

Casebook on the Roman Law of Contracts

Chapter IV: Sale:

A Contract Created Through Informal Agreement

Part A: Formation of a Sale

Unlike stipulations, which require the prescribed formality of solemn words, and “real” contracts, which require the “natural formality” of delivery, the four consensual contracts require only informal agreement (*consensus*) in order to be fully effective between the two parties to the contract. This Chapter deals with sale (*emptio venditio*), the most important and in many ways the most representative of these consensual contracts. The other three are considered more briefly in Chapter V.

In sale, the flow of benefit (*utilitas*) is almost always strongly bilateral; in this sense, it is much more like a typical modern contract than stipulation or the real contracts. The parties to a sale are each seeking advantage (usually, direct material advantage) from the sale of the object, and the agreement thus results from a genuine, bargained-for exchange between them. This is the real underlying reason why a sale becomes effective when agreement is reached, even though neither party may yet have begun to carry out the agreement or even to rely on it in preparation for performance. Their agreement is therefore often wholly executory, an exchange of promises that are to be carried out in the future. The Roman jurists, to be sure, explain the effectiveness of consensual contracts somewhat differently: the parties are obligated by good faith (*bona fides*) to carry out their agreement. Although this argument is illusory since *bona fides* has such a legal effect only in specific circumstances, nonetheless the jurists’ argument opens the way to a more social interpretation of the process of making and executing contracts.

As the Cases will show, much more substantial problems arise in defining *consensus* itself. It is not always clear what the jurists mean by *consensus*: a true mental (subjective) agreement between the parties, or rather an apparent and objective agreement that may even be contrary to one or both parties’ actual intentions. The Cases on mistake and interpretation throw limited light on this issue, but it is ultimately unclear how the jurists resolved the fundamental question.

Section 1: Agreement on the Basic Elements of a Sale

The Urban Praetor's Edict contained two *formulae* for sale: one for the seller (*actio ex vendito*), one for the buyer (*actio ex empto*). Their wording is discussed in the Introduction to this book; it is almost laconically brief, giving no detailed instructions to the *iudex* beyond a description of the object of sale and an injunction to determine liability on the basis of good faith (*ex fide bona*), a phrase that became the starting point for most Roman law surrounding this contract.

Although, on their face, the *formulae* seem to declare the fact of the sale, even this could be contested before the *iudex*. Most importantly in this respect, the two *formulae* gave no clue even as to how sale itself should be defined. This was a "question of law" (*quaestio iuris*) that was, at least eventually, the domain of the jurists. Plainly, the *formulae* required the *iudex* to identify a transaction as a sale, and also to identify the seller and the buyer. In most instances, this would not be difficult, since ordinary language would suffice. But not infrequently contracts could be more complicated or ambiguous. The problem of identification is, of course, basic to all the Roman contract types, but the answers the jurists give in the case of sale are not always obvious and in some instances highly debatable. These answers imply, as we shall see, a conception of sale that differs in important respects from the modern conception; and the reason for the differences may perhaps be related to the underdeveloped character of the Roman economy.

The Cases in this section explore a number of interrelated issues concerning the distinction between sale and barter, the nature of "price," and the sorts of property that qualify as objects of sale. It should be noted that, although our own law lays considerable stress on the difference between sale of goods and sale of land, Roman law, for the most part, does not, so the rules for sale are, to that extent, more generalized.

Case 77: The Origins of Sale

D. 18.1.1 pr. (Paulus libro trigensimo tertio ad Edictum)

Origo emendi vendendique a permutationibus coepit. Olim enim non ita erat nummus neque aliud merx, aliud pretium vocabatur, sed unusquisque secundum necessitatem temporum ac rerum utilibus inutilia permutabat, quando plerumque evenit, ut quod alteri superest alteri desit. Sed quia non semper nec facile concurrebat, ut, cum tu haberes quod ego desiderarem, invicem haberem quod tu accipere velles, electa materia est, cuius publica ac perpetua aestimatio difficultatibus permutationum aequalitate quantitatis subveniret. Eaque materia forma publica percussa usum dominiumque non tam ex substantia praebet quam ex quantitate nec ultra merx utrumque, sed alterum pretium vocatur.

Paul in the thirty-third book on the Edict:

Purchasing and selling (*emptio venditio*) took its origin from barter (*permutationes*). For at one time there was no coinage, nor was one thing called goods (*merx*) and the other the price (*pretium*). Rather, as time and circumstance dictated, each person bartered what was not needed for what was needed, since it is often the case that one party has in abundance what the other party lacks. But it did not always nor easily turn out that when you have what I want, I have in turn what you wish to take. Therefore a material was chosen, the public and enduring value of which overcame the problems with barter through the evenness of its amount. This material, struck with a public symbol, provided use and ownership less from its substance than from its amount; nor are both (the items exchanged) called goods, but one is called the price.

Discussion:

1. Legal Anthropology. Reconstruct Paul's account of the origins of sale. It seems plausible, doesn't it? How does the invention of money fit into Paul's scheme? The theory of economic development in this passage can be traced back at least to Greek philosophers such as Aristotle, who argued that money, as a neutral measurement of the value of other goods, had to have an intrinsic value of its own, be durable and portable, and finally be divisible into precise units (*Politics* 1.8-10); and he too advances the idea Paul expresses, that money was devised to make exchanges easier. In this understanding, money is still largely metallic: for the most part, gold or silver bullion secured by official minting and with a face value something close to its value as bullion, or bronze supported by the precious metals.

2. Barter and Sale. Does this passage provide any clear grounds for distinguishing barter (*permutatio*) from sale? As the Cases below will suggest, this was a major problem for the jurists, who eventually held that barter was not actionable through the *formulae* for sale (see Case 79).

Case 78: The Nature of Agreement

Gaius, *Institutiones* 3.135-137, 139

135. Consensu fiunt obligationes in emptionibus et uenditionibus, locationibus conductionibus, societatibus, mandatis. **136.** Ideo autem istis modis consensu dicimus obligationes contrahi, quod neque uerborum neque scripturae ulla proprietas desideratur, sed sufficit eos, qui negotium gerunt, consensisse. unde inter absentes quoque talia negotia contrahuntur, ueluti per epistulam aut per internuntium, cum alioquin uerborum obligatio inter absentes fieri non possit. **137.** Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet, cum alioquin in uerborum obligationibus alius stipuletur alius promittat et in nominibus alius expensum ferendo obliget alius obligetur. ... **139.** Emptio et uenditio contrahitur, cum de pretio conuenerit, quamuis nondum pretium numeratum sit ac ne arra quidem data fuerit. nam quod arrae nomine datur, argumentum est emptionis et uenditionis contractae.

Gaius in the third book of his *Institutes*:

135. Obligations are created through agreement (*consensus*) in the case of (the contracts of) purchase and sale, lease and hire, partnership, and mandate. **136.** We say that these kinds of obligations are contracted by agreement because no formality of words or writing is required; it is enough that the persons who make the transaction agree. So such transactions are contracted also between absent parties, e.g., through a letter or by messenger, whereas a verbal obligation (a stipulation) cannot be made between absent persons.

137. Likewise, in these contracts one party is obligated to the other for what each ought to provide the other in accord with what is right and proper (*bonum et aequum*), whereas in verbal obligations one party stipulates and the other promises. ... **139.** Purchase and sale is contracted when there is agreement on a price, even if the price is not yet paid, nor even an earnest (*arra*) given. For what is given as an earnest is (only) evidence that a sale was contracted.

The Problem:

Seius and Titius agree orally on Seius' sale of a Greek vase to Titius for 50,000 sesterces. Is anything further required in order to make their sale legally binding?

Discussion:

1. Stipulation and Sale. According to Gaius, how do sale and the other consensual contracts differ from stipulation? He seems to lay emphasis on the absence of formality in forming a consensual contract: the parties need not be in one another's presence (although sources suggest this was normal), nor must they employ any legally prescribed words, whether oral or written. Think about the pros and cons of informality. How easy will it be, for instance, to recognize a sale agreement when it has been made? The second difference is the content of the resulting contractual obligation: in stipulation, focus is on the wording of the promise, whereas in consensual contracts the debtor is liable "in accord with what is right and proper (*bonum et aequum*)." This concept of obligation in good faith (*ex fide bona*) comes, of course, from the procedural *formulae* for sale, which are discussed in the introduction to this section. But is Gaius implying that there is some deeper relationship between the informality of a sale and the obligation that results? Think about this question as you read later Cases.

2. The Characteristics of Agreement. What does Gaius mean by *consensus*? This problem figures large in subsequent Cases, but it is worth considering even at this early point. For instance, Scaevola, D. 21.2.12, gives the following problem: A man was named heir to half of an estate, with his co-heirs receiving the other half. The principal heir then sold the entire estate to a buyer. The co-heirs attended the sale and received their share of the purchase price, but at the time they sat poker-faced, saying and doing nothing to indicate their approval or disapproval of the sale. The estate's buyer later lost a lawsuit brought by a third party who claimed that some or all of the estate belonged to him. Can the buyer sue the co-heirs as sellers, on the grounds of breach of warranty of title (see Part B.4 below)? Scaevola says yes, because their presence and failure to object makes them effectively sellers of their shares. But in what sense did the co-heirs actually agree to sell? (The answer, you should be warned, is important.)

3. Bilaterality of Obligation. In a stipulation, one party is a promissor and the other a promisee. Sale is more complex in that it always involves an exchange, so both parties are, at the conclusion of a sale agreement and before each begins to execute it, both promissors and promisees who are each bound to the other. In Roman law, there is an important consequence: neither party can legally enforce the sale against the other unless he or she first tenders performance. For instance, Ulpian, D. 19.1.13.8: "When bringing an action on purchase, the buyer should offer the price, and therefore, even if he offers part of the price, there is still no action on purchase; for the seller can retain the object of sale as a sort of security (for the buyer's full payment)." This is a central rule that protects each party from having to perform when the other may be unwilling or unable to perform. But the parties can still vary this rule by express agreement, e.g., Gaius, *Inst.* 4.126a.

4. Earnest Money. An earnest (*arra* or *arrha*, ultimately from Hebrew) resembles a deposit by the buyer. It was sometimes popularly thought of as "cementing the deal," as if the parties' bare agreement was not enough. The Romans also used the custom of having the buyer give the seller a ring as a kind of symbolic earnest. Such customs look like formalities, but the jurists treat them only as evidence of agreement on the sale; e.g., Gaius, D. 18.1.35 pr.: "The practice of giving an earnest does not mean that agreement without earnest is ineffective; it simply makes clearer that there was agreement on the price." Accordingly, if the sale went through, the earnest was applied to the price; but if the sale failed, the earnest could be recovered by the buyer, see Case 229. Why do you think that the popular custom of giving an earnest nonetheless persisted?

5. Agreement on Price. Gaius says that sale is concluded when there is agreement on price. Clearly price is a most important term, but there must also be agreement at least on the object of sale and the fact of the exchange, see Case 88.

Case 79: Sale and Barter

D. 18.1.1.1 (Paulus libro trigensimo tertio ad Edictum)

Sed an sine nummis venditio dici hodieque possit, dubitatur, veluti si ego togam dedi, ut tunicam acciperem. Sabinus et Cassius esse emptionem et venditionem putant: Nerva et Proculus permutationem, non emptionem hoc esse. Sabinus Homero teste utitur, qui exercitum Graecorum aere ferro hominibusque vinum emere refert, ... Sed verior est Nervae et Proculi sententia: nam ut aliud est vendere, aliud emere, alius emptor, alius venditor, sic aliud est pretium, aliud merx: quod in permutatione discerni non potest, uter emptor, uter venditor sit.

Paul in the thirty-third book on the Edict:

But it is doubtful that sale without money can still be spoken of today, e.g., if I gave you a toga to receive a tunic. Sabinus and Cassius think that this is sale; Nerva and Proculus, that it is barter, not sale. Sabinus cites as evidence Homer (*Iliad* 7.472-475), who reports that the Greek army “buys” wine with bronze, iron, and slaves. ... But the more correct view is the opinion of Nerva and Proculus. For just as selling is one thing and buying another, and a buyer is different from a seller, so the price (*pretium*) is one thing and goods (*merx*) another. In barter it is impossible to distinguish which is the buyer and which the seller.

Discussion:

1. Barter Again. This Case (a continuation of Case 77) describes an early imperial “school controversy” between the Sabinians and Proculians. The issue is whether an agreement on barter is actionable under the *formulae* for sale. In your opinion, which side had the better argument, and which side should have won? Eventually the Proculian position prevailed. (On the Classical rules for handling barter, see Chapter VI.B.) The Proculian position requires that if the transaction is a “sale,” we must be able to identify one party as promising to pay a money price (*pretium*). Does their difficulty stem mainly from the procedural problem of having to sue either on the purchase or on the sale (*ex empto* or *ex vendito*)? Ulpian, D. 18.1.37, gives an illustration of the rule’s application: As the heir of Titius, I agree to sell you a farm “for as much as Titius paid for it.” But it turns out that Titius had received the farm as a gift. The sale is void; why?

2. An Exception? According to Gaius, *Inst.* 3.141, the jurist Caelius Sabinus, apparently attempting to circumvent the Proculian objection, argued that if you advertise a farm for sale, and I offer you a slave for the farm, then the slave should be regarded as a “price” even though our arrangement is essentially a barter; hence the actions on sale are applicable. Does this argument get round the problems noted by the Proculians? On the whole, it is hard to imagine a better example of the jurists’ “pigeonhole” mentality in handling contract law.

Case 80: Mixed Sales

D. 18.1.79 (Javolenus libro quinto ex *Posterioribus* Labeonis)

Fundi partem dimidiam ea lege vendidisti, ut emptor alteram partem, quam retinebas, annis decem certa pecunia in annos singulos conductam habeat. Labeo et Trebatius negant posse ex vendito agi, ut id quod convenerit fiat. Ego contra puto, si modo ideo vilius fundum vendidisti, ut haec tibi conductio praestaretur: nam hoc ipsum pretium fundi videretur, quod eo pacto venditus fuerat: eoque iure utimur.

Javolenus in the fifth book from Labeo's *Posthumous Writings*

You sold half of a farm with the provision that the buyer lease the other half, which you kept, for ten years at a fixed amount per year. Labeo and Trebatius deny that suit can be brought on sale to enforce what was agreed upon (regarding the lease). I think the opposite, provided that you sold me the farm at a lower price in order to obtain this lease; for it is construed as the price of the farm that it was sold with this provision. And this is the rule we use.

Discussion:

1. Price Partially in Money. The jurists display unease with the narrowness of the rule on money price, and so they try to expand it somewhat. How far are they willing to go? Pomponius, D. 19.1.6.1-2, discusses the sale of land for a price that includes a sum of money plus an undertaking to perform (in his hypothetical, either to repair a building, or to erect a building half of which is then to be conveyed to the original seller). In both cases, the seller can enforce the undertakings as an integral part of the sale. Does Javolenus, in the present Case, also presuppose that at least part of the price is a money payment? Is this the essence of his disagreement with the earlier jurists Trebatius and Labeo? Compare Paul, D. 19.1.21.4: sale of land, conditional on it being leased back to the seller for a fixed rent; the seller can enforce the lease “as though it were part of the price” of the sale (*quasi in partem pretii*).

2. Exchange of an Object for a Performance. On the other hand, it is not sale if an object is exchanged solely for an undertaking to perform, e.g., if I sell you a building in exchange for your repairing another building (see Neratius, D. 19.5.6). How can this instance be distinguished from those described in the previous question? Would it be sale if the buyer had also promised the repair plus some token sum of money? That is, how significant must the money component be? There is no real answer in our sources, but see Chapter VI.B.

Case 81: Definiteness of Price

D. 18.1.7.1-2 (Ulpianus libro vicensimo octavo ad Sabinum)

1. Huiusmodi emptio "quanti tu eum emisti", "quantum pretii in arca habeo", valet: nec enim incertum est pretium tam evidenti venditione: magis enim ignoratur, quanti emptus sit, quam in rei veritate incertum est. 2. Si quis ita emerit: "est mihi fundus emptus centum et quanto pluris eum vendidero", valet venditio et statim impletur: habet enim certum pretium centum, augetur autem pretium, si pluris emptor fundum vendiderit.

Ulpian in the twenty-eighth book on Sabinus:

1. A sale is valid when it takes this form: "as much as you bought him for" or "as much money as I have in my strongbox." The price is not indefinite in such an obvious sale; there is doubt more about how much it was bought for than about the reality of the transaction.

2. If someone buys (as follows): "Let the farm be bought by me for one hundred (thousand sesterces) and for as much beyond as I sell it for," the sale is valid and effective immediately; for there is a definite price of one hundred, but the price will increase if the buyer sells the farm for more.

Discussion:

1. **Definiteness.** In section 1, the price is in fact determinable at the time of the sale, even though its amount may be then unknown to both parties. In section 2, a large portion of the price is fixed at the time of sale, but the remainder is determined only by a subsequent event (the buyer's resale of the farm). In what sense can the price be described as definite in both situations?

2. **Price to Be Determined.** The jurists hold that a sale is void if the price is set at "as much as you wish, as much as the buyer thinks fair, as much as you estimate" (see Gaius, D. 18.1.35.1), presumably because the buyer could set the price at nothing. But what if the price is "as much as Titius (a designated third party) thinks fair"? Gaius, *Inst.* 3.140, reports an early Classical controversy, with some jurists considering the transaction void and others upholding it as a sale. Gaius does not tell us the outcome of the controversy, but Justinian, *Inst.* 3.23.1, also upholds the sale, provided that the third party is named and then makes the evaluation. (Each party can also sue to revise the resulting price if the third party acts unfairly.) Does it seem likely that the jurists would have gone further and accepted a price determined by "the prevailing market price next January"? Would they have felt differently about "the prevailing market price last 1 January"? What about "your standard price"? Would they ever have been willing (as modern courts often are) to imply a "fair" price if the parties had neglected to specify one, or if they "agreed to agree later" and then couldn't arrive at one?

Case 82: Reality of Price

D. 18.1.38 (Ulpianus libro septimo *Disputationum*)

Si quis donationis causa minoris vendat, venditio valet: totiens enim dicimus in totum venditionem non valere, quotiens universa venditio donationis causa facta est: quotiens vero viliores pretio res donationis causa distrahitur, dubium non est venditionem valere. Hoc inter ceteros: inter virum vero et uxorem donationis causa venditio facta pretio viliores nullius momenti est.

Ulpian in the seventh book of his *Disputations*:

If someone sells for less (than market value) in order to make a gift, the sale is valid. For we say that the sale is completely invalid whenever the entire sale was made as a gift; but whenever an object is sold at a lower price in order to make a gift, there is no doubt that the sale is valid. This is the general rule. But between husband and wife a sale at a cheaper price to make a gift is of no effect.

Discussion:

1. A Gift Element in the Price. Especially in sales between family members or close friends, it is not unusual for the price to be less than market value. How clearly can the line be drawn between a price that is partially a gift and one that is an outright gift? By and large, this is a question of fact for the *iudex* to decide; but the jurists would hold that there is no sale if the price was set at “one sestertius” (a nominal amount), compare Paul, D. 19.2.20.1, and Ulpian, D. 19.2.46. Since the transaction would then be essentially a gift, the promise would not be irreversible until the donor executed it, as in Common Law. Likewise, if the parties set what would be an acceptable price, but the seller had no intention to collect it, see Ulpian, D. 18.1.36. Note that the problem here is not “adequacy of consideration,” but the identification of the transaction as a contract of sale.

2. Husbands and Wives. To the rule just stated, Ulpian makes an exception for husbands and wives, who are not allowed to make effective gifts to one another during their marriage and hence must pay a reasonable price if one spouse sells property to the other: Ulpian and Paul, D. 24.1.1-3 pr. But the jurists do not always apply the rule as harshly as it is stated by Ulpian; here and elsewhere, a transaction the jurists describe as “void” may actually just be voidable. For example, a husband sells property worth 15,000 sesterces to his wife for 5,000; however, when the transaction is later challenged, the property is worth only 10,000. According to Ulpian, D. 24.1.5.5 (citing Neratius), the wife may keep the property provided she pays a further 5,000, the difference between the price paid and the fair price when the transaction is challenged; but in effect the sale is upheld. Somewhat similar problems can arise in modern tax law. Is the Roman solution the best one? (To a certain extent this problem also surfaces when a creditor sells property that a debtor has given as security: Marcian, D. 20.1.16.9, requiring a *iustum pretium*)

Case 83: Fairness of Price

D. 19.2.22.3 (Paulus libro quarto ad Edictum)

Quemadmodum in emendo et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conductionibus iuris est:

D. 19.2.23 (Hermogenianus libro secundo *Iuris Epitomarum*)

Et ideo praetextu minoris pensionis, locatione facta, si nullus dolus adversarii probari possit, rescindi locatio non potest.

Paul in the fourth book on the Edict:

Just as, in buying and selling, it is by Nature (*naturaliter*) allowed (for parties) to buy what is worth more for less, or to sell a thing worth less for more, and so in turn to cheat one another, this also is the rule for leases;

Hermogenianus in the second book of his *Epitomes of Law*:

and so when a lease is made, it cannot be rescinded on the basis of the rent being too low unless the other party's deceit (*dolus*) can be proven.

Discussion:

1. Freedom of Contract. Paul and Hermogenian are writing about lease, but draw on sales law by analogy. The rule established by this Case is the Classical rule: within wide limits, the parties have unrestricted freedom to determine the price for themselves, and inequalities of bargaining power are not recognized except when one party deceives the other into a bad deal. (For an example, see Ulpian in Case 92.) As in the present Case, Ulpian there says that the action on a fraudulent sale can be used to rescind the sale.

2. Laesio Enormis. In early postclassical law, however, the Emperor Diocletian upset the Classical view at least in one particular case: C. 4.44.2 (285 CE), 8 (293). Both constitutions were written during an economically turbulent era, and both are addressed to sellers who received a grossly low price for purchased land. The first rescript, so historically influential that it deserves quotation in full, is addressed to Aurelius Lupus, evidently a private citizen.

“If you or your father sold property worth more for a lesser price, the humane course is that either you restore the farm to the buyers and recover the price under the authority of a *iudex*; or, if the buyer prefers, you recover the difference from the just price (*iustum pretium*). A price is deemed lesser if not even half of the true price (*verum pretium*) is paid.”

The rescript bristles with problems; for instance, is a “just price” the same as a “true price,” and how is each one related to a market price? But the fundamental point (brought out even more clearly in the later constitution) is that the seller need not prove any defect in contract formation, such as fraud by the buyers, in order to obtain relief. The excessively low price is enough in itself. Even though these two imperial rescripts are limited to the sellers of land, they clearly look at sale from a much different viewpoint than did the Classical jurists, and they set the stage for later discussions of the possible substantive unconscionability of contracts—their fundamental unfairness—as a basis for wholly or partially undoing them. Think carefully both about the broader contractual implications of Diocletian's change in the law, and about the form of the remedy he devised. Is Diocletian's approach preferable to Classical Roman Law? At least as a general rule, should inequality of exchange provide a ground for attacking the validity of a bilateral contract?

Case 84: Saleable Objects

D. 18.1.34.1 (Paulus libro trigensimo tertio ad Edictum)

Omnium rerum, quas quis habere vel possidere vel persequi potest, venditio recte fit: quas vero natura vel gentium ius vel mores civitatis commercio exuerunt, earum nulla venditio est.

Paul in the thirty-third book on the Edict:

Sale is properly made for all things that one can own or possess or sue for. But there is no sale of things that Nature or the Law of Nations or community usage exclude from commerce.

Discussion:

1. Saleability. This text sets the ground rule: subject to a few exceptions, anything that private individuals can have a property right in, they can also sell. But there is no sale of things “excluded from commerce” (*extra commercium*) by the Law of Nature (e.g., the ocean or the air), or by a general or particular public law (e.g., the Brooklyn Bridge), except, of course, that the State or a municipality can normally sell its own property. This rule somewhat overlaps with other rules against immoral or illegal sales; for instance, in principle a free person cannot be sold, see Case 94. Certain other prohibitions also stem from public policy; e.g., a guardian may not purchase property of his ward, see Paul, D. 18.1.34.7. Gaius, D. 18.1.35.2, has an interesting discussion of the sale of poison: it is valid only if the poison can conceivably serve some acceptable purpose.

2. Effect of a Void Sale. What happens if someone does sell the Brooklyn Bridge to a gullible buyer? Although the sale may be void, the buyer still often has an interest in its performance, especially if he or she has already paid the price. Section 3 below discusses how Roman law handled the resulting problems.

Case 85: Object Made by Seller

D. 18.1.20 (Pomponius libro nono ad Sabinum)

Sabinus respondit, si quam rem nobis fieri velimus etiam, veluti statuam vel vas aliquod seu vestem, ut nihil aliud quam pecuniam daremus, emptionem videri, nec posse ullam locationem esse, ubi corpus ipsum non detur ab eo cui id fieret: aliter atque si aream darem, ubi insulam aedificares, quoniam tunc a me substantia proficiscitur.

Pomponius in the ninth book on Sabinus:

Sabinus responds that it is regarded as sale also if we want something made for us, like a statue or a container or clothing, provided we give nothing but money (in exchange). There can be no lease (of a job) where the materials are not provided by the person for whom it is made.

It is different if I give a site where you are to build an apartment building, since then the substance comes from me.

Discussion:

1. Moveables. Although an object of sale usually exists at the time of the sale, the jurists also allow sale of moveable object to be made by the seller, provided that the latter also supplied the materials. For example, Gaius, *Inst.* 3.147 (= Case 185), holds that it is sale if a goldsmith makes rings for me out of his own gold, but lease (of a job, see Chapter V.A.4) if I furnish the gold. How plausible is this distinction? Javolenus, D. 18.1.65, applies the same rule to the manufacture of rooftiles. But would it also be sale if I commissioned you to paint my portrait on your canvas, or to prepare a legal document on your own parchment? These cases (usually discussed by the jurists as aspects of acquiring ownership, e.g., Gaius, *Inst.* 2.77-79) raise difficulties because the value of the materials is usually insignificant in relation to the value of the finished product. It is unclear how the jurists would have solved the problem for sale.

2. Immoveables. A different rule is applied when, for instance, I contract with you to build a building with your materials on my land. What does Pomponius mean by “the substance comes from me”? Paul, D. 19.2.22.2, sheds some light: by the rules of property law, what is constructed on my land becomes my property, and ownership of your materials passes to me as they are incorporated into the structure (by a principle called *superficies solo cedit*, still widely in use today). Hence the contract is a lease (of a job), not a sale of the materials. Is this logic entirely convincing? Note that Roman law has no statutory “mechanic’s lien” if the customer is then unwilling or unable to pay for the completed structure; the contractor’s remedy is solely contractual unless the parties have expressly agreed on a security arrangement.

