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OBSERVATIONS CONCERNING THE PAPYRUS BARAIZE AND THE RIGHT OF REDEMPTION IN HELLENISTIC LAW

The Papyrus Baraize has been edited and commented by Paul Collart and Pierre Jouguet. It bears the name of its discoverer M. Baraize, Ingénieur du Service des Antiquités. The text is highly interesting indeed, but also very difficult to be understood. It dates from the II century B.C. and is not without interest for a famous controversy between Romanists concerning a later period. Students of Roman Law namely differ in answering that great fundamental question: „Imperial or national Law?”. Mitteis in his epochmaking work has framed a theory that has become a communis opinio. According to that theory national Law must be considered as an antithesis to Imperial Law. National Law is opposite to Imperial Law and as such — illegal.

But Schönbauer — in a series of essays — rejected recently this theory of struggle and has proved the possibility of a peaceful competition and coexistence between Imperial and national Law. Newly discovered sources such as the Greek translation of

3 Mitteis, Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreiches (1891); reprinted (1935).
the original Latin text of the *Constitutio Antoniniana*, the edicts of Augustus at Kyrene and last not least the Inscription of Rhosos contributed to make the new (i.e. Schönbauer's) opinion prevailing. They prove namely the possibility of a double citizenship after the grant of the Roman citizenship. There were indeed voices of doubt and rejections, but the new opinion prevailed not withstanding in a brief time. But a convinced opponent of the prevailing opinion and a defensor of the Mitteis theory appeared lately in the person of Arangio-Ruiz.

A few remarks — before we proceed to discuss the Papyrus Baraize — can therefore be useful. They will help to clear the situation created by the controversy and prevent to far going conclusions from Schönbauer's statements.

If we reject the possibility of a double citizenship of the subjects of the Roman Empire, who have been raised en masse to Roman citizenship by the generous *Constitutio Antoniniana*, then we must reject the admissibility of every Law that is not Roman Law. The possibility of application of the non-Roman Law in a Roman Court is then excluded a priori. The reception of a non-Roman Law could not even be thought of by a Roman court. That principle would prevail without discussion in every small local court and still more in the supreme Imperial court. But this was not the case: a Greek who — in a petition addressed to a Roman magistrate — defended a legal opinion incompatible with the Imperial Law was not dismissed as trespassing.

6 *Fontes* I. c. No 68 pp 403 — 414.
7 *Fontes* I. c. No 55 pp 308 — 315.
the Law. His petition was taken into consideration even by the highest authority — the consistorium principis. If this was so then there is only one explanation for it, namely: that the survival of Greek and generally speaking Hellenistic law must be recognized as the reason of this phenomenon.10

Even the most conservative protagonists of the classicity of the Corpus Iuris do not deny nowadays that there were possibilities of non-Roman influences on Roman Law. There exist only differences (and wide ones) concerning the extent to which various factors have contributed in exercising the above mentioned influence. We care in that guess in two strongly diverging basic opinions: the first one has been formulated by the venerable senior of Romanistic studies Salvatore Riccobono11 a defender of the Romanità of Justinian’s Law. We find the other in a book12 published as a posthumous after the early death of Paul Collinet, the learned champion of the „byzantinity“ of the Corpus Iuris. But it would be a mistake to assume that all scholars who admit that national Law survived the promulgation of the Constitutio Antoniniana are adherents of the Byzantine school13. They refuse, often manifestly (and this is essential) to admit Hellenistic influences and express their refusal in a frankly blaming tone, even in cases, when the existence of such influences seems to have been proved. Such intransigent an attitude shows that the discussion is of vital importance and belongs to the history of human mind. It raises itself to the level of the codifiers of the Corpus Iuris. The partners of such a discussion are not diminished even by the glory of anonymous „men of Berytos“. It is a matter of course that an answer to the question to what extent and in what manner Roman Law has undoubtedly undergone an influence by a foreign Law must be based upon the knowledge of this particular foreign Law. The papyri and the inscriptions are in this respect — in so far the Hellenistic period

10 I have tried to explain my opinion in a contribution to Mélanges Fernande de Visscher (under press).
12 Collinet, La nature des actions des interdits et des exceptions dans l'œuvre de Justinien, Etudes historiques sur le droit de Justinien, tome V (Paris 1947).
13 Cf. also the opinion of Schönbauder that the Law of Justinian remains Roman in its essence, Sav. Z. LVII 355.
is concerned — a very promising soil for investigation. It is quite obvious that opinions must diverge (and sometimes widely diverge) because juristic papyrology is a very young science. We have before us a multitude of sources; new ones appear practically every day and the reading of the text is a difficult one, as they often are full of mistakes and in very bad state of conservation. It is obvious that — under such circumstances — very diverging opinions can draw advantage from the same single papyrus. But even if we must resign to avail ourselves on a proof in a particular case, it does not necessarily mean that we have to change our mind about the essence of the question. This assertion can be proved on the basis of our present text.

