

8 The Ignorant Seller's Liability for Latent Defects: One *Regula* or Various Sets of Rules?

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A. INTRODUCTION

In 1999 a European Directive was issued that required specific protection for the buyer of consumer goods. This was subsequently implemented in the various European jurisdictions. When repair or replacement of these goods, in the case of non-conformity, is impossible or cannot be demanded or when the seller refuses to provide either of these solutions, the buyer has the remedies of reduction in price and rescission.¹ The corresponding liability of the seller does not necessarily depend on explicit warranties, contractual clauses or any kind of malicious intent (*mens rea*) on his side, but is simply imposed by the law or based on an implied warranty. In the Netherlands, the implementation of the Directive resulted in some changes in the civil code. These were promulgated in 2003. The remedies of price reduction and rescission, just mentioned, were adopted in a specific provision for sale contracts in book seven of the code (art 7:22 BW), next to the already existing general rules on rescission in view of breach of contract in book six (art 6:265 ff. BW).

Because of the many similarities between, on the one hand, these remedies of price reduction and rescission and, on the other, the Roman law *actio quanti minoris* and *actio redhibitoria*, it was argued that the ties between contemporary Dutch private law and Roman law in this respect had again become apparent. These ties had been severed in 1992, when, together with the introduction of the new Dutch civil code, the specific rule on the seller's liability for latent defects of the previous civil code, dating from 1838 (art 1543 OBW), had lost the force of law.² General concepts of liability for latent defects – a kind of precursor of the provisions imposed by the European Directive – can already be found in early modern times.³

The sources of Roman law, especially the *Corpus iuris*, are not characterised by general rules of law; but if the concepts mentioned above are substantially based on Roman law, some rules must have already developed out of the casuistic texts of the *Corpus iuris*. Cases dealing with the seller's liability for latent defects can be found in the Digest and Code titles on the remedies of

1 See art 3 (2) of the EU Directive 99/44, dealing with warranties to consumers within the European market. See also R Sefton-Green, *Mistake, Fraud and Duties to Inform in European Contract Law* (2005); for the links between Roman and contemporary law, see the chapter by M Schermaier in that volume.

2 J J Verhoeven, "Verborgen gebreken bij koop" (1990) 39 *Ars Aequi* 495; K Krzeminski, "Ad Edictum Aedilium Curulium; De Romeinsrechtelijke grondslag van de aansprakelijkheid voor verborgen gebreken" (2005) 54 *Ars Aequi* 692; J J Verhoeven, "Het gelijk der curulische aedielen; naar een moderne uitleg van de regeling betreffende de conformiteit bij koop in geval van verborgen gebreken" (2006) 23 *Groninger Opmerkingen en Mededelingen* 17.

3 H Coing, *Europäisches Privatrecht, Band I, Älteres Gemeines Rechts (1500 bis 1800)* (1985) 452-453.

sale (D 19.1, *de actionibus empti et venditi* and C 4.49, *de actionibus empti et venditi*), as well as those on the aedilician edicts (D 21.1, *de aedilitio edicto et redhibitione et quanti minoris*, and C 4.58, *de aedilitiis actionibus*). It is the purpose of this contribution to investigate the way in which developments in medieval learned law contributed to the formation of a more general doctrine on the seller's liability for latent defects, as far as such liability is imposed by the law, in other words, not based on warranties or contractual clauses voluntarily agreed upon by the parties, or on the seller's malicious intent.

B. ROMAN LAW

Before investigating the medieval commentaries on the texts of *Corpus iuris* relevant to our issue, it is necessary first to come to grips with the texts of the *Corpus iuris* itself. This has to be done from the appropriate perspective.

From the beginning of the twentieth century, after the *Corpus iuris* had lost its significance for legal practice even in the German territories, the focus of the majority of Romanists has generally been directed towards historical developments during Roman antiquity revealed by the texts of the *Corpus iuris*, with much attention being paid in particular to the classical period of Roman law (from the beginning of our era until the end of the third century CE). As will be explained below, this approach is not that of the medieval jurists and, if we are not sufficiently conscious of this, our perception of medieval scholarship can be obscured. On the other hand, it is this historical development prior to the compilation of the *Corpus iuris* that can explain the problems in interpretation that occur when we attempt to understand the texts of the *Corpus iuris* as provisions of consistent legislation.

(1) Traces of historical developments in the *Corpus iuris*

As regards the question of the ignorant seller's liability for latent defects, we can roughly distinguish three stages of historical development in Roman Antiquity. The first starts with the introduction of the aedilician edicts at the beginning of the second century BCE. Before that time, the regular contractual remedy for the buyer – the *actio empti* – was already in existence; but it is very doubtful whether this remedy, being a *iudicium bonae fidei*, could be used against an ignorant seller. The aedilician edicts, promulgated by magistrates with jurisdiction in the marketplace, known as the *aediles curules*, offered the buyer remedies for rescission (the *actio redhibitoria* or *aestimatoria*) and price reduction (the *actio quanti minoris*) for the case where a slave or beast of burden, purchased at the market, showed latent defects. The edicts

imposed upon the seller a duty to reveal to the buyer possible defects in the merchandise and to give him certain warranties. Moreover, under the edicts the seller was liable even for defects of which he was unaware. The texts of the edicts themselves were incorporated in the Digest of Justinian. The one for slaves can be found in D 21.1.1.1, and that for beasts of burden in D 21.1.38pr (with a later addition for all the other cattle in D 21.1.38.5). The *actio quanti minoris* was not mentioned explicitly in the edict for slaves, but nevertheless appears to have been applied to the sale of defective slaves (cf D 21.1.55).

The second stage of development we can trace in the *Corpus iuris* dates back to the period of classical Roman law. In view of the social need to grant the buyer better protection beyond the sphere of the marketplace,⁴ the regular contractual remedy of sale – the *actio empti*, which was actually older than the aedilician edict – was applied by analogy with the aedilician remedies. In the formulary procedure this could presumably be achieved by interpreting the clause “ex fide bona” of the *actio empti* as covering the observance of aedilician principles.⁵ This implies that it began including a liability of ignorant sellers. Some texts indicate that the seller who was unaware of the defects, and thus acting in good faith, could be held liable under the *actio empti* of civil law. Moreover, this remedy now was applied to claim price reduction (D 19.1.13pr) and rescission (D 19.1.11.3).

The third and final stage of development originated in Justinian's decision to retain the old remedies of the aedilician edicts, which in his days had become more or less redundant, and to extend their application. This development is clearly visible in the *Corpus iuris*. The Digest and Code contain, next to the titles on the remedies for sale (*de actionibus empti et venditi* – D 19.1 and C 4.49), separate titles on the aedilician edicts (D 21.1, *de aedilitio edicto et redhibitione et quanti minoris*, and C 4.58, *de aedilitiis actionibus*). Moreover, according to D 21.1.1pr and D 21.1.63, the aedilician edict for the sale of slaves also applies to other things. These two texts are regarded as containing Justinianic interpolations. However, only a few examples of goods

4 M Wlassak, *Zur Geschichte der negotiorum gestio. Eine rechtshistorische Untersuchung* (1879) 169-XXX. This opinion was followed, amongst others, by H Honsell, *Quod interest im bonae-fidei iudicium. Studien zum römischen Schadenersatzrecht* [= Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte LV] (1969) 81-82 [please check]; and Kaser, *RPR*² 558. In some of the older literature D 19.1.13pr and D 19.1.11.3 were still presumed to be interpolated. See G Impallomeni, *L'Editto degli edili curuli* (1955) 245, 251; and P Stein, “Medieval discussions of the buyer's actions for physical defects”, in D Daube (ed), *Studies in the Roman Law of Sale Dedicated to the Memory of Francis de Zulueta* (1959) 102.

5 It may be argued, though, that it is not very obvious to grant a *iudicium bonae fidei* such as the *actio empti* against a seller who is not to blame for anything. The liability is usually explained as resulting from a breach of duty of care: being owner, the seller is the first to notice the defect and should inform the buyer.

with latent defects, other than slaves or cattle, can be found in the Digest title on the aedilician edicts (D 21.1, *de aedilitio edicto et redhibitione et quanti minoris*), containing replies from classical jurists. The same holds good for the imperial constitutions adopted in the title *de aedilitiis actionibus* of the Code (C 4.58).⁶

(2) Justinianic law

To understand how the texts of the *Corpus iuris* were interpreted during the Middle Ages and how they could serve as material to build up a doctrine on liability for latent defects, it is important not to approach the texts in the fashion of those many modern Romanists who concentrate on the developments in the law of antiquity prior to the compilation of the *Corpus iuris*. This was by no means the approach of the medieval scholars. These jurists were perfectly aware of the historical genesis of the Roman law embodied in the *Corpus iuris*. They knew exactly when the classical jurists and the emperors had lived, but nonetheless they did not approach the *Corpus iuris* as if it were a historical source. They considered all texts of the *Corpus iuris* to be provisions of one and the same scheme of legislation, having an equal force of law and promulgated at approximately the same time, namely in the sixth century by Justinian. Accordingly, it did not matter whether a text originated from pre-classical, classical, or post-classical times, or whether a text was interpolated either by Justinian or earlier in post-classical compilations of classical replies. It is necessary to adopt this perspective to understand medieval legal scholarship.

Reading these texts, containing such traces of historic development, as provisions of consistent legislation containing no contradictions leads to problems in interpretation. The *Corpus iuris* appears to contain two separate kinds of remedy for the buyer of goods with latent defects in order to hold the seller liable: first, the *actio empti*, and secondly, the aedilician actions. Both seem to be available for the same kinds of defects. The aedilician actions had originally only applied to slaves and cattle with an illness (*morbus*) or a certain (corporeal) defect (*vitium*); but, since Justinian extended the application of the aedilician actions to the sale of things other than just slaves and cattle, the range of defects should be understood as extended beyond those mentioned specifically in the original edicts.⁷ Such defects, not mentioned in the edicts,

⁶ D 21.1.49 and C 4.58.4 (Diocletian) deal with sale of defective plots of land.

⁷ See also for the Justinianic reform, N Donadio, "Garanzia per i vizi della cosa e responsabilità contrattuale", in E Jakab and W Ernst (eds), *Kaufen nach Römischem Recht. Antikes Erbe in den europäischen Kaufrechtsordnungen* (2008) 61 at 69-71.

included, for example, poisonous herbs growing in the plot of land one had bought. Some defects, however, remained exempted from application of the aedilian edicts.

At the same time, there were certain defects where the *actio empti* could not be used. Furthermore, both kinds of remedy, the *actio empti* and the aedilician actions, were aimed or could be aimed at the same purpose, namely price reduction or rescission. Finally, both kinds of remedies seem to have been available against a seller in good faith, that is, someone who was not aware of the defects. As regards the use of the *actio empti* against the ignorant seller of defective goods, the texts in the Digest are not unequivocal. This resulted in a debate among the glossators. Moreover, in the cases where ignorant sellers appear to be liable, no general pattern can be found regarding the extent of their liability.

The most striking difference between the two types of remedy is that the *actio empti* originated in the *ius civile* or civil law (originally resulting from legislation, plebiscites, decisions of the Senate, imperial constitutions, and so on), whereas the *actio quanti minoris* and the *actio redhibitoria* belonged to the *ius honorarium* or praetorian law (originally resulting from the edicts of the magistrates). Though the distinction between civil and praetorian actions was still preserved in the *Corpus iuris* (see J Inst 4.6.3), it had lost its procedural significance. Since the formulary procedure had come to an end (342 CE), it was no longer necessary in civil litigation to request the magistrate for an action that derived from either civil law or praetorian law. But one important rule was preserved (J Inst 4.12pr): civil-law actions were perpetual, praetorian actions temporal or time-limited.

Before turning to the commentaries of the glossators and commentators, it is first appropriate to present a general outline of the provisions of the *Corpus iuris* relating to the ignorant seller's liability for latent defects. These provisions centred around the specific use of the *actio empti* for price reduction or rescission in the titles D 19.1 and C 4.49, and the remedies of the aedilician edicts in titles D 21.1 and C 4.58 – namely the *actio quanti minoris*, the *actio redhibitoria*, and the *actio in factum*. The *Corpus iuris* indicates that the *actio empti* was the primary remedy, and the aedilician actions the additional ones. This follows from the composition of the Digest, as explained in the introductory constitutions by Justinian himself. All that was introduced by laws concerning purchase and sale should have a prominent position within the books on patrimonial law (*de rebus*), that is, books twelve to nineteen of the Digest. Provisions derived from the former aedilician edicts are compiled in an additional book in the fourth part, to wit the twenty-first book of the

Digest, which necessarily has its place not far from the contracts of sale, as if these provisions were their subordinates (*ministrae*).⁸ According to Justinian, the aedilician remedies developed from their beginning as attendants (*pedisequae*) in the wake of the remedies for sale.⁹ This precedence of the civil law *actio empti* over the praetorian actions of the aedilician edicts is, moreover, confirmed by the idea, still preserved in the *Corpus iuris*, that it is the task of the *ius honorarium* to support, supplement and rectify the *ius civile* (D 1.1.7.1).

The main provisions dealing with the use of the *actio empti* as a remedy for latent defects can be found in D 19.1.13pr and C 4.49.9.¹⁰ The opening lines of D 19.1.13pr are generally phrased as if they were a rule of law not limited to the sale of certain goods or the existence of certain defects, although some specific examples follow. When the seller is unaware of the defects, the remedy (*actio empti*) can be used to claim price reduction. When the seller knowingly sold the defective object, the buyer can, on the other hand, claim compensation for his interest that amounts to full damages including consequential losses. As stated above, there are, however, some texts in the same Digest title where a seller in good faith appears not to be liable. This is the case where the slave he sold is a thief (D 19.1.13.1) or taxes (*tributum*) are due for the plot of land he sold (D 19.1.21.1). Other fragments in the Digest seem to confirm that D 19.1.13pr has a general purport. This possibility was at least discussed in later times by the medieval jurists.