Case 86: Future Objects

D. 18.1.8 (Pomponius libro nono ad Sabinum)

pr. Nec emptio nec venditio sine re quae veneat potest intellegi. Et tamen fructus et partus futuri recte ementur, ut, cum editus esset partus, iam tunc, cum contractum esset negotium, venditio facta intellegatur: sed si id egerit venditor, ne nascatur aut fiant, ex empto agi posse. **1.** Aliquando tamen et sine re venditio intellegitur, veluti cum quasi alea emitur. Quod fit, cum captum piscium vel avium vel missilium emitur: emptio enim contrahitur etiam si nihil inciderit, quia spei emptio est: et quod missilium nomine eo casu captum est si evictum fuerit, nulla eo nomine ex empto obligatio contrahitur, quia id actum intellegitur.

Pomponius in the ninth book on Sabinus:

pr. Neither purchase nor sale can be understood to exist without an object of sale. Still, future produce and offspring are legally bought, such that when the offspring is born, the sale is construed as having been made from when the transaction was contracted. But if the seller acts to prevent birth or crop growth, (a jurist holds) that suit can be brought on purchase (*ex empto*).

1. Nevertheless, sometimes sale is understood to exist even without an object (of sale), e.g., when it is purchased as if on a chance (*quasi alea*). This occurs when the catch of fish or of birds or of scattered largesse is bought. For the purchase is contracted even if nothing results, since it is the purchase of a hope (*emptio spei*). In the case of scattered largesse, if there is eviction from what was caught, no obligation on sale is contracted on this account, since this is construed as what the parties transacted.

The Problem:

Seius, a farmer, sells to Titius the grapes from his vineyard, which are now on the vine and will be ripe in three months. Is this sale binding on the two parties, and what are their respective duties before the grapes are harvested?

Discussion:

1. Two Kinds of Future Objects. In the *principium*, the seller sells an object that does not now exist, but may come into existence in the future, e.g., the future child of a slave woman. The sale is construed as conditional on the future event's occurring, but takes effect retroactively when the event occurs. (In the meantime, the contract seems to exist in pendency.) By contrast, in section 1 the sale is of an opportunity, e.g., for whatever a fisher may land by casting his net; here the sale is valid immediately, and the price is due even if the net lands nothing. What is the basic difference between these two forms of sale? How is it possible, in practice, to tell the difference between them? In section 1, the scattering of largesse refers to the Roman custom of having the emperor throw out prize tokens from a balcony to a crowd; whoever caught the token got the prize. The parties have evidently contracted for one to act on behalf of the other. Comparable would be selling the proceeds of a lottery ticket prior to the drawing: the sale of a chance.

2. Obstruction of the Sale by the Seller. In the conditional sale of a future object, there is an action on sale if the seller acts to prevent the object from coming into existence; why, and for what? A similar problem may arise in the case of the sale of an opportunity. Suppose, for instance, that a fisher sells the catch from a future cast of his net, and then refuses to cast the net; Celsus, D. 19.1.12, allows the buyer to sue for the speculative value of the cast, based, perhaps, on the average return from prior casts.

3. A Problem. Julian, D. 18.1.39.1, sets the following hypothetical: Someone purchases olives that are still growing on the seller's trees. The sale price is a fixed amount for ten pounds of olive oil. In fact, the olives produce only five pounds of oil. What is the price? The Latin text is doubtful, but apparently the price is scaled back by half. Is this decision sound?

4. Sale of an Inheritance. Heirs occasionally sold their claim to an inheritance, that is, all their future rights in the estate. Problems could arise that are similar to those in sale of future objects. For example, must there actually be an inheritance in order for the sale to be valid? Normally this is true, see Paul, D. 18.4.7; the sale is construed as conditional on the existence of the inheritance. (Similarly for sale of a debt: Hermogenian, D. 21.2.74.3.) On calculation of damages, see Javolenus/Paul, D. 18.4.8-9. But it is also possible to sell an inheritance "if there is one"; in that case, the sale is valid as the sale of an opportunity, even if there is no inheritance, see Javolenus, D. 18.4.10 (noting that the risk is on the buyer). The same issues arise in the case of sale of a debt; must the debt actually exist? However the actual sale is construed, special provision must also be made against fraudulent sellers; see, for instance, Gaius, D. 18.4.12.

Case 87: Sale from Stock

D. 18.1.35.5-6 (Gaius libro decimo ad Edictum Provinciale)

5. In his quae pondere numero mensurave constant, veluti frumento vino oleo argento, modo ea servantur quae in ceteris, ut simul atque de pretio convenerit, videatur perfecta venditio, modo ut, etiamsi de pretio convenerit, non tamen aliter videatur perfecta venditio, quam si admensa adpensa adnumeratae sint. Nam si omne vinum vel oleum vel frumentum vel argentum quantumcumque esset uno pretio venierit, idem iuris est quod in ceteris rebus. Quod si vinum ita venierit, ut in singulas amphoras, item oleum, ut in singulos metretas, item frumentum, ut in singulos modios, item argentum, ut in singulas libras certum pretium diceretur, quaeritur, quando videatur emptio perfici. Quod similiter scilicet quaeritur et de his quae numero constant, si pro numero corporum pretium fuerit statutum. Sabinus et Cassius tunc perfici emptionem existimant, cum adnumerata admensa adpensa sint, quia venditio quasi sub hac condicione videtur fieri, ut in singulos metretas aut in singulos modios quos quasve admensus eris, aut in singulas libras quas adpenderis, aut in singula corpora quae adnumeraveris. 6. Ergo et si grex venierit, si quidem universaliter uno pretio, perfecta videtur, postquam de pretio convenerit: si vero in singula corpora certo pretio, eadem erunt, quae proxime tractavimus.

Gaius in the tenth book on the Provincial Edict:

5. For objects reckoned by weight, number, or measure—e.g., grain, wine, olive oil, and silver—sometimes the same rules are observed as for other things, namely that the sale is held complete as soon as they agree on the price. At other times, even if they agree on the price, the sale is not held complete unless the objects are (subsequently) measured, weighed, or counted. For if all the wine or oil or grain or silver, as much as there is, is sold for a single price, the rule is the same as for other objects.

But if wine is sold at a fixed price for each amphora, or oil for each container, or grain for each bushel, or silver for each pound, question arises as to when the sale is held complete. But a similar question obviously arises about things determined by number, if a price is set (per unit) for a number of items. Sabinus and Cassius think that the sale is complete when the objects are counted, measured, or weighed; for the sale is treated as being made under the condition that it is contracted for each amphora, container, or bushel that you have measured, or for each pound you have weighed, or for each item you have counted.

6. Therefore also, if a herd is sold in its entirety for a single price, it is held to be complete after agreement is reached on a price; but if with a set price for each animal, the rule will be the same as just discussed.

Discussion:

1. **Four Types of Sale from Stock.** Sale of an entire stock (“all the wine in my winecellar”) at a fixed price presents no difficulties; this is an ordinary sale. The other two types raise more problems: sale of a stock at a fixed price per measure, where the exact measure is presently unknown (“all my wine at 200 sesterces per amphora”); or sale of a stock at a price per unit, where the number of units is presently unknown (“my herd of cows at 500 sesterces per animal”). The same problem would arise in another way if the measures or units were to be selected out of an existing stock (e.g., “30 sheep from my flock”; see, e.g., Case 112). Gaius states that the sale is not “complete” (*perfecta*) until the measurement is taken, the units are counted, or the object of sale is isolated from the stock (i.e., identified). What exactly does he mean? Is he construing the sale

as conditional, rather like the sale of a future object in the previous Case? Where is the problem in these various types of sale from stock: that the price is not presently certain, or that the object of sale is not identified? In any case, the main legal issue in sales from stock is the point at which risk of accidental destruction passes to the buyer, see Part B.1 below.

2. Generic Sale. Pomponius, D. 18.1.8 pr. (Case 86), states flatly: “Without an object of sale, no sale can be construed.” In the types of sale described above, although the exact object of sale is not always isolated when the contract is made, there is at least an existing stock from which the object of sale will eventually be drawn. Is it a requirement of Roman sales law that the physical object of sale be identifiable, at the time of the sale, at least to this extent? At any rate, our sources present no clear case in which the object of sale is identified, not by some existing or future object, but instead only by a set of specifications (“5,000 widgets of the following description”), where it is presumably often immaterial to the buyer where the seller obtains the conforming widgets. (Modern business relies heavily on sale of goods by description or specifications.) Look again at Case 85: the seller is to make a statue for the buyer; would the seller satisfy the contract by obtaining and tendering a conforming statue made by a third party? The sources on stipulation make it clear that the Romans did recognize generic promises. See, for instance, Case 23 (a stipulation for “one hundred bushels of good African wheat”). Why might the jurists have been more hesitant in the case of sale? (For one possible exception to the rule against generic sales, see Papinian, *Frag. Vat.* 16, discussed in Case 112.)

Section 2: Defects in Agreement

Even though two parties may believe that they have reached agreement on a sale, in some instances their *consensus* may prove illusory. Roman law identified three main ways in which apparent agreement can nonetheless be fatally defective: it may be induced by duress (*metus*), or by deceit (*dolus*), or it may be somehow based on a fundamental mistake of fact (*error*). Of these three, mistake is undoubtedly the commonest and most difficult, and what survives of juristic discussion is in any case a good deal less than satisfactory.

One way of looking at the problem is to ask: did the parties reach agreement on what can be identified as a complete sale? Granted the importance of identification to Roman contract types, an irreconcilable difference between the parties as to the price, the object of sale, or the exchange of object for price must usually be fatal to the existence of sale. For instance, if one party thought that the sale was of the slave Stichus, and the other that the sale was of a completely different slave Pamphilus, then it is possible to conclude that a sale never took place; misunderstanding or mistake (*error*) vitiates agreement (*consensus*), in the limited sense that the transaction cannot be conclusively identified as a sale. But even here it matters whether we require the parties to mentally agree on the object of sale, or only to ostensibly agree.

If this were the end of the doctrine of mistake, it would be comparatively innocuous. But mistake can also occur over some important characteristic of the object of sale; and here the parties may not simply differ in what they each individually believe, they may also both share the mistake. Suppose, for instance, that a table is sold which one or both parties believe to be of solid silver, when in fact it is made of lead. Note that if both parties are mistaken, there is no absence of *consensus*; and in any case it cannot be held that the object of sale is not identified. Nonetheless, the jurists (or some of them) hold that the sale may be invalid because of the mistake, provided at least that the buyer is reasonably mistaken, and also (as it seems) regardless whether or not the seller is also mistaken.

This is a primitive and somewhat cumbersome form of buyer's protection that the jurists apparently devised at a time when the buyer would have been unprotected if the sale were upheld. In late Classical law, by contract, the buyer was better protected even when the sale was upheld; see Part B.5 below. The doctrine of mistake on a characteristic had therefore been cut back to cover only a few, rather improbable cases—of which, reasonably mistaking a lead table for a silver one is certainly an example.

Case 88: Mistake on a Basic Element of Sale

D. 18.1.9 pr.-1 (Ulpianus libro vicensimo octavo ad Sabinum)

pr. In venditionibus et emptionibus consensum debere intercedere palam est: ceterum sive in ipsa emptione dissentient sive in pretio sive in quo alio, emptio imperfecta est. Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putasti, quia in corpore dissensimus, emptio nulla est. Idem est, si ego me Stichum, tu Pamphilum absentem vendere putasti: nam cum in corpore dissentiatur, apparet nullam esse emptionem. **1.** Plane si in nomine dissentiamus, verum de corpore constet, nulla dubitatio est, quin valeat emptio et venditio: nihil enim facit error nominis, cum de corpore constat.

Ulpian in the twenty-eighth book on Sabinus:

pr. In sales and purchases it is obvious that agreement (*consensus*) must occur. But the sale is incomplete if they disagree on (the fact of) the purchase itself, or on the price, or on something else. Therefore, if I thought that I bought the Cornelian farm and you thought that you sold the Sempronian, there is no sale because we disagreed on the object of sale (*in corpore*). Likewise, if I thought (I purchased) Stichus, and you that you sold the absent (slave) Pamphilus; for since there is disagreement on the object of sale, there is clearly no sale.

1. Clearly, if we disagree (merely) on the name but agree on the object, there is no doubt that the sale is valid; for mistake (*error*) on the name is not relevant if there is agreement on the object.

Discussion:

1. Mutual Misunderstanding. A contract of sale is created through the agreement of seller and buyer; as we have seen in the previous section, this agreement must extend at least to the price, the object of sale, and their exchange. One problem that sometimes arises is that the parties think they have reached agreement when they have not. The classic example is mutual misunderstanding: we talk of sale of “the farm,” but each of us has a different farm in mind, and neither of us knows or has reason to know the other’s understanding. (In our law, this is the famous “Peerless” problem in *Raffles v. Wichelhaus*, 1864.) Is it clear that at least this situation is being discussed by Ulpian? How is mutual misunderstanding on the object of sale different from misunderstanding on the name of the object? Is it right in this situation simply to throw in the towel and declare the sale void for want of agreement, without examining how the misunderstanding arose?

2. Unilateral Mistake. This type of mistake differs from mutual misunderstanding. We both talk of sale of “the farm,” and again each of us has a different farm in mind; but in conversation I seem (both to you and to an objective external observer) to accept the farm that you are thinking of, even though this is not in fact the farm I want. A situation of this sort is much more common, and much more difficult to handle, than mutual misunderstanding. Essentially, law has two choices: either to hold me to what I seemed to say, on an “objective” theory of agreement that treats me as responsible for what I seem to say because the other party may have been misled by my mistake; or to let me escape from the contract on a “subjective” theory of agreement that requires genuine mental agreement (not just the external appearance of agreement) in order for a contract to come into existence. Which choice does Ulpian make? Although the answer is less than clear, note the way he words his opinion: “I *thought* (*putarem*) that I bought the Cornelian farm and you *thought* (*putasti*) that you sold the Sempronian.” This wording seems to look toward a subjective theory of agreement. Do you think a subjective theory is correct, or at least defensible?

What sorts of difficulties does it cause? In modern law, an objective theory is usually preferred because of the impersonal nature of the modern marketplace, although most authorities concede at least that a court must not impose on parties a contract that neither party wants.

3. Mistake and Identification. In discussing mistake theory, it is important to keep in mind the purpose of the analysis in relation to particular cases. One purpose in Roman law is to identify the transaction as a sale: it must have the required elements (price, object of sale, exchange) for properly classifying it. This purpose relates to the procedural needs of Roman law, with its intricate pigeonholes for various contracts. Another quite different purpose is judicial fairness with respect to the parties: are they each getting what they wanted from the contract, or, if not, what is the most equitable way for the court to proceed? Which of these two purposes does Ulpian have in mind in the present Case?

4. Mistake on the Price. Pomponius, D. 19.2.52, discusses what happens in the contract of lease if two parties disagree on the rent: “If I lease a farm to you for ten (thousand sesterces), but you think you hired it for five, the transaction is void. But again, if I think I lease for less, and you that you hire for more, the lease will not be for more than what I thought it to be.” This text apparently establishes an option; the party that thought the rent was higher can nonetheless enforce the lease at the other party’s lower amount, presumably even if the other party is no longer willing to be bound by this figure. It is unclear whether a similar option is available in sale; should it be?

5. Mistake on an Accessory. Paul, D. 18.1.34 pr., sets this problem: In the sale of a farm, the parties agree that “the slave Stichus” will be part of the farm, but it later emerges they were thinking of different slaves of that name. The sale remains valid. As to the slave, Paul appears to approve Labeo’s holding that the Stichus meant by the seller is owed, and he adds that it makes no difference even if what the value of the “accessory” turns out to be in relation to the main object, “for at times we buy many things because of their accessories, as when a house is purchased because of its marbles and statues and paintings.” Can such a holding be justified? Is the question here more one of contractual interpretation than of misunderstanding? If so, what rule would seem to be in play?

6. Mistake on a Party’s Identity. What happens if one party is mistaken about the other party’s identity (the buyer is not Seius, as I thought, but Titius)? No surviving text on sale discusses this problem, but elsewhere in the Digest mistake on identity is held to void a contract; e.g., Celsus, D. 12.1.32 (stipulation for a loan). The question can be important if, for instance, the other party’s credit rating is important to the transaction.

Case 89: Mistake on a Characteristic

D. 18.1.9.2, 11 (Ulpianus libro vicensimo octavo ad Sabinum)

9.2. Inde quaeritur, si in ipso corpore non erratur, sed in substantia error sit, ut puta si acetum pro vino veneat, aes pro auro vel plumbum pro argento vel quid aliud argento simile, an emptio et venditio sit. Marcellus scripsit libro sexto digestorum emptionem esse et venditionem, quia in corpus consensus est, etsi in materia sit erratum. Ego in vino quidem consentio, quia eadem prope οὐσία est, si modo vinum acuit: ceterum si vinum non acuit, sed ab initio acetum fuit, ut embamma, aliud pro alio venisse videtur. In ceteris autem nullam esse venditionem puto, quotiens in materia erratur. **11 pr.** Alioquin quid dicemus, si caecus emptor fuit vel si in materia erratur vel in minus perito discernendarum materiaram? In corpus eos consensisse dicemus? Et quemadmodum consensit, qui non vidit? **11.1.** Quod si ego me virginem emere putarem, cum esset iam mulier, emptio valebit: in sexu enim non est erratum. Ceterum si ego mulierem venderem, tu puerum emere existimasti, quia in sexu error est, nulla emptio, nulla venditio est.

Ulpian in the twenty-eighth book on Sabinus:

9.2. Next, question arises if there is no mistake on the object itself, but there is a mistake on its substance (*error in substantia*). E.g., if vinegar is sold as wine, bronze as gold, or lead or something silver-like as silver, is there a purchase and sale? Marcellus wrote, in the sixth book of his *Digests*, that there is a sale because there was agreement on the object even if there was a mistake on the material (*in materia*).

I agree (with Marcellus) concerning the wine, since it is virtually the same substance (οὐσία), provided the wine turns sour. But if the wine did not turn sour, but was vinegar from the start, like vinegar sauce, one object appears to have been sold for another. As for the rest, I think there is no sale whenever there is a mistake on the material.

11 pr. Otherwise what will we say if the buyer was blind, or in the case of a person less skilled in judging materials, if there is an error on the material? Will we say they agreed on the object of sale? And how has a person agreed if he does not see (the object)?

11.1. But the sale is valid if I thought I was buying a virgin when she was already a (sexually experienced) woman; for there was no mistake on the sex (of the woman). But if I sold a woman and you thought you bought a boy, there is no sale because there is a mistake on the sex.

Discussion:

1. Mistake on a Characteristic. In this famous and difficult text (which Justinian's compilers probably abbreviated), the situation differs from the previous Case. Here the two parties agree on the object of sale, but there is a possible mistake concerning some characteristic or quality that it has or is supposed to have, with significant effects on the equality of the exchange. Note that, at least as Ulpian phrases the Case, it is the buyer who is most likely to be mistaken: a lead object is sold as silver, or vinegar as wine, or a male slave as female. In each instance, the object is doubtless considerably less valuable to the buyer than he or she had thought it was. (Does it matter whether the seller was mistaken as well? What if only the seller is mistaken, e.g., in selling gold as bronze?)

Ulpian says nothing about how the buyer came to be mistaken. The mistake could result from the seller's misrepresentation, but also the buyer may simply be self-deluded, or acting on erroneous information from a third party. In any case, the basic problem is when should a mistake

be regarded as so fundamental that the sale should be entirely void, or at least voidable by the mistaken party? How do the issues raised here differ from those in the previous Case? The jurists obviously disagreed on how to handle this problem. Marcellus favored abolishing the doctrine of mistake on a characteristic altogether (and so too did Paul: Case 146), while Ulpian retained and perhaps even somewhat enlarged it. Who is right? Does your answer depend, at least in part, on what protection is afforded the buyer if the sale is preserved?

2. Other Contracts. As stated by Ulpian, the doctrine of mistake on a characteristic, as a basis for voiding a sale, is confined to a narrow set of circumstances. The doctrine is also not available for other contracts such as stipulation (Case 17) and *pignus* (Ulpian, D. 13.7.1.1-2). Why might the jurists have been reluctant to extend the doctrine beyond sale?

3. Sale of a Virgin. In section 11.1, the buyer is looking for a virgin slave, evidently with the (exceptionally disagreeable) intent of exploiting her sexually. The likelihood of this buyer being mistaken on this point is obviously considerably greater than his being mistaken on the slave's sex. Ulpian, D. 19.1.11.5, gives the mistaken buyer a remedy in sale for damages in some circumstances; see the Discussion on Case 140. How does the existence of this remedy affect a legal decision about whether to void the sale on the basis of the buyer's mistake about virginity?

4. Mistake and Misrepresentation. Ulpian speaks, e.g., of "bronze (sold) as gold." It is undoubtedly tempting in this context to suppose that the seller is misrepresenting the truth, even inadvertently. But in that event it is curious that Ulpian lays no stress on this possibility. Instead, his ruling goes off on the buyer's mistake, which, as section 11 pr. suggests, must usually be reasonable granted the buyer's general capacities. The answers to Ulpian's three questions in 11 pr. have apparently been stripped away by the Digest compilers, but see Case 91 below on the risk taken by "indolent" buyers. A blind buyer is, of course, not "indolent."

Case 90: Shared Mistake

D. 18.1.14 (Ulpianus libro vicesimo octavo ad Sabinum)

Quid tamen dicemus, si in materia et qualitate ambo errarent? Ut puta si et ego me vendere aurum putarem et tu emere, cum aes esset? Ut puta coheredes viriolam, quae aurea dicebatur, pretio exquisito uni heredi vendidissent eaque inventa esset magna ex parte aenea? Venditionem esse constat ideo, quia auri aliquid habuit. Nam si inauratum aliquid sit, licet ego aureum putem, valet venditio: si autem aes pro auro veneat, non valet.

Ulpian in the twenty-eighth book on Sabinus:

But what will we hold if both parties are mistaken on the material and a characteristic (*materia et qualitas*)? E.g., if I thought that I sold, and you that you bought, gold, when it was (in fact) bronze? For instance, co-heirs sold to one heir, for a substantial price, a bracelet said to be of gold, and it was (subsequently) found to be mostly bronze? It is settled that there is a sale because it had some gold. For, if something is gilded, the sale is valid even if I thought it (solid) gold; but if bronze is sold as gold, it is not valid.

Discussion:

1. Both Parties Make a Mistake. This Case also illustrates the narrowness of Ulpian's views on mistake concerning a characteristic: the sale is void only if the bracelet contains no gold whatsoever. (But see below.) In this text, however, both the seller and the buyer are mistaken about the characteristic. This is still a different type of mistake than those discussed in Case 88 above; here, the seller and buyer agree on the characteristic (so that their transaction cannot be void or voidable for want of *consensus*), but both are mistaken, and their fundamental mistake is held sufficient alone to render the sale invalid. Is Ulpian correct to treat this case as similar to the situations in the previous Case? If so, then it rather looks as if the seller's mistake is irrelevant, so long as the buyer is mistaken. Can the doctrine of mistake on a characteristic be plausibly regarded as a form of buyer's protection, allowing the buyer to void the sale if the object is fundamentally different from what he or she expected to be?

2. Gilding. Ulpian holds that the sale is valid if the object is gilded or contains some admixture of gold. This holding appears to overrule Julian, D. 18.1.41.1: "You unknowingly sold me, also unaware, a silver-plated table as a solid one: there is no sale and money paid on this account can be recovered by a *condictio*." Does the contradiction illustrate the late Classical constriction of the doctrine of mistake on a characteristic, or can the two texts be distinguished?

Case 91: The Buyer's Alertness

D. 18.1.15.1 (Paulus libro quinto ad Sabinum)

Ignorantia emptori prodest, quae non in supinum hominem cadit.

Paul in the fifth book on Sabinus:

Ignorance is of use to the buyer (only) if it is not that of an indolent person.

Discussion:

1. Buyer's Ignorance. This tiny fragment (nine words!) states an important principle. If the buyer can avoid a sale because of his or her mistake, we are bound to ask whether the buyer has any countervailing duty to be reasonably careful in inspecting the object of sale. Although the context of Paul's remark is uncertain, he appears to indicate that buyers do have such a duty; they cannot be "indolent" (literally, "prostrate"). Look back at Case 89; in section 11 pr., Ulpian speaks of buyers who are blind or inexperienced in distinguishing metals. Unfortunately, Ulpian does not answer the questions he asks in that fragment (the Digest compilers presumably stripped away his answers), but it appears that Ulpian is worried about the relative capacity of various buyers. Presumably he would hold a sighted or an experienced buyer to a higher standard of alertness than one who was blind or inexperienced. Is this sensible? What does this apparent rule suggest about the purpose of the doctrine of mistake as to a fundamental characteristic?

2. Seller's Mistake. It is also possible, of course, for a seller to be mistaken about a characteristic. We have all read, for instance, about art dealers who inadvertently sell a Van Gogh for a tiny fraction of its real value, to a buyer who may or may not know the truth, or who may just suspect the truth. In surviving texts, the jurists say nothing about this situation. Do they assume that sellers should bear the risk of their own mistakes with regard to characteristics? Could such a legal position be justified?

Case 92: Fraud

D. 4.3.9 pr. (Ulpianus libro undecimo ad Edictum)

Si quis adfirmavit minimam esse hereditatem et ita eam ab herede emit, non est de dolo actio, cum ex vendito sufficiat.

Ulpian in the eleventh book on the Edict:

If someone affirmed that an inheritance was of slight value and so bought it from the heir (for a low price), there is no action on deceit (*dolus*) since the action on sale suffices.

Discussion:

1. The Action on *Dolus*. In this Case, the seller has purchased an estate from its heir after deceiving the heir into believing the estate was not worth much. In Roman law, the Urban Praetor provided an action on deceit (*dolus*), whereby those who are deceived into financial loss by someone can recover the loss from the deceiver; but the action is available only if there is no other remedy. Ulpian says that “the action on sale suffices,” but does not indicate what the remedy in sale would be. Can the seller sue on purchase to force the buyer to pay a higher price, or is he limited to seeking rescission of the sale and restitution? Probably the latter, but there is no certain text.

2. Another Example. Papinian, D. 19.1.41, discusses a case in which the buyer of land discovers, after the sale, that he is obliged to pay an annual fee to a neighbor for conveying water through the neighbor’s property. The seller presumably knew of this payment and did not inform the buyer when the sale was concluded. If the buyer is sued for the price, should the *iudex* take account of the unforeseen fee when assessing damages? Papinian says yes. This case illustrates the general duty of *bona fides* in the making of contracts; see also especially Case 131. Could the buyer escape the sale altogether if the fee was too burdensome?

3. Duress. In addition to mistake and fraud, it is likely that duress (*metus*) could also be used to void a sale. Although no juristic text survives on this point, it is presumed by early post-classical rescripts of Gordian, C. 2.19.3-5 (238-239). In Roman law, duress usually involves fear of death or serious physical injury (Ulpian, D. 4.2.1: “a mental alarm because of a present or future danger”). The fear must be objectively reasonable (Gaius, D. 4.2.6: “the fear not of a weak-minded person, but one that rightly befalls also a highly resolute person”). It is not clear that the Romans recognized undue influence as vitiating contractual consent, but they do support fairly high standards of conduct for the guardians of children.