Wilhelm Felgenträger undertook in his publication Antikes Lösungsrecht (1933) the study of a single phenomenon in the complex of possible influences of Greco-Hellenistic and Oriental Law on the Roman Imperial Law. He assumes that — until the reign of Diocletian — the attitude of Roman Law towards non-Roman influences was negative and even a hostile one. But after that period Roman Law became receptive to non-Roman influences. M. Kaser gives recently a general survey treating the same question in a scientific contribution to a periodic and formulates the following opinion: Even Diocletian fought desperately against influences of racially alien provincial elements on the essence of the legal order. Such an opinion was naturally incompatible with Schönauer's theory that Roman Law proved receptive for provincial Law which although in modest limits survived the Constitutio Antoniniana and Schönauer was therefore lead to a sharp repudiation of Kaser's assertions.

14 Cf. an important contribution to the great literature of the subject two volumes of Taubenschlag's The Law of Greco-Roman Egypt in the Light of the Papyri (332 B. C.-640 A. D.) I (1944), II (1948). It is the best guide based on a long study of sources.
16 Kaser, Die deutsche Wissenschaft vom röm. Recht seit 1933, Forschungen und Fortschritte XV (1939) 205 ff, a quotation from p. 207.
17 Schönauer Arch. f. Pap. XIII 188 ff. and especially: Diocletian in einem verzweifelten Abwehrkampfe? (cf. supra 4), Sav. Z. LXII 267 ff.
I have no reasons in principle to decline Felgenträger’s conclusion that the expression Lösungsrecht (ius redemptionis) shows some character of a non-Roman conception. Lösungsrecht means the right to recover lost property by paying an adequate compensation to the holder of it. The idea inherent to such a definition of the Lösungsrecht is the idea of a compromise between diverging interests; a compromise deriving from a just policy of administering Law. Such compromise can be understood as a species of practical aequitas concording in principle with natural Law.

But I feel obliged to remind that we have still to establish the proof that such a conception did really appear in the history of ancient Law. The demonstration of such a proof is an undertaking not connected with our present considerations. Felgenträger undertook to demonstrate it for Babylonian and Assyrian Law, as well as for Greek and Jewish Law. But his conclusions raised strong doubts and contradictions by some critics. As I do not know any Semitic language, I must refrain from expressing any personal view about Semitic Law. But I feel able to assert that in my opinion the existence of the idea of a Lösungsrecht seems to be proved by a text belonging to the Ptolemaic epoch i.e. to the Hellenistic period. Concerning Greco-Hellenistic Law and especially its importance for the internal administration of the state I was able to quote the Papyrus Baraize a document unknown to Felgenträger when writing his book. But Schönauer declined my attempt of interpretation.

Felgenträger, Antikes Lösungsrecht 1 and passim.  
L. c. 222 f. cf. Weber l. c. passim and supra 15.  
About the general aspect of the question: Schönauer (No 17) does not admit the conception of the Lösungsrecht (ius redemptionis) in one of the quoted laws. If this be so then there can be no question of an influence of those laws on Imperial law nor of a struggle and a surrender of Imperial Law.  
Concerning Babylonian and Assyrian Law (Felgenträger 53 ff) cf. the controversy (philological and material) between David 377 ff, Schönauer 313 f. Jewish sources are more favourable for Felgenträger p. 39 ff, David 379 f., Schönauer 311 f. (This scholar does not admit the possibility of a conflict with Imperial Law, 307 – 313).

Felgenträger 63 ff.  
Felgenträger 70 ff. The author confesses frankly that the sources at his disposal are but weak ones. David (378 f. n. 5) and Schönauer (307 f.) object strongly against conclusions driven from Chariton’s Callirhoe 1–2 cent A. D.

Arch. f. Pap. XIV 224.  
Sav. Z. LXII 306 V.
An answer of mine was destroyed on an infortunate day shortly before its publication. Thanks to the kindness of my editors I am now in the position to submit my interpretation to the verdict of my professional colleagues. It is a document proving the occurrence of the conception of the Lösungsrecht in the Hellenistic juristic world. Relying on such a proof I do not feel inclined to bow silently to the condemning verdict of my honourable friend and to acquiesce to his sentence that the study of Greco-Hellenistic sources has lead to completely negative results concerning the existence of such a Lösungsrecht.