D 19.1.13pr and C 4.49.9 also make clear the way in which assessment of price reduction is supposed to take place. The buyer can claim the difference between what he paid and what he would have paid if he had known of the defect (*quanto minoris empturus esset*). Thus, it is not the objective difference in value that is owed, and certainly not as much as the buyer's interest. The generally-phrased rule of D 19.1.13pr does not mention the possibility of claiming rescission, but other texts in the same title show that the *actio empti* can also be used for this purpose. In D 19.1.11.3 this is again phrased in general terms: rescission in view of latent defects is also covered by the *actio empti*. Other texts, however, have a mere casuistic character: the *actio empti* is used for rescission of the sale of a slave-woman whom the buyer erroneously considered to be virgin.¹¹ There is no indication whatsoever that

⁸ *Constitutio Omnem* § 4.

⁹ *Constitutio Tanta* § 5.

¹⁰ The cases, however, are not identical. In D 19.1.13pr the seller did not give any specific information concerning the merchandise; in C 4.49.9 he did, namely the amount of *capitatio* due for the plot of land, which was sold.

¹¹ D 19.1.11.5.

the use of the *actio empti* for price reduction or for rescission was limited to a certain period of time. Being a civil action, it was perpetual.

The most important, generally-phrased lines, dealing with the aedilician actions¹² – the *actio redhibitoria*, the *actio quanti minoris* and the *actio in factum* – can be found in D 21.1.1.1 (the edict for slaves) and D 21.1.38pr (the edict for beasts of burden). The aedilician edicts primarily imposed a duty upon the seller to provide the buyer with the necessary information concerning the merchandise and to give certain warranties. Moreover, as appears from D 21.1.1.2, the edict for the sale of slaves was applicable also to cases where the seller was unaware of any defects. It was argued that this was not unfair because the seller was in a position to know these defects, and it made no difference to the buyer whether he was deceived by the seller's lack of knowledge (*ignorantia*) or by the latter's slyness (*calliditas*). As stated above, the edict for slaves applied, according to its own wording, also to the sale of "immovables, movables as well as living things",¹³ and, according to another text, even to all other goods (*venditiones ... ceterarum quoque rerum*).¹⁴ Accordingly, the provision was supposed to have a wide application, making the other edict, that is the one for beasts of burden reproduced in D 21.1.38pr, more or less superfluous, unless one argued that the latter still had some significance, since D 21.1.1.1 mentions only rescission and D 21.1.38pr includes the remedy for price reduction. But, as seen above, other texts in title D 21.1 make clear that, in the case of defective slaves, it was possible to claim reduction of the selling price. The fact that the examples given in the Digest, where the aedilician remedies applied, almost exclusively cover cases of defective slaves and cattle has a historic reason and does not mean that the application is limited to such merchandise. Accordingly, the defects which resulted in liability should not have been seen as limited to illnesses (*morbi*) and corporeal defects (*vitia*).¹⁵ There was only a limited number of defects where the aedilician actions did not appear to be applicable, although sometimes the *actio empti* could nevertheless be used. These included the cases of slaves with certain mental defects¹⁶ and the sale of a slave-woman erroneously considered to be a virgin.¹⁷ Other cases, where the Digest explicitly and in more general terms maintained that the aedilician liability for

12 In some specific instances in title D 21.1, such an *actio in factum* is granted to claim reimbursement of the selling price or rescission (see D 21.1.31.17, 22).

13 D 21.1.1pr.

14 D. 21.1.63.

15 C 4.58.3 mentions a plot of land with poisonous herbs; cf also D 21.1.49.

16 D 21.1.4.

17 D 19.1.11.5.

latent defects was excluded, included a purchase from the Imperial Treasury (*fiscus*),¹⁸ and the *emptio simplaria*.¹⁹ The term *simplaria* probably referred to daily purchases of minor importance.²⁰

The main differences between, on the one hand, the *actio empti* used for price reduction and rescission and, on the other, the aedilician actions, used for the same purposes, exists in the fact that the praetorian remedies were only available within a limited period of time. The *actio redhibitoria* had to be brought within six months from the day the contract of sale was concluded,²¹ or from the moment the defect became known to the buyer or the buyer could have known of it.²² The *actio quanti minoris* had to be brought within one year from the day the contract of sale was concluded.²³ Finally, there was also a difference between the *actio empti* and the *actio quanti minoris* as regards the assessment of price reduction. Whereas the first remedy was aimed at the difference between the selling price and what the buyer would have paid if he had known of the defect,²⁴ the second was aimed at the difference between the selling price and the actual, that is, the objective market value of the defective object.²⁵

It may be questioned in which way the compilers considered the praetorian actions to add something to the civil remedy. In the *Corpus iuris* the civil *actio empti* seems to be the primary remedy for latent defects, but its applicability was somewhat wider than that of the aedilician actions. It can be used for some defects that the aedilician edicts did not cover and its use was not restricted to a limited period of time. If indeed praetorian law supported, supplemented and rectified civil law, as D 1.1.7.1 stated, and Justinian wanted the aedilician actions to function as remedies additional to the remedy of sale, what could these actions offer? The only obvious advantage is the fact that the objective assessment of the price-reduction of praetorian law could sometimes result in a higher amount than the subjective assessment of civil law. It is possible, of course, to question whether this was sufficient ground for not abrogating the aedilician edicts, and to ask what other reasons might have induced Justinian to adopt in his legislation the two titles on the aedili-

18 See D 21.1.3.

19 D 21.1.48.8.

20 In H G Heumann and E Seckel, *Handlexikon zu Quellen des römischen Rechts* (many editions) *simplarius* is described as *geringfügig*.

21 D 21.1.38pr; C 4.58.2; D 21.1.19.6.

22 D 21.1.55.

23 D 21.1.19.6. On the *annus utilis*, see D 21.1.38pr and C 4.58.2;

24 See *quanti minoris empturus esset, si ... scisset* in D 19.1.13pr or *quanto, si scisset emptor ab initio, minus daret pretii* in C 4.49.9.

25 See *quo minoris cum venirent fuerint*, D 21.1.38 and D 21.1.31.5.

cian actions next to those on the actions of sale. Usually this is ascribed to the traditionalistic tendencies of both Justinian himself and the Eastern law schools. No matter what the reason may have been, the medieval jurists encountered two distinct remedies and two distinct sets of rules, and, as will be seen, this fact was to cause serious problems in interpretation.

C. THE ERA OF THE GLOSSATORS

In discussing the era of the glossators, the focus will be on the *actio empti* rather than on the aedilician actions, since the *actio empti* was the principal remedy in Justinianic law and most of the time the aedilician actions were applied in cases where the seller had given warranties, or was supposed to have done so.

It is, however, first appropriate to notice that the extensive interpretation given in the medieval period to the Roman rule on a fair price (*iustum pretium*) found in C 4.44.2, in some cases covering latent defects, meant the buyer could claim rescission of the sale on the grounds that the selling price had been too high. This provision had originally granted the seller an action if something was sold for less than half the fair price. In such a case, he was considered to suffer an extreme prejudice (*laesio enormis*). In the Middle Ages the rule on a fair price was generalised. It was used not just to protect the seller, but also was applied when the buyer was deceived, in the sense that the selling price was too high. The remedy was named the *condictio ex lege rem maioris* after the opening words of C 4.44.2. Among the early glossators at Bologna, there was, however, no agreement as to in exactly which cases the buyer suffered such *laesio enormis*. According to Martinus (d before 1166) and some others, the actual selling price had to be at least twice as much as the fair price. Azo was of a different opinion, arguing that the buyer could claim rescission of the sale because of *laesio enormis* if what he had paid on top of the fair price was at least half of that fair price.²⁶ It was his view which prevailed and which was adopted in the authoritative Accursian gloss.²⁷ As a consequence the remedies of sale and the aedilician remedies were still necessary for cases of latent defects, where the difference between the selling price and the fair price did not exceed half of the latter.

²⁶ G F Haenel (ed), *Dissensiones dominorum sive controversiae veterum iuris romani interpretum*, Hugolinus § 253 (1834; repr 1964) 426-427.

²⁷ See the *Glos ord sv iudicis* ad C 4.44.2.

(1) Early legal scholarship

One of the first issues to be discussed by the Bolognese glossators was probably the extent of the liability of the seller who was unaware of the defects. Although this is not always stated explicitly in the sources, this discussion did not involve situations where the seller had given express warranties against defects in his merchandise, but this clearly followed from the nature of the Roman law texts adduced as arguments.

The author of *Lo Codi*, an anonymous *summa* on the Code, originally written in the Provençal language and dating from just after the middle of the twelfth century, noted that sometimes in the Digest the seller who was unaware of the defects was also held liable under the *actio empti*. Some examples were given (the leaky barrel of D 19.1.6.4 and the unsound beams of D 19.1.13pr), without entering into the problem of whether or not these examples contained the general rule, namely that ignorant sellers were always liable. The cases which did consider the ignorant seller liable did not adopt, however, an equal extent of liability. Most of the time the ignorant seller was liable for the balance between what the buyer paid and the lesser sum he would have paid if he had known the defect, but some texts, such as D 19.1.6.4 (sale of a leaky barrel) or D 19.2.19.1 (lease of a leaky barrel), were understood to point in the direction of liability for the other party's full interest. In *Lo Codi* this was justified by the supposition that the vendor or lessor of a leaky barrel might not have known of the defect, but that he was to blame for such lack of knowledge.²⁸

The same line of reasoning was adopted and further elaborated by Rogerius (d between 1162 and 1166), who is said to have founded a law school at Montpellier. This glossator drew a distinction between three types of ignorant sellers. Some were not to blame for their ignorance and could not be held liable. Some were ignorant when they could easily have known of the defects, and these are liable *quanto minoris* "as in the case of selling a slave who is inclined to run away or is otherwise defective". In exceptional cases, such as the sale of a leaky barrel or of an infertile slave woman,²⁹ the ignorant seller was liable for the buyer's full interest. The reference for the second category to the *servus fugitivus* and *servus morbosus*, combined with an explicit reference to D 22.1.1, may indicate that, according to Rogerius, the *actio empti* for price reduction should be applied in conformity with the assessment rule of the aedilician edicts. If so, Rogerius also adopted the

²⁸ H Fitting (ed), *Lo Codi in der Lateinischen Übersetzung des Ricardus Pisanus* 4.62.9 (1906) 129.

D 19.1.6.4 does not speak about interest or consequential damages.

²⁹ D 19.1.6; D 19.1.1.

objective standard – that is, the difference between the selling price and the market value at the time of the contract – for the use of the *actio empti*, although this is not in conformity with D 19.1.13pr and C 4.49.9.³⁰ Rogerius' contemporary Albericus rejected the former's opinion that the vendor of a leaky barrel (the case in D 19.1.6.4) was liable for the buyer's full interest. The text of D 19.1.6.4 stated that the seller was obliged to deliver a barrel which did not leak, even if he were unaware of the defect; but Albericus applied to this case the rule of D 19.1.13 that limits the vendor's liability to the lesser amount the buyer would have paid if he had known of the defect.³¹

The underlying problem probably was that the *Corpus iuris* contains cases where the ignorant seller is not liable at all, where he is only liable for *quanti minoris*, or where he is liable for the buyer's interest. This prompted Rogerius to discern three groups of ignorant buyers, each belonging to a certain category. A similar distinction was drawn by his contemporary Henricus de Baila in a gloss to the case in C 4.49.9. If the seller knew the exact amount of *capitatio* due for the plot of land he sold, but deliberately provided the buyer with incorrect information, he was liable for all damages. The seller who gave the wrong information out of ignorance was liable only for the balance between what the buyer paid and the lesser sum he would have paid, whereas the seller who did not say anything could not be blamed and was not liable at all.³²

Later glossators preferred to acknowledge a principal rule for all ignorant sellers, and it is possible that Albericus, in his rejection of Rogerius's interpretation of D 19.1.6.4, was one of those. The *Casus Codicis* of Wilhelm of Cabriano – said to be a faithful reproduction of the teachings of Wilhelm's master, the glossator Bulgarus (d 1166) – offered two explanations for the fact that the ignorant seller was sometimes liable for defects and sometimes not. It argued that he was liable when he had given warranties, and that he was not liable, if he had not done so. Alternatively, one could argue that the texts that said that the ignorant seller was not liable should be understood as if he was not liable for the buyer's interest, but that, despite his ignorance, he was liable for the balance between what the buyer paid and the lesser sum he

30 See the gloss with siglum R ad D 19.1.13 in Paris BN MS lat 4450 fol 194v: "Venditor rei uendite, detrimentum ignorans ..." Cf Rogerius, *Summa Codicis*, IL (De actionibus empti et venditi) in BIMAE I 128. Rejecting for the *actio empti* the subjective standard for calculating the *quanti minoris* – i.e. the amount the seller would have paid less had he known the defect – can explain the occurrence of Rogerius in the gloss *essem empturus* ad D 19.1.13pr of Accursius.

31 See the gloss by Albericus ad D 19.1.6.4 in Paris BN MS lat 4450 fol 193v, in F C von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 3rd edn (repr 1956) IV 42S.

32 See the gloss with siglum yr. ad C 4.49.9 in Paris BN MS lat 4536 fol 80va: "Venditor sciens nisi ueram capitacionem predicat ..." A similar gloss, but without siglum, can be found in München BSB MS Clm 22 fol 84rb: "Venditor sciens nisi in capitacione ..."

would have paid had he known of the defects.³³ This seems to be a first step in the direction of a general rule for all ignorant sellers. The same approach can be found in a gloss by Otto Papiensis.³⁴

(2) Placentinus and Johannes Bassianus

Placentinus (d 1192), a citizen of Piacenza, was one of the most important glossators of the twelfth century. He taught at Mantua where *ca* 1160 he wrote a treatise on legal remedies, the *Libellus de actionum varietatibus*, which begins with the words *Cum essem Mantue*. Probably around 1170 he moved to Montpellier in France to succeed his master Rogerius. There he wrote his *Summa Codicis*.

