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# Roman Vulgar Law in Late Antiquity

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# Roman Vulgar Law in Late Antiquity*

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## 1. Heinrich Brunner's ‚Römisches Vulgarrecht'

The term ‚Römisches Vulgarrecht', in English ‚Roman vulgar law', was coined in 1880 by the historian of Germanic law Heinrich Brunner[1] (1840-1915), professor at the renowned University of Berlin. He used the term in a definite sense: the law of the Romance peoples under Germanic rule, and he meant: in Italy under the Lombards and in Gaul under the Franks from the sixth century AD up to the twelfth. After the western Emperor had abdicated in 476 AD there was, in Gaul and in Italy under the Lombards, no responsible authority as a source of the Roman law which continued to be applied, so that the Romance peoples were left to their own to develop their actually Roman law then in force. The Germanic rulers in general did not especially concern for it, except on some sensitive points like punishing high treason, and the authority of the east Roman Emperor did not extend to the Lombard and Frankish kingdoms with their mainly romance population, except for some cultural aspects like orthography. Thus the Franks accepted the Byzantine *ph* instead of *f* in terms like philosophy, whereas the Italian, Spanish and Portuguese languages persisted in *f* as ordered by the west roman Emperor Constans about 350 AD.[2]

Brunner evoked the parallel of the vulgar Latin language. He was at that time engaged in early Germanic law, especially in the transfer of ownership by deed of particularly real estates and slaves. He wanted to [S. 36] show that this was influenced by Roman law, not the official classical or postclassical law of the later Roman Emperors, but the law practised by the Romance peoples and *their* conception of what was required. It is well known that even in classical Roman law people who wanted to transfer an estate or a slave used to give their deed of

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[1] H. Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, Berlin 1880, 113 f.; see also 139; and idem, Deutsche Rechtsgeschichte I, Leipzig 1887, 255, 2nd ed. 1906, 377 f.

[2] Theodor Mommsen, Die Wiedergabe des griechischen Φ in lateinischer Schrift, in: Id., Gesammelte Schriften VII, Berlin 1909, 792-803 (first published 1878).

purchase, drawn up maybe many years ago by their predecessor, to the new buyer.[3] But that was just a custom, an indication that they wished to transfer ownership. Roman law only required – when provincial land was in question – tradition (delivery of possession) and, of course, a *iusta causa traditionis*, the legal basis as provided by an agreement of parties of, e. g., sale or gift. The transfer of the deed only indicated that they might have fulfilled the requirements just mentioned. The deed was in any case neither necessary nor sufficient, for example not sufficient when the owner had given it to a prospective buyer to convince him in advance, that he, the seller, was really the owner. But the Romance peoples, without the guidance by a Roman government with an emperor, clerks and specialists in Roman law, might have arrived at a more conspicuous conception of law, based on visible signs in stead of, for example, an agreement which required the concurring intentions of the parties, often difficult to ascertain exactly. In an undated letter of Heinrich Brunner to his elder friend and faculty colleague Theodor Mommsen (1817-1903), quoted by Mommsen in 1885,[4] Brunner qualified as an indication of Roman vulgar law the fact that at least from the sixth century onwards in the Romance communities it was seen as admissible to sell yourself as a slave, contrary to the official Roman law, which made sale of one self possible only in some excep[37]tional situations.[5] The observation was drawn from a passage in the *Lex Romana Visigothorum*, taken from the *Sententiae* of Pseudo-Paul.[6] In the widely disseminated *Epitome Aegidii*, a shortened version of the *Lex Romana Visigothorum*, which in time replaced the *Lex Romana* itself, the last half phrase of this passus was dropped.[7] By this the sentence of Pseudo-Paul became misleading. Centuries earlier Tacitus had said of the Germanic tribes[8] that they accepted voluntarily their own enslavement by a creditor, if they could not pay their debt. It may rest undecided if, in their own minds, they saw this as law or just as a common usage without being strict law. Nevertheless, this usage continued until the early middle ages. So it is very likely that this common Germanic practice, if not law, at least led to the transformation of the law of

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[3] See Septimius Severus 27 June 210, Cod. Just. 8, 53, 1; Ulpian, Ad edictum praetoris XVII, Digest 6, 1, 77; cf. also the *emptio pueri* from 142 AD, FIRA III No. 88; and the *emptio ancillae*, ibid. No. 89.

[4] Theodor Mommsen, Bürgerlicher und peregrinischer Freiheitsschutz im römischen Staat, in: Festgabe für Georg Beseler zum 6. Januar 1885, Berlin 1885, 253-72, here 266 f. n. 5.

[5] See Detlef Liebs, Sklaverei aus Not im germanisch-römischen Recht, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung (hereafter: ZSS) 118 (2001) 286-311, esp. 290-94; fraudulent participation in self-selling originally did not lead to slavery, but only to the loss of the remedies saving freedom by misuse, see on this point Max Kaser, Das römische Privatrecht I, 2nd ed. München 1971, 292 and nn. 43-46; and Liebs (above), 293 and nn. 46-48.

[6] Lex Rom. Visig. Pauli sent. 2, 19, 1.

[7] See Gustav Hänel (ed.), Lex romana Visigothorum, Leipzig 1849, 366 f.

