fact that these *testes* were originally not witnesses but *auctores*:<sup>24</sup> neighbours, friends or relatives (it did not matter much which) who were prepared to authorise the alienation of the object of exchange. They were indispensable participants in the transfer of the important *res mancipi*. Similarly, the *testes* involved in the *confarreatio* and other significant family events (e.g. the abandonment of children, engagement, the start of puberty, the acceptance of a legacy or the conclusion of a *litis contestatio*) must have been relatives granting their authority (*auctoritas*). In this perspective, it is clear why the *testes* ought to be *rogati*, i.e. have to be summoned: they were obliged to participate in important events. As the *testes* did not derive their importance from their objectivity and knowledge but from their willingness to participate, it is understandable that they could not be forced to participate and that, in general, existing family ties between the parties did not form an obstacle to the testimony.

In my schooldays, transactions between boys would be subject to one condition: the articles to be swopped had to be handed over simultaneously. This principle was, of course, a sign of distrust. One wonders whether such a mode of exchange was the usual form of these transactions in a community of close-knit, kindred families. Such was clearly not the case. This suggests another possible origin of the law of contract: giving in order to receive. This social phenomenon has been observed in cultures where writing was unknown, among what are popularly known as "primitive peoples". Malinowski's and Mauss' classic theory on the custom of gift still applies.<sup>25</sup> In archaic types of society a gift demanded one in return.

<sup>24</sup> Herman van den Brink, *Ius fasque, Opmerkingen over de dualiteit van het archaïsch-romeins recht*, Amsterdam 1968, pp. 165-167; also Arnaldo Biscardi, "Testes estote", *Contribution à l'étude du témoignage en droit romain*, in *Revue historique de droit français et étranger* 49 (1971), p. 403/404.

<sup>25</sup> Raymond W. Firth, in *Themes in economic anthropology*, ed. R. Firth, London 1967, pp. 8-17 and passim. About the theory of Mauss: J. van Baal, *Symbols for communication*, Assen 1971, pp. 183-185. About Bronislaw Malinowski: *Man and Culture, an evaluation of the work of Bronislaw Malinowski*, ed. Raymond W. Firth, 4th ed., London 1968, particularly p. 218: "Fundamental to all his treatment, though not always equally stressed, is his recognition of 'the deep tendency to create social ties through an

The hypothesis has been put forward that relics of this institution can also be found in ancient cultures, such as Indo-European culture.<sup>26</sup> Moses Finley,<sup>27</sup> for instance, has shown that for the Greeks in Homer's day the exchange of gifts was one of the main methods of the distribution of goods. The same was true of the ancient Romans.

The terminology of purchase contracts (*emptio venditio*) reflects this social phenomenon: it constituted one agreement but was indicated by two words as though purchase might be divided into two separate legal acts. *Emere* means basically nothing more than "to take" and *venditio* is a compound of *venum* and *dare*, the latter term forming part of gift terminology. *Dare* ("to give as a present") also occurs in connection with price payment: *pretium reddere*. *Reddere* means "to give a person his due". According to Mauss, *reus* (=defendant) originally was "the man who has received the *res* from another"; thus, he had become a debtor. This, among other things, accounts for the unilateral nature of real contracts: doing someone a favour which will later be returned in the form of a counter-gift. According to Arthur Hands<sup>28</sup>: "Significant, too, are reciprocal terms such as (...) *hospestis* in Latin, which may mean either the person who offers or the person who receives entertainment". The host will in due course become a guest; one good turn deserves another.

Did barter and exchange of gifts, sharing the common function of goods distribution, exist side by side? Could people at the time choose freely between these two types or was there a characteristic difference between the two? At first sight, their legal implications do not seem to be widely divergent.

Modern social anthropology<sup>29</sup> has taught us the decisive difference exchange of gifts." About the question whether Arnold van Gennep anticipated Malinowski's analysis of reciprocity: Max Gluckman, *Les rites de passage*, in Essays on the ritual of social relations, Manchester 1962, p. 6.

<sup>26</sup> General literature: Jacques H. Michel, *Gratuité en droit romain*, Bruxelles 1962, pp. 447 ff.; Emile Benveniste, *Le vocabulaire des institutions indo-européennes I (économie, parenté, société)*, Paris 1969, pp. 65 ff.; Arthur R. Hands, *Charities and social aid in Greece and Rome*, London 1968, pp. 26-48 (ch. III: Giving for a return).