In *Cum essem Mantue*, when discussing the remedies of the contract of sale, Placentinus adopted the tripartite division of Rogerius. The ignorant seller was sometimes liable for all damages, as in the case of the leaky barrel; sometimes only for a limited amount, as in the case where he had sold cattle with a disease or a runaway slave; and sometimes not liable at all, unless he gave the buyer warranties, as in the cases where he had sold a thief or had not mentioned the existence of a servitude. For the assessment of the reduction in price, Placentinus clearly followed the subjective calculation of D 19.1.13pr, which was the difference between the purchase price and the price the buyer would have paid had he known of the defect.³⁵ There is a gloss by Lotharius (d after 1211) suggesting that Placentinus considered the cases where the ignorant seller was liable to be exceptions to the principal rule that ignorant sellers should not be liable. An argument to consider this as the principal rule was found in the statement of D 19.2.22.3 (see also D 4.4.16.4) that, according to nature, seller and buyer may deceive each other. Later glossators considered this text not applicable to cases where the buyer's disadvantage resulted from defects in the merchandise, except in the cases of D 19.1.13.1 (sale of a *fur*) and D 19.1.21.1 (sale of a *predium tributarium*).³⁶

If a first step towards one general rule for ignorant sellers can be traced

33 Ad C 4.49.9 in T Wallinga (ed), *The Casus Codicis of Wilhelmus de Cabriano* [= Studien zur Europäischen Rechtsgeschichte CLXXXII] (2005) 314-315.

34 This glossator considered the cases of selling and leasing out of leaky barrels (D 19.1.6.4 and D 19.2.19.1) as exceptional, where no distinction should be made between the one who knows the defect and the one unaware. Both are liable for the full damages. See the gloss with siglum Ot. ad C 4.58.1 in Munich BSB MS Clm 22 fol 86va and Paris BN MS lat 4536 fol 82vb: "Set si ignorasset ..."

35 See Placentinus, *Summa 'Cum essem Mantue' siue de actionum uarietatibus*, tit XXII no 235, ed G Pescatore [= Beiträge zur mittelalterlichen Rechtsgeschichte V] (1897; repr 1967) 56.

36 See the gloss by Lotharius ad D 19.1.13 in Paris BN MS lat 4450 fol 194v, ed in Savigny, *Geschichte* (n 31) IV 465.

in the *Casus Codicis* of Wilhelm of Cabriano, a similar approach is found in the *Liber Pauperum*, a well-structured compendium on the Digest and Code, composed by Vacarius (ca 1120-after 1198), the first scholar to teach Roman law in England. This referred to an existing opinion that there was a difference between leaking barrels and other things containing some kind of defect, since it was very easy to check whether or not a barrel leaks. As a consequence, the sale of leaky barrels should be seen as an exceptional case, where it was justifiable to hold the ignorant seller liable for the buyer's full damages.³⁷ Since Vacarius did not mention the cases where the ignorant seller was not liable at all, this pointed in the direction of a single criterion for the extent of the ignorant seller's liability, namely *quanti minoris* in the sense of the balance between what the buyer paid and the lesser amount he would have paid, had he known of the latent defect.

Johannes Bassianus (dates unknown) holds an important position within the tradition of Bolognese glossators, as not only a student of Bulgarus but also the master of Azo, whose influence would last until the end of the Middle Ages. Johannes Bassianus was the first to formulate a general rule on the liability of ignorant sellers. This can be found in an extensive gloss to C 4.4.9.9. He did not use the term *regula*, but the expression *generaliter ... extendimus*: we extend the provision generally. The criterion of D 19.1.13, namely that the ignorant seller was liable for the balance between what the buyer paid and the lesser amount he would have paid, had he known the defect, was now extended to all other cases and all other defects, not just those mentioned in that text. This construction of a rule on the basis of one single text in the Digest was justified by appealing to D 39.2.30.2: what had been written down as an example could also be taken to refer to other things.³⁸ Thus, the instances mentioned in D 19.1.13 should be taken as mere examples. Only two cases were excepted: the sale of a thief and the sale of a plot of land liable for *tributum*. In these cases, the ignorant seller could not be held liable since, as Johannes Bassianus subsequently explained, there was no slave who had never stolen something from his master. Thus every slave might be presumed to be a thief. For this reason it was written: "Quod domini faciant, audent cum talia fures." The quotation is from Virgil, *Eclogues* 3.16, but this source was not mentioned by the gloss. Furthermore, the seller of a plot of land for which *tributum* was owed (which in antiquity applied only to provincial and

37 Vacarius, *The Liber Pauperum*, ed by F de Zuleta, lib IV tit 46 [= Selden Society XLIV] (1927; repr 1972) 151.

38 "Quod dictum est 'aquae ducendae causa', exempli gratia scriptum est: ceterum ad omnia opera stipulatio accommodabitur."

not to Italian land) could not be held liable, since everyone must know that, according to the ancient laws, *tributum* was owed for provincial tenements. Thus the buyer's supine ignorance could not work out to his advantage.³⁹

The gloss of Johannes Bassianus continues stating that there was another opinion, to the effect that the ignorant seller was never liable except in some of the cases mentioned before and in the one concerning the sale of second-hand garments as new in D 18.1.45. According to this opinion, it was the text on the sale of a *fundum tributarium* which should be adopted as a general rule and applied to other cases. But it was also possible to argue, Johannes Bassianus stated, that the ignorant seller was always liable for the the balance between what the buyer paid and the lesser amount he would have paid if he had known of the defect. This meant that the ignorant seller of a *fundum tributarium* did not have to pay additional damages to the same level as the seller who knew of the defect. The ignorant seller of a slave who was a thief did not have to pay the same level of damages as a seller who knew he was selling a runaway slave. The latter had to pay full damages; the seller of the thief had to pay only as much as the buyer would have paid less.⁴⁰

39 “Qui pecus morbosum uel tignum uitiosum uel seruum fugitiuum aut uas non integrum sciens uendidit, tenetur ad omne interesse, si ignorans quanto minoris empturus esset, ut ff. de act. empti. et uen. Iul [D 19.1.13] et l. Tenetur § Si uas [D 19.1.6], quod ad alias res et ad alia uitia generaliter extendimus, ut quod in predictis exemplis dicitur ad cetera porrigatur, ut ff. de damp. infec. Dampni § Qui uor. [D. 39.2.30.2]. Excipiuntur duo casus. Nam qui ignorans furem uendidit uel tributarium predium, cum deberet uendere non furem, non tributarium, nec etiam in quanto minoris tenetur, ut ff. de act. emp. et uen. Iul. § Item qui furem [D 19.1.13.1] et l. Si sterilis § i [D 19.1.21.1], quippe debet quilibet suspicari et credere seruum furem esse. Nullus enim est, qui non quandoque uel modicum domino furetur, quare etiam fur est, ut ff. de edic. e. Quod si nolit § Si uenditor [D 21.1.31.1]. Propterea scriptum est ‘quid domini faciant audent cum talia fures’ id est serui. Item quilibet debet scire secundum uetera iura quod nullum predium ytalichum tributarium est. Omne autem prouinciale tributarium est. Ergo emptoris supina ignorantia in fure et tributario predio est quare non prodesset ei, ut ff. de contrahen. empt. Et si consensu [D 18.1.15] et infra instit. de rerum di. § Per traditionem [J Inst 2.1.40].” For reference see next note.

40 Gloss with siglum Jo. and Job. ad C 4.49.9 in BamSB MS Jur 21 fol 80vab, Munich BSB MS Clm 22 fol 84rab and Paris BN MS lat 4534, fol 74va-b: “Alii dicunt quod in nullo casu tenetur ignorans, nisi in aliquo predictorum et in alio, scilicet ff. de contrahen. emp. et uen. Si uestimenta [D 18.1.45]. Regulare est ut non teneatur ignorans, set excipiuntur casus predicti. Et quod dicitur de iure tributario predicta porrigunt generaliter. Potest etiam dici quod generale est, ut in omni casu teneatur ignorans quanto minoris empturus esset. Quod ergo dicitur quod ignorans predium tributarium uenditor non tenetur supplere ad omne interesse, sicut tenetur qui sciens, et sic intellige l. ff. de act. emp. et uen. Si sterilis § i [D 19.1.21.1]. Quod uero dicitur quod ignorans furem uenditor non tenetur supplere adeo ut tenetur qui sciens uendidit fugitiuum. Illum enim habere non licet, ut ff. de ac. emp. et uen. Iul. § Item qui furem [D 19.1.13.1] et ideo uenditor ignorans per quanto minoris tenetur ad totum pretium, set non ad totum in fure sed in id quod minoris empturus esset, ut ff. de tridua. ac. Illud § Si cuius [D 14.4.7.2] et ff. de v. si. Minus [D 50.16.32] et ff. de fideius. Amis. in prin. [D 46.1.52pr] et C. de her. insti. Pater [C 6.24.2]. jo[annes]b[assianus].” This opinion of Johannes Bassianus is confirmed in the *dissensiones dominorum* handed down under the name of Hugolinus: see Haenel (ed), *Dissensiones*, Hugolinus § 410 (n 26) 530-531.

Thus, Johannes Bassianus seems to have adopted as a general rule the view that the seller who was aware of the defects was liable for the full loss of the buyer, whereas the ignorant seller was only liable for the balance between what the buyer paid and the lesser amount he would have paid if he had known of the defect. The cases of D 19.1.13.1 (sale of a *fur*) and D 19.1.21.1 (sale of a *predium tributarium*) either could be taken as exceptions to this general rule, where the ignorant seller was not liable, or they could, through interpretation, still be brought into conformity with this general rule.

Johannes Bassianus discussed a further problem: the difference between the *actio empti* to claim reduction in price and the *actio quanti minoris* of the aedilician edict, used for the same purpose. These two actions show many similarities and can be granted in similar situations.⁴¹ In a gloss to D 19.1.13, Johannes Bassianus explained that the first was a civil action and the second praetorian.⁴² But was not the second, in fact, redundant? The answer was no. The praetorian action was aimed at the difference between the selling price and the objective value or common price (*estimatio communis*). The civil action was aimed at the difference between the selling price and the lesser amount he would have paid. One might use the remedy which was the most advantageous. Suppose that someone, who knew very well how to handle horses, bought for forty a horse which moved backwards. It was more in his interest to use the praetorian action, because had he known of the defect, he still would have paid at least five for the horse, whereas the average buyer would not have given anything. With the praetorian action he could claim back the full forty.⁴³

(3) Azo

The writings of the glossator Azo (d 1220) reveal that, by the time he was lecturing in Bologna, there had developed a view that sellers, unaware of

41 The aedilician edict imposed on the seller the duty to give certain warranties, but liability under the *actio quanti minoris* does not seem to have been dependent upon those warranties.

42 In the Middle Ages the *actio quanti minoris* and the *actio redhibitoria* were characterised as praetorian actions, although they were introduced not by the *praetor* but by the *aediles curules*. For this reason the use of the term “praetorian” was in this respect criticised by the Humanist jurists of the sixteenth century. The remedies did belong, however, to the *ius honorarium* and in the *Corpus iuris* the terms *ius praetorium* and *ius honorarium* were more or less used as synonyms: see D 1.1.7.1.

43 Gloss with siglum Job ad D 19.1.13, in Paris, BN MS lat 4450 fol 194v: “Pone ergo comuni estimacione est deterior equus in v. Ergo in v. competit illa pretoria, ac si scisset, minoris empturus esset xl. Ergo potius interest hic ciuili, nam per hoc consequitur quis quanto minoris esset empturus, ut hic. Pone ergo e contrario emit equum retrogradum quis qui bene nouerat usum equorum. Istius interest magis in pretoria quam ciuili, nam non fuerit <empturus> minoris quam v, si millesies scisset. Si ergo agat pretoria, poterit consequi xl. totum. Enim estimacione communi hanc differentiam inuenit. Jo[hannes] b[assianus].”

defects in their merchandise, were liable under the *actio empti* for the balance between what the buyer paid and the lesser amount he would have paid, but, at the same time, there was still the dissenting view, mentioned by Johannes Bassianus but not linked to any glossator by name, that ignorant sellers should not be held liable at all. The most important texts in the *Corpus iuris* holding the ignorant seller liable for defects were D 18.1.45 (garments which had been repaired were sold as new), D 19.1.6.4 (sale of a leaky barrel), D 19.1.13.1 (sale of a runaway slave), D 19.2.19.1 (lease of a leaky barrel) and C 4.49.9 (sale of a plot of land which owed a higher *capitatio* than the seller had stated). The most important texts stating that the ignorant seller was not liable for defects were D 19.1.13.1 (sale of a thief) and D 19.1.21.1 (sale of a plot of land for which *tributum* appeared to be owed).

As a matter of fact, the case of C 4.49.9 closely resembled that of D 19.1.21.1. Yet they differed in the answer given to the legal problem, which was explained by the fact that in C 4.49.9 the seller had provided the buyer with incorrect information, whereas in D 19.1.21.1 the seller had given no information at all.⁴⁴ It was uncertain whether the five cases, declaring the ignorant seller liable, should be considered as reflecting the principal rule or rather the exception. The same could be asked about the two cases that declared the ignorant seller not to be liable.

Azo's line of thinking can be found in his *Apparatus maior* to the *Digestum Vetus* as well as in his *Lectura Codicis* and *Summa Codicis*; he followed the approach of his master Johannes Bassianus. Azo considered that the five cases contained the general rule, applicable also to other cases of latent defects, namely that the ignorant seller was liable for the balance between what the buyer paid and the lesser amount he would have paid. In the fragments in the *Apparatus maior* the term *regula* was not used (Azo stated that the ignorant seller was always (*semper*) liable); but in the *Summa Codicis*, and likewise in the *Apparatus maior*, the terms used were *regulare esse* and *regula*, though it is clear that we are dealing with a general rule of law. Azo argued that it made more sense to consider two cases to be exceptional, rather than five.⁴⁵

44 See the gloss with siglum p. (but it cannot have been Placentinus since it refers to the opinion of Azo) ad C 4.49.9 in Paris BN MS lat 16910 fol 84rb: "ff. e. l. i Si sterilis [D 19.1.21.1] contra ..."