[8] Tacitus, Germania 24, 1.

personal freedom also in the Romance communities. By doing this they gave up an old principle of Roman law, though one which admitted exceptions from the 3rd century AD.[9]

## 2. Reception and extension of Brunner's idea

The Brunner notion of Roman vulgar law as the uncontrolled or, more exactly, pluralistic updating of official Roman law was immediatly adopted by French and Italian colleages: as *droit romain vulgaire* from 1883 onwards by the historian of French law Adhémar Esmein [38] (1848-1913)[10] and later by Jean Brissaud (1854-1903),[11] and, as *diritto volgare romano* from 1892 onwards by the historian of Italian law after the fall of the Empire, Francesco Schupfer (1833-1925).[12] But as soon as 1893 Brunner deplored already the too wide extension of the term and its use as a catchphrase.[13]

What had happened? Ludwig Mitteis (1859-1921), then in Prague and later in Leipzig, had some years earlier, in 1891, taken over the term ‚römisches Vulgarrecht' – Roman vulgar law, using it, however, in a much broader sense than Brunner had meant. Mitteis specified by it all Roman law practised in the countryside in Italy and within the territory of the provinces next to the academic Roman law of the classical jurists. According to Mitteis, Roman vulgar law differed from Roman law theory and conformed to specific local needs. It was a degenerate Roman law, practised already in classical times, in the first centuries AD, and of course also in the postclassical times of the later Roman Empire. Tacitly he implied that the law of the classical Roman jurists lacked in practice widely influence. He defined his notion of Roman vulgar law at a prominent place in his bestselling ‚Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs' (Law of the Empire and of the people in the eastern provinces of the Roman Empire), namely on pages 3 and 4. There he refers explicitly [39] and repeatedly to Heinrich Brunner, claiming that the new notion had already appeared

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[9] Liebs (note 5) 286-311.

[10] Esmein, Études sur les contrats dans le très ancien droit français, Paris 1883.

[11] J. Brissaud, Manuel d'histoire du droit français (sources – droit public – droit privé) [other title of the same, post mortem published book: Cours d'histoire générale du droit français public et privé] I, Paris 1904, 74 f. Without using the term *droit romain vulgaire*, but otherwise very similar Louis Stouff, Étude sur la formation des contrats par l'écriture dans le droit des formules, Nouvelle revue historique de droit français et étranger 11 (1887) 269 ff.; and idem, Revue bourguignonne de l'enseignement supérieure 1894, 8.

[12] F. Schupfer, Manuale di storia del diritto italiano I: Le fonti, Milano 1892; idem, I semplicisti nella storia del diritto, Rivista italiana per le scienze giuridiche 57 (1916) 157 ff., v. Idem, La publicità nei trapassi della proprietà secondo il diritto romaqno del basso Impero specie in relazione alle vendite, Rivista italiana 39 (1905) 4 f.

[13] Brunner in an added footnote to the reprint of his basic article: Die fränkisch-romanische Urkunde als Wertpapier, Zeitschrift für Handelsrecht 22 (1877) 64 ff. and 505 ff., also in: Idem, Forschungen zur Geschichte des deutschen und französischen Rechtes. Gesammelte Aufsätze, Berlin 1894, 607 n. 1.

in several writings of other German contemporaries. In a footnote he quotes for this assertion two articles, one by Theodor Mommsen and the other by Alfred Pernice, two Berlin colleagues of Brunner. But this quotation is wrong. Mommsen did not use the term himself, he only quoted verbatim the aforesaid letter of Brunner. And Pernice (1841-1901) did not speak of Roman vulgar law, but merely of vulgar law – Vulgarrecht –, meaning the non-Roman laws of the different regions of the Roman Empire.[14]

The idea of Mitteis, that the law of the classical Roman jurists was a mere academic law without much influence in practice outside of the Roman centre, was apparently prompted by his papyrological research and further by his observations on the actual law in the prewar Habsburg Empire. Outside Vienna, the fine Austrian lawcode *Allgemeines Bürgerliches Gesetzbuch*, did not have much authority, such as in the countryside of Bohemia and in the far east territories of Galicia. It was not for nothing that the obstetrician of the sociology of law, Eugen Ehrlich (1862-1922), lived far away in Czernowitz or Tschernowzy in Bukowina, which came after the first world war to Romania and now is in Ukraine. The Mitteis view of classical law is no longer generally accepted by contemporary romanists.

But his broadening of the Brunner concept was more than welcome in Italy. There it generated a new theory of a pre-Roman Italian vulgar law. The specialist of Italian legal history Enrico Besta (1874-1952), published in 1905 an article intitled: *La persistenza del diritto volgare italico nel medioevo*.[15] And his compatriot Arrigo Solmi (1874-1944), later known as a fascist minister, welcomed this view.[16] For both, Roman vulgar law or *diritto volgare romano* did not exis. There was just a *diritto volgare* alongside Roman law during all the time when [40] Roman law was the officially applied law. In Italy this *diritto volgare italico* would have persisted and in the provinces the *diritto volgare* of the indigenuous peoples there, of course also after the fall of the Roman Empire. Already in 1921 the elder colleague of both Besta and Solmi, Francesco Brandileone (1858-1929), took issue with this view.[17] After 1945 the view of a pre-Roman Italian vulgar law, which would have survived the time of Roman domination, faded away with its main advocate. The leading figure at that time of Italian legal history,

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[14] Alfred Pernice, Volksrechtliches und amtsrechtliches Verfahren in der römischen Kaiserzeit, in: Festgabe Georg Beseler (above n. 3) 49-78, here 75 n. 3.