<sup>27</sup> Moses I. Finley, *The world of Odysseus*, Pelican-edition (1962), pp. 73 ff..

<sup>28</sup> *Op. cit.*, p. 27/28.

<sup>29</sup> Cf. Van Baal, *op. cit.*, p. 183/184; Daryll Forde and Mary Douglas,

between exchange and gift. The primary purpose of a gift is to engage in a social relationship or to maintain one; exchange, however, does not involve the objective of a more lasting social bond between parties. In his studies of the Trobriand Islanders, Malinowski showed that gifts and counter-gifts comprise one of the main instruments of social organisation.<sup>30</sup> In other words, the presentation of gifts presupposes a relationship that goes beyond purely economic considerations. The aim, however, was frequently to seek a certain balance although one gets the impression that the gift was used as an instrument to bring about or emphasize social inequality<sup>31</sup> (cf. for example, the *precarium* given to the *clientes*). Yet, "giving for a return" should not be restricted to transactions concerning material goods; it should be viewed in a wider context. According to George Caspar Homans,<sup>32</sup> "Social behaviour is an exchange of goods, material goods but also non-material goods, such as the symbols of approval or prestige". He continued to point out that this process of exchange was intended to bring about a balance in the exchanges.

The question "exchange or gift?" must therefore be related to the social structures of the ancient Roman community. In urban Roman society there were different structures, based on completely different criteria and sprung from very different factors. There were differences in ethnic origin, economic and social status, political position, civil rights etc. For simplicity's sake we could put it this way: there were individuals and groups whose relations were characterised by mutual trust; there were others who lacked this social tie. There were people with whom one exchanged goods (simultaneous transfer) and others to whom one gave a present, in the conviction that the gesture would be reciprocated in due course. This kind of social relationship was referred to by the Romans as

in *Man, Culture and Society*, ed. Harry L. Shapiro, New York 1960, Dutch edition, Utrecht 1965, p. 271.

<sup>30</sup> Quotation of Richard M. Titmuss, *The gift relationship*, London 1970, p. 73.

<sup>31</sup> Benveniste, *op. cit.*, pp. 118 ff. Cf. Jan Berling, *Reciprociteit en gelijkheid, Sociologen over sociale rechtvaardigheid*, Meppel 1970, p. 9: reciprocity in relation to the typical primitive community, a little island of friends amid a sea of strangers and enemies.

<sup>32</sup> G. C. Homans, *Sentiments and activities*, New York 1962, pp. 278-293, worked out in *Social behaviour; its elementary forms*, New York 1961.

*fides*.<sup>33</sup> The verb *fidere* originally means "to unite" (cf. Greek *πεισμα* = cable). *Fides* is a sociological concept: it refers to the normal pattern of behaviour of those belonging to the group; it ultimately reflects the natural order of human behaviour. It is this accepted natural order which guaranteed that the gesture would be reciprocated. To act against this socially expected pattern was regarded as *fraus*. *Fidem frangere*, therefore, constituted a serious offence; being found guilty of it was a taint on one's reputation. The Law of the Twelve Tables still stipulated the sanction of *sacer esto* for an isolated case. This special relationship, based on *fides*, is absent in contracts leading to exchange. In this perspective, it is clear why contracts based on barter (*mutuum*) led to a trial *stricti iuris* whereas contracts based on gift relationships were *bonae fidei*. In the former, there was no underlying social relationship involving certain rights and duties; in the latter, however, such a bond did exist. In the former, again, non-performance was considered a delict<sup>34</sup> where as in the latter, the *actio fiduciae*—and this is an unmotivated and bold assumption—possibly served as a means to enforce the performance of the obligations deriving from the *fides*, before the special *actiones ex contractu* had fully developed: *aio te mihi centum dare oportere, uti ne propter te fidemve tuam captus fraudatusve sim*.<sup>35</sup> ("I affirm you owe me a hundred, that I be not deceived and defrauded through you and my confidence in you").

The distinction between the *amici* and those who did not entertain a *fides* relationship between themselves did not coincide with that between Roman citizens and *peregrini*. In this process of social differentiation and increasing dichotomization resulting from the urbanisation of Rome, the importance of the assumed *fides* tie diminished; it continued to exist, however, between relatives, guardian and ward, *patronus* and *cliens*. The special tie was rein-

<sup>33</sup> Cf. Herman van den Brink, *Ius fasque*, pp. 184-188.

