

# PROBLEMS CONCERNING *LAUDATIO AUCTORIS* AND *DENUNTIATIO LITIS* MADE BY THE BUYER IN CLASSICAL ROMAN LAW

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1. What the buyer of a thing had to do vis-à-vis the seller when a *rei vindicatio* or a comparable real action was instituted against the buyer for the thing bought,<sup>1</sup> has not been the object of much Romanistic research since Girard's studies of 1923.<sup>2</sup> Concerning pre-classical Roman law, there is an instructive passage in Kaser's monograph on ownership and possession;<sup>3</sup> Vincenti wrote a short paper on the relevant post-classical law;<sup>4</sup> and there are only a few other more recent pages on the buyer's duty in classical Roman law to inform the seller in the case of impending eviction.<sup>5</sup> Nevertheless, it is an interesting topic concerning which an important number of texts of classical Roman lawyers, and imperial constitutions from Alexander Severus to Diocletian may be studied.

In this contribution to the studies in honour of my very dear friend Laurens Winkel, who in so many publications has enhanced our knowledge and understanding of numerous topics in Roman law and legal history, I shall investigate only a select

1 E.g. *actio Publiciana*, *vindicatio usus fructus*, *actio Serviana*, *vindicatio in libertatem*. In this study, we assume that a claim of ownership was instituted against the purchaser when there are no indications of another action.

2 See P.F. Girard *Mélanges de Droit Romain*, II, Droit privé et procédure (Paris, 1923) 93, 179, 205, 207, 209, 277.

3 See M. Kaser *Eigentum und Besitz im älteren römischen Recht* (2 ed. Cologne-Graz, 1956) 59-68.

4 U. Vincenti 'Gli effetti della *denuntiatio litis* nel processo di rivendica tardo imperiale' in *Atti dell'Accademia Romanistica Costantiniana (AARC)* IX Convegno internazionale (Napoli, 1993) 365-373.

5 See M. Lemosse 'La mise en cause judiciaire de l'*auctor*' in *Labeo* 30 (1984) 169-170 = Lemosse, *Etudes Romanistiques* (Clermont Ferrand, 1991) 431-432 and Vincenti (n. 4) 366 who also regrets at 365 "la carenza sul punto della precedente letteratura". The excellent work of Rafael Brägger, *Actio auctoritatis*, thesis Zürich 2011 [Freiburger Rechtsgeschichtliche Abhandlungen, N.F. Band 67] (Berlin, 2012) was published after completion of this study. This book contains a passage of twelve pages about the duty of *litis denuntiatio* of the buyer of a mancipiated thing to the seller; cf. par. 2 below.

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number of these texts<sup>6</sup> and address some problems concerning *laudatio auctoris* and *denuntiandi necessitas*. I shall examine some problems concerning the duty of the buyer, against whom an ownership procedure had been initiated, to inform the seller of pending eviction in three different situations: when a *res mancipi* had been mancipated to him, when a stipulation for eviction (such as the *stipulatio duplae*) had been made, and when the parties had concluded a consensual contract of *emptio venditio*.

2. As indicated, three different situations could present themselves: the seller could mancipate to the purchaser the thing sold if it was a *res mancipi*; the seller could by a *stipulatio* promise the buyer a sum of money, for example the *duplum pretium*, in the event of loss of the *habere licere* of the thing as a consequence of eviction; and the parties could conclude a consensual contract of *emptio venditio*. As will be shown, in all three situations the buyer was obliged to inform the seller if a *rei vindicatio* had been instituted against him. There were, however, differences regarding the seller's obligations and the consequences of the purchaser's failure to inform the seller. It is therefore necessary to examine the three situations separately. I shall discuss problems related to the buyer's duty to notify the seller in these situations in the following order: *mancipatio*, *stipulatio duplae* and consensual sale.

Brägger's work, which appeared after completion of this article, contains important information on the buyer's duty of *denuntiatio* in the case of *mancipatio*,<sup>7</sup> but I have decided to maintain my text and limit my discussion of this important Swiss thesis to the footnotes.

3. To fulfil his obligation of *auctoritas* the seller *mancipio dans* had to assist the buyer *mancipio accipiens* in the real procedure started against him and had to secure a favourable outcome.<sup>8</sup> The seller could also defend the buyer as his *cognitor* or *procurator in rem suam*<sup>9</sup> in this procedure and he could be absolved, or condemned to pay the *litis aestimatio*.<sup>10</sup> If he failed to assist or defend the buyer or if this assistance was unsuccessful, the buyer could institute the *actio de auctoritate* against him for double the purchase price. Imperial constitutions of the first half of the third century<sup>11</sup> confirm that *mancipatio* was then still in use, especially for *fundī italici*.

