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About the Meaning of *colens in asse* in CIL VI 33840: A Contrast to *colonus partiarius*?*)

Dieser Beitrag thematisiert die Aussagekraft des Ausdrucks *colens in asse* CIL VI 33840. Mommsen vertrat die Ansicht, dass er als Gegensatz zum Entrichten einer Pacht durch einen Teil der Ernte zu verstehen sei. Die Quellen bestätigen diese Annahme jedoch nicht: Es gibt keinen Gegensatz zwischen *in asse / in parte*, sondern nur zwischen *nummis / in parte* (D. 47,2,26,1 Paul 9 *ad Sab.*; Plin. IX 37). Scialoja widersprach Mommsens Ansatz, indem er sich auf Columella (de re rust. II.12,7; II.12,9) bezog und den Ausdruck als „im Ganzen" übersetzte. Diese Diskussion ist in den vergangenen Jahren in Vergessenheit geraten. Indem nun im Sinne der Digesten von „Teilpacht" ausgegangen wird und damit das Teilen des Risikos – die *pars quota* ist von entscheidender Bedeutung – eine größere Bedeutung erfährt als der Gegensatz zwischen Sachleistung (*merces in natura*) und ‚*merces* in Geld' (D. 19,2,25,6 Gai 10 *ad ed. prov.*), wird Mommsens These einer Revision unterzogen. Dabei werden Inschriften, die entweder später entdeckt wurden (Vialmp 138 = AE 1987 93) oder bereits bekannt, aber noch nicht beurteilt worden waren (wie CIL VIII 25992), herangezogen.

1. The libellus of Geminius Eutiches:

The commonly known *libellus* of Geminius Eutiches is an inscription which reproduces a petition addressed to the *quinquennales* of the *collegium magnum arkarum divarum Faustinarum*, requesting the right to build a little monument, likely a tomb (*memoriola*) in the vegetable gardens (*horti olitorii*) placed in the *via Ostiensis* belonging to that *collegium* and cultivated by the applicant, a tenant at a yearly rent 26000 sesterces who designated himself as a *colens in asse*. Also the answer of the *quinquennales* (positive) is included in the inscription, dated in the *VIII K(alendas) Aug(ustas)*, under the consulship of *Albinus* and *Maximus*, i.e. the 25th July 227 AD, during the reign of Alexander Severus.

CIL VI 33840: Cum sim colonus hortorum olitoriorum qui sunt via Ostiensi iuris
collegi(i) magni arkarum divarum Faustinarum matris et Piae colens in
asse annuis SS XXVI (milibus) et quod excurrit per aliquod annos in ho-
diernum pariator deprecor tuam quoq(ue) iustitiam domine Salvi sic
ut Euphrata v(ir) o(ptimus) collega tuus q(uin)q(uennalis) Faustine matris aditus
a me permis(it)
consentias extruere me sub monte memoriolam per ped(es) XX in quadra-
to acturus Genio vestro gratias si memoria mea in perpetuo const(abit)
habitus itum ambitum dat(us) a Geminio Eutychete colono
Euphrata et Salvius Chrysopedi Pudentiano (H)yacintho Sophroni q(uaestoribus)
et Basilio et Hypurgo scrib(is) salutem exemplum libelli dati nobis a Geminio

*) This paper was drawn up during my last stay at the Universität Hamburg (15th Sept.–15th Dec. 2009). I am deeply indebted to my host, Prof. H. Halfmann, who has read and corrected previous versions of it. I am also grateful to Prof. D.P. Kehoe (Tulane University of Louisiana) for his suggestions and advice, but obviously neither Prof. Kehoe nor Prof. Halfmann must be held responsible for any of my mistakes. I should also express my gratitude to the library of the CSIC (Madrid).

Abbreviations: **Acta Jur.** = Acta Juridica (Cape Town 1958–); **AIACNews** = Bollettino informativo dell'Associazione Internazionale di Archeologia Classica Onlus (Roma 1994–); **MEFRA** = Mélanges de l'école française de Rome (Roma 1881–); **PP** = La Parola del Passato (Napoli 1946–); **TAPA** = Transactions of the American Philological Association (Baltimore 1869–).

CIL VI 33840, Museo Nazionale Romano, Terme di Diocleziano, inv. nr. 444

Eutychete colono litteris nostris adplicuimus et cum adliget aliis quoq(ue) colonis permissum curabitis observare ne ampliorem locum memoriae extruat quam quod libello suo professus est dat(a) VIII K(alendas) Aug(ustas) Albino et Maximo co(n)s(ulibus).

3 *milibus* (Arangio-Ruiz) 7 *Ginio* (Gordon) 8 Gordon; *habitu<ra>(?)* (Hülsen); *habitura* (Arangio-Ruiz); *h(abens) a(ram) ritus, itus ambitum* (Röhle) 9 Gordon; *Sophronio* (Arangio-Ruiz) 10 *eximplum* (Gordon) 11 *cum adl<e>get aliis quoq(ue)* (Hülsen); *cum ad lig(em) et aliis quoq(ue)* (Röhle) 12 *obsirvare* (Gordon)

Apart from some questions concerning the nature of the mentioned *collegium magnum arkarum divarum Faustinarum matris et Piae*, Theodor Mommsen, the first commentator of the *libellum* from a juristic point of view[1]), highlighted the difficulties that

[1]) Th. Mommsen, Eine Inschrift aus der Umgegend von Rom, ZRG Rom. Abt. 8 (1887), 248ff. = Gesammelte Schriften III, Berlin 1907, 71ff. The first edition – published the same year – was actually that conducted by M. Barnabei, Notizie degli scavi, Roma 1887, 115. These *Faustinae* honoured by this 'foundation' were the wives of Antoninus Pius and Marcus Aurelius (*vide* other sources in H. Temporini, Die Frauen am Hofe Trajans; Berlin 1979, 77 n. 356; C. Cecamore, Faustinae aedemque decernerent, MEFRA 111 (1999), 334 n. 57). In general, about this 'foundation' and its basis on the lease, *vide* H.-J. Drexhage/H. Konen/K. Ruffing, Die Wirtschaft des römischen Reiches, Berlin 2002, 235. About the archaeological context *vide* F. Missi, Dinamiche insediative nel suburbio fluviale sud-occidentale di Roma dall'età repubblicana a quella tardo-antica, AIACNews 2 (2007), 8ff. As the Gordons (A.E. Gordon/J.S. Gordon, Album of Dated Latin Inscriptions, Rome and the Neighbourhood III, Berkeley 1965, 56) warn, the only two editors who allege having seen the inscription are Barnabei and Hülten, but today Röhle should be added. I

arise from the expression *colens in asse* as a description of the activity carried out by the tenant, and consequently of the contract that bound the *colonus* to the landlord. This tenant proves to be a wealthy one, considering the rent (26.000 HS)[2]) and the investments that these kinds of crops required[3]).

As we shall have the opportunity to summarize, Mommsen essentially based his solution on D. 47,2,26,1 (Paul. 26 ad ed.), D. 19,2,25,6 (Gai 10 ad ed. prov.) and D. 20,6,9 pr. (Mod. 4 resp.). In the year following this edition the meaning of *in asse* suggested by Mommsen (i.e. *colens in asse* as a way to express the opposite of a *colonus partiarius*) was discussed by Vittorio Scialoja, who advanced a not totally alternative theory on the grounds of Columella 2,137: according to this interpretation, *in asse* must simply be translated as "in total" – which is in a way implied in Mommsen's interpretation, but ruling out any contrast with the *colonus partiarius*[4]).

This controversy is still present in the edition and commentary of Arangio-Ruiz (FIRA III² 147), who for his part supported Scialoja's translation[5]). In subsequent quotations of this source however, the difficulties of knowing the actual content of this expression have been ignored, dodged or – generally – avoided[6]). It is quite sig-

accept the Gordons' edition, with some insignificant precisions (they are hypercritical in '*Ginio*', '*obsirvare*', '*eximplum*', which I cannot identify neither on the picture nor on the inscription). A. D'Ors in his review (AJA 69, 1966, 84) points out that "The authors conserve the word '*adliget*' in line 11: *et cum adliget aliis quoq(ue) / colonis permissum* ... and translate <<since it involves (possible) permission to other tenants also, i.e. may set a precedent ...>>. I wonder how the subject of *adliget* can be an impersonal one and not the same personal subject as that of the immediate verbs *extruat ... professus est*, that is to say the petitioner himself. In this case the sense could have been the same given by the Gordons, but with a slightly different translation "since it implies a precedent of permission to the other tenants". As I have remarked, I find Röhle's corrections difficult to recognize.

