



## **WARRANTY AGAINST EVICTION IN ROMAN LAW: A CONVENTIONAL OR LEGAL OBLIGATION?**

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**Abstract:** *The purpose of this paper is to highlight the mechanism of the vendor's warranty against eviction by reference to known sources of Roman Law, and to search for its nature, either legal or conventional.*

*The first two parts of the paper will be mostly dedicated to establishing terminology and the evolution of the sale contract in Roman Law, while the next three parts will be dedicated to a punctual analyze of the mechanisms of warranty for eviction by reference to the sale by mancipation, by double stipulation and by consensual contracts.*

*The last part will sum up a conclusion about the nature of the obligation to warrant as it had been previously approached.*

**Key words:** *warranty against eviction, Roman law, history of law, eviction, sale contract*

1. In Ancient times, a contract was primarily regulated by principles of good faith, so that all parties involved would reach the effects they desired when contracting. One of the most important ways to lawfully obtain something you did not possess, was to buy that particular object from someone who had it.

Buying things was not always a simple operation that involved goods offered for sale and a price given in exchange. The first type of sale contract was the exchange of goods in which a party would offer some products it had in excess in exchange for some goods it lacked, to another party that was willing to offer its own excess products in return.

The greatest deficiency of this practice was that the other party had to need your extra products, and you had to have a shortage of its extra goods.

A remedy was to trade your own excess for exchangeable merchandise, therefore trading for metal bars or coins developed.

From this moment on, we can see the prototype of the sale contract as it was developed in ancient times and still exists nowadays.

For the purpose of this paper, we shall focus on the sale contract in Roman Law, mainly its three forms (mancipation, double stipulation and consensual contracts), and especially on the obligation of the seller to protect and guarantee the buyer against eviction originating from a third person.



Our main interest is to see whether the warranty against eviction was assumed by contract, or it was an implicit provision imposed by law as a guarantee offered to the buyer, therefore is its origin conventional or legal?

To this end we shall first present the three phases of the sale contract in Roman Law, after that, analyze the vendor's obligation to warranty against eviction in case of mancipation, double stipulation and consensual contracts, and in the last part we shall draw a conclusion over how the duty to warrant against eviction evolved from a normal act of good faith, to a legal binding obligation for the seller.

2. Briefly, we shall define eviction as *the dispossession of a good (in the legal sense) in a judicial manner*.

At its origin, the obligation to warrant against eviction was an effect of the obligation to deliver the object sold. The vendor had the obligation to assure the buyer the ownership of the object sold and in case it failed to do so, to offer compensation if the buyer was evicted by a third person that was lawfully more entitled than the vendor to own the object sold (Girard, 1906).

Therefore to be in the presence of an eviction, a third person has to claim a legal right over a good that has been sold, declaring he is entitled to the property or the use of that good. It will not be an eviction if the good is stolen or if it is taken away by any means of force by a third person, this being a criminal, not a civil matter.

Taking that into consideration, we acknowledge that in Roman Law, the sale contract encountered three phases of evolution. Chronologically, first it was the **mancipation**, (lat. *mancipatio*<sup>1</sup>) that represents a way of acquiring property *per aes et libram*, therefore by a strict ritual involving the alienator<sup>2</sup>, the purchaser<sup>3</sup>, five witnesses, all adult roman citizens, and a libra carrier<sup>4</sup>. The effect of the *mancipatio* was the transfer of property between the alienator and the purchaser by a ritual statement of the latter, followed by the weighting of the price<sup>5</sup>. Mancipation was a highly ritualized process. It was only accessible to roman citizens or to foreigners (Stoicescu, 2009) that possessed *ius commercium* and could only be used to transfer the property of *res Mancipi*, and it could not generate other obligations.

The second form was the **double stipulation** (Molcut, 2011), according to which the buyer stipulated towards the vendor that he will assume the obligation of paying the price, and the vendor assumed himself the obligation of rendering the good that he traded for the price to the buyer. This contract did not transfer the property of the object traded, it only generated obligations between the parties involved. For the property to be transferred, the parties had to resort to *mancipatio* or *tradition* (Tomulescu, 1958), whether the object of the sale was a *res Mancipi* or a *res nec Mancipi*.