6 The study of all the relevant texts would make this paper too long.

7 Brägger (n. 5) 81-93.

8 See on the duty of *auctoritas* and on the *actio de auctoritate*, my article 'Problemi concernenti l'evizione del compratore nel diritto romano classico' in L. Vacca (ed.) *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica* (Milano, 1991) II, 605-609 = my *Extravagantes Scritti sparsi sul diritto romano* ed. J.E. Spruit (Napoli, 2007) 203-207. See for a detailed, clear and instructive discussion of the duty of *auctoritas* and the contents of the *actio auctoritatis*, Brägger (n. 5) 40-161, 162-174.

9 The seller who acted as a *cognitor* was appointed by the buyer in formal words, in the presence of the plaintiff. The *cognitor* was eliminated in Justinianic law. See on the *cognitor* and the *procurator* as a procedural representative in classical law, M. Kaser and K. Hackl *Das römische Zivilprozeßrecht* (München, 1996) 209-213. See for a discussion of the cases in which the seller *mancipio dans* acted as a *cognitor* or as a *procurator in rem suam*, Brägger (n. 5) 122-127.

10 In the last-mentioned case, the seller had to pay the *litis aestimatio* and in this way he prevented the buyer from bringing the *actio auctoritatis* against him for the *duplum pretium*.

11 See, e.g., the rescripts of Alexander Severus of A.D. 224 (C. 5.44.2) and of Gordian of A.D. 230 (C. 8.44.14) examined below in the text.

If, after the *mancipatio* and the *traditio* of the sold *res mancipi*, a *rei vindicatio* was instituted against the purchaser, he immediately had to contact the seller *mancipio dans*, often called *auctor*. In the original texts on the topic, the technical term “*laudare auctorem*” was used. According to Aulus Gellius,<sup>12</sup> in pre-classical texts these words meant that the possessor divulged to the vindicating plaintiff the name of the person from whom he had acquired the claimed thing.<sup>13</sup> In the classical period the words had a different meaning.<sup>14</sup> My provisional translation is: “to call on the seller to perform his obligation of *auctoritas*”. A survey follows of the texts in which *laudare auctorem* has this technical meaning, with brief explanatory remarks in the notes.

I found two texts of Pomponius and Modestinus:

D. 19.1.6.5 Pomponius *l.9 ad Sabinum*

Si tibi iter vendidero, ita demum auctorem me laudare poteris, si tuus fuerit fundus, cui adquirere servitutem volueris: iniquum est enim me teneri, si propter hoc adquirere servitutem non potueris, quia dominus vicini fundi non fueris.<sup>15</sup>

D. 21.2.63.1 Modestinus *l.5 responsorum*

Gaia Seia fundum a Lucio Titio emerat et quaestione mota fisci nomine auctorem laudaverat et evictione secuta fundus ablatus et fisco adiudicatus est venditore praesente: quaeritur, cum emptrix non provocaverat, an venditorem poterit convenire. Herennius Modestinus respondit sive quod alienus fuit cum veniret sive quod tunc obligatus evictus est, nihil proponi, cur emptrici adversus venditorem actio non competit.<sup>16</sup>

12 *Noctes Atticae* 2,16,1: *Laudare significat prisca lingua nominare appellareque. Sic in actionibus civilibus auctor laudari dicitur, quod est nominari.*

13 Cf. Kaser (n. 3) 61. According to Brägger (n. 5) 81-85, this was also the meaning of *laudare* in sources of the classical period. In the light of Gellius’ words *prisca lingua*, which suggest that in his time the meaning of *laudare* was different, this seems improbable to me.

14 See, for an explanation of this “Bedeutungswandel” of *laudare*, Kaser (n. 3) 62.

15 Pomponius decided that the buyer to whom a servitude of way was mancipated was not entitled to *laudare auctorem* if he could not acquire the servitude because he was not the owner of a *fundus vicinus*. It was difficult to find the case in which this decision was given. My friend Eric Pool (Amsterdam) with whom I had a conversation about this text proposed the following: After A’s sale and mancipation of the servitude of right of way to B for the benefit of a neighbouring *fundus* of which B was not the owner, C instituted the *rei vindicatio* against B with regard to this *fundus*. In this procedure, B pretended that he had acquired a servitude of *iter* for the claimed piece of land and that he had paid the purchase price to A, whom he wanted to include in the procedure as his *auctor*. In this way he wanted to prove that he had made *impensa utiles* for the land. Pomponius gave a negative decision on this. See, for another interpretation of this text, Brägger (n. 5) 87-88; this author, too, is of the opinion that Pomponius’ text is related to the duty of *auctoritas*.

