THE UNILATERAL DETERMINATION OF PRICE IN ROMAN LAW

HM du Plessis

1 Introduction

The law of purchase and sale in South Africa derives from Roman and Roman-Dutch law, and despite the extensive period of time that has elapsed, the Roman-law principles governing purchase and sale have not been modified to any great extent. Nor, it seemed, had the rule that prohibits the unilateral determination of the price by one of the parties to a contract of sale. However, in *NBS Boland Bank v One Berg River Drive*, the South African Supreme Court of Appeal questioned (but did not decide) whether the rule should still form part of South African law. Specifically, the Court stated that the views of the Roman-Dutch writers are “not only illogical but also sadly out of step with modern legal systems”. A full investigation is therefore needed into what these “views” are and how the Roman-Dutch writers interpreted the Roman law sources.

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2 Kerr *The Law of Sale and Lease* (2002) 55 n 221 in which Kerr provides a summary of the sources of the rule as found in Roman, Roman-Dutch and South African law.
3 *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of South Africa Ltd* 1999 (4) SA 928 (SCA) (*NBS Boland Bank v One Berg River Drive*) par [16].
5 It is not within the scope of this article to investigate whether the rule as found in South African law is out of date as compared with modern legal systems. This article will also not investigate the South African courts’ interpretation of the Roman and Roman-Dutch law sources since these aspects warrant a separate discussion.

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article to critically analyse the rule as found in Roman law. In a subsequent article, the author will investigate how the Roman-Dutch writers interpreted the Roman law sources. Specifically, it will be shown that the interpretation and application of the rule are, in fact, very controversial and that the rule is susceptible to a variety of interpretations, some of which are more “logical” than others. Finally, the author will demonstrate why such an investigation is of value for the future of South-African law.

2 Roman law of purchase and sale

2.1 Introduction

The contract of sale was the first and most important consensual contract found in Roman law and the one most commonly used. The parties had to agree on the price and the thing to be sold, but no further formalities were required. Furthermore, the parties were bound to the principles of good faith. This meant that the parties were bound not merely to do what was agreed, but also to act in good faith. A judge could interfere with the parties’ contractual rights and duties by “employing expansive and corrective functions of good faith”, and limit a party’s rights where these were in conflict with the concepts of fairness and equity.


7 D 18 1 2 1; D 18 1 8 (Mommsen & Krueger; Watson The Digest of Justinian Vol 2 (1985). All further references in this article to the Digest were taken from Watson’s The Digest of Justinian unless otherwise stated; Gaius Inst 3 135-140 (tr & comm by Poste Institutes of Roman Law by Gaius and rev & ed by Whittuck with a historical introduction by Greenidge) (1904). All further references to Gaius’ Institutes were taken from this source; I 3 22 1 (tr Thomas The Institutes of Justinian: Text, Translation and Commentary (1975)). All further references to the Institutes of Justinian were taken from this source; Moyle The Contract of Sale in the Civil Law with References to the Laws of England, Scotland and France (Oxford, 1892) 39-40; Roby Roman Private Law in the Times of Cicero and of the Antonines Vol 2 (1902) 139; Joubert General Principles of the Law of Contract (1987) 26; Van Warmelo (n 6) 169; Thomas (n 6) 280; Van Zyl (n 6) 285; Zimmermann (n 6) 230; Du Plessis (n 6) 260-261; Buckland (n 6) 278.

8 Gaius Inst 3 137: “Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet”. Du Plessis (n 6) 260; Buckland (n 6) 278; Roby (n 7) 90.


10 Du Plessis “Good faith and equity in the law of contract in the civilian tradition” 2002 THRHR 399-400.

11 Ibid.
2.2 Certainty of price

One of the essential elements of a contract of sale was agreement on the price, which had to be certain. Gaius states in his *Institutes* that agreement on price is a requirement for a contract of sale and that the price must be certain. Similarly, the requirement of certainty in price was enshrined in the *Corpus iuris civilis*. In the *Codex* it is stated that a sale without a price is unenforceable. In the *Digest*, Ulpian is quoted as stating that “[t]here is no sale without price”. In the *Institutes*, it is reiterated that the parties must agree on a price and that the price must be certain.

2.3 Unilateral determination of the price in the *Institutes* of Gaius

In his *Institutes*, Gaius does not deal with the unilateral determination of the price by one of the parties but refers to the debate on whether a third party may be nominated to determine the price. This controversy was solved in Justinian’s time, when the nomination of a third party to determine the price was allowed under certain circumstances. According to some legal scholars this indicates that the unilateral determination of the price by one of the parties was not permitted in Roman law. It would seem that this argument is based on the presumption that the buyer would have too much power to determine the price if this were allowed. Daube contends that it is only from this viewpoint that...
such an argument makes sense. Criticising this view, he argues that this question is not relevant to Gaius’ text since he is discussing third-party price determination in regard to the topic of certainty of price, not the situation where the buyer had too much power. Furthermore, Daube argues that the price determined by a third party would be just as uncertain as a price determined by a buyer. In fact, he believes that a price to be determined by the buyer is probably more certain, since the buyer is less likely to refrain from determining a price. This view is supported by the fact that the failure of a third party to determine the price was discussed in detail in the *Corpus iuris civilis*.

