ROMAN PRIVATE LAW January 10th, 2017

IV. RESPONSIBILITIES OF THE BUYER (FOR EVICTION AND FOR LATENT DEFECTS)

A. RESPONSIBILITY FOR EVICTION

1. *ACTIO AUCTORITATIS*
2. *STIPULATIO DUPLAE*
3. *ACTIO EMPTI – in duplum* or *in simplum*
4. *ACTIO EMPTI - quanti tua interest rem evictam non esse* or *rem sibi habere*

B. RESPONSIBILITIES FOR LATENT DEFECTS

1. *ACTIO DE MODO AGRI*
2. *STIPULATIO DUPLAE*
3. *ACTIO EMPTI – dolus*
4. *ACTIO REDHIBITORIA*
5. *ACTIO QUANTI MINORIS*

CASE

Salvius is a farmer living in Campania who comes regularly to the markets of Paestum. He comes on the 1st of March with his slaves Stichus and Pamphilus to buy on the cattle market the needed animals for the work that expects him during the spring and summer.

1. Salvius first approached Gneius with questions about two horses and a donkey that Gneius was selling. He would need the horses for pulling the carriage and he inquires about their strength and their suitability for pulling a carriage. Gneius is full of praise for the horses, although he is aware that one of the horses is wilder and is not good for working in pair. Nevertheless, Gneius does not reveal that fact and Salvius buys both horses for 1 500 HS (*sestertii*) each. Salvius will not take the horses immediately, but he will send his slave Stichus in the afternoon to bring them to the guesthouse where he is staying.

2. Regarding the donkey, replying to the question on the donkey's nature Gneius said that he was very strong and beautiful, while at the first sight it was clearly visible that the donkey was smaller than regular animals and a bit skinny. Salvius teases that the donkey is a bit malnourished and Gneius accepts the joke but insists that the donkey is not sick. They make an agreement for a sale of the donkey for 600 HS, what is under the regular prices for donkeys on the market, but Gneius still promised by stipulation duplae that the donkey is healthy. As Salvius does not have any more money on him, he will send it by Stichus who will also pick the donkey, as the horses, in the afternoon.

3. Going further around the market Salvius comes upon Mucius who is selling cattle. Mucius is offering an ox and claims that it is very calm and will be very good for any existing or new herd that Salvius would gather. Salvius checked the ox and decides to buy it for 1 500 HS. He first went to the near-by goldsmith to whom he sold one golden bracelet he brought for the purpose and brings the money to Mucius in half an hour. He will pick the ox in the afternoon.

4. Mucius also brought with him 5 calves (young of cattle) as examples of further 50 calves he has in his farms. They make sales agreement for buying 20 calves that are still at Mucius' farm for 6 000 HS and Salvius will come and pick them in two weeks, when he will also bring the money to pay them.

LEGAL ISSUES

GROUP A (RESPONSIBILITY FOR EVICTION)

1. Stichus has picked the horses and Salvius brings them home. However, on the 5th of May comes his neighbour Sextus claiming that the horses belong to him and they were stolen from the pasture last autumn. Stichus does not want to give the horses so easily as he is not persuaded by Sextus so Sextus decides to sue him.

2. Describe the development of Salvius' position depending on the following conditions:

a) Situation took place in 100 BC.

Gneius vouched by *stipulatio* that the horses belong to him:

1. Salvius contacted Gneius and he joined the suit, but they lost;
2. Salvius did not contact Gneius and he lost the suit.

Gneius did not vouch by *stipulatio* that the horses belong to him:

1. Salvius contacted Gneius, but he refused to join the suit because he knew the horses did not belong to him, and Salvius lost.
2. Salvius contacted Gneius, but he refused to join the suit because even though he did not know the horses did not belong to him, but simply because he did not vouch for that, and Salvius lost.

b) Situation took place in 300 AD.

Gneius did not vouch by *stipulatio* that the horses belong to him:

1. Salvius contacted Gneius, but he refused to join the suit because he knew the horses did not belong to him, and Salvius lost.
2. Salvius contacted Gneius, but he refused to join the suit because even though he did not know the horses did not belong to him, but simply because he did not vouch for that, and Salvius lost.

(TEXTS PROVIDED THE LAST TIME)

LEGAL ISSUES

GROUP B (*STIPULATIO DUPLAE, DICTA PROMISSAVE* AND *ACTIO EMPTI*)

1. Salvius has brought the horses and the donkey home. It the next few weeks it comes to the surface that one horse is wilder and cannot work in the pair as Stichus was driving the carriage and the horse ran it of the way killing Stichus and destroying two amphorae of wine worth 200 HS.
Also, Salvius notices that the donkey is not eating very well and sends for the neighbour Calimachus who acts as veterinarian. Callimachus establishes that the donkey has some parasitic intestinal sickness and cannot eat properly.
Salvius brings the horse and the donkey on the 5th of April to Gneius and asks him to pay back the money and damages for Stichus and amphorae.

2. Describe the development of Salvius' position depending on the following conditions:

a) Situation took place in 77 BC.

1. Gneius will not return the money for the horse and does not want to pay for the damages for Slave and amphorae.
2. Gneius will return the money for the horse, but does not want to pay for the damages for Slave and amphorae.
3. Gneius claims that donkey's sickness is caused by parasites from Salvius' pastures and will not pay the damages *in duplum*.
4. What would happen if Gneius did not promise *stipulatio duplae* for donkey's health?

b) Situation took place in 235 AD.

1. Gneius will not return the money for the horse and does not want to pay for the damages for Slave and amphorae.
2. The donkey carried on the 15 of April two bales of silk across the river but as he was weak the current took him and the silk was lost, although the donkey survived. The damage in the silk was 1500 HS. What can Salvius do?

transferred. There is often a strong possibility that the deterioration in quality might have taken place subsequently; that is why modern German law lays down very short prescription periods, which begin to run, not when the purchaser has (or could have) detected the defect, but from the time of delivery (transfer). However, what may have been an acceptable (if somewhat crude) policy in the small rural community of old, which knew only the executed sale, did not tie in with the refined standards of good faith which governed the classical, executory contract. As in the case of liability for eviction, the protection of the purchaser developed gradually and from a variety of roots.

2. Early remedies

First of all, already in the ancient law we find the actio de modo agri.[91] Where land was mancipated and the vendor had stated by way of a lex mancipio dicta (a formal declaration made in the course of mancipatio) that it was of a particular size, he was liable for the proportionate amount of the price if the actual acreage turned out to be less than asserted. This liability was subject to litiscrescence,[92] i.e. if the vendor (defendant) disputed the claim and had to be sued, he was condemned to pay double the amount involved (infitiando lis crescit in duplum).[93] The actio de modo agri survived in classical law, albeit under new auspices,[94] but fell away together with mancipatio in Justinian's time,[95] Could the purchaser also make the vendor liable for dicta in mancipio, which did not relate to the size of land but to other characteristics, qualities or freedom from defects of res mancipi at large?[96] We do not know, for we have only a statement by Cicero[97] which may be read to imply that the phrase "uti lingua nuncupasset ita ius esto" in tab. 6, 1 of the XII Tables was applied to vitia in general. However, Cicero was no lawyer and his statements do at times display a certain lack of technical precision.

3. Liability for dolus and dicta in venditione

By the time of the late Republic the actio empti had become available where the vendor had acted in such a way that not to make him liable would have seemed in conflict with good faith. Two groups of cases fall into this category. Firstly, the vendor was responsible where he had

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[91] Bechmann, vol. I, pp. 247 sqq.; Lenel, Quellenforschungen in den Edictcommentaren (1882) 3 *ZSS* 190 sqq.; Watson. *Obligations,* pp. 81 sqq.; Kaser, *RPr* I, pp. 133 sq.

