Sale Actions and other Actions

by J.A.C. Thomas
(*London*)

The titles on *emptio venditio* — D.18.1.7 and 19.1 — do not perhaps provide the same interesting examples of the interplay of actions to be found in the cases of *societas* and *locatio conductio* (1); but they are not wholly lacking in cases thereof. Perhaps the best way of treating them is to make broad groupings.

I. — Three passages treat of sale actions and an *actio in factum* or *utilis* or *praescriptis verbis*.

> D.18.5.6 (Paul, 2 *ad Ed.*)
> *Si convenit, ut res quae venit, si intra certum tempus displicuisset, redderetur, ex empto actio est, ut Sabinus putat, aut proxima empti in factum datur.*

As we have it, the passage suggests an *actio empti* or an action *in factum;* but it has long been argued (2) that the final *aut ... datur* is an addition to the text — and this writer would not dissent from that view. It is well-known that there had been differences between the Sabinians and Proculians over the scope of the sale actions, the former favouring their use to enforce any term of the contract while the latter would lean to actions *in factum* for the redress of, so to say, ancillary

(1) For which see recently Thomas, 7 IJ 152ff. (*societas*) and articles to appear in *Festschrift Beinart* and in IJ (*locatio conductio*).

(2) Cf. *Ind. Itp.*

contractual provisions (3). These differences, however, had been resolved in favour of the Sabinian view before the time of Paul (4). Moreover, whatever earlier possibilities, the *pactum displicentiae* was accepted as resolutive by his day (5); so that a contract in which it was included would be *pura* and the contractual actions would need no supplementation in the shape of an *actio in factum*. The final clause of our passage, it is therefore submitted, is the work of a commentator or of the compilers, recalling the earlier controversy.

D.18.1.50 (6) (Ulpian, 11 *ad Ed.*)

Labeo scribit, si mihi bibliothecam ita vendideris, si decuriones Campani locum mihi vendidissent, in quo eam ponerem, et per me stet, quo minus id a Campanis impetrem, non esse dubitandum, quin praescriptis verbis agi possit. ego etiam ex vendito agi posse puto quasi impleta condicione, cum per emptorem stet, quo minus impleatur.

In its present form, the text reports Labeo as giving an *actio praescriptis verbis* to redress a purchaser's failure to implement a term whereunder he was to seek a building site from the Campanian authorities on which to house a library he was buying. That the earliest Proculian should not give *a. venditi* would be understandable in the light of the paragraph above: whether, however, he used the expression *praescriptis verbis* is open to question — he would more probably have resorted to the usual *actio in factum* of his school (7). In such case, Ulpian's own concession of *a. venditi* would be conformable with the victory of the Sabinian view.

(3) E.g. D.18.3.5; 19.5.2; 18.1.50; 18.1.79. See THOMAS, *Studies in the Roman Law of Sale in Memory of De Zulueta* at p. 160ff.; KASER, RPRI², 561-2 and n. 76.

(4) Cf. D.18.2.4.4; 19.1.21 and e.g. 18.1.7.1, 2; 18.1.41pr.; 18.1.79; 19.1.13.24; and Ulpian allows the contractual action in 18.1.50 below.

(5) E.g. 18.1.3. See THOMAS, 35 TvR 557ff.; WESEL, 85 ZSS 94ff.

(6) See DAUBE, 12 Iura 82ff. at 105, 28 TvR 271ff.; THOMAS, 1 IJ 116ff.

(7) In D.19.5.1.1, Papinian attributes to Labeo an *actio civilis in factum* — but in respect of a question of uncertainty over the nature of the contract made between a consignor and the master of a ship. No problem exists over the contract in the text under discussion.

It is, though, less the use of actions in this text than the substantive issue which is the principal feature. What was the nature of the term? (8) The final *quasi ... impleatur* would suggest that it was a condition of the contract (I sell you the library, *if* you shall have sought ...); but in such case there should be no action available if the site be not forthcoming. The formulation may be ambiguous but it is more probable that Labeo viewed the provision as a term incidental to the contract (I sell you the library *and* you are to obtain ...): which exposes the final *quasi, in fin.* as an erroneous added explanation (9).

D.19.1.11.6 (Ulpian, 32 *ad Ed.*)
Is qui vina emit arrae nomine certam summam dedit : postea convenerat, ut emptio irrita fieret. Iulianus ex empto agi posse ait, ut arra restituatur, utilemque esse actionem ex empto etiam ad distrahendam, inquit, emptionem ...