45 "Tenetur ignorans quanto minoris erat empturus emptor in capitacione predii, C. e. l. Si minor [C 4.49.9] et in uase non integro uendito et in uase uitioso locato, supra e. Tenetur § Quod [D. 19.1.6.4 *if.*] et infra locati Set addes § i [D 19.2.19.1]. Hic tamen melius et apertius dico ignorantem pro non integro teneri ad interesse, ut supra e. Tenetur [D 19.1.6], pro uase uitioso locato, idem pro uendito quanto minoris, in uestimentis, supra de contrahen. empt. Labeo [D 18.1.45], in seruo fugituo ut hic. Set hii v casus, ut dicunt, speciales sunt. In aliis enim ignorans non tenetur. Set nos contra, nam semper tenetur, nisi in casibus duobus, ut in fure et predio tributario, ut hic et infra e. Si ste. § Si pre. [D 19.1.21.1]. Cum ipsi dicunt v specialia sunt, multo

Azo stated that there was a perfect explanation for the two exceptional cases: every slave might be presumed to be a thief and every man should know that *tributum* was owed for provincial land.⁴⁶

In the text corresponding to this gloss in his *Summa Codicis*, Azo followed Johannes Bassianus in quoting Virgil, who was this time explicitly recognised as the author of the quotation.⁴⁷ Azo also dealt with the question whether or not the aedilician actions were in fact redundant in his *Apparatus maior* to the *Digestum Vetus*. According to Johannes Bassianus, the *actio quanto minoris* in particular was still useful, because in some cases this remedy allowed the plaintiff to claim a higher amount than would be gained by using the civil action. Azo explained that the aedilician actions were not superfluous, because it was not possible to use the civil *actio empti* for rescission on the ground of corporeal defects, only for damages or reduction in price. Moreover, the civil *actio empti* could not be used if one had bought a thief or a *predium tributarium*. Therefore it was necessary to introduce the aedilician actions, for they served a different purpose.⁴⁸

magis nos duos dicemus." For the reference, see the following note.

46 Gloss with siglum az. ad D. 19.1.13.1 in BamSB MS Jur 11 fol 223rb; Paris BN MS lat 4451 fol 137rb; Paris BN MS lat 4459 fol 179vb; BV MS Vat Lat 1408 fol 210rb; BV MS Borgh Lat 225 fol 164rab: "Et hoc ideo, quia scire debuit eum furem esse eo ipso quod seruus erat, maxime si cautius erat. Dominis enim suis, et si nil aliud possunt, cinerem tamen subripiunt. Et fur est non solum qui extraneo, set etiam qui domino suo furtum facit, ut de aedilic. e. Quod si nolit § i. [D 21.1.31.1]. Item, si predium erat provinciale, scire debet tributarium. Ideoque, quia est quod ei imputetur, non agit contra ignorantem uel quod dicit lex non tenetur subaudi adeo non agitur quanto minoris res est, non quanto minoris empturus. Nec obstat quod dicitur licere contra-hentibus se decipere, quia hoc in pretii quantitate non in uitibus rei. Verum est. az[o]." An almost identical gloss with siglum az. ad C 4.49.9 can be found in Prague, Knihovna Národního Musea, XVII A.10 fol 92va. A similar discussion (which cases make the rule?) can be found in anonymous gloss ad D 19.1.13 in BV MS Vat Lat 1408 fol 210rab: "Infra e. t. Si sterilis § i [D. 19.1.21.1] assignatur contrarium ..." Cf also Azo, *Lectura Codicis* ad C 4.49.9 nos 1-4 in Azo, *Lectura super Codicem* (1577; repr 1966) 348-349 and Azo, *Summa Codicis* ad C 4.49 no 17 (1559) fol 111rb.

47 Azo, *Summa Codicis* ad 4.49 no 17 (n 46) fol 111rb.

48 Gloss with siglum az. ad D 21.1.19.2 in BamSB MS Jur 11 fol 247vb; Paris BN MS lat 4451 fol 192rb; Paris Bn MS lat 4461 fol 198ra; BV MS Vat Lat 1408 fol 235r; BV MS Vat Lat 2512 fol 198rab; BV MS Borgh Lat 225 fol 182rab: "Putat si uendidisti seruuum fugitiuum uel pecus morbosum cuius, nomine agi potest etiam de iure ciuili uel ad interesse uel quanto minoris empturus erat, ut supra de acti. emp. Iulianus in prin. [D 19.1.13pr]. Et nichilominus agi reddibitoria potest de iure pretorio uel quanto minoris uel ex contractu uel ex cautione res est. Et caue tibi quia propter corporis morbos non agebat ut de iure ciuili ad redhibitionem, set ad interesse uel quanto minoris, uel ex contractu uel ex cautione, ut in pecore morbo et seruo. Set propter uitium animi in seruo fugitio agebatur de iure ciuili, non in seruo fure, nec predio tributario, ut notauit supra de act. emp. Iulianus [D 19.1.13]. Vnde exponebatur cautio super fugitio et quibusdam aliis quibus aduocari potest res. Item de sanitate de iure ciuili, ut supra de act. emp. l. Ex empto § Etiam [D 19.1.11?] et C. de act. emp. Emptor [C 4.49.14]. Set sine cautione agebatur, ut dixi, in fugitio, supra e. l. Quis sit § Idem recte [D 21.1.17.10]. Nec obstat quod dicitur supra de acc. emp. Ex empto § Redhibitionem [D 19.1.11.3], ut ibidem notauit. Fuit ergo necessarium has edilicias acciones proponi, utpote cum iste ad aliud dantur quam superiores de iure ciuili.

A more elaborated view can be found in Azo's *Summa Codicis*. The *actio empti* could in some specific instances be used for rescission;⁴⁹ but when the *actio empti* was used for reduction in price, this could also sometimes result in rescission, such as when the buyer would not have bought the merchandise at all, if he had known of the defect, as appeared from D 44.2.25.1.⁵⁰ In conformity with Azo's view that the *actio empti*, used for price reduction, was clearly different from the aedilician *actio quanti minoris*, the *Apparatus major* indicates that there was a difference between the civil action, directed at the the balance between what the buyer paid and the lesser amount he would have paid, and the praetorian, directed at the difference between the selling price and the common estimation.⁵¹

In at least one manuscript, this gloss continues by stating that there were two *actiones quanti minoris*, one of civil law and one of praetorian law.⁵² This is exactly what was written in Azo's *Summa Codicis*. There was a civil *actio quanti minoris*, directed at the balance between what the plaintiff paid and the lesser sum he would have paid if he had known the defect. This remedy was perpetual, but, as explained above, could not be used for all defects. There was also a praetorian *actio quanti minoris*, directed at the difference between selling price and actual value. This remedy could be brought for only one year, and could also be brought in certain cases where the civil action was not available. Both were necessary.⁵³

Azo thus considered that the civil *actio empti* used for price reduction

Quid enim si emptor quidem empturus erat, set minori precio? Subuenitur ei per hoc edictum uel ad redhibitum, uel quanto minoris erat res. Item quandoque dantur iste et non ille, ut supra dixi. az[o].”

49 D 19.1.11.3.

50 Azo, *Summa Codicis* ad C 4.49 nos 21-23 (n 46) fol 111va. The distinction between the buyer who would have bought, but for a lower price, and the buyer who would not have bought at all, may be derived from Aristotle. See Aristotle, *Ethica Nicomachea* lib III, cap 1-4 [= Aristoteles Latinus, ed G A Gauthier, vol XXVI 1-3 Fasc tertius] (1972) 179-183.

51 A gloss with siglum az. ad D 19.1.13, in BamSB MS Jur 11 fol 223rb; Paris BN MS lat 4451 fol 137rb; Paris BN MS lat 4459 fol 179vb; BV MS Vat Lat 1408 fol 210rb; BV MS Borgh Lat 225 fol 164rb: “Alia est accio ciuilis quanto minoris empturus esset, alia pretoria quanto minoris res ualet ut infra de edil e. l. Quod si nolit § Si quis [D. 21.1.31.16] et de except. rei iudi. Si is qui § Est in po. [D. 44.2.25.1]. az[o].”

52 See the gloss in BV Vat Lat 1408 fol 210rb: “Due sunt acciones quanti minoris ...” This continuation of the gloss also maintains that the praetorian action can sometimes be used to claim a higher amount. For these reasons the aedilician remedies are not superfluous.

53 Azo, *Summa Codicis* ad C 4.58 no 3 (n 46) fol 114ra: “Actio autem quanto minoris empturus esset emptor ciuilis est, ut ff. de act. empt. l. Iulianus [D. 19.1.13] et ideo perpetua est. Haec autem quanto minoris res est, competit usque ad annum et cum ad aliud datur quam superior, neutra est superflua. Quid enim si emptor quidem empturus erat sed minori pretio? Subuenitur ei per hoc edictum, uel ad redhibendum, uel quanto minoris res est. Item esse quod dantur iste scilicet redhibitoriae, uel quanto minoris res est et non datur illa ciuilis, quia illa in casibus tantum competit, ut diximus supra de act. empt. ...”

resembled the aedilician *actio quanti minoris* to such an extent that he presented the two as distinct actions, but with similar names. The question however arises as to whether he actually wanted the *actio quanti minoris civilis* to be a separate remedy, distinct from the regular *actio empti*. This question was of importance for procedural law, as will appear in the next section. This does not seem to have been the case. A *Summa de Actionibus*, sometimes ascribed to Azo,⁵⁴ considered that the terms *quanti minoris* and *redhibitoria* did not indicate independent remedies, but were just additions (*adiectiones*) to, for example, the *actio empti*.⁵⁵ A student of Azo maintained that, according to his master (*dominus meus*), the words *quanti minoris* were just an addition and did not refer to a separate action.⁵⁶ Azo's own master, Johannes Bassianus, had composed an *Arbor actionum*. This "tree of actions" set out the remedies of the *Corpus iuris*, totalling 169, in a scheme of 180 circles with the praetorian actions at the left and the civil actions at the right. Above each circle there were letters, placing an action into a certain category. This *Arbor actionum*, however, contained only one *actio quanti minoris*, which was described as praetorian and temporal.⁵⁷

(4) The last generation of glossators

According to Hugolinus (d after 1233), a student of Johannes Bassianus and one of the last generation of glossators, the general rule should be based on the five cases where the ignorant seller was liable and on the entire Digest title on the aedilician edicts. In the exceptional cases where the ignorant seller was not liable, the buyer could himself be blamed for the loss he suffered. Or one should argue that, in the case of selling a thief or a tenement owing *tributum*, the seller was not liable under the *actio quanti minoris civilis* but rather under the *actio quanti minoris pretoria*.⁵⁸ Hugolinus used the term

54 W Litewski, *Der römisch-kanonische Zivilprozeß nach den älteren ordines iudicarii* (1999) I 188.

55 *Summa de Actionibus* § 78 in B1MAE III 6.

56 Roffredus Beneventanus, *Libelli iuris civilis* (1500; repr 1968) fol 101va. See also Jacques de Revigny (under the name of Petrus de Bella Pertica), *Lectura super prima parte Codicis* ad C 4.58.2 (1519; repr 1967) fol 207rb: "Azo dicit quod quanto minoris et redibitoria non sunt nomina actionis, sed sunt adiectio actionis."

57 A Brinz, *Arbor actionum* (1854) 19; for the *Arbor actionum* of Johannes Bassianus, see also A Errera, *Arbor actionum, Genere letterario e forma di classificazione delle azioni nella dottrina dei glossatori* (1995); and Lange, *RRM* I 221-224.

58 A gloss with siglum h. ad D 19.1.13 in London, British Library MS Royal 11 C III, fol 188ra and Paris BN MS lat 4461 fol 178rb: "Generaliter dixerunt quidam, numquam ignorantem uenditorem propter rei uitium teneri, sumpta generali regula propter istum casum de fure et alium, infra e. Si steri. § Si predium [D 19.1.21.1] et speciale esse in v casibus, ut teneatur ignorans, scilicet in pecore morbosio, tigno uitioso, seruo fugitio, uestimentis interpolis et uase non integro, ut hic et supra de contrahen. empt. Si uestimenta interpola [D 18.1.45] et supra e. Teneri § Si uas

regula here. There was also an extensive *quaestio* on D 19.1.13 by Jacobus Balduini (d 1235), a contemporary of Hugolinus and student of Azo, which also reflected his master's teachings. Balduini used the term *regulariter* and spoke about *regula nostra*.⁵⁹

Accursius (ca 1182-1263) and Odofredus (d 1265) did not add anything new to the doctrines developed by Johannes Bassianus and Azo, which were generally accepted and confirmed by the last generation of glossators. In fact, they were mere compilers and the importance of Accursius is primarily that, through his Ordinary Gloss, which gained enormous authority in centuries to come, more than 150 years of legal scholarship was compiled and transmitted to future generations of students being educated in Roman law. Azo's teachings were accepted on which cases should be adopted as general and which as exceptional. They can be found in the gloss *quanto minoris* on D 19.1.13.1 as well as in the *Lectura* on the *Digestum vetus* of Odofredus on D 19.1.13pr.⁶⁰ Here we also find the traditional justification for the fact that the ignorant seller was not liable when a thief or a *predium tributarium* was sold. Even the quotation from Virgil is found. Only in one respect did the Accursian gloss differ from the writings of Azo: it recognised, beyond any doubt, two distinct remedies for price reduction – one civil and one praetorian. The most important gloss for this position was that *essem empturus* on D 19.1.13pr.⁶¹

[D 19.1.6.4]. Nos totum contrarium dicimus, sumpta a pluribus regula, et fere ex toto illo titulo de edilic. e. [D 22.1] et ratione specialitatis assignamus, ut non teneatur in illis duobus casibus, quoniam emptori imputandum est. Et idem se queri debet quare non petit sibi caueri furem non esse uel non quesitum utrum fur esset, cum satis potuit putare nullum seruum facile inueniri nisi furem, saltem qui aliquid subripuit domino suo uel solitus est subripere, nam talis fur dicitur, infra de ed. ed. Quod si nolit § Si uenditor [D 21.1.31.1]. Et etiam omnes fures appellantur, ut ibi dicitur. Vnde Virgilius in bucolicis in illo loco dicit Damoeta cuium pecus 'Quid facient domini audent cum talia fures!'. Secundus est in predio tributario. Quid enim si predium erat provinciale? Nonne debuit putare illud tributarium? Vel aliter dic quod in istis duobus casibus tenetur, sed non adeo ut in aliis. Nam in aliis tenetur ignorans quanto minoris fuisset empturus, set hic quanto minoris res est. Et est quidam differentia inter has acciones, quoniam prima est ciuilis et perpetua, secunda temporale et praetoria, ut infra de ed. e. Quod si nolit § Si quis [D 21.1.31.16] et infra de excep. r. iud. Si is qui § Est in potestate [D 44.2.25.1] et C. e. Si minor [C 4.49.9] et infra de edil. Quod si nolit § Si plures [D 21.1.31.5] et l. Bouem § Aliquando [D 21.1.43.6] et l. Hominem [D 21.1.47] et l. Sciendum § fi. [D 21.1.19.6]. h[u]golinus."