[92] Cicero, De *offiais,* 3, XVI-65; Paul. Sent. I, XIX, 1.

[93] Kaser, *RZ,* pp. 99 sq.

[94] Levy, *Obligationetirecht,* pp. 229 sqq.

[95] Cf. e.g. Bechmann, vol. Ill, 2, pp. 218 sqq.

[96] Raymond Momer, *La garantie contre les vices caches dans la vente romaine* (1930), pp. 6 sqq.; Arangio-Ruiz, *Compravendha,* pp. 353 sq.; Olde Kalter, op. cit., note 24, pp. 33 sqq.; Honseil, *Quod interest,* pp. 62 sqq.

[97] *De officiis,* 3, XVI-65.

fraudulently (dolo malo) failed to disclose a defect known to him.[98] The earliest case of which we know was decided by Marcus Porcius Cato. A man of the name of Titius Claudius Centumalus sold his house, which was situated on the mons Coelius, to Publius Calpurnius Lanarius. He did not mention that the augurs had ordered the demolition of this house, because its height obstructed their observation of the flight of birds." About Cato's decision we hear: "[C]um in vendendo rem earn scisset et non pronuntiasset, emptori damnum praestari oportere."[100] A variety of further examples is contained in the Digest, for instance Paul. D. 19, 1, 4 pr.:[101] "Si servum mihi ignoranti, sciens furem vel noxium esse, vendideris, . . . teneris mihi ex empto, quanti mea intererit scisse. . . ." In order to sue the vendor, the purchaser did not have to wait until he lost the slave (by way of noxae deditio).

Secondly, the vendor was also liable under the actio empti, where he had specifically assured the purchaser, in the course of concluding the sale, that the object was free from certain (or all) defects or that it possessed certain qualities.[102] For an example of such liability arising from dicta in venditione we may turn to Pomp. D. 19, 1, 6, 4: "Si vas aliquod mihi vendideris et dixeris certam mensuram capere vel certum pondus habere, ex empto tecum agam, si minus praestes."[103] What necessitated a deviation from caveat emptor in this instance was not so much bad faith on the part of the vendor, but the fact that his dicta had engendered reasonable reliance in the person of the purchaser.

The actio empti, in all these cases, lay for quod actoris interest. One of the most explicit texts is Ulp. D. 19, 1, 13 pr.:[104]

> "Iulianus . . . ait . . . qui pecus morbosum aut tignum vitiosum vendidit . . . si . . . sciens reticuit et emptorem dccepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morbosi pecoris perierunt, quod interfuit idone venisse erit praestandum."

Julian mentions two examples: the sale of defective timber and of animals suffering from a contagious disease. The vendor is liable not

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[98] Monicr, op. cit., note 96, pp. 177 sqq.; Paul van Warmelo, *Vrywaring teen gebreke by koop in Suid-Afrika* (1941), pp. 53 sqq; Stein, *Fault,* pp. 5 sqq.; Honsell, *Quod interest,* pp. 79 sqq. Cf. also David Daubc, "Three Notes on Digest 18. 1, Conclusion of Sale", (1957) 73 *LQR* 379 sqq. (dealing with Gai. D. 18, 1, 35, 8 and fraudulent concealment of (the existence of) a neighbour, so that the estate sold appears larger than it is).

[99] This case lies on the borderline between defectiveness of the object sold and legal defects.

[100] Cicero, *De ojficiis,* 3, XVI—66.

[101] Cf. also, for instance, Viv./Ulp. D. 21, 1, 1, 10; Ulp. D. 21. 1, 38, 7 in fine.

[102] Monier, op. cit., note 96, pp. 134 sqq.; Olde Kalter, op. cit., note 24, pp. 54 sqq.; Stein, *Fault,* pp. 28 sqq. The use of specific words or forms was not required; this was different, for instance, in English law up to the 19th century following *Chandetor v. Loptts* (supra note 82).

[103] Cf. further e.g. Lab. D. 18, 1, 78, 3; Gai. D. 18, 6, 16 (relating to the sale of wine).

[104] Cf. further Pomp. D. 19, 1, 6, 4; Ulp. D. 19, 1, 13, 2; Marci. D. 18, 1, 45 and Medicus, *Id quod interest,* pp. 128, 299; Honsell, *Quod interest,* pp. 87 sqq.

only for the reduced value of the objects themselves but also for consequential loss: if the house that has been built with the bad timber collapses, or if the purchaser's cattle die owing to infection, compensation for these damages is within the compass of the actio empti.

4. Liability arising from specific prormssa

If the purchaser wanted to make sure that the thing sold was either free from specific defects or that it had certain qualities, he could also ask the vendor for a stipulation to that effect.[105] Such promissa were usually combined with the stipulatio duplae against eviction;[106] unlike the latter, however, they did not lie for duplum, but covered the purchaser's interest in the truth of the affirmations. Again, quod interest (in this instance under the actio ex stipulatu) could go beyond compensation for the lesser value of the object sold.[107] There was a somewhat scholastic dispute as to whether such stipulations could in principle be regarded as valid:

> "Si ita quis stipulanti spondeat sanum esse, furem non esse, vispellionem non esse et cetera, inutilis stipulatio quibusdam videtur, quia si quis est in hac causa, impossibile est quod promittitur, si non est, frustra cst. sed ego puto verius hanc stipulationem furem non esse, vispellionem[10fi] non esse, sanum esse utilem esse: hoc cnim continere, quod interest horum quid esse vel horum quid non esse. . . ."[109]

A promise to the effect that the slave sold is healthy, it was argued, is useless: for either the slave is healthy, in which case the stipulation does not have any practical relevance; or he is not healthy—then the vendor has promised something which is objectively impossible. But this argument does not hold water. What the vendor promises is neither the absence of a defect nor the presence of a certain quality, but to pay damages if, contrary to his affirmation, the thing sold does have this defect or does lack the specific quality:

> ". . . hac stipulatione non agitur, ut factum infectum fiat, et quod est non sit, sed quanti interest, furem non esse praestari, vel quanti interest furtum non fieri, quod omnimodo utilem actionem efficiat."[110]

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[105] Monier, op. cit., note 96, pp. 10 sqq.; Arangio-Ruiz, *Compravendita,* pp. 355 sqq.

[106] Cf. e.g. Varro, *De re rustica,* Lib. II, 2, 6; Lib. II, 3, 5; Lib. II, 4, 4; Lib. II, 10, 5.

[107] Honscll, *Quod interest,* pp. 63 sqq.; contra: Medicus, *Id quod interest,* pp. 110 sqq., 117.

[108] A vispellio was a person whose profession it was to carry corpses, not, as has frequently been assumed, a violator of graves. Why would a purchaser not wish to have a vispellio? They stood at the lowest end of the social hierarchy and were usually regarded as very shadowy figures. Meddling with sinister affairs, usually being found in bad company and making their money by burying the poor at night, they were turpes personae. For details, see Uwe Wesel, "Vispellio", (1963) 80 *ZSS* 392 sqq.

[109] Ulp. D. 21, 2, 31.

[110] Cuiacius, as quoted by Honsell, *Quod interest,* p. 66; Arangio-Ruiz, *Compravendita,* p. 357.

surrender the slave (noxae deditio). However, liability attached to the person who was master at the time when the noxal suit was brought: noxa caput sequitur.[167] Hence it was extremely important for the purchaser to know whether acquisition of the slave exposed him to possibly far-reaching delictual claims by third parties.[168]

(d) Dicta promissave

The parties were free to extend the scope of the vendor's warranty beyond these limits; an affirmation (be it by way of dictum in venditione, be it by way of formal promise) that the slave was free from further defects or that he possessed special qualities, which mattered to the purchaser in the individual case,[169] was sufficient.[170] The technical term for these formal or informal declarations was "dicta promissave".[171] They were binding and led to liability under the aedilitian edict.[172]

In practice, it was not always easy to draw a line between dicta and promissa on the one hand and the usual non-binding sales talk on the other. Each vendor is inclined to praise his goods[173] and as long as such praise remains either on a fairly general level or consists in the ostentatious exaggerations of notorious puffers, no sensible purchaser will take it all too seriously; the legal system consequently has no reason for making the vendor liable.