The second half of the passage — which has not escaped the critics (10) — will be returned to in connexion with *condictiones* and sale actions. For Julian, *arra* would have been purely evidentiary (11), even if consisting in a (conceivably) modest sum of money, and in no way part-performance. Parties to a consensual contract could resile from their agreement while it was wholly executory (*re integra*) (12) and, if that were the situation posited, there should therefore no longer be a sale and so no *actio empti* (13). The *arra* should thus be recoverable not by a contractual action but by *condictio causa data causa non secuta* (14). But Julian is said to have given *a. empti* for its recovery and that supreme master of the niceties of the

(8) Cf. 18.1.41pr. which presents a similar problem of interpretation.
(9) See THOMAS, 1 IJ *cit.*
(10) *Ind. Itp.*
(11) G.III.139.
(12) Cf. e.g. D.2.14.7.6, 27.2, 58; 18.1.6.2, 72*pr.*
(13) Cf. re *res extra commercium* where again there is no sale, D.18.1.22, 23; see THOMAS 29 CLP 136ff.
(14) The solution in fact adopted in the latter part of the text where the sale had been executed.

ius quod ad actiones pertinet would not have perpetrated an elementary error. It must, therefore, be supposed that some act or acts had been performed towards execution of the contract when the parties decided to call off their contract. In such case, the invocation of *actio empti* would be understandable. The *a. empti utilis* to put an end to the contract, however, attracts one's attention. If the parties had agreed on the ending of their contract, this redress was surely unnecessary since any attempt by the other party to enforce the buyer's obligation could be met by, in effect, an *exceptio pacti conventi* (15). It is therefore thought, on substantive grounds, that those (16) who maintain that *utilemque ... emptionem* is an addition by a later hand are correct.

In the result, it is submitted, apart from the early School controversy over the scope of the contractual actions, the existence of *actiones in factum*, *utiles* or *praescriptis verbis* concurrent with or alternative to the sale actions is unsubstantiated.

II. — There is nothing unorthodox about the text which relates the sale actions and those on hiring:

> D.19.1.13.30 (Ulpian, 32 *ad Ed.*)
> *Si venditor habitationem exceperit, ut inquilino liceat habitare, vel colono ut perfrui liceat ad certum tempus, magis esse Servius putabat ex vendito esse actionem: denique Tubero ait, si iste colonus damnum dederit, emptorem ex empto agentem cogere posse venditorem, ut ex locato cum colono experiatur, ut quidquid fuerit consecutus, emptori reddat.*

A vendor who sold land or premises occupied by a tenant to whom he had granted a lease thereof would have, in his own interests, to extract an undertaking from his purchaser that the tenant could remain until the expiry of his lease since, otherwise, he would be liable to an *actio conducti* if the

(15) Cf. D.18.5.5*pr.* (Julian, 15 *Dig.*).
(16) *Ind. Itp.*

purchaser evicted the tenant (17). This could, of course, be effected by an independent stipulation or by a provision in the contract of sale itself. That Servius preferred the *actio venditi* to redress the breach of the purchaser's undertaking indicates that, in the case envisaged, the undertaking was a term in the sale contract and the *magis* foreshadows the School controversy already discussed. The grant by Tubero of the *actio empti* to the purchaser for damage done by the tenant would suggest either that the property had not yet been transferred to him or that it had been transferred only by *traditio* so that he was not yet *dominus* for, had this last been the case, he could himself have proceeded *ex lege Aquilia* against the tenant. In the present circumstances, he would have to look to his vendor to protect his economic interests (18).

III. — Passages concerning contractual and delictal actions in connexion with sale are notably fewer than in respect of *societas* and *locatio conductio*; but there are some.

D.18.6.13(12) (Paul, 30 *Alf. epit.*)
Lectos emptos aedilis, cum in via publica positi essent, concidit : si traditi essent emptori aut per eum stetisset quo minus traderentur, emptoris periculum esse placet.

D.18.6.14(13) (Julian, 30 *ad Urs. Fer.*)
eumque cum aedili, si id non iure fecisset, habiturum actionem legis Aquiliae : aut certe cum venditore ex empto agendum esse, ut is actiones suas, quas cum aedile habuisset, ei praestaret.

These well-known texts, much invoked in discussions of the rule *periculum est emptoris*, deal, it is thought with Arangio-Ruiz (19), with a different matter. Couches, the object of a sale, constituted an obstruction on the street and were accordingly destroyed by the aedile; it naturally follows that the person

(17) D.19.2.25.1. See, generally, Thomas, 41 TvR 35ff.