[15] Rivista di legislazione comparata 3 (1905) 5 ff.; later comprimed in his manual: Storia del diritto italiano I, Milano 1923, 23-25; and defended in his article In difesa del diritto volgare italico, in: Scritti di diritto e di economia in onore di Flaminio Mancaleoni, Sassari 1938, 245 ff.

[16] Solmi, Storia del diritto italiano, Milano 1930 (3rd ed.; 1st 1908, 2nd 1918) 2 f., 61 and 97.

[17] Brandileone, Il diritto romano nella storia del diritto italiana, introducing lecture for a course in history of italian law, held in Rome 5th of March 1921, now in: F. Brandileone, Scritti di storia del diritto privato italiano I, Bologna 1931, 19-58, esp, 40-50; he opposes also the Brunner view of Roman vulgar law, calling it simply Roman law of the sixt century etc.

Francesco Calasso (1904-65), rejected it completely. But he maintained the idea of a Roman vulgar law which emerged in the 4th and 5th century, when the power of the western emperor was weakened, and wich carried on the Roman law tradition after the fall of the Empire.[18]

## 3. Ernst Levy

The scholar who made of Roman vulgar law into a basic idea of Late Antique law and who caused a vivid discussion lasting for decades, was Ernst Levy (1881-1968). He began with his research which led to this three years after Mitteis' death; and he broadened the notion once more vigorously. Not a pupil of Mitteis, he nevertheless revered him. Now he included in the notion of vulgar law not only degenerate Roman law as practised in the provinces, but all law practised in the Roman Empire outside the centre which did not correspond to the law of the classical jurists, including usages in the provinces which stemmed from different peregrine laws. Mitteis had called this 'Volksrecht' – law of the people – and had it opposed to Roman vulgar law. Levy qualified even imperial law from the time of Constantine and his successors as Roman [41] vulgar law, if it simplified classical law in a popular way. And later a pupil of Fritz Pringsheim in Freiburg, Gudrun Stühff, brought this view to the point, that the laws of Constantine and his successors generated the Roman vulgar law.[19] Dieter Nörr immediatly rejected this idea.[20]

Roman vulgar law was to become Levy's special interest and the object of his research from the 1920s until his last days, but he particularly intensified it when he was in exile in America (1936 until about 1954),[21] and continued it after his return to Europe (about 1954

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[18] Calasso, Medio evo del diritto I, Milano 1954, 56-79; see already idem, Diritto volgare, diritto romanzi, diritto comune, in: Atti del congresso internazionale di diritto romano e di storia del diritto Verona 1948 II, Milano 1951, 357-80, esp. 372 f.

[19] Gudrun Stühff, Vulgarrecht im Kaiserrecht unter besonderer Berücksichtigung der Gesetzgebung Konstantins des Großen, Weimar 1966, esp. 82-128.

[20] Dieter Nörr, ZSS 84 (1967) 464 f., a review of the book of Stühff.

[21] On his biography see the obituary by his most prominent pupil, Wolfgang Kunkel, in ZSS 86 (1969) pp. XII-XXI; and Ralph Backhaus with Karlheinz Misera, in: Semper apertus. Sechshundert Jahre Ruprecht-Karls-Universität Heidelberg 1386-1986 vol. III, Berlin 1985, 186-93. In America appeared 1942 the article ‚Reflections on the First „Reception" of Roman Law in Germanic States', American Historical Review 48, 20-29, reprinted in his *Gesammelte Schriften* I, Köln 1963, 201-9; 1943 the article ‚Vulgarization of Roman Law in the Early Middle Ages', Medeaevalia et humanistica 1, 14-40, *Gesammelte Schriften* I 220-47; 1945 the book ‚Pauli Sententiae. A Palingenesia of the opening titles as a specimen of research in West Roman Vulgar Law', Ithaca/New York; 1950 the article ‚The Reception of Highly Developed Legal Systems by Peoples of Different Cultures', Washington Law Review 25, 233-45, *Gesammelte Schriften* I 210-9; and 1951 the book ‚West Roman Vulgar Law. The Law of Property', Philadelphia. The continuation ‚Weströmisches Vulgarrecht. Das Obligationenrecht' appeared in Germany, Weimar 1956, albeit equally elaborated mostly in America. In Italy he published 1948 ‚Possessory remedies in Roman vulgar law', in: Scritti in onore di Contardo Ferrini pubblicati in occasione della sua beatificazione III, Milano 1948, 109-43, not reprinted in the *Gesammelte Schriften*.