> "Ea quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant, veluti si dicat servum speciosum, domum bene aedificatam: at si dixerit hominem litteratum vel artificem, praestare debet: nam hoc ipso pluris vendit."[174]

That the slave is handsome, the horse well built are statements of a general, non-committal nature. Matters look different if the slave is said to be litteratus (which can mean either literate or learned) or a skilled artisan. Along the same lines Ulpianus distinguishes between "ea, quae

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[167] Gai. IV, 77; Ulp. D. 47, 2, 41, 2; see infra, p. 917.

[168] The vendor also had to declare the nationality of the slave—certain nations seem to have had a very bad reputation concerning the quality of their people; Ulp. D. 21, 1, 31, 21: "Qui mancipia vendunt, nationem cuiusque in venditione pronuntiare debent: plerumque enim natio servi aut provocat aut deterret emptorem: idcirco interest nostra scire nationem . . .". Cf. Impallomeni, op. cit., note 111, pp. 63 sqq.

[169] For instance, that he was an excellent cook: Gai. D. 21, 1, 18, 1.

[170] Cf. Ulp., Gai. D. 21, 1, 17, 20—19, 4.

[171] As to the distinction between dicta and promissa, see Ulp. D. 21, 1, 19, 2. That distinction was not crucial; in fact, the two became increasingly amalgamated. Dictum possibly continued to refer to a (unilateral) declaration by the vendor; promissum implied a bilateral arrangement. See Max Kaser, "Unlautere Warenanpreisungen beim romischen Kauf", in: *Festschrift fur He inrich Demelius* (1973), pp. 128 sq.

[172] Except where the defect was patent. Where, for instance, a slave, whose eyes had been knocked out, was sold and the seller promised that he was "sanus", this stipulation was taken to mean that the slave did not suffer from physical defects apart from his blindness: cf. Flor. D. 18, 1, 43, 1.

[173] "jo tmngs of sale a seller's praise belongs": *Love's Labour's Lost,* Act IV, Scene III, line 237.

[174] Flor. D. 18, 1, 43 pr.

ad nudam laudem servi pertinent: veluti si dixerit frugi probum dicto audientem" and binding statements such as "aleatorem non esse, furem non esse, ad statuam numquam confugisse".[175]

Finally, the vendor was also liable under the edict if he had in any way acted fraudulently.[176]

(e) "Redhibendi iudkium"

Now let us examine the remedies that were provided by the edict. First of all, the purchaser was entitled to ask the vendor for an express warranty in the form of a stipulation that the slave was in fact free from all defects which should have been declared and which were not apparent.[177] Where that warranty was given, the purchaser had the standard remedy of the actio ex stipulatu to claim quod interest in case of breach of warranty. If the vendor refused to comply with this request, there was reason to suspect that something might be wrong with the slave. Hence the purchaser was given the right, within two months, to demand repayment of the price against the return of the slave:

> "Si venditor de his quae edicto aedilium continentur non caveat, pollicentur adversus cum redhibendi iudicium intra duos menses vcl quanti emptoris intcrsit intra six menses."[178]

The point of this "redhibendi iudicium" was that a purchaser whose confidence in the regularity of the transaction had been shattered was allowed to withdraw from it even before a defect had become apparent.[179] After those two months that he was given to decide whether or not he wanted to have the slave, even without warranty, or not, he was still able, within a further four months, to claim quod interest—but only if his interesse had been infringed, i.e. if the slave had in fact turned out to be defective. This is what Gaius seems to state in the latter part of the fragment quoted above, and it may well have been that this claim was based on a fictitious actio ex stipulatu: the purchaser could sue the vendor for what he would have been able to sue him for had the warranty been given.[180] But whether and on what basis

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[175] D. 21, 1, 19 pr. Cf. further Olde Kalter, op. cit., note 24, pp. 48 sqq.; Stein, *Fault,* pp. 29 sqq.; Kaser, *Festschrift Demelius,* pp. 127 sqq.

[176] Ulp. D. 21, 1, 1, 1 in fine: "[Hjoc amplius si quis adversus ea sciens dolo malo vendidisse dicetur, iudicium dabimus." This clause is difficult to understand; see, for example, Monier, op. cit., note 96, pp. 56 sqq.; Impallomeni, op. cit., note 111, pp. 30 sqq.; A.M. Honore, "The History of the Aedilitian Actions from Roman to Roman-Dutch Law", in: *Studies in the Roman Law of Sale in memory of Francis de Zulueta* (1959), pp. 136 sqq. It probably applied in cases such as Flor. D. 18, 1, 43, 2 and Ulp. D. 4, 3, 37; cf. Kaser, *Festschrift Demelius,* pp. 127 sqq., 136 sq.

[177] Ulp. D. 21, 2, 37, 1 in fine (". . . per edictum autem curulium etiam de servo cavere venditor iubetur") and Monier, op. cit., note 96, pp. 87 sqq.; Impallomeni, op. cit., note 111, pp. 44 sqq.

[178] Gai. D. 21, 1, 28. [179] Honsell, *Quod interest,* p. 69.

[180] i.e. the same principles as in the case of the stipulatio duplae: *cf.* supra pp. 295 sqq., 300; Honsell, *Quod interest,* pp. 68 sqq.

LEGAL ISSUES

GROUP C (*ACTIO EMPTI* and *ACTIO REDHIBITORIA*)

1. Salvius brought home the ox he bought from Mucius. However, very soon it became apparent that the ox is quite wild and is causing a lot of trouble to the keepers, while it is also impossible to keep him in the herd. Salvius finds out that the ox is not castrated regularly and pays 100 HS for the healing of animal to veterinarian Callimachus.
Salvius held the ox for next 3 months, but he was still not good enough for working and being in the herd so he decides on the 23rd of July to bring it to Mucius and demand from him to receive him back and give him his money. Also, he requested the payment of extra 100 HS for veterinarian.

2. Describe the development of Salvius' position depending on the following conditions:

a) Situation took place in 122 BC.

Mucius did not vouch by *stipulatio* that the ox is tame:

1. and he rejected to pay back the money for the ox and medical procedure.

b) Situation took place in 255 AD.

Mucius did not vouch by *stipulatio* that the ox is tame:

1. and he rejected to pay back the money for the ox and medical procedure.
2. he rejected to pay back the money for medical procedure, but will give money back for the ox;
3. while going to the market once with the ox Salvius used the ox to pull the carriage of a noble woman from the ditch near the road and she gave Salvius a golden chalice; Mucius said that if he will give back the money for ox, he wants that chalice. Is he right with that demand?
4. What if Salvius kept the ox for 7 months and brought it on the 23rd of November?

5. The aedilitian remedies

(a) The sale of slaves

The most interesting and—in the long run—influential inroad on the principle of caveat emptor originated in the jurisdiction of the aediles curules over market transactions.[111] Economically, one of the most important articles sold on the market were slaves. Slave-traders (mangones) were notoriously ill-reputed people, and thus one had to be particularly careful in one's dealings with them.[112] Warranties relating to the quality of slaves sold by way of stipulation seem to have been so common that the aediles curules felt called upon to regulate the matter comprehensively and to make certain remedies available in their edict.[113] The Digest still preserves the wording of this part of the aedilitian edict:

> "Qui mancipia vendunt certiores faciant emptores, quid morbi vitiive cuique sit, quis fugitivus errove sit noxave solutus non sit: eademque omnia, cum ea mancipia venibunt, palam recte pronuntianto,[114] quodsi mancipium adversus ea venisset, sive adversus quod dictum promissumve fuerit cum veniret, fuisset, quod eius praestari oportere dicetur: emptori omnibusque ad quos ea res pertinet iudicium dabimus, ut id mancipium redhibeatur. . . ."[115]

The individual slaves wore a board on which the vendor was required to inform potential purchasers of everything that could be classified as morbus or vitium.