The text that I have in mind cannot be peremptorily declined as a proof in our case on the ground that it belongs to a different historical epoch being by centuries older than the late Roman period. What we have to prove is that a particular legal conception existed already during the Hellenistic period. And I think that this proof can be produced.

The Papyrus Baraize (ca 165—158 B. C.) contains a hypomnema addressed to Daimachos who was διάδοχος και στρατηγός of the Perithebes. The writer of the hypomnema is a γεωργός named Petaroeris. He brings in a complaint bare of every juristic acuteness and critical sense against a certain Pemsaïs who — on two different occasions — has deprived him of 80 arourai of land. The wording of the text whose clumsiness is one more stimulant to attempt a juristic interpretation is as follows:

Δαιμάχωι διαδόχωι και στρατηγῶι παρὰ Πεταρόεριος τοῦ Φήςιος γεωργὸι ιῶν ἀπὸ Διοσπόλεως τῆς μεγάλης. 'Αδικοῦμαι ὑπὸ Πεμσαίος τοῦ Φανοφίου ὑπαρχοῦσης 5 γάρ τῇ ἐμῇ γονιμᾷ Τσενουμποῦτῃ γῆς ἡμεῖσι, ἦ ἐστιν ἐν τῇ κάτω τοιχῇ εἰς τοῦ Περιθηβας (ἀρουρῶν) πι, συνέβη ἐν τῇ.

26 I expected it to appear in the Literaturübersicht X in the Arch. f. Pap. XV under No 434.
27 Schönauer, Sav. Z. LXII 306 V.
28 This is the opinion Wilcken's Arch. f. Pap. XI 292 f.
29 I. e. τῶν διαδόχων; about that title cf. the editors pp 27—30; Wilcken 292.
30 Wilcken 293.
31 The editors p. 25 f. I did not underline the gaps in the text. They consist in a few letters only and have been satisfactorily completed.
According to this petition the strategos is asked to order a letter to be written to the topogrammateus Ismuthes directing him to present a detailed report about the case which is very complicated indeed. Petaroesis expects evidently that after such an official exposition of his case the issue of the lawsuit will be favourable for him. That favourable issue would consist in a definitive recognition of his claim to the whole real estate: namely his claim to recover unconditionally 2 arourai as γην απρατον and his claim to recover 53 arourai by paying a certain amount of money to the detentor of the land as indemnity (Lösungssumme).

The facts are as follows: the deceased wife of the petitioner owed 80 arourai of arable land not exposed to inundation. She was compelled to fly northward owing to an insurrection. The administrative magistracy officially alienated 53 arourai of her property to the respondent because it considered the land as a derelict res nullius. It would lead us to far to investigate in the present context the legal consequences of political revolutions. We know them sufficiently well from the history of Ptolemaic

22 L. έξεδιάζομαι. έξεδιάζων (med.) to appropriate something, embezzle cf. Preisigke-Kiessling, Wörterbuch s. v.
23 I have based myself mostly on the excellent commentary of the editors.
24 See the explanation by Wilcken 293 l.
Law as well as from other sources. The position of the respondent Pemsaïs is in our case more favourable for him than if he had simply put himself in possession of the land during the unrests and owing to the absence of the displaced proprietor. He was namely in the position to refer to have purchased the arourai from the state, i.e. probably from the ίδιος λόγος whose existence seems to be proved from 162 B.C.

As the acquisition of the land through purchase from the state became legally valid the proprietor lost all hope to recover her property by means of vindication. Nevertheless she tried to recover her estate — as it is told to us by the plaintiff who is her heir — but the only way was to repurchase it, to συνπληρώσαι τὰς άρουρας, τῶν συμπληρώσεως (ἀρούρας) ν. She had to repay fully to the purchaser Pemsaïs all the expenses connected with the acquisition of the 53 arourai i.e. the price that had been payed for the estate in the first place and all other expenses. She declared probably to Pemsaïs her readiness to bear all those burdens, but he was not inclined to grant her request. It seems quite certain that Tsenonpmutis as she offered to redeem her estate recognized that her opponent had acquired her property. It could be doubtful whether in her sense of justice she was in possession of a right of redemption and whether she was able to prevail with her claim, in court. That she did not do it in fact, cannot be considered as an argument against our thesis. Her illness and her


36 Cf. also the Correspondance of Zenon P. Cair. Zen. Ill 59460 and Berneker, Die Sondergerichtsbarkeit im griechischen Recht Ägyptens, Münch. Beiträge 22 (1935) 86 concerning acquisition through purchase of an officially seized real estate belonging to a debtor of the fiscus.