(18) Cf. similarly D.19.2.60.5; 47.2.52.8. Alternative possibility in D.18.6.14 post.

(19) *La compravendita*, 269-270.

responsible for the nuisance should bear the loss and that is the significance of the transfer or not of the goods to the purchaser — in private law terms, the infringement of the public regulation of the streets would be a matter of *culpa*. If they had been transferred to the buyer, he would be their owner and the loss would be his on the ordinary principle of *res perit domino* : hence his entitlement to the *a. legis Aquiliae* if the aedile had acted wrongly. *Aut certe ... praestaret* has been strongly challenged (20) but, it is thought, wrongly. The compilers have been at fault but in a different way. D.18.6.15pr. is obviously the continuation of D.18.6.13:

> D.18.6.15pr. (Paul, 30 *epit. Alf.*)
> *Quod si neque traditi essent neque emptor in mora fuisset quo minus traderentur, venditoris periculum erit.*

Had 15pr. been left with 13, the content of 14 as a whole — though its formulation would have needed some adjustment — would excite no controversy. The purchaser, not yet owner of the goods, would have needed, to protect his interests, either the device indicated in the latter part of D.19.1.13.30 or that which appears in D.18.6.14. Again, there is no unorthodoxy.

The next passage of interest is

> D.19.1.13.12 (Ulpian, 32 *ad Ed.*)
> *Sed et si quid praeterea rei venditae nocitum est, actio emptori praestanda est, damni forte infecti vel aquae pluviae arcendae vel Aquiliae vel interdicti quod vi aut clam.*

This extract would give the possibility of a plethora of actions to the purchaser in the event of damage to the thing sold before delivery — that the relevant action *praestanda est* (is to be made available) to the purchaser is a clear indication thereof. It may be also conjectured that, though not specifically mentioned, the *actio empti* referred to in the final part of D.18.6.14(13) would be available to the purchaser to ensure the cesser of the relevant action (21).

(20) *Ind. Itp.*

(21) Cf., for a similar wealth of remedies, D.19.2.25.5.

There remains the interesting

D.19.1.25 (Julian, 54 *Dig.*)
Qui pendentem vindemiam emit, si uvam legere prohibeatur a venditore, adversus eum petentem pretium exceptione uti poterit si ea pecunia, qua de agitur, non pro ea re petitur, quae venit neque tradita est. ceterum post traditionem sive lectam uvam calcare sive mustum evehere prohibeatur, ad exhibendem vel iniuriarum agere poterit, quemadmodum si aliam quamlibet rem suam tollere prohibeatur.

This passage, seemingly unchallenged by anyone except Beseler (22), has attracted little attention (23) but would appear to have features deserving comment. Standing, as it does, in the title *De Actionibus Empti Venditi,* it is nonetheless from Book 54 of Julian's Digest which treated of stipulation (24). It may, therefore, be supposed that — though the text does not mention it — the vendor had followed the not uncommon practice (25) of novating the *bonae fidei* duty of the purchaser to pay the price into a stipulation therefor.

The elaborate *exceptio,* again, attracts attention. One might have thought that the broad scope of the *exceptio doli* evidenced in the Digest (26) would have covered the case of a vendor suing for the price while, in effect, refusing to deliver the goods. Still, the classical authenticity of such generality for the *exceptio* may be questioned (27): and, even if valid for later classical law, it may not yet have extended so far in the time of Julian. Hence, it is thought, the particularity of the formulation of the present *exceptio* — which, if the suggestion in the

(22) 45 ZSS at 439.

(23) It is unmentioned by Arangio-Ruiz (*cit.* n. 19): de Zulueta, *The Roman Law of Sale,* includes the text (p. 129) but does not discuss it. Its treatment by Mackintosh, *Roman Law of Sale,* 130, is on a quite different topic from that here under consideration.

(24) Lenel, *Palingenesia.*

(25) E.g. Varro, *De R.R.* 2.2.5, 6; D.18.1.40.2; 44.1.14.

(26) E.g. D.9.2.47; 44.4.2.3, 5, 4pr., 12, 16; 44.7.44.1; 45.1.36; 50.17.56.

(27) Cf. Buckland, *Textbook of Roman Law,* 605.

previous paragraph be accepted, cannot be regarded as a so-called *exceptio non adimpleti contractus* (28).

The second sentence of the text also is intriguing. Julian was never the most diffuse of authors; but the conciseness of this sentence makes it difficult to envisage the facts of the case. That *traditio* should be effected by allowing the purchaser to come and collect what he had bought would be perfectly normal (29): but should it be supposed that the pressing of the grapes was also to take place on the vendor's land? — or did the vendor allow the gathering of the fruit and then forbid its removal from the land?