2.4 Unilateral determination of the price under the *Corpus iuris civilis*

2.4.1 *Introduction*

Gaius is quoted in the *Digest* as stating that:

> Illud constat imperfectum esse negotium, cum emere volenti sic venditor dicit, ‘quanti velis, quanti aequum putaveris, quanti aestimaveris, habebis emptum’.

The translation and interpretation of the above text has given rise to much controversy. The following aspects warrant further discussion, namely (a) is a contract that grants such a discretion void or is its conclusion valid but not yet effective, and (b) does the rule refer to a discretion granted to the buyer only or to both parties?

2.4.2 *Is the contract of sale void or is its conclusion valid but not yet effective?*

Watson translates *D 18 1 35 1* as follows:

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21 Daube "Certainty of price" (n 19) 23. It should be noted that Daube refers to a discretion granted to the buyer (not the seller). This is because *D 18 1 35 1*, which deals with unilateral price determination, refers to a discretion granted only to the buyer. See, further, par 2.4.3 *infra*.

22 Daube "Certainty of price" (n 19) 23. Referred to with approval by Lubbe "Kontraktuele diskresies, potestatiewe voorwaardes en die bepaaldheidsvereiste" 1989 *TSAR* 171. See, also, Pugsley "Pretium certum" 1972 *SALJ* 412 in which he states that the "*Institutes* were merely concerned to emphasize that in a contract of sale there must be certainty as to the terms". This view supports the first reason proposed by Zimmermann (see n 20 *supra*).

23 Daube "Certainty of price" (n 19) 23. Further referred to with approval by Lubbe (n 22) 171.

24 Daube "Certainty of Price" (n 19) 23. Zimmermann (n 6) 254 agrees that this was not the real issue.

25 Daube "Certainty of Price" (n 19) 23.

26 *D 18 1 35 1*, *Gaius libro decimo ad edictum provinciale*. 

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It is settled that no contract is concluded when the vendor says to the purchaser: “You shall buy for what you choose to give, or what you think fair or at your own estimate of its value”. (my emphasis)

However, Scott translates the phrase “[i]llud constat imperfectum esse negotium” as “[i]t is settled that a transaction is imperfect”. Therefore, it seems that there are two possible translations and interpretations of the above text, one that considers the contract to be void and one that considers it to be valid but not yet effective, or conditional upon the determination of the price.

2421 Interpretations and arguments that consider the contract to be void

Many legal scholars argue that D 18 1 35 1 must be interpreted to mean that the contract is void. Four main arguments may be identified and will be investigated below, namely that a discretion to determine the price:

(a) excludes agreement on one of the essential elements of a contract of sale;
(b) would allow for an unreasonable contractual imbalance between the parties;
(c) amounts to a pure potestative condition; and
(d) amounts to an arbitrator deciding a matter in which he has an interest.

(a) A discretion to determine the price excludes agreement on one of the essential elements of a contract of sale

One of the reasons advanced for the rule is that where contracts are formed by agreement it is required that parties agree on the essential provisions of the contract. This ensures that they conclude a firm contract and that the transaction will not break down subsequently because the price has not been determined. Following this line of argument, Arangio-Ruiz believes that because one of the essential elements of the sale (the price) is missing where a party is given the discretion to determine the price, there can be no agreement. This view is supported by Thomas who argues that the term “imperfectum” has two possible interpretations in the context of sale. First, there is agreement on the subject...
and the price and therefore there is a contract, but the agreement is subject to a condition which has not yet been satisfied or fulfilled.\(^{33}\) Secondly, there is no contract because the price or subject of the sale has not been agreed and the contract is incomplete.\(^{34}\) Therefore, since the price is not certain if left to the discretion of one of the parties, the contract is imperfect in the sense that the contract is not complete and is therefore void.\(^{35}\) This view may be criticised. Although the contract is imperfect, once the price is determined, the contract becomes valid and binding. As pointed out above, the Romans did allow a third party to determine the price subsequently, and a price that a third party has to determine is just as uncertain as a price that a buyer has to determine.\(^{36}\)

(b) \(A\) discretio\(n\) to determine the price would allow for an unreasonable contractual imbalance between the parties

Zimmermann argues that granting such a discretionary power to one of the parties would create an “unreasonable contractual imbalance” and that the purchaser could not be prevented from abusing such a power.\(^{37}\) He suggests that this is one of the main reasons for the rule.\(^{38}\) As mentioned above, this question is irrelevant in Gaius’ *Institutes* because Gaius is discussing price determination by a third party with regard to the topic of certainty of price and does not refer to the situation where the buyer has too much power.\(^{39}\) The same approach is taken in Justinian’s *Institutes* where the issue is discussed.\(^{40}\) Furthermore, as will be shown below,\(^{41}\) the *Corpus iuris civilis* (specifically, the *Digest*) contains provisions precluding the abuse of such power; and there are interpretations that render the contract valid but which would include an “institutional check against the danger of gross and unreasonable contractual imbalance”\(^{42}\) created by granting the discretion to the purchaser to determine the price.

