

# 50 Years of Alan Watson's Legal Transplants : Comments from over the Channel/Ocean



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Université de Liège



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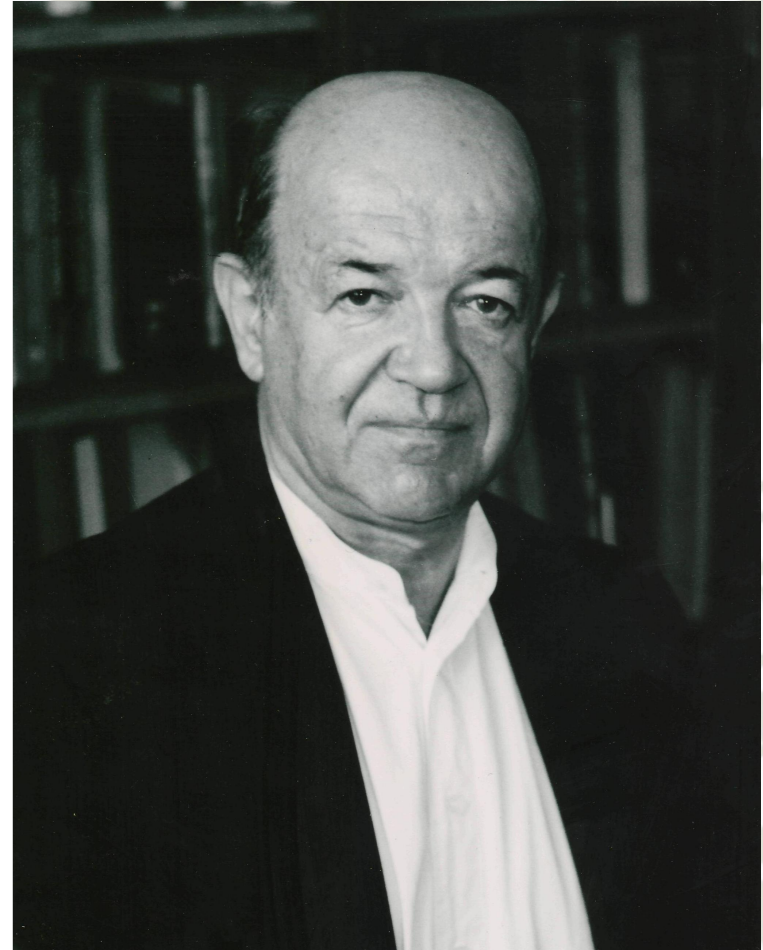
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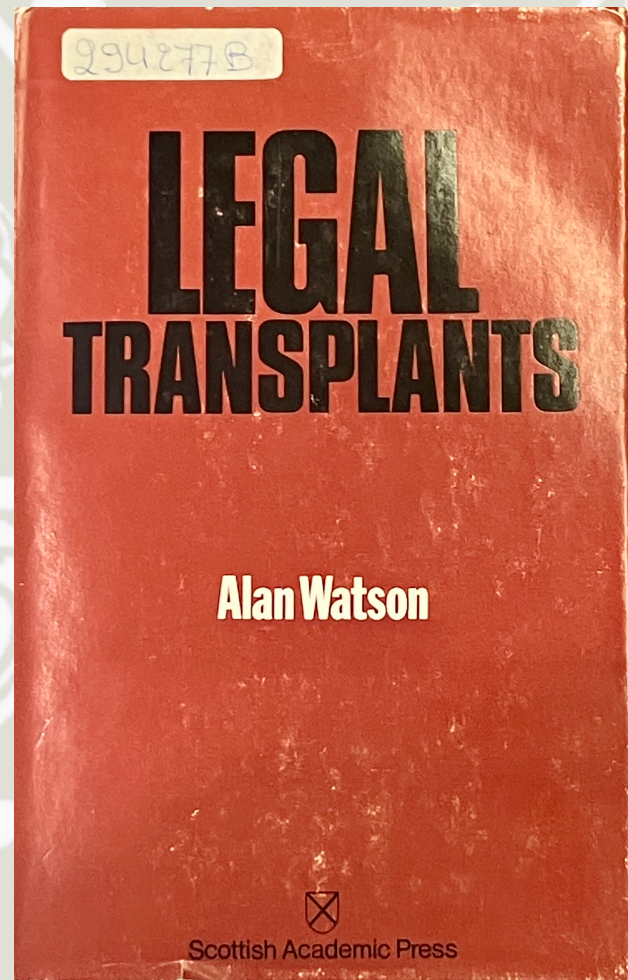
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# Alan Watson – Legal Transplants