The mention of only the *actiones ad exhibendum* and *iniuriarum* — and that, seemingly, in the alternative — also deserves comment. Despite the wording of the sentence, a vendor who prevented the purchaser from dealing freely with the goods could scarce be regarded as having given that *vacua possessio* which it was his duty to provide (30) and so should be liable to the *actio empti* — even if the purchaser's obligation had, in effect, been novated. Again, having different *causae* and *res*, *actio ad exhibendum* and *actio iniuriarum* should be cumulative, not alternative: and a *vindicatio* could complement the former if *dominium* had passed. None of these actions should, at civil law, preclude the bringing of the others, though the praetor *in iure*, or the *officium iudicis* in an *actio ex empto*, would ensure that the purchaser did not, in effect, recover twice for the grapes by that action and by a *vindicatio* (31).

The conciseness of the passage is doubtless the source of these problems. One cannot, however, refrain from suspecting that the final *quemadmodum ... prohibeatur* is a later addition; without being incorrect, it is unnecessary.

IV. — Contractual actions and various forms of *condictio* appear in a series of passages. *Condictio indebiti* appears in

(28) So Mackintosh (*cit.* n. 23), 130, 138.
(29) e.g. D. 19.1.9, 40.
(30) e.g. D.19.4.1pr.; 19.1.2.1, 3pr., 11.13.
(31) Cf. in a different context D.19.2.43.

D.19.1.24pr. and 1.

D.19.1.24pr. (Julian, 15 *Dig.*) (32)

Si servus, in quo usus fructus tuus erat, fundum emerit et antequam pecunia numeraretur, capite minutus fueris, quamvis pretium solveris, actionem ex empto non habebis propter talem capitis deminutionem, sed indebiti actionem adversus venditorem habebis. ante capitis autem minutionem nihil interest, tu solvas an servus ex eo peculio quod ad te pertinet : nam utroque casu actionem ex empto habebis.

Ascertaining the factual situation is not easy. A fructuary would, of course, become owner of whatever the slave acquired by his own labours (*ex operis suis*) or *ex re fructuarii* (33) — assuming, naturally, an effective transfer of the thing. Payment is made by the fructuary. It may, however, be inferred that, though the payment has been made, there has been no transfer (34) of the land: for, otherwise, one cannot conceive how any claim for the money could be made by the fructuary, *tu*. The nature of his change of status is also a matter of speculation: it must be a form of *capitis deminutio minima* since any other type would deprive him of *civitas* and of legal capacity. *Adrogatio* would clearly suggest itself, for only one *sui iuris* would have had assets and proprietary or similar capacity. But then, whatever the form of relief, it would surely be the new *paterfamilias* who, as a universal successor, would be entitled to bring proceedings: and that would make *habebis* surprising (35). The probability is that Julian, understandably, was concerned with the nature of the action available and not

(32) Only the nature of the *condictio* in issue has been queried: cf. *Ind. Itp.*

(33) Cf. Inst. II.9.4.

(34) *Scil.*, by *mancipatio*.

(35) The civil law consequence (D.4.5.2) of *deminutio* was the extinction of non-delictal obligations of the *minutus:* in respect of liabilities of the *minutus*, the praetor mitigated this by granting actions against him with the fiction that he was still *sui iuris* (cf. G.III.84; IV.80; LENEL, EP^3, 117): but there is no hint of a similar fiction for him to assert claims and the *condictio* of our passage would seem to refute the suggestion.

with precisely who would bring it. That Julian should explain the availability or not of a given action was characteristic (36). The *actio ex empto* would not be available because of the civil extinction of non-delictal obligations on *capitis deminutio* (37) and thus of contractual ties. It has been suggested (38) that *actio indebiti* should read *actio certae pecuniae creditae* ; but it is submitted that, if the facts be as suggested above, *condictio indebiti* to recover the 'price' of a no longer existent sale is highly appropriate — though there still remains the problem, linked again with *solveris* and *habebis*, of when the money was paid. The case dealt with in the final sentence, where the money was clearly paid before *capitis deminutio* — the reference to the slave and his *peculium* is no doubt occasioned by the earlier *solveris* having clearly been by *tu* — presents no barrier to the *actio ex empto* ; though again the question remains of the actual plaintiff. But, assuming a clarification of the facts, the whole illustrates Julian's precision in the application of actions.