<sup>34</sup> Max Kaser, *Das altrömische Ius, Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer*, Göttingen 1949, p. 286.

<sup>35</sup> Max Kaser, *op. cit.*, p. 292; by the same author, *Das römische Privatrecht I*, 2nd ed., München 1971, p. 200 note 21 and p. 461 note 19; cf. Cicero, *De officiis*, ed. Walter Miller, London 1968 (Loeb classical library), p. 341. Differently Alan Watson, *The law of obligations in the later roman republic*, Oxford 1965, p. 179: *fiducia* must have originated in a clause in *mancipatio*.

stated at the conclusion of an agreement. Formerly, however, this *fides* must have existed between the *Quirites* (*quiritare* means to appeal to this solidarity),<sup>36</sup> but not exclusively between these Roman citizens. The *hostis*<sup>37</sup> was a foreigner with whom one exchanged gifts; originally, it did not refer to the enemy. Festus wrote that the *hostes* had the same rights as the Romans (*erant pari iure cum populo Romano*). *Hostes* is cognate to *hospes*, i.e. those personifying friendship between host and guest (hospitality).

In short, exchange took place when there was no mutual trust or solidarity between parties; simultaneous swopping was the necessary but deplorable result.

A similar argument may be presented with regard to situations which later fell under the letting and hiring of objects, services or work to be carried out. Here, the same two forms of transaction occurred: on the one hand, the more or less direct exchange of goods or services, similar to barter, and the exchange of gifts on the other. It appears from the data supplied by social anthropology that no distinction was made between making a present of an object and rendering a service. The benefits included many kinds of services, material and non-material. In the literature on letting and hiring in ancient Roman society, both the approach based on barter and that based on exchange of gifts are recorded. Horst Kaufmann,<sup>38</sup> for instance, has discussed a form of leasing which required goods in exchange. According to John Crook,<sup>39</sup> "The labour force, the tools, the precious objects for display, passed round the community as required, and the reward was simply the reciprocal obligation on the other man to do likewise when called on". The same meaning is found in Henry Sumner Maine, just a century ago.<sup>40</sup>

The then current terminology indicates the identical origin of the two forms which ultimately developed into the separate contracts

<sup>36</sup> Jean Gagé, *La ligne pomériale et les catégories sociales de la Rome primitive*, in *Revue historique de droit français et étranger* 48 (1970), p. 17.

<sup>37</sup> Benveniste, *op. cit.*, pp. 87 ff.

<sup>38</sup> *Op. cit.*, p. 37.

<sup>39</sup> John Crook, *Law and Life of Rome*, New York 1967, p. 209.

<sup>40</sup> Henry Sumner Maine, *Village communities in the East and West*, London 1871, p. 188/189.

of purchase and lease: *merx* later referred to merchandise and the word *merces*, deriving from the same root, referred to rental or wage; their common characteristic is that they were used for the gift-exchange of goods and services. The term "commercium", a compound of *com* and *merx*, may be reminiscent of the relationship in which gifts were exchanged; later on, it came to refer to the privilege of having contractual relations with Roman citizens on equal terms. In barter, *pretium* was the term<sup>41</sup> for providing an equivalent commodity or service in return.<sup>42</sup>

Originally, then, virtually no distinction was made between purchase and hire; this is adequately illustrated by a provision from the Law of the Twelve Tables: "*Si pater filium ter venum duit, filius a patre liber esto*" ("If father thrice surrender son for sale, son shall be free from father").<sup>43</sup> "How is one to understand the phenomenon of repeated sale of children?" Reuven Yaron wonders.<sup>44</sup> His answer is: "One might speak of a *venditio ad tempus*. A jurist thinking in classical Roman terms would have regarded this as an unsatisfactory notion; *non constat* that in early times an equally strict view would have been taken". In short, this cannot be regarded as hiring or purchase proper; the son was transferred to the other party in order to supply labour for a certain period, for which an equivalent commodity or service was due to the father.