[2]) O. Seeck, s.v. 'Colonatus', RE IV, col. 483ff., 486; B.W. Frier, Law, Technology, and Social Change, ZRG Rom. Abt. 96 (1979), 204ff., 214; V. Weber, Die Kolonen in Italien und den westlichen Provinzen des römischen Reiches nach den Inschriften, in: K.-P. Johne/J. Köhn/V. Weber (eds.), Die Kolonen in Italien und den Westlichen Provinzen des römisches Reiches, Berlin 1983, 258ff., esp. 261; P.W. De Neeve, Colonus: Private Farm-tenancy in Roman Italy during the Republic and the Early Principate, Amsterdam 1984, 84; A. Los, Les intérêts des affranchis dans l'agriculture italienne, MEFRA 104 (1992), 728; P. Erdkamp, The Grain Market in the Roman Empire, Cambridge 2005, 23 n. 48; J.S. Kloppenborg, The Tenants in the Vineyard: Ideology, Economics and Agrarian Conflict, Tübingen 2006, 311ff. This author, by quoting M.I. Finley (Private Farm Tenancy in Italy before Diocletian, in: M.I. Finley, ed., Studies in Roman Property, Cambridge 1976, 103ff.) and De Neeve (op. ult. cit. 85ff.) points out that large tenancies were normally sub-divided (cf. e.g. Colum. 1,7,3–4; Cic. Att. 13,9,2; Plin. epist. 5,14,8). It would be reasonable and widely attested, but in this case no evidence is available.

[3]) K.D. White, Roman Farming, Ithaca 1970, 246ff.

[4]) V. Scialoja, Libello di Geminio Eutichete, BIDR 1 (1888), 21ff. = Scritti giuridici I, Roma 1933, 352ff.

[5]) V. Arangio-Ruiz, FIRA III² 142 (p. 459), n. 1 "[in asse] scil. in toto, quae interpretatio ex duabus quas Scialoja suppeditavit nobis praestare videtur".

[6]) Cf. e.g. Th. Mayer-Maly, Locatio conductio: eine Untersuchung zum klassischen römischen Recht, Wien 1956, 135ff., by quoting L. Wenger, Die Quellen des römischen Rechts, Wien 1953, 786ff. Wenger refers to Arangio-Ruiz, but neglects the latter's opinion (on Scialoja's side). Wenger's commentary is limited to state: "Der Stein ist beachtlich als erstes Zeugnis einer selbsändigen Stiftung mit eigenen Organen, und fürs Pachtrecht, weil sich der Petent als *colens in asse* bezeichnet,

nificant that an essential work about the *locatio conductio* such as that of Mayer-Maly interprets the expression tout court as an indirect proof of the existence of the *colonia partiaria* in Italy: his outline characterizing a *locatio conductio* as a *locatio in asse* implies – *a sensu contrario* – that other were *in partem*, i.e., that in those cases the *merces* was a *pars quota* of the harvest.

In my opinion, new studies on inscriptions already published early on after the first edition of CIL VI 33840 such as that of Henchir Mettich (CIL VIII 25902)[7]) or other more recently edited, such as ViaImp 138 = AE 1987 93 might offer some arguments to elucidate the meaning of *colens in asse* in CIL VI 33840. This is, in short, the aim of this paper. First, let us evaluate the grounds of both interpretations by considering the three fragments put forward by Mommsen, starting from the two main senses of *as* from a lexicological point of view. Next I shall discuss the sense of this expression in the aforementioned inscriptions, and finally I shall compare both meanings with the goal of assigning one of them to the inscription we are dealing with.

2. The texts used by Mommsen:

The texts used by Mommsen do not actually present distinction between *in asse* and *in parte* to express the *merces* or the risk of the *locatio conductio*. As I pointed out earlier, according to Mommsen's interpretation, *colens in asse* is primarily based on D. 47,2,26,1 (Paul. 9 ad Sab.), where a *colonus* is characterized as a *colonus qui nummis colit*, presumably – although technically it is not exactly accurate that a *colonus* in kind is necessarily a *colonus partiarius* – in contrast to a *partiarius*. This is one of the two texts of the Digest alluding to sharecropping[8]), the other – also quoted by

als Pächter, der die ganze Ernte selbst bezieht und dafür den ganzen Pachtschilling in Geld bezahlt im Gegensatz zum *colonus partiarius*, der nur einen Teil der Ernte behält und den anderen Teil dem Eigentümer als Pachtzins abliefert." This inscription received a great deal of comment and was repeatedly republished in its time (cf. P.F. Girard, Textes de droit romain, 4e éd. Paris 1913, 853 e; E. Schiaparelli, Raccolta di documenti latini, Como 1923, 40; G. Bruns, Fontes iuris romani antiqui, Tübingen 1912, 168; Gordon/Gordon, n. 1, 57) and of course the problem of what *in asse* could mean was one of the main questions dealt with by scholarship, but quickly forgotten. For example, Weber, who includes this inscription under number 7 (Die Kolonen in Italien und den westlichen Provinzen, n. 2, 258ff.), tackles the question of what *colens in asse* means, without regard for the old discussion. The same goes for D. Kehoe, Lease Regulations for Imperial Estates in North Africa I, ZPE 56 (1984), 193ff., 217, and D. Flach, Römische Agrargeschichte, München 1990, 92, *vide infra*. Apart from some new readings by Gordon/Gordon (n. 1) the only exception – practically ignored by the subsequent literature – is the accurate commentary of this inscription by R. Röhle (Zur Bedeutung der lex locationis in CIL 6 33840, ZRG Rom. Abt. 104, 1987, 437ff.), who slightly tackles this expression (439f. esp. 440 n. 17), since it is focused on other problems such as the meaning of 'annuis SS XXVI' and *ex quod excurrit*.

[7]) It might be stressed that Mommsen had the opportunity to compare our inscription with CIL VIII 25902. CIL VIII Supp. 4 was published by Dessau after his death, but the first edition was published some years before. Scialoja, Regolamento d'un fondo africano, BIDR 9, 1896, 185ff., in an article about the Henchir Mettich inscription does not relate this inscription with CIL VI 33840, the meaning of *in asse* being exactly the same as he had ventured some years before. As far as I know, only Röhle, ZRG Rom. Abt. 104 (1987), 440 n. 15 points out that the expression *in asse* is present in both inscriptions. He quotes CIL VIII 25902 according to Bruns' edition (Fontes 114 I).

[8]) This fragment offers many problems which are not our concern now, but

Mommsen – is D. 19,2,25,6 (Gai 10 ad ed. prov.). Sharecropping shows at least two peculiarities: 1) fruit perception, a question lightly touched on in the former, and 2) the share of risk – a problem dealt with in the latter.

D. 47,2,26,1 (Paul. 9 ad Sab.): Item constat colonum, qui nummis colat, cum eo, qui fructus stantes subripuerit, acturum furti, quia, ut primum decerptus esset, eius esse coepisset.

The case tackles the active legitimation to the *actio furti* of the *colonus qui nummis colat*. The right of the *colonus* to claim the *fructus stantes* is here the core of the matter and this question – clear in what a *locatio conductio* like this is concerned – has been traditionally one of the features which have puzzled scholarship because the text does not express – nor any other in the Digest – the system of fruit perception in the case of sharecroppers. Of course, the tenant's right to the crops derives from the lessor's will (D. 12,1,4,1 Ulp. 34 ad Sab.; D. 47,2,62,8 Afr. 8 quaest.)[9]), but no clear exposition about the *partiarius* is preserved[10]).

This point is irrelevant to our problem, but it would be useful – in order to contextualize the discussion – to point out, that Sybille von Bolla's explanation (the *colonia partiaria*, being in many aspects a partnership, incorporated also the *condominium* of fruits between lessor and lessee) is far from being obvious, since – as I shall

contributes to define the *colonia partiaria*. Apart from the question of risk, sharecropping sets out some questions related to the perception of fruits, and this is the foundation of the right to the *actio furti*. At first sight the precision *qui nummis colit* excludes that the *colonus partiarius* has the *actio furti*, but authors who have proposed this solution declared that it is only based on an argument *ex silentio*. This is the case with J. Köhn, Die Kolonen in den Rechtsbestimmungen, in: Johne/Köhn/Weber, n. 2, 167ff., especially 187ff. and 197ff.

[9]) The 'lessor's will' obviously implies the contract. The lessee acquires the right over the fruits not by the *separatio* but by the contract. About this question cf. M. Kaser, Die natürlichen Eigentumserwerbsarten im altrömischen ius, ZRG Rom. Abt. 65 (1947), 219ff., esp. 251. Starting from a hard interpolationistic point of view, this author states that the two main texts regarding this problem (D. 39,5,6 Ulp. 42 ad Sab. and D. 47,2,62,8 Afr. 8 quaest.) are manipulated, but at the same time affirms that the statement of African in the latter, according to which the rights of the lessee derive from the lessor's will, "wird auf eine klassische Quelle zurückgehen". J. Rosenthal, Custodia und Activlegitimation zur actio furti, ZRG Rom. Abt. 68 (1951), 217: "Als Gebrauchinteressent hat die a. furti der colonus wegen gestohlener Früchte (Paul. D. 47.2.26.1). An diese denkt auch Ulpian D. 47,2,14,2 ohne es auszusprechen, denn das Pachtgrundstück selbst kann als unbewegliche Sache nicht Gegenstand eines furtum sein." Köhn (n. 8) 186 comments D. 47,2,26,1 (Paul. 9 ad Sab.) and D. 47,2,62,8 (Afr. 8 quaest.) with this outline: "Das Eigentumsrecht an den Früchten, d.h., das Recht, diese zu verkaufen, erwirbt der Kolone erst durch die Einwilligung des Verpächters. Gemeint ist hier das im Vertrag zugesicherte Recht, die Früchte zu ernten." This is the basis to state that in the first case the tenant has the *a. furti*. For the same reason this action could be exercised by the lessor in the second case, because the *furtum* has been committed by the same tenant.