# Plan of the conference

1. The Role of « Volksgeist » in Legal Transplants
2. The Role of Authority in Legal Transplants
3. The Question of Transfer of Ownership and Transfer of Risk
  - a. The Roman Rule of *Periculum est emptoris*
  - b. The Modern Solutions about *Periculum rei venditae*

# Volksgeist in Legal Transplants:

- P.96: “It follows from our reflections to this point that usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter for great concern” ;
- P.97: Speaking broadly though, if one were trying to discover ‘the Spirit of a people’ from its law, one should look not at the overall system but to the details where it diverges from other systems”.

# « French » Belgium (1795-1815)



# The United Kingdom of the Netherlands(1815-1830)

Le royaume uni des Pays-Bas (1815-1830)





# 1830: Belgian Secession



# The Civil Code of the Netherlands (1838)



Pierre-Thomas NICOLAÏ (1763-1836)

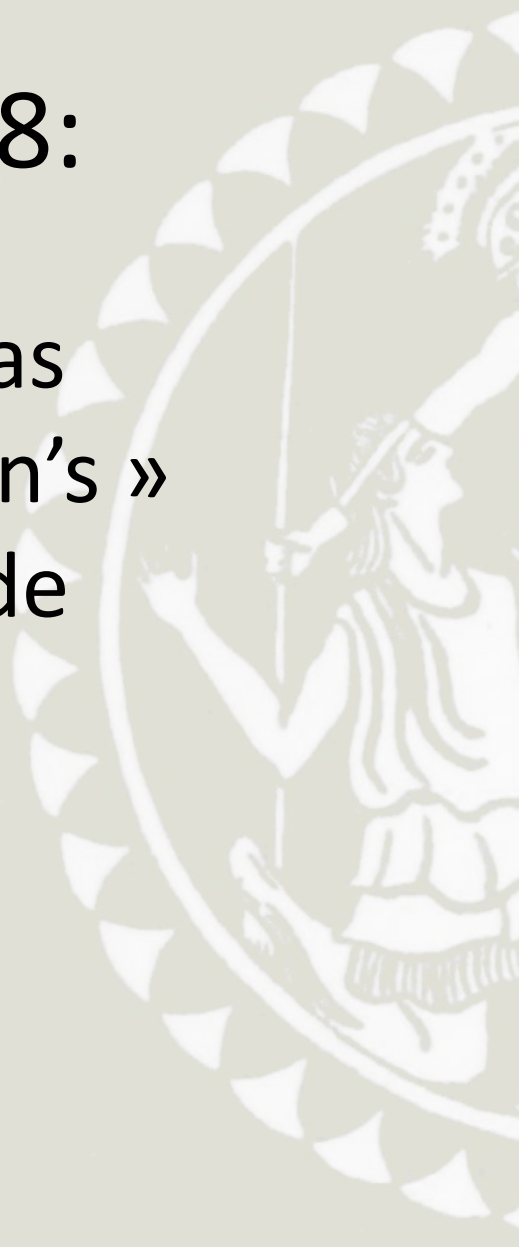
Tableau appartenant à la famille Nicolai de Gorhez

Pierre-Thomas Nicolai is a Judge from Liège and the main author of the Dutch civil code of 1838.

# Civil codes after 1838:

The Netherlands  
have Nicolai's  
« Belgian code »

Belgium has  
« Napoleon's »  
French code



# Belgian Constitution (1831)

art. 139, 11°:

“The French codes  
must be changed as  
soon as possible  
(dans les plus courts  
délais possibles)”



# The Question of Authority in Legal Transplants

- God or Religion
- National Hero
- ...



# The Authority of Roman Law

- “*non ratione imperii, sed imperio rationis!*”



# The Law of the Principality of Liège

- In the beginning of modern times, customary law is very often replaced by roman law
- Ex.: “Mambournie” is being replaced by “puissance paternelle” (or patria potestas)
- Age for marriage: 12 and 14 years
- Legal capacity: 14 years
- Widows have full capacity and can be powerful and rich.