until 1966). But he had begun all this much earlier. A little more than one year after he had settled in Freiburg in 1922, early in 1924, he was busy with a new palingenesia of the Sentences of Pseudo-Paul[22] and examined all the various sources, which contained – more or less – sentences: the *Lex Romana Visigothorum* with ist supplements and *Appendices*, the *Lex Romana Burgundionum*, the *Consultatio veteris cuiusdam iurisconsulti*, the *Lex Dei quam Deus dedit ad Moysen*, the [42] *Fragmenta iuris Vaticana* and other minor texts. He soon saw that for this diverse material an *index verborum* was missing. It neither existed nor was it planned. So he decided to do first this: to organise an *index verborum* of, in the end, 53 minor pre-Justinianic Roman law texts which were up till then partly neglected and partly just ignored. They included those texts which were transmitted only through Germanic law codes of the tribal kings on former Roman territory, issued for their Germanic and, often separately, for their Romance subjects. The most prominent exemples of these are the so called *Codex Euricianus*, a Visigothic code of about 465 AD, and the *Edictum Theoderici*, an Ostrogotic code of about 500 AD. Both were obviously drawn up by Roman lawyers in the service of Germanic kings. The other texts claimed to represent the actual Roman law. The Visigothic law code of 506 AD, destined for the Romans under Visigothic rule, contained beside imperial laws and an epitome of the Sentences of Pseudo-Paul a short version of the Institutes of Gaius. It further contained various *interpretationes* to the Sentences of Pseudo-Paul and to the pre-Justinianic law codes, and above all part of the Theodosian code, a collection of supplementary laws since Constantine, arranged in a systematic order.

The *Ergänzungsindex zu Ius und Leges* (Supplementary index to ius and leges) was published in 1930. Levy's intense preoccupation with these texts led him to characterise the bulk of them as western evidence of the Roman law as practised in the fourth to sixth century AD. And three years later, in 1933, he gave lecture in Rome at the 1 400th anniversary of the completion of Justinian's Digest, entitled *Zum Wesen des römischen Vulgarrechts* (On the essentials of Roman vulgar law). Here he used the term *Römisches Vulgarrecht* for the first time, whereas 1928 in Oslo he spoke of ‚West and East in the postclassical development of Roman law'.[23] Although the *Index* is generally considered as a preliminary work to his Roman vulgar law research, the term as such did not yet appear, nor did it in his in 1930 published article *Paulus und der Sentenzenverfasser* (Paul and the author of the [43] Sentences).[24]

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[22] Ernst Levy, Ein Ergänztungsindex zu den Jura und Leges, ZSS 46 (1926) 287-9, esp. 289.

[23] Westen und Osten in der nachklassischen Entwicklung des römischen Rechts, published a year later in ZSS 49, 230-59, reprinted in *Gesammelte Schriften* I 163-83.

[24] ZSS 50, 272-94, reprinted in *Gesammelte Schriften* I 99-114.

So not until after nine years of incubation ‚Roman vulgar law' became Levy's key to unlock western Roman law from the fifth or even fourth century onwards.

What were the charateristic outlines of Roman vulgar law? Levy maintained that since Constantine, who reigned from 306 to 337 and had introduced many changes, also in the law, Roman law particularly in the west had become simplified. The main feature of vulgar law was to reject all complicated or intricate regulation. For example, the provisional ineffectiveness or effectiveness of an agreed right, which depended on a contingency, a future uncertain event such as the agreement that transmission of property would depend *ipso jure* on paying the full price. Another example is the difference between property on one side and possession on the other side as the factual, effective holding of tangibles, real estates or movables, regardless of property and other rights to posess. Levy maintained that in western Roman law of Late Antiquity the notion of mere possession, bona or mala fide, did not survive; possession would be used in the sense of property. A third exemple: the difference between the transmission of rights and their legal ground, such as between transmission of property and the underlying sales agreement, gift, loan or whatever, would have been levelled. They only acknowledged cash transactions like the old *mancipatio* before the *mancipatio nummo uno* had been invented, by which the Romans had learned to differentiate between the transmission of ownership and other rights and the underlying deal. In other words: the whole transaction of, e. g., sale would have been ineffective unless the price was immediatly paid. The mere tradition of the thing sold, in combination with the agreement to transfer it on ground of sale, would be irrelevant. They looked for obvious phenomena expressing the facts and for obvious, simple solutions. The counterpart to Roman vulgar law was the classicism of the eastern law schools, especially of Berytos and later Constantinople, and of Tribonian and the Emperor Justinian, who lived about 480 to 565 and reigned from 527 AD, with his uncle Justin already from 518.

[44] Levy developed all this to a broader, overall scope in the scientific loneliness of America, where Roman law and its history was till then never taught in a noteworthy way. Special subjects of Roman law had not created any interest there and so he was free to erect for the astonished public his very own architecture.