(c) A discretion to determine the price amounts to a pure potestative condition

Legal scholars tend to compare and equate a discretion to determine the price with a pure potestative condition to support their assertion that the contract must be void.\(^{43}\)

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33 Ibid.  
34 Ibid.  
35 *Idem* 88-89. Thomas argues that the question relates to “Abschluß [completion] and not Vollziehbarkeit [enforceability] of the contract” because without agreement on the price there is no contract.  
36 See, again, par 2 3 *supra*.  
37 Zimmermann (n 6) 254.  
38 See also n 20 *supra* regarding the reasons for the rule as proposed by Zimmermann.  
39 See, again, par 2 3 *supra*.  
40 Pugsley (n 22) 412.  
41 See, further, par 2 4 2 2 (b) *infra*.  
42 Zimmermann (n 6) 254.  
43 A pure potestative condition may be described as a condition “which depends entirely upon the will of the promisor” (Wessels (n 29) 406 par 1313).
Although Kerr and Glover rely on the text as translated by Watson to support their view that a contract granting a discretion to the buyer to determine the price is void,44 they also rely on C 4 38 13.45 This text provides that

[w]hen a sale is made dependent on the will of the seller or purchaser, no obligation is created, because the contracting parties are not bound to do anything. Hence, an owner or anyone else is not compelled to sell his property unwillingly by reason of such contract.46

This text deals with a pure potestative condition, a so-called condition *si voluero* (“if I wish to”) and refers to the situation where the existence of the contract is made dependent on the will of one of the parties. No legally enforceable obligation is created in this situation because it is not the parties’ intention to conclude a legally binding contract.47 One of the parties may decide whether or not he will perform at all.48 Therefore, there is a lack of *consensus*.

In contrast, D 18 1 35 1 refers to the situation where the buyer has the discretion to determine the *price*. Here, the parties do have the intention to create a legally binding contract.49 As Daube pointed out, the text explicitly refers to a willing buyer.50 However, *what price* will be paid (ie the final amount) is uncertain at the time when the contract is concluded. As soon as the discretion is exercised, the amount will be certain, and seeing that the discretion favours the buyer, it is unlikely that the buyer will refuse to exercise it.51 Even if the buyer refuses to determine the price, Daube argues that the discretion can be interpreted as a promissory condition, so that the buyer can be compelled to fix a price.52 A discretion to determine the price can therefore not be equated with a discretion to decide whether or not to be bound to the contract.53

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44 Kerr & Glover (n 19) 203. See, again, par 2 4 2 supra for the different translations by Watson and Scott. Kerr & Glover refer to Scott’s translation of C 4 38 13 in the same paragraph in which they discuss D 18 1 35 1, but do not refer to Scott’s alternative translation. However, Kerr (n 2) 55 n 222 does refer to the different interpretations of “imperfectum”, but comes to the conclusion that they should not be followed because the Roman-Dutch writers adopted the view that the contract was void which is also regarded as the “usual interpretation”.

45 Kerr & Glover (n 19) 203.

46 The original Latin reads as follows: “In vendentis vel ementis voluntatem collata condicione comparandi, quia non adstringit necessitate contrahentes, obligatio nulla est. Idcirco dominus invitus ex huiusmodi conventione rem proprium vel quilibet alius distrahere non compellitur” (Krueger “Codex Iustinianus” in *Corpus iuris civilis* Vol 2 (1954).

47 Daube “Certainty of Price” (n 19) 22; Lubbe (n 22) 166-167.

48 Daube “Certainty of Price” (n 19) 22.

49 Ibid.

50 Ibid. The Latin text refers to “emere volenti”. A literal translation will read as follows: “to the person who wishes to buy”.

51 Ibid.

52 Ibid. See, further, De Zulueta (n 18) 28-29.

53 Daube “Certainty of Price” (n 19) 22. See, also, Lubbe (n 22) 169-170. Windscheid further distinguishes between these two texts and argues that C 4 38 13 does not refer to a reasonable discretion and that therefore no contract comes into being once the determination is made (Windscheid *Lehrbuch des Pandektenrechts* Vol 2 (1963) by Kipp at 632 par 386 n 6). (The author would like to thank Prof Melodie Slabbert for her assistance in the translation of this source.)
The same may be said in respect of scholars who cite D 44 7 8\textsuperscript{54} and D 45 1 46 3\textsuperscript{55} in support of their view that the contract is void. D 44 7 8 embodies the rule that a contract subject to “if I wish” is no contract at all.\textsuperscript{56} A similar rule is found in D 45 1 46 3.\textsuperscript{57} These two texts also refer to a pure potestative condition and can be distinguished from a discretion granted to the buyer to determine the purchase price.