# Plan of the new Belgian civil code (10 books)

1. Dispositions générales
2. Les personnes, la famille et les relations patrimoniales des couples
3. Les biens
4. Les successions, donations et testaments
5. Les obligations
6. La responsabilité extracontractuelle
7. Les contrats spéciaux
8. La preuve
9. Les sûretés
10. La prescription



# Plan of the new Belgian civil code (10 books – half of it in force)

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# « New » definitions in the code in 2023:

Livre 5. Les obligations

Article 5.1. Obligation

L'obligation est un lien de droit en vertu duquel un créancier peut exiger, si nécessaire en justice, d'un débiteur l'exécution d'une prestation.

Art. 5.2. Obligation naturelle

L'obligation naturelle est une obligation dont l'exécution ne peut être exigée. La restitution n'est pas admise à l'égard de l'obligation naturelle qui a été acquittée sans ignorance ni contrainte. La reconnaissance, sans ignorance ni contrainte, d'une obligation naturelle donne naissance à une obligation.

Art. 5.3. Sources des obligations et portée des dispositions

Les obligations naissent d'un acte juridique, d'un quasi-contrat, de la responsabilité extracontractuelle ou de la loi.

# Art. 5.1 – Inst. 3.13pr.

## Article 5.1. Obligation

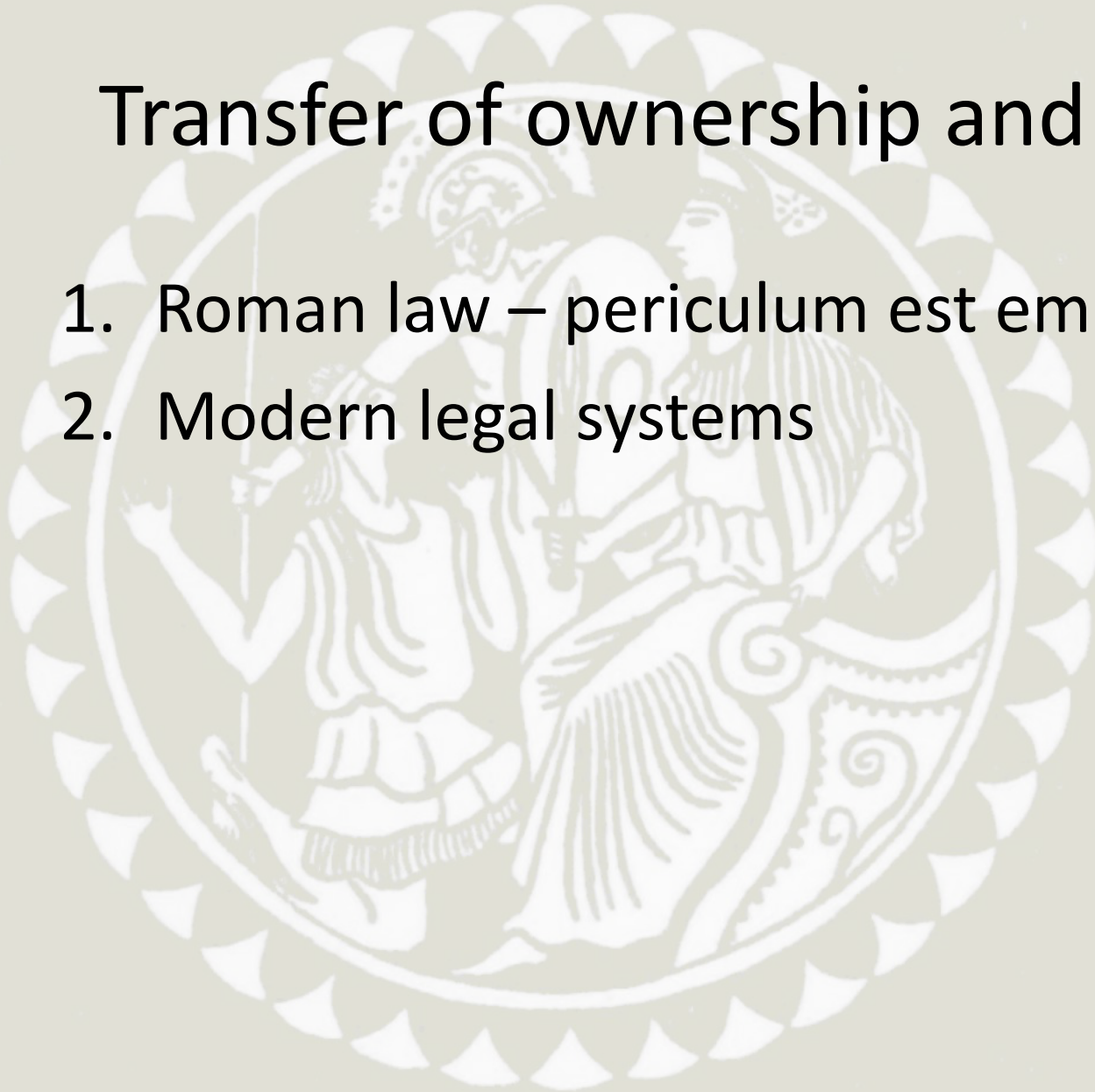
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Inst. Iust. (*de obligationibus*) 3.13pr :