Section 3: Impossibility

A stipulation is usually invalid if it is impossible to perform from the outset or its performance subsequently becomes impossible without the promissor's fault (see Cases 18-21). In the law of sale, by contract, only initial impossibility is a bar to a contract's validity; subsequent impossibility to deliver the object of sale is instead treated largely under the theory of risk, see Part B.1 below.

Problems of initial impossibility arise mainly with regard to the object of sale, if the object does not exist at the time of the sale (e.g., a purchased slave has previously died) or cannot be sold because it is not in commerce (see Case 84). One's initial intuition might be that such sales are entirely void. But here the doctrine of *bona fides* begins to affect the law on the formation of sale. If the buyer is unaware that the physical or legal condition of the object makes the sale impossible, in many circumstances the jurists hold that the buyer has a defensible legal interest in the sale; accordingly, they often award the buyer an action on purchase to recover this interest, even though the sale itself is void. The theory of impossibility thus seems to be used as a form of buyer protection, since the seller's knowledge of the sale's impossibility is often held to be immaterial.

In any case, physical or legal impossibility should be carefully distinguished from personal circumstances that prevent a party from performing. Suppose that a farm's seller incorrectly but justifiably believes that the farm belongs to her, or that a slave's buyer incorrectly assumes that he has the ready cash to pay for the slave. Although this party may then find it "impossible" to perform, the sale is nonetheless valid and binding, since otherwise the other party would have to bear the risk for a problem over which he or she has little control. The issue of proper risk allocation is fundamental not just for this problem, but in general for the entire law governing the formation and execution of contracts; it is almost always worthwhile to evaluate legal rules in terms of the allocations of risk they presuppose.

Case 93: Sale of Objects Not in Commerce

D. 18.1.62.1 (Modestinus libro quinto Regularum)

Qui nesciens loca sacra vel religiosa vel publica pro privatis comparavit, licet emptio non teneat, ex empto tamen adversus venditorem experietur, ut consequatur quod interfuit eius, ne deciperetur.

Modestinus in the fifth book of his *Rules*:

If someone unknowingly bought sacred or religious or public areas as (if they were) private, then, although the purchase does not hold, he will still sue the seller on purchase (*ex empto*) in order to obtain his interest in not being deceived.

The Problem:

Calpurnia sells to her neighbor Julia land on which sits a public temple to Jupiter. If Julia then incurs losses because of this sale, can she recover them from Calpurnia, and, if so, how?

Discussion:

1. Sale of the Brooklyn Bridge Revisited. Note how Modestinus phrases his holding: the sale is invalid, but the unknowing buyer can still sue “on the purchase” (*ex empto*). Is this view inconsistent? The jurists vary somewhat in how they analyze situations of this type; but some uphold the sale, e.g., Licinius Rufinus, D. 18.1.70 (sale of a free man, see the following Case). Why is only an unknowing buyer protected? Would it matter if the buyer should have known that an object was unsaleable, but failed to exercise due care? Does the seller’s knowledge make any difference? Discussion continues in the following Cases.

2. Measure of Damages. Modestinus says that the buyer can obtain “his interest in not being deceived.” What is this interest? Is it the value to the buyer of the contract if it could have been carried out (somewhat similar to the expectation interest), or rather the losses the buyer sustains as a result of the contract being invalid (the reliance interest)? Probably the latter, but Modestinus does not express this very clearly. What measure would be appropriate? As you should see, the answer could depend on whether we regard the deception as negating the sale from the outset (in which case, most logically, only the would-be buyer’s losses should be compensated), or as bringing about a subsequent breach of a contract (which allows the buyer to recover his or her “interest” in the contract being valid).

Case 94: Sale of a Free Man or a Stolen Object

D. 18.1.34.2-3 (Paulus libro trigensimo tertio ad Edictum)

2. Liberum hominem scientes emere non possumus. Sed nec talis emptio aut stipulatio admittenda est: “cum servus erit,” quamvis dixerimus futuras res emi posse: nec enim fas est eiusmodi casus exspectare. **3.** Item si et emptor et venditor scit furtivum esse quod venit, a neutra parte obligatio contrahitur: si emptor solus scit, non obligabitur venditor nec tamen ex vendito quicquam consequitur, nisi ultro quod convenerit praestet: quod si venditor scit, emptor ignoravit, utrimque obligatio contrahitur, et ita Pomponius quoque scribit.

Paul in the thirty-third book on the Edict:

2. We cannot knowingly buy a free man. But neither is it allowed to make a sale or stipulation (with a condition) like this one: “when he will be a slave,” even though we hold that future objects can be sold; for it violates religious law (*fas*) to await an event of this sort.

3. Likewise, if both buyer and seller know that the object of sale was stolen, an obligation is contracted by neither party. If the buyer alone knows, the seller is not obligated nor does he obtain anything by suing on sale unless he voluntarily tenders what was agreed on. But if the seller knows and the buyer was unaware, an obligation is contracted on either side; and Pomponius also writes this.

Discussion:

1. Sale of a Free Person. Compare Case 25 on stipulation, particularly as to a contract that speculates on future enslavement. Although Celsus, cited by Pomponius, D. 18.1.6 pr., had ruled it “impossible” (*non posse*) to knowingly sell a free man, Paul considers the sale valid if the seller is aware of the truth and the buyer is not; so he would presumably also hold the sale valid if both parties are unaware, see Licinnius Rufinus, D. 18.1.70. Pomponius, D. 18.1.4, also indicates that only the buyer’s knowledge or ignorance is relevant. What this means is that the unknowing buyer can recover damages. Does the rule function as a form of buyer protection?

2. Measure of Damages. Paul states that, in the case of an unknowing buyer, “an obligation is contracted on either side”; this could mean that the buyer must pay the price, but can then claim from the seller his or her entire expectation interest. Would that be appropriate? Why might the outcome here be different from the previous Case? Paul, D. 18.1.5, observes the inherent difficulty of telling a free man from a slave (Roman slavery did not depend much on ethnicity, for instance); is this problem then more salient than in the case of public property?

3. Sale of Property Already Owned by the Buyer. Pomponius, D. 18.1.16 pr., states that the sale of property to someone who already owns it is always void, regardless of whether or not the buyer is aware of this fact; and if the sale has been executed, the unknowing buyer can recover the price. As stated, this rule is too broad. For example, Marcellus, D. 18.1.61, notes that the buyer can purchase his or her own property in order to quiet a possible claim on ownership by the seller; in that case, would it matter if the claim was patently frivolous? Must the buyer actually believe in the possible validity of the claim? (Similar problems arise in Common Law concerning the “reality” of consideration.) See also Paul, D. 18.1.15.2, who posits a buyer who unknowingly purchases his own property and then orders its delivery to a third party; does the buyer lose his ownership upon its delivery?

4. Sale of a Third Party’s Property. It is usually possible to sell someone else’s property, with the seller taking the risk that the third party may be unwilling to sell (Ulpian, D. 18.1.28).

Still, often the owner may have pre-authorized the sale; see, for instance, Case 186 (brokerage). However, in the case of stolen property, section 3 of the present Case applies most of the usual rules as to legally impossible sales. If both parties know that the property is stolen (e.g., in a typical fencing operation), the sale is void; if only the seller is aware, “an obligation is contracted on either side,” presumably meaning that the buyer must pay and the seller must deliver. (Is the seller then liable in sale if the true owner reclaims the object? Surely yes, see Part B.4 below.) More interesting is Paul’s treatment of the situation where the buyer is aware and the seller is not: the seller incurs no obligation, but can claim the price upon delivery of the object. Is the seller liable if the true owner reclaims the object from the buyer? The answer is uncertain, but probably yes.

Case 95: Sale of an Object Already Destroyed

D. 18.1.58 (Papinianus libro decimo *Quaestionum*)

Arboribus quoque vento deiectis vel absumptis igne dictum est emptionem fundi non videri esse contractam, si contemplatione illarum arborum, veluti oliveti, fundus comparabatur, sive sciente sive ignorante venditore: ...

Papinian in the tenth book of his *Questions*:

Also when trees were blown down by wind or destroyed by fire, it was held that a sale of the farm was not contracted if the farm was bought with a view to those trees, e.g., an olive orchard; (and this is true) whether the seller knew (of their destruction) or was unaware. ...

Discussion:

1. Physical Impossibility. The jurists hold that there can be no sale without an object of sale, see Pomponius, D. 18.1.8 pr. (Case 86). Hence they find it easy to hold that when the object of sale has perished before the sale was agreed upon, there is no sale, see Paul, D. 18.1.15 pr.; Marcian, D. 18.1.44 (two slaves are bought for one price; if one was already dead, there is no sale also for the other). In this Case, the trees (presumably a major asset in determining the farm's value) had apparently been destroyed before the conclusion of the sale. The question that arises is whether there is still a sale at least of the land. Is Papinian's solution convincing? Ostensibly, the issue is one of physical impossibility, but the buyer's expectations take center stage in evaluating the destruction. Is this another form of buyer protection?

2. Another Example. Paul, D. 18.1.57 pr., discusses a more complex case, although this text was probably rewritten by the Digest compilers. A buyer has purchased a house that had been wholly or partially destroyed by fire before the sale. In the text as preserved, two issues are considered: the state of knowledge of the two parties, and the degree of destruction. If the buyer is unaware, the contract is void if the destruction is total or nearly total; but the contract is valid if the house is only partially destroyed, although the buyer may then seek a reduction in price. Where the buyer is aware and the seller is not, the contract is good and the buyer must pay full price. If both parties are aware, the sale is held void because of their mutual fraud. These rules (particularly the last one) may not be Classical. Try to devise better ones.

Section 4: Interpreting Agreements of Sale

We saw that the jurists normally interpret stipulations fairly closely, in accord with their “plain meaning” when a more case-specific understanding cannot be achieved (Chapter II.B). Such fairly narrow interpretation follows from the nature of a formal contract. By contrast, sales often receive a more generous interpretation that *bona fides* would appear to require, but the difference is not so great as one might have anticipated, and the jurists can occasionally be quite rigid.

However, there is one respect in which the contrast between stipulation and sale is especially instructive. At least in principle, every stipulation can be interpreted in its own right, since stipulation is theoretically only a form; the parties themselves determine the wording and thereby the content of each promise, even if they adhere to general patterns. But sale, as a contract type, has a predefined content; further, unlike stipulation, sale is subject to the overarching norm of *bona fides*. These two characteristics of sale made it much easier for the jurists to establish many general rules that were applicable to all sales. Some of these rules could not be varied by the parties, but most were enforced only if seller and buyer did not provide otherwise for a particular sale.

Rules of this second type are today often called “dispositive” or “default” rules, in the sense that they provide a structure that relieves individual parties from the necessity of elaborate bargaining over every contract. The touchstones for measuring the success of such dispositive rules is the perception of their general fairness and efficiency. In Part B of this Chapter, many of these dispositive rules will be more closely examined.

Case 96: The Course of Negotiations

D. 18.1.80.2 (Labeo libro quinto *Posteriorum* a Iavoleno Epitomatorum)

Silva caedua in quinquennium venierat: quaerebatur, cum glans decidisset, utrius esset. Scio servium respondisse, primum sequendum esse quod appareret actum esse: quod si in obscuro esset, quaecumque glans ex his arboribus quae caesae non essent cecidisset, venditoris esse, eam autem, quae in arboribus fuisset eo tempore cum haec caederentur, emptoris.

Labeo in the fifth book of his *Posthumous Writings*, as Epitomized by Javolenus:

Timber rights (on a piece of land) had been sold for five years. Question arose as to whom the fallen acorns belonged. I know that Servius responded that the first thing to be followed is what it appears the parties transacted (*quod appareret actum esse*). But if this is unclear, then the seller owns whatever acorns fell from trees that were not felled, and the buyer, those that were on the trees at the time they were felled.

Discussion:

1. The Felling of Timber. Although at the time of sale the timber is still attached to the seller's land, this arrangement is considered a normal sale in Roman law. By the contract, the buyer is presumably entitled to enter the seller's land and fell the trees. Compare sale of olives still on the trees: Julian, D. 18.1.39.1; also Julian, D. 19.1.25 (although a stipulation may be involved here). It would apparently make no difference if the seller contracted to fell and deliver the trees himself. Rather more startling is Labeo, D. 18.1.80.1: a buyer purchases the use of portions of his own building that project over the seller's property, with the projections to remain in place.

2. The Process of Interpretation. With this Case compare Case 11 on stipulation. How, if at all, is the interpretation of a sales contract different? The acorns could often be of some value as human and animal feed. Since the present contract made no provision at all for acorns, it is not ambiguous but defective; nonetheless, the *iudex* is allowed to fill in the missing term by surmise or by taking testimony from the parties and their witnesses. If this testimony is inconclusive (as it usually will be), the jurists supply the term. Compare Pomponius, D. 18.1.6.1: "In sales, what should be enforced is what was transacted (*id quod actum sit*), rather than what was said." Roman law appears to have no "parol evidence rule" restricting admission of evidence on the course of negotiations when it contradicts or even supplements a written agreement; see Case 102. Is this wise? What interest might the parties have, for instance, in preserving the "sanctity" of a written contract? Ulpian, D. 21.1.31.20, indicates that "practice and custom" (*mos et consuetudo*) were also used as tools in interpreting sales contracts; this is not far off from "plain meaning" as informed by "trade usage."

Case 97: Interpreting a Condition

D. 18.1.41 pr. (Iulianus libro tertio ad Urseium Ferozem)

Cum ab eo, qui fundum alii obligatum habebat, quidam sic emptum rogasset, ut esset is sibi emptus, si eum liberasset, dummodo ante kalendas Iulias liberaret, quaesitum est, an utiliter agere possit ex empto in hoc, ut venditor eum liberaret. Respondit: videamus, quid inter ementem et vendentem actum sit. Nam si id actum est, ut omni modo intra kalendas Iulias venditor fundum liberaret, ex empto erit actio, ut liberet, nec sub condicione emptio facta intelletur, veluti si hoc modo emptor interrogaverit: "erit mihi fundus emptus ita, ut eum intra kalendas Iulias liberes", vel "ita ut eum intra kalendas a Titio redimas". Si vero sub condicione facta emptio est, non poterit agi, ut condicio impleatur.

Julian in the third book on Urseius Ferox:

A certain person sought to buy a farm from someone who had obligated it (as a security) to a third party, under the condition that it be purchased by him if he (the seller) freed it (from the encumbrance) before the Kalends of July. It was asked whether he can effectively sue on the purchase to make the seller free it.

He (Julian) responded: Let us examine what the buyer and seller transacted. For if their transaction was that the seller free the land in any case before the Kalends of July, there will be an action on purchase in order that he free it, nor is the sale construed as being made under a condition—e.g., if the buyer made the following offer: "The farm will be bought by me such that you free it before the Kalends of July," or "such that you redeem it from Titius before the Kalends." But if the sale was made under a condition, he will not be able to sue for fulfillment of the condition.

Discussion:

1. The Problem. In this contract, the meaning of the condition is ambiguous: is the seller actually undertaking to clear the farm of the third party's security interest, or is he merely promising to sell the farm if the security interest is (somehow) removed? In the former case (which is decidedly more likely), the buyer can bring action on purchase to enforce the "promissory condition," or at least to get damages for breach. How does Julian think that a *iudex* should resolve the problem? Does he seem to favor one solution over the other? What if the testimony from the parties is inconclusive as to the condition?

2. Another Example. In the sale of a farm, a contract stated that the farm had 18 acres and set a price per acre "as it may be measured." A survey later revealed that the farm had 20 acres. Must the buyer pay for all 20 acres? Paul, D. 18.1.40.2, says yes; is this outcome defensible?

Case 98: Reasonability

D. 18.1.77 (Iavolenus libro quarto ex *Posterioribus* Labeonis)

In lege fundi vendundi lapidicinae in eo fundo ubique essent exceptae erant, et post multum temporis in eo fundo repertae erant lapidicinae. Eas quoque venditoris esse Tubero respondit: Labeo referre quid actum sit: si non appareat, non videri eas lapidicinas esse exceptas: neminem enim nec vendere nec excipere quod non sit, et lapidicinas nullas esse, nisi quae apparent et caedantur: aliter interpretantibus totum fundum lapidicinarum fore, si forte toto eo sub terra esset lapis. Hoc proba.

Javolenus in the fourth book of Labeo's *Posthumous Writings*:

In the terms for sale of a farm, rock quarries were reserved (for the seller) wherever they were on the farm; after considerable time, (new) quarries were opened on the farm. Tubero responded that they too belonged to the seller. Labeo (said) that it mattered what the parties transacted (*quid actum sit*); if this should be unclear, these (new) quarries should not be understood as reserved, since no one sells or reserves what does not exist, and there are no quarries unless they were obvious and (already) being mined. On the opposed interpretation, (Labeo said) that the entire farm would be a quarry if rock happened to lie everywhere beneath the earth. I approve this view.

Discussion:

1. Imposing a Reasonable Solution. If the course of negotiations is unclear, the jurists often resort to plausible guesses about what the parties intended. In this Case, the issue is whether the seller would have wanted to reserve for himself just the existing quarries, or all present and future quarries. Is Tubero following the literal meaning of the contract? How reasonable is Labeo's opposing interpretation?

2. Other Examples. Paul, D. 18.1.40.1, 3, gives two other examples. 1) By an express term, the seller of a farm gave the buyer water rights in a neighboring farm that the seller retained; does the buyer also have a right of way to approach the water? 2) The seller of a farm reserved the grain that had been sown by hand on the farm; can the seller claim grain that grows from thatch, or that grows from seed that accidentally falls from the sower's bag, or that grows from seed dropped by birds?

Case 99: Interpretation Against the Seller

D. 8.3.30 (Paulus libro quarto *Epitomarum Alfeni Digestorum*)

Qui duo praedia habebat, in unius venditione aquam, quae in fundo nascebatur, et circa eam aquam late decem pedes exceperat: quaesitum est, utrum dominium loci ad eum pertineat an ut per eum locum accedere possit. Respondit, si ita recepisset: "Circa eam aquam late pedes decem", iter dumtaxat videri venditoris esse.

Paul in the fourth book of the epitomized *Digests* of Alfenus:

A person owned two (adjacent) properties. In selling one, he reserved (for himself) the water that sprang on the farm, as well as ten feet around this water. It was asked whether he has ownership of this area, or (only a property right) that he be able to approach through the area. He (Alfenus?) responded that if the reservation was worded: "ten feet around the water," the seller is held to have only a right of way (*iter*).

Discussion:

1. Against the Seller. Paul, D. 18.1.21: "Labeo wrote that ambiguities in the agreement should harm the seller who stated it, rather than the buyer, since he (the seller) could state the matter more clearly in entering the transaction." This principle, which recurs in other texts, seems to apply the theory of interpretation against the stipulator, see Case 12. How convincing is its analgous application to sale? Is the seller likely in fact to have written most terms of the sale, particularly reservations of rights? Is the rule easier if the underlying principle is that ambiguous promises should be interpreted narrowly? Is the present Case an application of the rule?

2. A Second Example. The seller of a house reserved for himself the right either to live in the house for his lifetime, or, in lieu thereof, to receive 10,000 sesterces per year (its presumed rental value). The buyer interpreted this reservation to mean that the choice was his: he offered the seller the money for the first year, occupancy for the second, i.e., the seller would have to move in and out at the buyer's request. Paul, D. 19.1.21.6 (citing Trebatius), upholds the buyer's interpretation. Do you agree?

3. And a Third. The sale agreement states that the water flows and eave run-off are to remain as they now are, without specifying which ones. Pomponius, D. 18.1.33: "First we should examine what was transacted; if this is unclear, then we adopt the interpretation disadvantaging the seller, since the language is ambiguous."

Case 100: Supplying Reasonable Terms

D. 19.1.38.2 (Celsus libro octavo *Digestorum*)

Firmus a Proculo quaesivit, si de plumbeo castello fistulae sub terram missae aquam ducerent in aenum lateribus circumstructum, an hae aedium essent, an ut ruta caesa vineta fixaque quae aedium non essentiarum. Ille rescripsit referre, quid acti esset. Quid ergo si nihil de ea re neque emptor neque venditor cogitaverunt, ut plerumque in eiusmodi rebus evenisse solet, nonne propius est, ut inserta et inclusa aedificio partem eius esse existimemus?

Celsus in the eighth book of his *Digests*:

Firmus asked Proculus: If underground water pipes bring water from a lead cistern into a cauldron built into the walls, are they part of the building, or (instead) like “things dug, cut, bound, and attached,” which are not part of the building?

He wrote back that it matters what the parties transacted (*quid acti esset*). But what if neither buyer nor seller thought about this matter, as is often the case in matters of this sort? Is it not more fitting that we regard things implanted or inserted in the building as part of it?

Discussion:

1. Conveyancing. A good deal of legal interpretation inevitably accumulated around the sale and subsequent conveyance of land, as to what is or is not reserved for the seller. One category that is reserved, in the absence of express agreement otherwise, is “things dug, cut, bound, and attached” (*ruta caesa vineta fixaque*), which are not part of the land, see Pomponius, D. 18.1.66.2. The jurists give many examples. According to Ulpian, D. 19.1.17 pr., the seller must deliver to the buyer the door bars, keys, and locks, but may keep crops and their receptacles even if buried. The buyer gets dung heaps and straw beds if they were not collected for later sale; the seller can take woodpiles. Paintings inserted as wall decorations go to the buyer; but netting around columns, awnings, and cupboards on walls belong to the seller. And so on. The distinctions seem to be mainly customary, though ultimately based on function.

2. Water Pipes. In the present Case, the underground water pipes feed a cauldron fixed in the walls. Note how Celsus (a great expert on interpretation) treats the problem. By contrast, Ulpian, D. 19.1.13.31 and 15, simply assumes that pipes and water receptacles are part of the building and belong to the buyer. Where the parties have not expressed themselves, is it worth inquiring into the course of their negotiations?

Earlier, Labeo, D. 18.1.78 pr., had examined another case in which the contract specified that pipes would accede to a purchased building; is the reservoir to which the pipes are connected also part of the sale? Labeo rules favorably to the buyer: “Apparently, what was transacted was that this too accede, although the writing omits this.” Note that he does not seem to reach this conclusion on the basis of extrinsic evidence as to the parties’ intent.

Case 101: Dispositive Provisions

D. 19.1.13.10-11, 13 (Ulpianus libro trigesimo secundo ad Edictum)

10. Si fructibus iam maturis ager distractus sit, etiam fructus emptori cedere, nisi aliud convenit, exploratum est. **11.** Si in locatis ager fuit, pensiones utique ei cedent qui locaverat: idem et in praediis urbanis, nisi si quid nominatim convenisse proponatur. ... **13.** Item si quid ex operis servorum vel vecturis iumentorum vel navium quaesitum est, emptori praestabitur, et si quid peculio eorum accessit, non tamen si quid ex re venditoris.

Ulpian in the thirty-second book on the Edict:

10. If farmland was sold when crops were already ripe, the settled view is that the crops also fall to the buyer unless they agreed otherwise. **11.** If the farmland was leased, the rent in any case goes to the person who leased it. So too for urban properties, unless it is alleged that they expressly agreed on something (different). ... **13.** Likewise, if some profit resulted from the work of slaves or from fares for (using) beasts of burden or ships, it will be owed to the buyer; and also (in the case of slaves) if there was an increase in their *peculium*, but not what (comes) from the seller's property.

Discussion:

1. Default Rules. Often it is helpful to the parties if law simply provides default rules for handling doubtful matters; the parties can then, if they wish, vary these rules by express agreement. This Case discusses several instances. The general rule is that the buyer takes any "fruit" (*fructus*) accruing to the object of sale after the contract is arranged, including, e.g., crops, rent, and profits from the lease of slaves, animals, and ships. Is this sensible? Keep watch for other dispositive rules in Roman sales law. How does the law of sale differ, in this respect, from stipulation? On the tenants, see Case 156.

2. Sale of Slaves with Their *Peculia*. A *peculium* is a separate account that for practical purposes is controlled by a slave, although it ultimately belongs to the slave's owner; see Case 196. When a slave is sold, his or her *peculium* is kept by the seller unless the parties provide otherwise, see, e.g., Ulpian, D. 18.1.29. But, as this Case indicates, the buyer of a slave with a *peculium* keeps most increases in it after the sale.

Section 5: Associated Pacts and Modification

Most sales involve the straightforward exchange of money for an object of sale. But some (such as the sale described in Case 80 above) are much more complex, the exchange being only one crucial element in a larger transaction. The Roman theory of contract types requires the ability to recognize the larger transaction as a sale so that it can be “pigeon-holed” in its proper procedural category, but it is then also necessary to adapt or expand the law of sale so that it can take account of the larger transaction as well.

Roman law accomplishes this through a theory of “pacts” (*pacta*), informal agreements more or less contemporaneous with the central sale and, in effect, incorporated into it, so that they too become actionable as constituent parts of the sale. By contrast, subsequent pacts that modify the original bargain have a more limited effect: as a general rule, they can be used to narrow, but not to expand, one party’s duties under the original sale. Roman law is, however, still fairly generous in permitting such modifications, at any rate by comparison with Common Law.

The Romans frequently used pacts in order to create specially tailored forms of sale, such as sale on approval. These special forms often raise delicate legal problems that the jurists found difficult to resolve, particularly when the form had implications for property law. Nonetheless, the jurists seem generally to have tried to give the parties the widest legally possible latitude to form sales as they wished. In a very few instances the parties could even impose covenants restricting future use of the object of sale by the seller and all subsequent owners; interestingly, in Roman law such permissible covenants invariably concern the use of slaves, not (as with us) the use of land.

Case 102: Pacts Incorporated into the Sale

D. 2.14.7.5 (Ulpianus libro quarto ad Edictum)

Quin immo interdum format ipsam actionem, ut in bonae fidei iudiciis: solemus enim dicere pacta conventa inesse bonae fidei iudiciis. Sed hoc sic accipiendum est, ut si quidem ex continenti pacta subsecuta sunt, etiam ex parte actoris insint: si ex intervallo, non inerunt, nec valebunt, si agat, ne ex pacto actio nascatur. ... Et si in tutelae actione convenit, ut maiores quam statutae sunt usurae praestentur, locum non habebit, ne ex pacto nascatur actio: ea enim pacta insunt, quae legem contractui dant, id est quae in ingressu contractus facta sunt. Idem responsum scio a Papiniano, et si post emptionem ex intervallo aliquid extra naturam contractus conveniat, ob hanc causam agi ex empto non posse propter eandem regulam, ne ex pacto actio nascatur. Quod et in omnibus bonae fidei iudiciis erit dicendum. Sed ex parte rei locum habebit pactum, quia solent et ea pacta, quae postea interponuntur, parere exceptiones.

Ulpian in the fourth book on the Edict:

But sometimes it (a pact, *pactum*) gives rise to an action itself, as in the actions on good faith (*bona fides*); for we usually hold that informal pacts are incorporated in good faith actions.

