

**C.4.58.2 and the Civil Remedy**  
**for Price Reduction**  
**Two Ways of Reading the *Corpus Iuris Civilis***

Jan HALLEBEEK

*(Université libre d'Amsterdam)*

*1. Introduction*

A theme such as ‘the contract in all its stages’ certainly includes the pre-contractual phase of the contract<sup>1</sup>. And indeed, some attention to this stage is all the more appropriate, since it can be determinative for the possibility of rescinding the contract or for the liability of the parties. One of such determining circumstances in the pre-contractual phase is the existence of latent defects, not disclosed by the seller, regardless of whether or not he acted in good faith. This contribution will focus on one specific text in the *Corpus iuris* dealing with such a sale of defective merchandise, viz. a rescript from Emperor Gordian (225-244) enshrined in book four of the Codex in the title on the aedilician actions, dating from the year 239 AD. In this case the buyer had purchased a slave who appeared to be inclined to flee. According to the facts of the case, the slave actually fled more than one year after the sale had been concluded.

*C.4.58.2 Imp. Gordianus A. Petilio Maximo*

*Cum proponas servum, quem pridem comparasti, post anni tempus fugisse, qua ratione eo nomine cum venditore eiusdem congregari quaeras,*

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\* Vrije Universiteit Amsterdam.

<sup>1</sup> This contribution is an elaborated version of a paper, presented on 25 September 2008, at the 62<sup>nd</sup> session of the *Société Internationale ‘Fernand de Visscher’ pour l’Histoire des droits de l’Antiquité* at Fribourg (Switzerland) on the theme “Le contrat dans tous ses états”.

*non possum animadvertere: etenim redhibitoriam actionem sex mensum temporibus vel quanto minoris anno concludi manifesti iuris est.*

*PP. K. Dec. Gordiano A. et Aviola conss [a. 239].*

At first sight this rescript may seem to be entirely in conformity with what we know from the textbooks on Roman law. The *actio redhibitoria* to claim rescission is only available for a limited period of six months, while the *actio quanti minoris* to claim price reduction is available for one year. This seems to be in conformity also with what is written in the Digest-title on the aedilician actions (see Ulp., D.21.1.19.6 and Ulp., D.21.1.38pr.).

On closer investigation, however, the text is problematic, no matter whether we approach it as a rescript by Emperor Gordian or as a provision of Justinian's legislation. As will be demonstrated below, in any event the main problem is why the text pronounces only upon the aedilician actions, and not upon the possibility of bringing the civil remedy, i.e. the contractual *actio empti* against the seller. And yet the two approaches just mentioned, viz. reading the text as a rescript by Gordian or as a Justinianic provision, differ fundamentally and even to such an extent that one can speak of two ways of reading the *Corpus iuris*. The first approach may be characterized as more historic than systematic in the sense that it is aimed at understanding the text in its original historical context, i.e. as an imperial rescript given for a specific case and dating from the third century. The second one is more systematic than historic in the sense that it is aimed at understanding the text as part of a consistent codification of law, promulgated in the sixth century.

It is the purpose of this contribution to depict and compare both approaches towards the case and the decision of Gord., C.4.58.2, in order to demonstrate which hermeneutical intricacies we often encounter when we want to describe what we find in the sources of Roman law and in those of the civilian tradition as elements of a historical development.

## 2. A civil remedy for price reduction ?

The case of Gord., C.4.58.2 deals with the buyer of a slave. After conveyance had taken place the slave ran away. In Roman law a slave inclined to flee (*fugitivus*) was considered defective. At the beginning of the second century BC, two edicts, promulgated by magistrates

with jurisdiction over the market place, the so-called *aediles curules*, introduced two remedies the buyer of defective goods could bring against the seller, viz. one for rescission: the *actio redhibitoria* or *aestimatoria*, and one for price reduction: the *actio quanti minoris*. Two titles of the *Corpus iuris*, D.21.1 and C.4.58, still deal with this kind of liability. The texts of the aedilician edicts themselves, which are reproduced in Ulp., D.21.1.1.1 and Ulp., D.21.1.38pr., originally only dealt with slaves and cattle bought at the market place, but Justinian extended their applicability to all sales contracts.