Another text referred to in support of the argument that the contract is void, is D 45 1 108 1.\textsuperscript{58} D 45 1 108 1, Iavolenus libro decimo epistularum provides that “[n]ulla promissio potest consistere, quae ex volentate promittentis statum capit”. Wessels provides two different translations of this text in The Law of Contract in South Africa.\textsuperscript{59} First, in his discussion of vague and indeterminate objects of a contract, he proposes the following translation: “No promise can subsist which has its character determined by wish of the promisor.”\textsuperscript{60} He argues that if the promisor can determine the object of the contract, the contract will be too vague and indefinite to enforce.\textsuperscript{61} This translation would seem to deny the power granted to the buyer to determine the price. This is because such a power permits the promisor (the buyer) to determine the character (the amount) of the promise (to pay a price). However, when discussing potestative conditions, he translates this text as “[n]o valid promise can exist which is dependent upon the wish of the promisor”.\textsuperscript{62} This second translation relates to a condition si voluero, which can be distinguished from the situation in D 18 1 35 1. This would also seem to be the preferred interpretation of D 45 1 108 1.\textsuperscript{63}

Legal scholars similarly refer to D 18 1 7pr in support of their view that the contract is void.\textsuperscript{64} D 18 1 7pr, Ulpianus libro vicensimo octavo ad Sabinum provides that “venditio nulla est, quemadmodum si quis ita vendiderit, si voluerit, vel stipulanti sic spondeat ‘si voluero, decem dabo’ neque enim debet in arbitrium rei conferri, an sit obstrictus (my
emphasis)." Once again, this argument may be questioned since the passage refers to a pure potestative condition ("si voluero") which can be distinguished from the situation described in $D\ 18\ 1\ 35\ 1$.

Reference may also be made to $D\ 45\ 1\ 17$ where Ulpian is quoted as stating that "[a] stipulation is not valid when a condition is entrusted to the judgment of the party making the promise". Generally, this text is regarded as referring to a pure potestative condition. The fact that this text originally followed directly after the phrase "the sale is null as would be also the case where a man would sell if he chose to do so, or if he promised in a stipulation, 'I will give ten if I want to'" (as found in $D\ 18\ 1\ 7$) in Ulpianus’ discussion on sale in his commentaries on the works of Sabinus, supports this view.

It is therefore clear that a discretion to determine the price cannot be equated to a pure potestative condition. Consequently, none of these texts should be relied on to support the view that a discretion to determine the price renders the contract void.

(d) A discretion to determine the price amounts to an arbitrator deciding a matter in which he has an interest

One of the arguments advanced in support of the view that the discretion to determine the price would be invalid, is that Roman law did not allow a person to be an arbitrator in his own case. However, Roman law distinguished between two types of judgments. For example, in $D\ 17\ 2\ 76-79$ dealing with the situation where a partnership is formed subject to a condition that a third party will determine the shares of each party, Proculus stated that there are two types of judgments. First, the parties have agreed that the nominated third party’s decision is final and binding "whether he is fair or unfair". Alternatively, the third party’s decision must be made $arbitrio boni viri$. Meijers argues that in the first case, the third party was referred to as an arbitrator but in the second case as an $arbiter$.

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65 Watson (n 7) translated it as follows: "[T]he sale is null as would be also the case where a man would sell if he chose to do so, or if he promised in a stipulation, 'I will give ten if I want to', it cannot be left to the decision of a contracting party whether he is under an obligation."

66 However, the whole text as found in $D\ 18\ 1\ 7$ read together with other relevant texts is used by legal scholars to support the view that the situation described in $D\ 18\ 1\ 35\ 1$ provides for a valid (but not yet effective) contract. See, further, par 2 4 2 2 (b) infra.

67 The Latin reads as follows: "Stipulatio non valet in rei promittendi arbitrium collata condicione."

68 Wessels (n 29) 406 par 1312; Lubbe (n 22) 166; MacKintosh (n 54) 71.


70 Meijers “Aanvulling en uitleggeng van overeenkomsten door een der partijen” 1916 *Weekblad voor Privaatrecht, Notaris-ambt en Registratie* 253. $D\ 4\ 8\ 51$, *Marcianus libro secundo regularum*: “Si de re sua quis arbiter factus sit, sententiam dicere non potest, quia se facere iubeat aut petere prohibeat: neque autem imperare sibi neque se prohibere quiscumque potest” tr by Watson (n 7) as “[i]f anyone becomes an arbiter in an affair of his own, he cannot make an award because he would be ordering himself to do something or forbidding himself to sue. But no one can either give an order or issue a prohibition to himself.”

71 Meijers (n 70) 239.

72 See, further, par 2 4 2 2 (b) infra.

73 Meijers (n 70) 255; Lubbe (n 22) 172 n 76.
The partnership agreement was a bona fide contract and the third party would need to act in accordance with the standard of arbitrio boni viri (ie he would be regarded as an arbiter). Meijers argues that because a person could not be appointed as an arbitrator in a matter in which he had any interest, the decision by a party on the price would have to conform to the standard of arbitrio boni viri. His decision could be questioned if it was obviously unreasonable or prejudicial. Lubbe argues that since this was so, any prejudice that might arise through the granting of this discretion to one of the parties could be investigated. Therefore, according to Lubbe the argument that the discretion to determine the price would be invalid because a person could not be an arbitrator in his own case, must fail.