But this rule is understood to mean that if the pacts followed immediately (upon the contract being made), they are also incorporated in the plaintiff's case; if (they are made) after a space of time, they will not be incorporated, nor will they be valid if he sues, so as to prevent an action from arising out of a pact (alone). ... I know Papinian gave the same response, that if, some time after a sale, they agreed on something outside the nature of the contract, no suit on sale can be brought for this reason, on account of the same rule that an action may not arise from a pact. This must be held in all good faith lawsuits. But on the defendant's side the pact is good, since even pacts that are later interposed generally provide defenses.

Discussion:

1. Contracts and Pacts. As Ulpian indicates, in forming a consensual contract the parties have fairly wide latitude to make agreements (*pacta*) that are accessory to the contract. In the case of sale, such agreements are then actionable through the *formulae* on sale; that is, they become part of the sale. Case 80 provides a good example of this latitude: sale of half of a farm, accompanied by the buyer's ten-year lease of the other half: the lease is actionable through the sale provided it has a demonstrable effect on the sale price. Presumably it must be clear that the sale is the central transaction, and also that the accessory pact is in some way integrally connected with it. The jurists require that the pact be closely temporally connected to the sale; see also the Emperor Maximinus Thrax, C. 2.3.13 (236 CE).

In good faith contracts, one common use for pacts was to make interest payable on outstanding debts: Scaevola, D. 16.3.28. This device was often used for interest-bearing bank deposits, see Case 69.

2. Pacts Later Modifying the Sale. A different rule is adopted in the case of later agreements altering the original terms of the sale. Here, as Ulpian says, such an informal agreement has, in principle, no legal force (as the jurists put it, no action can arise from a bare agreement); but the agreement does give rise to a legal defense (*exceptio pacti*). The effect of this rule can be illustrated by two examples. First, sometime after the sale the parties agree that the buyer will pay interest on the price until it is paid; his agreement increases the duties of the buyer, so the seller

cannot sue to enforce it: *Pauli Sent.* 2.14.1 (a subsequent agreement imposing interest on money due). (We might say the agreement fails for want of consideration; the jurists approach the question differently. In Roman law, the parties can, of course, make their subsequent agreement actionable through a stipulation.) Second, some time after the sale the parties agree that the buyer pay no interest on the price; if the seller then sues for interest as provided in the original agreement, the buyer can use the pact as a defense (Case 36). To put this in the parlance of our time, the pact is a shield but not a sword. What reasons can be given for this lop-sided rule? Is an agreement to raise the price more suspect (perhaps because of the possibility of duress) than one to lower the price?

Case 103: Pacts Made after the Sale

D. 18.1.72 pr. (Papinianus libro decimo *Quaestionum*)

Pacta conventa, quae postea facta detrahunt aliquid emptioni, contineri contractui videntur: quae vero adiciunt, credimus non inesse. Quod locum habet in his, quae adminicula sunt emptiois, veluti ne cautio duplae praestetur aut ut cum fideiussore cautio duplae praestetur. Sed quo casu agente emptore non valet pactum, idem vires habebit iure exceptionis agente venditore. An idem dici possit aucto postea vel deminuto pretio, non immerito quaesitum est, quoniam emptiois substantia constitit ex pretio. Paulus notat: si omnibus integris manentibus de augendo vel deminuendo pretio rursus convenit, recessum a priore contractu et nova emptio intercessisse videtur.

Papinian in the tenth book of *Questions*:

Informal pacts that are made later and reduce some (duty) from the sale are regarded as contained in the contract; but those that increase (a duty) we regard as not incorporated. This applies to those (pacts) that support the sale, e.g., that the stipulation for double not be provided (against eviction), or that the stipulation for double be provided with a surety (*fideiussor*). But in this (latter) case (where the pact does support the sale), the pact is invalid if the buyer sues; but by the rule on defenses it operates if the seller sues. It is properly questioned whether the same can be held if the price is later increased or diminished, since the essence of the sale is the price.

Paul notes: If, while everything is still fresh (i.e., neither party has performed), they reach a new agreement on reducing the price, they (are understood to) back off from the earlier contract, and a new sale is held to have intervened.

Discussion:

1. Three Issues. This Case is complicated because Papinian (in his usual irritating fashion) seems to discuss three issues at once: first, the distinction between pacts that increase or decrease a party's duty; second, the requirement that, in any case, a later pact must "support" (or supplement) the original contract, and cannot be entirely unrelated; third, Papinian's doubt, which he seems to be alone in expressing, as to whether a pact can modify an essential term such as the price. Try to clarify the discussion, if possible. The stipulation for double (*cautio duplae*) is a formal promise by the buyer that he or she will repay double the price if a true owner successfully claims the object from the buyer (see Case 134); and the seller's promise may be guaranteed by a surety as well.

Case 104: Rescinding or Modifying a Sale

D. 2.14.7.6 (Ulpianus libro quarto ad Edictum)

Adeo autem bonae fidei iudiciis exceptiones postea factae, quae ex eodem sunt contractu, insunt, ut constet in emptione ceterisque bonae fidei iudiciis re nondum secuta posse abiri ab emptione. Si igitur in totum potest, cur non et pars eius pactione mutari potest? Et haec ita Pomponius libro sexto ad edictum scribit. Quod cum est, etiam ex parte agentis pactio locum habet, ut et ad actionem proficiat nondum re secuta, eadem ratione. Nam si potest tota res tolli, cur non et reformari? Ut quodammodo quasi renovatus contractus videatur. Quod non insuutiliter dici potest. Unde illud aequae non reprobo, quod Pomponius libris lectionum probat, posse in parte recedi pacto ab emptione, quasi repetita partis emptione. Sed cum duo heredes emptori existerunt, venditor cum altero pactus est, ut ab emptione recederetur: ait Iulianus valere pactionem et dissolvi pro parte emptorem: quoniam et ex alio contractu paciscendo alter ex heredibus acquirere sibi potuit exceptionem. Utrumque itaque recte placet, et quod Iulianus et quod Pomponius.

Ulpian in the fourth book on the Edict:

In *bona fides* lawsuits, subsequent pacts arising from the same contract are incorporated to such an extent that it is settled that in purchase and other *bona fides* trials, if nothing has yet been done, rescission of a sale is possible.

So, if this is possible for all of it, why can't a part of it also be changed by a pact? And in his sixth book on the Edict Pomponius writes that this is so (i.e., that a part can be changed). In light of this, a pact is effective also for the plaintiff, so he too can enter an action by the same reasoning so long as nothing has yet been done. For if the entirety can be rescinded, why can't it also be modified? Such that the contract is held somehow to be almost recreated.

This position is subtly taken. Hence equally I will not reject what Pomponius affirms in his books of *Readings*, that by a pact a rescission in part is possible from a purchase, as though the purchase of part is reconsidered.

But when there are two heirs to the buyer, and the seller makes a pact with one to rescind the purchase, Julian says the pact is valid and the purchase is rescinded in part, since also from (some) other contract one heir could acquire a defense for himself. So each view, that of Julian and that of Pomponius, is correct.

Discussion:

1. Counter-Agreement. Now a major complication. Since a sale (like other good faith contracts) is created by agreement (*consensus*) the jurists hold that the parties can also dissolve it by bilateral counter-agreement (*contrarius consensus*), at any rate so long as the sale is still completely executory, with neither side having yet performed. (The jurist Aristo permitted voluntary rescission even after the contract was partially executed, see Neratius, D. 2.14.58; but this seems to have been a minority view). The effect of such a counter-agreement is to end the contract completely; neither side can enforce it. But the implication of this rule is that, so long as the contract is wholly executory, the parties have the power to substitute a new contract modifying the terms of the original contract; see, besides Ulpian in this Case and Papinian/Paul in the previous Case, Pomponius, D. 18.5.2, and Paul, D. 18.5.3. This possibility substantially undermines the rule on pacts in the two prior Cases. Why should the situation then change after one or both parties have begun to perform?

Case 105: Reserving Seller's Right to Accept a Better Price

D. 18.2.2 (Ulpianus libro vicensimo octavo ad Sabinum)

pr. Quotiens fundus in diem addicitur, utrum pura emptio est, sed sub condicione resolvitur, an vero condicionalis sit magis emptio, quaestionis est. Et mihi videtur verius interesse, quid actum sit: nam si quidem hoc actum est, ut meliore allata condicione discedatur, erit pura emptio, quae sub condicione resolvitur: sin autem hoc actum est, ut perficiatur emptio, nisi melior condicio offeratur, erit emptio condicionalis. **1.** Ubi igitur secundum quod distinximus pura venditio est, Iulianus scribit hunc, cui res in diem addicta est, et usucapere posse et fructus et accessiones lucrari et periculum ad eum pertinere, si res interierit.

Ulpian in the twenty-eighth book on Sabinus:

pr. When a farm is sold subject to rescission within a stated time (*addictio in diem*), there is a question whether the sale is unconditional but resolved under a condition, or the sale is instead conditional. I think it better to hold that it makes a difference what the parties transacted (*quid actum sit*). For if they arranged that it be called off when better terms are offered (by a third party), the sale will be unconditional but resolved under the condition. But if they arranged that the sale be complete unless better terms are offered, the sale will be conditional.

1. So when, according to this distinction, the sale is unconditional, Julian writes that the person who buys under such a provision can both usucapt and profit from its fruits and accessions, and that he bears the risk (*periculum*) if the object perishes (before the contract is resolved).

Discussion:

1. Addictio in Diem. This clause allows the seller to accept a better offer before a specified date. The issue is whether, in the meantime, the sale is valid but can later be rescinded if the seller receives a better offer; or, instead, the sale is not presently valid but will become valid if no better offer is accepted. Ulpian treats this as entirely a matter of contractual interpretation. The issue is important because it affects especially the passage to the buyer of the risk for accidental destruction of the object prior to delivery, see Part B.1 below. (Note that, in Roman law, a contract is said to be “conditional” only if it does not become valid except upon occurrence of a condition—what we would call a suspensive condition or a condition precedent. If a contract become valid at once but can be resolved upon occurrence of a condition—what we would call a resolutive condition or a condition subsequent—the jurists describe the contract as unconditional but resolvable.)

2. Better Offers. An offer is considered “better” if, e.g., a higher price is offered, or faster payment, or sturdier credit; see Ulpian, D. 18.2.4.6. A *iudex* could evidently review whether the second offer is in fact better. If it is, the original buyer has the option to meet the new offer, see Ulpian, D. 18.2.6.1; and, if the buyer fails to do so, the buyer must surrender the object back to the seller, although he may keep the fruits if the sale was unconditional in the interim.

3. The Effect of Annuling the Contract. Suppose that the sale is unconditional, and the buyer receives the object and pays the price; thereby the buyer will usually acquire ownership. What happens if a better offer is then made before the deadline? Clearly the sale is annulled retroactively, but does the buyer's ownership automatically revert to the seller? The answer is not completely certain. Ulpian, D. 18.2.4.3 (citing Marcellus), puts the case where a buyer in an unconditional sale has then used the property as a real security to a third party; if the seller subsequently accepts a better offer, the security interest in the property is automatically withdrawn,

which would imply that the buyer no longer owns the object. (See also Ulpian/Marcellus, D. 20.6.3.) If these and similar texts mean what they seem to mean, then the buyer's ownership, in the interim before the deadline, is not absolute but only provisional; the seller is protected by the possible reversion of ownership. Although this would seem to be a reasonable solution, many scholars believe it was imposed on the texts by the Digest compilers. If that is so, the jurists themselves may have restricted the seller to a suit on the contract—a very harsh rule. Much the same problem arises with the other types of sale discussed in subsequent Cases.

Case 106: Calling Off Sale If Price Is Not Paid

D. 18.3.2 (Pomponius libro trigensimo quinto ad Sabinum)

Cum venditor fundi in lege ita caverit: "Si ad diem pecunia soluta non sit, ut fundus inemptus sit", ita accipitur inemptus esse fundus, si venditor inemptum eum esse velit, quia id venditoris causa caveretur: nam si aliter acciperetur, exusta villa in potestate emptoris futurum, ut non dando pecuniam inemptum faceret fundum, qui eius periculo fuisset.

Pomponius in the thirty-fifth book on Sabinus:

When a farm's seller provides in the terms of sale as follows: "that, if the money is not paid by the due date, the land be unsold," this is taken to mean that the farm is not sold if the seller wishes it not to be sold, since the provision is for the seller's benefit. For were it otherwise interpreted, (a jurist held) that if the farmhouse burned down, it would be in the buyer's power to undo the farm's sale by not paying the money; but it was at his risk (*periculum*).

Discussion:

1. Lex Commissoria. This clause allows the seller to rescind the sale if the buyer does not pay the price (or at least tender payment) by a deadline; note that the option to rescind is entirely with the seller. The present Case gives the standard formulation of the clause, which is regularly taken to mean that the sale is valid but can be resolved in the event of non-payment. However, it is also possible to make the validity of the sale dependent upon payment, though this seems to have been uncommon. Normally the buyer sought to have the object at once and pay for it later. If the buyer failed to pay by the deadline, the seller had to decide at once whether to call off the sale, and was obliged then to stick to this choice; see Papinian, *Frag. Vat.* 3-4; Ulpian, D. 18.3.4.2; Hermogenian, D. 18.3.7. Why is the seller required to choose promptly?

2. Seller's Remedies. Although the sale is rescinded, the seller is allowed to sue the buyer on sale, see Ulpian, D. 18.3.4 pr. The state of our texts makes it unclear whether ownership reverted to the seller, who could then bring a property law vindication to recover the object; for instance, consecutive rescripts of the Emperor Alexander (C. 4.54.3-4) contradict one another on this point. It is thought that in Classical law the seller did not automatically recover ownership if it had passed to the buyer; but such a rule may work hard consequences if, for instance, the buyer is insolvent.

3. Other Special Terms. The parties may also agree that the seller has the right to repurchase the object if the buyer later decides to sell it, or that the seller can repurchase it within a specified time.

Case 107: Sale on Approval

D. 19.5.20 pr.-1 (Ulpianus libro trigesimo secundo ad Edictum)

pr. Apud Labeonem quaeritur, si tibi equos venales experiendos dedero, ut, si in triduo displicuissent, redderes, tuque desultor in his cucurreris et viceris, deinde emere nolueris, an sit adversus te ex vendito actio. Et puto verius esse praescriptis verbis agendum: nam inter nos hoc actum, ut experimentum gratuitum acciperes, non ut etiam certares. **1.** Item apud Melam quaeritur, si mulas tibi dedero ut experiaris et, si placuissent, emeris, si displicuissent, ut in dies singulos aliquid praestares, deinde mulae a grassatoribus fuerint ablatae intra dies experimenti, quid esset praestandum, utrum pretium et merces an merces tantum. Et ait Mela interesse, utrum emptio iam erat contracta an futura, ut, si facta, pretium petatur, si futura, merces petatur: sed non exprimit de actionibus. Puto autem, si quidem perfecta fuit emptio, competere ex vendito actionem, si vero nondum perfecta esset, actionem talem qualem adversus desultorem dari.

Ulpian in the thirty-second book on the Edict:

pr. In Labeo it is asked: If my horses are for sale and I give them to you on approval, with the condition that you return them within three days if they displease you, and you (then) ride them in an acrobatic contest and win, and then decline to buy them, is there an action on sale against you? I think the better view is that suit must be by a special preamble (*actio praescriptis verbis*), since what we transacted was that you have a free trial, not that you also compete (with them).

1. Likewise, in Mela it is asked: If I give mules to you on approval, with the condition that you buy them if they please you and pay something for each day (before their return) if they displease you, and the mules are then stolen by brigands within the trial period, what should be owed: the price, or just the rent? Mela says that it matters whether or not the sale had yet been contracted, so that, if it was made, the price is claimed; if it was (still) in the future, (only) the rent is owed. But he does not speak about the actions. I think that if the sale was complete, an action lies on sale; if it were not yet complete, an action is given like that against the acrobat (in the case described above).

Discussion:

1. Approval. This clause gives the buyer a virtually unrestricted right to reject the object after a trial period. The parties would normally specify this period, but a 60-day limit was imposed if they did not, see Ulpian, D. 21.1.31.22-23. The parties were also free to determine that their arrangement would become a valid sale only if the buyer expressed agreement (a suspensive condition), or that the sale would be valid forthwith but resolved if the buyer rejected the object (in our law, a resolutive condition). The latter seems to have been more common; why?

2. Misuse of the Object on Trial. In the *principium* of this Case, the buyer has received the horses on trial and then used them in an acrobatic contest; this goes considerably beyond what would normally be considered fair use during a trial period, particularly because the buyer rejected the horses after winning the contest. The buyer's right to reject is apparently not questioned; but some remedy must be found for the seller. Labeo considered an action on sale; Ulpian prefers a special action, which probably did not exist in Labeo's time, that will presumably allow the seller to recover at least the fair rental value of the horses. (On the *actio praescriptis verbis*, see Chapter VI.B below; but the applicability of this suit is unclear, and restitution of the benefit would seem more appropriate.) In this case, the sale appears to be subject to what we would call a resolutive condition, see Ulpian, D. 18.1.3; in such a sale, ownership would not automatically revert to the seller upon the buyer's rejection, see Ulpian, D. 20.6.3.

3. Destruction in the Interim. In section 1, a more elaborate arrangement is described: the prospective buyer pays rent for the trial period if he later rejects the mules, or the price if he accepts them. But the mules have been stolen before the buyer reached his decision on buying. As Fabius Mela and Ulpian indicate, the problem seems to hinge on how the arrangement is to be construed. If the sale was subject to a resolutive condition, then the sale was already in force and the buyer is liable in sale for failure to return the mules; but if the condition was suspensive, then the buyer need pay on the rent and the seller bears the risk of the mules' loss. Which seems the better outcome?

4. Good Faith? Can it be presumed that the would-be buyer is acting honestly when accepting or rejecting the object? We might compare the decision on the horses or mules to a painting commissioned on approval; in the latter case, must the buyer at least look at the painting before rejecting it? What result if the approval is dishonest?

Case 108: Condition of Tasting Wine

D. 18.6.4.1 (Ulpianus libro vicesimo octavo ad Sabinum)

Si aversione vinum venit, custodia tantum praestanda est. Ex hoc apparet, si non ita vinum venit, ut degustaretur, neque acorem neque mucorem venditorem praestare debere, sed omne periculum ad emptorem pertinere: difficile autem est, ut quisquam sic emat, ut ne degustet. Quare si dies degustationi adiectus non erit, quandoque degustare emptor poterit et quoad degustaverit, periculum acoris et mucoris ad venditorem pertinebit: dies enim degustationi praestitutus meliorem condicionem [emptoris] <venditoris> facit.

Ulpian in the twenty-eighth book on Sabinus:

If wine is sold for a lump sum, only safekeeping (*custodia*) is owed (by the seller). From this it is clear that if wine was not sold with a condition of tasting, the seller should not be liable for acidity or mustiness, but all risk (of the wine going bad) falls on the buyer. But it is hard (to believe) that anyone would buy on a condition of not tasting.

So if a deadline is not set for the tasting, the buyer can taste when he likes, and until he tastes, the risk of acidity and mustiness will lie on the seller; setting a deadline on tasting thus improves the position of the seller.

Discussion:

1. Tasting. The sale of wine was a risky business in the Roman world, since wine often went bad before it could be marketed. Ulpian strongly recommends that the buyer insist on the right to taste the wine before accepting it, and that the seller insist in turn on a deadline for tasting. Unlike with a trial period (in the previous Case), a condition of tasting does not give the buyer an arbitrary right to reject; the tasting must conform to the judgment of an upright person, see Ulpian, D. 18.1.7 pr. (*vir bonus*), and so the buyer's decision is reviewable by a *iudex*. The legal situation if no condition of tasting is agreed upon is described below in Case 139.

2. Preventing Tasting. Ulpian, D. 18.6.4 pr., deals with a case in which the seller sets a deadline for tasting and then obstructs the buyer from tasting before the deadline. The question is whether the seller thereby bears the risk if the wine goes bad after the deadline. Ulpian states that this depends on interpreting the agreement between the parties (*quid actum sit*), but, if the matter is unclear, then the seller bears this risk because of his obstruction. "Bearing the risk" presumably means, in this context, at least that the buyer can back out of the sale; should the buyer also be able to recover damages?

Case 109: Restricting Use of Object of Sale

D. 18.1.56 (Paulus libro quinquagesimo ad Edictum)

Si quis sub hoc pacto vendiderit ancillam, ne prostituatur et, si contra factum esset, uti liceret ei abducere, etsi per plures emptores mancipium cucurrerit, ei qui primo vendit abducendi potestas fit.

Paul in the fiftieth book on the Edict:

If someone sells a slave woman under a pact that she not be prostituted, and that, if this be violated, he be permitted to take her back, (then) even if the slave passes through many (subsequent) buyers, the person who first sold her has the power to take her back.

Discussion:

1. Covenants on Use. In a limited number of situations (all concerning sale of slaves), Roman law allows a seller to impose a covenant restricting future use: that the slave be sold abroad, that the slave be manumitted (or not be manumitted), or that a slave woman not be prostituted. Some of these covenants are intended to punish slaves, others to protect them. What is unusual about the covenants is that they have limited “real” effects. In this Case, for example, the original seller can take back the slave woman if she is prostituted not only by the original buyer, but even by a much later one (who may not know about the covenant). It was also possible to impose a covenant that the slave woman be free if she was prostituted: e.g., Paul, D. 18.7.9. Why did the Romans recognize such covenants? Why did they restrict the list of possible covenants?

2. Imperial Implementation. The Emperor Alexander, C. 4.56.1 (223 CE), citing a constitution of Hadrian, allows imperial officials to intervene and order a slave woman to be freed if she is prostituted against a covenant, even where the original owner tolerates the violation. This might be a humanitarian measure, but the emperors also enforce covenants requiring export of a slave, see Septimius Severus and Caracalla, C. 4.55.1-2 (200).

Part B. Execution of a Sale

After a sale has been successfully arranged, the two parties must execute it. The vast majority of sales are executed immediately: the seller hands over the object, the buyer pays its price. Even in such cash sales, it is helpful to keep in mind the agreement that underlies the transfer, since it is the agreement that explains not only why the transfer occurs, but also why in most circumstances it is legally irreversible once completed. Further, the agreement may have important subsequent repercussions, if, for instance, the object of sale turns out to be defective in some serious way.

More interesting, however, are sales that do not involve immediate exchange, but instead envisage the unfolding of performance over a period of time following the agreement. Here the interaction of the seller's and buyer's respective rights and duties can result in a richly textured law, a sort of intricate counterpoint with many possible variations. Suppose, for example, the seller retains the object for subsequent delivery, and the object is then destroyed before the buyer receives it. Clearly there is a loss; the difficult legal problem is to determine which party will bear the loss.

As they articulated the rules for executing sales, the jurists appear to have kept in mind the ultimate double goal of all sales: that the buyer receive the object, and the seller its price. This implies that the rights and duties of seller and buyer are not theoretically independent, but instead interlinked and inseparable; the implicit model remains the cash sale with its immediate exchange. As the Cases below will demonstrate, this model has many important legal implications.

There are two important subjects, related to execution of sales, that you need to keep your eye on. First, Roman law has a rather underdeveloped theory of breach, particularly as it relates to the rights of the aggrieved party; the jurists often seem to tie breach too closely to the concept of default (*mora*), or improper delay in performance, which is really just one type of breach. The issue here becomes more important in modern law, where the complexity of sales (think especially of installment sales) often makes it important for an aggrieved party to take action even before default.

Second, our sources are also surprisingly slender as regards remedies. As usual in Roman law, a plaintiff's remedy is normally expressed in money (*condemnatio pecuniaria*). So, too, in our law, except that we allow somewhat more access to court-ordered (specific) performance of the contract. But the Roman jurists are not especially clear on the amount of damages, beyond often defining them vaguely in terms of the plaintiff's "interest" (*id quod interest*). It may help to break damages down into two broad categories: direct damages (e.g., the plaintiff bought for 500 an object worth 600 on the market, and is now entitled to the difference) and consequential damages (e.g., the plaintiff loses a downstream contract because of the defendant's breach). Our sources seem to recognize both categories, but do not exhaustively analyze them, much less indicate when each form of damages is available. For the most part, the *iudex* seems to have been left on his own, to do the best he could.

Besides damages, other Cases provide for remedies such as rescission and restitution, essentially undoing the sale.

Section 1: Risk of Damage or Destruction Prior to Delivery

A sale is complete (*perfecta*) when the parties have agreed on all its basic terms and no condition bars its execution. The direct result of a completed sale is that each party has a contractual action for damages if the other party fails to perform. However, this liability is purely *in personam*; unlike in older Common Law, no property right in the object of sale passes to the buyer as an immediate consequence of the sale, regardless of whether or not specific property has been “identified” as the object of sale. Accordingly, if the seller then fails to deliver the object, the buyer can sue on purchase only to obtain damages from this breach.

In cases where the seller does not make immediate delivery, but instead retains the object for a time, it is possible that the object may be destroyed or damaged before delivery. In the law of sale, the resulting legal problem is handled through the doctrine of risk (*periculum*). This doctrine holds that the seller is liable for all physical damage to the object that he or she could conceivably prevent—what is called a liability for “safekeeping” (*custodia*). However, the risk falls on the buyer if the object is damaged or destroyed by a cause that is regarded as entirely beyond the seller’s control—what the Romans term a “higher force” (*vis maior*), or a pure accident (*casus fortuitus*). This means that the buyer may have to pay for the destroyed object even though he or she does not receive it, and, what is more, even though no property right (title or possession) has yet passed from the seller to the buyer.

The Roman doctrine of risk is not obvious and has often attracted criticism. It may be hard to justify theoretically, but it makes eminent practical sense. Simply as a result of the sale, the buyer already has a limited legal interest in the object, and the seller’s preexisting interest is correspondingly reduced. Both parties are likely to want the sale’s execution in as short a time as is feasible, and the doctrine of risk encourages this result.

Case 110: Passage of Risk

D. 18.6.8 pr. (Paulus libro trigesimo tertio ad Edictum)

Necessario sciendum est, quando perfecta sit emptio: tunc enim sciemus, cuius periculum sit: nam perfecta emptio periculum ad emptorem respiciet. Et si id quod venierit appareat quid quale quantum sit, sit et pretium, et pure venit, perfecta est emptio: quod si sub condicione res venierit, si quidem defecerit condicio, nulla est emptio, sicuti nec stipulatio: quod si exstiterit, Proculus et Octavenus emptoris esse periculum aiunt: idem Pomponius libro nono probat. Quod si pendente condicione emptor vel venditor decesserit, constat, si exstiterit condicio, heredes quoque obligatos esse quasi iam contracta emptio in praeteritum. Quod si pendente condicione res tradita sit, emptor non poterit eam usucapere pro emptore. Et quod pretii solutum est repetetur et fructus medii temporis venditoris sunt (sicuti stipulationes et legata condicionalia peremuntur), si pendente condicione res extincta fuerit: sane si exstet res, licet deterior effecta, potest dici esse damnum emptoris.