## 4. Levy's reception in Germany

When after the war he renewed his connections with the representatives of German Romanistic legal history, with hesitation and first mainly encoured by his pupil Wolfgang Kunkel,

who had stayed in Germany, the three then leading figures of the discipline in Germany, his pupil Kunkel, Max Kaser and Franz Wieacker, all were enthusiastic about his research, mainly done during his exile. Kaser effectively helped him to publish its further results in Germany.[25]

In his case, like in that of Wieacker, this attitude can also be explained psychologically. Both had made compromises during the twelve years of the Nazis. Kaser had tried to make friends with the Nazis. They had denounced Roman law in their party program as serving a materialistic, let us say Jewish world system, which was to be replaced by a German common law.[26] Kaser now tried to show that the historical Roman law was full of social regulations and that the individualistic traces only came from the liberal interpreters of Roman law in the 19th century.[27] As dean of the law faculty of Münster in Westfalia, Kaser had also cooperated in the withdrawal of the doctorate from Karl Barth, a famous German protestant theologian, who taught at that time at the University of Basel in Switzerland. Wieacker had joined the Nazi party to become an ordinary professor in Leipzig after having waited in [45] vain for five years and he had made some compromising statements, for exemple comparing the Nazi racial laws with Roman *conubium*. After the war, both recepted Levys views completely.[28] Wieacker even took them further, elaborating a general vulgar attitude of style in law: vulgarism as opposed to the classisicm of the east in later 5th and 6th century.[29]

## 5. Critics of Levy

After the death of Levy Wieacker reduced his endorsement more and more, inspired by his last pupil Wulf Eckart Voß and by Dieter Simon.[30] Voß had taken a closer look at the laws of Constantine and the emperors after him. He discovered that the apparent vulgar features in these did not point to a lost capacity to comprehend the distinctions of classical law, but were

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[25] He thanks him warmly in the preface of his *Weströmisches Vulgarrecht. Das Obligationenrecht*, Weimar 1956, VI f.

[26] Program of the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) from 24th Feb. 1920, Chapter 19: *Wir fordern Ersatz für das der materialistische Weltordnung dienende römische Recht durch ein deutsches Gemeinrecht*.

[27] Max Kaser, Römisches Recht als Gemeinschaftsordnung, Tübingen 1939; see also idem, Die deutsche Wissenschaft vom römischen Recht seit 1933, Forschungen und Fortschritte 15 (1939) 205-8.

[28] Max Kaser, Art. Vulgarrecht, RE IXA 2 (1967) 1283-1304; see already idem, Das römische Privatrecht II, München 1975, 17-31 (1st ed. München 1959, 13-18) = § 193.

[29] Franz Wieacker, Vulgarismus und Klassizismus im Recht der Spätantike, Heidelberg 1955. Levy appreciated this on p. 1 f. of his *Weströmisches Vulgarrecht*.

[30] Dieter Simon, Marginalien zur Vulgarismusdiskussion, in: Festschrift für Franz Wieacker zum 70. Geburtstag, Göttingen 1978, 154-74.

intentional colourings in a rhetorical style, because the laws promulgated everywhere now served much more than before as propaganda for the all embracing government.[31] Constantine had strengthened propaganda for his regime to a hithertoo unknown degree. The imperial lawyers, Voß said, not only were very well aware of the difference between transmission of ownership and the underlying obligation, whether a contract of sale or some other obligation: they even still knew the requisites of *mancipatio* for real estates, slaves and cattle and in general accepted them. This observation was recently supplemented – after Cannata[32] – by Sarah Vandendriessche who showed [46] that also the difference between property and mere possession was still well known and respected in imperial legislation of the 4th and 5th century, and even refined, be it in non-classical terms.[33] Wieacker now objected to the idea of vulgar law in imperial laws. The term would be at least improper, if used for the laws emanating from the centre of the Empire.[34] The men there may have been rude military men, but you could not call their output vulgar. This is convincing. Imperial legislation must be excepted from the texts attesting Roman vulgar law. Otherweise vulgar law would be just a pejorative qualification, applicable to all law making of a lower standard. In the context of vulgar law Levy took only Roman private law with ist many fastidious rules, developed by the classical jurists, into consideration. In criminal law you find particularly in the laws of Constantine a lot of openly brutal penalties,[35] which never have been stigmatized as vulgar law. Why not?

This leads to a principal objection against Levy's concept. Most of the Late Antique non-imperial law texts, which stemmed from late antique jurists, still specialists in Roman law, were not written for publication. They were just written down mostly in school either by a student from hearing a law teacher or by a teacher as a reminder for use in his teaching – thus

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[31] Wulf Eckart Voß, Recht und Rhetorik in den Kaisergesetzen der Spätantike. Eine Untersuchung zum nachklassischen Kauf- und Übereignungsrecht, Frankfurt am Main 1982 (but already in the 1970ies developed in Wieacker's seminary).

[32] Carlo Augusto Cannata, Possessio, possessor, possidere nelle fonti giuridiche del Basso Romano. Contributo allo studio del sistema die rapporti reali nell'epoca postclassica, Milano 1962.

[33] Vandendriessche, Possessio und Dominium im postklassischen römischen Recht. Eine Überprüfung von Levy's Vulgarrechtstheorie anhand der Quellen des Codex Theodosianus und der Posttheodosianischen Novellen, Hamburg 2006.

[34] Franz Wieacker, ‚Vulgarrecht' und ‚Vulgarismus'. Alte und Neue Probleme und Diskussionen, lecture in Siena 4th December 1979, published in: Studi in onore di Arnaldo Biscardi I, Milan 1982, 33-51, also in idem, Ausgewählte Schriften, Frankfurt am Main 1983, 241-54.