*Nunc transeamus ad obligationes. Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura.*

# Transfer of ownership and risk in sale

1. Roman law – *periculum est emptoris*
2. Modern legal systems



# Risk in the contract of sale

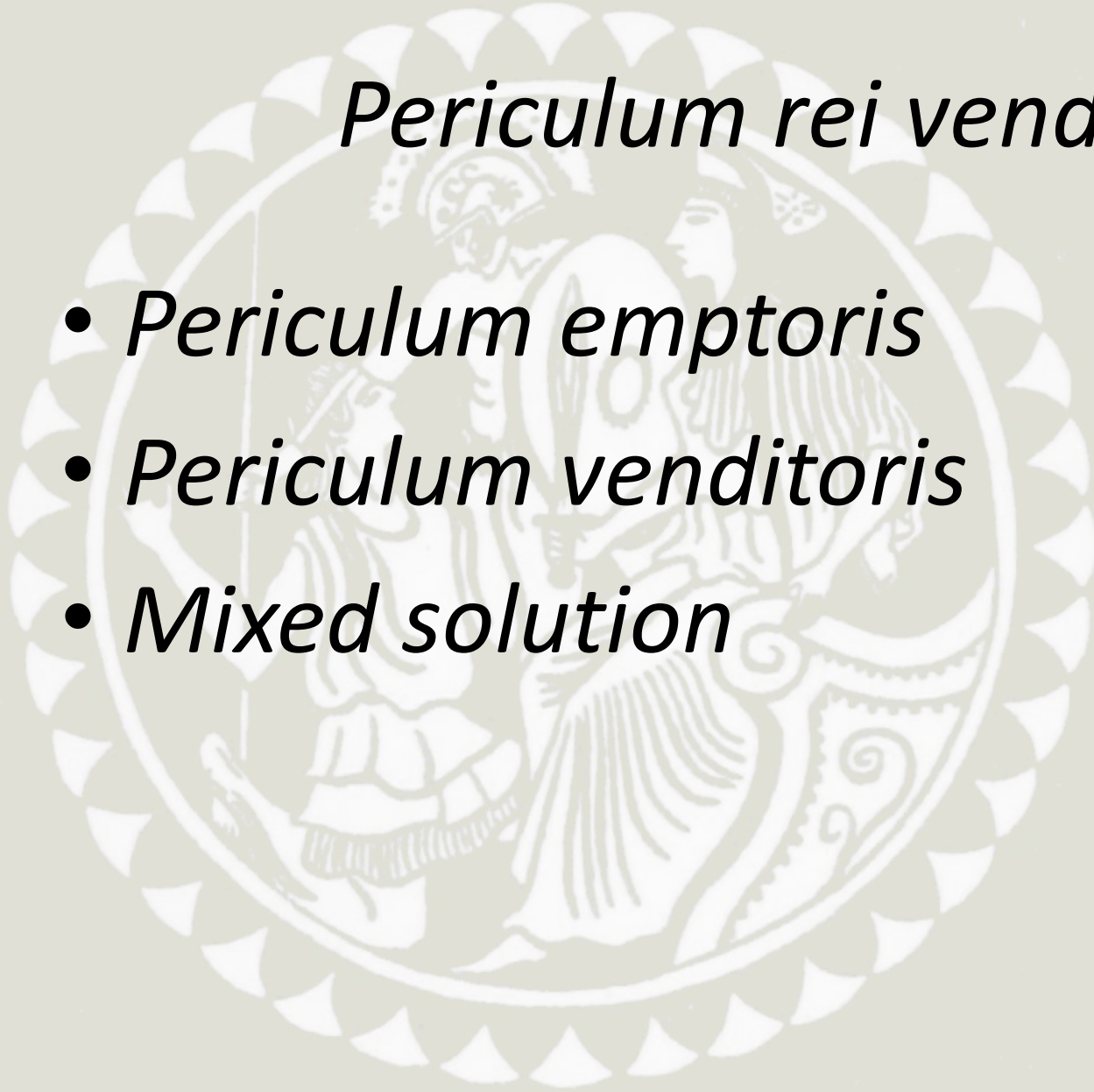
- The **delivery** to the buyer is foreseen at a moment **after the perfection of the contract** of sale;
- If **the thing perishes during this time-span**, the obligation to deliver the thing becomes impossible;
- On the other hand, the obligation to pay the price remains possible (*genera non pereunt*).