(b) Morbus and vitium

What did these entail? First of all, only those diseases or physical defects that were not apparent. The aedilitian remedies applied only to latent defects.[116] After all, we are dealing with a market transaction and the purchaser had the opportunity to examine the slaves before he bought any of them. If he did not realize[117] that the slave was female instead of male, that his eyes had been knocked out or that he had a big and

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[111] On the jurisdiction of the aediles generally, see Giambattista Impallomeni, *L'editto degli edili cuntli* (1955), pp. 109 sqq.; Max Kaser, "Die Jurisdiktion der kurulischen Adilen", in: *Melanges Philippe Meylan,* vol. I (1963), pp. 173 sqq.

[112] Cf. e.g. Paul. D. 21, 1, 44, 1.

[113] Introduced in the early part of the 2nd century B.C., perhaps in the year 199; cf. A. de Senarclens, "La date de l'edit des Edilcs de mancipiis vendundis", (1923) 4 *TR* 384 sqq.; idem, "Servus Recepticius", (1933) 12 *TR* 390 sqq.; Impallomeni, op. cit., note 111, pp. 90 sqq.; David Daube, *Forms of Roman Legislation,* pp. 91 sqq.

[114] On the use of imperatives in the aedilitian edict, see David Daube, *Forms of Roman Legislation* (1956), pp. 91 sqq.; Alan Watson, "The Imperatives of the Aedilitian Edict", (1971) 39 *TR* 73 sqq.

[115] Ulp. D. 21, 1, 1, 1.

[116] Ulp. D. 21, 1, 1, 6; Van Warmelo, op. cit., note 98, pp. 13 sqq.

[117] As to the relevant test, see Ulp. D. 21, 1, 14, 10: "Si nominatim morbus exceptus non sit, talis tamen morbus sit, qui omnibus potuit apparere . . ., eius nomine non teneri Caecilius ait, perinde ac si nominatim morbus exceptus fuisset: ad eos enim morbos vitiaque pertinere edictum aedilium probandum est, quae quis ignoravit vel ignorare potuit."

dangerous scar across his face,[118] he had, as Florentinus put it,[119] deceived himself and was precluded from taking recourse against the vendor. Secondly, it is obvious that not every defect could reasonably be expected to be displayed on the board. There is no standardized human being; everybody has some or other characteristics which may possibly be classified as a "defect". "Morbus" was usually defined as

> "habitu[s] cuiusque corporis contra naturam, qui usum eius ad id facit deteriorem, cuius causa natura nobis eius corporis sanitatem dedit".[120]

What mattered was whether the slave's fitness for use was impaired by the disease.[121] Therefore, the slave had to be suffering from a genuine, grave sickness—something which in a different context was referred to as morbus sonticus.[122] "Vitium", the other term mentioned in the edict, like morbus, referred only to physical defects;[123] how it related to morbus, was disputed. Sabinus insisted on the difference between both terms ("vitiumque a morbo multum differre"), but Ulpianus took them to constitute a hendiadys ("ego puto aediles tollendae dubitationis gratia bis κατα ταυ αλ)τοϋ idem dixisse, ne qua dubitatio superesset").[124] But whatever the relationship between morbus and vitium may have been, the more crucial distinction between what amounted to a physical defect or disease, of which the purchaser had to be notified, and what were seen as more minor matters which did not interfere with the use and services of the slave and with which the purchaser had to make do, was an apparently inexhaustible source of a somewhat weird casuistry.[125] Especially the first 15 fragments contained in the Digest titled "De aedilicio edicto et redhibitione et quanti minoris" preserve a wealth of examples.[126] Today they make curious and somewhat melancholic reading—and provide an idea of how eager many Romans

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[118] Cf. Ulp. D. 21, 1, 14, 10: ". . . (ut puta caecus homo venibat, aut qui cicatrkem evidentem et periculosam habebat vel in capite vel in alia parte [aperta?] corporis). . . ."

[119] D. 18, 1, 43, 1.

[120] Sab./Ulp. D. 21, 1, 1, 7; cf. also Aulus Gellius, *Nodes Attkae,* Lib. IV, II, 3.

[121] Ulp. D. 21, 1, 1, 8: "Proinde si quid tale fuerit vitii sive morbi, quod usum minis teriumque hominis impediat, id dabit redhibitioni locum. . . ."

[122] Ulp. D. 21, 1, 4, 5. Morbus sonticus excused the disregard of a summons (cf. tab. 2, 2 of the XII Tables and Aulus Gellius, *Nodes Atticae,* Lib. XX, I, 27). "Sonticus", etymologically, is an adjective from sum (in the sense of "definitely being", "overwhelm ingly real"). The participle "sons" (the one who is) is used in the sense of guilty and lies at the root of the word for sin (both in English and German). On all this, see the analysis by David Daube, "Pecco Ergo Sum", (1985) 4 *RJ* 137 sqq.

[123] Ulp. D. 21, 1, 4, 3: "Et videmur hoc iure uti, ut vitii morbique appellatio non videatur pertinere nisi ad corpora."

[124] Sab./Ulp. D. 21. 1, 1, 7.

[125] "f he jurists are perhaps not at their best in D. 21, 1": A. Rogerson, "Implied Warranty Against Latent Defects in Roman and English Law", in: *Studies in the Roman Law of Sate in memory of Franris de Zulueta* (1959), p. 121.

[126] But see also Aulus Gellius, *Nodes Atticae,* Lib. IV, II.

seem to have been to sell their old and sick slaves.[127] Thus, attention had to be drawn to the fact that the slave suffered from consumption[128] or podagra,[129] from a disease affecting lung, liver[130] or bladder,[131] from morbus comitialis (epileptic fits)[132] or any other chronic diseases.[133] The same applied if the slave was short-sighted,[134] blind during parts of the day[135] or dumb,[136] if he had a tumor or a nasal polypus,[137] if he had been castrated in a way that the organ required for the purposes of reproduction was totally absent,[138] or if he had been born with fingers that were joined together, so that he was prevented from properly using his hands.[139] A female slave was morbosa or vitiosa if due to a uterine disease she could give birth only to dead children,[140] if her vagina was so narrow that she could not become a woman,[141] or if she menstruated twice a month (or not at all, unless that was due to her age).[142] On the other hand, the purchaser could not complain if he subsequently found out that the slave suffered from slight feverishness, from an old quartan fever,[145] or from a light running of the eyes,[144] that in a spell of religious ecstasy he had made oracular pronouncements (as long as that did not occur habitually),[145] that he could only speak with difficulty,[146] stammered or lisped,[147] that he was knock-kneed or bow-legged,[148] that he had been born with a goiter, with protruding eyes,[149] or with more than the ordinary number of fingers or toes.[150] A left-handed slave was not diseased or defective,[151] nor was one who had bad breath or smelled like a goat,[152] who squinted[153] or who passed urine in bed (as long as this was due to sleep, wine or sluggishness in rising, not to a disease).[154] What if the slave had lost a tooth? He was not defective, since otherwise all babies (who have no teeth at all) would have had to be considered defective, too.[155]

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[127] Cf. also Cato, *De agri cultura,* II; Honsell, "Von den adilizischen Recbtsbehelfen zum modernen Sachma'ngelrecht", in: *Gedachtnisschrift jiir Wolfgang Kunkel* (1984), pp. 58 sq.