At the same time, there are texts in the Digest and Codex where the contractual *actio empti* is granted against the seller of defective merchandise, even if the latter was unaware of the defects. Moreover, this action appears to be used for the same purposes as the aedilician actions, viz. rescission and price reduction. The most important text in the Digest for the use of the *actio empti* for price reduction is Ulp./Iul., D.19.1.13pr.

D.19.1.13pr. *Ulpianus libro trigesimo secundo ad edictum*

*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 idonea venisse erit praestandum.*

For many years, romanists assumed that this text contains Justinianic interpolations. It would have been Justinian, and not yet classical jurists like Julian (mid-second century AD) and Ulpian († 223), who applied the civil *actio empti* for price reduction<sup>2</sup>. The example, given in the next paragraph (D.19.1.13.1), was also regarded as spurious. According to classical law, the one who sold a slave inclined to flee in good faith, thus without knowing this mental defect,

<sup>2</sup> See F.HAYMANN, *Die Haftung des Verkäufers für die Beschaffenheit der Kaufsache* I, Berlin 1912, p.89ss., followed by F.PRINGSHEIM, *Das Alter der aedilizischen actio quanti minoris*, *ZSS Rom. Abt.* 69 (1952), pp.234-301, esp. 293. Kunkel ascribed this use of the *actio empti* to an incorrect interpretation of pre-Justinianic legal scholarship; see W.KUNKEL, *Miszelle in ZSS Rom. Abt.* 46 (1926), pp.285-287.

could not be held liable. Others were convinced, however, that in the classical period of Roman law the principles of the aedilician edicts had penetrated into civil law. This view gradually became accepted among romanists. As regards the possibility of claiming price reduction, it was beyond dispute that classical law granted an *actio empti* for this purpose. There are more doubts as regards the use of the *actio empti* for rescission, despite the statement in Ulp., D.19.1.11.3 that the *actio empti* can indeed be used for such a purpose. Julian considers, in Ulp./Iul., D.19.1.13pr, that, since a person who sells slaves and cattle at the market place is liable for price reduction in case of latent defects, good faith requires that this should also be the case for other sales contracts involving defective merchandise<sup>3</sup>. That the aedilician edicts must have been applied analogously to other sales contracts was already defended in the nineteenth century by the Austrian legal historian Moritz Wlassak (1854-1939)<sup>4</sup>. The handbook of Max Kaser (1906-1997) reflects the old opinion as the principal rule. The *actio empti* can be used against a seller in bad faith or against a seller who gave express warranties. Subsequently it is added that, since the days of Julian, the *actio empti* was obviously applied for claiming price reduction as a competitive remedy to the aedilician *actio quanti minoris*<sup>5</sup>. It has to be noted, however, that in the literature it is often assumed that liability of the ignorant seller under the regular contractual remedy of sale was accepted at a much earlier stage. The text of Pomp., D.19.1.6.4, dealing with the sale of a leaking barrel, indicates that it was already the early classical jurist Labeo who held the seller –without regard to his knowledge of the defects– obliged to convey to the buyer an undamaged and usable barrel<sup>6</sup>. If the buyer

<sup>3</sup> R.HENLE, *Miszelle in ZSS Rom. Abt. 58* (1938), pp.180-185, esp. 184 and H.HONSELL, *Quod interest in bonae-fidei-iudicium. Studien zum römischen Schadensersatzrecht* [Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte, 55], Munich 1969, p.85.

<sup>4</sup> M.WLASSAK, *Zur Geschichte der negotiorum gestio. Eine rechtshistorische Untersuchung*, Jena 1879, p.169ss. Cf. also A.VON BECHMANN, *Der Kauf nach gemeinem Recht*, Band I, Erlangen 1876 (reprint Aalen 1965), pp.654-655 and Band III.2, Erlangen 1908 (reprint Aalen 1965), p.177 and note 3.

<sup>5</sup> M.KASER, *Das römische Privatrecht*, Erster Abschnitt, Munich 1971<sup>2</sup>, pp.557-558, Zweiter Abschnitt, Munich 1975<sup>2</sup>, pp.393-394.

<sup>6</sup> See about this text: A.L.OLDE KALTER, *Dicta et Promissa. De aansprakelijkheid van de verkoper wegens gedane toezeggingen betreffende de hoedanigheid van de verkochte zaak in het klassieke Romeinse recht*, Utrecht 1963, p.54ss.

would indeed have had at his disposal two competitive remedies for claiming price reduction, it has to be seen whether there were mutual differences and whether or not one of the two actions was more or less redundant.