The third phase of the sale contract was the **consensual contract** (Molcut, 2011), meaning that the two stipulations previously mentioned merged to form one act that generated legal binding obligations for both parties involved (Hanga, Bocşan, 2005), only by virtue of the agreement between them. This is the maximum in which the sale contract could evolve. In this form, two parties, no matter their citizenship, could buy or sell even goods they did not have

<sup>1</sup> Also called *venundatio*, meaning a transfer of property – E.Molcut – *Roman Private Law* (original title Drept Privat Roman), Universul Juridic Publishing House, 2011, Bucharest, pag.289.

<sup>2</sup> Also named *mancipio dans*

<sup>3</sup> Named *mancipio accipiens*

<sup>4</sup> The latin term is *libripens*, contextually translated by *libra carrier*, or *weigher*, respectively the person that determines the weight by using a balance.

<sup>5</sup> The price consisted of copper bars, as an exchangeable good, that were at first weighted by *libripens*, but later he would only hit de libra with a piece of copper as a symbolic gesture for having weighted the price.



at the time of the agreement. The contract was legally binding even though the price was not paid or the object has not been rendered. Equally, this is the physiognomy of nowadays sale contracts.

In all three types of sale contract, regardless of the source<sup>6</sup>, the vendor had an obligation to protect the buyer from a third person that would legally challenge its title, and therefore challenge its rightful ownership of the object bought.

In the following sections we shall point out the origin and mechanism of this obligation to warrant against eviction in all three types of sale contract as mentioned before.

3. Therefore, in the time when a sale was made through the ritual of *mancipatio*, there is no doubt about the fact that property was transferred to the *accipiens*, and, as a consequence, he had the right to receive the good, as *corpus*, and be granted its peaceful ownership. If the buyer was threatened with eviction by a third person, he was entitled to ask the seller to defend its title<sup>7</sup> (*praestare auctoritatem*).

The judicial mechanism used in this purpose was the *actio auctoritatis* and consisted of the introduction of the seller as *auctor*<sup>8</sup> in the trial launched by the third person against the buyer. If the seller refused to defend the buyer's title, or failed to do so, despite its efforts, he would be sentenced to pay the buyer double the price received from him (Molcut, 2011).

In this case, nowadays Roman Law literature explains that the obligation to warrant against eviction had a delictual nature (tort) (Stoicescu, 2009), considering the fact that the seller had to pay back the price to cover the prejudice and also pay the same sum again, as a penalty for its action to sale an object that did not belong to him.

Considering only this fact, we agree that the obligation to warrant comes also as a penalty, therefore it has the nature of a tort. In addition we need to state that the obligation could not have been of contractual nature, primarily because *mancipatio* was not a contract itself, but a procedure to transfer property, which did not imply a clause to warrant against eviction.

In Roman Law, contracts were only able to generate obligations by virtue of their express stipulation. If such provision lacks, then, a conventional obligation cannot exist. On the other hand a delictual obligation only required to be established by law as a tort.

More than that, in favor of the legal origin of the obligation to warrant we can add that parties were not consensually stipulating the quantum of the compensation, this being directly established by law and in favor of the buyer. Firstly the buyer was compensated for the loss of the object he bought by restitution of the price paid, and secondly, the buyer would receive the same price again as the equivalent of a penalty imposed upon the seller. The penalty, specific to illicit actions, had a repressive and discouraging character. In this case, the action of the vendor to fail in defending the title transferred to the buyer had been seen as an illicit action and had been punished by law. If the warranty against eviction would have had a contractual nature, then the penalty imposed on the seller wouldn't have been justified.

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<sup>6</sup> either legal or conventional

<sup>7</sup> Indeed, the seller was called to the buyer's assistance due to the fact that he was the one who sold the object of the contract, pretending to be the real owner, therefore, the seller had to vouch for its title as the owner of the good sold at the time of the contract.

<sup>8</sup> The terms *auctor* and *auctoritas* are used in this context in the same sense as in tutorship, therefore the seller has to warrant the buyer in the same way the tutor warrants the pupil – G.May – *Elements of Roman Law* (original title: *Éléments du droit romain*), Recueil Sirey, Paris, 1913, pag.346



Equally, we can analyze the idea that the obligation to warrant results *ex bona fides* – out of good will. To this purpose, we can consider that although mancipation is not a contract, it is performed by virtue of preexistent conventions that generated the obligations fulfilled by mancipation.

In this case, due to the fact that conventions had to be executed with good faith, as a principle of Roman law, we can state that the obligation to warrant is implicit to the convention that generated the obligation to transfer property, carried out by mancipation.

As seductive as this thesis may seem, we appreciate that it is not sustainable in the frame of Roman Law, especially in the Old Era and first part of the Classic Era, especially for the level of formalism existing at the time.