[128] Ulp. D. 21. 1, 1. 7. [129] J$_{av}$. D. 21, 1, 53.

[130] Ulp. D. 21, 1, 12, 4. [131] Ulp. D. 21, 1, 14, 4.

[132] Jav. D. 21, 1, 53. Epilepsy was referred to as morbus comitialis, because, if the fits occurred in a popular assembly (comitia), an immediate interruption and postponement of the gathering took place, since this was considered a bad omen. Cf. e.g. Berger, ED, p. 587.

[133] Ulp. D. 21, 1, 6 pr. [134] Ulp. D. 21, 1, 10, 3.

[135] Ulp. D. 21, 1, 10, 4 (". , . ubi homo ncque matutino tempore videt neque

[136] Ulp D 21, 1, 9. | [137] Ulp D 21, 1, pr. | [138] Ulp D 21, 1, 7.
[139] Ulp D 21. 1. 14. 6. | [140] Ulp. D 21. 1. pr. | [141] Ulp D 21. 1. H.
[142] Pau D 21, 1, 15. | [143] Ulp. D 21, 1, 1. 8. | [144] Ulp D 21, 1, 4, 6.
[145] Viv /Ulp. D. 1, 1, 10. | [146] Ulp. D 21, 1, 9. | [147] Ulp D 21, 1, 10.
[148] Ulp D 21. 1. 10. 5. | [149] Ulp D 21. 1. 2. | [150] Ulp D 21. 1. 10.
[151] Ulp D 21, 1, 12, 3. | [152] Ulp. D 21, 1, 4. | [153] Ulp D 21, 1. 12,
[154] Ulp D 21, 1, 14, 4. | [155] Paul D 21, 1, 11

(c) Defects of character

Defects of character, as has been indicated, were not covered by the term "vitium".[156] It would have been quite absurd to call every slave defective who was giddy, superstitious, irascible or insolent,[157] timid, avaricious[158] or melancholic,[159] given to gambling, drinking, lying or quarreling.[160] Hardly anybody could have been called healthy or normal under those circumstances. Yet, the lack of some of these vitia animi was so crucial to the purchasers that they usually asked the vendor for a specific assurance to that effect. The aediles curules therefore placed them on the same level as morbi and vitia and made the vendor declare a certain number of character defects, too: whether the slave was a runaway (fugitivus),[161] a person with the habit of roving about (erro),[162] or somebody who had perpetrated a capital crime,[163] who was prone to committing suicide[164] or who had fought wild beasts in the arena.[165] Besides these, there was one other flaw which had to be displayed on the board if the vendor wanted to avoid liability, even though it was neither a physical nor a character defect: whether the slave was still burdened with noxal liability {noxa non solutus).[166] If he had committed a delict, his master was liable: he could either pay the damages as if he had himself been guilty of the delict or he could

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[156] Ulp. D. 21, 1. 4, 3: ", . . animi autcm vitium ita demum pracstabit venditor, si promisit, si minus, non"; Viv./Ulp. D. 21, 1, 1, 10. Brunnemann, *Commentarius,* Lib. XXI, 1, Ad L. Labeo, I, § 3, n. 8 gives this reason: ". . . quta animi vitia facilius poenis, aliisque modis in servis corrigi possimt."

[157] Viv./Ulp. D. 21, 1, 1, 9.

[158] Viv./Ulp. D. 21, 1, 1, 10.

[159] Paul. D. 21, 1, 2.

[160] Pomp./Ulp. D. 21, 1, 4, 2.

[161] For a massive amount of casuistry, see Ulp. D. 21. 1, 17.

[162] For a definition, see Ulp. D. 21, 1, 17, 14.

[163] Ulp. D. 21, 1, 1, 1; Ulp. D. 21, 1, 23, 2.

[164] Ulp. D. 21, 1, 1, 1; Ulp. D. 21, 1, 23, 3, with a very interesting reasoning: ". . . maius servus creditus est, qui aliquid facit, quo magis se rebus humanis extrahat, ut puta laqueum torsit sive medicamentum pro veneno bibit praecipitumve se ex alto miscrit aliudve quid fecerit, quo facto speravit mortem perventuram, tamquam non nihil in alium ausurus, qui hoc adversus se ausus est." A breath-taking piece of early criminology; the person who had attempted suicide had demonstrated that he had no respect for life; he was a bad (and dangerous) person, because he was likely to try to do to another what he had attempted against himself. A modern variant of this idea can be found in §§ 211, 212 StGB (dealing with murder and wilful manslaughter), if Eberhard Schmidhauser's argument ("Selbstmord und Beteiligung am Selbstmord in strafrechtlicher Sicht", in: *Festschrift fur Hans Welzel* (1974), pp. 801 sqq.) is correct that both sections as far as their objective requirements are concerned, place the killing of another and suicide on the same level; their wording is: "Who kills a person . . .", not "Who kills another . . .". Schmidhauser then carries on to argue that, since (attempted) suicide is an unlawful act (which is not punishable only due to an extra-legal exculpation ground), the aider and abettor has committed a crime and can consequently be punished. But see Albin Eser, in: Alfred Schonke, Horst Schroder, *Strafgesetzbuch* (23rd ed., 1988), Vorbcm. §§ 211 sqq., nn. 33 sqq. for the prevailing opinion in German criminal law. On the fascinating topic of the evaluation of suicide in Roman law and society, see the study by Andreas Wacke, "Der Selbstmord im romischen Recht und in der Rechtsentwicklung", (1980) 97 *ZSS* 26 sqq.

[165] Ulp. D. 21, 1, 1, 1.

[166] Ulp. D. 21, 1, 1, 1; Ulp. D. 21, 1, 17, 17-19.

surrender the slave (noxae deditio). However, liability attached to the person who was master at the time when the noxal suit was brought: noxa caput sequitur.[167] Hence it was extremely important for the purchaser to know whether acquisition of the slave exposed him to possibly far-reaching delictual claims by third parties.[168]

(d) Dicta promissave

The parties were free to extend the scope of the vendor's warranty beyond these limits; an affirmation (be it by way of dictum in venditione, be it by way of formal promise) that the slave was free from further defects or that he possessed special qualities, which mattered to the purchaser in the individual case,[169] was sufficient.[170] The technical term for these formal or informal declarations was "dicta promissave".[171] They were binding and led to liability under the aedilitian edict.[172]

In practice, it was not always easy to draw a line between dicta and promissa on the one hand and the usual non-binding sales talk on the other. Each vendor is inclined to praise his goods[173] and as long as such praise remains either on a fairly general level or consists in the ostentatious exaggerations of notorious puffers, no sensible purchaser will take it all too seriously; the legal system consequently has no reason for making the vendor liable.

> "Ea quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant, veluti si dicat servum speciosum, domum bene aedificatam: at si dixerit hominem litteratum vel artificem, praestare debet: nam hoc ipso pluris vendit."[174]

That the slave is handsome, the horse well built are statements of a general, non-committal nature. Matters look different if the slave is said to be litteratus (which can mean either literate or learned) or a skilled artisan. Along the same lines Ulpianus distinguishes between "ea, quae

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[167] Gai. IV, 77; Ulp. D. 47, 2, 41, 2; see infra, p. 917.

[168] The vendor also had to declare the nationality of the slave—certain nations seem to have had a very bad reputation concerning the quality of their people; Ulp. D. 21, 1, 31, 21: "Qui mancipia vendunt, nationem cuiusque in venditione pronuntiare debent: plerumque enim natio servi aut provocat aut deterret emptorem: idcirco interest nostra scire nationem . . .". Cf. Impallomeni, op. cit., note 111, pp. 63 sqq.

[169] For instance, that he was an excellent cook: Gai. D. 21, 1, 18, 1.