16 My interpretation of this text is the following: Lucius Titius sold land that he had mancipated to Gaia Seia and transferred possession to her; the *fiscus* started a real procedure against Seia, who called on Lucius Titius to appear in the procedure. Titius was present but unsuccessful and the land was adjudicated to the imperial treasury. Seia could institute the *actio de auctoritate* against Titius, since she had made the *laudatio auctoris* timeously. According to Modestinus, she would not forfeit the *actio de auctoritate* because she had not appealed against the sentence. See on this text briefly Brägger (n. 5) 32.

I further found three rescripts of the emperors Alexander Severus and Gordian:

C. 8.44.7 Alexander Hilariano (A.D. 222)

Auctore laudato si evicta res est, fideiussorem, etiamsi agi causam ignoraverit conveniri [evictionis] <auctoritatis> nomine posse non ambiguitur.<sup>17</sup>

C. 5.44.2.1 Alexander Euaristo (A.D. 224)

Respicere autem debes officium, in quo te esse tutorem dicis, ne ob eiusmodi petitionem evictione secuta ultra pretii quantitatem auctoris heredem pupillum tuum oneres, qui laudatus per te defendi debeat, cum aut compensationis rationem habere aut contrario tutelae iudicio experiri possis.<sup>18</sup>

C. 8.44.14 Gordianus Secundino (A.D. 239)

Sive possessio venditoris fuit, filius eiusdemque [read: eius idemque] patris heres frustra quaestionem movet, sive non patris, sed filii eius possessio fuit de qua iure hereditario auctor laudari potest, controversiam movere non potest.<sup>19</sup>

Having studied these texts I can pinpoint the meaning of the expression “laudare auctorem” more accurately and be more precise about the purchaser’s duty to call on the seller to perform his obligation of *auctoritas*. As soon as the lawsuit<sup>20</sup> against the buyer had started, he had to call on the seller *mancipio dans* to appear in those proceedings, about which he was obliged to inform him,<sup>21</sup> so that the *auctor* could assist or defend him. This

17 There had been a *mancipatio* and a *traditio* of the thing sold to the buyer, and the seller had granted a *fideiussor* for his *obligatio auctoritatis*. The *rei vindicatio* had been instituted against the purchaser, who had called on the seller to appear in the ownership procedure. In spite of the *auctor*’s assistance, the buyer was condemned. According to the chancery, it is certain that the buyer can sue the surety if the *laudatio auctoris* had been made, even if the surety did not know that a real procedure had taken place. The evicted buyer can institute an action against the surety (as against the seller) only if he had called on the seller to be present in the real procedure.

18 In this complicated text, which cannot be interpreted fully here, the imperial chancery addressed itself to the tutor of a *pupillus* who had become his father’s heir. The father had made a *mancipatio* and a *traditio* to the buyer of a piece of land. The tutor pretended that he was the co-owner for half the land. He wished to bring a *vindicatio pro parte* against the buyer. The rescript emphasises that in that lawsuit the young son as his father’s heir, after having been called on to appear, had to be represented by the tutor who would give his assistance to the buyer. To prevent a conflict of interests the rescript declared in § 2 that in that case special *curatores* had to be appointed to represent the *pupillus*. It is interesting to note that the chancery took it for granted that in the case of eviction the *auctor*’s heir had to pay *ultra pretii quantitatem*. This is an indication that the sold land had been mancipated.

19 A *possessio* (an immovable property) was mancipated and transferred to a buyer. The seller died and his son became his heir. If the land belonged to the seller, the son would be unsuccessful when he instituted a *rei vindicatio* against the buyer. If the *fundus* belonged to the son and he instituted a *rei vindicatio* against the buyer, an *exceptio doli* could be raised against him, since, as the seller’s heir, he could be called on to perform *auctoritas*.

20 As the obligation of the *auctor* was to assist or to defend the purchaser during the whole real procedure directed against him, the purchaser had to notify the seller immediately after the beginning of the procedure.

21 Kaser (n. 3) 61 speaks in this context of “die Streitverkündigung und Aufforderung an den Gewährsmann”.

was not an *in ius vocatio*.<sup>22</sup> The legal consequences of non-appearance were completely different for an *auctor laudatus* and an *in ius vocatus*. If a summonsed defendant did not appear, *missio in bona* and *venditio bonorum* could take place according to classical law.<sup>23</sup> If the *auctor* remained inactive in spite of a *laudatio*, the sanction was that the *actio de auctoritate* could be instituted against him.