37 Editors 33 f. The άλλα πάντα belong to the βασιλικόν.


39 Concerning the broad possibilities to use the expression διαγραφή in the Ptolemaic legal language v. the editors (p. 36 l. 14). They refer justly to Wilcken, UPZ I p. 532 f.

40 The expression συμπληρώσας has all those meanings (not only: repaying of the price).

41 Concerning the expression ὑπομείναι that has been used in the bill of complaint referring to the attitude of both parties cf. Preisigke-Kiessling, Wörterbuch s. v.
death could have prevented her from bringing in her claim. Facts speak on the contrary in favour of the existence of a Lösungsrecht. The husband of the deceased proprietor qualifies namely in his petition the refusal to accept the offer of his wife as a case of ἀπαγόρευσις an embezzlement, an unrighteous appropriation, in one word a dolus. The occupation by force of the remaining 27 arourai is qualified by the petitioner as an unrighteous and illegal measure παρά το καθήκον βιαζόμενος. * Dolus and vis are opposite. The deceased wife left her inheritance to her husband in a very sad state of possession. After having described the facts, the husband brings in his petition based upon them. The petition is very badly worded — all students of the papyrus agree about that point. It can be considered as a true crux interpretationis and opinions of the interpretators vary. I think that I have found in the petition of the widower a full reception of both chief claims of the deceased testator i. e. those she had actually presented and those she could have presented in case she had survived. I mean claims concerning the 53 arourai sold by the state to Pemsaïs and also claims concerning the 27 arourai that he occupied by force.

The interpretators of the text seem to be unanimous about those 27 arourai. They have not been sold by the state; the defendant could not produce any title whatever concerning them, he acted merely by force (παρά το καθήκον βιαζόμενος). The fact that the plaintiff mentioned the remaining 53 arourai although he recognized that they had been legally acquired by the defendant, the fact that he mentioned them not merely in the narrative part of his statement of the case — what is a matter

42 V. supra n. 32.
43 ἀπαγόρευσις — to compel; to use force Preisigke-Kiessling, Wörterbuch. Here mediat to appropriate something by force.
44 Wileken, l. c. 294.
45 The editors translate p. 27: et, que je reçois de lui la terre qui m’appartient, and explain additionally to θηρίων: avant qu’elle soit vendue. They are more accurate in the commentary p. 37 where they give an alternative: que la terre appartient à Petaroéris parce que Pemsaïs ne l’a pas achetée au fisc.
Wileken 294: To get back the 27 arourai which have been unlawfully occupied by Pemsaïs. His petition has according to that only that aim. Similarly Schönbauer l. c. 306: According to my opinion the plaintiff asks to recover without a compensation the 27 arourai which have not been sold.
46 Irregular, Preisigke-Kiessling, Wörterbuch II 714.
of course — but he mentioned them in his *petitum* in a relatively full and detailed account (vv 18—20), finally the fact that Petaroeris based his expectation of a possible understanding with the defendant concerning those 27 *arourai*, chiefly upon the report that Imuthes was ordered to present, προσανενεγκείν τα κατά τήν διαγραφήν το πλήθος τῶν ἀρουρῶν; all those facts seem to prove that he had not lost all possibilities to recover them. But it is not to be denied that Schönbauer emits the opinion that Petaroeris has lost all his rights without any possibility to recover them; he takes for granted that the settlement of the case could be based not upon the *Lösungsrecht* (i.e. the right to redeem the *arourai*) but on a particular category of Ptolemaic decrees whose purpose it was to regulate unlawful changes of possession that occurred during political unrests. He reminds on the so called decrees of indulgence whose existence has been proved by the Hermias case.47 But we still have to find an interpretation for the mysterious words ὁτ.ως αποαετρήιω and to prove that only the defendant Pemsaïs can be meant by them. The word ἀπομ,ετέρω is translated in the first edition of the dictionary of Preisigke-Kiessling by the words: to pay in goods (as opposite to money) but Kiessling in his new edition48 gives a more detailed translation namely: 1 to measure corn, to pay and 2 to measure of, to find out by taking measure and quoting one text he adds: to make me verify for him the precincts of the *arourai* by measuring them, and so enable me to get back that part of my estate that had not been sold. In this way he accepts the interpretation of Wilcken49 (but he mentions my opposite opinion also). Wilcken’s interpretation is that the plaintiff’s claim culminates in a demand to find out by measurement the situation and the precincts of the 27 *arourai* and this because it is plausible to admit that Pemsaïs has obliterated the boundaries of the estate. I must confess that I am unable to consider as plausible such an interpretation of the expansion of the plaintiff which Wilcken himself considers very clumsy. The editors of the papyrus translate