More than that, as previously shown, the quantum of the compensation was already established and the parties were not entitled to modify it. The possibility of conventionally stipulating the quantum of the compensation implies an express stipulation that is not compatible with an implicit clause.

Nevertheless, the possibility to accept the implicit conventional nature of the obligation to warrant cannot be rejected *de plano*, because it is, at a theoretical level, possible.

For these reasons, as a preliminary conclusion, we will state the fact that the obligation to warrant against eviction in case of a sale made through *mancipatio*, most probably has a legal nature.

4. The mechanism based on *actio auctoritatis* was only available for a valid mancipation, therefore all the conditions of the mancipation had to be satisfied: for example the parties had to be Roman, the object had to be Roman and had to belong to the category of *res Mancipi*. If an object was sold without mancipation, to obtain a warranty against eviction, the Romans have chosen to imitate the effects of *auctoritas* by a stipulation<sup>9</sup>.

This was the form of the warranty against eviction when the sale contract was concluded by double stipulation. As we earlier mentioned, the effect of the contract was to generate, in this case, bilateral obligations between the parties.

Taking into consideration that the obligations were assumed by contract, by default, one could not have been liable for more than he agreed. To warrant against eviction, a separate stipulation was required according to which the vendor, would guarantee to protect the buyer against a third person that would claim a right over the object traded. If he would not be able to defend the buyer against such a legal threat, he would be forced to compensate him for the eviction suffered.

If the object of the sale was a *res Mancipi*, the vendor was obligated to pay double the price received. This provision was called a *stipulatio duplae*. In this regard, in the Digests, an example can be found in Book XXIII, Title III, paragraph 75, according to which if the wife gave land which was not appraised as dowry, and, on account of this, a stipulation for double damages was provided, and the land should be evicted from the husband, the latter can immediately bring an action on the stipulation.

Double stipulation could be judicially claimed (Molcut, 2011) by *actio certae creditae pecuniae*, therefore, by an action based on the stipulation (*actio ex stipulatu*).

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<sup>9</sup> Usually it was a verbal stipulation, but it could have also been convened in writing.



In case of a sale made by double stipulation, in which the transfer of property would have been made by valid mancipation, what would the buyer use in case of an eviction? We consider that the buyer had the choice of action between *actio auctoritatis* and *actio certae creditae pecuniae*. Of course, he would not be entitled to use them both, therefore when he would choose one, he would lose the right to use the other, by virtue of the principle *electa una via non datur recursus ad alteram*.

If the object of the sale was a *res nec Mancipi*, the situation was different, therefore, if a sale was made by double stipulation, but the transfer of property was not possible by *mancipatio*, for example it was done by *traditio*, the only way to obtain warranty against eviction was to use the *actio ex stipulatu*<sup>10</sup>. If the stipulation for warranty was not made, then there would be no valid obligation to warrant.

The stipulation for warranty in case of a *res nec Mancipi*, was done by the *rem habere licere* provision. By it, the vendor acknowledges that the buyer has the right to own the object sold (*rem habere*). In case of an eviction, the vendor was obligated to pay only the price of the sale (Molcut, 2011).

Another opinion (May, 1913) states that the provision *rem habere licere* gave birth to an *actio incerta*, therefore, the quantum of the compensation would be appreciated by the judge.

Regardless of the opinion followed, it is relevant that by this mechanism of warranty the only interest protected was that of the buyer, because he was compensated only for the damage suffered (the losing of the object, valued by the price paid). It is not relevant if the parties established a *stipulatio poenae* in case of eviction, or if only the price paid would be rendered back to the buyer, because there is no additional penalty for the seller, unlike the case of the *actio auctoritatis*.

For these reasons we can preliminary conclude that in case of a sale by double stipulation there is no doubt the obligation to warrant against eviction is of conventional nature mainly because if the stipulation lacks, the obligation does not exist and it only protects the private interest of the buyer.

5. In what concerns the consensual sale contract, it has been historically accepted that, at first, a stipulation to warrant against eviction was not implied by the buy-sale provisions, but, as an effect of good faith, the buyer was entitled to ask the seller for a promise *de evictione cavere* (May, 1913), that he would defend the buyer's title or compensate its loss in case of eviction. Therefore, because the contract was of good faith, (*ex bona fides*), the vendor had to offer all the usual benefits, including the promise mentioned.