# Risk in the contract of sale

- *Periculum est emptoris*: The buyer must pay the price of the thing he will never receive;
- *Periculum est venditoris*: The seller will not receive the price or will have to give it back.

# *Periculum rei venditae*

- *Periculum emptoris*
- *Periculum venditoris*
- *Mixed solution*



*Periculum rei venditae  
in Roman law*

*Periculum emptoris  
ante traditionem*





# Paul. *l.36 ad ed* (D.18.6.8pr.)

*Necessario sciendum est, quando perfecta sit emptio: tunc enim sciemus, cuius periculum sit: nam perfecta emptione **periculum ad emptorem respiciet**. et si id quod venierit appareat quid quale quantum sit, sit et pretium, et pure venit, perfecta est emptio (...)*

It is essential to know when a sale is perfect because we then know who bears the risk in the thing; for one the sale is perfect, **risk is on the purchaser**. And if the thing sold be identified, what it is, its nature, and quantity, the price be fixed, and the sale be subject to no condition, the sale is perfect (...)

# Paul.-Iul. (D.18.6.13-15)

Paul. *l.3 Alfeni Epit.* (D.18.6.13)

The aedile destroyed beds which had been bought and which were left in the street; if they had been delivered to the purchaser or if it was his fault that they had not been delivered, it is clear that the risk is on the purchaser,

Iul. *l.3 ad Urs. Ferocem* (D.18.6.13)

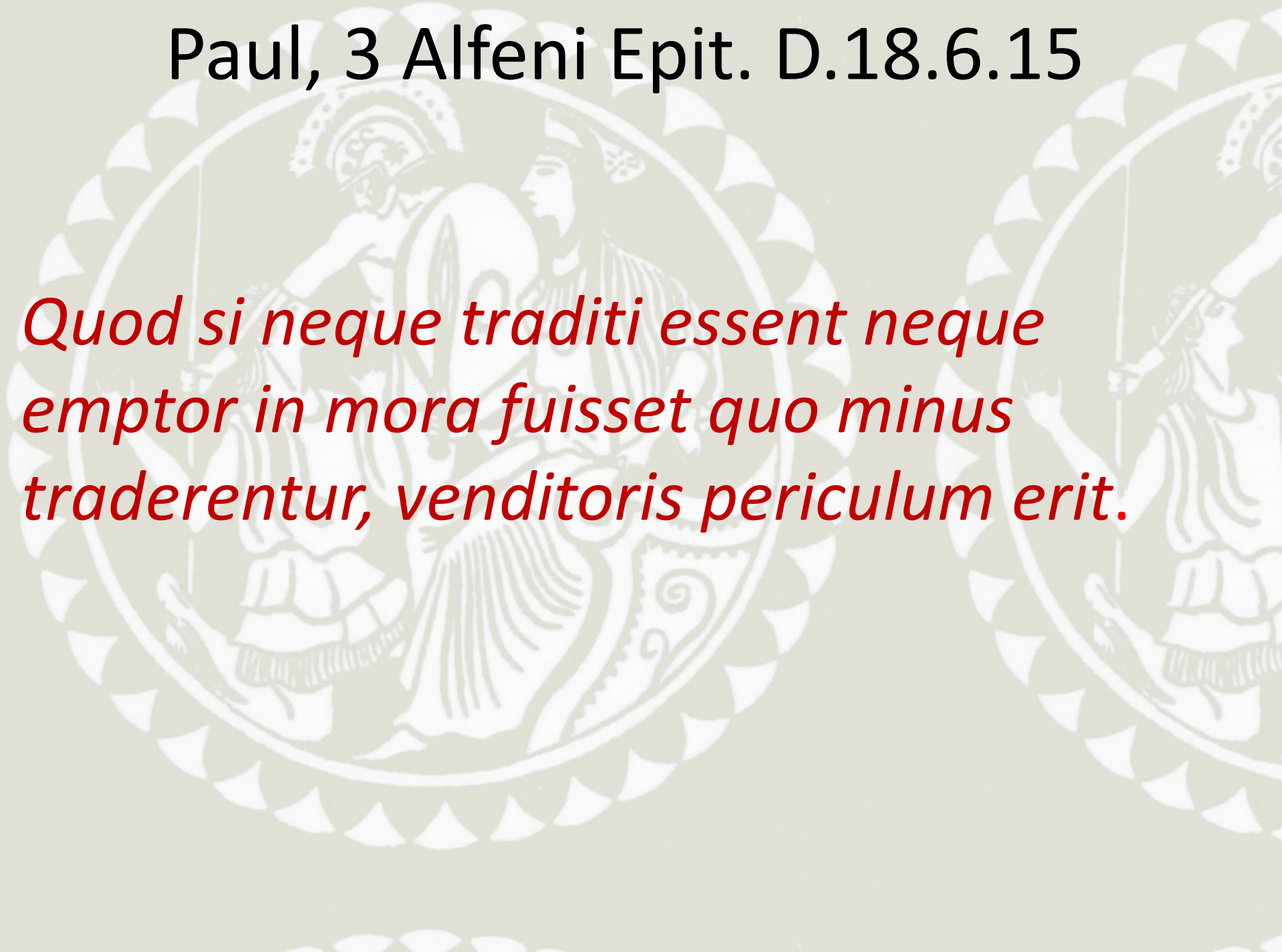
and he can bring an *actio legis Aquiliae* against the aedile if the latter acted wrongfully, or at least can he proceed against the seller with the *actio empti* to require the seller to cede to him the actions he would have against the aedile.