(i) As regards the kind of merchandise the actions were considered applicable to, the civil *actio empti* was available beyond the sphere of the market sale of cattle and slaves. It was granted also for other defective things one had purchased, such as second-hand garments sold as new (Marc., D.18.1.45), a fragile beam (Ulp./Iul., D.19.1.13pr.), or a plot of land which appeared to be encumbered with more *capitatio* than the seller had told (Diocl., C.4.49.9). In Justinianic law this difference ceased to exist, since the application of the aedilician remedies was, because of interpolations in Ulp., D.21.1.1pr. and Ulp., D.21.1.63, extended to almost all contracts of sale<sup>7</sup>.

(ii) A second difference, both in classical and Justinianic law, consisted in the assessment of price reduction. The aedilician *actio quanti minoris* was aimed at the difference between the selling price and the actual value, i.e. the objective market value of the defective object (*quo minoris cum venirent fuerint*, see Ulp., D.21.1.38 and Ulp., D.21.1.31.5). The *actio empti*, used for claiming price reduction, was aimed at the amount the buyer would have paid less had he known of the defect (*quanti minoris empturus esset, si ... scisset* in Ulp./Iul., D.19.1.13pr., or *quanto, si scisset emptor ab initio, minus daret pretii* in Diocl., C.4.49.9).

(iii) A third difference concerned the period of time the seller could be sued. As stated above, the aedilician *actio quanti minoris* had to be brought within one year. No evidence can be found in any of the texts where the *actio empti* is used to claim price reduction that the reception of the aedilician principles into civil law also included a limited possibility to sue the seller. As a general rule, in both classical and Justinianic law, civil actions, such as the *actio empti*, are perpetual and only expire after thirty years. This can be found in Institutes of Gaius (mid-second century AD) as well as in those of Justinian<sup>8</sup>.

<sup>7</sup> See for these interpolations HONSELL, *op. cit.*, p.81 note 75, with references to further literature.

<sup>8</sup> The question whether the aedilician remedies were not in fact entirely redundant is left aside here. Justinian adopted in the Digest and the Codex separate titles for the aedilician edicts. According to Kaser, this should be ascribed to the traditionalistic tendencies of both Justinian himself and the Eastern Law Schools. In the Middle Ages

Gaius 4.110

*Quo loco admonendi sumus eas quidem actiones quae ex lege senatusve consultis proficiscuntur, perpetuo solere praetorem accomodare, eas uero quae ex propria iurisdictione pendent, plerumque intra annum dare.*

Inst. 4.12pr

*Hoc loco admonendi sumus eas quidem actiones, quae ex lege senatusve consulto sive ex sacris constitutionibus proficiscuntur, perpetuo solere antiquitus competere, donec sacrae constitutiones tam in rem quam personalibus actionibus certos fines dederunt: eas vero, quae ex propria praetoris iurisdictione pendent, plerumque intra annum vivere (nam et ipsius praetoris intra annum erat imperium). aliquando tamen et in perpetuum extenduntur, id est usque ad finem constitutionibus introductum: quales sunt hae, quas bonorum possessori ceterisque qui heredis loco sunt, accomodat. furti quoque manifesti actio, quamvis ex ipsius praetoris iurisdictione proficiscatur, tamen perpetuo datur: absurdum enim esse existimavit anno eam terminari.*

The text of Gord., C.4.58.2 presents us with a problem. Whether we approach it as a rescript by Gordian or a provision from the *Corpus iuris*, this problem remains the same. The text deals with a slave who ran away more than one year after he was bought. Emperor Gordian stated that he could not think of an action the buyer could bring in this instance. The question is why the Emperor did not mention the *actio empti*, since it is not written anywhere in the *Corpus iuris*, unless we should consider the text of Gord., C.4.58.2 itself as such, that the *actio empti* for price reduction cannot be used after the one-year period has lapsed.

### 3. C.4.58.2 as a rescript of the emperor Gordian

As we saw above, in the older literature it was not yet generally accepted that in the era of classical law the *actio empti* could be used for claiming price reduction with regard to defects. Especially the idea of bringing an action of sale against the ignorant seller of a slave inclined to flee was considered incompatible with the good faith which governed the relationship between the parties. Thus, the text of D.19.1.13.1 was considered to be interpolated and our rescript,

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it was argued that the different ways of estimating the price reduction justifies the existence of the aedilician *actio quanti minoris*.