[35] Jean-Pierre Callu, Le jardin des supplices au Bas-Empire, in Du châtiment dans la cité. Supplices corporels et peine de mort dans le monde antique, Roma 1984, 313-59; Detlef Liebs, Unverhohlene Brutalität in den Gesetzen der ersten christlichen Kaiser, in Römisches Recht in der europäischen Traditon. Symposion aus Anlaß des 75. Geburtstages von Franz Wieacker, Ebelsbach 1985, 89-116; and Ramsay MacMullan, Judicial savagery in the Roman Empire, Chiron 16 (1986) 147-66.

in my opinion the bulk of the late Roman juristic literature.[36] There we find, while the author tries to describe the single rules in a way that modest minds could understand them, perhaps himself also being of a modest mind, that the law is sometimes misunderstood, maybe in a vulgar way. But was the law in force itself vulgar? Levy's observations, that these texts show a vulgarized view of otherwise well known [47] Roman law, are often quite right. But what is the reason for this? In each case you have to take into consideration the purpose of the text. Was it a school text from law lessons? Was it sketched by the teacher himself as an aid for his oral lessons, whose sketches later got into circulation, or was it noted down by a pupil? Was it a private law document: a contract, a testament, or a document from a lawsuit, the product of a Roman officer, for example a governor, or of a sovereign Germanic king? Was it issued for all the latter's subjects, or only for the Romance peoples, or only for all his Germanic subjects, or only for his military people? Or was it perhaps non-legal text? Levy put all the available texts of Late Antiquity which concerned law on one heap and distilled from this the law that was then practised. He had come to know the texts of Late Antique law which till then had been neglected or just unknown to the historians of Roman law and he had the skill to build from this slender-looking material an impressive outline of a living law during legally dark centuries in western and southern Europe.

Wieacker had stressed already in the fifties the cultural aspect of vulgar law. Vulgarism was more a quality of style than an officially acknowledged type of law, a legal system. From the late seventies onwards he flatly disowned the term and existence of Roman vulgar law as a legal order binding all members of the Roman community during the still enduring west Roman Empire, say until the 460ies AD, when the western part of the empire was about to collapse.[37] The Roman law of the Romance population in the Germanic kingdoms rightly can be called Roman vulgar law, albeit the Visigothic king Alaric II 506 AD had given clear rules as to which parts of the traditional Roman law should have force in his kingdom and which not. Thus he excluded all imperial laws against Arianism. But his effort had only a short effect; in the Gallic part of his kingdom, which already 507 fell for the greater part to the Franks, his laws were upheld. But the parts of Roman law, which Alaric II had excluded, were accepted, if only in a supplementary way. A clear difference from the Frankish reigns can be seen in the Iberian peninsula under Visigotic rule. There [48] legal documents are written in a

[36] Detlef Liebs, Esoterische römische Rechtsliteratur vor Justinian, in Akten des 36. Deutschen Rechtshistorikertages in Halle 23.-26. Sept. 2006, Baden-Baden, forthcoming.

[37] Wieacker in the above n. 34 quoted article. See now his recapitulation in Wieacker, Römische Rechtsgeschichte II, München 2006, 211-8.

remarkably good Latin and they stress the bindingness of the written law. But this may have been just rhetorics; here too Roman vulgar law seems to have actually prevailed.[38]

Before the collapse of the Empire and its effective central burocracy dealing with tax collecting and the administration of justice, you nevertheless can find vulgarisms in descriptions of the law by law teachers of lower standing, who lacked professional understanding, and of course likewise in the practice of the official law by legal laymen, such as businessmen, legal advisors and lower courts. Nevertheless law instruction in the west was not as Wieacker maintained (followed by many others) left to rhetoric schools as an extra, performed by orators who lacked professional legal knowledge. In the Romanised western provinces like Africa, southern Spain and particularly Gaul, professional law teachers existed all through late antiquity.[39] We have evidence of this law teaching. From Autun we have the famous Gaius of Autun, which is to be dated as early as the fourth century and which does not contain any of the anachronisms, found by Wieacker and others due to a wrong dating.[40] And from the later fifth century we have the so called *Epitome Gai*, the *interpretationes* to all the law codes and the Sentences of Pseudo-Paul, mostly in the *Lex Romana Visigothorum* (the Breviary of Alaric), which were the main sources of Levy's and Kaser's buildings of a west Roman vulgar law. They stem from law teaching in the Gallic provinces under a western Emperor, perhaps Narbonne or Lyons, on a rather low if still professional level. They try to do their best to continue the Roman law tradition. In the *interpretationes* of the Gregorian and the Hermogenian codes how[49]ever, Nicole Kreuter found no traces of vulgarisation at all.[41] But the interpretations of the Sentences of Pseudo-Paul, also transmitted by the Breviary of Alaric II and obviously stemming from law teaching in 5th century Gaul – other interpretations existed too – contain here and there peculiarities which may be qualified as vulgarisms,[42] although Levy, Kaser and still Hartwig Schellenberg exaggerated this very much. Only a small number of their ‚vulgarisms' can really be called vulgar; and I have not found a single case where you can say the law had really changed due to vulgarisation. At any rate, you have to take account of the lower level of the basic text itself, the Sentences of Pseudo-Paul from about 300 AD.