Interpretations and arguments that consider the contract to be valid but imperfect

There are legal scholars who support the view that such a contract was valid but imperfect and thus subject to the determination of the price by the buyer. The moment the buyer determined the price and the condition was fulfilled, the contract became binding. Two main arguments may be identified here and will be investigated, namely:

(a) the one on the use of the word “imperfectum” in D 18 1 35 1; and

(b) the one on the question whether the standard of arbitrio boni viri should apply to such discretions.

(a) The use of the word “imperfectum” in D 18 1 35 1

Some legal scholars argue that the use of the word “imperfectum” (imperfect) in D 18 1 35 1 in contrast with “nullum” (void), indicates that such a contract was not void.
but imperfect (valid, but not yet effective). However, the wording used in D 18 1 35 1 requires further investigation. Daube argues that Gaius uses the word *constare* to indicate a unanimous view replacing previous differing views. He suggests that “illud constat” indicates that there was a difference of opinion on the three different cases mentioned in D 18 1 35 1. According to Daube, some classicists would have argued that “for what you consider fair” and “for what you think it worth” would constitute a binding contract since it indicated some external reference. He argues that such contracts would be valid but imperfect until the price was fixed. On the other hand, contracts containing the term “for what you wish” would probably not have found any takers because the buyer would have been able to fix any price or no price. The problem is that all three cases discussed in D 18 1 35 1 render the sale “imperfectum”. The inclusion of the latter case would indicate that the contract would be void. In contrast, it could be argued that because third-party price determination was allowed, a price for what the buyer wished would be permissible, since it could still be distinguished from a sale subject to a condition *si voluer o*. Daube suggests that it would probably be a requirement that even in such cases the determination had to result in “a price which is not a non-price” while other legal scholars argue that such a discretion would have to be exercised *arbitrio boni viri*.

The relationship between D 18 1 35 1 and other texts must also be considered. First, the text must be compared with that of Gaius in his *Institutes*, dealing with third-party determination. It has been mentioned above that in that work, Gaius refers to the different opinions on third-party price determination without expressing an opinion of his own on the matter. Nelson and Manthe argue that Gaius’ use of the term “imperfect” in D 18 1 35 1 indicates that he supported the Proculian view that the price may be determined by a third party and believed that even one of the parties could determine the price.

Legal scholars also refer to the relationship between D 18 1 35 1 and D 18 1 35 5. D 18 1 35 5 deals with the situation where fungible goods that are the object of the sale have not yet been counted, weighted or measured and the contract of sale is considered to

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82 Daube “Certainty of price” (n 19) 21; Nelson & Manthe (n 80) 262; Windscheid (n 53) 632 par 386 n 6. Moyle (n 7) 69 n 2 concedes that the word “imperfectum” is used rather than “nullum”.
83 Daube “Certainty of price” (n 19) 21.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid. See, also, Moyle (n 7) 69. He is of the view that a contract is void if the determination of the price is left to the absolute discretion of one of the parties.
88 Daube “Certainty of price” (n 19) 24.
89 Ibid.
90 Ibid.
91 Ibid. Referred to with approval by Rodger (n 57) 15 n 63. See, further, par 2 4 2 2 (b) *infra* in respect of the arguments that such discretions had to be exercised *arbitrio boni viri*.
92 Gaius *Inst* 3 140.
93 See par 2 3 *supra*.
94 Nelson & Manthe (n 80) 263.
95 *Idem* 262; Daube “Certainty of price” (n 19) 22-23.
be imperfect. The fact that these two texts formed part of the same chapter and discussion in Gaius’ *Ad Edictum Provinciale* indicates that the words in the text should be given the same meaning. In addition, Nelson and Manthe also refer to the text in *D 18 6 8pr* in which the so-called “risk rule” appears and argues that since the text also refers to the term “perfecta”, the use of “imperfect” in *D 18 1 35 1* should be given the same meaning. Thus there seem to be various reasons why “imperfect” in *D 18 1 35 1* should be interpreted as providing for a valid but imperfect contract.

(b) The standard of *arbitrio boni viri* should apply to such discretions

Although there are arguments that it was possible for the buyer to have an absolute discretion to determine the price, the view generally taken is that the discretion must be exercised *arbitrio boni viri*. Support for this view can be found in *D 18 1 7pr* and *D 50 17 22 1*. Originally, these two texts formed part of Ulpian’s discussion on sale in his commentaries on the works of Sabinus. *D 18 1 7pr* provides as follows:

> The sale of a slave ‘if he shall have settled his account to his master’s satisfaction’ is conditional; now conditional sales become perfect only when the condition is satisfied. Does the condition mentioned refer to the master’s personal satisfaction or to the satisfaction of an honorable man? If we accept the former interpretation, the sale is null as would be also the case where a man would sell, if he chose to do so, or if he promised in a stipulation, ‘I will give ten if I want to’, it cannot be left to the decision of a contracting party whether he is under an obligation. Accordingly, it was settled by the earlier jurists that one looks to the judgment of an honorable man and not that of the master himself. Hence, if the accounts were acceptable but he refused them or if he, in fact, accepted them but pretended not to, the condition of purchase would be realized and the vendor could be sued by the action on purchase.