Paul in the thirty-third book on the Edict:

It must be known when a sale is complete (*perfecta*), since we will then know who bears the risk (*periculum*); for when the sale is complete, the risk falls on the buyer. If the object of sale is clear, what and of what sort and how much it is, and what the price is, and the sale is unconditional, then the sale is complete. But if the object is sold under a condition, there is no sale if the condition fails, just there is no stipulation (if a condition fails). But if it (the condition) is realized, Proculus and Octavenus say that the buyer (then) bears the risk; Pomponius approves this view in his ninth book.

But if the buyer or seller dies while the condition is pending, it is settled that, if the condition is realized, the (decedent's) heirs are also obligated, on the theory that the sale's effects now reach into the past. But if the object was handed over while the condition is pending, the buyer cannot usucapt it as buyer.

If the object of sale perishes while the condition is pending, any price paid will be recovered and the fruits for the interim belong to the seller, just as stipulations and conditional legacies fail. However, if the object remains but becomes worse, it can be said that the buyer bears the loss.

The Problem:

Sempronia sells a cow to Titius, but the cow dies of natural causes before Sempronia can deliver it. Is Titius obliged to pay for the cow?

Discussion:

1. Completion of the Sale. Paul relies on a distinction between the making of the contract through agreement on its essentials, and the contract's "completion." Usually these occur more or less simultaneously with no further action required, but completion may be delayed especially if the agreement involves a condition, such as that the object of sale be measured (Case 87) or come into existence (Cases 85-86). Even before completion, however, the agreement has consequences; neither party may unilaterally back out of the sale or obstruct the occurrence of the condition (see Case 86). Also, as Paul says, the obligations are already inheritable on either side. Paul's rule on the object's destruction or deterioration during a condition's pendency looks peculiar as it stands; his thought is perhaps that the sale cannot become complete without an object of

sale, but surely the seller should at least bear contractual liability for any loss that he or she is responsible for. How would you rephrase Paul's rule?

2. Performance before Completion. The parties may begin to perform even before the sale is complete. If they do, as Paul says, their performance has limited effect: the buyer acquires no property rights in the object of sale, and may presumably recover any price that has been paid, so long as the condition is pending. If the object is destroyed through *vis maior* before the condition is realized, the seller "bears the risk" only in the sense that the contract is effectively nullified; the seller has no liability to the buyer. However, the parties can agree that the buyer bears the risk during pendency: Ulpian, D. 18.6.10.

3. Effects of Completion: Passage of Risk. Completion of a sale has two main consequences. First, the parties each become contractually liable to perform according to the terms of their agreement; note that this liability is solely contractual. Second, however, as Paul says, risk of the accidental destruction of the object passes to the buyer. This means that if before its delivery the object of sale is destroyed through circumstances over which the seller has no control (e.g., through *vis maior*), the buyer bears the loss and must pay the price regardless. Passage of risk is discussed in the Cases that follow, but Paul, D. 18.1.34.6, gives a hypothetical that may serve to illustrate it. Sale is of one of two slaves, Stichus or Pamphilus, with either the seller or the buyer to choose. Presumably without the seller's fault, one slave dies before choice can be made; then the other slave dies before delivery. Paul holds that the death of the first slave is at the seller's risk (in the sense that the possibility of choice is eliminated), but the death of the second is at the buyer's. Do you follow the logic? Paul goes on to note that the result is the same if the slaves die simultaneously, "since at least one lived at the buyer's risk." (Note that natural death of slaves and animals is deemed a form of *vis maior*.)

4. Deterioration of the Object. In the last sentence of this Case, Paul indicates that the buyer bears the loss if an object loses value after or even before completion of the sale. It is unclear what kind of loss in value he is thinking of. See Case 112 with Discussion 2, on wine that goes acetic. How widely should Paul's rule be applied? Ulpian, D. 19.1.13.12, indicates that if an object of sale is harmed by a third party, the seller must cede to the buyer any resulting actions against the wrongdoer; this probably indicates that the seller is not himself liable to the buyer for the damage. Compare Ulpian, D. 47.2.14 pr., on seller's cession of the action of theft; and see Case 113.

Case 111: Explaining the Passage of Risk

Iustinianus, *Institutiones* 3.23.3

Cum autem emptio et venditio contracta sit ..., periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. itaque si homo mortuus sit vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arboribus turbine deiectis longe minor aut deterior esse coeperit, emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet: nam et commodum eius esse debet cuius periculum est.

Justinian in the third book of his *Institutes*:

When a sale has been contracted ..., the risk (*periculum*) for the object of sale falls at once on the buyer, even if the object is not yet handed over to the buyer. So if a slave died or was wounded somewhere on his body, or if all or part of a building was consumed by fire, or if all or part of a farm was destroyed by the force of a river or even lost considerable value through a flood or when its trees were blown down by a gale, (in all these circumstances) the buyer bears the loss and must pay the price even though he does not obtain the object. The seller is protected regarding whatever occurs without his deceit (*dolus*) and fault (*culpa*). But also if the farm is increased by alluvial soil after the sale, the benefit falls to the buyer; for he ought to have the benefit since he bears the risk.

Discussion:

1. Why Does Risk Pass to the Buyer? This Case is, of course, not Classical but Justinianic (the omitted clause refers to one of the emperor's innovations). But by and large Justinian reproduces Classical sources (e.g., Paul, D. 18.6.7 pr.). The problem is to explain why the buyer must pay the price even though he or she has not received the object and does not even have title to it. The final sentence gives a clue: after completion of the sale, the buyer is entitled to any natural (or other) increase in the object of sale. In fact, the rule is still broader. For instance, Neratius, D. 19.1.31.1, holds that the seller must deliver any acquisitions made through a purchased slave. Justinian explains this as compensation to the buyer for bearing the risk; but he may reverse the true relationship. The buyer's entitlement to the "fruits" suggests the existence of an economic interest in the object, and it is this interest that justified passage of risk. In any event, as we will see in Case 114, the risk that the buyer assumes is not for all destruction of the object, but only for destruction beyond the seller's control. The question, then, is which of two innocent parties should bear the loss when such destruction occurs. Work out the answer for yourself.

2. Hard Cases under the Roman Rule. You can easily imagine instances in which passage of risk is overly generous to the seller. Suppose, for example, that the sale is of an object not belonging to the seller, and the object perishes through *vis maior* before the seller can acquire it; or that the seller inadvertently sells the same object to two buyers and it then perishes through *vis maior* before delivery to either one. In both cases, the seller can apparently collect the price; and, in the latter case, twice! But a *iudex* would presumably take note if the seller was in bad faith, see Case 113. More generally, it may be objected to the Roman rule that before delivery the seller is in a better position to assess risk and to account for it in the contract price, and may also spread the expected or actual cost of any losses to other buyers.

3. Passage of Title and the Buyer's Position. Because Roman law holds that the buyer does not acquire property rights in the object of sale until it is conveyed, the buyer faces at

least two further dangers. First, if the seller goes bankrupt before delivery, the buyer has no *in rem* rights and must line up with other creditors; but since the buyer would then have to tender the price, in many instances a buyer would probably prefer to avoid the contract altogether, rather than pursuing a remedy. Second, if a seller sells to two buyers separately and then conveys the object of sale to the second buyer, the first buyer has no property rights to the object and is limited to contract remedies against the seller. These examples help to explain modern criticism of the Roman rules on risk, don't they. Would you incline to regard the Roman rule as "an instinct surviving from primitive sale"? Or does it in fact correspond to "commercial convenience"?

4. An Example. An apartment building is sold; before it is conveyed to the buyer, the seller's slaves carelessly set fire to it and burn it down. Does the buyer bear this risk? Alfenus, D. 18.6.12, makes the seller liable in sale only for failure to show care in protecting the property, a responsibility that would perhaps include choosing careful slaves. Is this result correct?

5. Variation by Contract. Gaius, in Case 113, presumes that by an express agreement the parties can vary the dispositive rule on risk. However, little evidence suggests that the Romans commonly did so. Why might that be?

Case 112: Risk in a Conditional Sale

D. 18.1.35.7 (Gaius libro decimo ad Edictum Provinciale)

Sed et si ex doleario pars vini venierit, veluti metretae centum, verissimum est (quod et constare videtur) antequam admetiatur, omne periculum ad venditorem pertinere: nec interest, unum pretium omnium centum metretarum in semel dictum sit an in singulos eos.

Gaius in the tenth book on the Edict:

But if part of the wine from a wine cellar is sold, e.g., one hundred containers, it is quite correct, and is also apparently agreed, that the seller bears all risk (*periculum*) before measurement. Nor does it matter whether one price is set for all hundred containers, or (a price) for each (container).

Discussion:

1. Sale from Stock. In this Case, one hundred container-measures (nearly 4,000 liters) of wine from a cellar have been sold, but not yet measured out. Completion of the sale is held to be conditional on measurement, see Case 87. Gaius states that “the seller bears all risk before measurement”; what does he mean? That if the wine cellar is totally destroyed, the sale is off and the seller does not get the price? See also Case 77.

2. Spoilage. The situation is different, however, if the wine goes bad. Papinian, *Frag. Vat.* 16: “The buyer bears the risk of wine changing even though this occurs before the date for paying the price or the fulfillment of a condition of sale.” This corresponds with Paul’s rule in Case 110; the risk of wine going bad is generally regarded as beyond human control. (The most common cause, unknown to the Romans, was bacterial.) However, Papinian goes on to say: “But if he sold 1,000 amphoras at a fixed price, without physically defining (the wine), the buyer bears no risk in the meantime.” If the text is right (this has been doubted), the sale looks to have been generic; the buyer does not bear the risk until the wine, or at least the stock of wine, is physically identified to the sale. But most scholars doubt the possibility of generic sale in Roman law, see Case 87.

3. Sale of a Slave. Two parties agree on sale of a slave; but until the price is paid, the buyer is to hold the slave under lease, i.e., evidently the seller retains ownership until he is paid, in a lease/purchase agreement. According to Javolenus, D. 18.6.17, the slave is not regarded as delivered to the lessee/buyer; but, under this arrangement: “The buyer bears the risk for whatever happens to the slave except through the seller’s intentional misconduct (*dolus*).” Can this result be explained? It is hard to reconcile with the ordinary rules for lease, see Case 153.

Case 113: The Seller's Duty to Protect Object of Sale

D. 18.1.35.4 (Gaius libro decimo ad Edictum Provinciale)

Si res vendita per furtum perierit, prius animadvertendum erit, quid inter eos de custodia rei convenerat: si nihil appareat convenisse, talis custodia desideranda est a venditore, qualem bonus pater familias suis rebus adhibet: quam si praestiterit et tamen rem perdidit, securus esse debet, ut tamen scilicet vindicationem rei et conditionem exhibeat emptori. Unde videbimus in personam eius, qui alienam rem vendiderit: cum is nullam vindicationem aut conditionem habere possit, ob id ipsum damnandus est, quia, si suam rem vendidisset, potuisset eas actiones ad emptorem transferre.

Gaius in the tenth book on the Edict:

If the object of sale is lost through theft, the first thing to examine is what the parties agreed to regarding the safekeeping (*custodia*) of the object. If what they agreed is unclear, then the degree of safekeeping (*custodia*) required from the seller is that which an upright *paterfamilias* would use for his own property. If he provided this and lost the object nonetheless, he should be protected, provided, of course, that he conveys to the buyer (the right to) vindicate the object and (also) the *condictio* (on theft).

Next we consider someone who sells another person's property. Since he can have no vindication or *condictio*, he should be condemned (in an action on purchase) for this very fact, since, if he had sold his own property, he would have been able to transfer these actions to the seller.

The Problem:

Seius sells an antique vase to Aurelia; however, before he can deliver it to her, an unknown person steals it. Is Aurelia still liable for the price of the vase? Does the answer depend on how carefully Seius was safeguarding it?

Discussion:

1. Liability for Safekeeping. In general, the seller is held to a very high standard of care in safeguarding the object: what is called a *custodia* liability, meaning that he is liable unless he can show that no possible care could have avoided the loss, see Paul, D. 18.6.3. But the jurists relax this requirement somewhat when a third party damages or steals the object; here it is enough if the seller took due care to prevent this happening and surrenders the appropriate delictual actions to the buyer, see also Neratius, D. 19.1.31 pr. Is this relaxation justified?

2. Expropriation. The buyer bears the risk if the object is destroyed by an irresistible "higher force" (*vis maior*). But what if the State expropriates the object of sale prior to its delivery? Africanus, D. 19.2.33, holds that the seller bears the risk; the sale is at an end, and the buyer can recover any of the price that has been paid. By contrast, in similar circumstances, Paul, D. 21.2.11 pr., allows the seller to obtain the full price despite failure to deliver because of expropriation. Which solution is better? Should it depend on the reasons for the expropriation (public need, as against criminal conviction)?

Case 114: Seller's Fair Use of a Purchased Slave

D. 19.1.54 pr. (Labeo libro secundo Pithanon)

Si servus quem vendideras iussu tuo aliquid fecit et ex eo crus fregit, ita demum ea res tuo periculo non est, si id imperasti, quod solebat ante venditionem facere, et si id imperasti, quod etiam non vendito servo imperaturus eras. Paulus: minime: nam si periculosam rem ante venditionem facere solitus est, culpa tua id factum esse videbitur: puta enim eum fuisse servum, qui per catadromum descendere aut in cloacam demitti solitus esset. Idem iuris erit, si eam rem imperare solitus fueris, quam prudens et diligens pater familias imperaturus ei servo non fuerit. Quid si hoc exceptum fuerit? Tamen potest ei servo novam rem imperare, quam imperaturus non fuisset, si non venisset: veluti si ei imperasti, ut ad emptorem iret, qui peregre esset: nam certe ea res tuo periculo esse non debet. Itaque tota ea res ad dolum malum dumtaxat et culpam venditoris dirigenda est.

Labeo in the second book of *Plausible Views*:

If you sold a slave and he did something on your order and as a result broke a leg, you do not bear the risk (*periculum*) for this, provided you ordered what he normally did before the sale, and that the order was one you would give also to a slave you had not sold.

Paul (comments): On the contrary. For if he (the slave) usually did something dangerous before the sale, this (his continuing to do it) will be held to occur by your fault (*culpa*); e.g., suppose he was a slave who usually walked a tightrope or was lowered into a sewer. The rule is the same if you usually ordered something that a cautious and careful *paterfamilias* would not order a slave to do. What if this right was reserved (by the seller)? He can still order the slave to do something new, which he would not have ordered had he (the slave) not been sold; e.g., if you ordered him to travel to the buyer who was abroad; this clearly should not be at your risk (as the seller). And so this entire matter should be reduced to just the seller's intentional deceit (*dolus*) and fault (*culpa*).

Discussion:

1. Fair Use. To what extent can the seller continue using the slave before delivery to the buyer? Does Paul really differ from the views of the early Classical jurist Labeo? Note Paul's willingness to rely on a broader concept of *culpa* as defining the extent of the seller's obligation to the buyer. The "fair use" principle is closely linked to the seller's duty to deliver in good condition; see Case 127, and also Ulpian, D. 4.3.7.3 (the seller must not poison a slave prior to delivery).

Case 115: Buyer's Liability before Delivery

D. 19.1.13.22 (Ulpianus libro trigesimo secundo ad Edictum)

Praeterea ex vendito agendo consequetur etiam sumptus, qui facti sunt in re distracta, ut puta si quid in aedificia distracta erogatum est: scribit enim Labeo et Trebatius esse ex vendito hoc nomine actionem. Idem et si in aegri servi curationem impensum est ante traditionem aut si quid in disciplinas, quas verisimile erat etiam emptorem velle impendi. Hoc amplius Labeo ait et si quid in funus mortui servi impensum sit, ex vendito consequi oportere, si modo sine culpa venditoris mortem obierit.

Ulpian in the thirty-second book on the Edict:

In an action on sale, he (the seller) also will recover his expenses on the object of sale, e.g., if there were some expenditures on buildings that were sold; for Labeo and Trebatius write that there is an action on sale for this. Likewise, if before delivery there were expenses on care for a sick slave, or if something (was spent) on instructing (the slave) that it was probable the buyer also wished to be spent. Furthermore, Labeo says that even if something was spent on the funeral of a dead slave, it should be recovered in an action on sale, provided that he met his death without the seller's fault (*culpa*).

Discussion:

1. Expenses. Does Ulpian mean that the seller can recover all his or her expenditures on the object of sale, including, e.g., the costs of board? Or only those expenditures that are of an unusual and necessary kind, such as propping up a sagging building, or caring for a sick slave? The crucial example is the expense for instruction that the buyer would probably have wanted (and will also probably benefit from), but did not specifically request; how certain must it be that the buyer would want the instruction enough to pay for it? Roman law aside, what is the best rule regarding such incidental expenses?

2. Funeral for a Dead Slave. It should be noted that the buyer must pay the price for the dead slave, as well as the slave's funeral costs (consequential damages). Does this add insult to injury?

Section 2: Buyer's Default and Remedies

The buyer's principal duties under a sale are relatively straightforward: to make timely payment of the agreed price, and to take delivery of the object of sale.

In Roman law, the buyer is ordinarily obliged to remove the object of sale if it is moveable. The jurists therefore commonly write of "taking delivery," rather than of "accepting delivery," and they make little of the buyer's inspecting the object upon delivery in order to spot any defects. Should the buyer delay unreasonably in taking delivery, the seller may even be entitled to destroy the object of sale; but the jurists make some effort to mitigate the harsh results of this rule. (For immoveables, the rough equivalent is taking possession of the land by physically entering it with the intent to possess: e.g., Paul, D. 41.2.3.1. Title is transferred from seller to buyer most commonly by the formal ceremony of mancipation or, failing that, through usucapion, the buyer's uninterrupted possession of the land for two years. See Gaius, *Inst.* 2.18-22, 40-61.)

The parties may set a deadline (*dies*) for payment. Otherwise, the buyer must pay upon demand by the seller, this demand usually being accompanied by tender (or offer of tender) of the object of sale. If the buyer does not make timely payment, he or she is in default (*mora*, literally "delay"), and the seller who has tendered delivery is then entitled to sue for payment. However, once again, the jurists show considerable flexibility in allowing for particular circumstances to determine whether default has occurred.

They also make a crucial assumption: since the seller's damages are normally measurable by the agreed price, the condemnation of the buyer will usually be for this price alone, although the *iudex*, at his discretion, can also award interest from the time of *mora* onward. The only major apparent exception to this rule is when the object of sale has a readily calculable market value, such as generic wheat or wine; then the seller's damages are assessed at the prevailing price when suit is brought (see Case 123). The parties to a sale have sharply limited rights to increase this fundamental measure of damages, and consequential damages seem to be precluded. Besides the price, the buyer must also pay for many of the seller's expenses on the object before its delivery.

Case 116: Determining Default (*Mora*)

D. 22.1.32 pr.-2 (Marcianus libro quarto *Regularum*)

pr. *Mora* fieri intellegitur non ex re, sed ex persona, id est, si interpellatus opportuno loco non solverit: quod apud iudicem examinabitur: nam, ut et Pomponius libro duodecimo epistularum scripsit, difficilis est huius rei definitio. Divus quoque Pius Tullio Balbo rescripsit, an *mora* facta intellegatur, neque constitutione ulla neque iuris auctorum quaestione decidi posse, cum sit magis facti quam iuris. **1.** Et non sufficit ad probationem *morae*, si servo debitoris absentis denuntiatum est a creditore procuratoreve eius, cum etiam si ipsi, inquit, domino denuntiatum est, ceterum postea cum is sui potestatem faceret, omissa esset repetendi debiti instantia, non protinus per debitorem *mora* facta intellegitur. **2.** In bonae fidei contractibus ex *mora* usurae debentur.

Marcian in the fourth book of his *Rules*:

pr. Default (*mora*) is construed as arising not from an objective fact (*res*) but from the person (of the defaulter), i.e., if he does not pay when called upon (to do so) at a suitable place. This will be investigated by the *iudex*, for, as Pomponius also writes in the twelfth book of his *Letters*, it is hard to define it. The deified (Antoninus) Pius, in a rescript to Tullius Balbus, wrote that whether default is held to have occurred cannot be determined by any imperial enactment or by asking the jurists, since it is more a matter of fact than of law.

1. To prove default, it is not enough if formal notice was given to the debtor's slave by the creditor or his *procurator*. For even if, he (Pomponius) says, he gave notice to the (slave's) owner himself, but later, when he had the chance to do so, he did not take the opportunity to reclaim the debt, the debtor is not automatically held to be in default.

2. In actions on good faith (*bona fides*), interest is owed after default.

The Problem:

Seius purchased from Titius a Greek wall painting, with payment due by 1 January, but had not yet paid by that date. When can Titius bring suit against Seius for the price? Must Titius first demand payment from Seius? Would the answers change if there was no due date?

Discussion:

1. Default in General. Default (*mora*) is the failure to discharge a legal duty when its performance is demanded at a proper time and place. (On the effect of an express time limit, see the following Case.) The general definition of *mora* is a matter of law, as are the consequences that flow from it; but it is the province of a *iudex* to determine that any particular party is in *mora*, and the jurists uphold a case-by-case approach. Why? The jurists hold that default occurs only if the defaulting party is "responsible" for *mora*, see, e.g., Pomponius, D. 19.1.3.4. At D. 12.1.5, Pomponius is more specific: the *iudex* must examine not only whether it was in the alleged defaulter's power to perform and whether the defaulter acted deceitfully to prevent performance, but also whether the defaulter has a legitimate excuse for non-performance. Ulpian and Paul, D. 22.1.21-24, suggest some possible excuses: the party was genuinely uncertain about the existence of the debt, or is unavoidably away on public business, and so on. The concept of *mora* is thus appreciably different from "default" in Common Law in that the alleged defaulter's state of mind and fault are considered judicially significant. Why does Roman law take this view? Note that the alleged

defaulter must normally be notified that the other party regards his or her inaction as constituting *mora*; see Case 118. Why this requirement?

2. Default by a Debtor. This is the most common form of default: the debtor fails to perform or pay in a timely fashion. For example, a buyer fails to pay the price, or the seller fails to deliver the object. Details are discussed in subsequent Cases; but the main consequences in a *bona fides* contract such as sale are that a defaulting buyer becomes liable for interest on the money due (as Marcian states), while a defaulting seller becomes liable for virtually all loss to the object, i.e., the object is no longer at the risk of the buyer (Case 125).

3. Default by a Creditor. It is also possible for a creditor to be in default: for example, the buyer may fail to take delivery, or the seller may fail to accept payment. The main consequences are that a defaulting buyer becomes liable for all damage to the object except that intentionally done by the seller, and further must pay any costs for keeping the object. A defaulting seller loses interest on the price if the price is deposited with the court, see Marcellus and Ulpian, D. 26.7.28.1 (on tutelage).

4. Purging Default. One odd aspect of Roman law is that even default does not ordinarily have the consequence that the aggrieved party can terminate the contract. Rather, in general the aggrieved party continues only to be entitled to performance and can sue for damages if he or she is still willing to tender. But the defaulter can “purge delay” by tendering performance, although the aggrieved party can then sue for any damages owed as a result of the default. All this is very strange from a Common Law perspective; why shouldn’t the aggrieved party have the option to look elsewhere for substitute performance in the event of default? This rule goes to the heart of the general Roman conception of obligation, and of contract in particular; why?

Case 117: Buyer's Failure to Take Delivery

D. 18.6.4.2 (Ulpianus libro vicesimo octavo ad Sabinum)

Vino autem per aversionem vendito finis custodiae est avehendi tempus. Quod ita erit accipiendum, si adiectum tempus est: ceterum si non sit adiectum, videndum, ne infinitam custodiam non debeat venditor. Et est verius secundum ea quae supra ostendimus, aut interesse, quid de tempore actum sit, aut denuntiare ei, ut tollat vinum: certe antequam ad vindemiam fuerint dolia necessaria, debet avehi vinum.

Ulpian in the twenty-eighth book on Sabinus:

When wine is sold for a lump sum, the (duty of) safekeeping (*custodia*) ends with the time set for removal (by the buyer). This rule should be applied if a time was provided (by the contract); but if one was not provided, consider whether the seller owes permanent safekeeping. In accord with what we showed above, it is more correct (to hold) either that what the parties transacted about the time is decisive, or (if they set no deadline) that he (the seller) give notice to him (the buyer) to remove the wine. In any case, the wine ought to be removed before the vats are required for the (next) vintage.

Discussion:

1. Buyer's Duty to Take Delivery. Pomponius, D. 19.1.9, sets a case where someone has purchased loose stones from a farm and then declines to remove them; the seller can sue on sale to force taking of delivery (through an award of money damages). Could the seller also make delivery himself and then sue for the delivery costs? Could the seller recover costs arising from the buyer's failure to take delivery? Would it matter if the buyer had refused to take delivery because, in the buyer's view, the object of sale did not conform to the contract specifications? (There are no specific surviving sources on these points.) See also Case 124.

2. Effect of Buyer's Default on Risk. Ulpian states that the seller no longer has a duty of safekeeping (*custodia*) after buyer's failure to remove the wine; default occurs upon expiration of a specified time limit, or upon reasonable notice if the contract contains no time limit. For the effects of buyer's default on risk, see Case 125; the seller is then liable only for *dolus*. Celsus, D. 19.1.38.1, discussing sale of a slave, holds that the buyer is liable for any expenses in maintaining the slave after *mora*. But both this text and the present Case simply assume that the seller will keep the object for the buyer, at least for a reasonable time. Is the seller required to do so?

Case 118: Buyer's Failure to Fulfill a Condition

D. 18.6.1.3 (Ulpianus libro vicesimo octavo ad Sabinum)

Licet autem venditori vel effundere vinum, si diem ad metiendum praestituit nec intra diem admensum est: effundere autem non statim poterit, priusquam testando denuntiet emptori, ut aut tollat vinum aut sciat futurum, ut vinum effunderetur. Si tamen, cum posset effundere, non effudit, laudandus est potius: ea propter mercedem quoque doliorum potest exigere, sed ita demum, si interfuit eius inania esse vasa in quibus vinum fuit (veluti si locaturus ea fuisset) vel si necesse habuit alia conducere dolia. Commodius est autem conduci vasa nec reddi vinum, nisi quanti conduxerit ab emptore reddatur, aut vendere vinum bona fide: id est quantum sine ipsius incommodo fieri potest operam dare, ut quam minime detrimento sit ea res emptori.

Ulpian in the twenty-eighth book on Sabinus:

The seller may even pour out the wine if he set a deadline for measurement and it was not measured before the deadline. But he cannot pour out the wine immediately, before he gives formal notice (*denuntiatio*) to the buyer that he remove the wine or know that the wine will be poured out.

Nonetheless, if he did not pour it out when he could have, he is more praiseworthy. He can (then) also collect rent for the vats, but only if it was in his interest that the wine containers be empty—e.g., if he would have leased them out—or if he had to rent other vats. But it is more convenient that the containers be rented and the wine not returned (to the buyer) unless the buyer pays the amount of the rent, or (for the seller) to (re)sell the wine in good faith (*bona fides*), i.e., that to the extent he can, without inconvenience to himself, he see to it that the buyer's loss from this be minimized.