Paul. *l.3 Alfeni Epit.* (D.18.6.15pr.)

But if the beds had not been delivered and it was not due to the purchaser that the delivery had not taken place, **the risk will be on the seller** (*periculum est venditoris*).

# Paul, 3 Alfeni Epit. D.18.6.15

*Quod si neque traditi essent neque  
emptor in mora fuisset quo minus  
traderentur, venditoris periculum erit.*



# Mario Talamanca (SIHDA 2005)



## Paul, 3 Alfeni Epit. D.18.6.13-15

D.18.6.13 Paul. (3 Alfeni Epit.) *Lectos emptos aedilis, cum in via publica positi essent, concidit: si traditi essent emptori aut per eum stetisset quo minus traderentur, emptoris periculum esse placet.*

D.18.6.14 Iul. (3 ad Urs. Ferocem.) *Eumque cum aedili, si id non iure fecisset, habiturum actionem legis Aquiliae: aut certe cum venditore ex empto agendum esse, ut is actiones suas, quas cum aedile habuisset, ei praestaret.*

D.18.6.15pr. Paul. (3 EPIT. ALF.) *Quod si neque traditi essent neque emptor in mora fuisset quo minus traderentur, venditoris periculum erit.*

# Timeline imagined by Talamanca

1. *Periculum est venditoris* (Alfenus)
2. Special rule for the sale of slaves: *periculum est emptoris* (Labeo)
3. Controversy between Sabinians & Proculians
4. Generalisation of the *custodia* (that can be understood as a partial persistence of *periculum venditoris*), and generalisation of the *periculum est emptoris* rule (Paul)
5. In Justinian's time, *periculum emptoris* remains the principle (Digest & Institutions)

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Forschungen  
zum  
Römischen Recht