C.4.58.2, was the solid proof of this<sup>9</sup>. But, as we know, in the first half of the twentieth century hardly any text in the *Corpus iuris* was safe from “interpolation-hunting”. Thus it was questioned whether the text of C.4.58.2 was also interpolated and, if so, to what extent. In 1930 the French legal historian and romanist Raymond Monier (1900-1956) published a monograph, *La garantie contre les vices cachés dans la vente romaine*, in which he maintained that the *actio quanti minoris* did not stem from pre-classical or classical times, but that it was an invention of the Byzantine law schools of the sixth century. Accordingly, he considered the many texts in the *Corpus iuris* dealing with the *actio quanti minoris* to be interpolated. According to Monier also the second part of C.4.58.2 is spurious and thus he only preserved the first line, which included the words *post anni tempus fugisse*<sup>10</sup>. But what would the meaning of these words be if in the days of Gordian only the *actio redhibitoria*, which had to be brought within six months, was available<sup>11</sup>? Moreover, if the words *post anni tempus fugisse* are indeed part of the description of the case under consideration, the last line containing the words *vel quanto minoris anno* cannot be omitted<sup>12</sup>.

If we, by contrast, consider the text of C.4.58.2 not to be interpolated and the use of the *actio empti* for price reduction to be classical, it remains to be seen why the Emperor did not mention the *actio empti*. Some romanists identified a possible reason for this by reading C.4.58.2 in connection with Pap., D.21.1.55. One of the first scholars who compared the two texts was the German romanist August von Bechmann (1834-1907). Papinian († 212) stated in D.21.1.55 that, in case of a *servus fugitivus*, the period to bring the *actio redhibitoria* does not start to run from the time the sale was concluded or the merchandise was conveyed, but from the time the buyer could have discovered the defect.

<sup>9</sup> HAYMANN, *op. cit.* (*Die Haftung*), p.89ss.

<sup>10</sup> R.MONIER, *La garantie contre les vices cachés dans la vente romaine*, Paris 1930, p.183 and pp.187-188.

<sup>11</sup> See the review by F.HAYMANN of Monier’s book in ZSS Rom. Abt. 51 (1931), pp.474-482, esp. 481.

<sup>12</sup> See A.PEZZANA, *Classicità dell’ “actio aestimatoria”*, *Archivio Giuridico “Filippo Serafini”* 140 (1951), pp.53-71, esp. 69 and PRINGSHEIM, *op. cit.*, esp. 287 and note 228.

D.21.1.55 *Papinianus libro duodecimo responsorum*

*Cum sex menses utiles, quibus experiundi potestas fuit, redhibitoriae actioni praestantur, non videbitur potestatem experiundi habuisse, qui vitium fugitivi latens ignoravit: non idcirco tamen dissolutam ignorationem emptoris excusari oportebit.*

If this also holds good for the *actio quanti minoris*, the buyer would have no *annus continuus*, but an *annus utilis* to sue the seller. But according to Bechmann, this would be incompatible with the phrasing of C.4.58.2, which points in the direction of an *annus continuus*. Bechmann did not solve the contradiction. He presumed that the text of the rescript was probably incomplete<sup>13</sup>. Some scholars harmonized the two texts, e.g. by taking into account that the petitioner of the rescript, Petilius Maximus, did not maintain that he was unaware of the slave's inclination to flee before the latter actually ran away<sup>14</sup>. According to the majority view, however, the opinion of Papinian that there is *tempus utile* for the seller to bring a claim in view of latent defects was an isolated view which was not adopted by Gordian in C.4.58.2<sup>15</sup>. This would be confirmed by other sources, corroborating that it is from the moment the sale is concluded that the buyer has six months to bring the aedilician claim for rescission and one year to bring the aedilician claim for price reduction<sup>16</sup>. This brings us to a possible explanation as to why Emperor Gordian did not mention the *actio empti* in C.4.58.2. He was asked to pronounce upon a specific question, viz. whether the buyer could bring aedilician actions within *tempus continuum* or *tempus utile*. The latter was defended by Papinian, but Gordian decided not to follow this view. Thus, he did not pronounce upon the availability of the *actio empti* simply because it was not part of the problem presented to him. This view is sometimes substantiated by referring to the fact that the text is adopted in the Codex-title on the aedilician actions<sup>17</sup>, but this

<sup>13</sup> BECHMANN, *op.cit.*, Band III.2, p.143 note 2. cf. also p.217 note 3.