We need not dwell on the subject of hiring at any great length: *locatio conductio* was *bonae fidei*. By way of illustration, I would like to draw attention to *precarium*. The relationship between *patronus* and *cliens* is governed by *fides*; the stipulation from the Law of the Twelve Tables that "*patronus si clienti fraudum faxit, sacer esto*" serves as a reminder of this role of *fides*.<sup>45</sup> In this special *fides* relationship, the *clientes* worked for their patrons who were bound to perform in return, e.g. by supplying protection in case of

<sup>41</sup> Adolf Berger, *Encyclopedic dictionary of Roman law*, Philadelphia 1953, s.v. *ius commercii*.

<sup>42</sup> A. Walde—J. B. Hofmann, *Lateinisches Etymologisches Wörterbuch II*, 3rd ed., Heidelberg 1954, p. 361.

<sup>43</sup> XII Tab. 4.2b; translation: E. H. Warmington, *Remains of old Latin III* (Loeb Classical Library), London 1961, p. 443.

<sup>44</sup> Reuven Yaron, *Si pater filium ter venum duit*, in: *Tijdschrift voor rechts-geschiedenis* 36 (1968), p. 70/71.

<sup>45</sup> XII Tab. 8.21. Cf. Herman van den Brink, *Ex iure Quiritium*, Deventer 1968, p. 10/11.

need. The patron's counter-performance could also include the giving in possession in immovables and possibly also movables.<sup>46</sup> The client acquired a right of usage not unlike that granted under hiring arrangements, although it was only valid as long as the grantor permitted. Thus, *precarium* suggests a form of hire, wholly consistent with the *fides* relationship, which we assume to be the basis of this type of gift exchange.

### III

We have traced back certain elements from the history of Roman contract law to the coexistence of exchange transactions and "giving in order to receive." A great deal remains to be explained; our enquiry is far from complete. For instance, no mention has so far been made of the *sponsio* and *stipulatio* although these are very ancient forms of contract, at least according to present views. In this context, two questions have to be answered. First of all, is my observation justified that *sponsio* and *stipulatio* are two different contracts? Secondly, in view of the needs of the ancient community, what could have been the functions of these contracts?

The possibly most widely held view that *sponsio* and *stipulatio* originally were two different transactions, has been disputed by some scholars.<sup>47</sup> A strong argument in favour of this refutation is the later, uniform tradition of one single *obligatio verbis*. Here, the obvious objection may be raised that, if this was true, why were two completely different terms applied to this contract?

*Sponsio* is a clearly defined and understandable concept. It derives from a verb meaning "pouring a drink-offering" (cf. Greek στένθειν). Even the Homeric Greeks still used στονδαι in the double denotation of drink-offering and treaty. You are free to form your own opinion of the relation between religion and law; personally I oppose the view, widely held since Sir Henry Maine's day, that the origin of law was to be found in religion.<sup>48</sup> But no one can

<sup>46</sup> Max Kaser, *Das römische Privatrecht I*, 2nd ed., München 1971, p. 388.

<sup>47</sup> Cf. Detlef Liebs, *Contrarius actus, Zur Entstehung des römischen Erlassvertrags*, in: *Sympotica* Franz Wieacker, Göttingen 1970, p. 134/135 note 106. Edward Adamson Hoebel, *The law of primitive man*, Cambridge (Mass.) 1964, p. 257.

<sup>48</sup> Cf. Geoffrey MacCormack, *Formalism, Symbolism and Magic in Early Roman Law*, in: *Tijdschrift voor rechtsgeschiedenis* 37 (1969), pp. 456 ff.

argue that the use of religion in support of a promise or allegation was implausible. Indeed, I need only point out that even our secularised society still maintains the practice of taking oaths. *Spondere*, therefore, must have meant: to conclude an agreement or treaty, an event with far-reaching consequences, sealed with the pouring of a drink-offering. The solemn nature of this promise was later still emphasized by the required ceremonial form: the exchange of question and answer in which the same verb had to be used: *spondesne? . . . . . spondeo!* ("Doest thou promise?" . . . . . "I do promise!"). We encounter dialogue as a form of contract elsewhere too; in the ancient Orient, dialogue-type contracts were known the late eighth century B.C.<sup>49</sup> I am only drawing attention to this aspect so as not to have to dwell on the magic effect of solemnly pronounced words.