[10]) F. Schulz, Die Aktivlegitimation zur actio furti im klassischen römischen Recht, ZRG Rom. Abt. 32 (1911), 23ff. esp. 66, points out that D. 47,2,83 (Paul. 2 sent.) deals with sharecroppers and that this interpretation dates from the Magna Glossa ('*qui nummis*'), but in fact there is no reason to state that sharecropping was dealt with in this fragment, *vide* F. Haymann, Textkritische Studien zum römischen Obligationenrecht, ZRG Rom. Abt. 40 (1919), 167ff., *vide* infra.

point out later[11]) – the comparison between a sharecropping lease and a partnership in D. 19,2,25,6 (Gai 10 ad ed. prov.) is merely for the purpose of argument. Von Bolla's theory is mainly based on a biased interpretation of D. 19,2,25,6 (Gai 10 ad ed. prov.), starting from documentation issued in Roman Egypt, which is probably not the best way to elucidate the actual solution in Roman jurisprudence.

To sum up, there seems to be some relationship in D. 47,2,26,1 (Paul. 9 ad Sab.) between the acquisition of fruits and the legitimation to the *actio furti* and Paul declares that the regime applicable to the *colonus qui nummis colit* is not exactly the same as that applicable to the *partiarius*, or, if it were, the solution in each case depended on different reasons. Perhaps in practice the problem was irrelevant, since the landowner in a sharecropping had stricter control over production in order to achieve greater productivity. In Kehoe's words, the sharecropping contract required "more vigilant management than leased for fixed amounts in kind or in cash", because in this contract the landlord had an incentive "to make certain that the tenant cultivated his land in accordance with prescribed norms and did not cheat in paying the rent"[12]).

Apart from this controversy, the main question that this fragment raises is whether the expression *qui nummis colat* is the best contrast of a sharecropper, since the use of *in nummis* as a term of comparison does not fully explain that the relevant feature in sharecropping is not that the rent should be paid in kind as opposed to in money (*in nummis*), but that the *merces* is conceived as a *pars quota* of the harvest, unless we understand the expression in a wider sense. In favour of his thesis, Mommsen mentions that the contrast (*nummus / pars*) is present in Plin. epist. 9,37:

Nam priore lustro, quamquam post magnas remissiones, reliqua creverunt: inde plerisque nulla iam cura minuendi aeris alieni, quod desperant posse persolvi; rapiunt etiam consumuntque quod natum est, ut qui iam putent se non sibi parcere. Occurrendum ergo augescentibus vitiis et medendum est. Medendi una ratio, si non nummo sed partibus locem ac deinde ex meis aliquos operis exactores, custodes fructibus ponam. Et alioqui nullum iustius genus reditus, quam quod terra caelum annus refert.

Pliny alludes to his tenants falling into debt and even consuming the farm products. On these grounds he justifies his decision of providing incentives to greater productivity by resorting to sharecropping, which is defined by the author as *medendi una ratio, si non nummo sed partibus locem*. Mommsen thinks that when the author refers to the *colonia partiaria* as a *pars quota* of the fruits is making use of a similar contrast or in other words, Mommsen seems to imply that the contrast *in nummis / pars* is equivalent to *in asse / in parte*. This argument, however is not exactly in favour of accepting *in asse* in contrast with *in parte*, precisely because Ulpian does not use this expression (*in asse*), but merely resorts to *in nummis*, at first sight centred in the contrast of money / kind[13]). Pliny does not use this terminology in a technical way.

[11]) About this question, see infra, n. 19.

[12]) D.P. Kehoe, Manegement and Investment on Estates in Roman Egypt during the Early Empire, Bonn 1992, 131. Kehoe relies on S.N.S. Cheung, The Theory of Share Tenancy, Chicago 1969, 72ff. In fact, the landlord's right to supervise production is frequently present on sharecropping contracts, cf. e.g. P.Oxy. IV 729,l.11 or P.Ross. Georg II 19,l.3 or P.Oxy. XLVII 3354, ll. 38–39.

[13]) This fragment of Pliny has been widely commented, *vide* e.g.: V.A. Sirago, Italia agraria sotto Traiano, Napoli 1957, 2. ed. 1991, 110ff.; A.N. Sherwin-White, The Letters of Pliny, A Historical and Social Commentary, Oxford 1966,

This is in fact the main question: whether both terms are normally contrasted in legal sources and consequently whether on CIL VI 33840 the expression *in asse* could be equivalent to *in nummis*. The problem however is that, as far as I know, the expression *in asse* is never attested to designate a fixed-share lease to contrast with a crop-share lease neither in a technical or non-technical source. The terminology is more focused on rent than on the sharing of risk. A lease qualified as *in nummis* – within the context of a contrast with a lease *in parte* - is the only one that sources offer us, in order to define a lease in which the risk is not shared between both parties, as is the case in the *colonia partiaria*.

The problem is that the contrast *nummus / pars* is in a way imprecise: on the one hand it rightly underlines that the *merces* in the *colonia partiaria* is a *pars quota*, but on the other it does not sufficiently stress that in a tenure whose rent was paid in a fixed price the *merces* – here called *in nummis* – at least in theory could also be paid in kind. What actually distinguishes the *colonia partiaria* is the idea of a *merces* conceived around the concept of *pars quota*, not necessarily the fact that normally – or practically always – the *merces* in the *colonia partiaria* was actually paid in kind[14]). As a consequence of that, the essential difference of the rent, which the sources call *in nummis* is not that it was paid in money (despite the term *nummus*), but that the fixed price implied that the risk (with the exception of *vis maior*) was exclusively borne by the *colonus*.

It is noteworthy that the contrast between *nummus* (as an expression apparently limited to indicate *merces* in money) and *pars* is an incomplete definition of sharecropping in the sense that it is also possible – D. 19.2.19.3 (Ulp. 32 ad ed.) – a *locatio conductio* with a *merces* paid in kind, but not determined through a *pars quota*. Should we call this lease *in nummis*? We have also much evidence about tenancy paid in kind in the papyri, but those tenancies were not exactly expressed as sharecropping: the documentation consider this form as a different matter. Perhaps only by understanding money as a fixed measure of the rent, a fixed cash quantity, it is possible to explain the contraposition in a technical way: the rent based on a fixed quantity (which implies full

520; L. Capogrossi-Colognesi, Grandi proprietari, contadini e coloni nell' Italia romana (I–III d. C.), in: A. Giardina (ed.), Società romana e Impero tardoantico I, Roma 1986, 353ff.; W. Backhaus, Plinius der Jüngere und die Perspektiven des italienischen Arbeitskraftspotentials seiner Zeit, Klio 69 (1987), 140ff.; P.W. De Neeve, A Roman Landowner and his Estates: Pliny the Younger, Athenaeum 68 (1990), 363ff.; F. De Martino, Dalle lettere di Plinio Junior alla tavola di Veleia, PP 49 (1994), 321ff.; E. Lo Cascio, Considerazioni sulla struttura e sulla dinamica dell'affito agrario in età imperiale, in: De Agricultura, In Memoriam P.W. De Neeve, Amsterdam 1993, 296ff., esp. 304ff.; D. Vera, Padroni, contadini, contratti: realia del colonato tardo antico, in: E. Lo Cascio (ed.), Terre, proprietari e contadini dell'imperio romano, Roma 1997, 185ff., esp. 214; L. Capogrossi-Colognesi, Remissio mercedis, Napoli 2005, 80ff.; D.P. Kehoe, Law and the Rural Economy in the Roman Empire, Ann Arbor 2007, 107ff.

[14]) De Neeve (n. 2), 15 n. 59 rightly rejects the definition of *colonia partiaria* offered by D. Stockton in The Gracchi, Oxford 1979, 15: "Share-cropping is in essence simply a form of tenant-farming where the rent is in kind rather than in money", which falls into this common mistake, cf. P.W. De Neeve, Remissio mercedis, ZRG Rom. Abt. 100 (1983), 296ff., 309 n. 43. The same imprecision can be observed in Mayer-Maly, Locatio conductio (n. 6), 136 or recently in P. Rosafio, Studi sul colonato, Bari 2002, 110.

risk except *vis maior*) is evaluated in money, regardless of the fact that eventually this quantity could be materialized in kind[15]). Consequently this rent could be called rent *in nummis* in the sense that it was fixed in money and consequently did not depend on the quantity of the crop. This solution, however does not explain all the possible cases.