47 Sav. Z. LXII 306 supra 45. Connected with the quotation is the following sentence: according to the editors the settlement of this dispute consists in a compromise. Restitution in exchange of compensation. This means execution of the *ius retractus* in concordance with the opinion of the editors.
49 Arch. f. Pap. XI 294 ff.
that expression as follows: pour que je lui (Pemsaïs) en paye le prix en nature (p. 27) and give the following explanation (p. 36): Petaroesis propose d’en payer le prix à Pemsaïs "άπομετρείν τιμήν ςύμφωνα σύμφωνα" Car nous ne voyons pas comment entendre ces mots difficiles. I think that the editors are right. I also think that perhaps we can dissipate the doubts felt by the editors and recognized by Wilcken. The editors say: άπομετρείν signifie un versement en nature and they understand by it an offer of grain. Wilcken asks what sort of grain was meant by the petitioner as he has not specified it. He underlines that the offer is not defined as a τιμή and finally that the value of the versement is not mentioned. According to Wilcken we miss here the precision of the act of doing which is essential for an offer of purchase. But are we obliged to take for granted that the word άπομετρείν means necessarily and exclusively only a versement en nature?

The Thesaurus Graecae Linguae translates άπομετρείν only by metior, dimetior and mentions other objects of measuring and apportioning too. Wilcken explaining the interpretation of the editors has omitted one point and assumes that it is hidden in the word τιμή or even more probably in the word άρουρον. But is it impossible that the word has been used in its intransitive form?

We say for instance in German abgelen (to repay, to give back the value of a service). The plaintiff asks for a report of the topogrammateus, that will clear the situation. It will be possible — on the basis of such a report — to reach an official decision concerning the amount of the compensation that will be due to Pemsaïs, and the plaintiff will recover his estate by paying compensation. The recovery will be based upon his Lösungsrecht (right of redemption). If our interpretation is correct, then it is understandable, that the word τιμή is omitted. It is also matter of course that the amount of the compensation could not yet be precisely fixed. The fixation of that amount was possible only after the termination of the investigation lead by Imuthes. It is also easily understood that the parties did not reach an agreement concerning the compensation, which was legally due to Pemsaïs at the moment of the restitution of the arourai. Pemsaïs’ attitude in the law-suit

50 The payment of a compensation in nature instead of money is conceivable especially in a period of political unrest. But I do not intend to propose such an interpretation in our case.
shows clearly that he intended to retain the whole of the 80 arourai, having paid to the fiscus the price for only 53 (τῆς γυναικός... ὑπομένοσης... οὐχ ὑπομένει). Pemsaïs was — as we remember — a ἀξιοζήμονες and a βιαζόμενος. It is true that we have a presentation of the case by the plaintiff only, and that we have no possibility (as often happens) to hear the altera pars. It is possible that the plaintiff or perhaps the deceased lady neglected to appear in court during the legal space of time and therefore lost their right to redeem the estate, or that they have not complied with some other legal condition? It is quite certain — owing to the interpretation of Wilcken — that the sale of the 53 arourai was a legal one. It was a consequence of the flight of the landlady. The estate belonged to ἐν τοις ἀδεσπότοις i. e. to the block of the bona vacantia. It is only under that condition that its recovery was possible by paying a compensation based upon the right of lost property. In every other case the plaintiff had only one way open before him: namely to recover the estate by vindication (the 53 arourai that had been sold as well as the remaining 27 arourai). But only 27 arourai are considered by the plaintiff as ἡ ὑπαγόμενη μοι τῇ.

If our interpretation proves correct, then we can consider the Papyrus Baraize not only as a certificate of the existence of a legal conception of a right to redeem lost property by paying a compensation in Hellenistic Law, but also that such a right existed in fact and was recognized by the judicial courts. I should like to mention in fine that Collart and Jouguet have tried to prove in a similar way the existence of a legal institution of the ἐπίλοσσες which was the object of investigations by Guéraud on the basis of the Papyri Enteuceis 61 and Eleph. 27.

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51 Cf. concerning those questions and these of the 53 arourai the remarks of the editors p. 37 ff.
52 P. 36 f.
53 P. 148 ff.