But why was a second term, *stipulatio*, added to this meaningful name of the contract *verbis*? The search for the etymological origin of the name of this contract, concluded in the form of a dialogue and sealed with a drink-offering, presents us with enigmatic problems. It is not unlikely that the contract under discussion was characterised by special features. The most straightforward and, consequently, most acceptable etymology shows that the term derived from the root *stipula*, i.e. a blade of straw. How could this origin be interpreted? In an article published in an earlier volume of this periodical<sup>50</sup> I have discussed the nature of this symbol. I concluded that a branch or twig as such is frequently encountered in Mediterranean culture. The bundle of plants or the single stalk signifies that the bearer thus emphasizes, in a manner similar to swearing an oath, that special significance may and should be attached to his words or promise. The same interpretation applies to the role of the *festuca* in the *legis actio per sacramentum*, in the lictor's *virga* or *fascies*, etc.

A common feature of the institutions and phenomena of ancient

<sup>49</sup> Kenneth Anderson Kitchen, *Ancient Orient and Old Testament*, London 1966, p. 155; Herman van den Brink, *Genesis 23: Abrahams Koop*, in: *Tijdschrift voor rechtsgeschiedenis* 37 (1969), p. 469 n. 1 and p. 488 n. 71; Raymond Westbrook, *Purchase of the cave of Machpelah*, in: *Israel Law Review* 6 (1971) p. 34.

<sup>50</sup> Herman van den Brink, *Festuca, quasi hastae loco*, in *Talanta* 2 (1970), pp. 1-21.

law is that their name was indicative of their function: no legal jargon had as yet been developed.<sup>51</sup> The "technical concepts" of legal terminology were still closely linked up with colloquial usage. Legal terms of that era are still readily understandable. Biondo Biondi, in particular, has developed the theory that, in that early period, names of legal institutions still reflected their essential function. Here, then, his assumptions are confirmed. That is why we attach great value to etymology. Words like *mutuum*, *mancipatio* and *venditio* are clearly indicative of their most characteristic aspect. Continuing along these lines, we find that *sponsio* and *stipulatio* were separate forms of contract which were nevertheless closely related in content and function: the unilateral promise was solemnly confirmed. It is not surprising, therefore, that the two terms later merged into one concept when the characteristic elements, the drink-offering and the wielding of a staff or rod, had gradually died out.

The question remains why there were several types of contract for this single function. First of all, I would like to draw your attention to yet another aspect of the historical contract *verbis*: in the dialogue, only Roman citizens could use the verb *spondere*. It was not until later that foreigners could also conclude a contract *verbis* though they had to use a different verb: *fide promittere*. Here then, lies the key to the problem. In accordance with what I said before, *sponsio* may have been used in the ancient Roman community; religion was likewise exclusive because it was reserved for those who formed part of the original community; in the class struggle, this exclusive nature of religion was to play an important role. *Sponsio*, the dialogic nature of which shows that both parties were active participants, was a form of contract presupposing a common religious basis. In contrast, *stipulatio* was not only based on a single party's religious gesture but also involved the use of a symbol, frequently encountered in the Mediterranean area. *Stipulatio* did not necessarily require that the contracting parties share a common religion, that is to say, it was not exclusively reserved for Roman citizens.

<sup>51</sup> Herman van den Brink, *Ius fasque*, p. 391/392; by the same author, in: *Labeo* 16 (1970) p. 174.

This contrasting of *sponsio*, as a form of contract for members of one's own select community, and *stipulatio*, as a form of contract used for transactions with foreigners, is not entirely new: Franco Pastori<sup>52</sup> has argued that *sponsio* came under *ius civile* and *stipulatio* under *ius gentium*.

We now have to consider the question why it was felt necessary to add a new type of contract to the existing forms, i.e. for barter and exchange of gifts. Was it necessary to create a third form of contract covering territory not covered by the two traditional contracts which applied to the distribution of goods and services? Although the verbs *spondere* and *stipulari* have the general meaning of "to promise" and "to make someone promise", their actual scope may well have been more restricted.<sup>53</sup>

Economic intercourse by exchange of goods has two drawbacks. First of all, how could credit be granted? In a primitive economy without a market, a credit system need not necessarily be impracticable.<sup>54</sup> The question is, how could one of the parties be granted a delay before reciprocating? Secondly, once this delay had been granted, what personal security might be given to guarantee that the party in question would perform in due course? The debtor was usually a foreigner, that is to say he did not belong to the circle of *amici*; how, then, could his compliance be eventually enforced? These are two closely related weaknesses in the system of barter trade. These problems do not arise in the system of gift exchange; here there was always a close social relationship (*fides*) between the participants in the transaction which comprised the possibility of a delay in counter-performance and a guarantee for compliance.