59 Paris BN MS lat 4458 fol 171ra.

60 Odofredus, *In secundam Digesti Veteris partem Praelectiones* ad D 19.1.13pr (1552; repr 1968) fol 109vb.

61 "*essem empturus* Nota hic differentiam inter actionem quanto minoris et ciuilem et praetoriam. Nam in ciuili agitur quanto minoris esset empturus, si scisset, ut hic. Sed in praetoria quanto minoris ualuit tempore contractus propter uicium, ut infra de edil. edic. l. Quod si nolit § Si plures [D 21.1.31.5]. Sed aliis, ut R[ogero], haec differentia non placet, ut arg. infra e. l. § Per contrarium in fi. [D 19.1.13.5], ubi etiam ciuili agitur quanto minoris ualeat. Sed ibi non ea ex empto, siue quanto minoris, que propter uicium detur, agitur. Sed propter dolum emptoris, ubicumque tamen dicitur quanto minoris praetoria teneri, ibidem habet locum redhibitoria, si non esset empturus, si uicium sciuisset, ut infra de excep. rei iu. l. Si is qui § i. [D 44.2.25.1]." Cf also the gloss *quanto*

In this gloss Accursius described the difference between, on the one hand, claiming *quanto minoris esset empturus, si scisset* with the civil action and, on the other, claiming *quanto minoris ualet* with the praetorian action. Rogerius and others were said to have disliked this distinction. Yet, as we saw above, the distinction Rogerius disliked was the one between the two kinds of assessment of price reduction. He preferred to use the objective standard of the aedilician *actio quanti minoris*, namely the difference between the selling price and the value of the object at the moment the contract was concluded (*quanto minoris ualet*), and, in spite of what can be read in D 19.1.13, he wanted to use this criterion when the *actio empti* was used for price reduction. We should consider it to be improbable, if not impossible, that the difference Rogerius disliked would have been the distinction between the *actio quanti minoris civilis* and the *actio quanti minoris praetoria*, since these concepts had not yet been developed in his day.⁶²

Odofredus did not follow Accursius' opinion that there were two separate *actiones quanti minoris*, civil and praetorian. In his view, the words *quanti minoris empturus essem si scissem* did not establish an independent remedy, but simply were a different name (*cognomen*) for, or an addition (*adiectio*) to, the contractual *actio empti*. The phrasing *quanti minoris res valet quam empti* indicated the aedilician action for price reduction which was available during one year.⁶³

(5) Conclusions

For more than a century and a half the glossators had produced opinions on the use of the *actio empti* for latent defects against an ignorant seller. Gradually some general concepts and rules of law had developed from the casuistry found in the *Corpus iuris*.

(a) *Actio empti; actio quanti minoris*

The seller, aware of defects, was held liable for the buyer's full interest. When the seller was not aware, the buyer could use the *actio empti* to claim *quanti minoris empturus esset, si scisset*. In such a case, the seller was liable for the balance between what the buyer paid and the lesser sum he would have paid, had he known of the defects, a claim which was not restricted to a

minoris ad D 19.1.13.1, the gloss *homo sit* ad D 21.1.31.5 and the gloss *minus daret precii* ad C 4.49.9.

⁶² Unfortunately the literature has missed this point and sometimes suggested the text of the gloss to be corrupt. See P van Warmelo, *Vrywaring teen gebreke by koop in Suid-Afrika* (1941) 61 and 65.

⁶³ Odofredus, *Praelectiones* ad D 19.1.13pr (n 60) fol 109va.

certain period of time. Accursius no longer regarded this action as the regular contractual action for sale, and provided it with a name of its own, the *actio quanti minoris civilis*. Only in two exceptional cases could the ignorant seller not be held liable under the *actio empti*: when he had sold either a thief or a *fundum tributarium*. In these cases the buyer had to blame himself for his losses. He should have realised that all slaves were thieves and that *tributum* was owed for all provincial land. In these cases, however, it was still possible to use the aedilician action.

According to the Digest, the *actio empti* could also be used for rescission.⁶⁴ In contrast to what happened to the texts in D 19.1, *de actionibus empti et venditi*, where the *actio empti* was used to achieve reduction in price, the few scattered texts that allowed the *actio empti* to be used for rescission were not developed into a general rule of law. The medieval jurists considered it possible in only a few exceptional cases to use the *actio empti* for rescission, such as when the seller was aware of the defects, as in the case of D 19.1.11.5.⁶⁵ The principal rule was that the *actio empti* could not be used for rescission on the ground of latent defects.⁶⁶ It is questionable, though, whether this restricted applicability of the *actio empti* was seen as a problem. Since the plaintiff's *actio empti*, used for price reduction, was directed at *quanti minoris empturus esset si scisset*, he would surely be indemnified, and where he would not have bought the goods at all had he known of the defect, the use of the *actio empti* for price reduction would in any case result in rescission.⁶⁷

(b) Praetorian remedies

Since the *actio empti* could only be used for rescission in some exceptional cases, the praetorian *actio redhibitoria*, which had to be brought within half a year, was by no means superfluous. The praetorian remedy for price reduction, however, which had to be brought within one year, had lost much of its significance. The glossators saw, as one of the few reasons that could justify the latter's existence as a separate remedy, the fact that *quanti minoris valet*, based on the *pretium commune*, sometimes covers more than *quanti minoris empturus esset si scisset*, based on the *pretium singulare*. Moreover, the praetorian action could be used where the civil action was not available, such as against the seller of a thief or *predium tributarium*.

⁶⁴ D 19.1.11.3.

⁶⁵ Azo, *Summa Codicis* ad C 4.49 no 21 (n 46) fol 111va.

⁶⁶ The gloss *contineri* ad D 19.1.11.3 and the gloss *comueniri* ad D 21.1.19.2.

⁶⁷ See Azo, *Summa Codicis* ad C 4.49 no 21 (n 46) fol 111va; Roffredus, *Libelli* (n 56) fol 101rb, and the gloss *essem empturus* ad D 19.1.13pr (Ulpian, *Edict* 32).

(c) The View of Accursius

As stated above, Accursius was probably the first to acknowledge the existence of two separate remedies *quanti minoris* aimed at price reduction due to defects, but this stand was not undisputed. According to Odofredus, one of these actions is the regular contractual action of sale. The words *quanti minoris*, as, for example, added to the remedy by Azo, are just an addition, which indicates that the buyer is using the contractual *actio empti* for a specific purpose, namely to achieve a reduction in price. Moreover, Accursius' opinion seems to have been rejected by the compilers of the *Siete Partidas*, who codified the Roman law of sale for the kingdom of Castile at approximately the same time as or just after Accursius was teaching in Bologna and composing his ordinary gloss. The *Partidas* adopted a remedy for price reduction only for the difference between the selling price and the actual price, thus taking the *pretium commune* as a premise: "tanta parte del precio, quanto fallassen en verdad, que valia menos por razon de la tacha, o de la enfermedad que era en ella."⁶⁸

D. FROM THE *GLOSSA ORDINARIA* TO THE FOURTEENTH CENTURY

From the twelfth century onwards, the remedies of Roman law – or at least their names – were used in drawing up the statement of claim or libel (*libellus*), which means that the law of procedure, in particular of Romano-canonical procedure, is important here. Thus, we have to consider what were the consequences of Accursius' teaching that there were two *actiones quanti minoris*: a civil and a praetorian.

But there were further developments in legal scholarship after the era of the glossators. Since Accursius' ordinary gloss gained enormous authority during the Middle Ages it was impossible to teach the *Corpus iuris* without taking it into account. This did not mean, however, that doctrinal developments had come to an end. From about 1235 a law school developed at Orleans in France that soon became an important centre for legal education, mainly in Roman law. Its great scholars, who taught at the end of the thirteenth and

68 *Part* 5.5.65 ("so much of the price, as much as it was mistaken in truth, as it is worth less by reason of the defect or disease"). On the one hand, the gloss *que valia menos* on *Part* 5.5.64 by Gregorio López de Tovar (ca 1496-1560) states that this provision derives from D 19.1.13pr (*pretium singulare*), but the gloss *fallassen en verdad* on *Part* 5.5.65 rejects the opinion that there is a civil and a praetorian *actio quanti minoris*. The gloss *que valia menos* on *Part* 5.5.64 states that the *Partidas* incline to the later opinion of Pierre de Belleperche and Cinus of Pistoia that there is only one *actio quanti minoris*.

the beginning of the fourteenth centuries, no longer produced glosses, but rather commentaries in the form of written elaborations of lectures given on the Digest and Code (*Lecturae*). Their ideas, sometimes deviating from those of Accursius, were to be important for the doctrines of the Italian and French commentators of the later fourteenth and fifteenth centuries.

(1) Romano-canonical procedure

In Romano-canonical procedural law, the earliest *ordines iudicarii* required that the plaintiff's demand was formulated in writing, in what was called the *libellus (conventionalis)*, namely the statement of the claim or libel. According to some jurists, this libel had to contain the name of the action (*nomen actionis*); according to others, it had only to contain the reason for the claim (*causa petendi*). Nevertheless, the name of the action had to be announced to the magistrate at a later stage in the litigation. The wording of the libel could be decisive especially when the facts of the case (sale of a defective object) gave rise to various remedies (*actio empti* and *actio quanti minoris*) which had the same end: price reduction. Was the use of the remedy set out in the libel restricted to a certain period of time? At what exactly was the claim directed? What had to be proved by the plaintiff? To answer these questions it was important to know whether the claim for price reduction was based on the civil *actio empti* or on the praetorian *actio quanti minoris*.

If the remedy brought for price reduction because of defects was the *actio empti* (as found in D 19.1.13pr), its function was to claim the balance between what the plaintiff paid and the lesser sum he would have paid had he been aware of the defect. This action was thus based on the *pretium singulare*. It was perpetual, so that its use was not restricted to a certain period of time and it only prescribed after thirty years. There were, however, two instances in which it could not be used: sale of a thief or sale of land owing *tributum*. If the remedy brought for price reduction because of defects was the praetorian *actio quanti minoris* – that is, one of the aedilician edicts – the aim was to claim the difference between the selling price and the actual value at the time the sale was concluded. This action was thus based on the *pretium commune*. It was temporal or annual.⁶⁹ If it had to be used within one year, it was available for the sale of a thief or of a *praedium tributarium*.

As we have seen, Azo introduced the term *actio quanto minoris civilis*; but he taught that the words *quanto minoris*, as used here, were just an addition (*adiectio*) to the regular *actio empti*. Furthermore, Odofredus was of the view

⁶⁹ See J Inst 4.12pr.

that the term *quanto minoris essem empturus* was only a different designation (*cognomen*) for the *actio ex empto civilis*. The fact, though, that Accursius in the gloss *essem empturus* ad D 19.1.13pr presented the *actio quanto minoris civilis* as a separate and independent remedy, distinct from the aedilician *actio quanti minoris praetoria* and distinct from the regular *actio empti*, prompted the jurists who drafted the statements of claims for civil litigation according to Roman-canonical procedure to formulate a separate libel for this remedy, which in earlier times had been considered nothing other than the regular *actio empti*.

This appears to have become the common practice in medieval works on procedural law. Probably Roffredus Beneventanus (*ca* 1170-after 1244), in his famous treatise on the statement of claims, the *Libelli iuris civilis*, was the first to present separate formulas for the libel of the *actio quanti minoris praetoria* and that of the *actio quanti minoris civilis*. The first is directed at *quanto minoris res est*; the second, which according to Roffredus was missing in the *Arbor actionum* of Johannes Bassianus is directed at *quanto minoris empturus essem*.⁷⁰ Many more treatises on procedural law were to follow the example of Roffredus.⁷¹ The most important of these was the *Speculum iudiciale* of the canonist Wilhelm Durand (*ca* 1230/31-1296). This work was a perceptive compilation of procedural rules, intended both for legal practitioners as well as litigants. It was widely used during the Middle Ages and gave separate libels for the *actio quanti minoris praetoria* (*ideo illa x peto quod a illa tanto minoris est*) and for the *actio quanti minoris civilis* (*propter quod uitium si ego scuissem, dedissem duo minus; unde ago contra eum, ut illa duo mihi praestet*).⁷² The *Aurea practica libellorum* (1311-1329) of Petrus Jacobi (Pierre Jame) stated that the phrasing *quanti minoris emptor esset empturus* was an addition to the civil *actio empti*;⁷³ but the *Aurea practica* nevertheless contained a separate statement of claim for the remedy provided with such an addition. In the libel of this remedy, termed the *actio ex empto quanto minoris civilis*, which only prescribed after thirty years, the plaintiff claimed "as much as he would have paid less for the horse aforesaid, had he known it was inclined to kick with the heels, namely that the aforesaid 40 Tours

70 The two *libelli* can be found in Roffredus, *Libelli* (n 56) fols 17ra & 101vb, with the reference to the *Arbor actionum* on fol 101rb.

71 Cf the one by Jean de Blanot (d 1281): Joannes de Blansco, *In titulum de actionibus in institutis commentaria*, in *De actionibus tractatus* (1596) I fols 222-285 at fol 259.

72 Wilhelmus Duranti, *Speculum Iuris* lib IV partic 3 (*De rescindendis uenditionibus*) §§ 4 & 6 (1574; repr 1975) II 250.

73 Petrus Iacobi Aurelianensis, *Aurea practica libellorum* rubr 86 no 4 (1575) 353.

shillings be restored”.⁷⁴ Next to this remedy there was the one termed the *actio ex empto quanto minoris praetoria*, which had to be brought within one year. In the libel for this remedy the plaintiff claimed “as much as the aforesaid horse lacked in value in view of its defect at the time of the contract, which is 60 Tours shillings”.⁷⁵

(2) The school of Orleans and Cinus

The jurists from the school of Orleans, followed by Cinus of Pistoia, rejected the existence of two different *actiones quanti minoris*, one civil and one praetorian. This rejection can be found, for example, in the *Lectura* on the *Digestum Vetus* of Jacques de Revigny (d 1296). Revigny referred to the opinion of Rogerius, as recorded in the gloss *essem empturus* ad D 19.1.13pr; the latter did not supplement the civil action with a praetorian action and did not distinguish between two ways of estimating reduction in price. Revigny subsequently maintained that, by using the civil action, one could claim as much as the merchandise lacked in value at the time at which the contract was entered into, thereby referring to D 19.1.13.5. Rogerius did not take into account what the buyer would have been willing to pay. *Quanti minoris* was an addition (*adiectio*) to an action, not a separate action in itself. This was, of course, the opinion of Azo and Odofredus. Were it otherwise, it could be argued that, if the seller was deceived in a similar way, he would have the *actio quanti pluris*. Thus, rather than two actions, there was only one action, based on the contract of sale, with the addition of *quanto minoris*, which can be brought within the first year.