<sup>14</sup> PRINGSHEIM, *op. cit.*, p.287 note 228.

<sup>15</sup> G.IMPALLOMENI, *L'editto degli edili curuli*, Padova etc. 1955, esp. 223-230.

<sup>16</sup> These texts are: PS 2.17.5 (no indication for *tempus utilis*), § 39 of the Syro-Roman Law Book (rescission within six months - of a slave who ran away). *Tempus continuum* is not contrary to Gai. D.21.1.20 (the buyer can sue the seller on the basis of his *dictum* from the time the sale is concluded).

<sup>17</sup> U.MANTHE, *Zur Wandlung des sevus fugitivus*, TR 44 (1976), pp.133-146, esp. 137 note 22.



argument is relevant only to the meaning of the text in its Justinianic context<sup>18</sup>. This interpretation indeed explains why the *actio empti* was not brought up in the text, while, at the same time, it allows for the possibility of granting the *actio empti* for price reduction after the one-year period has lapsed.

An entirely different view was presented in more recent years: in cases of slaves running away after being sold and conveyed, all aedilician provisions would be applicable. Petilius Maximus, however, thought that after the lapse of the one-year period he could still bring an *actio empti*. This was denied by the rescript. In all litigation concerning the sale of defective goods, thus also beyond the jurisdiction of the *aediles*, the aedilician terms should be observed<sup>19</sup>. This is in fact the interpretation I had in mind when I stated above that there are no traces in the *Corpus iuris* indicating that the *actio empti* for price reduction cannot be used after the one-year period has elapsed, unless we should consider the text of Gord., C.4.58.2 itself as such.

#### 4. C.4.58.2 as a provision of the Justinian Codex

In the contemporary literature we do not find many attempts to understand C.4.58.2 in its Justinianic context, that is as a provision enshrined in the Codex-title on the aedilician actions and in coherence with other texts in the *Corpus iuris*, especially with the text of D.19.1.13.1, which says that the seller of a slave inclined to flee is liable for price reduction under the civil *actio empti*, and with Inst.4.12pr., which states that civil actions, such as the *actio empti*, are perpetual<sup>20</sup>.

<sup>18</sup> Cf. also M.MEMMER, *Der 'Schöne Kauf' des 'guten Sklaven'. Zum Sachmängelrecht im Syrisch-römische Rechtsbuch*, ZSS 107 (1990), pp.1-45, esp. 26.

<sup>19</sup> E.JAKAB, *Praedicere und cavere beim Marktkauf. Sachmängel im griechischen und römischen Recht* [Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte, 87], Munich 1997, p.217.

<sup>20</sup> According to Impallomeni, Justinian created a new rule of law by combining D.21.1.55 and C.4.58.2. The buyer has the competence to sue the seller from the moment he finds out that the slave has run away, but this running away should happen within six months or one year after the sale, otherwise he will not be entitled to bring the *actio redhibitoria* or the *actio quanti minoris*. See IMPALLOMENI, *op.cit.*, esp. 230.

However, interpreting the texts in their Justinianic context is in fact what was done in the civilian legal scholarship which, at the beginning of the twelfth century, emerged in Bologna when the *Corpus iuris* was taught again. One of the intricacies I referred to above, however, consists in the fact that what medieval jurists did was much more than just interpreting the texts in their Justinianic context. Most of the time they presented their views as nothing else but the correct interpretation of the *Corpus iuris*, but we have to remember that it was not the primary purpose of the glossators and commentators to describe accurately the law as Justinian meant it to be in the sixth century. Interpretation always took place in view of adopting the *Corpus iuris* as a living law. This often required that Roman law be adapted –if necessary, harmonized– to the socio-legal circumstances in order to make it acceptable and systematized. It is rather pointless to say that by so doing the medieval jurists did not understand the *Corpus iuris* or that their interpretation was incorrect, since it was not their primary purpose to produce correct interpretations. And yet what they did for the greater part was reading the texts in their mutual coherence and as provisions of one and the same consistent legislation. As regards our rescript, this means that they indeed discussed the problem as to why the *actio empti* was not mentioned in C.4.58.2. But at the same time we cannot understand their views without the right perspective, i.e. when we do not realize in which way they were developing rules of law for latent defects on the basis of the Roman casuistry.