[170] Cf. Ulp., Gai. D. 21, 1, 17, 20—19, 4.

[171] As to the distinction between dicta and promissa, see Ulp. D. 21, 1, 19, 2. That distinction was not crucial; in fact, the two became increasingly amalgamated. Dictum possibly continued to refer to a (unilateral) declaration by the vendor; promissum implied a bilateral arrangement. See Max Kaser, "Unlautere Warenanpreisungen beim romischen Kauf", in: *Festschrift fur He inrich Demelius* (1973), pp. 128 sq.

[172] Except where the defect was patent. Where, for instance, a slave, whose eyes had been knocked out, was sold and the seller promised that he was "sanus", this stipulation was taken to mean that the slave did not suffer from physical defects apart from his blindness: cf. Flor. D. 18, 1, 43, 1.

[173] "jo tmngs of sale a seller's praise belongs": *Love's Labour's Lost,* Act IV, Scene III, line 237.

[174] Flor. D. 18, 1, 43 pr.

ad nudam laudem servi pertinent: veluti si dixerit frugi probum dicto audientem" and binding statements such as "aleatorem non esse, furem non esse, ad statuam numquam confugisse".[175]

Finally, the vendor was also liable under the edict if he had in any way acted fraudulently.[176]

(e) "Redhibendi iudkium"

Now let us examine the remedies that were provided by the edict. First of all, the purchaser was entitled to ask the vendor for an express warranty in the form of a stipulation that the slave was in fact free from all defects which should have been declared and which were not apparent.[177] Where that warranty was given, the purchaser had the standard remedy of the actio ex stipulatu to claim quod interest in case of breach of warranty. If the vendor refused to comply with this request, there was reason to suspect that something might be wrong with the slave. Hence the purchaser was given the right, within two months, to demand repayment of the price against the return of the slave:

> "Si venditor de his quae edicto aedilium continentur non caveat, pollicentur adversus cum redhibendi iudicium intra duos menses vcl quanti emptoris intcrsit intra six menses."[178]

The point of this "redhibendi iudicium" was that a purchaser whose confidence in the regularity of the transaction had been shattered was allowed to withdraw from it even before a defect had become apparent.[179] After those two months that he was given to decide whether or not he wanted to have the slave, even without warranty, or not, he was still able, within a further four months, to claim quod interest—but only if his interesse had been infringed, i.e. if the slave had in fact turned out to be defective. This is what Gaius seems to state in the latter part of the fragment quoted above, and it may well have been that this claim was based on a fictitious actio ex stipulatu: the purchaser could sue the vendor for what he would have been able to sue him for had the warranty been given.[180] But whether and on what basis

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[175] D. 21, 1, 19 pr. Cf. further Olde Kalter, op. cit., note 24, pp. 48 sqq.; Stein, *Fault,* pp. 29 sqq.; Kaser, *Festschrift Demelius,* pp. 127 sqq.

[176] Ulp. D. 21, 1, 1, 1 in fine: "[Hjoc amplius si quis adversus ea sciens dolo malo vendidisse dicetur, iudicium dabimus." This clause is difficult to understand; see, for example, Monier, op. cit., note 96, pp. 56 sqq.; Impallomeni, op. cit., note 111, pp. 30 sqq.; A.M. Honore, "The History of the Aedilitian Actions from Roman to Roman-Dutch Law", in: *Studies in the Roman Law of Sale in memory of Francis de Zulueta* (1959), pp. 136 sqq. It probably applied in cases such as Flor. D. 18, 1, 43, 2 and Ulp. D. 4, 3, 37; cf. Kaser, *Festschrift Demelius,* pp. 127 sqq., 136 sq.

[177] Ulp. D. 21, 2, 37, 1 in fine (". . . per edictum autem curulium etiam de servo cavere venditor iubetur") and Monier, op. cit., note 96, pp. 87 sqq.; Impallomeni, op. cit., note 111, pp. 44 sqq.

[178] Gai. D. 21, 1, 28. [179] Honsell, *Quod interest,* p. 69.

[180] i.e. the same principles as in the case of the stipulatio duplae: *cf.* supra pp. 295 sqq., 300; Honsell, *Quod interest,* pp. 68 sqq.

this claim was actually granted, remains a matter of speculation.[181] In the course of time, it was superseded in any event by what has generally become known as "the" aedilitian remedies, the actiones redhibitoria and quanti minoris.

(f) The actxo redhibitoria

Only the first of these actiones was proposed in that part of the aedilitian edict that has come down to us in Ulp. D. 21, 1, 1, 1. If the slave turned out to have one of the defects referred to in the edict, without the vendor having declared it, if a quality that had been specifically warranted was absent or a defect whose absence had been promised was present (i.e. in case of breach of dicta promissave) or if the vendor had acted fraudulently, the purchaser could return the slave and receive back the purchase price.[182] This was the main content of the actio redhibitoria, but there were further implications.[183] Both vendor and purchaser had to be restored to the same position as if the sale had not been concluded ("Iulianus ait iudicium redhibitoriae actionis utrumque, id est venditorem et emptorem, quodammodo in integrum restituere debere").[184] Thus, for instance, the purchaser had to be indemnified if the slave had committed a theft or done some other damage to his property[185] and he had to be reimbursed for what he had expended in connection with the sale.[186] This did not apply to the cost of maintaining the slave, as he did not have to reimburse the vendor for the value of the slave's services either.[187] The vendor, on the other hand, was entitled to "quid ad emptorem pervenit vel culpa eius non pervenit"[188] as, for instance (the usual school-book example), an inheritance which the purchaser had acquired through the slave. Furthermore, the purchaser was liable for any deterioration of the slave due to his (the purchaser's) fault.[189] There was one very important practical restriction on the actio redhibitoria: it could only be brought

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[8] Usually the text is regarded as interpolated, the claim for inlcresse being thought to have been added by a post-classical reviser; cf. e.g. Monier, op. cit., note 96, pp. 104 sqq.; Arangio-Ruiz, *Compravendita,* p. 389. For a different interpretation, see Medicus, *Id quod interest,* pp. 118 sqq.

[182] Technically, condemnation of the vendor was dependent upon restitution of the slave; there was no action that the vendor could bring to get the slave returned. Cf. Ulp. D. 21, 1, 29 pr. and Uwe Wesel, "Zur dinglichen Wirkung der Rucktrittsvorbehalte des romischen Kaufs", (1968) 85 *ZSS* 141 sqq.

[183] For details, see Bechmann, vol. Ill, 2, pp. 118 sqq.; Impallomeni, op. cit., note 111, pp. 137 sqq.; Georg Thielmarm, "'Actio redhibitoria' und zufalliger Untergang der Kaufsache", in: *Studi in onore di Edoardo Volterra,* vol. II (1971), pp. 487 sqq.; Honsell, *Quod interest,* pp. 70 sqq.

[184] Ulp. D. 21, 1, 23, 7; cf. also Ulp. D. 21, 1, 21 pr.

[185] Ulp. D. 21, 1, 23, 8; Paul. D. 21, 1, 58 pr.

[186] Ulp. D. 21, 1, 27; Ulp. D. 21, 1, 29, 3.

[187] Aristo/Paul. D. 21, 1, 30, 1.

[188] Ulp. D. 21, 1, 23, 9.

[18g] Or that of his people ("familia" and "procurator"): cf. Ulp. D. 21, 1, 1, l,;Ulp. D. 21, 1, 25; Ulp. D. 21, 1, 31, 12.

LEGAL ISSUES

GROUP D (*ACTIO EMPTI* and *ACTIO QUANTI MINORIS*)

1A. Salvius picked the calves from Mucius and brought them home. After two weeks, he notices that one of them is sick and dies. After few more days 5 more of the bought calves get sick, as well as 10 calves that belonged to Salvius from before. Two of old calves died.
Salvius called the veterinarian Callimachus and he cured and saved them for 130 HS.