D.19.1.24.1 (Julian, 15 *Dig.*)

Servum tuum imprudens a fure bona fide emi : is ex peculio quod ad te pertinebat hominem paravit, qui mihi traditus est. posse te eum hominem mihi condicere Sabinus dixit, sed si quid mihi abesset ex negotio quod is gessisset, invicem me tecum acturum de peculio. Cassius veram opinionem Sabini rettulit, in qua ego quoque sum.

The case concerns a *bona fide possessor* of a slave, albeit a stolen one, who could acquire through him in the same way and to the same extent as could a usufructuary (39). The slave having bought his *vicarius* with a *peculium* granted by *tu*, the *dominus*, it follows that *ego* received the *vicarius* without any justification and thus was open to a *condictio*. The *actio de peculio* which Sabinus, Cassius and Julian would allow to *ego* is not specified: *actiones adiectitiae qualitatis* were, of course,

(36) Cf. e.g. D.9.2.5.3 ; 19.2.13.4 ; and see THOMAS, *St. Biondi* II, 185ff.
(37) N. 35 ante.
(38) N. 32 ante.
(39) G. II.92 ; Inst. II.9.4.

merely modified forms of established actions so that the question is which modified action would *ego* have. Since the sale transaction was between the slave and the vendor, *ego* acquired no contractual right — that would be in *tu*. Any loss arising out of the purchase of the *vicarius* incurred by *ego* would presumably be cost of maintenance of the *vicarius*, possible medical and similar treatment, etc. before *tu* came on the scene; and, since *ego* thought himself owner, there would be no question of *negotiorum gestio*: the obvious claim would appear to be a *condictio* limited by the extent of the slave's *peculium*. Presumably, an alternative relief, not adverted to in the passage, would have been an *exceptio* in *tu*'s *condictio* (40).

D.19.1.11.6 (Ulpian, 32 *ad Ed.*) (41)

... ego illud quaero : si anulus datus sit arrae nomine et secuta emptione pretioque numerato et tradita re anulus non reddatur, qua actione agendum est, utrum condicatur, quasi ob causam datus sit et causa finita sit, an vero ex empto agendum sit. et Iulianus diceret ex empto agi posse : certe etiam condici poterit, quia iam sine causa apud venditorem est anulus.

Here there is no uncertainty such as surrounds the circumstances of the first sentence; the sale has been completed and executed but the *arra* has not been returned; and the question is the means by which the purchaser can recover for it. The Sabinian Julian understandably would grant the *actio empti* ; but Ulpian, without contradicting him, would allow a *condictio sine causa* in lieu. Since the *causae* and *res* of the two forms of redress are different, there would be no incompatibility between them at civil law: it would be for the praetor in effect to put the purchaser to his election.

The *condictio incerti* appears in D.19.1.5.1 and 8.

(40) In *D.12.1.31.1* (Paul, 7 *ad Plaut.*) which clearly deals with the same case, Paul reports Julian as raising the question whether the *dominus* (our *tu*) might have a straight *actio empti* against the vendor and the latter a *condictio* against the *bona fide possessor* (our *ego*).

(41) The first part of the passage has been considered, ante, p. 419.

D.19.1.5.1 (Paul, 3 *ad Sab.*)
Sed si falso existimans se damnatum vendere vendiderit, dicendum est agi cum eo ex empto non posse, quoniam doli mali exceptione actor summoveri potest, quemadmodum, si falso existimans se damnatum dare promisisset, agentem doli mali exceptione summoveret. Pomponius etiam incerti condicere eum posse ait, ut liberetur.

The case is that of an heir who, being mistaken over the terms of the will, sells to a purchaser in the belief that he is charged thereto by the will (42). The passage has excited much suspicion (43) but the substance of the first sentence must be genuine apart from *quoniam ... potest* which has doubtless been introduced in the light of the final *agentem ... summoveret* : the underlying argument is not erroneous but an express *exceptio doli* would not be necessary in a *bonae fidei actio empti* as it would in the *stricti iuris* action on a stipulation. The *condictio incerti* of the final sentence has, in the past, aroused suspicion but it is now widely accepted that the use of a *condictio* (whatever the dating of the designation *condictio incerti*) for an *incertum* is classical (44) and there is no lack of illustration of its employment to effect a *liberatio* (45). The compilers would scarcely have fabricated the sentence which, it is submitted, should be accepted as authentic.