In any of the two quoted texts (D. 47,2,26,1 Paul. 9 ad Sab., and Plin. epist. 9,37) there is a clear definition of the *colonia partiaria* through its *merces*, but it is more significant in the case of Paul. Perhaps, as I have pointed out earlier because Roman jurisprudence insists on the main economic consequences of the *locatio conductio* conceived around the idea of *pars quota*, i.e., the share of risk, the definition is partially based on this question, but the notion is not clearly stated. Since this type of rental agreement was "characteristic of the lower end of the spectrum"[16]), Roman jurists probably avoided full discussion about the features of this contract. In fact, the distinguishing note, the sharing of risk, is the element explicitly highlighted – but perhaps not very clearly expressed – by Gaius in D. 19,2,25,6 (Gai 10 ad ed. prov.), the other fragment quoted by Mommsen:

D. 19,2,25,6 (Gai 10 ad ed. prov.): Vis maior, quam Graeci θεοῦ βίαν appellant, non debet conductori damnosa esse, si plus, quam tolerabile est, laesi fuerint fructus: alioquin modicum damnum aequo animo ferre debet colonus, cui immodicum lucrum non aufertur. Apparet autem de eo nos colono dicere, qui ad pecuniam numeratam conduxit: alioquin partiarius colonus quasi societatis iure et damnum et lucrum cum domino fundi partitur.

Here the contrast is between the *colonus partiarius* and the *colonus* qui *ad pecuniam numeratam conduxit*. The requirement of a *pecunia numerata* for the *merces*

[15]) About prices fixed in cash but actually paid in kind, *vide* C.R. Whittaker, Trade and the Aristocracy in the Roman Empire, Opus 4 (1995), 49ff., who points out the lack of money in some areas. The main problems in order to fix the rent were the risk of the size and the market price of the crop. I do not intend to tackle the complicated problem of the part played by money in the Roman economy during the Principate, but perhaps this question might cast light on why a fixed price (perhaps actually paid in kind) could be occasionally expressed in terms of *pecunia numerata* and not necessarily in terms of weights. It seems that money was widely used in towns as a normal form of exchange for goods and that *coloni* in many contexts used money for a range of purposes, but on the other hand (Ch. Howgego, The Supply and Use of Money in the Roman World, JRS 82, 1992, 1ff.) agricultural produce played a "significant role alongside coin in taxation rents, wages and credit" and there was some "lack of sophistication" in the use of money. In this context a rent consisting in a fixed cash payment does not exclude that the rent was actually paid in kind taking into account the market price, in such a case money being only the way to express that the risk goes to the *colonus* and to determine the amount of it. A similar role could have been played by fixed amounts of kind determined through weights, for example. It should be pointed out, however, that fixed payments in kind (as it is the case in the aforementioned possibility) avoided problems derived from low market prices, but not those derived from poor crops. This question emphasizes that the main contrast is not exactly between fixed prices in money and sharecropping, but between fixed rents (whether in cash or in kind) and variable rents (*pars* quota of the harvest). On the other hand – as Howgego himself outlines – it seems that in some contexts the nature of the rent is determined starting from the type of produce, *vide* e.g. for the case of Oxyrhyncus, J. Rowlandson, Landowners and Tenants in Roman Egypt, Oxford 1996, 266ff.

[16]) D. Johnston, Roman Law in Context, Cambridge 1999, 65. This author expresses very clearly the problem, but in my opinion does not rightly highlight the question of sharing the risk as the main feature of sharecropping.

in the *locatio conductio* is the core of an old polemic that occupied the interpolation criticism, but still not proposed when Mommsen published this inscription, and essentially irrelevant to our concern[17]). Gaius centres the question on the problem of sharing the risk between the *locator* and the *colonus*, focusing on the *remissio mercedis*[18]), but apparently defines this kind of leasing according to the nature of rent (in kind / in money). Again – as is obvious in Ulpian – it can be understood that *ad pecuniam numeratam* essentially implies a fixed price (being in kind or in money) as contrasted to an amount determined by a quota. In this case we would have been dealing – as could be the case with the expression *in nummis* – with a use of money only as a way to determine a fixed quantity. Whether the rent is paid in money or in kind is consequently not the main element to distinguish between *locatio conductio nummis* and *colonia partiaria*.

There is another controversial point in Gaius' affirmation that the tenant in the sharecropping – as stated by the jurist – should be considered as a kind of partner. This statement has been appraised as a trace of post-classical intervention, in my opinion on poor grounds. What Gaius says can be understood within the limits of the *quasi*: it does

[17]) The rule "*merces in pecunia numerata*" is assumed by C. Ferrini (La colonia partiaria, Rend. Ist. Lomb. 26, 1893 = Opere III 1, Milano 1929, 1ff.) to be nothing more than a Justinean interpolation generated by a theory derived from the School of Beryt. His thesis is essentially based on the comparison between the text included in the Digest and the *scholia* of the Basilics. Cf. e.g. B. 20,1,1 (D. 19,2,1) Scheltema B. III 1170: *Δεῖ δὲ ἐν ἀργυρίοις ὁρισθῆναι τὸν μισθόν. Εἰ γὰρ μὴ ἐν ἀργυρίοις ἐγένετο, οὐκ ἦν μίσθωσις ...* 18 *... ὡς ἔστι μὲν καὶ ἀλλαχόθεν μαθεῖν, μάλιστα δὲ ἐξ ὧν ὁ Οὐλπιανὸς ἐν τῷ θ'. βίβ. τοῦ παρόντος συντάγματος τιτ. γ'. δίγ. ε'. φήσιν.* Stephanus quotes D. 16,3,1,9 (Ulp. 30 ad ed.), one of the typically controversial cases in the sources, such as D. 10,3,23 (Ulp. 32 *ad ed.*) or D. 19,5,17,3 (Ulp. 28 ad ed.). The answer from C. Longo (Sulla natura della merces nella locatio conductio, in: Mélanges P.F. Girard II, Paris 1912, 105ff.) dismisses Ferrini's arguments and defends the position that in classical law the exigence of *pecunia numerata* was already present. Probably the solution is not that simplistic, taking into account that there was a *ius controversum* around this problem (i.e. the nature of *merces*), in order to make a difference between *emptio-venditio* and *permutatio* and that the former is considered as a general framework for *locatio-conductio* (cf. Gai. 3,141). According to R. Fiori (La definizione della locatio conductio: giurisprudenza romana e tradizione romanistica, Napoli 1999, 233ff.), by taking into account D. 19,2,35,1 (Afr. 8 quaest.) and especially the comparison between I. 24,2 and Gai. 3,144, this rule could also have sprung up during late-classical or even post-classical law. Regarding this *ius controversum*, *vide* A. Thomas, The Nature of merces, Acta jur. 1 (1958), 191ff. and K.-H. Misera, Der Nutzungstausch bei Nachbarn und Miteigentümern, ZRG Rom. Abt. 94 (1977), 259ff. I consider it unclear that Africanus made reference to the *colonia partiaria*, as I. Molnár (Rechte und Pflichten der Parteien bei der locatio conductio rei, Index 12, 1983–1984, 157ff.) states.

[18]) The expression *plus quam tolerabile* is ambiguous and makes it more difficult to characterize the *remissio mercedis*. De Neeve (Remissio, n. 14, 296ff.) discusses the common concept of a mere benefit for the tenant. Capogrossi-Colognesi, Remissio mercedis (n. 13), 80 outlines the complexity of this institution: "La *remissio* insomma è elemento della disciplina del contratto, non rientra quindi nella sfera della liberalità, anche se spesso i confini appaiono meno netti." In this sense, he quotes two examples: Colum. 1,7,1 and C. 4,65,19. He concludes (81) that "Si tratta in questo caso, di una gamma di situazioni e di casi particolari difficilmente imprigionabili all' interno di schemi formali troppo rigidi."

not exactly mean that the *colonus partiarius* was actually a partner, but only that in a way he is comparable to a partner considering some specific points of the agreement as such[19]). In fact, the term *quasi* is commonly used by classical jurists "when applying recognised institutions or rules to similar relations or situations"[20]).

The third text put forward by Mommsen – D. 20,6,9 pr. (Mod. 4 resp.) – is less significant, since it is not even related to *locatio conductio*[21]).