Discussion:

1. Seller's Right to Destroy the Object. Here the buyer has defaulted on a condition of measurement. Although Ulpian heartily urges the seller to take alternative measures (collect rent for the containers in the meantime, or resell the wine perhaps on a "distress" basis), the seller is not obliged to do so. Ulpian, D. 18.6.1.4, also allows for destruction of wine in the case of failure to take delivery; but Gaius, D. 18.6.2 pr., appears to permit destruction only as a last resort. Why do the jurists not oblige the seller to mitigate damages to the buyer, for instance by resale if possible?

Would the outcome be different if the object of sale were not wine, but some imperishable? See Paul, D. 18.6.13: the seller makes beds for the buyer and then places them on the street, where an Aedile (a magistrate charged with keeping public streets clear) destroys them. The buyer is still liable for the price if he or she had previously taken delivery (although they remained with the seller), or was responsible for their prior non-delivery. Can we assume that the seller simply had no room for the beds in his shop? (Julian, D. 18.6.14, adds that if the Aedile was acting *ultra vires*, the seller would have a civil action against him for wrongful damage to property, *damnum iniuria datum*, and the buyer could then sue the seller on purchase to force cession of the action.)

Case 119: Buyer's Failure to Pay Price

D. 18.6.20 (Hermogenianus libro secundo *Iuris Epitomarum*)

Venditori si emptor in pretio solvendo moram fecerit, usuras dumtaxat praestabit, non omne omnino, quod venditor mora non facta consequi potuit, veluti si negotiator fuit et pretio soluto ex mercibus plus quam ex usuris quaerere potuit.

Hermogenianus in the second book of his *Epitome of Law*:

If the buyer is in default (*mora*) in paying the price to the seller, he will owe only interest (on the price), not everything that the seller could obtain had no default occurred, e.g., if he was a merchant and, if the price was paid, could profit more from the goods (he then purchased) than from the interest (on the price).

Discussion:

1. Interest If the Buyer Defaults on Payment. The buyer must pay the price in timely fashion; this is interpreted to mean that the buyer must make the seller owner of the money paid, see, e.g., Ulpian, D. 19.1.11.1. But failure to pay results only in the buyer's liability for interest on the money due, not in consequential damages (such as the seller's lost profit on a possible resale); and even the reward of interest is subject to the discretion of the *iudex*, see Papinian, *Frag. Vat.* 2. Since the seller cannot make productive use of the unpaid price, loss of interest is the minimum loss that he or she sustains; but why should the *iudex* not consider other possible losses, at least if the probability of their occurrence was known to the buyer (as when a wholesaler purchases from a producer)? Roman law seems to lack a concept of the foreseeability, at the time the contract was made, of consequential losses in the event of a future breach (the rule in *Hadley v. Baxendale*).

2. Buyer's Defenses. The buyer can escape an action for the price by proving, e.g., that the seller has failed to deliver although delivery is still possible; or that the sale should be rescinded because of a serious latent defect in the object of sale, see Ulpian, D. 21.1.59 pr.; or that question has arisen whether a third party has title to the object of sale, so that the seller cannot deliver title, see Papinian, D. 18.6.19.1. (Papinian gives the last rule somewhat differently in *Frag. Vat.* 12.)

Case 120: A Penalty Clause

Fragmenta Vaticana 11 (Papinianus libro tertio *Responsorum*)

Conuenit ad diem pretio non soluto uenditori alterum tantum praestari. quod usurarum centesimam excedit, in fraudem iuris uidetur additum. diuersa causa est commissoriae legis, cum in ea specie non fenus illicitum exerceatur, sed lex contractui non improbabilis dicatur.

Papinian in the third book of his *Responses*:

It was agreed that, if the price was not paid by the deadline, as much again (as the price) was owed to the seller. To the extent that this exceeds one percent interest, it is held to have been added as an evasion of the law (*in fraudem iuris*). Different is a *lex commissoria* (a clause rescinding the sale if the price is not paid), since in this case no illicit interest is sought; rather, a not unacceptable clause is provided in the contract.

Discussion:

1. Penalties. Roman usury laws set the highest allowable interest at one percent per month, or 12 percent per annum; and compound interest was forbidden. This Case indicates that the parties are restricted in setting a penalty clause that effectively would exceed this rate, for non-payment of money. Why should this be so, at least in instances where the seller can demonstrate the importance to him or her of timely payment? (The jurists do not rely on a concept of a liquidated damages clause, as distinguished from a penalty.) The *lex commissoria* allows the seller to call off the sale if the price is not paid, see Case 106; although its purpose is similar to a penalty clause, it aims at simple rescission and restitution.

2. Evasion of Law. Papinian treats the contract clause as an attempt by the parties to dodge the usury statute; is this view correct? The jurists not infrequently enforce statutes beyond their face through this kind of interpretation. Their usual argument is either that, had they thought of this possibility, the legislators would have sanctioned the conduct in question; or (as here) that one or both parties are practicing a deceit to evade the statute (*fraus legis*). Both arguments result in an extension of the statutory norm, in much the same way that modern courts invoke a (judicially created) doctrine of illegality for contracts circumventing the law. Think about the pros and cons of this method of statutory interpretation.

Case 121: Seller's Right to Reclaim Object

D. 18.1.19 (Pomponius libro trigensimo primo ad Quintum Mucium)

Quod vendidi non aliter fit accipientis, quam si aut pretium nobis solutum sit aut satis eo nomine factum vel etiam fidem habuerimus emptori sine ulla satisfactione.

Pomponius in the thirty-first book on Quintus Mucius:

What I sold does not become the recipient's property unless either the price is paid to me, or satisfaction is provided for it, or I extend credit (*fides*) to the buyer without (receiving) any satisfaction.

Discussion:

1. Passage of Ownership to the Buyer. The principle stated in the Case is eminently sensible. Suppose, for instance, that the seller has delivered the object, but the buyer cannot pay for it because he or she has become insolvent; should the seller have to line up with the buyer's other creditors, rather than simply reclaiming the object? Justinian, *Inst.* 2.1.41, makes it clear that the rule stated in this Case was Byzantine law; but it is uncertain whether it was also the rule in Classical Roman Law. Archaic Roman law held that ownership of an important class of objects called *res mancipi* (principally land, slaves, and beasts of draught and burden) was conveyed, pursuant to a sale, through a formal ritual called mancipation, which is described by Gaius, *Inst.* 1.119; but Justinian notes that, under a rule of the Twelve Tables (VII.11; 449 BCE), ownership did not pass until payment of price or the giving of satisfaction. (On satisfaction, see Case 72; it usually involves alternative credit arrangements acceptable to the creditor.) Mancipation is a formal conveyancing procedure reserved for special objects; it is unclear whether the Classical jurists applied the same rule to sales in general, and the present Case may originally have referred to mancipation alone. If, for instance, the rule was general in Classical law, what would be the point of a *lex commissoria* such as is described in Case 106? Still, Gaius, D. 18.1.53, also supports the present Case: "For the object to become the buyer's, it makes no difference whether the price is paid or a surety is given on its account." Gaius indicates that some form of payment (even the attenuated form of providing a surety for payment) is required for ownership to pass.

2. Extending Credit. The force of the Justinianic rule is considerably vitiated, it appears, by the exception that ownership passes if the seller extends credit (*fides*) to the buyer. Doesn't a seller always extend credit by delivering before the price is paid? Perhaps Justinian's compilers had some more formal extension of credit in mind.

Section 3: Seller's Default and Remedies

The seller's legal duties are considerably more complex than the buyer's; indeed, most of the remainder of this chapter is concerned with them. Leaving aside, for the moment, the seller's express and implied warranties as to legal title and the quality of the object (these are discussed in the next two sections), the seller must safeguard the object of sale until its delivery (see Section 1 above), and then allow the buyer to take delivery in timely fashion.

If the seller fails to allow timely delivery, the buyer is entitled to tender payment (see Ulpian, D. 19.1.13.8) and then sue for the extent of his or her "interest" (*id quod interest*). This measure is, in principle, considerably broader than the corresponding standard for seller's damages. It may include, besides a measure of the buyer's economic loss on the sale (so-called direct damages), also at least some of the consequential losses that the buyer has suffered because of the seller's default. The jurists do indicate that the buyer is not entitled to unlimited damages stemming from the seller's default, but the exact way in which the *iudex* was supposed to measure damages is not easy to work out.

Case 122: Seller's Failure to Deliver

D. 19.1.1 pr. (Ulpianus libro vicesimo octavo ad Sabinum)

Si res vendita non tradatur, in id quod interest agitur, hoc est quod rem habere interest emptoris: hoc autem interdum pretium egreditur, si pluris interest, quam res valet vel emptā est.

Ulpian in the twenty-fifth book on Sabinus:

If the object of a sale is not handed over, the action is for the extent of the (buyer's) interest (*id quod interest*), i.e., the buyer's interest in having the object. This sometimes exceeds the price if his interest is more than the object is worth or was purchased for.

Discussion:

1. Delivery. Ulpian, D. 19.1.11.2: "The seller's primary duty is to tender the object itself, i.e., to hand it over." The object of sale must be delivered together with any accessories, see Ulpian, D. 19.1.13.10-18. For instance, in the case of an animal, under the Curule Aediles' Edict the seller must deliver the animal and the trappings in which it was displayed for sale, see Ulpian, D. 21.1.38 pr. (quoting the Aediles' Edict). Similarly, the seller must deliver any documents establishing title: Scaevola, D. 19.1.48 pr. However, the seller can recover anything that was delivered but not accessory to the object of sale; e.g., Paul, D. 21.2.3 (slave sold without his or her *peculium* takes something from it and is then delivered to the buyer). Delivery does not itself necessarily convey ownership to the buyer; for the seller's duties in this regard, see Section 4 below.

2. Liability for Failure to Deliver. Ulpian sets the measure of damages as "the buyer's interest in having the object." *Id quod interest* means literally the buyer's "stake" in the transaction. This measure is explored in subsequent Cases, but obviously it is something different from the price. Could the measure also be less than the price, or does the price set a minimum measure of damages? The buyer can also collect some consequential damages as part of the "interest." See, for instance, Neratius, D. 19.1.31.1: "I (as seller of a slave) must provide not only what I acquired through him, but also that which the buyer would have acquired had the slave already been delivered to him." The former type of damages might include wages earned by the slave, or an inheritance that came to the seller through the slave, apparently only for the period after conclusion of the sale; the latter might include wages that the slave could have earned for the buyer. Is it right that the buyer should be able to claim both?

Ulpian, D. 19.1.13.14 (citing Neratius), raises an odd problem: The seller of a 90-acre farm warrants that it has 100 acres. After the sale is concluded but before its handover, alluvial soil accumulates and adds 10 acres to the farm. If the original deficiency was an innocent error, the buyer has no action; but if the seller knew of the deficiency, the buyer can sue on purchase. This must mean that the buyer receives damages based on breach of warranty. But why, and how much?

3. Speculative Losses. I purchase the catch from the future cast of a fisherman's net (see Case 86). The fisherman refuses to cast his net, so the catch is purely speculative. Can I claim this speculative value? See Celsus, D. 19.1.12 (yes). How could the *iudex* estimate the value of the catch? (In our law of damages, this problem resembles the familiar "new business" difficulty.)

Case 123: Measuring the Buyer's Interest

D. 19.1.21.3 (Paulus libro trigesimo tertio ad Edictum)

Cum per venditorem steterit, quo minus rem tradat, omnis utilitas emptoris in aestimationem venit, quae modo circa ipsam rem consistit: neque enim si potuit ex vino puta negotiari et lucrum facere, id aestimandum est, non magis quam si triticum emerit et ob eam rem, quod non sit traditum, familia eius fame laboraverit: nam pretium tritici, non servorum fame necatorum consequitur. Nec maior fit obligatio, quod tardius agitur, quamvis crescat, si vinum hodie pluris sit, merito, quia sive datum esset, haberem emptor, sive non, quoniam saltem hodie dandum est quod iam olim dari oportuit.

Paul in the thirty-third book on the Edict:

When the seller is responsible for not handing over the object, at issue in an evaluation is the buyer's entire benefit, provided that it is connected with the matter itself (*circa ipsam rem*). For if, e.g., he (the buyer) could trade with the wine and make a profit, this should not be evaluated, no more than if he buys grain and his household (then) starves because it was not delivered: he obtains the price of the grain, not that of the slaves killed by starvation. An obligation does not increase because it is executed late, although it does grow if wine is worth more now, and rightly so. For if it had been given (on time), I as buyer would have it; if it was not, what should be given now is what ought to have been given already previously.

Discussion:

1. "Connected with the matter itself." The buyer's interest must be "connected with the matter (*res*) itself" (*circa ipsam rem*). *Res* is extremely ambiguous; it could mean "thing" (i.e., the object of sale) or "matter, affair" (i.e., the sale). Do the examples given by Paul clarify his ruling? What if the wine buyer had contracted to resell the wine before the present sale was arranged, and this fact was known to the seller? The most pathetic case is that of the householder who buys food for his slaves that is not then delivered. As the following Case shows, he can receive the so-called "market difference" (the current market price less what he paid, what we would think of as direct damages), and the jurists appear to assume that the buyer will always be able to purchase substitute goods. But what if this is untrue owing to the onset of a famine? In any case, Paul in this fragment is clearly eager to restrict the chain of "proximate cause" as much as possible, so as to bar most claims for consequential damages at least for ordinary staples like wine and grain. What explains such a severe restriction? Did the Romans run into problems by their failure to develop a concept of foreseeability? See also Cases 119, 130.

2. Statutory Limits on Damages. Justinian, C. 7.47.1 (531 CE), conceding the problem in earlier attempts to define the buyer's "interest," set an upper limit on damages of double the price; the Digest compilers then inserted this limit into Africanus, D. 19.1.44. The Byzantine rule at least implies that earlier damage awards had occasionally been in excess of double the price.

Case 124: Failure to Deliver Wine

D. 19.1.3.3-4 (Pomponius libro nono ad Sabinum)

3. Si per venditorem vini mora fuerit, quo minus traderet, condemnari eum oportet, utro tempore pluris vinum fuit, vel quo venit vel quo lis in condemnationem deducitur, item quo loco pluris fuit, vel quo venit vel ubi agatur. **4.** Quod si per emptorem mora fuisset, aestimari oportet pretium quod sit cum agatur, et quo loco minoris sit. Mora autem videtur esse, si nulla difficultas venditorem impediatur, quo minus traderet, praesertim si omni tempore paratus fuit tradere. Item non oportet eius loci pretia spectari, in quo agatur, sed eius, ubi vina tradi oportet: nam quod a Brundisio vinum venit, etsi venditio alibi facta sit, Brundisi tradi oportet.

Pomponius in the ninth book on Sabinus:

3. If a seller of wine is in default (*mora*) for non-delivery, he should be condemned for whatever time the wine was worth more, either when it was sold or when the lawsuit resulted in his condemnation; and (also) for whatever place it was worth more, either where it was sold or where suit was brought.

4. But if the buyer were in default (*mora*) (in taking delivery), the price should be evaluated for when suit is brought, in whichever place it is lower (i.e., where it was sold or where suit was brought). But default (by the buyer) is held to occur if no impediment prevents the seller's handing it over, especially if he was ready to hand it over at any time.

Likewise, (in some cases) we should examine not the prices in the place where the lawsuit is brought, but those where the wine should be delivered; thus, wine sold "as from Brundisium" should be handed over at Brundisium even if the sale is made elsewhere.

The Problem:

Sempronius arranges with Claudia for the sale to her of 5,000 amphoras of wine, with delivery in Brundisium on the next 1 February. If Sempronius fails to deliver by then, how should Claudia's damages be determined? If Claudia fails to accept delivery, how should Sempronius' damages be calculated?

Discussion:

1. Measurement by Market Price: The Buyer. In determining the buyer's "interest" for highly marketable goods like wine, the jurists estimate direct damages mainly by relying on market prices as providing a base measurement. Pomponius, in section 3, gives the *iudex* a choice of market prices among which he can choose; the *iudex* is evidently expected to give the buyer the best of these prices. In any case, modern analysis would suggest that none of these market differences should be awarded (the place where suit was brought is particularly odd), and that the proper measure is to place the buyer in the position he would have been in had the breach not occurred, i.e., the difference between the price and the time when the buyer learned of the breach, since it is then that the buyer will likely look for substitute goods as "cover." So far as Roman law is concerned, part of the problem undoubtedly lay in their overly quick identification of breach with *mora*, delay or default. Do you see why?

Suppose a contract, concluded on 1 April, for delivery of 500 measures of wine on the coming 1 October; in a sharply rising market, the seller then sells to a third party and repudiates the contract on 1 September, and the buyer on that date either elects to buy substitute wine at a price much higher than the contract price, or to forgo cover and seek damages. If, as was true in Roman law (and would also probably be true in our law), the buyer cannot ask a court to compel

delivery, and if, as was also true in Roman law (see Case 21; but not in our law), the buyer must await the contract deadline for delivery before seeking damages, it is not easy to see how any of Pomponius' standards is of much immediate relevance. You can vary the "facts" of this hypothetical to explore other possibilities. For instance, what if, in the hypothetical case, the wine was sold at Puteoli for delivery at Ostia, and suit was then brought at Rome in the Urban Praetor's court?

On the other hand, Pomponius is clearly right, in section 4, to emphasize the market at the point of delivery as better than the place where the lawsuit was brought or the sale was made.

2. The Seller. The situation in section 4 is unclear. It appears that, after the buyer's unjustified refusal to take delivery, the seller resold the wine at a loss and subsequently sued for the market difference. Pomponius' measurement resembles that for buyer's damages, except that now only the time of the lawsuit is relevant and the *iudex* is obliged to choose between only two market prices, whichever is lower.

Case 125: Effects of Seller's Default on Risk

C. 4.48.4 (Imp. Gordianus A. Silvestro militi)

Cum inter emptorem et venditorem contractu sine scriptis inito de pretio convenit moraque venditoris in traditione non intercessit, periculo emptoris rem distractam esse in dubium non venit.

The Emperor Gordian to Silvester, a soldier (239 CE)

When the buyer and seller agreed on the price in an oral contract and the seller was not in default (*mora*) in handing over (the object of sale), there is no doubt that the buyer bears the risk for the object of sale.

Discussion:

1. Risk after Seller's Default. The reasonable inference from this passage is that, after the seller defaults in making timely delivery, the buyer no longer bears the risk for the object's accidental destruction. This should mean that if the object is destroyed (no matter how), the buyer can then sue for his or her entire "interest" in the object of sale. See also Ulpian and Pomponius, D. 23.3.14-15; Paul, D. 18.4.21. This principle is broadly similar to "persistence of the obligation" in stipulation law, see Case 28. Is the rule sensible for sale?

2. Exception? Gaius, D. 16.3.14.1 (discussing deposit, not sale), discusses a case in which a plaintiff sues for a slave who then dies before a final judgment: "Sabinus and Cassius said that the defendant should be absolved because it is fair (*aequum*) that a natural loss fall on the plaintiff, especially since this property would perish even if it had been restored to the plaintiff." Although other texts suggest a generalization of the same rule (Ulpian, D. 4.2.14.11; Paul, D. 10.4.12.4), it is uncertain whether the rule is Classical, rather than a Justinianic innovation. In any case, a text of Ulpian (D. 6.1.15.3) makes an interesting modification of the rule, allowing for recovery in particular circumstances: "if the plaintiff might have sold it had he taken delivery, it (the price) ought to be paid to the person who experienced default; for if he had restored it to him, he would have sold it and profited from the price," obviously by shifting the inevitable loss onto a third party.

Case 126: Purging Default

D. 18.6.18 (Pomponius libro trigesimo primo ad Quintum Mucium)

Illud sciendum est, cum moram emptor adhibere coepit, iam non culpam, sed dolum tantum praestandum a venditore. Quod si per venditorem et emptorem mora fuerit, Labeo quidem scribit emptori potius nocere quam venditori moram adhibitam, sed videndum est, ne posterior mora damnosa ei sit. Quid enim si interpellavero venditorem et non dederit id quod emeram, deinde postea offerente illo ego non acceperim? Sane hoc casu nocere mihi deberet. Sed si per emptorem mora fuisset, deinde, cum omnia in integro essent, venditor moram adhibuerit, cum posset se exsolvere, aequum est posteriorem moram venditori nocere.

Pomponius in the thirty-first book on Quintus Mucius:

It must be understood that when the buyer begins to be in default (*mora*), the seller is no longer liable for fault (*culpa*), but only for deceit (*dolus malus*).

But if both seller and buyer are in default, Labeo, to be sure, writes that default harms the buyer rather than the seller. But consider whether (only) subsequent default is harmful to him. For what if I gave notice to the seller and he did not deliver what I bought, and later he tenders and I do not accept? Clearly, in this case I should be harmed (by my subsequent default).

But if the buyer was in default, and then, while everything was fresh (i.e., before performance on either side), the seller was in default when he could perform, it is fair that his subsequent default harms the seller.

Discussion:

1. Buyer's Default Revisited. In the first sentence of this Case, has the buyer defaulted by failing to pay the price or by not taking delivery? It appears to make no difference at least as to the issue discussed.

2. Default by Both Parties. With this Case, compare Labeo and Javolenus, D. 19.1.51, which handles two situations. In the first, both parties are responsible for delay in the tasting and delivery of wine; Labeo holds that the buyer alone should be treated as in default. In the second, the seller prevents payment of the price on the due date, but the buyer is then responsible for not paying at a later date; Javolenus allows seller's enforcement of a penalty clause against the buyer, provided that the seller was not acting dishonestly. Can these rulings be reconciled with each other and with this Case? Note the jurists' willingness to make the obligation persist beyond default.

Section 4: Seller's Warranties for Lack of Right

It might be anticipated that, simply because of the nature of sale, all sellers would be obliged to provide buyers with ownership (title) of the object of sale. However, for complex historical reasons, this was originally untrue in Roman law; the seller was obliged only to transfer what may be called “quiet possession,” which meant that, after delivery, the seller was not liable on purchase unless and until the buyer was “evicted” from the object by its true owner who had successfully recovered the object through, e.g., a suit on ownership.

Since title was in itself often of considerable significance to buyers, it became common, particularly when more expensive items were sold, for the seller to provide an express warranty that offered the buyer additional protection. In Classical law, the usual form of the warranty was a stipulation that, in the event of the buyer's eviction, the seller would pay the buyer a multiple of the object's value—most commonly double, although the parties could determine the multiple for themselves. Such a stipulation was punitive, in the sense that it penalized a seller for failing to transfer valid title without requiring a proof of damages. The Edict of the Curule Aediles (magistrates slightly junior to the Praetors) required this stipulation for market sales of slaves and large farm animals: Case 136 below.

The jurists, with considerable creativity, gradually extended the buyer's protections still further, for example by allowing the buyer to sue even before eviction when the seller knowingly sold another's property. By the end of the Classical period, it is likely that the seller was required to proffer a warranty of title, so that a buyer could sue on the purchase to obtain a warranty if none had been given. Some late sources even suggest that the warranty was being tacitly implied.

In examining the Cases in this and the following section, it is worthwhile to think about why the Roman jurists acted to provide increasing protection to buyers. From a modern perspective, a movement toward buyer protection is bound to seem desirable, but Rome had a much simpler economy in which the typical seller was not a large, anonymous corporation but a private individual often not very differently economically placed from the ordinary buyer. Why, therefore, were the jurists so solicitous of buyers? In any case, the toxic legal maxim *caveat emptor* (“Let the buyer beware”) is entirely alien to Roman contract law.

Case 127: No Duty to Convey Ownership

D. 18.1.25.1 (Ulpianus libro trigesimo quarto ad Sabinum)

Qui vendidit necesse non habet fundum emptoris facere, ut cogitur qui fundum stipulanti spopondit.

Ulpian in the thirty-fourth book on Sabinus:

A seller does not have to make the buyer owner of the (purchased) farm, unlike a person who promised a farm to a stipulator (the promisee).

Discussion:

1. No Duty to Convey Ownership. This is the basic rule, often repeated in our sources. For example, Paul, D. 19.4.1 pr.: “For a buyer is liable on sale unless he makes the seller the owner of the coins (used in payment); but for the seller it is enough to oblige himself against eviction, hand over possession, and be free of deceit (*dolus malus*). Hence, he is not liable if the object is not evicted.” Eviction is the removal of the object from the buyer by a true owner; before eviction, an innocent buyer of another’s property is a “good faith possessor” (*bona fide possessor*). Why are the obligations of seller and buyer asymmetrical as to the duty to convey ownership?

2. Sale and Mancipation. For the seller, the sale creates an obligation to deliver possession of the object (if tangible; see the following Case); this can be accomplished by physically handing over the object (*traditio*). For most objects, handover pursuant to a sale would also transfer ownership if the seller was in fact the owner: Ulpian, D. 41.1.20 pr.; Paul, D. 41.1.31 pr. However, for a special class of objects called *res Mancipi* (chiefly land, slaves, beasts of draught and burden), ownership is not conveyed by handover. Instead, for ownership of the property to pass, the seller must formally convey it through a ceremony called mancipation: Gaius, *Inst.* 1.119. It is clear that the buyer of a *res Mancipi* can sue to obtain mancipation from the seller, see, e.g., Gaius, 4.131a; but in any case mancipation conveys ownership only if the seller is owner. If the buyer takes delivery of a *res Mancipi* without mancipation, he or she becomes a “bonitary owner” fully protected by the Praetor’s Edict until possession ripens into ownership through usucapion (two years for land, one for other *res Mancipi*). Note how carefully the Romans work out the distinction between the purely personal obligation created by the contract and the property consequences of its execution.

Under a provision of the Twelve Tables (VI.3; 449 BCE), if a *res Mancipi* was delivered to the buyer and then evicted, the mancipator (seller), as implied guarantor (*actor*) of title, was liable for double the price: Cicero, *Caec.* 54; *Pauli Sent.* 2.17.3.

3. Deceit in Delivery or Mancipation. The seller of a farm delivers it after deliberately or carelessly destroying buildings or cutting down trees, or imposes a servitude while formally mancipating it; can the buyer sue on the purchase? See Ulpian, D. 4.3.7.3, who says yes but indicates that the question had formerly been in doubt (why?). Compare Case 122 on the seller’s duty to deliver, and Case 114 on seller’s fair use of a purchased slave before delivery; and contrast Case 27 concerning stipulation.

Case 128: Delivery of Quiet Possession

D. 19.1.11.13 (Ulpianus libro trigesimo secundo ad Edictum)

Idem Neratius ait venditorem in re tradenda debere praestare emptori, ut in lite de possessione potior sit: sed Iulianus libro quinto decimo digestorum probat nec videri traditum, si superior in possessione emptor futurus non sit: erit igitur ex empto actio, nisi hoc praestetur.