44

**Martin Pennitz**

## **Das periculum rei venditae**

Ein Beitrag zum  
„aktionsrechtlichen Denken“  
im römischen Privatrecht

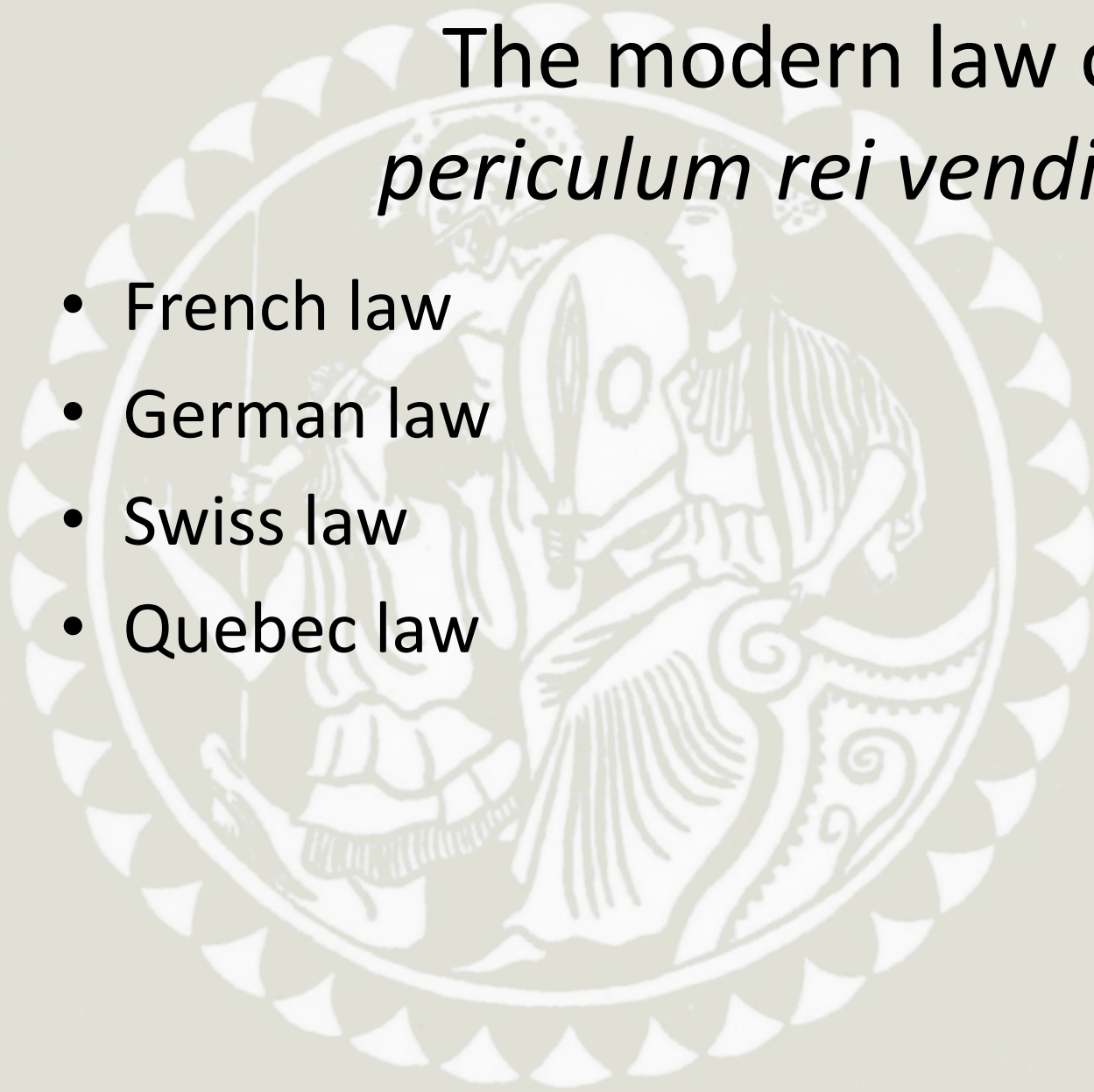
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# The modern law of *periculum rei venditae*

- French law
- German law
- Swiss law
- Quebec law



# French law: *Res perit domino*

Article 1138 CCF : L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes.

Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée, encore que la tradition n'en ait point été faite, à moins que le débiteur ne soit en demeure de la livrer ; auquel cas la chose reste aux risques de ce dernier.

# German law: *Casum sentit dominus*

- BGB § 446 **Gefahr- und Lastenübergang**
- **Mit der Übergabe** der verkauften Sache geht die **Gefahr** des zufälligen Untergangs und der zufälligen Verschlechterung auf den Käufer über. Von der Übergabe an gebühren dem Käufer die Nutzungen und trägt er die Lasten der Sache. Der Übergabe steht es gleich, wenn der Käufer im Verzug der Annahme ist.

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- *Dingliche Einigung = Traditio*

# *Res perit domino – Casum sentit dominus*

- French, Italian, Belgian, Spanish law... :
- *Periculum emptoris*
- German, Austrian, Dutch, Greek law... :
- *Periculum venditoris*

# Swiss code of Obligations

- Art. 184
- 1. A contract of sale is a contract whereby the seller undertakes to deliver the item sold and **transfer ownership** of it to the buyer in return for the sale price, which the buyer undertakes to pay to the seller.