[19]) The interpolation criticism has been suspicious with this fragment (*vide* e.g. M. Kaser, Periculum locatoris, ZRG Rom. Abt. 54 (1957), 172 n. 60), but in my opinion few elements can be discarded, as it is the case with the probable Greek gloss: A. Steinwenter, Vis maior in griechischen und koptischen Papyri, Eos 48 (Symbolae Raphaeli Taubenschlag dedicatae I) (1956), 261. As for the term *alioquin*: F. Pringsheim, Noch einmal Gai. 3,161 und Inst. Just. 3,26,8, ZRG Rom. Abt. 72, 1955, 82 and n. 144, decided that it is genuine, by taking into account the VIR. S. v. Bolla, s.v. Teilpacht, RE XVIII. 4, col. 2480ff. relies on documents dated in the second century AD in order to assert that this construction (the partnership in the perception of fruits) is post-classical or simply not Roman; and she agrees with E. Costa (La colonia partiaria, Bologna 1912, 32) in that the text is interpolated from *apparet* to the end ("Der Hinweis auf das Gesellschaftsrecht ist also nachklassisch und [...] vielleicht gar nicht römisch"). At the same time, she recognizes that sharecropping is present in classical Roman law since there is a reference in C. 4,65,8 (Alex. Sev. 231 AD). In order to demonstrate that the comparison with partnership is not genuine, she resorts mainly to P.Oxy. II 277,l.8 (19 BC) and P.Lond. V 1694,l.4 (sixth century AD). In my opinion, these documents cannot be compared with the situation in Roman law during second and third centuries AD, bearing in mind that lease has a very different status in Greek and Hellenistic law. For instance it was not conceived as a consensual contract (cf. e.g. H.J. Wolff, Consensual Contracts in the Papyri, JJP 1 (1946), 55ff.; F. Pringsheim, The Greek Law of Sale, Weimar 1950, 295ff.; D. Behrend, Attische Pachturkunden, München 1970, 10ff.). This question has been analysed by J. Herrmann, Studien zur Bodenpacht im Recht der graeco-aegyptischen Papyri, München 1958, 209ff., and D. Hennig, Untersuchungen zur Bodenpacht im ptolemaisch-römischen Ägypten, Diss. München 1967, 285ff.) with other examples, but regardless of this problem, i.e., the authenticity of Gaius's assertion. Herrmann states that the clause *ek tou koinou* probably only means that the cost of production must be shared between the parties, and he quotes in favour of this hypothesis PSI I 32 ll. 13ff. The lease as "Gründer der koinonia" had been situated in Ptolemaic times by M. San Nicolò, Ägyptisches Vereinswesen zur Zeit der Ptolemäer und Römer, München 1912, repr. 1972, 148ff.

[20]) Mayer-Maly (n. 6), 137 interprets the text in this sense. In my opinion, C. Azon (Les risques dans la locatio conductio, Labeo 12, 1966, 318 n. 26) does not tackle the problem by affirming that the fragment develops the *colonia partiaria* as a *quasi societas*. The point is the use of *quasi* in this fragment. A. Berger, Encyclopedic Dictionary of Roman Law, Philadelphia 1951, 664, points to an analogical use of *quasi* in certain fragments and warns (665) that, although this adverb was widely used by Justinian, this fact is a poor criterion to assert that a fragment is interpolated; *vide* about this problem K. Hackl, Vom quasi im römischen zum als ob im modernen Recht, in: R. Zimmermann/R. Knütel/J.P. Meincke, Rechtsgeschichte und Privatrechtsdogmatik, Heidelberg 1999, 117ff. Regarding the content, the comparison with *societas* is also present in the *politio*, one of the so-called 'Catonian contracts' (Cato agr. 136), when dealt with by Ulpian (D. 17,2,52,2 Ulp. 31 ad ed.). In fact the *politor* was a temporary labourer who helped to bring in the harvest for a fixed payment in kind, not exactly a partner, *vide* e.g. M. Kaser, Römisches Privatrecht I, München[2] 1971, 566.

[21]) Mommsen (n. 1), 250–251: "Für den Juristen ist weiter zu beachten, dass der *colens in asse* (vg. *vendere in assem* bei Modestinus Dig. 20,6,9 pr. u.dgl.m.) allem Anschein nach zusammenfällt mit dem *colonus qui nummis colit* (Paulus Dig. 47,2,26,1), *qui ad pecuniam numeratam conduxit* (Gaius Dig.) unserer Rechtsbücher und den Gegensatz dazu der *colonus partiarius* macht, also hier sich einander entgegenstehen der Pächter, der sämmtliche Früchte (*assem*) übernimmt und dafür Geld zahlt, und der Pächter, der einen Theil (*partem*) der Früchte für sich nimmt, die übrigen statt des Pachtgeldes an den Eigenthümer abliefert." Röhle (n. 6) underlines that Mommsen relies on B. Brissonius, De formulis et solemnibus populi Romani verbis libri VIII, Paris 1583, 515, but probably also on Forcellini's Lexicon (*vide infra*).

D. 20,6,9 pr. (Mod. 4 resp.): Titius Sempronio fundum pignori dedit et eundem fundum postea Gaio Seio pignori dedit, atque ita idem Titius Sempronio et Gaio Seio fundum eundem in assem vendidit, quibus pignori ante dederat in solidum singulis. Quaero, an venditione interposita ius pignoris exstinctum sit ac per hoc ius solum emptionis apud ambos permanserit. Modestinus respondit dominium ad eos de quibus quaeritur emptionis iure pertinere: cum consensum mutuo venditioni dedisse proponantur, invicem pigneraticiam actionem eos non habere.

Modestinus deals with the case of a *fundus* pledged as security by Titius to Sempronius and subsequently sold to Caius Seius. The same *fundus* is also sold in total (*in assem*) to both creditors and the problem is *an venditione interposita ius pignoris exstinctum sit*, that is, whether the actions derived from the *pignus* become extinguished by the sale. *In asse* here clearly implies that the *fundus* is sold in total, but – the expression being too general – there is no basis to contrast *in asse* with *in parte* to define the *locatio conductio* in terms of the nature of rent. It can be also highlighted that the expression is used to characterize the real object of the contract, that is, the land itself.

3. Scialoja translates in asse as in total:

The theory of Scialoja is based on the use of *in asse* in Columella, sensibly interpreted within the context of agrarian terminology. According to the author's thesis, *in asse(m)* is rightly translated as 'in total' and consequently by extrapolating this interpretation it is implied that the *colonus* is the *colonus* of the whole property. The most significant element of this theory is that the meaning of *in asse* – which by definition contrasts with 'in part' – is here not explicitly contrasted with *in parte*. In other words, in Scialoja's assumption *in asse* would allude to the whole contract, not only to the rent or to the risk. As I have earlier pointed out, the two examples that this author employs are concerned with agrarian tasks, which offer a plausible context.

Colum. 2,12,7 Quae nos ratio docet, sufficere posse iugum boum tritici centum viginti quinque modiis, totidemque leguminum, ut sit in asse autumnalis satio modiorum ducentorum quinquaginta; et post hanc nihilo minus conserat trimestrium modios quinque et septuaginta.

The author is talking about the tasks of sowing, and in this context states that according to his calculation, normally with one yoke of oxen one hundred and twenty five *modii* of wheat or legumes can be planted, so the autumn sowing might be in total (*in asse*) two hundred and fifty *modii* and that even after that seventy-five *modii* of three months crops may still be sown.

Colum. 2,12, 9: Sic in asse fiunt octo menses et dies X.

In the same context Columella affirms that the total amount to eight months and ten days. In both fragments the expression can be translated as 'in total' with a wide and general meaning and without explicitly being contrasted with *in parte*.

Scialoja implicitly underlines the ambiguity of the term *as* in the sense that its meaning 'in total' is too general to be put forward as an argument to define the actual status of the *colonus* on CIL VI 33840 as a synonym of *in nummis*. In favour of Scialoja's interpretation we can point out the literal expression of the inscription: the tenant declares that he has always and punctually paid the rent and explicitly mentions the amount: in this context what is more probable is that the *colonus* emphasizes that he is the only tenant of this *hortus olitorius*, more than alluding to the rent, which has been clearly stated[22]).

4. Meaning of the expression 'in asse' from a lexicological point of view:

The ambiguity of the expression *in asse* ('in total', insisting or not on the contrast with 'in part') is also present in the very meaning of the term *as*. According to the Oxford Latin Dictionary, this term can be understood – apart from, as the copper coin included as the tenth part of a *denarius* – as a standard for different coins, weight or measures, which justifies its sense in the inheritances "and other money matters, where a division was made"[23]). Thus, as is known, *heres in asse* means 'sole heir' in the same sense that expressions such as *vendere* or *possidere in asse(m)* or *ex asse* normally mean 'in all, entirely, completely'[24]). This scheme is clearly developed in the Thesaurus Linguae Latinae, where these two main meanings are clearly distinguished[25]): I) *nummus priscus: unitas* (under which the coin and the weight are included) and II) *generaliter, i.e., i q unum opponitur et partibus et multiplici cuicumque*. We wish to point out that the conception of 'in total' could or could not emphasize the contrast with 'in part'.

The Vocabularium Iurisprudentiae Romanae also insists on the translation, with general value, *in totum* but also includes examples where *in asse* is expressly contrasted to *in parte*[26]). A closer examination, therefore, suggests that the ambiguity of *in asse(m)* does not allow us to decide about its meaning without taking into account a text in which the contraposition was clear. The most similar example to the fragment we are looking for could be D. 2,8,15,1 (Mac.) *qui ... rem soli possidet aut ex asse aut pro parte*, but the context is not exactly the *merces* of a *locatio conductio*, but only the right of possession and consequently it is not legitimate to project the scheme *in asse / in parte* as equivalent to lease paid in total (fixed price) / lease paid in part (a pars quota), construction that in this sense and with this reference is never available in the sources.