2A. Describe the development of Salvius' position depending on the following conditions in 200 AD:

a) Salvius comes on the 13th of April to Mucius and asks him to repay him for one dead calf and 130 HS for the costs of veterinarian. Mucius declines the request claiming that he did not know about any disease so Salvius sues him. Will he succeed?

b) It came to Salvius' attention that Mucius probably knew about the disease but fraudulently kept it a secret so Salvius comes on the 13th of April to Mucius and asks him to repay him for all three dead calves and 130 HS for the costs of veterinarian. Mucius declines the request so Salvius sues him.

1B. Alternative situation. Salvius picked the calves from Mucius and brought them home. After two weeks, he notices that one of them is sick and after few more days 5 more of the bought calves get sick, as well as 10 calves that belonged to Salvius from before. Salvius called the veterinarian Callimachus and he cured and saved them. All the calves survived, but because of the sickness 10 of the newly bought calves which would become cows would not be able to have young.

2B. Describe the development of Salvius' position depending on the following conditions in 200 AD:

a) Salvius finds about that 11 months after the sale was concluded.

b) Salvius finds about that 14 months after the sale was concluded.

within six months.[190] However, this period began to run only once the defect had become apparent and the purchaser was thus able to discover it[191] (no matter whether he had m actual fact discovered it or not), and it was what was called "useful" time ("sex menses utiles"), that is, those days during which the purchaser was unable to pursue his claim (because of disease, captivity, etc.) were not counted.[192]

(g) The actio quanti minoris; the sale "sub corona"

Alternatively, the purchaser could bring the actio quanti minoris. Even though this remedy is not mentioned in Ulp. D. 21, 1, 1, 1, there is no doubt that it was already available in early classical law.[193] It allowed the purchaser to claim from the vendor "quanto ob id vitium minoris [fujerit,"[194] that is, an amount representing the difference between what the slave was actually worth and what he would have been worth had he been free from defects or possessed the promised qualities. In the end result, that led to a reimbursement of part of the purchase price.[195] The actio quanti minoris could be brought within a year of prima potestas experiundi (vitium).[196]

If the vendor did not want to be responsible at all for the quality of a particular slave (which happened particularly in the case of prisoners of war), he usually made him wear a hat or a wreath, thus selling him "sub corona".[197]

(h) The sale of iumenta

Along very much the same lines the aediles dealt with another typical market transaction that fell under their jurisdiction: the sale of certain livestock.

> "Aediles aiunt: 'Qui iumenta vendunc, palam recte dicunto, quid in quoquc eorum morbi vitiique sit, utique optime ornata vendendi causa fuerint, ita emptoribus tradentur. si quid ita factum non erit, de ornamentis restituendis iumentisvc ornamentorum nomine redhibendis in dicbus sexaginta, morbi autem vitiivc causa inemptis faciendis in six mensibus, vel quo minoris cum venirent fuerint, in anno iudicium dabimus. . . .'"[lyH]

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[190] Ulp. D. 21, 1, 19, 6.
[191] Pap. D. 21, 1, 55.
[142] Windscheid/Kipp, § 104.
[193] Cf. Aulus Gellius, *Nodes Attkae,* Lib. IV, II, 5; and Fritz Pringsheim, "Das Alter der aedilizischen actio quanti minoris", (1952) 69 *ZSS* 234 sqq.; Arangio-Ruiz, *Compravendita,* pp. 381 sqq.; Impallomeni, op. cit., note 111, pp. 194 sqq.
[194] Aulus Gellius, loc. cit.; cf. also Ulp. D. 21, 1, 38 pr.
[195] For details, sec Bcchmann, vol. HI, 2, pp. 160 sqq.; G.A. Mulligan, "Quanti Minoris Than What", (1953) 70 *SALJ* 132 sqq.; Medicus, *Id quod interest,* pp. 124 sq.; Honsell, *Quod interest,* pp. 74 sqq.
[196] Ulp. D. 21, 1, 38 pr. and cf. Pap. D. 21, 1, 55.
[197] Aulus Gellius, *Nodes Atticae,* Lib. VI, IV; as far as exclusion of liability is concerned, *cf.* also Ulp. D. 21, 1, 14, 9 and Impallomeni, op. cit., note 111, pp. 20 sqq.
[198] Ulp. D. 21, 1, 38 pr. See Monier, op. cit., note 96, pp. 46 sqq.; Arangio-Ruiz, *Compravendita,* pp. 380 sqq.; Impallomeni, op. cit., note 111, pp. 75 sqq.

Again, there was the actio redhibitoria, to be brought within six months, and the actio quanti minoris, available for a year. They applied in cases of physical defects or diseases, of which the purchaser had not been notified; also (even though that is not mentioned in the edict) in cases of dicta et promissa.[149] The term "iumenta" (beasts of burden) came to be seen as unduly restrictive; hence a special clause was added to the effect that the remedies were to apply to the sale of cattle in general (pecus).[200] The terms "morbus" and "vitium", again, had to be given concrete meaning in the application of individual cases. We are informed that not everything classed as a disease in slaves could be considered in the same light with regard to animals; castration was a case in point. A horse was taken as sound, even though it might have lost its powers of reproduction completely;[201] not so, for instance, if its tongue had been cut out.[202] Roman traders often seem to have tried to make their cattle look more attractive by splendidly caparisoning them, but then actually delivering them without all these ornamenta (harness, gear, etc.). The aediles did not condone such practices and required the vendor to hand over the cattle in whatever condition it had been offered for sale.[203] If a pair of cattle had been sold and only one turned out to be defective, the other one could also be returned.[204]

6. Extended liability under the actio empti

If we survey what has been said so far and try to sum up the law relating to latent defects at, say, the time of Salvius Iulianus, we must come to the conclusion that the picture was still somewhat patchy. The aedilitian remedies were restricted to the sale of slaves and cattle; furthermore, they applied to market transactions only. The seller of land was liable only if he had overstated its actual acreage. The actio empti covered all types of objects of sale, but was available only in cases of dolus. If the purchaser wished the vendor to be liable on a broader basis, he had to ask him for express warranties (by way of formless dicta in venditione or by formal promissa). Unless such warranties were given, the purchaser's protection was far from perfect. Caveat emptor still prevailed to a large extent.[205]

Ulp. D. 21, 1, 38, 10 (referring only to the actio redhibitoria). [21X1]

(a) Pomp. D. 19, 1, 6, 4 and other texts

Until about three decades ago it was the more or less generally accepted view that classical Roman law never advanced beyond that point. In the meantime, however, a different opinion has been gaining ground.

It is now widely recognized that we can see, in the course of classical jurisprudence, an energetic move towards a generalized liability for latent defects.[206] The vehicle for this development was the actio empti, its motor the "ex fide bona" clause inherent therein. Again (as in the case of liability for eviction) Iulianus seems to have played an important role, but he could take up and build upon the idea of a contemporary of Augustus, Marcus Antistius Labeo. The latter was commenting on a case involving the sale of a vessel,[207] to which we have already briefly referred.[208] According to the traditional opinion, the vendor was liable only for dolus, if that vessel did not turn out to be whole; unless, of course, he had given an express warranty to that effect:

> "[S]ed si vas mihi vendideris ita, ut adfirmares integrum, si id integrum non sit, etiam id, quod eo nomine perdiderim, praestabis mihi: si vero non id actum sit, ut integrum praestes, dolum malum dumtaxat preastare te debere".