This is not the place to present a full survey of the interpretation of C.4.58.2 from the earliest glossators until early modern times.<sup>21</sup> But I would like to focus attention on a certain discussion in the fourteenth and fifteenth centuries in which our rescript played a crucial role. This discussion started only after the Accursian Gloss came into existence, because in the Gloss the *actio empti* aimed at price reduction was presented as a separate remedy on the one hand, distinct from the aedilician *actio quanti minoris*, but, on the other, also distinct from

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<sup>21</sup> Literature: P.STEIN, *Medieval discussions of the buyer's actions for physical defects*, in: D.DAUBE (ed), *Studies in the Roman law of sale dedicated to the memory of Francis de Zulueta*, Oxford 1959, pp.102-111 and H.DILCHER, *Die Theorie der Leistungsstörungen bei Glossatoren, Kommentatoren und Kanonisten*, Frankfurt/M 1960.

the regular contractual *actio empti*. The Gloss termed this action *actio quanto minoris civilis*, while the aedilician action for price reduction was termed *actio quanto minoris praetoria*<sup>22</sup>. This was not just a matter of labelling the Roman remedies. There were important consequences for civil litigation according to the roman-canonical procedure. Since the twelfth century a separate *libellus* was drafted for the *actio quanti minoris civilis*, stating that the plaintiff was claiming the difference between the selling price and the *pretium singulare*, whereas the *libellus* for the *actio quanti minoris praetoria* mentioned the difference between the selling price and the *pretium commune*. This idea of two *actiones quanti minoris*, one of civil law and one of praetorian law, was not beyond dispute. It was rejected, for example, by the compilers of the *Siete Partidas*, who codified the Roman law of sale for the Kingdom of Castile approximately at the same time or just after Accursius taught in Bologna and composed his Ordinary Gloss<sup>23</sup>.

At the law school of Orleans, the text of C.4.58.2 began to play an important role in the discussion whether the Gloss was right or not to distinguish between the two *actiones quanti minoris*. It was Jacques de Révigny († 1296), who taught in his *Lectura* on the *Digestum Vetus* that the words *quanti minoris* were only an addition to the regular *actio empti*. In case the slave one had bought ran away during the first year, this is the remedy that could be used, which view he substantiated by referring to C.4.58.2. In this text the jurist –it is actually the Emperor who is meant– states that he cannot think of a possible remedy after one year has passed. Consequentially, as a principal rule the *actio empti* is perpetual, but when it is used to claim price reduction it is, obviously, temporal.

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<sup>22</sup> See the gloss *essem empturus* ad D.19.1.13pr.

<sup>23</sup> The *Partidas* adopted a remedy for price reduction only for the difference between the selling price and the actual price, thus taking the *pretium commune* as a premise: *tanta parte del precio, quanto fallassen en verdad, que valia menos por razon de la tacha, o de la enfermedad que era en ella* (Part.5.5.65). On the one hand, the gloss *que valia menos* ad Part.5.5.64 by Gregorio López de Tovar (ca. 1496-1560) states that this provision is derived from D.19.1.13pr. (*pretium singulare*), but the gloss *fallassen en verdad* ad Part.5.5.65 rejects the opinion that there is a civil and a praetorian *actio quanti minoris*. The gloss *que valia menos* ad Part.5.5.64 states that the *Partidas* incline to the opinion of Petrus and Cinus that there is only one *actio quanti minoris*.