[22]) Röhle (n. 6), 440 n. 17 sides with Scialoja' s position right and starting from there criticizes the proposal of the Gordons (Gordon/Gordon, n. 1, 57). According to them, there are other leases mentioned on the inscription (l. 11), which might imply that Geminius was not the only tenant, but it is not exactly so, because the *collegium* may have had other tenants, Geminius being the only tenant of that particular garden. In Röhle's words: "Das alii coloni bezieht sich doch auf andere Pächter der Stiftung und nicht auf andere Pächter der Gemüsegärten!"

[23]) C.T. Lewis/C. Short, Oxford Latin Dictionary, Oxford 1968, 170.

[24]) C.T. Lewis/C. Short, op. et loc. cit.

[25]) Thesaurus Linguae Latinae II, Lipsiae 1900–1906, col. 746ff.

[26]) Vocabularium Iurisprudentiae Romanae I, Berlin 1903, col. 504. Röhle (n. 6), 440 n. 13, by relying on VIR outlines that Ulpian used this expression four times, Scaevola twice and Modestinus once, but in my opinion the relevant element for our problem is that none of these texts is related to the contract of lease.

The Heuman/Seckel Handlexikon does not refer to the supposed contrast, i.e. *in asse / in parte* under this sense (the *merces*), but essentially stresses – as usual – the meaning of *in asse* as 'in total' in contrast with *in parte*. All the examples where the expression *in asse* is quoted in contrast to *in parte* are far from the problem of the *merces* in the *locatio conductio* and, on the other hand, the *locatio in nummis* or in *pecunia numerata* are never expressed through the interpretation of *in asse* as '*merces* paid in total, not in a pars quota'[27]).

Regarding *in nummis* as an expression of a tenancy contrasted to the *colonia partiaria*, mentioned by Pliny, we do not have as yet at our disposal the volume of the Thesaurus Linguae Latinae, but the Lexicon of Forcellini outlines the contrast with D. 47,2,26 and defines the expression *in nummis* as "annua pensione, cui oponitur partibus", probable origin of Mommsen's interpretation[28]).

To sum up, the expression *in asse* is never used – in contrast to *in parte* – in order to define the contrary of sharecropping tenancy and the meaning of this expression, 'in total', can be used stressing the contrast to in *parte* or not. In the first case we discover some examples, but belonging to different contexts, and significantly none with the sense that Mommsen gives to this expression in CIL VI 33840. In the second, the general value of *as* and the expression *in asse* as 'totality' might be related to tenancy, but more likely when the whole tenancy, the whole contract is implied, not only the rent and this is the case with CIL VI 33840. The question if the *colonus* pays rent on a shared basis or not is pretty clear in the inscription (even the amount of the rent is mentioned) and – as a result – the use of *in asse* would be redundant if referred to the rent.

5. The testimony of other inscriptions:

Manfred Clauss' database[29]) includes only three inscriptions apart from CIL VI 33840, where the expression *in asse(m)* appears: CIL III p. 950 (p. 1058, 2215) = IDR I 44; Via Imp. 138 (= AE 1987 93) and CIL VIII 25902. The first case – drawn up in Rosia Montana (Dacia) – is slightly significant for our concern and so can be easily ruled out: *as* is merely used in the sense of 'coin'.

CIL III p. 950 (p. 1058, 2215) = IDR I 44 Inter Cassium Frontinum et Iulium / Alexandrum societas dani[st]ariae ex / X Kal(endas) Ianuarias q(uae) p(roximae) f(uerunt) Pudente e[t] Polione co(n)s(ulibus) in / prid[i]e Idus Apriles proximas venturas ita conve/n[i]t ut quidq[ui]d in ea societat<c> ab re / natum fuerit lucrum damnumve acciderit / aequis portionibus s[uscip]ere debebunt / in qua societate intuli[t Iuli]us Alexander nume/ratos sive in fructo |(denarios) [qu]ingentos et Secundus / Cassi Palumbi servus a[ctor] intulit [] ducentos / pr[]tin[] / sexaginta septem [] S[]C[] VM[]S //]ssum Alburno [] d[ebe]bit / in qua societ[ate] si quis d[olo ma]lo fraudem fec[isse de]/prehensus fue[rit] in a[sse] uno |(denarium) unum [] / [denarium] unum XX [] alio inferre deb[ebi]t / et tempore perac[t]o de[duc]to aere alieno sive / summam s(upra) s(criptam) s[ibi recipere sive] si quod superfuerit / dividere d[ebebunt?] id d(ari) f(ieri) p(raestari)que stipulatus est / Cassius Frontin[us spopon]dit Iul(ius) Alexander / de qua re dua paria [ta]bularum signatae sunt / [item] debentur Lossae |(denarios) L quos a soci(i)s s(upra) s(criptis) accipere debebit / [act(um) Deusa]r(a)e

[27]) H. Heumann/E. Seckel, Handlexikon zu den Quellen des römischen Rechts, Jena[11] 1907, repr. Graz 1971, 41: "‚*in assem*' ganz, ungeteilt, im Gegensatz von ‚*ex parte*' und ‚*in partem*' z.B. ‚*in assem fundum vendere*' D. 20,6,9, ‚*vindicare*' D. 32,40,1, ‚*creditoribus satisfacere*' D. 42,6,1,1, ‚satisdare' D. 36,4,5,11, ‚*actionem dividere/dare*' D. 39,5,35 pr.; D. 11,1,11,2".

[28]) E. Forcellini, Totius latinitatis Lexicon IV, Prato 1868, 317.

[29]) www.manfredclauss.de.

V Kal(endas) April(es) Vero III et Quadrato co(n)s(ulibus) // Inter Cassium Frontinum et / Iul[i]um [Alexandrum societa]s dan[i]/s[tariae.

In the context of a *societas danistaria*, both *socii* (Cassianus Frontinus and Iulius Alexander) stipulate a penalty in case of fraud: *si quis do[lo ma]lo fraudem fec[isse de]/ prehensus fue[rit] in a[sse] uno/ (denarium) unum /[denarium] unum XX.* In other words, the penalty is a *denarius* for each *as* i.e., a tenfold penalty, since each *denarius* contained ten *asses*. As it is easy to ascertain, in this text we are dealing with a very different meaning of the expression.

Via Imp. 138 (= AE 1987 93) P(ublius) Annius F[3] / et Annia On[] / aedicul̲am sibi [] / destinaverunt q[u]orum / beneficio monumentu(m) / hoc a solo suscit[a]tu(m) est / in asse partes [] / partes quat[tuor] / habent [

In this case, we are dealing with a funerary inscription – the term *aedicula* seems to allude to a funerary construction in this context[30]) – where the translation of *in asse* (l. 7) is again a little problematic. The editor suggests two possibilities: in the first case *aedicula* could be linked to the preceding verb and in this case we would discover again a testimony of *in asse* as 'in total'; in the second, and according to other sources, it would be also possible to translate as 'costruito asse su asse, soldo su soldo', which would be irrelevant for our topic, except for the fact that this meaning demonstrates the wide scope of this expression[31]). Personally I am inclined towards the first option ('in total'), but as to the rest, this use of the expression does not offer further arguments to solve our problem.

As far as the Trajanic inscription of Henchir Mettich (CIL VIII 25902 = FIRA II^2 100) is concerned, the sense of *in asse(m)* is for us notably more significant because it is formulated in a context where sharecropping is present, which would be unlikely if the expression had technical value to designate the leasing which the sources usually call *in nummis* or *pecunia numerata*. As is widely known, we are dealing with one of the profusely studied inscriptions of the Bagradas Valley (also called today Medjerdá), related to the imperial estates in North Africa and discovered in a period between 1879 and 1906[32]). Our example is the oldest of this group of inscriptions –

[30]) L. Avetta (ed.), Roma – Via imperiale: scavi e scoperte (1937–1950) nella costruzione di via delle Terme di Caracalla e via Cristoforo Colombo, Roma 1985, 149: "aedicula […] può alludere inoltre alla sola nicchia contenete le olle cinerarie".

[31]) G. Nenci, Ab asse quaesitum, in: Riv. Fil. Ist. Class. 92 (1964), 331ff. The author bases his assertion on two funerary inscriptions where this expression (scil. *ab asse quaesitum*) is available: CIL V 2,7647 l. 3 and CIL IX 2029, l. 5. Perhaps it is also the case with CIL V 2,6623 (*vide* bibliography 333).