# Swiss code of Obligations

- Art. 185
- 1. The **benefit and risk of the object pass to the buyer on conclusion of the contract**, except where otherwise agreed or dictated by special circumstance.



# Code civil du Québec

Art. 1433.

**Le contrat** crée des obligations et quelquefois les modifie ou les éteint.

En certains cas, il a aussi pour **effet de constituer, transférer, modifier ou éteindre des droits réels.**

# Code civil du Québec

Art. 1433.

- A **contract** creates obligations and, in certain cases, modifies or extinguishes them.
- In some cases, it also **has the effect of creating, transferring, modifying or extinguishing real rights.**

# Code civil du Québec

Art. 1456.

- L'attribution des fruits et revenus et la charge des risques du bien qui est l'objet d'un droit réel transféré par contrat sont principalement réglées au livre Des biens.
- Toutefois, tant que la délivrance du bien n'a pas été faite, le débiteur de l'obligation de délivrance continue d'assumer les risques y afférents.

# Code civil du Québec

## Art. 1456.

- The allocation of fruits and revenues and the assumption of risks incident to property forming the object of a real right transferred by contract are principally governed by the Book on Property.
- The debtor of the obligation to deliver the property continues, however, to bear the risks attached to the property until it is delivered.

# *Periculum rei venditae*

## *Periculum emptoris*

1. The buyer owns the thing since the conclusion of the contract (e.g.: **France**, Italy, Belgium, Spain...)
3. The buyer becomes owner only with the delivery of the thing (e.g.: **Switzerland**)

## *Periculum venditoris*

2. The buyer owns the thing since the conclusion of the contract (e.g.: **Québec**, Louisiana...)
4. The buyer becomes owner only with the delivery of the thing (e.g.: **Germany**, Austria, Greece, Netherlands...)

# *Periculum rei venditae*

## *Periculum emptoris*

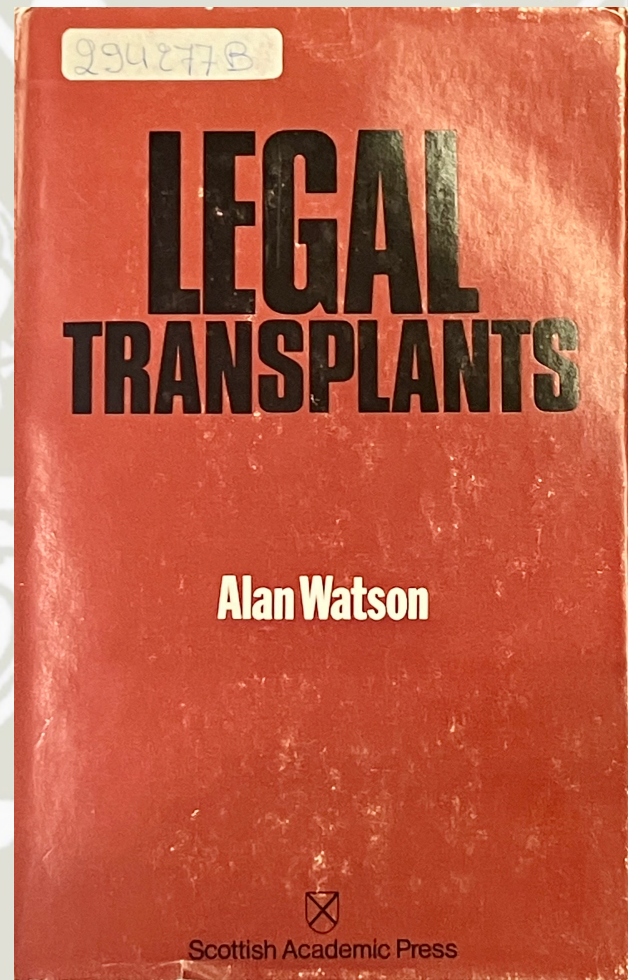
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## *Periculum venditoris*

- The buyer owns the thing since the conclusion of the contract (e.g.: Québec, Louisiana...)
- The buyer becomes owner only with the delivery of the thing (e.g.: Germany, Austria, Greece, Netherlands...)

**ROMAN LAW**

# Alan Watson – Legal Transplants



Thank you very much for your kind  
attention!



Liège