Labeo, however, argued that specific dicta or promissa should not be necessary in order to ensure delivery of a vessel that is whole: ". . . et ilium solum observandum, ut, nisi contrarium id actum sit, omnimodo integrum praestari debeat. . . ." In other words: the vendor does not have to give a specific warranty to the effect that the vessel is fit for use; on the contrary, if he does not want to be responsible for its defectiveness, he specifically has to exclude liability.[209] But what did the liability entail? This was spelt out by Iulianus:

> ". . . ait enim, qui pecus morbosum aut tignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus si id ita esse scissem."[210]

This seems to be the actio quanti minoris; and yet, as we can see from the second example (tignum vitiosum), we are not dealing with aedilitian liability but with the normal actio empti. That is confirmed by other texts. Marc. D. 18, 1, 45 deals with the sale of clothes which turned out to be renovated rather than new (". . . si vestimenta interpola quis pro novis emerit"). Iulianus opines "si quidem ignorabat venditor, ipsius rei nomine teneri". What this means is that, once again, the purchaser can achieve a reduction in the purchase price.[211] But this

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[206] Ulrich von Lubtow, "Zur Frage der Sachmangelhaftung im romischen Recht", in: *Studi in onore di Ugo Enrico Paoli* (1955), pp. 492 sqq.; Olde Kalter, op. cit., note 24, pp. 116 sqq.; Honsell, *Quod interest*, pp. 80 sqq.; Kaser, *RPr* I, p. 558.

[207] Pomp. D. 19, 1, 6, 4.

[208] Cf. supra, p. 309.

[209] Cf. further Ulp. D. 19, 1, 11, 7: "Venditorem, etiamsi ignorans vendiderit, fugitivum non esse praestare emptori oportere Neratius ait."

[210] Ulp. D. 19, 1, 13 pr.

[211] For details, see Honsell, *Quod interest*, pp. 85 sqq.

was not the only result to which application of the actio empti could lead.

> "Si quis virgmem se emcrc putasset, cum mulier venisset, ct sciens errare cum venditor passus sit . . . ex empto compctcrc actionem ad resolvendam emptionem. . . ."[212]

This looks like the actio redhibitoria in the guise of the actio empti; and a few lines above this text we find, indeed, the more generalized statement, attributed already to Labeo and Sabinus, that "[rjedhibitionem quoque contineri empti iudicio".[213]

(b) Reception of the aedilitian principles into the ius civile

What seems to have happened is that the principles laid down in the aedilitian edict were gradually received into the ius civile.[214] On the one hand, with the growing complexity of Roman economic life, there was less and less justification for the simple and straightforward caveat emptor. It became standard practice to add an express warranty to sale transactions, even outside the market place, and sooner or later this warranty was no longer perceived as a mere accidentale, but obtained the status of a naturale negotii. On the other hand, the aedilitian edict offered a reasonably satisfactory model set of rules, of which the lawyers could avail themselves in order to accommodate the need for an extended protection of the purchaser. These rules were well balanced, particularly in so far as they imposed an "objective" liability on the vendor (that is, he was liable irrespective of whether he was at fault or whether he had made special assertions), but they did not allow the purchaser to claim his full damages (quod interest); furthermore, their application was confined to certain, generally physical, defects. Thus, as far as the ius civile was concerned, a system of graduated liability could be built up by phasing in aedilitian principles where no liability had previously existed. Hence we find Iulianus stressing the difference between the vendor sciens and ignorans, the former being liable for "omnia detrimenta, quae ex ea emptione emptor traxerit", the latter only for quanti minoris.[215] All in all, then, warranty for latent defects was taken to be implicit in the contract of sale, even in cases where the seller had not known about the defects himself. This warranty, implied by law, was based on a generalization of the aedilitian remedies and was effected by means of a more refined interpretation of what was owed, in good faith, under the actio empti. The aedilitian rules were read into the "oportere ex fide bona" clause of the general action on sale and

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[212] Ulp. D. 19, 1, 11, 5; Medicus, *Id quod interest*, pp. 146 sq.
[213] Ulp. D. 19, 1, 11, 3.
[214] Cf., particularly, Montz Wlassak, *Zur Geschichte der negotiorum gestio* (1879), pp. 169 sqq.; Bechmann, vol. III, 2, pp. 174 sqq.
[215] Ulp. D. 19, 1, 13 pr.; cf. also Iul./Marci. D. 18, 1, 45.

there can be little doubt today that the texts, on which this statement is based, are substantially genuine.[216]

(c) The position under Justinian

Nothing much remained to be done by Justinian. With the actio empti a satisfactory remedy was available to cope with the problems arising from latent defects. The purchaser could use it to claim quod interest, to ask for redhibition or for quanti minoris. In view of this, one might have expected Justinian to abolish the aedilitian remedies, for they had become redundant. Since the office and jurisdiction of the aediles had been abolished,[217] the difference between the actiones redhibitoria and quanti minoris on the one hand and the actio empti on the other did not even have jurisdictional relevance and consequences any longer. In fact, however, they were not only retained as an appendage to the law of sale,[218] but their range of application was extended beyond slaves and cattle to cover the sale of all things "tarn earum quae soli sint quam earum quae mobiles aut se moventes".[219] The continued existence of the aedilitian remedies is evidence of the traditionalism of both the East Roman school jurisprudence and Justinian.

7. Actio empti and aedilitian remedies in the ius commune

(a) "Miretur veto aliquis, cur Aediles introduxerunt actiones . . . "

From the time of the intellectual rediscovery of the Digest in Bologna down to the days of the pandectists, the unfortunate coexistence of two sets of remedies both dealing with latent defects in the thing sold has caused difficulties.[220] Of course, only the actio empti was available, if

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[216] The classicality of the actio empti against the venditor ignorans has been recognized for centuries (cf. still Vangerow, *Pandekten,* vol. Ill, p. 302; Wlassak and Bechmann supra, note 214). In view of the texts referred to above, a contrary view can only be maintained on the basis of extensive interpolation assumptions: cf. Franz Haymann, *Die Haftutig des Verkdufers for die Beschaffenheit der Kaufsache,* vol. I (1912), pp. 71 sqq.; Van Warmelo, op. cit., note 98, pp. 55 sqq.; Pringsheim (1952) 69 *ZSS* 293 sqq.; Impallomeni, op. cit., note 111, pp. 247 sqq.; Honore, *Studies de Zulueta,* pp. 137 sqq. (but see pp. 143 sq.). Today, one tends to adopt a more conservative and cautious approach, as far as the corruption of classical texts is concerned; hence the renaissance of the pre-interpolationist view of the range of the actio empti.

[217] Mommsen, *Romisches Staatsrecht,* vol.11, 1, p. 522.

[218] Cf. Const. Omnem 4; Const. Tanta 5; Levy, *Obligationenrecht,* pp. 223 sq.; Monier, op. cit., note 96, pp. 186 sqq.

[219] Ulp- D. 21, 1, 1 pr. (interpolated); cf. further e.g. C 4, 58, 4, 1 (dealing with the sale of "pestibilis fundus, id est pestibulas vel herbas letiferas habens"). Cf. e.g. Monier, op. cit., note 96. pp. 161 sqq.; Van Warmelo, op. cit., note 98, pp. 16 sqq.; Arangio-Ruiz, *Compravendita,* pp. 394 sqq.; Impallomeni, op. cit., not 111, pp. 265 sqq. The aedilitian remedies and the actio empti stood in a relationship of elective concurrence.

[220] For details of the historical development of the law relating to latent defects in things sold, cf. Van Warmelo, op. cit., note 98, pp. 58 sqq.; Honore, *Studies de Zulueta,* pp. 132 sqq.; Norbert Burke, *Einschrdnkungen der ddilizischen Rechtsbehelfe beim Kaufvon der Rezeption bis zur Gegenwart* (unpublished Dr. iur. thesis, Munster, 1967); Walter-jurgen Klempt, *Die Crundlagen der Sachmdr'gelhaftutig des Verkdufers im Vemunjtrecht und Usus modertius*