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[38] There is not very much evidence. First of all we have the Visigotic formulary from Córdoba, a town of moderate autonomy within the Visigotic kingdom. The formulary can be dated between 616 and 620 AD; see Detlef Liebs, Römische Jurisprudenz in Gallien, Berlin 2002, 196-9.

[39] Detlef Liebs, Rechtskunde im römischen Kaiserreich. Rom und die Provinzen, in: Iurisprudentia universalis. Festschrift für Theo Mayer-Maly, Köln 2002, 383-407, esp. 394 ff.

[40] Detlef Liebs, Die Jurisprudenz im spätantiken Italien, Berlin 1987, 144-50.

[41] Nicole Kreuter, Römisches Privatrecht im 5. Jh. n. Chr. Die Interpretationen zum westgotischen Gregorianus und Hermogenianus, Berlin 1993.

[42] Put together by Hartwig Schellenberg, Die Interpretationen zu den Paulussentenzen, Göttingen 1965, 81-6.

An example given by Max Kaser,[43] which was not expressly attributed to vulgar law by Levy,[44] is this. In civil lawsuits for a certain sum of money and some related cases, Roman law provided for the plaintiff who wanted to speeden up the procedure to call on the defendant to take a judicial oath on the matter in dispute.[45] The interpreter of Pseudo-Paul, however, says[46] that if somebody asks his money back and there is no proof that money is owed, the text of the Sentences will settle the dispute by imposing an oath. Obviously the judge would have to impose it. The fair mechanism of calling for the oath and the [50] defendant's option to return the calling is no longer borne in mind. Apparently the judge is free to impose the oath at his discretion, in as much as it would seem expedient to him to solve the case. But this cannot be called vulgar. It is simply a consequence of the increased power of the Late Antique judge, who now is an officer and no longer the holder of a honorary position as in classical times. It also coincides to some extent with traits of Germanic law, in which the defendant can often clear himself by a purging oath of himself and a certain number of honorable friends, strengthening the honesty of the defendant. In the Germanic communities the oath of a party played a prominent role. Levy stressed this and assumed the influence of Germanic law. But the role of the oath in Germanic law differs remarkably from the regulation in this text. An influence is, if you look closer, very improbable.[47]

But on the other hand you actually find in this *interpretatio* as well as in the *Epitome Gai* a number of insufficiencies which you may define as vulgarisms. For example, the text in the case of a purchase or gift does not distinguish between the obligation and its execution by disposition. However, of Schellenberg's nine examples[48] only one is really convincing and another may come into consideration. Once the interpreter says *donatus*, where the basic text says *ex lucrativa causa meus factus*:[49] you cannot call this a deficiency. The interpreter just substituted for the abstract notion a concrete example, as you have to do if you want to be

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[43] Max Kaser, Das römische Zivilprozeßrecht, München 1966, 480 = § 90 III 3, unchanged by Karl Hackl in the second edition of 1996, revised by him, p. 590.

[44] Ernst Levy, Westen und Osten in der nachklassischen Entwicklung des römischen Rechts, ZSS 49 (1929) 245 and 250, treates this phenomenon, but then he characterises it only as *dem Westen eigenen neuartigen Rechtssatz* and *Verflachung*.

[45] Kaser-Hackl, Das römische Zivilprozeßrecht[2], München 1996, 268 f. = § 36 III.

[46] IP 2, 1, 1: *Cum de repetitione pecuniae agitur et probatio debitae pecuniae nulla proferatur, iubet, huius rei ambiguitatem sacramentorum interpositione finiri.* The Sentences (2, 1, 1) had said, already misleadingly generalising: *In pecuniariis causis si alter ex litigatoribus iusiurandum deferat, audiendus est; hoc enim et compendio litium et aequitatis ratione provisum est*. The not completely preserved context may have saved the reader from misunderstanding, see at any rate PS 2, 1, 2 and 3.

[47] Schellenberg (above n. 42), 71-75.

[48] Schellenberg, op. cit. 84 and 118 note 638.

[49] IP 2, 18, 5, belonging to PS 2, 17, 8.

understood by pupils who are not yet advanced. Similar concretisms can be found in classical school literature.

The acquisition of possession and ownership by a third person, especially by a *procurator*, was only valid if the principal gave his approval. Whereas Pseudo-Paul himself uses the general term *comparata ..., si rata sit, quaeritur*,[50] the *interpretatio* tries to make the point clearer for teaching purposes and says ... *si ... fuerit comparatum, ... ei adquiritur, ... si hanc ipsam v e n d i t i o n e m sibi acceptam dominus esse consenserit*.[51] Of course, here only the acquisi[51]tion of possession and ownership on the legal ground of the sale is debated, not the sale itself. So to mention only the obligatory part of the transaction would certainly have been wrong. But he did not do that. By *venditionem* he meant the whole deal, as did Pseudo-Paul by *comparata*. This actually harmless inaccuracy too is conditioned by the basic text and should not be stigmatised as vulgar.