Ulpian in the thirty-second book on the Edict:

Neratius says that the seller, in handing over the object, ought to be liable to the buyer for his prevailing in a suit on possession. But Julian, in the fifteenth book of his *Digests*, states that it is not held to be handed over (at all) if the buyer would not prevail on possession; so there will be an action on purchase unless this is provided.

Discussion:

1. What Constitutes Delivery. In the case of tangible property, delivery of possession (*tradition*) is obviously the minimum duty of the seller. The two jurists differ subtly in their interpretation of this duty: Neratius ca. 100 CE seems to make the seller's liability dependent on an adverse judgment in a lawsuit, while Julian (writing about fifty years after Neratius) indicates that there is liability if "the buyer would not prevail on possession," whether or not a suit has been brought by a true owner, so that the buyer can sue immediately, even before eviction, apparently for damages resulting from insecurity of title. Which jurist has the better of this dispute? In any event, Julian's view seems to have prevailed in late Classical law, see Pomponius, D. 19.1.3.1. Note that on neither view is failure to convey title in itself necessarily a breach. Titles were often cloudy for Roman property, which may help explain the rules in this Case.

2. Delivery Itself. Handover of possession (*traditio*), described in most handbooks, is governed by general rules of property law. On the part of the person taking possession, there is both a mental requirement (*animus*, the intent to take) and a close physical relationship to the object being taken (*corpus*): e.g., Paul, D. 41.2.3.1. The jurists, however, considerably attenuate these requirements in particular cases. For example, a buyer can take possession of heavy wooden beams by placing his seal on them even though they remain unmoved in the seller's lumberyard: Paul, D. 18.6.15.1. When goods stored in a locked warehouse are sold, it suffices if the seller gives the keys to the buyer; Papinian, D. 18.1.74, adds that both parties must also be present at the warehouse, but Gaius, D. 41.1.9.6, omits this requirement. (In any case, however, handover cannot ordinarily occur by simple agreement between the parties; a physical element must be present.) To some extent, delivery of possession is therefore a formal act that transfers to the new possessor the protections that the Praetor's Edict provides for possession. The goods however, may remain with the seller even after handover of possession; see, e.g., Paul, D. 18.6.13 (beds made for and delivered to the buyer, even though the seller still has them in his shop).

Case 129: Liability Absent an Express Warranty

D. 21.2.60 (Iavolenus libro secundo ex Plautio)

Si in venditione dictum non sit, quantum venditorem pro evictione praestare oporteat, nihil venditor praestabit praeter simplam evictionis nomine et ex natura ex empto actionis hoc quod interest.

Javolenus in the second book from Plautius:

If a sale does not provide for the extent of the seller's liability in the event of eviction, the seller will be liable, on account of eviction, for nothing but the simple value (of the object), plus, in accord with the nature of the action on purchase, the (buyer's) interest.

Discussion:

1. Implied Warranty Against Eviction. As Pomponius, D. 18.1.66 pr., notes, this warranty arises even if it is not express in the contract; it is based upon *bona fides*, the duty of protection that the seller owes the buyer. Labeo, D. 18.1.80.3, notes that it is simply not sale if the parties arrange that ownership not pass to the buyer; this idea presumably underlies the implied warranty. It can be excluded by express agreement, but this agreement is ineffective if the seller knows of a defect in title and the buyer is unaware; see Ulpian, D. 19.1.11.15-18, and Case 131. How effective is the implied warranty in protecting the buyer?

2. Damages. If the price has already been paid, the buyer is entitled at least to recover it upon eviction; if it has not been paid, the buyer can refuse payment until an impending lawsuit on eviction is decided, see Papinian, *Frag. Vat.* 12. The buyer may also claim "interest" as an addition; on measuring this, see the following Case.

3. Sale of Intangibles. A special problem arises in the case of the sale of intangible claims, as to a debt or to an inheritance. Provided that this is not the sale of a mere opportunity (Case 86), in the case of debt the seller must hand over the claim and warrant the debt's existence, but not the debtor's solvency (Ulpian, D. 18.4.4), unless the debt is expressly warranted to be of a certain amount (Paul, D. 18.4.5). Somewhat similarly for sale of an inheritance, see D. 18.4.7-13.

Case 130: Measuring Damages after Eviction

D. 21.2.8 (Iulianus libro quinto decimo *Digestorum*)

Venditor hominis emptori praestare debet, quanti eius interest hominem venditoris fuisse. Quare sive partus ancillae sive hereditas, quam servus iussu emptoris adierit, evicta fuerit, agi ex empto potest: et sicut obligatus est venditor, ut praestet licere habere hominem quem vendidit, ita ea quoque quae per eum adquiri potuerunt praestare debet emptori, ut habeat.

Julian in the fifteenth book of his *Digests*:

The seller of a slave should provide the buyer with the extent of his interest in the slave having been the seller's. So if there is eviction either of a slave woman's offspring or of an inheritance the slave took up on the buyer's order, suit can be brought on the purchase. As the seller is obligated to provide the right to hold (*licere habere*) the slave he sold, so too he should be liable for the buyer's having what could have been acquired through him.

The Problem:

Julia sells a slave woman to Tullius, and the slave, after Tullius takes delivery of her, gives birth to a child. The slave woman's true owner then asserts his ownership and, as is his right, reclaims both the woman and her child from Tullius. Is Julia liable to Tullius for the value of the child?

Discussion:

1. Damages. The Cases on eviction supplement the discussion of the buyer's interest in Section 3 above. A slave woman who belongs to a third party was sold to an innocent buyer; the slave then gave birth and also received an inheritance. The true owner can use property rights to claim from the buyer the slave woman, her child, and the inheritance; but the buyer can then sue the seller for all three because of the breach of warranty against eviction. Paul, D. 19.1.43 and 45 pr., is broader still: A slave has a testamentary right to his manumission, but is sold without the buyer being notified; after several years (!), the slave successfully demands manumission. The buyer's interest includes even his own expenses in training the slave after the sale and before eviction. Limits are imposed only if the damages become wildly disproportionate to the slave's value at the time of the sale (e.g., a slave is sold for a small price and then becomes a highly successful charioteer or actor). Similarly, Paul, D. 19.1.45.1: land belonging to a third party is sold, and the innocent buyer then builds a house on it; after eviction, the buyer can sue on sale for the house's cost if the true owner does not pay compensation for it, even if the seller was also unaware of the defective title. Does this go too far?

2. Buyer's Duty to Resist Eviction. The buyer is expected to defend his or her property rights if a lawsuit is brought by a third party, and also to notify the seller about the claim; see, e.g., Ulpian, D. 21.2.55. Failure to do so results in loss of the warranty, see Paul, D. 21.2.53.1. Similarly, the buyer must be diligent in acquiring ownership by usucapion, if this is possible; see Paul, D. 21.2.56.3. This basically means that the buyer must remain in possession.

Case 131: Concealment, Warranties, and Disclaimers

D. 19.1.1.1 (Ulpianus libro vicesimo octavo ad Sabinum)

Venditor si, cum sciret deberi, servitutem celavit, non evadet ex empto actionem, si modo eam rem emptor ignoravit: omnia enim quae contra bonam fidem fiunt veniunt in empti actionem. Sed scire venditorem et celare sic accipimus, non solum si non admonuit, sed et si negavit servitutem istam deberi, cum esset ab eo quaesitum. Sed et si proponas eum ita dixisse: "Nulla quidem servitus debetur, verum ne emergat inopinata servitus, non teneor", puto eum ex empto teneri, quia servitus debebatur et scisset. Sed si id egit, ne cognosceret emptor aliquam servitutem deberi, opinor eum ex empto teneri. Et generaliter dixerim, si improbato more versatus sit in celanda servitute, debere eum teneri, non si securitati suae prospectum voluit. Haec ita vera sunt, si emptor ignoravit servitutes, quia non videtur esse celatus qui scit neque certiorari debuit qui non ignoravit.

Ulpian in the twenty-eighth book on Sabinus:

If the seller concealed a servitude that he knew was owed (from purchased land), he will not escape the action on purchase, provided the buyer was unaware of it. For everything done contrary to good faith (*bona fides*) is included in the action on purchase. But we construe the seller as knowing and concealing not only if he did not warn (the buyer), but also if he was asked by him (the buyer) and denied that the servitude was owed.

But also, if you assume he spoke thus: "No servitude is owed, but I am not liable if one comes to light unexpectedly," I think he is liable on purchase because a servitude was owed and he knew it. But (also) if he acted to prevent the buyer's knowing that a servitude is owed, I think he is liable on purchase. I would hold generally that if he behaved reprehensibly in concealing a servitude, he should be held liable, but not if he (simply) wished to protect his own peace of mind.

These rules are correct if the buyer was unaware of the servitudes; but a person who knows of them is held not to be deceived, nor must he be informed if he was aware of them.

The Problem:

Seius sells Julius a farm over which he knows that a neighboring property has a right of way. If Seius fails to disclose this fact, is he liable on the sale? Does it matter if he expressly disclaims liability? What if Julius knows of the servitude but Seius tries to conceal it?

Discussion:

1. Servitudes. This Case concerns praedial servitudes (*servitutes praediales*), that is (in our parlance) easements, such as rights of way, that attach to a dominant property over an adjacent servient one. In sale of land, these servitudes cause problems in two ways. First, servitudes may be owed to the purchased property. Papinian, D. 18.1.66 pr., states that, unlike with the implied warranty against eviction, the seller does not warrant existence of such a servitude unless he or she does so expressly; but see also below, Case 141 (the seller conceals a servitude that would benefit the buyer). Second, as in the present Case, the purchased property may be encumbered with a servitude to a neighboring property.

2. Concealment. If the seller was unaware of the servitude on the purchased property, Ulpian implies that there would be no liability absent an express warranty against servitudes. But there is liability on purchase if the seller knew of the servitude and the buyer did not. Who bears

the burden of proof on this question? On the measure of damages if the seller is held liable, see Paul, D. 21.2.15.1: the buyer can recover the reduction in the value of the property. Should this reduction be measured subjectively (reduction in value to this particular buyer) or objectively (reduction in market value)? Similar rules are applied to other possible encumbrances on land: a prior security interest held by a third party (e.g., Pomponius, D. 19.1.6.9; Ulpian, D. 19.1.11.16); a public land tax (Paul, D. 19.1.21.1); or a fee for a public water channel running into the property (Papinian, D. 19.1.41). Should all such encumbrances lie outside the implied warranty against eviction?

3. Exclusion of Liability. Sellers had general freedom to exclude liability not only for encumbrances, but even for eviction; see, e.g., Ulpian, D. 19.1.11.15-18, and Papinian, D. 21.2.68 pr. In effect, the buyer, by thus assuming the risk, purchases an opportunity (as in Case 86). But such a disclaimer will not defeat a knowing seller who concealed the liability. Granted the difficulties in proving knowledge, are such disclaimers likely to be generally effective? Note Julian's attempt to diminish the effectiveness of such disclaimers in Case 133.

Case 132: Liability Prior to Eviction

D. 19.1.30.1 (Africanus libro octavo *Quaestionum*)

Si sciens alienam rem ignoranti mihi vendideris, etiam priusquam evincatur utiliter me ex empto acturum putavit in id, quanti mea intersit meam esse factam: quamvis enim alioquin verum sit venditorem hactenus teneri, ut rem emptori habere liceat, non etiam ut eius faciat, quia tamen dolum malum abesse praestare debeat, teneri eum, qui sciens alienam, non suam ignoranti vendidit: id est maxime, si manumissuro vel pignori daturus vendiderit.

Africanus in the eighth book of his *Questions*:

If you knowingly sell another person's property to me, and I am unaware, he (Julian) thought that even before eviction I can effectively sue on purchase for the extent of my interest in it being mine. For although it is otherwise true that the seller is liable only for the buyer's right to hold (*habere licere*) the object, not also for his being made owner, nonetheless because he (the seller) ought to be liable for the absence of deceit (*dolus malus*), he is liable if he knowingly sells what is not his own property, but another's, to a person who is unaware of this. This is especially true if he sells to someone who wished to manumit (the slave) or use (him) as security (for a debt).

Discussion:

1. The Knowing Seller. Although the seller has no direct duty to convey ownership to the buyer (Case 127), the jurists are sensitive to deliberate deceit (*dolus*) by the seller. Africanus, following the views of his teacher Julian, allows the knowing seller to be sued on purchase, even before eviction, for the buyer's interest in obtaining ownership. This presumes, of course, that the true ownership, as well as the seller's role in concealing it, have become known. How should the *iudex* measure the buyer's interest?

2. Intent to Manumit or Use as Security. The last sentence of this Case is curious. The buyer's intentions with regard to the object of sale are frustrated by failure of title to pass; he cannot manumit or use the slave as security. Does it matter whether these intentions were known to the seller? Do they affect the availability or extent of the buyer's remedy? Or is Africanus simply observing that the buyer may have intentions that are presently frustrated, even before eviction?

Case 133: The Stipulation for Undisturbed Possession

D. 19.1.11.18 (Ulpianus libro trigesimo secundo ad Edictum)

Qui autem habere licere vendidit, videamus quid debeat praestare. et multum interesse arbitror, utrum hoc polliceatur per se venientesque a se personas non fieri, quo minus habere liceat, an vero per omnes. Nam si per se, non videtur id praestare, ne alius evincat: proinde si evicta res erit, sive stipulatio interposita est, ex stipulatu non tenebitur, sive non est interposita, ex empto non tenebitur. Sed Iulianus libro quinto decimo digestorum scribit, etiamsi aperte venditor pronuntiet per se heredemque suum non fieri, quo minus habere liceat, posse defendi ex empto eum in hoc quidem non teneri, quod emptoris interest, verum tamen ut pretium reddat teneri. Ibidem ait idem esse dicendum et si aperte in venditione comprehendatur nihil evictionis nomine praestatum iri: pretium quidem deberi re evicta, utilitatem non deberi: neque enim bonae fidei contractus hac patitur convenientone, ut emptor rem amitteret et pretium venditor retineret. Nisi forte, inquit, sic quis omnes istas supra scriptas conventiones recipiet, quemadmodum recipitur, ut venditor nummos accipiat, quamvis merx ad emptorem non pertineat, veluti cum futurum iactum retis a piscatore emimus aut indaginem plagis positus a venatore, vel pantheram ab aucupe: nam etiamsi nihil capit, nihilo minus emptor pretium praestare necesse habebit: sed in supra scriptis conventionibus contra erit dicendum. Nisi forte sciens alienum vendit: tunc enim secundum supra a nobis relatum Iuliani sententiam dicendum est ex empto eum teneri, quia dolo facit.

Ulpian in the thirty-second book on the Edict:

Let us examine what a person should be liable for if he sells (only) the right to hold (*habere licere*). I think it matters greatly whether he promises that the right to hold not be disturbed by himself and his heirs, or by anyone. For if (only) by himself, he is not held to provide against eviction by a third party; so, if the object is evicted (by a true owner), he will not be liable on stipulation if they concluded a stipulation, nor will he be liable on purchase (*ex empto*) if they did not conclude one.

But Julian writes, in the fifteenth book of his *Digests*, that even if he expressly affirms that the right to hold will not be disturbed by himself or his heir, it can be argued that (in the event of eviction by a third party) he is not liable on purchase for the extent of the buyer's interest, but he is nevertheless liable for return of the price. He goes on to say that the same should be held also if it is expressly included in the sale that there is no liability for eviction: after eviction (the return of) the price is owed, but the (buyer's) interest is not owed, since a contract in good faith (*bona fides*) does not permit an agreement that the buyer lose the object and the seller retain the price.

But perhaps, he says, someone might interpret all the agreements described above as similar to those in which the seller receives the money although the buyer does not get the object of sale (*merx*), e.g., when we buy from a fisherman the future haul of a net, or from a hunter his catch from setting nets, or from a fowler his entire catch. For even if he captures nothing, nevertheless the buyer must pay the price.

However, in the agreement described earlier the contrary view must be held, unless he knowingly sells another's property; for then, according to Julian's opinion given above (in the previous Case), it must be ruled that he is liable on purchase because he acted deceitfully.

Discussion:

1. An Express Warranty of the Right to Hold. This is one common type of express warranty, which took the form of a stipulation; the seller promises that the buyer will be allowed to “have” the property. Such a stipulation is discussed at length by Ulpian, D. 45.1.38 pr.-5; the jurists tend to interpret it narrowly, since the seller cannot make a promise as to a third party’s conduct; the stipulation only means that the seller binds himself and his heirs and successors not to prevent the buyer from “having” it. The stipulation itself provides no penalty upon eviction, and so that had to be separately arranged. The odd effect of the stipulation, therefore, was to exclude the seller’s further liability for eviction by third parties. Was this interpretation inevitable?

2. Return of the Price. Julian is a bold and resourceful jurist, but never more so, perhaps, than in this passage. He argues that, even in the case of the seller’s express disclaimer of liability for eviction, and (as it seems) regardless whether the seller is knowing, the seller must refund the purchase price if the buyer is evicted; *bona fides* allows nothing else. The disclaimer is effective only to exclude liability for the buyer’s “interest.” Julian therefore rejects the analogy to sale of an opportunity (Case 86). In the final paragraph, Ulpian upholds the opposite view: in the face of a disclaimer, only a knowing seller has liability for eviction. Which jurist has the better of the argument?

Case 134: The Stipulation for Double

D. 21.2.16.1 (Pomponius libro nono ad Sabinum)

Duplae stipulatio committi dicitur tunc, cum res restituta est petitori, vel damnatus est litis aestimatione, vel possessor ab emptore conventus absolutus est.

Pomponius in the ninth book on Sabinus:

The stipulation for double (in the event the buyer is evicted) is held to become due when the object has been surrendered to the claimant, or he (the buyer) has been condemned for the assessed worth of the lawsuit, or the possessor was sued by the buyer and absolved.

Discussion:

1. Penalty for Eviction. By contrast with the warranty discussed in the previous Case, this form of warranty by stipulation provides that the seller pay the buyer double the price “if the object or part of it was evicted, preventing the right to enjoy, hold, and possess legally”; see Paul, D. 21.2.56.2. Double was the standard penalty, but the parties could set the multiplier at will. A penalty of double was also automatically available by statute if a mancipation was executed pursuant to a sale of a *res Mancipi* (see Discussion on Case 127), and the buyer was then evicted, see *Pauli Sent.* 2.17.1-3. (This action, called the *actio auctoritatis*, was provided by the archaic Twelve Tables, VI.3; the Digest compilers removed most references to it from Classical texts.) The stipulation for double was often given when mancipation had not taken place or was not available because of the character of the object; see, e.g., Marcellus, D. 21.2.61; Ulpian, D. 21.2.33.

2. Violation of the Stipulation. This Case describes three instances in which the penalty comes due: the seller loses a suit on ownership and either surrenders the property to the true owner, or instead pays its condemned value (as was possible in a vindication); or the true owner takes possession and the buyer is unable to recover the property. If eviction is only of part of the object, the buyer’s recovery is *pro rata*, see Ulpian, D. 21.2.1, provided that the stipulation also protected against partial eviction, Paul, D. 21.2.56.2. The buyer must, of course, have been vigilant in defending title against the true owner; otherwise, the stipulation is unavailable, see Ulpian, D. 21.2.55.

Many sources (e.g., Paul, D. 21.2.18), indicate that the stipulation for double does not preclude a buyer from suing instead on the sale if that would yield him higher damages; i.e., double is not a damage limiter.

3. A Problem. A slave is sold with the proviso that, within thirty days, the seller undertakes to promise double, but will have no liability thereafter; the buyer fails to ask for the promise within the time limit, and is then evicted. Under what circumstances can the buyer nonetheless claim damages from the seller? Is the buyer at least protected from interference by the seller as to the title to the object? See Ulpian, D. 19.1.11.15, citing Julian.

Case 135: The Express Warranty and Regional Custom

D. 21.2.6 (Gaius libro decimo ad Edictum Provinciale)

Si fundus venierit, ex consuetudine eius regionis in qua negotium gestum est pro evictione caveri oportet.

Gaius in the tenth book on the Provincial Edict:

If a farm is sold, the undertaking against eviction should be given in accord with the custom of the region in which the transaction occurred.

Discussion:

1. Regional Custom. At least in some areas of the Roman Empire, the giving of a stipulation became so normal that, as Gaius says, the seller's duty to give it was implied into the contract, so that the buyer could sue if he or she did not receive the stipulation. Probably only sales of considerable value were affected, see the following Case; in the present Case, for instance, Gaius rules only on sale of land. Note that Gaius is commenting on provincial law, which may have been more advanced in this respect than Roman law in the capital city.

2. The Curule Aediles' Edict. In Rome, the Curule Aediles had control over market sales of slaves and draught animals. They established some rules, separate from the ordinary rules for private sales, that regulate their markets. One of these rules is that, in a market sale, the seller is obligated to give the stipulation for double against eviction, see the following Case. What if the seller declined to do so? Ulpian, D. 21.1.31.20: "Since the stipulation for double is customary, it is further held that suit can be brought on purchase if the seller of a slave does not promise double; for matters of practice and custom should be included in *bona fides* actions." Ulpian envisages a suit in sale, within the Urban Praetor's court; what would the damages be? But the buyer could probably also sue in the Curule Aediles' court for rescission of the sale or recovery of the difference in value, see Case 143-144.

Case 136: Requiring the Stipulation for Double

D. 21.2.37 pr.-1 (Ulpianus libro trigesimo secundo ad Edictum)

pr. Emptori duplam promitti a venditore oportet, nisi aliud convenit: non tamen ut satisdetur, nisi si specialiter id actum proponatur, sed ut repromittatur. **1.** Quod autem diximus duplam promitti oportere, sic erit accipiendum, ut non ex omni re id accipiamus, sed de his rebus, quae pretiosiores essent, si margarita forte aut ornamenta pretiosa vel vestis serica vel quid aliud non contemptibile veneat. Per edictum autem curulium etiam de servo cavere venditor iubetur.

Ulpian in the thirty-second book on the Edict:

pr. Unless otherwise agreed, the seller must promise the buyer double (in the event of eviction); but (he must give only) a promise, not security, except if it is posited that this was specifically agreed to.

1. But as to our holding that double must be promised, this should be taken to mean not that we receive it for everything, but only for more valuable objects, e.g., pearls or precious jewelry or silk clothing or anything else of no small value.

But by the Edict of the Curule Aediles the seller is also ordered to give the undertaking for a slave.

Discussion:

1. Seller Must Give an Express Warranty. The position taken in this Case appears first in late Classical sources. However, Ulpian, D. 19.1.11.8-9, cites the jurist Neratius (writing ca. 100 CE) as holding that the buyer has an action on purchase when the seller does not give a stipulation for undisturbed possession (see Case 133); and if the seller does not give security against eviction, the measure of damages is “the maximum a warranter of title (in a mancipation; an *auc-tor*) stands to lose,” i.e., apparently double the price in the event of eviction. By about 150 CE, a *iudex* could impose on sellers a duty to give a stipulation for double, see Pomponius, D. 45.1.5 pr. Among late Classical jurists, this had probably become settled law, no longer discretionary. But Ulpian requires the stipulation only for sales of considerable value, and does not demand the seller give security against eviction; are such restrictions justified? The parties are also still permitted to exclude the stipulation.

2. The Edict of the Curule Aediles. Under their Edict, the Curule Aediles gave an action for rescission within two months, and an action for difference in price within six months, if the seller failed to give the stipulation for double: Gaius, D. 21.1.28; see also Ulpian, D. 21.2.37.1.

Case 137: Implying the Warranty

Pauli Sententiae 2.17.1-2

1. Venditor si eius rei quam vendidit dominus non sit, pretio accepto auctoritatis manebit obnoxius: aliter enim non potest obligari. **2.** Si res simpliciter traditae evincantur, tanto venditor emptori condemnandus est, quanto si stipulatione pro evictione cavisset.

The second book of the *Sentences of Paul*:

1. If the seller is not the owner of the property he sells, after receiving the price he will remain liable for authorization (*auctoritas*), but otherwise he cannot be obligated. **2.** If there is eviction from objects that were simply handed over, the seller should be condemned for as much as if he had provided by stipulation against eviction.

Discussion:

1. Implied Warranty. In this postclassical work (which, despite its title, may not directly derive from the writings of the Classical jurist Paul), the author is discussing only sales of *res mancipi*: especially land, slaves, and beasts of draught and burden. In section 1, it is assumed that the seller has mancipated them, as would normally be required for title in such property to pass; the ensuing liability for double in the event of eviction derives from the Twelve Tables (see the discussion on Cases 127, 134). But section 2 then posits that the objects were handed over without a mancipation, and the buyer has then been evicted by a true owner. In this situation, the author of this postclassical work finds it fairly easy to imply a promise of double damages, since the buyer was entitled to mancipation and would have been protected had it occurred. So too, probably, the “real” Paul: D. 21.2.2. If the stipulation for double is implied, the buyer no longer needs to sue in order to obtain it.

2. Warranties and the Action on Sale. Surviving sources make it difficult to reconstruct the final position of Classical Roman Law. The stipulation for double provides, in essence, for a sort of liquidated damages in the form of an enforceable penalty clause; the additional amount covers the buyer’s anticipated consequential damages as well as the bother of things like court costs. By contrast, the stipulation for undisturbed possession permits the *iudex* to assess the buyer’s interest (unliquidated damages) if the stipulation is violated; and this is also the natural position in the action on sale if no express warranty is either given or implied, see Cases 129-130. Further, under the action on sale the buyer can proceed immediately against a seller who knowingly sells another’s property, see Case 132; the buyer need not wait for eviction. The action on sale lies even if the buyer acquires title otherwise than through the seller, e.g., by inheritance from the true owner (Paul, D. 21.2.9); for instance, Julian, D. 19.1.29, lets the buyer recover the price if he is left the object by legacy and then unknowingly buys it from the heir. How well protected is the buyer’s right to title in late Classical law? Have the jurists effectively undermined the rule in Case 127?

Section 5: Seller's Warranties for Defects

As with seller's warranties for lack of right, the seller's warranties for defects show a steady legal development in the direction of protecting buyers. By the end of the Roman Republic, a seller had two basic liabilities: for concealing from the buyer a fundamental latent defect in the object of sale, and for making an affirmative claim or promise about the object if this statement turned out to be untrue.

In the case of "market sales" of slaves and draught animals, the Curule Aediles established a set of remedies that were at first entirely distinct from, and additional to, those in the the Urban Praetor's action on purchase. The Aediles imposed on the seller an obligation to reveal to the seller certain specified fundamental defects in the object of sale; further, this obligation was imposed even if the seller did not know of the defects, and the seller was also held liable for any affirmative claims about the object's quality. If the seller did not meet these obligations, the Aediles established two remedies: within six months after the sale the buyer could sue to rescind it (*redhibitio*), and within one year the buyer could sue for the difference in price (*quanto minoris*). However, buyers who used these remedies did not obtain their "interest" (*id quod interest*), as they did in a suit on the purchase.