*Sponsio* and *stipulatio* were instrumental in eliminating these two shortcomings. As I said before, there was a close correlation between these two imperfections: the granting of credits made it necessary to introduce some form of security. Even in historical times, the security-*sponsio* could still only be created when the

<sup>52</sup> *Appunti in tema di sponsio e stipulatio*, Milano 1961.

<sup>53</sup> David Daube, *Roman law, linguistic, social and philosophical aspects*, Edinburgh 1969, p. 4 ff.

<sup>54</sup> Mary Douglas, *Primitive Rationing*, in: Themes o.c. in note 25, p. 121. Tenney Frank, *Aspects of social behaviour in ancient Rome*, Cambridge (Mass.) 1932, p. 126; by the same author, *Some economic aspects of Rome's Early Law*, in *Proceedings of the American Philosophical Society* 70-2 (1931) p. 196.

principal obligation was also based on *sponsio* or *stipulatio*.<sup>55</sup> In general, this unilateral promise to perform an obligation is further in conflict with the principle of reciprocity (possibly long-term reciprocation), frequently encountered in that particular phase of culture. As I pointed out before, gift exchange was based on the same principle. *Sponsio* and *stipulatio*, therefore, could only serve to solemnly confirm an obligation which the debtor would also be bound to perform on other grounds (exchange). For this confirmation also the guarantors, who were also *sponsores*, bound themselves. These instruments, finally, aided the exchange of goods in which the *fides* relationship was absent. It is obvious, therefore, that *contractus verbis* led to an *iudicium stricti iuris*.

Some words deriving from *spondere* also have a number of more specific denotations; they may possibly be discussed in support of the simple and hence convincing system of contracts proposed here.

*Sponsio* plays a certain part in what we could call international law. Let us consider the *fetiales*.<sup>56</sup> First of all—omitting many details—we observe that they held a blade of grass in their hand just as private persons held the *stipula*; they furthermore guaranteed that the Roman people would comply with the treaty they had concluded. We here recognize elements of the *stipulatio*. The remark that this constituted an international legal relationship is not a valid counter-argument because certain other elements indicate similarity with normal commercial relations. The presence of *fetiales* in the *contrarius actus* (declaration of war), for instance, was called *res repetrere* just as in exchange transactions the property could be reclaimed if the other party failed to perform his part of the bargain.

*Sponsio* also played a role in the law of marriage: *sponsus* means fiancé or bridegroom. The use of a word to mean both a security and engagement or marriage is not unique: Greek also covers both meanings. We must start from the assumption that the marriage contract was originally regarded as a purchase agreement and sometimes as an exchange of gifts. According to Alfred Söllner,<sup>57</sup>

<sup>55</sup> W. A. J. Watson, *Obligations*, p. 6.

<sup>56</sup> Kurt Latte, *Römische Religionsgeschichte*, München 1960, p. 121.

<sup>57</sup> Alfred Söllner, *Zur Vorgeschichte und Funktion der Actio rei uxoriae*, Wien 1969, p. 14; Max Kaser, *Römisches Privatrecht I*, 2nd ed., p. 78.

for example, "the original form of marriage among Indo-Germanic peoples was marriage by purchase". According to other theories,<sup>58</sup> marriage was considered an exchange of gifts. We should not altogether exclude the possibility that both theories are correct and that the distinction discussed before should also be applied here. However this may be, the dowry was an essential gift; it was possibly not a formally legal gift but definitely a social one.<sup>59</sup> The term for dowry was *dos*, a word deriving from *dare*; this derivation emphasizes the gift relationship.

Whatever the correct interpretation, Alfred Söllner<sup>60</sup> has casually but cautiously suggested that the *sponsalia* fulfilled a function in marriage *usu* though not in *confarreatio*. The latter solemn form of marriage was probably restricted to a small circle of persons of equal social status; the circle of persons between whom there existed a *fides* relationship. In that context, there was no need for an engagement with reciprocal actionable promises. In marriage by purchase the situation was different. Here, the consent between the two parties was confirmed by question and answer: "*ubi tu Gaius, et ego Gaia*",<sup>61</sup> while the ceremony was preceded by the unilateral promises of the girl's father and the boy's father.