The only remaining convincing example of Schellenberg's nine, which deals with the merging of obligation and performance of a contract can, however, be critisised as possibly misleading. The text of Pseudo-Paul[52] deals with a problem of *fiducia*, which the interpreter had to transform into a parallel problem within the scope of *pignus* because *fiducia*, the older Roman transfer of ownership providing security for a credit, was no longer common. Only the younger *pignus*, mortgage or pledge, had survived in fifth century Gaul. Pseudo-Paul treats of the question, whether the creditor can buy the object of the security transfer. He denies it and goes on to state that a third person can buy it. In order to perform the contract, the debtor-seller must accept the price to pay his creditor and get back the object. After this he can render it (*praestare*) to the buyer. The interpreter[53] says the same in the case of pledge, but in the end he states that the debtor-seller, who already sold the object and got the price, after having recovered the sold thing from the creditor, may sell (*vendat*) it to his buyer. This is clearly wrong. At that moment, only the performance of the already contracted sale is in question. Instead of using mistakes like this just to insult the interpreter as a very stupid fellow and as a very ill-equipped lawyer who repeatedly shows abysmal ignorance, as William Warwick Buckland in 1944 did,[54] defects like this can be qualified more indulgently as vulgarisms in the sense of a more or less common feature of the private law texts of his time and place.

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[50] PS 5, 2, 2.
[51] IP 5, 2, 2.
[52] PS 2, 13, 3.
[53] IP 2, 12, 6.
[54] W. W. Buckland, The interpretationes to Pauli Sententiae and the Codex Theodosianus, LQR 60 (1944) 361.

As a rule, the interpreter reproduces the facts of the cases correctly and likewise the solutions given by Pseudo-Paul. So Schellenberg rightly rejects Buckland's vivacious condemnation of this author, going [52] thoroughly through the whole text and paying tribute also to his manyfold merits in modernising the law, adapting it a bit and making it more easily intelligible. Single mistakes, if grave, can be found almost in every work, albeit in classical literature in a substantially smaller number.[55]

## 6. Conclusion

Concluding[56] I would say that vulgarisms really existed in Late Antique law; they can be found in nearly all Roman law texts of private origin in this age. But is vulgar law really the key to characterise the law of the later Roman Empire at least in the west, as Levy proposed and Kaser willingly accepted? I doubt it. Too many of his presumed special institutions of West Roman vulgar law turn aut to be ingenious constructs, which too often fail the test, if you control all the adduced sources. The Roman law in Gaul under the Franks from the sixth up to the eighth or ninth century, perhaps also in Italy under the Lombards, where the Justinianic law introduced under the Lombards no longer developed according to the laws of the later Byzantine Emperors, may be called Roman vulgar law, as Brunner did it. An example is the *Lex Romana Curiensis*,[57] an epitome of the *Lex Romana Visigothorum* from law teaching in early eighth century AD in Chur in eastern Switzerland, which became a book of authority in the region and was to be called *lex*.[58] The Roman law taught there can reasonably be called a [53] Roman vulgar law.[59] Nevertheless you have to be cautious. A lot of rules which Alexander Beck, who taught in Bern in Switzerland, called Roman vulgar law of the *Lex Romana Curiensis*, turns out to be Frankish influenced deviations from Roman law. In the later ninth century in the region of Chur Frankish law openly imposed itself more and more on this residue of Roman law in a Germanic environment, as documents and deeds from this time

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[55] Schellenberg, op. cit. 85-87.

[56] Surveys on Roman vulgar law from recent times: Theo Mayer-Maly, art. Römisches Vulgarrecht, in: Handwörterbuch zur Deutschen Rechtsgeschichte V, Berlin 1990, 1132-7; Wolfgang Kaiser, art. Vulgarrecht, in: Der Neue Pauly – Enzyklopädie der Antike XII, Stuttgart 2002, 350 f.; and Sandro-Angelo Fusco, art. Vulgarismusforschung/Vulgarrecht, ibidem XV/3 (2003) 1071-4.

[57] Modern edition by Elisabeth Meyer-Marthaler, Die Rechtsquellen des Kantons Graubünden: Lex Romana Curiensis = Sammlung Schweizerischer Rechtsquellen XV 1, Aarau 1959.

[58] Detlef Liebs, Römische Jurisprudenz in Gallien, Berlin 2002, 230-5.

[59] To it Elisabeth Meyer-Marthaler, Römisches Recht in Rätien im frühen und hohen Mittelalter, Zürich 1968, 43-202; Jean Gaudemet, Le Bréviaire d'Alaric et les Épitome = IRMAE I, 2 b aa ß, Milano 1965, 55; and Alexander Beck, Studien zum vulgarrechtlichen Gehalt der Lex Romana Curiensis, in: idem, Itinera iuris, Bern 1980, 366-501, who sometimes exaggerates this, calling Roman vulgar law, what is really Frankish influenced law.

show.[60] So I for my part prefer to call the law of the Romance peoples under Gothic, Burgundian, Frankish, Alemannic or Lombard rule Germanic Roman law.[61]

[60] Martha Meyer-Marthaler, Lex Romana Curiensis cit. p. LV; and eadem, Römisches Recht cit. 211 and 216-9.
[61] Liebs (note 5) 286 f.