D.19.1.8pr. & 1 (Paul, 5 *ad Sab.*)
Si tibi liberum praedium tradidero, cum serviens tradere deberem, etiam condictio incerti competit mihi, ut patiaris eam servitutem, quam debuit imponi. (1) *Quod si servum praedium in traditione fecero, quod liberum tibi tradere debui, tu ex empto habebis actionem remittendae eius servitutis gratia, quam pati non debeas.*

In the *pr.*, the vendor's failure to mention the servitude intended in his favour means that the transferee receives more

(42) In a different context, cf. the so-called *error in dominio* in *traditio:* D.18.1.15.2; 17.1.49 (contra, D.12.1.41).

(43) *Ind. Itp.*

(44) Cf. Wolf, *Causa* 156ff., 190ff.; Kaser, RPRI², 598ff.

(45) E.g. D.12.7.1pr., 3; 23.3.46pr.; 39.5.2.3; 44.4.7pr. & 1. Pomponius again favours *condictio incerti* in D.12.6.22.1.

than he is paying for and thus to that extent receives an *indebitum* for which the *condictio incerti* is an appropriate rectification (46). By contrast, the transfer of burdened land in *1*, when it should be unencumbered (47), is really a failure by the vendor *vacuam possessionem tradere*, as contemplated by the contract, and so lays him open to the purchaser's *actio empti*. Together, *pr.* and *1* point up a nice distinction.

Problems arising from the fact that, except by express agreement, the *peculium* of a slave did not pass with him when he was sold (48) invoke the use of the *condictio* in D.18.1.29 and D.19.1.30pr.

> D.18.1.29 (Ulpian, 43 *ad Sab.*)
> *Quotiens servus venit, non cum peculio distrahitur : et ideo sive non sit exceptum, sive exceptum sit, ne cum peculio veneat, non cum peculio distractus videtur. unde si qua res fuerit peculiaris a servo subrepta, condici potest videlicet quasi furtiva : hoc ita, si res ad emptorem pervenit.*

The slave's appropriation of part of his *peculium* from the vendor was no part of the sale transaction and so would give rise to no contractual redress but, although no delictal redress either would have been available had the slave remained in the vendor's hands (49), he could recover for his property which had come into the purchaser's hands, through the transfer of the slave, by a kind of *condictio furtiva* (50).

> D.19.1.30pr. (Africanus, 8 *Quaest.*)
> *Servus quem de me cum peculio emisti, priusquam tibi traderetur, furtum mihi fecit. quamvis ea res quam subripuit interierit, nihilo minus retentionem eo nomine ex peculio me habiturum ait, id est ipso iure ob id factum minutum*

(46) Cf. 7.5.5.1, 9pr.; 12.6.22.1; 33.4.7.4; 35.3.3.10. Marcian, in D.8.2.35, in a case similar to that under discussion, says that the transferor could have *a. venditi* or *condictio incerti*.

(47 I.e. *optimus maximusque* : D.18.1.59.

(48) E.g. D.21.2.3.

(49) Cf. D.47.2.16.

(50) *N.b. quasi:* it is like — but is not — *condictio furtiva*.

esse peculium, eo scilicet, quod debitor meus ex causa condictionis sit factus. nam licet, si iam traditus furtum mihi fecisset, aut omnino condictionem eo nomine de peculio non haberem aut catenus haberem, quatenus ex re furtiva auctum peculium fuisset, tamen in proposito et retentionem me habiturum et, si omne peculium penes te sit, vel quasi plus debito solverim posse me condicere. secundum quae dicendum : si nummos, quos servus iste mihi subripuerat, tu ignorans furtivos esse quasi peculiares ademeris et consumpseris, condictio eo nomine mihi adversus te competet, quasi res mea ad te sine causa pervenerit.

In this relatively lengthy passage, the slave had, evidently by special agreement, been sold with his *peculium* ; he had also appropriated something belonging to the vendor. Julian (*ait*), as reported by Africanus, held that, in effect, if the *peculium* had not yet been transferred, the vendor could retain the value of the missing thing out of the fund; but, if it had been transferred, the vendor could have a *condictio* along the lines of a *condictio indebiti* ; and, finally, that, if the purchaser had unwittingly used money stolen by the slave, the vendor could recover by a kind of *condictio sine causa*. Whether or not the final clause of 30*pr*. be genuine (its position in the sentence gives rise to suspicion), it does not affect the substantive law. Generally, the two passages, D.18.1.29 and 19.1.30*pr*. show that the *naturalis* nature of the *obligatio* of a slave to his master requires the adapted application of established *condictiones*.