The common feature between this transaction and the function, mentioned before, of the *sponsio* is, in this context, the solemn confirmation of commitments made for the future involving obligations that were to be fulfilled by others: the *subjecti*. The spread of this custom across Latium might confirm the use of *sponsio* and not that of *stipulatio*: although there was no *fides* relationship between all Latini, they did share a common religious faith.<sup>62</sup>

An examination of the theories on the origin of security seems to confirm our hypothesis. Over more than half a century ago, Franz

<sup>58</sup> Cf. Herman van den Brink, *Een schandaal op de Olympos*, in: *Hermeneus* 37 (1966), pp. 222-225.

<sup>59</sup> Söllner, *op. cit.*, p. 109.

<sup>60</sup> *Op. cit.*, p. 21/22 *iolc*.

<sup>61</sup> Cf. Max Kaser, *Das römische Privatrecht* I, 2nd ed., p. 77 (notes 12 *jo* 17).

<sup>62</sup> It is not certain which phase of development was described by Aulus Gellius (*Noctes Atticae* 4.4.1); cf. Alan Watson, *The law of persons*, Oxford 1967, p. 11.

Beyerle developed new theories on the subject.<sup>63</sup> The oldest phase of the development of security is said to have been the *Gestellungsbürgschaft* in which the security guaranteed or ensured that the creditor would, if need be, have a hold on the debtor. The *vadimonium* is a good example to illustrate this phase of development in a particular field. The *praedes* also had this function although they did not refer to the appearance before the law of a person but of a property in litigation.<sup>64</sup> In my sketch of the development of the law of contract, too, the *sponsores* are persons guaranteeing that an outsider, a foreigner for example, would not be unreachable if his presence were required to pay his debt. A more extensive application was, at that time, not yet necessary. The need for a wider security was not felt until later when the redress had become fully regulated and trade had grown more intensive.

#### IV

The conclusion, in brief, of my argumentation is that our working hypothesis (i.e. that the foundation of the Roman law of contract was the existence of two basic methods for distribution of goods and services, namely exchange and "giving in order to receive"), has helped us to gain a better insight into various phenomena: the origin of the *iudicia bonaे fidei*, the unilateral character of certain forms of contract, the rule of price payment, etc. Even the roles of *sponsio* and *stipulatio* have thus been explained.

A few remarks should be added on further developments and their chronological order. As I am concerned with the sequence of various stages, I do not intend to take part in the controversy on absolute and relative chronology. We will subscribe to Einar Gjerstad's views on the matter.<sup>65</sup>

It is unlikely that barter was widespread or at all present, prior to the foundation of the city. In the pre-urban city there was only

<sup>63</sup> Cf. Hans-Rudolf Hagemann, preface to the reprint of Franz Beyerle, *Der Ursprung der Bürgschaft, Ein Deutungsversuch vom germanischen Rechte her*, Darmstadt 1971; also Max Kaser, *Das altrömische Ius*, pp. 9-26 ff.; cf. Max Kaser, *Das römische Privatrecht I*, 2nd ed., p. 169.

<sup>64</sup> Cf. Jean Coudert, *Recherches sur les stipulations et les promesses pour autrui en droit romain*, Nancy 1957, pp. 17-51.

<sup>65</sup> Einar Gjerstad, *op. cit.*, pp. 310/311; 581; 598/599; by the same author, *The origins of the roman republic*, in: *Les origines de la république romaine*, Genève 1967, pp. 4-7.

occasional import from neighbouring trading centres in Italy: sporadic precious objects possibly transmitted by single individuals. Within the ancient community on the Roman hills only the simple method of exchange of gifts, described before, could be practiced.

New commercial developments came with urbanisation after 575 B.C. The rapid transformation into a city-like community coincided with a major change in the Roman economy; trade and barter were the results. And here we have the second pillar of early contract law.