[32]) Today we have another testimony discovered in 1999, the Lellia Drebbia inscription, which does not offer new arguments for our problem (*vide* M. de Vos, Rus Africum: terra, acqua, olio nell' Africa settentrionale, in: Catalogue of an Exhibition Held at the Palazzo Thun in Trento, Trento 2000, 35ff.). The old literature about these inscriptions – starting from their discovery – is quoted in detail by R. Clausing, The Roman Colonate, The Theories of its Origin, New York 1925, 138ff. Clausing's theories are today quite out of date, because he starts from the outline of N. Fustel de Coulanges, Le colonat romain, Paris 1884, reimpr. New York 1979, 88ff., who tried to establish a continuity of development from the early Principate to the later Empire, which today is far from being shared; *vide* criticism in M. Mirkovic, Later Roman Colonate and Freedom, TAPA (1997), 144ff. and C.R. Whitakker/P. Garnsey, Rural Life in the Later Roman Empire, The Cambridge Ancient History, Cambridge 1998, 277ff., esp. 291ff.; *vide* especially

the Aïn-el Dejamala (CIL VIII 25943 = FIRA I^2 101) supplemented by the Aïn Wassel (CIL VIII 26416 = FIRA I^2 102), the inscriptions and the Souk-el-Khmis (CIL VIII 10570 = FIRA I^2 103, CIL VIII 14464), Gasr-Mezuar (CIL VIII 14428) and Aim Zaga (CIL VIII 14451) – and the only one where the expression *in asse* is present. Just to reconstruct the context of the Henchir Mettich inscription it would be useful to remark that it is perhaps the best testimony about the tenure arrangements in the area and that it is datable to 116–117 AD.

Inscription of Henchir Mettich (CIL VIII 25902) (ILTun, 1303 = AE 1897, 48=AE 1897, 134=AE 1897, 151=AE 1898, 2=AE 1898,137=AE 1903, 365=AE 1910, 56=AE 1952, 209=AE 1953, 130=AE 1962, 375=AE 1988, 1096=AE 1993, 1756=AE 1998, 1509=AE 1998, 1579): [Pro sal]ute / [A]ug(usti) n(ostri) Im[p(eratoris)] Caes(aris) Traiani prin[c(ipis)] / totiusqu[e] domus divin(a)e / [Op]timi Germanici Pa[r]thici data a Licinio / [Ma]ximo et Feliciore Aug(usti) lib(erto) procc(uratoribus) ad exemplu[m] / [leg]is Mancian(a)e qui eorum [i]ntra fund<um> Villae Mag/[n(a)e V]arian(a)e id est Mappalia Siga eis eos agros qui su/[bcesi]va sunt excolere permittitur lege Manciana / ita ut e<o>s qui excoluerit usum proprium habe/at ex fructibus qui eo loco nati erunt dominis au[t] / conductoribus vilicisve eius f(undi) partes e lege Ma/nciana pr(a)estare debebunt hac cond<i>cione coloni / fructus cuiusque cultur(a)e quos ad area(m) deportare / et terere debebunt summas r[eferant] arbitratu / [s]uo conductoribus vilicis[ve ei]us f(undi) et si conduc[to]/res vilici{s}ve eius f(undi) in assem p[artes col(on)icas] datur/as renuntiaverint tabel[lis subsignatis]es cavea/nt eius fructus partes qu[as pr(a)estare] debent / conductores vilici{s}ve eius [f(undi) col]oni colonic/as partes pr(a)estare deb[eant qui i]n f(undo) Villae Mag/nae sive Mappalia(e) Siga(e) villas [habe]nt habebun[t] / dominicas eius f(undi) aut conductoribus vilicis(ve) / eorum in assem partes [fr]uctu(u)m et vinea(ru)m ex / consuetudine Mancian<a> cu[i]usque gene/ris habet pr(a)estare debebunt tritici ex a/rea{m} partem tertiam hordei ex area{m} / partem tertiam fabe ex area{m} partem qu/[]tam vin<i> de lac<u> partem tertiam ol/[ei] [co]acti partem tertiam mellis in alve/{is} mellaris sextarios singulos qui supra // [H(a)]ec lex scripta a Lur(i)o Victore Odilonis magistro et Flavio Gem/inio defensore Felice Annobalis Birzilis // Quinque alveos / habebit in tempore qu[o vin]/demia mellaria fui[t fuerit] / dominis aut conducto[ribus vili]/cisve eius f(undi) qui in assem [colunt] / d(are) d(ebebit) si quis alveos examina apes [vasa] / mellaria ex f(undo) Villae Magnae sive M/appali(a)e Sig(a)e in octonarium agru[m] / transtulerit quo fraus aut dominis au[t] / conductoribus vilicisve eius quam fiat a[lv]/eis(!) exam(in)a apes vasa mellaria mel qui in [eo f(undo)] / erunt conductoribus v[ilicoru]mve(!) in assem e[ius] / f(undi) erunt ficus arid(a)e arbo[res] qu(a)e extra pom[a]/rio erunt qua pomari[um intra v]illam ips[am] / sit ut non amplius iu[sta vindemia] at col[on]/us arbitrio suo co[actorum fructu]m con[ducto]/ri vilicisve eius f(undi) part[em d(are) d(ebebit)] ficeta ve[te]/ra et oliveta qu(a)e ante [hanc lege]m [sata sunt ex] consuet[u]/dine{m} fructu(u)m conductori vilicisve eius pr(a)estar[e] / debea(n)t si quod ficetum postea factum erit eius fi[ceti] / fructu{ct}um per continuas ficationes quinque / arbitrio suo e<i> qui serverit percipere permittitur / post quintam ficationem eadem lege{m} qua s(upra) s(criptum) est / conductoribus vilicisve eius f(undi) p(raestare) d(ebebit) vineas serer[e] / colere loco veterum permittitur ea condicione u[t] / ex ea satione proxumis vindemis quinque fruct[um] / earum vinearum is qui ita fuerit suo arbitr(i)o per/cipeat itemque post

D. Flach, Inschriftenuntersuchungen zum römischen Kolonat in Nordafrika, Chiron 8 (1978), 441ff.; idem, Die Pachtbedingungen der Kolonen und die Verwaltung der kaiserlichen Güter in Nordafrika, ANRW II 10.2 (1987), 427ff.; idem, Römische Agrargeschichte (n. 6) 88ff. and D.P. Kehoe, The Economics of Agriculture on Roman Imperial Estates in North Africa, Göttingen 1988, 28ff.; idem, Law and the Rural Economy (n. 13), 57ff. As for the text, I follow Kehoe's edition, which according his own statement, modifies very slightly Flach's edition of 1978. There is another one between these two editions, that integrated in B. Ben Abdallah, Catalogue des inscriptions latines païennes du Musée du Bardo, Roma 1986, § 388, that I have also consulted.

quinta(m) vindemia(m) quam ita sata / erit fructus partes tertias e lege Manciana conduc/toribus // V[ilicis]ve eius in assem dare debe/bu[nt] [o]livetum serere colere in / eo loc[o] qua quis incultum excolu/erit permittitur ea condici{ci}one u/t ex ea satione eius fructus oliveti q/uid ita satum est per olivationes X pro/ximas decem arbitrio suo permitte/re debeat item pos[t] olivationes ole[i] / coacti partem t[ertiam c]onducto/ribus vilicisve ei[us f(undi) d(are) d(ebebit) q]ui inserue/rit oleastra post [annos qui] nque par/tem tertiam d(are) d(ebebit) Q[] in f(undo) / Vill(a)e Magn(a)e Var[ian(ae) sive] Mappaliae / Sig(a)e sunt eruntve extr[a eos] agros qui / vicias habent eorum a[g]rorum fruct/uus conductoribus vilicisv[e e]ius d(are) d(ebebunt) custodes e/xigere debebu(n)t pro pecora q[u]ae intra f(undum) Vill(ae) M/agn(ae) Mappali(a)e Sig(a)[e] pascentur in pecora sin/gula aera quattus conductoribus vilicisve do/minorum eius f(undi) pr(a)estare debeb[unt] si quis ex f(undo) Vill(a)e / Magn(a)e sive Mappali(a)e Sig(a)e fructus stantem pen/dentem maturum inmaturum caeci[d]erit excider/it exportaverit deportaverit conbuserit desequer/it de qu[o v]enit detrimentum conductoribus vilicisve ei/us f(undi) // [f(undi) c]oloni erit ei cui de [] / [ta]ntum pr(a)estare d(ebebit) [si qui in f(undo) Vill(a)e Mag]/n(a)e siv(e) Mappali(a)e Sig[(a)e se]/verunt severin[t liberis] / qui e legitim[o matrimonio procreati sunt] / testamen[to relinquere licet sup]/erficies [] hoc tempus lege Ma[nciana] / ritu fiducieve data sunt dabuntur / []ius fiduciae lege Mancian<a> serva[bitur qui] / [su]perficiem ex inculto excoluit excoluer[it ibique] / [] aedificium deposuit posuerit {e}i(s)ve qui [coluit colere] / desierit perdesierit eo tempore quo ita ea superfi[cies] / coli desit desierit ea quo fuit fuerit ius colendi dum[taxa]/t bienn(i)o proximo ex qua die colere desierit servatu[r] / servabitur post biennium conductores vilici{s}ve eor[um] / ea superficies qu(a)e proxumo anno culta fuit et coli [desi]/erit conductor vilicusve eius f(undi) ea superficies esse d[icit]/ur denuntiet superficiem cultam [] / denuntiationem denuntiatur ar[] sigalis testa[] / itemque <i>nsequentem annum [persis]tat ea sine quer[el]/a eius {eius} f(undi) post bienium conductor vilicusve cole[re de]/beto ne quis conductor vilicusv[e eoru]m in[q]uilinum [eius] / f(undi) [] coloni qui intra f(undum) Vill(a)e Magn[(a)e sive Mapp]ali(a)e Sig(a)e ha[bit]/abunt dominis aut conduct[oribus vilicisve eorum] in assem [q]/[u]odannis in hominibus [singulis in aratio]nes oper/as n(umero) II et in messem op[eras n(umero) et in sarritiones cuiusque] generi[s] / [s]ingulas operas bin[as] p[r(a)estare debebu]nt colon[i] / inquilini eius f(undi) i[n]tra [] anni n/omina sua con[duc]tor[ibus edere et operas i]n custo/dias singulas qu[as] agri[s pr(a)estare debent]/ra tam seorsum []sum / stipendiarior[um qui in f(undo) Vill(a)e Magn(a)e sive Mappa]li(a)e Sig(a)e habita[bunt operas s]aus c/onductoribus vil[icisve eius f(undi) pr(a)estare debean]t cus[t]/odibus servis dom[inicis] / [] singula [