V. — In the light of the circumstances posited in the last two passages discussed, it is perhaps appropriate to turn next to what may be broadly styled cases of vicarious liability and relief.

D.18.5.8 (Scaevola, 2 *Resp.*)

Titius Seii procurator defuncto Scio ab eo scriptus heres, cum ignoraret, fundum vendente servo hereditario, quasi procurator subscripsit. quaesitum est, an cognito eo, priusquam emptio perficeretur, a venditione discedere possit. respondit Titium, si non ipse vendidit, non idciro actionibus civilibus teneri, quod servo vendente subscripserat, sed servi nomine praetoria actione teneri.

The text presents no substantive issue which is exceptional: in the circumstances, the vendor has mistakenly misdescribed himself. The relevance of the passage for our purposes is that, a slave of the inheritance having been the actual instrument of sale, the vendor will be liable by an *actio adiectitiae qualitatis* — probably *actio quod iussu* — and not by the direct *actio empti*.

D.19.1.13.25 (Ulpian, 32 *ad Ed.*)
Si procurator vendiderit et caverit emptori, quaeritur, an domino vel adversus dominum actio dari debeat. et Papinianus libro tertio responsorum putat cum domino ex empto agi posse utili actione ad exemplum institoriae actionis, si modo rem vendendam mandavit : ergo et per contrarium dicendum est utilem ex empto actionem domino competere.

Where our previous vendor thought himself still to be a *procurator* there is no question in the present passage but that the sale is effected by a *procurator* of the selling owner. The passage has occasioned considerable discussion (51), the Roman approximation to agency in the modern sense being a matter of dispute, but there are too many attributions to Papinian (52) to deny that, in such a case as this, he would have allowed an *actio quasi institoria* against the vendor. More suspicious, it is submitted, is the final *ergo ... competere*. Not only is it in fact a *non sequitur* but, more orthodoxly, one would expect, conformably with the general law of mandate, the actual vendor to be given a *procuratio in rem suam* by his mandatory/ *procurator* to bring the *actio venditi* (53) *directa*.

D.19.1.11.12 (Ulpian, 32 *ad Ed.*)
Idem libro secundo responsorum ait emptorem noxali iudicio condemnatum ex empto actione id tantum conse-

(51) *Ind. Itp.* : CARRELLI, *Studii Scorza* 143ff. ; KRELLER, *Festschrift Wenger* II, 77ff. ; BURDESE, 84 Atti Torino 109ff. ; WESENER, 75 ZSS 228ff. ; VALIÑO, 37 AHDE 339ff. ; ANGELINI, 71 BIDR 230ff.

(52) D.3.5.30pr. ; 14.3.19pr. ; 17.1.10.5 apart from the present text.

(53) The manifestly incorrect *ex empto* further deepens suspicion.

qui, quanti minimo defungi potuit : idemque putat et si ex stipulatu aget : et sive defendat noxali iudicio, sive non, quia manifestum fuit noxium servum fuisse, nihilo minus vel ex stipulatu vel ex empto agere posse.

The vendor has obviously sold a slave in respect of whom noxal liability existed and the purchaser has been consequentially penalised. Neratius (54) (*idem*) says that he can have an *actio empti* to recover *tantum ... quanti minimo defungi* which prompts speculation: suppose the purchaser to have paid damages greater than the value of the slave or, alternatively, to have surrendered a slave worth more than would have been awarded against him in damages — would he get only the value of the slave or his price in the former case and only the amount that would have been awarded against him in the other ? The *idemque ... aget* which follows is not correct, unless the stipulation were of an *incertum :* but that, where there was a stipulation of guarantee, the purchaser could elect between action thereon and action on the contract already for Neratius is interesting in dating the development of the implied guarantee in sale (55).

VI. — The *stipulatio duplae* or *quanti minoris* goes with sale in a way which does not raise issues of the type that it is sought to inspect in the present paper and so is ignored. But a passage which does raise the question of sale actions and action on a stipulation is

D.19.1.28 (Julian, 30 *ad Urs. Feroc.*)
Praedia mihi vendidisti et convenit, ut aliquid facerem : quod si non fecissem, poenam promisi. respondit : venditor antequam poenam ex stipulatu petat, ex vendito agere potest : si consecutus fuerit, quantum poenae nomine stipulatus esset, agentem ex stipulatu doli mali exceptio summovebit : si ex stipulatu poenam consecutus fueris, ipso iure ex vendito agere non poteris nisi in id, quod pluris eius interfuerit id fieri.