The mechanism was the following: After the consensual sale contract was concluded, the buyer could ask the vendor to warrant against eviction by a separate stipulation. This obligation could be enacted by *actio empti* given to the buyer for this purpose.

Later, when this mechanism was generally accepted, it evolved by giving the possibility to directly ask the seller for warranty.

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<sup>10</sup> Personal action derived from the stipulation.



An usual example is encountered in a paragraph of The Opinions of Julius Paulus<sup>11</sup>. “*You sold me a tract of land belonging to another person, and it afterwards became mine for a valuable consideration; if part of the purchase money was paid, an action on purchase will lie in my favor against you to recover it*”<sup>12</sup>.

It is relevant to notice that regardless if the object of the sale was a *res mancipi* or *res nec mancipi*, the warranty only regarded the price of the purchase. Also, the parties could both establish the quantum of the warranty by agreement, also.

The obligation to warrant, in this case, is one of good faith (May, 1913), therefore, although it becomes implicit, from a certain point, it is also optional, so the parties could agree to give it up. If an agreement to give up the warranty lacks, then the warranty would be effective, due to the fact that it originated in a legal provision not in a consensual obligation.

It is also important to mention that the warranty against eviction in consensual sale contracts can also be claimed by exception and not only by action. An example is given by Ulpianus<sup>13</sup>, “*Marcellus says that if you sell a tract of land belonging to another, and afterwards, it having become yours, you bring suit against the purchaser for its recovery, you will very properly be barred by this exception*”<sup>14</sup>. The exception was called *exceptio rei venditae et traditae* (May, 1913).

Another interesting situation derived from this example refers to a stipulation that in case of eviction the seller would have to pay the buyer double the price. Here, the buyer has a choice, whether he will oppose the exception and keep the object, or he will wait to be evicted, and ask for double the price (Girard, 1906). We accept that the buyer had the opportunity to choose, depending only on its interest.

By a simple analyze, we can observe that the obligation to warrant was mainly based on a legal provision more than on a conventional stipulation, therefore, as in the case of the mancipation, it is a legal obligation of the vendor.

6. To conclude, we need to observe that the warranty against eviction did not cease to have the legal nature of a tort.

Starting from the first forms of sale contract, the warranty came along as a special way to protect the buyer by introducing the *auctor*, the vendor, in the process held between the buyer and the third person claiming a right over the object sold.

This was a primitive way to hold accountable the seller for having sold an object that was not his. Not only did the seller have the obligation to compensate the buyer for the loss of the good, but also, he had to be penalized by the same sum he received as price. This served as a repressive and preventive measure.

<sup>11</sup> *Julii Pauli – Sententiarum Receptorum ad Filium* – usually translated as *The Opinions of Julius Paulus*, book II, title XVII, paragraph 8

<sup>12</sup> Translation was offered by S. P. Scott, *The Civil Law*, I, Cincinnati, 1932, available online at: <http://droitromain.upmf-grenoble.fr/>, last visited on 26<sup>th</sup> of April 2014.

<sup>13</sup> *The Digests* – vol.1, book 1, title XXI, par.3

<sup>14</sup> Translation was offered by S. P. Scott, *The Civil Law*, V, Cincinnati, 1932, available online at: <http://droitromain.upmf-grenoble.fr/>, last visited on 26<sup>th</sup> of April 2014



Here, the warranty came as an obligation originated in a legal provision that not only protected the interest of the buyer, but also a general interest by repressing the conduct of the seller.

In the case of the sale made by double stipulation, we can observe that the contract was the only source of obligations between parties and they were free to stipulate including provisions for warranty. In this situation the warranty is only conventional, given the fact that it originated in a stipulation proposed by the buyer and agreed by the seller. More than that it only protects a private interest.

For the consensual sale the warranty has a slightly evolved nature, being situated at the border between legal and conventional obligations. Mainly it can be seen as a legal obligation, due to the fact that it is implicit in conventions that do not mention it. More than that, it does not have to be agreed by both parties to be enacted. It is imposed on them, unless they agree to give it up.

On the other hand, it only protects a private interest, and if parties agree, it will not be effective.

We shall not hesitate to include it in the field of legal obligations, although it does not fit quite easily, but it is more distanced from the category of conventional obligations.

Another argument would be that nowadays civil law sees the warranty against eviction as a legal obligation of the seller which the buyer, by express stipulation, can give up, if willing.

By the lines of this paper we tried to establish the evolution of the warranty against eviction in Roman law and we believe we've reached the point where the institution, as of origin, is not much different from its correspondent today.

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