As pointed out above, the last part of *D 18 1 7pr* is referred to in support of the argument that a discretion granted to the buyer to determine the price renders the contract void. This is based on the incorrect view that such a contract equals a condition “si voluero”.

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96 Lenel *Palingenesia iuris civilis* Vol 1 (1960) 216 par 238.
97 Nelson & Manthe (n 80) 262.
98 *Ibid*.
99 See eg Windscheid (n 53) 632 par 386 as referred to by Lubbe (n 22) 171.
100 Wessels (n 29) 140 par 431; Lubbe (n 22) 171.
101 Lenel (n 69) 1119 par 2712. See, also, Rodger (n 57) 14.
102 The Latin text reads: “Haec venditio servi ‘si rationes domini computasset arbitrio’ condicionalis est: condicionales autem venditiones tunc perficiuntur, cum impleta fuerit condicio. sed utrum haec est venditionis condicio, si ipse dominus putasset suo arbitrio, an vero si arbitrio viri boni? nam si arbitrium domini accipiamus, venditio nulla est, quemadmodum si quis ita vendiderit, si voluerit, vel stipulanti sic spondeat ‘si voluero, decem dabo’: neque enim debet in arbitrium rei conferri, an sit obstrictus, placiat itaque veteribus magis in viri boni arbitrium id collatum videri quam in domini. Si igitur rationes potuit accipere nec accept, vel acceptit, fingit autem se non acceptisse, impleta condicio emptionis est et ex empto venditor conueniri potest.”
103 See par 2 4 2 1 (c) *supra*.
104 *Ibid*.
The comparison between a condition “si voluero” (“where a man would sell if he chose to do so”) and contractual discretion (“refer to the master’s personal satisfaction”) would seem to be the reason for this incorrect interpretation. However, legal scholars also refer to this text in support of the view that a reasonable discretion would have been allowed. This would seem to be the better interpretation of this text.

Originally, D 50 17 22 1 follows on D 18 1 7pr and provides that “[o]ne must generally agree with the principle that, wherever in actions of good faith a condition is to be determined by reference to the judgment of the owner or his manager, this is to be interpreted as the judgment of an upright man”. When one reads this text in the context of D 18 1 7pr it is clear that it deals with the sale of slaves and a condition imposed by the seller that the sale of the slave is conditional, subject to his satisfaction with the accounts managed by the slave on his behalf. To ensure that a seller did not stall the sale for frivolous or fallacious reasons, the seller was required to make his judgment in accordance with the standard of a bonus vir. Rodger argues that this principle would have applied to all bona fide contracts. Where, therefore, someone was granted the power to decide about a condition in a bona fide contract, such a power had to be exercised arbitrio boni viri. Since a contract of sale is subject to the principles of good faith, a discretion granted to the buyer to determine the price had to be exercised arbitrio boni viri.

Reference may also be made to D 17 2 6 dealing with partnership agreements. The partnership agreement was also a bona fide contract and subject to the principles of good faith. D 17 2 6 provides for one of the parties to determine the division of shares in the partnership, provided such a determination is made in accordance with the standard of a bonus vir. In the same way, it is argued, the price in a contract of sale (also a bona fide contract) was determined by a reasonable discretion granted to the buyer.

105 Windscheid (n 53) 632 par 386 n 6; MacKintosh (n 54) 21-22; Nelson & Manthe (n 80) 262; Meijers (n 70) 240.

106 However, Rodger (n 57) 15 n 63 indicates that this text could be distinguished from D 18 1 35 1 in that this text deals with a discretion granted to the seller, while D 18 1 35 1 deals with a discretion granted to the buyer.

107 As translated by Rodger (n 57) 15. The Latin text reads as follows: “Generaliter probandum est, ubicumque in bonae fidei iudiciis confertur in arbitriium domini vel procuratoris eius condicio, pro boni viri arbitrio hoc habendum esse.” This text is translated by Watson (n 7) as “[o]ne must in general approve of the principle that wherever in actions of good faith the condition of someone is placed in the power of his master or of his procurator, then this power is to be regarded as equivalent to the power of the decision of a good man”. This translation is criticised by Rodger at 13-14 as not making sense because of the translator’s failure to consider the context of Ulpian’s original text.

108 Roger (n 57) 15.

109 Ibid.

110 Ibid.

111 See, again, par 2 1 supra.

112 MacKintosh (n 54) 22-23. As pointed out by MacKintosh, the “bonus vir” is a sort of standard embodiment of honesty and aptitude for the equitable settlement of disputes” and therefore refers to a reasonable discretion.

113 Pomponius libro nono ad Sabinium: “Si societatem mecum coieris ea condicione, ut partes societatis constitueres, ad boni viri arbitrium ea res redigenda est.” Translated by Watson (n 7) as: “If you enter a partnership with me on the terms that you are to determine our respective shares in the partnership,
fide contract) could be determined by one of the parties provided that the determination was made arbitrio boni viri. Moreover, D 17 2 76-79 deals with the situation where a partnership is formed subject to the condition that a third party will determine each party’s share. Proculus held that since a partnership agreement is a bona fide contract, the third party must make the determination arbitrio boni viri. In the same way, the price in a contract of sale could be determined by one of the parties provided that the determination was made arbitrio boni viri.