Jacques de Révigny, *Lectura Digesti Veteris ad D.19.1.13*

*Non etiam dico quod sint due actiones, immo dico quod illa quam ipsi dicunt quanto minoris pretoriam, est adiectio actionis. Non dico quod una sit pretoria, alia ciuilis, immo semper competit actio ex empto cum hac adiectione quanto minoris primo anno. Et dicit iurisconsultus quod non animaduerto quod possit, ut C. de edic. e. l. ii (C.4.58.2), set non diceret sic aliqua competeret. Et si dicas quod ciuiles actiones sunt perpetue, uerum est regulariter, sed non hic. Et est ratio, quia ista actio ex empto cum adiectione quanti minoris est redibitoria ad solutionem contractus et eius iura<sup>24</sup>.*

A slightly different opinion was defended by another jurist from the Orleans school, Pierre de Belleperche († 1308). In two fragments in his *Lectura Codicis*, he rejected the idea that there would be two different remedies for price reduction. There is only one *actio quanto minoris*: not the civil one but the praetorian one. It has to be brought within one year, which would again follow from C.4.58.2. If the Emperor cannot think of a remedy available after one year, nobody can.

Pierre de Belleperche, *Lectura Codicis ad C. 4.49.9*

*Dicit glossa, scire debetis, est quanto minoris, ut ff. de edic. e. l. Quod si nolit § Si plures (D.21.1.31.5) et est effectus, quod pretoria est annalis. Est alia quanto minoris ciuilis et est perpetua, ut Inst. de perpe. act. in prin. (Inst.4.12.1). Credo quod non sit nisi una actio quanto minoris que usque ad annum competit tantum, ut infra de edil. act. l. ii in prin. (C.4.58.2), cum idem sit quanto minoris et quanto minoris, ut ff. ad l. fal. Precia (D.35.2.63)<sup>25</sup>.*

Pierre de Belleperche, *Lectura Codicis ad C.4.58.2*

*Breviter credo quod non est reperire nisi unam accionem quanto minoris. Per actionem ex eo contractu agitur quanto minoris, ut supra allegata Iul. (D.19.1.13pr). Set non reperio id est de ciuili. Probo hoc per legem istam. Imperator dicit non animaduerto quo remedio etc. Nullus potest animaduertere si princeps non potest, ut infra de test. l. Omnium (C.6.23.19)<sup>26</sup>.*

<sup>24</sup> Leiden, d'Ablaing 2, fol. 249vb.

<sup>25</sup> Firenze BML Plut 6 Sin 6, fol. 208ra and Cambridge, Peterhouse 34 (sheets without numbers).

<sup>26</sup> Firenze BML Plut 6 Sin 6, fol. 212ra and Cambridge, Peterhouse 34 (sheets without numbers).

The opinion of Pierre de Belleperche was adopted in the commentary of Cinus de Pistoia (1270-1336) on the Codex. Cinus was an early commentator who often referred to the teachings of Belleperche. The Emperor who had spoken in C.4.58.2, was described by him as ‘full of Jurisprudence and having the entire law in his mind.’ If he could not think of an action, who could? Surely nobody.

Cynus Pistoriensis, *ad C.4.58.2, n. 3*

*Aduertatis, glossa non dicit uerum secundum Petrus, quia non est reperire nisi unam actionem quanto minoris, ut dicta lege Iul. (D.19.1.13). Nec reperitur aliqua ciuile et quod sit uerum probatur per hanc legem. Vide enim quod imperator dicit hic, qua ratione post annum congrédi queas, non possum animaduertere. Si ergo princeps, legalis philosophiae plenus et qui omnia iura in pectore suo habet, non potest animaduertere, quis ille qui hoc uidet? Certe nullus<sup>27</sup>.*

Thus according to the Orleans jurists and Cinus de Pistoia, the text of C.4.58.2 demonstrates that the available action for price reduction with regard to a purchased slave who had run away, expires after one year. According to Jacques de Révigny, this action is the civil *actio empti*, which, as an exception to the principal rule that civil actions are perpetual, can be brought during the first year only. According to Pierre de Belleperche and Cinus, this is the aedilician action. Moreover, they taught that the action granted in D.19.1.13.1 should also be understood as such an aedilician action, and not as a civil *actio empti*.

These opinions were rejected by the majority of commentators. Bartolus de Saxoferrato (1313/14-1357), for example, a student of Cinus who studied and later taught in Perugia, considered the argument derived from C.4.58.2 not convincing. From the context of the Emperor’s statement it appears that he was consulted on the availability of the *actio quanti minoris praetoria*. He was not asked whether an action was available in general.