This inscription preserves some dispositions given by the *procuratores* conceived for the running of the imperial estate known as *fundus Villae Magnae Variana*, also called by its native name, *fundus Mappaliae Sigae*. With the aim of increasing production, the inscription establishes the rules to occupy *subseciva*, i.e., lands not cultivated[33]). *Coloni* are allowed to cultivate the *subseciva* under the *lex Manciana* (I, l.8). In many aspects this set of norms defined the terms of the tenure in a very detailed way and it is likely that the whole regulation derives from a favourable imperial reply.

The expression *in asse* appears six times on this inscription: col. I l. 16, col. I l. 18 and col. I l. 23: Assessment of the rents for crops grown on *subseciva*, and col. I ll. 15–23:

et si conduc[to]/res vilici[s]ve eius f(undi) in assem p[artes col(on)icas] datur/as renuntiaverint tabel[lis subsignatis]es cavea/nt eius fructus partes qu[as pr(a)estare]

[33]) About the concept of *subseciva*, *vide* Kehoe, Economics of Agriculture (n. 32), 37ff., and idem, Law and the Rural Economy (n. 13), 156ff. This scholar affirms that the *lex Manciana* applied to all imperial estates, not only to uncultivated land. I deliberately avoid the question of the nature and scope of the *lex Manciana* and its relationship with the Henchir Mettich inscription.

debent / conductores vilici[s]ve eius [f(undi) col]oni colonic/as partes pr(a)estare deb[eant qui i]n f(undo) Villae Mag/nae sive Mappalia(e) Siga(e) villas [habe]nt habebum[t] / dominicas eius f(undi) aut conductoribus vilicis(ve) / eorum in assem partes [fr]uctu(u)m et vinea(ru)m ex / consuetudine Mancian<a> cu[i]usque gene/ris habet pr(a)estare debebunt)

Col. II l. 5 and col. II l. 12: Assessment of the rents, col. II ll. 1–5 and penalties for the fraudulent removal of equipment used in the production of honey (col. II ll. 6–12):

quinque alveos / habebit in tempore qu[o vin]/demia mellaria fui[t fuerit] / dominis aut conducto[ribus vili]/cisve eius f(undi) qui in assem [colunt] / d(are) d(ebebit) si quis alveos examina apes [vasa] / mellaria ex f(undo) Villae Magnae sive M/appali(a) e Sig(a)e in octonarium agru[m] / transtulerit quo fraus aut dominis au[t] / conductoribus vilicisve eius quam fiat a[lv]/eis(!) exam(in)a apes vasa mellaria mel qui in [eo f(undo)] / erunt conductoribus v[ilicoru]mve(!) in assem e[ius] / f(undi) erunt

Col. III l. 1: Incentives for the cultivation of intensive crops, col. II l. 24–col. III l. 2:

vineas serer[e] / colere loco veterum permittitur ea condicione u[t] / ex ea satione proxumis vindemis quinque fruct[um] / earum vinearum is qui ita fuerit suo arbitr(i)o per/cipeat itemque post quinta(m) vindemia(m) quam ita sata / erit fructus partes tertias e lege Manciana conduc/toribus // V[ilicis]ve eius in assem dare debe/bu[nt]

Col. IV l. 24 (labour services):

coloni qui intra f(undum) Vill(a)e Magn[(a)e sive Mapp]ali(a)e Sig(a)e ha[bit]/abunt dominis aut conduct[oribus vilicisve eorum] in assem [q]/[u]odannis in hominibus [singulis in aratio]nes oper/as n(umero) II et in messem op[eras n(umero) et in sarritiones cuiusque] generi[s] / [s]ingulas operas bin[as] p[r(a)estare debebu]nt

Apart from the diversity of the different contexts, the expression *in asse* has been rightly understood by scholarship starting from the general idea of 'total'. The differences are related to whether the expression is applicable to the price or to the *conductores*. As for the former solution, it was proposed by Schulten who defended that by relying on *partes in assem praestare*. Consequently the expression *in asse* on the whole inscription, meant, in his opinion, to pay the price without any reduction[34]). Flach explains it in a not very different way, by using a German expression: "auf Heller und Pfennig", i.e. down to the last cent[35]). In his edition – published some years earlier – he had translated it in the same sense "voll und ganz"[36]).

For his part Kehoe, also admitting the general meaning 'in total' referring to the *conductores, villici*, etc. translates the expression *in asse* 'as a group'[37]), which I consider more probable, but in any case, the meaning of 'in total' in a context of sharecropping makes, in my opinion, less sense than if this expression was used as a contrast to it, in order to characterize the tenancy *in nummis*.

Kehoe's interpretation underlines that the rents or the penalties ought to be paid to the owners, *conductores* or bailiffs, considered as a group. The same goes for the labours that the *coloni* were obliged to perform.

[34]) **A. Schulten**, Die *lex Manciana*, eine afrikanische Domäneordnung, in: Abhandlungen der Akademie der Wissentschaf zu Göttingen, II 3 (1897), 3ff., esp. 24: "Er bedeutet (*scil.* ‚der Ausdruck') die Quote unvermindert, ohne irgend welchen Abzug leisten".

[35]) **Flach (n. 6)**, 92.

[36]) **Flach (n. 30)**, 441ff., cf. e.g. 482.

[37]) **Kehoe**, The Economics of Agriculture (n. 32), e.g. 36.

6. Conclusions:

I think that the analysis of the sources offers a not very favourable context to interpret *in asse* as a contrast to *in parte*, focused on the risk of tenancy, and that the results are sufficiently underlined. For the sake of convenience, however I shall briefly sum up my conclusions:

1) CIL VI 33840 in my opinion, is far from being an indirect testimony of sharecropping in Italy in the third century AD, as Wenger stated, since the text does not make any explicit contrast between *in asse* and *in parte* (contrast between fixed rent / variable rent), but uses *in asse* alone. The rent is specifically mentioned (a fixed rent in cash) and in this context *in asse* consequently means in total, but alluding to the entire contract: the *colonus* claims that he is the sole tenant for the whole land. It is plausible, bearing in mind economic data, that sharecropping was widely spread in Italy in that time, for example with vineyards, but this inscription does not express any mention to the risk in the tenancy, the actual element that makes the difference of sharecropping.

2) The expression *in asse* does not point to the risk in tenancy. (D. 19,2,25,6 Gai 10 ad ed. prov.) Mommsen's interpretation rests probably on the theory that behind this expression is the comparison 'in total' (referred to the risk assumed) with *in parte*. This contrast however is never present in the sources (whether juristic or literary), at least in what tenancy is concerned. The contrast used by these sources to express the difference between the two types of tenancies is focused on the rent (*in nummis/in parte*), which is probably not the best way to highlight the main difference, i.e., the risk. This element is obviously implied in the case of *in parte* but not in the case of *in nummis* or *in pecunia numerata*, unless we understand under this denomination the use of money not to state that the rent is paid either in money or in kind, but only that the rent is previously fixed according to a certain price, in money. This solution, however, does not offer a clear solution for all the cases.

3) The study of the expression on the other inscriptions does not modify the panorama we have described. *In asse* proves to be a very general expression not easily confined to such a specialized meaning. *In asse* (on Via Imp. 138) could be acceptably translated as 'in total' and it is noteworthy that the text does not expressly imply a second term of comparison. This is also the case in Collumella or in other purely juristic texts. The presence of *in asse* (six times) on the inscription of Henchir Mettich (CIL VIII 25902), a context in which sharecropping is clearly implied, makes even more difficult to accept that it had that specialized meaning (i.e. *in nummis* or *in pecunia numerata*) as the contrast of this kind of tenancy, since is the *colonus partiarius* who is forced to pay *in asse*.

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