In two respects this use of the *actio empti* by Revigny for price reduction is extraordinary. The action was annual in duration rather than perpetual, and was based on the *pretium commune* instead of the *pretium singulare*. Revigny provided one further argument to support his opinion. In C 4.58.2 the emperor declared – Revigny spoke about the jurist, but it was in fact the emperor, either Gordian or Justinian himself – that he could not think of grounds why, more than one year after the sale had taken place, it should still be possible to sue the seller, when the slave he had sold had run away. But the emperor did not say that another action was available. It could be argued that civil actions were perpetual and that was indeed the principal rule; but this case was different. The civil action for price reduction came to an end

⁷⁴ Iacobi, *Aurea practica* rubr 86 no 1 (n 73) 353: “quanto minoris fuisset empturus dictum equum, si eum sciuisset calcitrosus, scilicet quod reddat sibi praedictos xl solid. Turon.”

⁷⁵ Iacobi, *Aurea practica* rubr 88 no 1 (n 73) 360-361: “quanto minoris ualebat dictus equus, propter illud uitium, tempore contractus, quod est in lx. soli. Turo.”

after one year. There was indeed an action based on sale with the addition *quanto minoris* that could be used over a longer period; but this action was intended to achieve rescission, that is, rescission of the contract.⁷⁶ The last lines of the fragment are difficult to read and contain two corrupt allegations. One of these, the text of D 44.7.35 (the lex *In honorariis*), is important for a further argument in support of the view that there was only one action for price reduction. It was to be explained more fully by later generations of learned jurists, as we shall see below.

The same opinion as that recorded in the *Lectura* on the *Digestum Vetus*, can be found in Revigny's *Lectura Codicis*, which was edited in the sixteenth century under the name of Petrus de Bella Perthica. Here a further argument was given as to why it was unnecessary to distinguish between two ways of calculating the *quanti minoris*. The difference between the selling price and the actual value of the merchandise at the moment the contract was entered into, may be presumed to coincide with the balance between what the buyer paid and the lesser sum he would have paid. This would follow from D 19.1.13.4.⁷⁷

Pierre de Belleperche (d 1308), another jurist of the school of Orleans, defended an opinion similar to Revigny's. In two fragments in his *Lectura Codicis*, Belleperche rejected the idea that there were two different remedies claiming for price reduction. There was only one *actio quanto minoris*, which could be brought within one year to claim the difference between the selling price and the *pretium commune*.⁷⁸ Another fragment in the *Lectura* refers

76 Jacques de Revigny, *Lectura Digesti Veteris* ad D 19.1.13 in Leiden, MS d'Ablaing 2 fol 249vb: "Dominus Rogerius non suppleat istam directam, quia queret inter directam et pretoriam, quia una fit quanto minoris esset empturus, alia quantum res ualuisset tempore contractus, quia ego reperio de ciuili quanto minoris que competit ad quanti res ualuisset tempore contractus, infra e. l. Per contrarium [D. 19.1.13.5]. Vnde non considerit ipse uoluntatem quanto minoris esset empturus, <set> quanti minoris res ualet, infra e. § Per annum. Et ego dico quod quanto minoris non est nomen actionis set adiectio. Aliter etiam dicimus quod uenditor eodem modo deceptus haberet quanto pluris. Non etiam dico quod sint due actiones, immo dico quod illa quam ipsi dicunt quanto minoris pretoriam, est adiectio actionis. Non dico quod una sit pretoria, alia ciuilis, immo semper competit actio ex empto cum hac adiectione quanto minoris primo anno. Et dicit iurisconsultus quod non animaduerto quod possit, ut C. de edic. e. l. ii [C 4.58.2], set non diceret sic aliqua competeret. Et si dicas quod ciuiles actiones sunt perpetue, uerum est regulariter, sed non hic. Et est ratio, quia ista actio ex empto cum adiectione quanti minoris est redibitoria ad solutionem contractus et eius iura; uerius arg. infra de ac. et ob. l. In similibus [D 44.7.55]. Sic ergo dico quod non fuit quanti pluris, set adiectiones unius actionis; sic seruanda retractauit pretor, arg. l. In honoriam [D 44.7.35]."

77 Petrus de Bella Perthica [Jacques de Revigny], *Lectura super prima parte Codicis* ad C 4.58.2 (1519; repr 1967) fol 207rb.

78 Pierre de Belleperche, *Lectura Codicis* ad C. 4.49.9, in Florence, BML MS Plut 6 Sin 6 fol 208ra; Cambridge, Peterhouse MS 34 (unfoliated): "Dicit glossa, scire debetis, est quanto minoris, ut ff. de edic. e. l. Quod si nolit § Si plures [D 21.1.31.5] et est effectus, quod pretoria est annalis. Est

to the gloss *congrédi* on C 4.58.2, the case where the buyer wanted to sue the seller because the slave whom he had bought more than one year before had run away. As just stated, according to C 4.58.2, the emperor could not think of any remedy for price reduction after one year; but, according to the gloss *congrédi*, the buyer would still have the civil *actio quanti minoris* at his disposal.⁷⁹ Belleperche rejected this opinion. The only possible remedy was that based on D 19.1.13pr. In the view of Belleperche, however, this remedy was not a civil one. If the emperor said in C 4.58.2 that he could not think of any remedy which could be used after one year for reduction of price, then nobody could think of such a remedy. Therefore, prescribing various methods of estimating the *quanto minoris* would be to put words in the mouth of the emperor, which is not allowed. Prices should be established through an objective estimation. For this opinion Belleperche referred to D 35.2.63, which stated that estimating the value of things was not done on the basis of individual affection or interest.⁸⁰ Thus, while Revigny maintained that the only possible action for price reduction was civil and that, unlike other civil actions, it had to be brought within one year, Belleperche taught that there was only a praetorian action which, as with all praetorian actions, was time-limited. Both jurists agreed in rejecting various ways of estimating the *quanti minoris*. The ignorant seller was always liable for an objective estimation of the difference in price, based on the *pretium commune*, as had already been Rogerius's opinion in the twelfth century. The innovation of the jurists of Orleans was always to restrict to the period of one year the possibility of claiming price reduction because of defects.

Cinus of Pistoia (1270-1336) adopted the opinion of Pierre de Belleperche

alia quanto minoris ciuilis et est perpetua, ut Inst. de perpe. act. in prin. [J Inst 4.12.1]. Credo quod non sit nisi una actio quanto minoris que usque ad annum competit tantum, ut infra de edil. act. l. ii in prin. [C 4.58.2], cum idem sit quanto minoris et quanto minoris, ut ff. ad l. fal. Precia [D 35.2.63].”

79 The gloss *congrédi* on C 4.58.2: “redhibitoria uel quanto minoris ex empto uero, ciuili cum sit perpetua ...”

80 Pierre de Belleperche, *Lectura Codicis* ad C 4.58.2, in Florence, BML MS Plut 6 Sin 6 fol 212ra: Cambridge, Peterhouse MS 34 (unfoliated): “Dico glossa non probat per legem. Breviter credo quod non est reperire nisi unam accionem quanto minoris. Per actionem ex eo contractu agitur quanto minoris, ut supra allegata Iul. [D. 19.1.13pr (Ulpian, *Edict* 32)]. Set non reperio id est de ciuili. Probo hoc per legem istam. Imperator dicit non animaduerto quo remedio etc. Nullus potest animaduertere si princeps non potest, ut infra de test. l. Omnium [C 6.23.19]. Preterea hoc esset imponere legem uerbis, et non debas, quanto minoris erat res uel quanto minoris erat empturus, set pretia rerum estimacione attendi debent, ideo etc. arg. ff. ad l. falci. l. Pretia [D 35.2.63] et ff. ad l. ac. Si seruuum meum [D 9.2.33]. Per legem que de accione quanto minoris pretoria loquet, habet locum quanto minoris empturus esset, sicut lege allegata Iul. [D 19.1.13] loquitur. Tunc glossam non credo ueram licet in iudicii seruare forte redibitoria proprie vi. mensibus durat. Est alia inpropria redibitoria ut infra e. Si predium [C 4.58.4].”

in his commentary on the Code. Cinus was an early commentator who often referred to the teachings of Belleperche. He described the emperor who had spoken in C 4.58.2 as “full of Jurisprudence and having the entire law in his mind” (*legalis philosophiae plenus et qui omnia iura in pectore suo habet*). Moreover, in his opinion there was no difference between the two ways of estimating the *quanti minoris*. To allow various methods of estimating the *quanto minoris*, as the Accursian gloss did, would be to read new law into the existing words, which, according to the last line of C 6.43.2, was not allowed. Cinus presented one further and rather scholastic argument on why the gloss was wrong. According to the last line of D 19.1.13.14, no *actio empti* was possible against the ignorant seller, and, according to D 19.1.13.1, the ignorant seller was liable for *quanti minoris empturus esset*. Thus, the praetorian action was also aimed at *quanto minoris empturus esset*. Cinus concluded that the gloss was mistaken, no matter what the legal practitioners who persisted in their deeply rooted errors (*advocati radicatis erroribus insistentes*) might say.⁸¹

E. THE ERA OF THE COMMENTATORS

The scholars belonging to the era of the commentators, living and working in Italy and France, no longer produced glosses, but continuous commentaries on the texts of the *Corpus iuris*, sometimes *lex* by *lex*, sometimes on only a selection of titles or provisions. Moreover, in this period we can trace an early reception of the learned law into legal practice. Although possible influence on the statutes of Italian cities and the extensive practice of producing *consilia* fall beyond the scope of this chapter, some attention will be paid to one of Baldus' *consilia*, dealing with latent defects, since this *consilium* has already featured in the secondary literature.

The commentators frequently acknowledged the rules concerning the liability of the ignorant seller for latent defects as developed during the previous centuries. There were, however, some new developments concerning the *ratio* between the two kinds of *actio quanti minoris* and the question whether one or the other is superfluous. The jurists were confronted with a difference of opinion concerning the very existence of two remedies. The gloss had ruled that there was a civil remedy for *quanto minoris esset empturus* and a praetorian remedy for *quanto minoris res ualet*, but according to Pierre de Belleperche, followed by Cinus of Pistoia, there was only one action for price

⁸¹ Cynus Pistoriensis, *In Codicem et aliquot titulos primi Pandectarum tomi, id est, Digesti veteris doctissima commentaria* ad C 4.58.2 no 3 (1578; repr 1963) I fol 272rb.

reduction, namely the praetorian one, although aimed at *quanto minoris res ualet*.

(1) Liability of the ignorant seller in case of latent defects

The gloss *quanto minoris* ad D 19.1.13.1 confirmed the general rule, developed during the era of the glossators, that the ignorant seller is liable for reduction in price. We will return below to the rather different question of the number of actions available: only one or two?

In the writings of the glossators it was not always explicitly stated that the rule just mentioned was restricted to cases where the ignorant seller had not given any warranties. Most of the time, however, this was beyond dispute. It simply followed from the texts adduced as arguments. In the majority of those texts, mainly cases from Digest title D 19.1, *de actionibus empti et venditi*, there was no mention of any warranties. The writings of the commentators were sometimes more specific. Paulus de Castro (*ca* 1360/62-1441), who lectured for some time at Avignon and later in various places in Italy, stated that, in case of warranties, the seller was liable for the buyer's entire interest. Only when no warranties were given, should a distinction be drawn between the seller who was aware of the defects and the ignorant seller. The latter was generally liable for price reduction.⁸² The authors who, following the gloss, assumed that there were two *actiones quanti minoris* acknowledged that there were three situations where the rule that the buyer, by using the civil action, could claim *quanti minoris empturus fuisset* did not apply. For example, Bartolus de Saxoferrato (1313/14-1357), a student of Cinus, who studied and later taught in Perugia, noted that, in the case of selling or leasing out leaky barrels, the seller or lessor would not be liable for *quanti minoris* but for the other party's full interest. He further noted that in two cases the ignorant seller was not liable at all: when he sold a thief or a *predium tributarium*. He justified the latter two exceptions on the same grounds as had the glossators mentioned above: everyone should know that slaves are thieves, and everyone should know that for provincial tenements *tributum* has to be paid.⁸³

It seems that there was not much dispute about the applicability of the civil *actio quanti minoris*. Bartolus' view can be found in the works, for example, of Bartholomeus de Saliceto (d 1412), who lectured at Bologna, Padua and

⁸² Paulus Castrensis, *In primam Codicis partem commentaria* ad C 4.49.9 (1582) fol 232va.

⁸³ Bartolus de Saxoferrato, *Digestum vetus in primum totum Pandectarum commentaria*, ed Jacobus Concenatius, ad D 19.1.13 no 5 (1562; repr 2007) fols 774vb-775ra.