Further reference may be made to D 19 2 24pr, which provides that where the approval of the work is left to the employer in a locatio operis contract it must be exercised arbitrio boni viri. This text is quoted in support of the proposition that the price in a contract of sale could be determined by one of the parties provided that the determination was made arbitrio boni viri. Wessels criticises this view on the basis that this text addresses the question whether the work was done satisfactorily as against the situation where one of the parties is given the power to determine the object of the contract, for example having a discretion to determine the price.

Legal scholars have also referred to the rules governing dowries. C 5 11 3 deals with the situation where the party promising to pay a dowry on the bride’s behalf is given a discretion to determine its amount and provides that it must be exercised arbitrio boni viri. D 23 3 69 4 deals with the situation where the dowry is to be decided by the then the matter must be referred to a good man for decision.” Interestingly enough, this text originally formed part of Pomponius’ discussion of contracts of sale (Lenel (n 101) 108 par 532).

Windscheid (n 53) 632 par 386 n 6; and the authorities listed by Wessels (n 29) 140 par 431.

D 17 2 78, Proculus libro quito epistularum: “[I]n proposita autem quaestione arbitrium viri boni existimo sequendum esse, eo magis quod judicium pro socio bonae fidei est”). Translated by Watson (n 7) as “[b]ut in the case before us, my judgment is that the decision of a good man ought to be followed, the more so because the partnership action is an action of good faith”.

Windscheid (n 53) 632 par 386 n 6; Kaser & Knütel Romisches Privatrecht: Ein Studienbuch (2008) 182 refer to both D 17 2 6 and D 17 2 76-79 as authority that any object of performance can be determined in the reasonable discretion of the debtor or the creditor. (The author would like to thank Prof Melodie Slabbert for her assistance in the translation of this source.)

Paulus libro trigesimo quarto ad edictum: “Si in lege locationis comprehensum sit, ut arbitratu domini opus adprobetur, perinde habetur, ac si viri boni arbitrium comprehensum fuisset, idemque servatur, si alterius cuiuslibet arbitrium comprehensum sit: nam fides bona exigat, ut arbitrium tale praestetur, quale viro bono conuenit.” Translated by Watson (n 7) as: “If it is provided in a lease clause [of a job] that the owner is to judge the work acceptable, this is construed to mean that what they had called for was the judgment of an upright man, and the same rule holds had they provided for judgment by some third party. Good faith requires that a judgment be offered such as is compatible with an upright man.” (The phrase “of a job” was inserted by the translator.)

Windscheid (n 53) 632 par 386 n 6; Meijers (n 70) 240; and Glück as referred to by Wessels (n 29) 140 par 432.

Wessels (n 29) 140 par 432.

See, eg, Windscheid (n 53) 632 par 386 n 6; Meijers (n 70) 240 in respect of C 5 11 3. See, eg, Wessels (n 29) 140 par 431 in respect of D 23 3 69 4.

“Si, cum ea quae tibi matrimonio copulatue est nuberet, is cuius meministi dotem tibi non addita quantitate, sed quodcumque arbitrates fuisset pro ea daturum se rite promisit et interpositae stipulationis fidem non exhibit, competentes actionibus usus ad repromissi emolumentum iure judiciorum perveniens: videtur enim boni viri arbitrium stipulation incertum esse.” Translated by
bide’s father. Such a contract was considered valid and the amount of the dowry could be determined with reference to the father’s resources and the bridegroom’s rank. Dowry was not included in any of the classes of bona fide contracts and was governed by its own rules that formed part of a number of wider rules governing marriages. For this reason this text should not be considered applicable to contracts of sale.

There are also texts on the rules governing the services of freedmen, specifically D 38 1 30pr. This text provides that where a freedman has undertaken to provide as many services as would meet his patron’s satisfaction, the patron’s judgment must be fair. Once again, this text concerns the services of freedmen, governed by separate rules, which therefore cannot be applied to contracts of sale.

Finally we may refer to arguments based on the principles governing fideicommissum that rely on D 32 11, which allows a fideicommissum to be based on such terms as “if you judge it good”, “if you think it suitable”, and “if you hold it”, provided that the discretion is exercised arbitrio boni viri. Daube rejects these arguments because it would be “rash to transfer a rule from fideicommissum to sale”.

Watson (n 7) as: “If, when you married your wife, the party whom you mention solemnly promised to give you a dowry in her behalf, the amount not fixed, to be according to his best judgment, but he has failed to perform the stipulation attached to his promise, you may compel him to do so, by suing him in the proper action, for the stipulation seems to contemplate that the amount to be paid is an amount according to the judgment of a just man.”