By the mid-second century, the analogy of the Curule Aediles' remedies apparently led the jurists to strengthen the buyer's remedies in the action on purchase. In requiring the seller to reveal certain fundamental defects, the Curule Aediles had relied on the idea that these defects would render the object of sale "unmerchantable" unless the buyer was informed of them. Within the law of sale, the great jurist Julian picked up and extended this concept of merchantability: if an object of sale had a fundamental defect, an unknowing seller was liable for the difference in price (*quanto minoris*), while a knowing seller was liable for the buyer's full interest (*id quod interest*), potentially including some consequential damages. Julian's implied warranty of merchantability represents the high-water mark of buyer's protection in Roman law.

Case 138: Puffery and Express Warranties

D. 18.1.43 (Florentinus libro octavo *Institutionum*)

pr. Ea quae commendandi causa in venditionibus dicuntur, si palam appareant, venditorem non obligant, veluti si dicat servum speciosum, domum bene aedificatam: at si dixerit hominem litteratum vel artificem, praestare debet: nam hoc ipso pluris vendit. **1.** Quaedam etiam pollicitationes venditorem non obligant, si ita in promptu res sit, ut eam emptor non ignoraverit, veluti si quis hominem luminibus effossis emat et de sanitate stipuletur: nam de cetera parte corporis potius stipulatus videtur, quam de eo, in quo se ipse decipiebat. **2.** Dolum malum a se abesse praestare venditor debet, qui non tantum in eo est, qui fallendi causa obscure loquitur, sed etiam qui insidiosae obscure dissimulat.

Florentinus in the eighth book of his *Institutes*:

pr. In sales, statements intended to make (the object) attractive do not obligate the seller if they are readily apparent, e.g., if he says that a slave is handsome or a house is well built. But if he says that a slave is educated or a craftsman, he should provide this (to the buyer), since he sells for more on this basis.

1. There are also some promises that do not obligate a seller if the matter is so obvious that the buyer is not unaware of it, e.g., if someone buys a slave whose eyes are gouged out, and he stipulates concerning his health. For he is held to stipulate about the rest of the (slave's) body, rather than about that part where he deceives himself.

2. The seller should be liable that deceit (*dolus malus*) is absent; it occurs not only if he speaks obscurely in order to deceive, but also if he sneakily conceals (a defect).

Discussion:

1. Puffery and Promises. Granted that warranties are enforceable, the problem is to distinguish real warranties from a seller's idle chatter in praise of the object. Ulpian, D. 21.1.19 pr.: "there is a large difference between words in praise of a slave, and a promise to provide what he (the seller) said." What criteria does Florentinus seem to use to separate the two? Consider, in particular, why it is puffery to say that a house is "well built." Is the seller obligated (and, if so, to what extent) if he says that a slave is hardworking? Loyal? A cook? A good cook? An excellent cook? Not a thief? See Gaius, D. 21.1.18; Ulpian, D. 21.1.17.20. When a warranty is given, the seller is liable on it regardless of whether he or she knew, or had reason to know, the truth concerning the quality warranted; see Case 140, where remedies are also discussed.

2. Warranties in Archaic Law. Even in archaic Roman law, the seller was liable for certain statements concerning the object of sale. For example, when the seller conveys purchased land by mancipation and describes it as "in the best possible legal condition" (*optimus maximusque*), the seller is held to warrant against any undisclosed servitudes; see, e.g., Venuleius, D. 21.2.75. (This follows, however, from the terms of the mancipation, not from the sale itself.) Similarly, if the seller states that the purchased land has a specified acreage, the seller is liable by a special action if he or she overstates the actual acreage, see *Pauli Sent.* 2.17.4 (indicating that a *iudex* had discretion to award double damages, apparently even when parties had not specified this). Other warranties were often embodied in stipulations. But in Classical law even informal warranties could be incorporated into the sale by the doctrine on pacts, see Case 102.

3. Absence of Deceit. Whether or not a specific warranty is given, the seller is liable if he or she practices deceit (*dolus*) against the buyer; see also Case 131 (concealing a servitude). For

significant defects, this normally means that the seller must reveal latent defects to the buyer unless they were already known. This rule was already in effect by the later Roman Republic. It suggests an early erosion of the maxim *caveat emptor* (not itself a Roman expression), doubtless under the influence of the general theory of *bona fides*.

Case 139: Concealment and Express Warranties

D. 18.6.16 (Gaius libro secundo *Cottidianarum Rerum*)

Si vina quae in doliis erunt venierint eaque, antequam ab emptore tollerentur, sua natura corrupta fuerint, si quidem de bonitate eorum adfirmavit venditor, tenebitur emptori: quod si nihil adfirmavit, emptoris erit periculum, quia sive non degustavit sive degustando male probavit, de se queri debet. Plane si, cum intellegeret venditor non duraturam bonitatem eorum usque ad in eum diem quo tolli deberent, non admonuit emptorem, tenebitur ei, quanti eius interesset admonitum fuisse.

Gaius in the second book of *Everyday Matters*:

If wine in vats is sold and (then), before it is removed by the buyer, it is corrupted because of its nature, he (the seller) will be liable to the buyer if he in fact affirmed its quality. But if he made no affirmation, the buyer bears the risk (*periculum*), since if he did not taste, or he did taste and wrongly approved (the wine), he has himself to blame. Obviously, if the seller knew that its quality would not last until the day it was to be removed and did not warn the buyer, he will be liable for the extent of his (the buyer's) interest in having been warned.

Discussion:

1. Wine Goes Bad after the Sale. This Case concerns wine that goes bad after the sale has been concluded but before delivery. Normally, the buyer bears the risk for this, see Ulpian, D. 18.6.1 pr. Gaius points out two exceptions: first, if the seller expressly warranted its quality; second, if the seller knew and did not reveal that it would go bad. Does this correspond to the seller's duties as outlined in the previous Case? The buyer is advised to insist on a condition of tasting, see Case 108.

2. The Duty to Reveal Defects. How far must the seller go in disclosing latent defects? The jurists do not consider this problem in the abstract, but some examples suggest that the duty was broadly construed. Gaius, D. 18.1.35.8: "The seller is liable if in selling property he conceals a neighbor and the buyer would not have purchased had he known of him." Does Gaius presume that the seller knew about the buyer's aversion to the neighbor? Would it matter if most buyers would not have minded the neighbor? Problems like this arise today when, for instance, the seller of a house conceals a grisly murder committed within it ten years before. Must sellers disclose (then or now) that a house is thought to be haunted?

Case 140: Remedies for Violating an Express Warranty

D. 19.1.13-3-4 (Ulpianus libro trigesimo secundo ad Edictum)

3. Quid tamen si ignoravit quidem furem esse, adseveravit autem bonae frugi et fidum et caro vendidit? Videamus, an ex empto teneatur. Et putem teneri. Atqui ignoravit: sed non debuit facile quae ignorabat adseverare. Inter hunc igitur et qui scit <et tacuit non multum interest: nam qui scit> praemonere debuit furem esse, hic non debuit facilis esse ad temerariam indicationem.

4. Si venditor dolo fecerit, ut rem pluris venderet, puta de artificio mentitus est aut de peculio, empti eum iudicio teneri, ut praestaret emptori, quanto pluris servum emisset, si ita peculiatus esset vel eo artificio instructus.

Ulpian in the thirty-second book on the Edict:

3. But what if he (the seller) was unaware that he (the purchased slave) was a thief, but affirmed that he was of good character and honest, and (so) sold him at a high price? I would consider him liable even if he was unaware (of the truth): he ought not lightly to have asserted what he did not know. There is, thus, little difference between him and a person who knew and kept silent; the person who knew should have given warning that he was a thief, (while) the former should not be prone to rash assertion.

4. If the seller acted deceitfully (*dolo*) in order to sell property for more, e.g., by lying about a (slave's) skill or (the size of) his *peculium*, (a jurist holds) that he is liable in an action on purchase to provide the buyer with as much more as the slave would be worth if he had such a *peculium* or had been trained in this craft.

The Problem:

In selling the slave Stichus to Decius, Calpurnia claims that the slave is honest. In fact, unknown to her, Stichus has stolen property from several persons. Is Calpurnia liable to Decius if she can show that there was no way she could have discovered this?

Discussion:

1. Damages. As Ulpian indicates, the normal measure of damages is the same for both misrepresentation and a violation of an express warranty: the buyer can claim the reduction of value of the object as a result of the defect. That consequential damages might also be claimed is implied by sources awarding the buyer's "interest"; e.g., Gaius, D. 18.6.9 (seller of an orchard knows that the trees have been blown down, but does not reveal this). See also Case 145.

2. Rescission and Restitution. In some cases, as a result of the defect, a buyer has no further desire for the object and may therefore wish to rescind the sale altogether. The jurists allow this; e.g., Ulpian, D. 19.1.11.5 (the buyer of a slave woman thought she was a virgin, but the seller knew otherwise), see 3: "Both Labeo and Sabinus think that rescission (*redhibitio*) is also included in the action on purchase, and I agree."

Case 141: Non-Disclosure of a Beneficial Servitude

D. 18.1.66.1 (Pomponius libro trigensimo primo ad Quintum Mucium)

Si cum servitus venditis praediis deberetur nec commemoraverit venditor, sed sciens esse reticuerit et ob id per ignorantiam rei emptor non utendo per statutum tempus eam servitutem amiserit, quidam recte putant venditorem teneri ex empto ob dolum.

Pomponius in the thirty-first book on Quintus Mucius:

If a servitude is owed to purchased land and the seller, instead of mentioning it, knowingly keeps silent, and for this reason the buyer, through ignorance of the facts, loses the servitude by not using it for the legally set period, some jurists rightly think that the seller is liable on purchase for deceit (*dolus*).

The Problem:

Fabius sells a farm to Lavinia without telling her that the farm has a valuable right of way over a neighboring farm. Lavinia then takes possession and ownership of the farm, but, because she did not know of the right of way, she loses it through failing to use it for a long time. Can she sue Fabius on the sale if the farm's value is thereby decreased?

Discussion:

1. Beneficial Servitudes. With this Case, compare Venuleius, D. 21.2.75: "But if the buyer (of land) sues for a right of way or of driving cattle, the seller cannot be held liable unless he expressly stated the right of way would accede (to the purchased property); for, if he did so state, he is liable." In the present Case, the buyer of the land would also ordinarily have obtained the servitude over the neighboring land, but lost it (through usucapion, failure to use) because the seller failed to inform her of its existence. It is easy enough to see why a seller would be liable for expressly warranting the existence of a servitude; but why should he be liable for knowingly concealing it? The buyer didn't rely on the existence of the servitude in purchasing the land, did she? How should the *iudex* go about measuring the buyer's interest? Should sellers generally be held liable for knowingly concealing potentially beneficial attributes of objects of sale, especially if these are generally counted as beneficial?

Case 142: Express and Implied Warranties

D. 19.1.6.4 (Pomponius libro nono ad Sabinum)

Si vas aliquod mihi vendideris et dixeris certam mensuram capere vel certum pondus habere, ex empto tecum agam, si minus praestes. Sed si vas mihi vendidieris ita, ut adfirmares integrum, si id integrum non sit, etiam id, quod eo nomine perdiderim, praestabis mihi: si vero non id actum sit, ut integrum praestes, dolum malum dumtaxat praestare te debere. Labeo contra putat et illud solum observandum, ut, nisi in contrarium id actum sit, omnimodo integrum praestari debeat: et est verum. Quod et in locatis doliis praestandum Sabinum respondisse Minicius refert.

Pomponius in the ninth book on Sabinus:

If you sell me a container and you say it has a specified capacity or a specified weight, I may sue you on purchase if you provide less (than what was specified). But if you sell me a container with the promise that it is sound, you will also owe me what I lose on this account; however, if the agreement was not that you be liable for its soundness, (a jurist held) that you should be liable only for deceit (*dolus malus*). Labeo thinks the opposite, that the sole valid rule is that unless they arranged the opposite, a sound (container) should always be provided; and this is correct. Minicius reports Sabinus' response that this is owed also in the case of rented casks.

Discussion:

1. Early Implied Warranties. This Case is an early attempt to break out of the pattern established by the previous Cases: seller's liability only for express warranties and deception. Containers are sold with no express warranty as to their soundness and no (demonstrable) deceit by the seller; they turn out to be unsound. An earlier jurist, whose name was doubtless removed by the Digest compilers, held to the established pattern; but the Augustan jurist Labeo develops an implied warranty of soundness, which can only be escaped by express agreement. Why might this situation have been especially appealing for the development of an implied warranty? Note that Labeo does not give the buyer's remedy; what should it be?

To what extent is it important, for the effectiveness of such an implied warranty, that the buyer suffer actual economic loss (e.g., wine seeps out of the flawed container) as a result of the defect? What if the object was only less valuable because of it, perhaps because the defect was discovered before the container was put to use?

2. Containers as Accessories. Paul, D. 19.1.27: "Whatever the seller states will accompany (the object of sale) must be delivered whole and sound; e.g., if he said that storage jars would accompany a farm, he should provide ones that are sound, not broken." Does this simply extend the rule in the present Case?

3. Lease. For a further extension of Labeo's rule to lease, see Case 161.

Case 143: Liability under the Aediles' Edict

D. 21.1.1.1-2 (Ulpianus libro primo ad Edictum Aedilium Curulium)

1. Aiunt aediles: "Qui mancipia vendunt certiores faciant emptores, quid morbi vitiiive cuique sit, quis fugitivus errove sit noxave solutus non sit: eaque omnia, cum ea mancipia veniunt, palam recte pronuntiant. Quodsi mancipium adversus ea venisset, sive adversus quod dictum promissumve fuerit cum veniret, quod eius praestari oportere dicitur: emptori omnibusque ad quos ea res pertinet iudicium dabimus, ut id mancipium redhibeatur. Si quid autem post venditionem traditionemque deterius emptoris opera familiae procuratorisve eius factum erit, sive quid ex eo post venditionem natum acquisitum fuerit, et si quid aliud in venditione ei accesserit, sive quid ex ea re fructus pervenerit ad emptorem, ut ea omnia restituat. Item si quas accessiones ipse praestiterit, ut recipiat. ...". 2. Causa huius edicti proponendi est, ut occurratur Fallaciis vendentium et emptoribus succurratur, quicumque decepti a venditoribus fuerint: dummodo sciamus venditorem, etiamsi ignoravit ea quae aediles praestari iubent, tamen teneri debere. Nec est hoc iniquum: potuit enim ea nota habere venditor: neque enim interest emptoris, cur fallatur, ignorantia venditoris an calliditate.

Ulpian in the first book on the Edict of the Curule Aediles:

1. The Aediles say: "Those who sell slaves must inform buyers concerning the disease or defect (*morbum vitiumve*) of each, and who is a runaway or a wanderer, or is not free from noxal liability; let them state all these things expressly and correctly when they sell slaves. But if a slave is sold in contravention of these rules, or contrary to what was stated or promised (by the seller) when he was sold, here is what he (the seller) must provide: to the buyer and all other concerned parties, we will give an action in order that the slave be restored (i.e., the action for redhibition). But if, after the sale and handover, a slave is worsened by the act of the buyer, his household, or procurator; and if, after the sale, anything is born to or acquired from him; and if any other thing acceded to him (the slave) in the sale, or if some fruit (*fructus*) came to the buyer from this thing: all these things he (the buyer) must restore (to the seller). Likewise, if he (the seller) provided any accessories, let him recover them. ..."

2. This edict was proposed in order to check the deceptive practices of sellers and give aid to buyers who are deceived by sellers. But we should realize that the seller ought still to be liable even if he was unaware of those things the Aediles order him to provide. Nor is this unjust, since the seller could learn of them; it makes no difference to the buyer why he is deceived, whether by the seller's ignorance or by his guile.

Discussion:

1. **Market Sales.** The Curule Aediles were elected magistrates (just lower than the Praetors) who had charge over the Roman markets where slaves and draught animals were commonly sold, often by sellers who were not previously known to their customers. The Edict of the Curule Aediles regulates this market to some extent; it provides remedies that are additional to any existing in the law of sale. As Ulpian suggests in section 2, deceptive practices may have been sufficiently common in such markets to warrant official regulation; but the Aediles intervened to protect all buyers, regardless whether the seller had been deceitful. Is Ulpian's argument in favor of this position entirely persuasive?

The Aediles had a somewhat similar edict for animals: Ulpian, D. 21.1.38 pr.

2. **Seller's Duties.** According to the Edict, the seller must inform the buyer

- 1) if the slave has a disease or defect (*morbum vitiumve*; see the following Case);
- 2) if the slave has previously run away or shows a propensity to do so;
- 3) if the slave has committed a delict against a third party, who might bring suit against the slave's current owner.

Other later provisions (not quoted here) require informing the buyer if the slave has committed a capital crime, attempted suicide, or fought wild animals in the arena. Why might all these things be considered defects? The seller's liability does not arise in the case of patent defects that the buyer should observe, see Ulpian, D. 21.1.14.10 (slave is blind, or has an obvious and dangerous scar on his head or elsewhere); and it may be excluded by express agreement, see Pomponius, D. 21.1.48.8.

3. Buyer's Remedies. The Curule Aediles' Edict establishes two remedies. The first, which is mentioned in section 1, is called redhibition and amounts to a rescission of the sale; the buyer must ask for it within six months of the sale. The second remedy, available within a year of the sale, is an action for reduction in the price (*actio quanti minoris*): the buyer claims the difference in value of the defective slave. The interrelationship between the two remedies is unclear. The buyer would presumably have a choice within six months, but perhaps redhibition was available only for defects that are more significant. In any case, characteristic of both remedies is, first, that they do not turn on seller's knowledge and hence are swift and relatively sure; second, that they do not provide any consequential damages to the buyer. Discuss the pros and cons of such a scheme of remedies. Would buyers always find the aedilician remedies attractive?

4. Warranties. The seller of a slave was also expected to give a stipulation against eviction (see Case 134) and against latent defects. Failure to do so could result in redhibition within two months, and the action for difference in value within six months; see Gaius, D. 21.1.28. The Edict also established liability for any other express warranties; see Ulpian, D. 21.1.17.20.

Case 144: The Soundness of Slaves

D. 21.1.1.8, 4.4 (Ulpianus libro primo ad Edictum Aedilium Curulium)

1.8. Proinde si quid tale fuerit vitii sive morbi, quod usum ministeriumque hominis impediatur, id dabit redhibitioni locum, dummodo meminerimus non utique quodlibet quam levissimum efficere, ut morbosus vitiosusve habeatur. Proinde levis febricula aut vetus quartana quae tamen iam sperni potest vel vulnusculum modicum nullum habet in se delictum, quasi pronuntiatum non sit: contemni enim haec potuerunt. Exempli itaque gratia referamus, qui morbosi vitiosique sunt. ... **4.4.** In summa si quidem animi tantum vitium est, redhiberi non potest, nisi si dictum est hoc abesse et non abest: ex empto tamen agi potest, si sciens id vitium animi reticuit: si autem corporis solius vitium est aut et corporis et animi mixtum vitium, redhibitio locum habebit.

Ulpian in the first book on the Edict of the Curule Aediles:

1.8. So if there is any defect or disease that impedes the slave's usefulness and service, this is a basis for redhibition, provided we remember that is not just anything however slight that leads to his being considered diseased or defective (*morbosus vitiosusve*). Hence a mild fever or an old case of malaria that can now be disregarded, or a slight wound, result in no liability if not declared; for they could be ignored. So let us give some cases of slaves who are diseased and defective. ...

4.4. In sum, if the defect is only mental, there can be no redhibition, except if it was stated not to be present when (in fact) it was; but there can be an action on purchase if he (the seller) knowingly kept silent about a mental defect. However, if there was a purely physical defect, or a mixed physical and mental defect, redhibition is available (under the Curule Aediles' Edict).

Discussion:

1. Defect or Disease. The jurists eventually decided that only physical defects should be considered; see Ulpian, D. 21.1.1.7. Presumably, most buyers were looking for physically sound laborers; mental qualities were of smaller importance. But the jurists discuss many hard cases. Is a slave defective if he or she is a moron? A lunatic? A religious fanatic? An alcoholic? A gambler? A chronic liar? Unable to speak? Unable to speak intelligibly? If the slave lacks a tooth, or has a wart on the nose, or is a bed wetter? If a female slave regularly has stillborn issue? These and numerous other questions are discussed in D. 21.1. The answers paint a vivid picture of the expectations of slave buyers in the Roman world.

Case 145: Implied Warranty of Merchantability

D. 19.1.13 pr.-2 (Ulpianus libro trigesimo secundo ad Edictum)

pr. Iulianus libro quinto decimo inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto: ait enim, qui pecus morbosum aut tignum vitiosum vendidit, si quidem ignorans fecit, id tantum ex empto actione praestaturum, quanto minoris essem empturus, si id ita esse scissem: si vero sciens reticuit et emptorem decepit, omnia detrimenta, quae ex ea emptione emptor traxerit, praestaturum ei: sive igitur aedes vitio tigni corruerunt, aedium aestimationem, sive pecora contagione morborum perierunt, quod interfuit id non evenisse erit praestandum. **1.** Item qui furem vendidit aut fugitivum, si quidem sciens, praestare debet, quanti emptoris interfuit non decipi: si vero ignorans vendiderit, circa fugitivum quidem tenetur, quanti minoris empturus esset, si eum esse fugitivum scisset, circa furem non tenetur: differentiae ratio est, quod fugitivum quidem habere non licet et quasi evictionis nomine tenetur venditor, furem autem habere possumus. **2.** Quod autem diximus "quanti emptoris interfuit non decipi", multa continet, et si alios secum sollicitavit ut fugerent, vel res quasdam abstulit.

Ulpian in the thirty-second book on the Edict:

pr. In the fifteenth book, Julian draws a distinction between a knowing and unknowing seller with regard to condemnation on purchase. He says that a person who sold diseased livestock or defective timber, if he acted unknowingly, is liable in an action on purchase only for the amount less that I would have purchased for had I known the truth; but if he knowingly kept silent and deceived the buyer, he is liable to him for all losses (*omnia detrimenta*) the buyer sustains from this sale. So if a building collapses because of the defective timber, (he must pay) an evaluation of the building; if livestock perishes through contagion from the diseased livestock, there is liability for the (buyer's) interest in this not having occurred.

1. Likewise, a person who sold (a slave who is) a thief or a runaway, if (he did so) knowingly, should be liable for the buyer's interest in not being deceived. But if he sells unknowingly, with regard to the runaway he is liable for the amount less he would have purchased for had he known he was a runaway; (while) with regard to the thief he is not liable. The reason for the distinction is that he (the buyer) does not obtain the right to hold (*habere licere*) the runaway, and the seller is liable as if on account of eviction; but we can hold the thief.

2. My words, "the buyer's interest in not being deceived," include many things, e.g., if he (the slave) instigates others to run away with him, or steals some property.

Discussion:

1. Julian's Warranty. This text presents the final outcome of the evolution towards buyer protection in Classical Roman Law. Whereas most earlier juristic holdings turn on the two issues of seller's express warranty or deception, Julian (writing ca. 140 CE) breaks through and requires that, at least in the case of significant and potentially harmful latent defects of the object of sale, the seller impliedly warrants the absence of these defects. Sellers are divided into two classes: those who know of the defects are liable for consequential losses suffered by the buyer, but unknowing sellers are liable only for the difference in price. The rule for knowing sellers may perhaps not represent a major change in the law; that for unknowing sellers does. Julian could have imported this second rule into sales law from the aedilician remedy discussed in Case 143. Does the final Roman scheme of remedies strike you as satisfactory? Why should so much depend

on the seller's knowledge? At the time of the sale, must it be clear to the seller that the buyer values the characteristic? (In the case of contagious livestock, rotten timbers, and thieving slaves, such an evaluation seems self-evident, of course.)

2. Sale of Used Clothing as New. Marcian, D. 18.1.45, discusses a case in which previously used clothing is sold as if it were new; Julian is cited as applying the rule in the present Case. Marcian does not indicate that used clothing would sell for substantially less than new clothing; but can this be presumed? (Ancient clothing was a good deal more substantial and durable than most modern clothing.) What does Marcian's holding indicate about the extent of the seller's implied warranty beyond inherently dangerous objects of sale?

3. Measuring the Buyer's Interest. In the case of a knowing seller, Julian allows the buyer to recover his or her "interest." This measure obviously includes most direct losses the buyer sustains as a result of the latent defect: the collapse of the building because of faulty timbers; the death of other animals because of the diseased herd; and the escape of other slaves, or the theft of buyer's property, because of the runaway slave. Does this measure of damages seem excessive? Can it be reconciled with Case 123? How does this measure differ from expectation damages in Common Law? (The Latin text given above derives from a famous emendation by Edouard Frankel: *quod interfuit id non evenisse*, "the (buyer's) interest in this not having occurred.")

4. A Slave Who Is a Thief? In section 1, Ulpian distinguishes between sale of a runaway and sale of a thief. Is his argument completely convincing? Can you reformulate it so that the distinction is clearer?

Case 146: Mistake and the Implied Warranty

D. 19.1.21.2 (Paulus libro trigesimo tertio ad Edictum)

Quamvis supra diximus, cum in corpore consentiamus, de qualitate autem dissentiamus, emptionem esse, tamen venditor teneri debet, quanti interest non esse deceptum, etsi venditor quoque nesciet: veluti si mensas quasi citreas emat, quae non sunt.

Paul in the thirty-third book on the Edict:

Although I held above that there is a sale when we agree on the object of sale but disagree about a characteristic (*qualitas*), nonetheless the seller should be liable for the (buyer's) interest in not having been deceived, (and so) even if the seller will also be unaware; e.g., if he buys tables as if they were of citron wood, when they are not.

Discussion:

1. Sale of Citron Wood Tables. These tables were luxury items, worth a fortune. The original text of Paul appears to have been abridged by the Digest compilers; Paul is likely to have applied the rule in the previous Case, that it is the knowing seller who is liable for the buyer's "interest in not having been deceived," but the unknowing seller only for the difference in price. With this Case, compare Marcian, D. 18.1.45, establishing a similar limited liability if a brass object is unknowingly sold as gold. In what sense are such objects defective? Both Paul and Marcian are late Classical; it certainly looks like Julian's warranty has been expanded, doesn't it.

2. Mistake Theory. Reread Cases 88-91 on mistake concerning a characteristic of the object of sale. Those Cases deal with formation of a sale; Ulpian allows the buyer to void the sale if he or she is mistaken about certain fundamental characteristics of the object. But, as Ulpian notes, at least Marcellus wanted to toss out the doctrine of mistake on a characteristic. What is Paul's position? Once Julian's warranty had developed, were problems of buyer mistake on characteristics better handled by upholding the sale and then enforcing the implied warranty?

3. Sale of a Slave Woman. In section 11.1 of Case 89, Ulpian voids the sale if a male slave is sold as a female, but upholds it if a sexually experienced woman is sold as a virgin. However, Ulpian, D. 19.1.11.5, holds that if the seller knew the truth about the slave's sexual experience, the buyer can sue on purchase to rescind the sale. Is this an application of Julian's warranty?