(54) Cf. D.19.1.11.7-13 generally.
(55) It was settled by the time of Julian: D.21.2.8; 19.1.11.18.

The passage has been subjected to criticism [56], principally because of the changes of person. That objection, however, loses much of its force if one argue that the first sentence represents the case posed, *respondit ... summovebit* the *responsum* (or a summary thereof) of Urseius and *si ex stipulatu ... id fieri* Julian's own contribution to the original case [57]. There is a further problem — the *eius* of the final clause, the *nisi* introduction of which makes it suspect. No difficulty would be occasioned if *eius* could refer back to *poenam* but then one would require rather *plus quam eam* with another *tui*. It would follow, therefore, that the *nisi* clause is either an addition or an unsatisfactory abridgment of what Julian said. It is thought that the second alternative is preferable.

Apart from the difference of contract, the answer of the passage is the same as that given for a similar case on *societas* in D.17.2.42 [58] — except for the *ipso iure* which could suggest automatic consumption of the claim at civil law. Levy [59] regards D.19.1.28 as falsified and the contrast *exceptio/ipso iure* is obvious.

Yet Julian was a master of procedure. Now *actio venditi* and *condictio* have different *res* and *causae*. *Actio venditi*, however, is *bonae fidei* so that there would be no need of an express *exceptio* in it, least of all *exceptio doli*. If the penalty had been obtained *ex stipulatu* and was greater than the vendor's *interesse ex vendito*, then the very wording of the *formula* would require the judge in the *actio venditi* to award the plaintiff nothing *ex fide bona* and to absolve the defendant,

(56) Cf. e.g. *Ind. Itp.*

(57) Apart from those cited in *Ind. Itp.*, MACKINTOSH, *The Roman Law of Sale*, pp. 198-9 suggests that *fueris* and *poteris* are corruptions from the third person.

(58) D.17.2.42 (Ulpian, 45 *ad Sab.*):

Quod si ex stipulatu eam consecutus sit, postea pro socio agendo hoc minus accipiet poena ei in sortem imputata.

See THOMAS, 7 IJ 151.

(59) *Konkurrenz*, II, 126ff.

nisi ... fieri. On this interpretation, *ipso iure* is not incorrect (60), even if unfortunately formulated.

VII. — The cases which concern sale actions and proprietary remedies are not numerous (61). D.18.1.30, however, is interesting:

> D.18.1.30 (Ulpian, 32 *ad Ed.*)
> *Sed ad exhibendum agi posse nihilo minus et ex vendito puto.*

Though taken out of a different book of Ulpian's commentary *ad edictum* (62), it is clearly intended to follow on from D.18.1.29, especially in the light of the succeding D.18.1.31 (63). It could scarcely be briefer but is not without interest. If it be assumed that the *res peculiaris* is still in existence, the *actio ad exhibendum* is perfectly understandable: but the *et* which seems to make the *actio venditi* additionally available is questionable. The *causae* of the two actions being different, there would be no mutual exclusion at civil law but the ensuring, by the praetor *in iure* or through the *officium iudicis* of, in effect, no 'two bites at the same cherry', would lead one

(60) See also D.18.5.5*pr.* where Julian accepted that a purported *acceptilatio* by one party to a sale to the other operated to discharge both from their obligations. Of course, if one hold that *nisi ...fieri* is an addition, no problem arises over *ipso iure*.

(61) D.19.1.25 has already been considered, ante pp. 423f. : D.19.1.17.6 concerns only *actio ad exhibendum* for *ruta et caesa* (on which, see recently, MARRONE, *Studi Volterra* I, 213ff.) : D.19.1.40 turns on the point that standing trees, the object of a sale, remain the property of the vendor until their lopping and delivery ; hence, if the vendor prevent their severance, only *actio empti* lies against him, essentially for failure *vacuam possessionem tradere*.

(62) Unless the inscription of D.18.1.29 (ante, p. 429) be incorrect.

(63) D. 18.1.31 (Pomponius, 22 *ad Sab.*) :

> *Sed et si quid postea accessit peculio, reddendum est venditori, veluti partus et quod ex operis vicarii perceptum est.*

Cf. D.19.1.23 where it should be assumed rather that Julian regarded the vendor's conduct as dolose (cf. D.18.1.45 ; 19.1.13pr.) than that he made an uncharacteristic howler.

to expect *vel* : conceivably, the jurist assumed that alternative availability would be inferred.

All in all, it is thought that, though the passages passed in review reveal points that have, perhaps, sometimes not caught the eye, the general picture is of overall orthodoxy in the operation of actions in respect of sale.