Papiniani libro quarto responsorum: “Gener a socero dotem arbitratu soceri certo die dari non demonstrata re vel quantitate stipulatus fuerat: arbitrio quoque detracto stipulationem valere placiut, nec videri simile, quod fundo non demonstrato nullum esse legatum vel stipulatum funi constaret, cum inter modum constitutundae dotis et corpus ignotum differentia magna sit: dotis etenim quantitas pro modo facultatum partris et dignitate mariti constitui potest.” Translated by Watson (n 7) as: “A son-in-law stipulated with his father-in-law for the payment of a dowry at a fixed date, without specifying its nature or quantity, but leaving this for the father-in-law to decide. This stipulation is held to be valid, without considering the father-in-law’s decision, unlike cases involving land which is not specified. A legacy or a stipulation of land is held to be void here, because there is great difference between constituting a dowry and providing an unspecified piece of property; the amount of the dowry can be fixed on the basis of (the) father’s resources and the husband’s rank.”


See, eg, Meijers (n 70) 240.

Celsus libro duodecimo digestorum: “Si libertus ita iurauerit dare se, quot operas patronus arbitratus sit, non aliter ratum for arbitrium patroni, quam si aequum arbitratus sit” translated by Watson (n 7) as “[i]f a freedman has sworn to render as many services as his patron has judged fit, the judgment of the patron will be ratified only where it is a fair one”.

The rules governing services of freedmen are to be found in Book 38 of the Digest.

Daube “Certainty of price” (n 19) 23-24.

Idem 24.
2 4 3 Discretion granted to the buyer only or to both parties?

D 18 1 35 1 refers to the discretion granted to the purchaser to determine his own performance (namely the price he has to pay). However, it has been argued that the same rule applied where one party was given the power to determine the other party’s performance. Support for this view is usually sought in C 4 38 13. However, as shown previously, this text deals with a different situation, namely a condition *si voluer* (“if I wish to”) so that it seems that D 18 1 35 1 dealt only with a discretion granted to the buyer to determine the price. However, some of the texts relied on to support the argument that such a contract is valid though not yet effective if the discretion has to be exercised reasonably, also include a discretion granted to the seller.

3 Conclusion

There are various arguments for and against the possibility of the unilateral determination of the price in a contract of sale in Roman law, so that its interpretation and application are controversial and the texts susceptible to a variety of interpretations. As was shown, most of the arguments seeking to show that such a contract was void are open to criticism. Although there are many arguments favouring the view that it would be valid but imperfect, not all of these stand up to scrutiny. The most widely held view seems to be that a discretion to determine the price did not invalidate the contract provided that the discretion was exercised *arbitrio boni viri*. This would seem to comply with the general principle that contracts of sale were subject to the principles of good faith.

If this view is followed, it would seem that such a discretion could be granted to either the buyer or the seller.

In the follow-up article, the author will investigate the rule as found in Roman-Dutch law and show that there too the rule was susceptible to a variety of interpretations. The author will also explain why an investigation into the Roman and Roman-Dutch law on this subject is of significance to the future of South-African law.

129 “[C]um emere volenti sic venditor dicit” tr by Scott (n 27) as “when the vendor says to a party who wishes to buy”.

130 See, eg, Moyle (n 7) 69 n 2; Kerr & Glover (n 19) 203; Kerr (n 2) 58. However, Kerr (n 2) 55 n 221 does point out that D 18 1 35 1 only mentions determination by the buyer, but relies on C 4 38 13 and many Roman-Dutch writers for authority that the rule relates to a discretion granted to both parties.

131 Moyle (n 7) 69 n 2; Kerr & Glover (n 19) 203; Kerr (n 2) 58; MacKintosh (n 54) 71; Daube “Certainty of price” (n 19) 21; Lötz (n 12) 230 n 98.

132 See again par 2 4 2 1 (c) *supra*.

133 Daube “Certainty of price” (n 19) 21 where Daube deals with these issues under the heading “Valuation by the Buyer”. See, also, Leesen (n 28) 207; Zimmermann (n 6) 254.

134 Specifically, D 18 1 7 and D 50 17 22 1 dealing with the seller’s discretion to decide whether the slave to be sold has handled the seller’s accounts in a manner satisfactory to the seller. See, again, par 2 4 2 2 (b) *supra*. See, also, Rodger (n 57) 15 n 63.

135 See par 2 1 *supra*.
Abstract
The unilateral determination of price has been a controversial issue for an extended period of time. In *NBS Boland Bank v One Berg River Drive*, the South African Supreme Court of Appeal questioned whether the rule against the unilateral determination of price should still form part of South African law. Specifically, the Court criticised the Roman-Dutch writers’ interpretation of the Roman-law texts. The article critically analyses the rule as found in Roman law. The article shows that different interpretations have been given to the original Roman-law texts dealing with the unilateral determination of price. This is caused, in part, by the difficulty in translating these texts from Latin and ascertaining the true meaning of the Roman-law principles from the fragments of texts scattered throughout the *Digest*. The main arguments for and against the unilateral determination of price based on the Roman-law texts are considered. The article shows that the majority of the arguments seeking to illustrate that such a contract was void in Roman law are open to criticism. Although there are many arguments favouring the view that the contract would be valid but imperfect, not all of these stand up to scrutiny. The most widely held view gives the impression that a discretion to determine the price did not invalidate the contract provided that it was exercised *arbitrio boni viri*.