After circa 450 B.C., this foreign trade suddenly disappeared from Rome. The transition towards a republican polity<sup>66</sup> and the concomitant increase in social inequality within the community (cf. for example, the *tabulae iniquae* of the second decemvirate) no doubt brought about a new development: many elements of international barter acquired a dominant position within the community too. Legal concepts originally only applying to relations with non-citizens gradually evolved into institutions exclusively reserved for members of the community. To the same extent, gift-exchange was reduced to secondary status, i.e. *fides* was from then on merely applied to certain circles. During the process of the secularisation of law, *sponsio* and *stipulatio* gradually merged into a single concept; they developed into forms of contract for internal Roman usage. At the time of the enactment of the Law of the Twelve Tables, *mancipatio* developed from a simple exchange in the presence of witnesses into a fundamental legal act, primarily for Roman citizens.<sup>67</sup> The process of isolation is aptly illustrated by the transformation of the word *hostis*: from "guest" to "foreigner" to "enemy". This process continued in later years; in 338 B.C., the basic rights of all Latins, the *conubium* and the *commercium*, were restricted to Roman citizens.<sup>68</sup> The personal legal tie, under which the fact that parties belonged to the *nomen Latinum* took precedence over their status as inhabitants of Rome, shifted towards a more territorial tie; thus Roman citizenship became a precious possession. I may add that the *comitia*

<sup>66</sup> Robert Werner, *Der Beginn der römischen Republik*, München-Wien 1963; Herman van den Brink, *Ius fasque*, pp. 357-359.

<sup>67</sup> Cf. Max Kaser, *Das altrömische Ius*, p. 83.

<sup>68</sup> Andreas Alföldi, *Early Rome and the Latins*, Ann Arbor 1963, pp. 38 ff., 116 and 263.

*curiata*, the meeting of heads of families, was superseded as the dominant institution by the *comitia tributa* which was based on the division of Roman territory into local organisations.

## V

The Dutch historian Jan Romein has argued that the practical study of history without theoretical reflection is pointless.<sup>69</sup> For this reason, finally, I would like to make a few observations on the study of the history of law.

As a result of the dogmatic approach which has prevailed on the continent for centuries, legal history is still too often regarded as a monodiscipline. I have tried to demonstrate that an interdisciplinary approach may help us to gain a new and stimulating insight into already well-worn fields of study. When I say "interdisciplinary approach", I mean the acquisition of knowledge of an empirical object without being restricted by a narrowing viewpoint.

This proposition will no doubt be more familiar to you than to my fellow-countrymen. More than a hundred years ago, Henry Sumner Maine intended to treat the study of law in relation to an examination of the structure of society.<sup>70</sup> Wieacker<sup>71</sup> has discussed the more empirical and sociological approach to law which was common in Anglo-Saxon and Scandinavian countries in the past; at the same time, he reproached scholars in Holland for a certain degree of conservatism. And only a few months ago, a Dutch historian<sup>72</sup> showed considerable self-criticism by expressing the

<sup>69</sup> Cf. my study in *Nederlands Juristenblad* 1971, p. 488. Already Werner Sombart said: "Pas de théorie, pas d'histoire" (cited after Fernand Braudel, *Civilisation matérielle et capitalisme XV-XVIII siècle*, tome Ier, Paris 1967, p. 9 = J. H. N. Salmon in *History and Theory* 10 (1971) p. 347).

<sup>70</sup> Raymond Firth in the preface to the paperback edition of Maine's *Ancient law*, Boston 1963. About Maine: William Holdsworth, *Some makers of English law*, Cambridge 1966 (original 1938); by the same author, *A history of english law*, vol. XV, ed. A. L. Goodhart and H. G. Handbury, London 1965, pp. 361 ff.

<sup>71</sup> Franz Wieacker, *Der gegenwärtige Stand der Disziplin der neueren Privatrechtsgeschichte*, in: Eranion in honorem Georgii S. Maridakis, Athens 1963, p. 352/353.

<sup>72</sup> E. M. Janssen Perio, in *Tijdschrift voor geschiedenis* 84 (1971), p. 564.

view that our national approach boiled down to a kind of methodological clog dance.

If, as far as you are concerned, the approach expounded here is not altogether unfamiliar, what can be said of the conclusions? They have not led to any astonishing results particularly because I have only skimmed the surface in my lecture: note, for instance, that practically no mention was made of textual sources. This is not the only reason why the picture which we have painted of the ancient law of contract is essentially very simple.<sup>73</sup> It may, after all, be plausible that this still very primitive society had not a very well-equipped arsenal of legal institutions. Noailles wrote that a fundamental unity existed in primitive institutions. In historical times, these were developed further; they ultimately evolved, by way of differentiation, transformation, change of objectives, and combination, into a more variegated pattern.

<sup>73</sup> Cf. Herman van den Brink, *op. cit.*, p. 390-392; by the same author in *Labeo* 16 (1970) p. 174.