Ferrara,⁸⁴ and of Paulus de Castro.⁸⁵ Saliceto held that there was also an existing opinion – not the prevailing one – to the effect that ignorant sellers could not be held liable at all, and that the buyer, when using the civil action, thus claiming *quanti minoris fuisset empturus*, might say that he would not have bought the object at all, had he known of the defect (with reference to D 14.4.7.2). The latter was the prevailing opinion, which had already been acknowledged by the gloss *essem empturus* to D 19.1.13pr.⁸⁶

The commentators also noticed the similarities and differences between D 19.1.21.1 and C 4.49.9. In both these cases the defect existed in the fact that it appeared that either property tax was owed for the tenement which the buyer had purchased (*tributum* D 19.1.21.1) or more tax than the buyer had expected (*capitatio* in C 4.49.9). But in D 19.1.21.1 the buyer was refused the civil action for price reduction, whereas in C 4.49.9 this action was granted. As seen above, this difference was supposed to result from the fact that in D 19.1.21.1 the seller had given no information at all, whereas in C 4.49.9 he had provided the buyer with incorrect information. Following the glossators, some commentators, such as Angelus de Ubaldis (1328-1407), a brother of the better-known Baldus de Ubaldis, also explained the difference between the texts in this way.⁸⁷

(2) The scope of the Aedilician *actio quanti minoris*

The existence in the *Corpus iuris* of two different remedies for price reduction in the case of the sale of defective goods gave rise to a number of questions. This inconsistency compelled the glossators to think of reasons why one of the two was not superfluous. It was not difficult to think of cases where the *actio empti* for *quanti minoris empturus esset*, which Accursius had considered to be a distinct action, offered the best opportunities. This claim, which took into account the effective interest of the buyer (*pretium singulare*), could exceed the claim based on the objective value (*pretium commune*) and even result in rescission if the buyer maintained that he would not have bought at all if he had known of the defect. In some instances the

84 Bartholomaeus à Saliceto, *Commentaria in Digestum Vetus accuratissima* ad D 19.1.13pr no 3 (1541) fol 113va.

85 Paulus Castrensis, *In secundam Digesti Veteris partem commentaria* ad D 19.1.13pr no 2 (1582) fol 121ra.

86 See also Azo, *Summa Codicis* ad C 4.49 no 21 (n 46) fol 111va.

87 A different explanation could be that the taxes owed in D 19.1.21.1 were outstanding, and those in the case of C 4.49.9 concerned the future. In the case of outstanding payments, it was important whether the seller was aware of their existence or not. See Angelus de Perusio, *Super codice nuper reuisa cum multis adiunctis, uidelicet repetitio* ad C 4.49.9 (1545) fol 102vab.

civil *actio empti* was the only option for recovering part of the selling price. In certain cases the praetorian *actio quanti minoris* could not be used: the sale of a slave with mental defects;⁸⁸ the sale of a slave-woman who was no virgin;⁸⁹ and the *emptio simplaria*.⁹⁰ In the Middle Ages, the *emptio simplaria* was understood as the contract where parties had agreed not to give the warranties mentioned in the aedilician edicts,⁹¹ or as the sale of simple things which needed no sustenance (*alimentum vitale*),⁹² or as the sale of incorporeal things, such as an inheritance.⁹³ Moreover, the praetorian action was annual in duration, the civil one perpetual. It was more difficult to see what role the additional action could play next to the civil *actio empti*.

The glossators nevertheless found two reasons to justify the existence of the aedilician *actio quanti minoris*. It could be used in the exceptional cases where the *actio empti* was not available – the sale of a thief and the sale of a *predium tributarium*. Secondly, the claim directed at *quanti minoris res* could exceed the claim *quanti minoris empturus esset*, because, for instance, what an average person would have given for a defective horse (*pretium commune*) was less than what a specific buyer – perhaps someone capable of handling such horses – was prepared to pay (*pretium singulare*). For the rest, the glossators considered that both remedies applied to the sale of practically the same defective things.

This opinion was not followed by the commentators. According to Bartolus, the praetorian *actio quanti minoris* was only given for slaves and animals. That was what D 21.1.1 and D 21.1.38 dealt with. D 19.1.13, on the other hand, speaks about the sale of an unsound beam. As a consequence the latter text could not be dealing with the aedilician action. Here, the civil-law *actio quanti minoris* was granted. It had a wider application and could be used against the ignorant seller of any kind of defective goods.⁹⁴ Since the aedilician edicts, as a result of Justinianic interpolations in D 21.1.1pr and D 21.1.63, were no longer restricted to the sale of slaves and certain animals in the *Corpus iuris*, what prompted Bartolus to defend such a position? How could he maintain that they were? It is quite unlikely that Bartolus wanted to interpret the *Corpus iuris* in conformity with classical law.

As a matter of fact, the commentators could see that the titles on the

88 D 21.1.4.

89 D 19.1.11.5.

90 D 21.1.48.8.

91 Vacarius, *Liber Pauperum* lib 4 tit 56 (n 37) 164.

92 See Azo, *Summa Codicis* ad C 4.58 no 6 (n 46) fol 114vb.

93 See the gloss *simplarium* ad D 21.1.48.8.

94 Bartolus, *Digestum vetus* ad D 19.1.13 nos 1 & 3 (n 83) fol 774vb.

aedilician edicts concerned almost exclusively cases dealing with the sale of defective slaves and animals, and only occasionally something else, such as a plot of land; but a return to classical law was incompatible with their approach to the *Corpus iuris* in general. It is more likely that we are dealing here with a medieval misinterpretation. On the basis of the wording of the edicts and the cases dealt with in the titles D 21.1, *de aedilitio edicto et redhibitione et quanti minoris*, and C 4.58, *de aedilitiis actionibus*, it was argued that the use of aedilician actions was restricted to the sale of slaves and animals. This was done for the sole purpose of developing a weapon to attack the view of Pierre de Belleperche and Cinus of Pistoia, who had claimed that the only action for price reduction was the praetorian, and that a civil action for the same purpose did not exist. If the praetorian action only applied to animals and slaves, there must be a civil action; otherwise, it was impossible to explain all the texts which granted remedies for price reduction when other defective goods were sold. When Bartolus and his followers maintained that the aedilician edicts were intended only for the sale of slaves and animals, or that these edicts acquired wider applicability only through later interpretation, this probably does not point at a sincere interest in legal developments prior to the compilation of the *Corpus iuris*, but rather at creating an argument for contemporary debate. A similar view to that of Bartolus was defended by Raphael Fulgosius (1367-1427), who lectured at Pavia, Siena and Padua.⁹⁵ Albericus de Rosate (*ca* 1290-1360), who practised law in Bergamo, had already explained that the praetorian *actio quanti minoris* was composed first. It had a limited application because it spoke only about defective animals. The civil action, however, mentioned any defective object purchased.⁹⁶ In fact, this explanation was historically incorrect, as the civil *actio empti* was older than the aedilician actions.

(3) Claiming price reduction: one remedy or various sets of rules?

As we have seen, the ordinary gloss maintained there was an *actio quanti minoris civilis*, distinct from the regular *actio empti* and distinct from the *actio quanti minoris praetoria* of the aedilician edicts. This idea was obviously accepted in procedural law, since each of the two actions for price reduction

⁹⁵ Raphael Fulgosius, *In primam pandectarum partem commentariorum ... Tomus secundus* ad D 19.1.13 nos 3-4 (1554) fol 143rb.

⁹⁶ Albericus de Rosate, *In secundam ff. Veteris Partem commentarii* ad D 19.1.13 no 3 (1585; repr 1977) fol 148vb: "Est et alia differentia, ut dicamus, quod quanto minoris pretoria, prius fuit in compositione et defectiva erat, quia loquebatur de morboris animalibus emptis. Ciuilis uero loquitur de omni re morbosa empti, ut emptor agere possit quantum minus emisisset, si fuisset (lege: sciuisset) morbum uel uitium, ut colligere potes hic, dum dicit de tigno uitioso."

appears to have received its own libel. The view of the gloss was rejected, however, by the Orleans jurists. Pierre de Belleperche, followed by Cinus of Pistoia, acknowledged the existence of only one *actio quanti minoris* the praetorian, which had to be brought within one year. The commentators, facing this difference in interpretation, had to think of arguments to adopt a position of their own.

Bartolus clearly decided to follow the gloss, as did most of the commentators. First he explained that, according to the gloss *essem empturus* on D 19.1.13pr, there were two *actiones quanti minoris* and he then referred to the deviating view, mentioned in this gloss, which appealed to D 19.1.13.5. Bartolus ascribed this dissenting view to Bulgarus rather than Rogerius. This may indicate that in the fourteenth century in some manuscripts of the *Digestum Vetus* the ordinary gloss to D 19.1.13pr may have had a reading different to that found in later printed editions.⁹⁷ Bartolus subsequently presented a number of arguments in favour of the view of Pierre de Belleperche and Cinus of Pistoia. Some of them derived from these jurists themselves. First, in C 4.58.2 the emperor declared he was not aware of any action which could be granted for price reduction after the period of one year had lapsed. It was argued that if there had been an *actio quanti minoris civilis*, which was perpetual, the emperor would have known. Secondly, the two ways of estimating price reduction resulted in the same amount, because it was very unlikely that the buyer, when he was aware of the defect, would have been willing to pay anything else but the *estimatio communis*. These two arguments were subsequently supported by complicated reasoning, based on the text D 44.7.35, which Jacques de Revigny had already discussed. According to this text, praetorian actions which were reipersecutory were available for a longer period than just one year, if they were in conformity with civil law. Thus, when *usucapio* was interrupted before the required period of time had elapsed, the *actio Publiciana* would be available for only one year, because it was not in conformity with the *ius civile*. Now, Bartolus argued that, if two *actiones quanti minoris* were in existence, the praetorian one had to be perpetual, since it was given in conformity with civil law. It was, however, an annual action, because it was granted contrary to the civil law. The praetorian action observed the *interesse commune*, the civil action observed the *interesse singulare*. This reasoning was obviously intended to lead to the conclusion (although this is not very clear) that it was impossible for the two actions to co-exist. As just stated, Bartolus himself followed the

⁹⁷ See Van Warmelo, *Vrijwaring teen gebreke* (n 62) 65 where the dissenting view is ascribed to Hugolinus, citing Leiden MS BPL n 6 C.

gloss. He maintained that the civil action could not be omitted, since the praetorian action was given only for the defective slaves and animals which the aedilician edicts spoke about in D 21.1.1 and D 21.1.38. In D 19.1.13 the *actio quanto minoris* was given for an unsound beam, and thus the remedy granted there could not possibly be praetorian. Bartolus next refuted the two arguments of Pierre de Belleperche and Cinus of Pistoia. He adduced three examples to demonstrate that there could be an enormous difference between the *precium commune* and the *precium singulare*, since the latter depended on the buyer's personal circumstances. I would not consider buying a slave if I knew he was a murderer, but someone else, a ruler (*tyrannus*) for example, might possibly like to have him. A *doctor* would not be willing to buy a horse if he knew it was defective, but a stable man (*marescalus*) might be willing to buy it, albeit for a small price.⁹⁸ Moreover, a student would not consider buying a book containing some errors, whereas a scholar (*doctor*) might not mind so much. Finally, according to Bartolus, the argument derived from C 4.58.2 was not convincing. From the context of the emperor's statement it appears that he was consulted on the availability of the *actio quanti minoris praetoria*. He was not asked whether in general an action was available.⁹⁹

Baldus de Ubaldis (1327-1400), who taught in various Italian law schools, summarised in his commentary on D 19.1.13 more or less what his master, Bartolus, had already said.¹⁰⁰ Baldus' *consilium* concerning the sale of a defective horse is of more interest. The main problem discussed in this *consilium* was not so much the difference between the praetorian and the civil actions for reduction in price, but how to prove that the horse that was bought and later died had already been carrying the lethal disease at the time it was sold. It is incidentally worth noting that this problem is somewhat similar to one described by the canonist Panormitanus (Nicolaus de Tudeschis, 1386-1445) on a text of the *Liber Extra* (3.19.4), which dealt with a horse that died three days after the sale because of what appeared to be heart trouble.¹⁰¹

This is not the place to go into details concerning the four different ways in which the plaintiff could furnish the required proof; rather, I will discuss the remedies considered advisable in the case of the *consilium*, which elucidated the practical consequences of Accursius' doctrine on the two separate

98 This example is reminiscent of the one in the gloss of Johannes Bassianus on D 19.1.13 reproduced in n 43 above.

99 Bartolus, Bartolus, *Digestum vetus* ad D 19.1.13 no 1 (n 83) fol 774vab.

100 Baldus Perusinus, *Tomus secundus in Digestum vetus* ad D 19.1.13pr (1541) fol 112va.

101 See Panormitanus, *In tertium decretalium librum interpretationes* ad X 3.19.4 no 4 (1547) fol 114rb.

actiones quanto minoris.¹⁰² Baldus mentioned three actions, each of which he characterised as a *bona via*. He noted first, however, that when a pact concerning diseases and defects was concluded between seller and buyer, this pact had to be observed. This followed from D 4.3.37, D 21.2.31 and D 21.1.19.2. He went on to mention the three remedies. If it could be proved that the horse had the disease at the time of the sale, there was the *actio redhibitoria* and the *actio quanto minoris*, which in this case would be aimed at *quanto minoris essem empturus*. These two remedies included restitution of the selling price. For the latter, this followed from D 21.1.43.6. The third action available was the contractual *actio empti* based on the pact which could also be used for rescission, as followed from D 19.1.11.5. The only action not mentioned here was the *actio quanto minoris praetoria*. Baldus explained the preference for the civil remedy for price reduction by referring to D 21.1.43.6. The civil *actio quanto minoris* could lead to rescission when the buyer declared that he would not have bought the horse at all, had he known of the defect, because it took into account the *pretium singulare*. This was already laid down in the gloss *essem empturus* on D 19.1.13pr. In the case under dispute, this was apparently what the buyer wanted, namely restitution of the entire selling price, and not just the difference between selling price and *pretium commune*.¹⁰³

Some writers, such as Bartholomeus de Saliceto, maintained that only the *actio quanti minoris praetoria* could be used to claim restitution of the entire selling price. Merely declaring, however, that one would not have bought the thing was insufficient for that purpose. The entire price could only be claimed back with this remedy when, according to the *estimatio communis*, the horse had no value at all at the time it was sold.¹⁰⁴ This had probably not been the case in the example in Baldus' *consilium*. For the rest, Saliceto adhered to the opinion of the gloss on the two actions for price reduction and the arguments produced by Bartolus against the teachings of Pierre de

102 For an entirely different opinion, namely that Baldus in this *consilium* did not see any difference between the praetorian and the civilian way of assessment and merged the aedilician action with the civil one, see Zimmermann, *Obligations* 323-324.

103 Baldus Ubaldus Perusinus, *Consiliorum sive responsorum ... Volumen Quintum consilium* 499 (1589) fol 122r.

104 Bartholomaeus à Salyceto, *Commentariorum ... in tertium et quartum Iustiniani Codicis* ad C 4.49.9 no 2 (1541) fol 214ra. To emphasise the difference between *pretium singulare* and *pretium commune* Saliceto referred again to the three examples mentioned by Bartolus and spoke about a doctor or physician (*medicus*) who would not have wanted to buy the defective horse. In this phrasing the case recalls one of the classical examples used in the sixteenth-century school of Salamanca: see Domingo de Soto, *De iustitia et iure* lib VI q 3 art 2, introd by V D Carro and trans M González Ordóñez (1968) 555.