Bartolus, *ad D.19.1.13pr., n. 1*

*(...) non obstat l. ii C. de edil. edic. (C.4.58.2), quia ut apparet in materia in qua posita est illa lex, ibi querebatur utrum possent agi*

<sup>27</sup> Cynus PISTORIENSIS, In *Codicem et aliquot titulos primi Pandectarum tomi, id est, Digesti veteris doctissima commentaria* I, Frankfurt 1578 (reprint Turin 1963), fol. 272rb.

*quanto minoris pretoria et imperator respondet non animaduerto etc. et non fuit quesitum in genere utrum agere posset*<sup>28</sup>.

A similar view can be found in the treatise *De actione et eius natura* of the Padua professor Battista da Sanbiagio (ca. 1425-1492). The Emperor was only asked whether the praetorian action for price reduction was available. The entire title C.4.58 deals with aedilician actions. Accordingly, so does C.4.58.2. One should understand this text as referring solely to the praetorian action. It does not say anything about the civil action. Furthermore, in case of doubt we should abide by the rule that the words of the title (*rubrum*) are determined by the texts adopted under the title (*nigrum*).

Battista da Sanbiagio, *Tractatus de actione et eius natura*, Vigesima prima actio, n. 45

*Ad dictam legem ii. C. de edil. act. (C.4.58.2) respondetur quod imperator ibi non fuit interrogatus nisi utrum competeret aliqua actio pretoria et si interrogatus fuisset de civili respondisset imperator eam perpetuo competere. Et ego hoc probo ratione illius rub. C. de edil. act. que loquitur de edilitiis actionibus tantum et sic de propriis. Vnde et lex illa de qua in dicta lege ii. eodem titulo debet intelligi, quod loquatur de pretoria tantum et quod nihil dicat uel tractet de civili redhibitoria arg. l. Imperatores ff. de in diem adiect. (D.18.2.16) et quod notat glossa in c. Bone de confirma. uti. uel inutil. (X 2.30.3), que dicit in dubio tenendum est quod nigrum disponat, id quod rubrum.*<sup>29</sup>.

### 5. Conclusions

In summary, we can say that hardly any interpretation is convincing when we attempt to bring C.4.58.2 in conformity with other texts in the *Corpus iuris*. When we take the text as genuine and accept that the *actio empti* was already applied for price reduction in the classical time and that it was perpetual, there is only one plausible explanation as to why the Emperor did not mention the *actio empti*. The question presented to him was not whether an action was available, but whether the *actio quanti minoris* had to be brought

<sup>28</sup> BARTOLUS, *Commentaria* II, Venice 1526 (reprint Rome 1996), fol. 118vab.

<sup>29</sup> BAPTISTA A SANCTO BLASIO, *Tractatus utilissimus solemnissimusque de actione et eius natura*, in *Volumen V Tractatum ex variis iuris interpretibus collectorem*, Lyons 1549, fol. 62vb.

within *tempus continuum* or *tempus utile*. But then again, it is a mystery why this question was actually problematic, since there was still the *actio empti* which could be used.

For Justinianic law it is more or less the same problem that has to be solved, but a harmonizing interpretation is almost impossible without violating the simple grammatical significance of the texts, e.g. by assuming the action mentioned in D.19.1.13 not to be the perpetual *actio empti*, but the temporal aedilician action, or the use of the *actio empti* for price reduction to be restricted in time in accordance with the aedilician terms. But, as was demonstrated above, the medieval jurists did not have any scruples about reading the *Corpus iuris* in such a way. Although they presented their views as an interpretation of Justinianic law, they were actually developing new legal dogmatics. The lack of clarity regarding how to read C.4.58.2 continued to exist after reception of Roman law had taken place. This explains why, on the one hand, we find in early modern times a minority view maintaining that the action for price reduction only expires after thirty years, and, on the other, a majority view stating that the *actio empti* can no longer be used for latent defects as soon as the aedilician actions have come to an end.<sup>30</sup> That eventually the latter opinion came to prevail and that we are nowadays familiar with the rule that remedies for latent defects must be brought within a reasonable period of time is obviously not the result of a clear and authoritative Roman doctrine. We owe it rather to the rational insight of those who interpreted the Roman sources and those who drafted the Codes of our civil law.

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<sup>30</sup> For a survey of the opinions the early-modern scholars see: C.F.VON GLÜCK, *Ausführliche Erläuterungen der Pandecten nach Hellfeld: Ein Commentar*, Bd. 20, Erlangen 1868, p.153 note 87 and p.154 note 89.