Belleperche.¹⁰⁵ The same can be said for Paulus de Castro. The only critical remark he made was that Pierre de Belleperche was right in his opinion that *quanti minoris civilis* is not the title of a specific, independent action, but an addition (*adiectio*) to the *actio empti*. On the other hand, he rejected the opinion of Belleperche that the action for price reduction was only aimed at *quanto minoris res est*. It might be more advantageous to claim *quanto minoris fuisset empturus*, as was shown by the examples.¹⁰⁶ According to Angelus de Ubaldis, legal practice observed the teachings of neither Pierre de Belleperche nor Cinus. He referred to the remark, now ascribed to Belleperche, concerning “practitioners who insist in their deeply rooted errors”, and said that it was the common opinion of the entire world to observe the opposite and to allow the buyer to sue the seller for latent defects for many years after the sale.¹⁰⁷

The treatise *De actione et eius natura* of the Paduan professor (Giovanni Battista da Sanbiagio (Baptista a Sancto Blasio, ca 1425-1492) contains an extensive commentary (two columns in folio) on the difference of opinion between, on the one hand, the Accursian gloss and, on the other, the Orleans jurists and Cinus. This does not dramatically change our understanding of the teachings of the commentators, but it demonstrates that, on the threshold of early-modern times, and while the process of reception of Roman law was already taking place, there was a lively debate on the seller's liability for price reduction in view of latent defects. The main issue for Sanbiagio was to consider what kinds of *actiones quanti minoris* existed. Eventually he appeared to adopt a middle-course between the gloss and Pierre de Belleperche.

Sanbiagio started with a discussion of three arguments derived from Pierre de Belleperche and Cinus of Pistoia. First, according to their view, there was only one action for price reduction – the praetorian action for *quanto minoris res*, which had to be brought within one year. Afterwards there was no action left for the buyer, but there would be, it was argued, if there were an *actio quanto minoris civilis*, because that action, being civil, would be perpetual. Second, it was very likely that the amount the buyer would have been willing to pay, had he known of the defect, would have coincided with the *pretium commune*. According to D 35.2.63, the *pretium singulare* should

105 Salyceto, *Commentariorum* ad C 4.58.2 no 4 (n 104) fol 220rb.

106 Paulus Castrensis, *In secundam Digesti Veteris partem commentaria* ad D 19.1.13pr no 4 (1582) fol 121rb.

107 Angelus, *Super codice* ad C 4.58.2 (n 87) fol 105rab: “et hoc dicit esse uerum quicquid teneant aduocati, sed mundi consuetudo obseruat contrarium quod ubi res uitiosa uenditur ratione uitii in perpetuum uenditorem agitur ad interesse.”

not be considered when estimating prices. Third, if there were two actions, the praetorian one had to be in conformity with civil law and, because of D 44.7.35, be available for more than one year, although this would not be the case if it was contrary to civil law. Sanbiagio subsequently brought some more arguments into the dispute. Fourth, if there were an action directed at *quanto minoris empturus fuisset*, it would be possible to claim back the entire selling price and at the same time to retain the merchandise. But, according to D 18.1.1, it was not fair if the seller were deprived of his goods without a *quid pro quo*, although both Saliceto in his commentary to C 4.49.9 and the gloss *essem empturus* to D 19.1.13pr seem to have accepted this. Fifth, if the buyer would not have paid anything, had he known of the defect, it seems that he should not use the *actio quanti minoris*, but the *actio redhibitoria*. On the basis of all these arguments, Pierre de Belleperche and Cinus of Pistoia came to the conclusion that there was only one *actio quanto minoris*, namely the praetorian.

After having expounded the doctrine of Pierre de Belleperche and Cinus of Pistoia, Sanbiagio put forward two counter-arguments. The common opinion did not agree with the idea that *quanto minoris* was just an addition to the *actio empti* of D 19.1.13pr. The gloss *empturus essem* to D 19.1.13pr had the correct view, because the aedilician action was only available for the slaves, animals and other things, about which D 21.1.1 spoke. Secondly, in C 4.58.2, the emperor was only asked whether the praetorian action for price reduction was available. The entire title C 4.58, *de aedilitiis actionibus*, dealt with aedilician actions. Accordingly, C 4.58.2 did so too. This text should be understood as referring solely to the praetorian action. It said nothing about the civil action. This followed from D 18.2.16. Furthermore, in case of doubt, it was necessary to stick to the rule that the name of the title (*rubrum*) was determined by the texts adopted under this title (*nigrum*).¹⁰⁸

Having explained this, Sanbiagio responded to the second and third arguments of Pierre de Belleperche and Cinus of Pistoia that he had just paraphrased. Although the provisions in the *Corpus iuris* did not express this unequivocally, if the buyer would not have bought at all, he had available the *actio redhibitoria*, not the *actio quanti minoris civilis*. Otherwise, the inconvenient consequences just mentioned (the seller losing his goods without counter-performance) might occur. Sanbiagio preferred the opinion

108 Baptista a Sancto Blasio, *Tractatus utilissimus solemnissimusque de actione et eius natura* Vigesima prima actio (Quanto minoris est) no 45 in *Volumen V Tractatum ex variis iuris interpretibus collectorum* (1549) fol 62vb: “et quod notat glossa in c. Bone de confirma. uti. uel inutil. (X 2.30.3) que dicit quod in dubio tenendum est quod nigrum disponat id quod rubrum.”

of Pierre de Belleperche and Cinus of Pistoia that it was better not to regard the *actio quanto minoris civilis* as an action of its own separated from the contractual action of sale. D 19.1.13pr spoke about *in condemnatione ex empto*, while the jurist in all the fragments from D 19.1.11 until D. 19.1.13pr dealt with the *actio empti*, and the compilers adopted D 19.1.13pr in the title on the remedies for sale. It was true there was only one *actio quanti minoris praetoria*, namely the one mentioned by Johannes Bassianus in his *Arbor actionum* and the one Roffredus dealt with in his *Libelli iuris civilis*.¹⁰⁹ There was also, however, the *actio empti* which, through its wide applicability, could be used for the purposes indicated in D. 19.1.13pr. But Bartolus and Paulus de Castro accepted the majority view that there was an *actio ex empto ciuilis quanto minoris emptor empturus fuisset*, which differed from the *actio pretoria quanto minoris res communiter ualebat*. One of Bartolus' examples was subsequently ridiculed. Suppose that a doctor, knowing a book contained errors, had nevertheless bought it for a higher price than an unlettered person, such as a student. He would have had the civil action, not the praetorian, because if the doctor wanted to declare under oath that he would only have bought it for the actual value, that would be perjury. All this was nonsense, Sanbiagio argued, because the one who knew of the defect did not want to buy at all, and certainly not for more than its *pretium commune*. D 1.3.5 and the gloss *essem empturus* on D 19.1.13pr did not refer to such very exceptional situations.¹¹⁰

It becomes clear that in some respects Sanbiagio followed Pierre de Belleperche and Cinus of Pistoia. There was no *actio quanti minoris civilis*, distinct from the *actio empti*, in the *Corpus iuris*. There was the *actio redhibitoria* for rescission and the *actio quanti minoris* for price reduction, based on the *pretium commune*. Thus, price reductions should be estimated according to the actual value of things and not according to the *pretium singulare*. Rescission should not be claimed by the *actio quanti minoris*. But whereas Pierre de Belleperche and Cinus of Pistoia had taught that, after one year, the buyer no longer had remedies for latent defects available, Sanbiagio still considered it possible to use the *actio empti* for the purposes indicated in D 19.1.13pr.

109 It may be noted, though, that Roffredus, *Libelli* (n 56) – at least the edition printed in Avignon 1500 (reprinted in Turin 1968) – also contains a *libellus* for the *actio quanti minoris civilis*, as was noted above.

110 Sancto Blasio, *Tractatus Vigesima prima actio* (Quanto minoris est) nos 43-48 (n 108) fols 62va-65ra.

F. CONCLUSIONS

In summary, we can say that developments in medieval legal doctrine concerning the ignorant seller's liability for latent defects took place in two different stages. The era of the glossators was characterised by the formation of a rule of law, the era of the commentators by the debate over whether the principle this rule contained – namely that the ignorant seller is liable for price reduction – offered the buyer the choice between two separate remedies, each with its own features.

The starting point of all scholarship was the *Corpus iuris civilis*, which offered hardly any general rules or principles on liability for latent defects. Apart from the aedilician edicts, the most generally phrased text in the Digest can be found at the beginning of D 19.1.13. For the rest there were only cases, and in some of these the ignorant seller was considered to be liable, such as in D 18.1.45 (garments which had been repaired were sold as new), D 19.1.6.4 (sale of a leaky barrel), D 19.1.13.1 (sale of a runaway slave) and C 4.49.9 (sale of a plot of land which owed a higher *capitatio* than the seller had stated). In other cases the ignorant seller was regarded as not liable, such as in D 19.1.13.1 (sale of a thief) and D 19.1.21.1 (sale of a plot of land which appeared to be a *predium tributarium*). It had to be decided which cases reflected the rule and which reflected the exception. In that discussion, the number of the cases played a role (four or five is more than two) as did the question whether the deviation from the principal rule could be rationalised. Indeed, the buyers in D 19.1.13.1 and D 19.1.21.1 could be considered to owe their loss to their own negligence. Second, it had to be decided to what extent the ignorant seller was liable – whether for the buyer's full interest or merely for reduction in price. Reduction in price appeared to become the standard, and full compensation the exception. This could also be rationalised, such as by the fact that it was very simple for a seller of barrels to check whether or not the barrel leaked.

All the cases just mentioned were found in titles dealing with the remedies for sale. As a consequence, the action granted was the contractual *actio empti*; but when this remedy was used against the ignorant seller of defective goods, it came very close to a different action, one which could be found in the titles on the aedilician edicts. Both actions, the *actio empti* and the *actio quanti minoris*, were available for exactly the same situation (sale of defec-

tive goods by an ignorant seller) and for exactly the same purpose (claiming a reduction in price).¹¹¹ This made Johannes Bassianus and Azo emphasise the differences. The *actio empti*, aimed at reduction in price, was civil and thus perpetual, and because of some texts in D 19.1, *de actionibus empti et venditi*, was used to claim as much as the buyer would have paid less had he known of the defect (*pretium singulare*). The aedilician *actio quanti minoris* was praetorian and thus limited in time, and because of some texts in D. 21.1, *de aedilitio edicto et redhibitione et quanti minoris*, it was used to claim the difference between the selling price and the value of the thing at the time of the contract of sale (*pretium commune*). The next step in development was made by Accursius who defined the *actio empti* used for price reduction as an independent and separate action, distinct from the regular *actio empti* and distinct from the aedilician action for price reduction in price termed the *actio quanto minoris civilis*.

Accursius made the Roman law remedies more systematic than the sources could actually justify, and for this he was criticised. The *Siete Partidas* did not adopt his view, as embodied in the gloss *essem empturus* to D 19.1.13pr, while the Orleans jurist Pierre de Belleperche, followed by Cinus of Pistoia, rejected it. In their opinion there was only one action for reduction in price available against the ignorant seller in the case of latent defects – the aedilician *actio quanti minoris* – which had to be brought within one year and was aimed at the difference between the selling price and the actual value at the time of the sale. In the course of the fourteenth and fifteenth centuries, hardly any commentator opted for the opinion of Pierre de Belleperche and Cinus of Pistoia and almost all followed the gloss. However, the scholarly sources we considered do show that the alternative opinion was very much alive in the doctrinal debate, even at the end of the fifteenth century. Both views – that of the gloss and that of Pierre de Belleperche and Cinus of Pistoia – were provided with many arguments, most of them derived from the *Corpus iuris*. At the end of the fifteenth century, Giovanni Crispo de Monti qualified the debate concerning the difference in assessment as an old and hackneyed story (*antiqua et trita quaestio*). He decided not to deal with it in order to proceed without delay to more interesting issues.¹¹² Around the year 1535, it appears that the Imperial Court of Justice (*Reichskammergericht*) still applied the prevailing view of the medieval *doctores*. Its assessor Viglius

111 Although the aedilician edicts imposed a duty on the seller to provide the buyer with information and to give warranties, liability under the *actio quanti minoris* was not dependent on the fact whether such warranties were given or not.

112 Joannes Crispus de Montibus, *Termini omnium actionum cum arbore* ad Quanto minoris (1519) [found added to Iason's *De actionibus* in the edition of Lyons, 1546].

of Aytta (1507-1577) opposed, however, the idea that the *actio quanti minoris empturus erat* was an independent action, and followed the view of Pierre de Belleperche and Cinus of Pistoia that price reduction should be based on the objective value of the merchandise. In an extensive report he rejected the doctrine of Bartolus and supported his own opinion with nine arguments.¹¹³ One generation later, the academic jurists would definitively abandon the teachings of the gloss *essem empturus* on D 19.1.13pr.

The most important difference between the two approaches was not so much the exact assessment of the reduction in price. This would only have made a substantial difference in very exceptional situations. According to the gloss, however, the *actio quanto minoris civilis* for price reduction could be used up to thirty years after the sale had been concluded, whereas, according to the alternative view, any action had to be brought within one year. When Roman law was received into the legal practice of early modern times, this issue of liability for defects required a choice to be made. The gloss retained its authority; but rules of law were no longer exclusively based on the authority of legal texts from a distant past; instead, they were developed by new generations of scholarly jurists and legal practitioners who were increasingly sensitive to the demands of legal practice and reliance on human reason.

113 See R Sprenger, "L'autorité de la 'communis opinio' dans le pratique de la Chambre impériale de justice (c. 1535): une application de l'*actio quanti minoris*", in A Wijffels (ed), *Miscellanea Consilii Magni III, Essays on the History of Forensic Practice* [= Verzamelen en bewerken van de jurisprudentie van de Grote Raad, Nieuwe reeks XII] (1988) 161; and R M Sprenger and A Wijffels, "De *actio quanti minoris* in de praktijk van het rijkskamergerrecht ca. 1535. Uit de aantekeningen van Viglius van Aytta", in D Lambrecht (ed), *Lopend rechtshistorisch onderzoek. Handelingen van het tiende Belgisch-Nederlands rechtshistorisch colloquium* [= Iuris Scripta Historica III] (1990) 129.