In addition to the technical expression *laudare auctorem* the Roman lawyers used several other expressions with roughly the same meaning. The following expressions are used in the original context of the sale of a mancipitated thing: *venditorem convenire*,<sup>24</sup> *a venditore postulare*,<sup>25</sup> *ex causa <auctoritatis> intendere*<sup>26</sup> and *interpellare venditorem sive successores eius, ut ... adsistant*.<sup>27</sup>

The verb *denuntiare*, instead of *laudare*, is used rather frequently in texts that originally discussed a real procedure instituted against the buyer of a mancipitated thing. *Denuntiare* is the term generally used in relation to the *actio ex stipulatu* based on a *stipulatio duplae*, and to the *actio empti* in case of eviction, to denote the buyer's notification to the seller that the real procedure has been initiated against him. In the texts that originally dealt with the *actio de auctoritate* we find two types of expressions concerning *denuntiare*. The first is *auctori* (or *venditori*) *denuntiare aliquid*,<sup>28</sup> which is good Latin; the second is *venditorem denuntiare* used for *venditorem laudare*,<sup>29</sup> which is bad Latin. That is why Girard and Kaser<sup>30</sup> believe that the original texts concerning the seller's duty of *auctoritas*, with expressions containing the term *denuntiare*, were interpolated. Of course, this is a possibility. However, I consider it more likely that the classical lawyers already used both expressions containing the term *denuntiare* in the sense of "to call on" or "to inform the seller" in this context.

The precise meaning of *laudare* or *denuntiare auctorem* and the other related expressions mentioned above is "to inform the seller about the real procedure initiated

22 This is also argued by Kaser (n. 3) 62-63, by Lemosse (n. 5) 165 and by Brägger (n. 5) 92-93 and 134.

23 See Kaser-Hackl (n. 9) 222.

24 See Venuleius D. 45.1.139: *venditoris heredes in solidum conveniendi sunt*; Africanus D. 21.2.46pr.: *posse me venditorem te [de evictione] <de auctoritate> convenire* (cf. on this text, Girard (n. 2) 187, 198, 209); Paul D. 21.2.42: *vendor non potest [de evictione] <de auctoritate> conveniri* (cf. on this text, Girard (n. 2) 252, note 1).

25 See Julian D. 3.3.75: *postulabat a venditore fundi ut ab eo defendetur* (cf. on this text, my article 'Der Verkäufer als *cognitor* und als *procurator* in rem suam im römischen Evikitionsprozeß der klassischen Zeit' in D. Nörr and Sh. Nishimura (eds.) *Mandatum und Verwandtes. Beiträge zum römischen und modernen Recht* (Berlin, 1993) 294-296).

26 See Paul D. 45.1.85pr.: *cum ex causa [evictionis] <auctoritatis> intendimus*.

27 Diocletian and Maximian C. 8.44.21.1 (A.D. 293): *interpellare venditorem sive successores eius debes, ut tibi adsistant*.

28 See Celsus D. 21.2.62.1: *omnibusque (scil. heredibus venditoris) denuntiari et omnes defendere debent*; Paul D. 21.2.53.1: *auctori denuntiare*; and Alexander Severus C. 8.44.8: *auctori denuntiare*.

29 See Ulpian D. 21.2.51.1: *Titius (scil. vendor) denuntiari non potuisset*; Paul. D. 5.1.49: *vendor ab emptore denuntiatus, ut eum [evictionis] <auctoritatis> nomine defendetur*; and Paul. D. 45.1.85.5: *auctoris heredes in solidum denuntiandi sunt*. See, for my interpretation of D. 5.1.49, Ankum (n. 25) 298-299.

30 See Girard (n. 2) 276, note 1 and 277, note 1; and Kaser (n. 3) 62.

against him (the purchaser) and to call on the seller to appear in this procedure<sup>31</sup> and to fulfil his duty of *auctoritas* by assisting or defending the purchaser”.

The important question is what happens if the purchaser fails to do the *laudatio* or the *denuntiatio*? There are two possibilities. If the buyer is victorious in the proceedings initiated against him without help from the seller, he may wish to bring the *actio de auctoritate* against the seller because of his failure to assist him. If the purchaser loses the case and is evicted from the thing he bought, he may also wish to institute this action against the seller. In both instances failure to inform the seller will prevent him from instituting the *actio de auctoritate* against the seller. The wording of the *formula* of this action led to this result. It probably read: *Si paret Nm.Nm. Ao.Ao. rem mancipio dedisse et auctoritatem defugisse vel Am.Am. in rei vindicatione sine dolo malo eius (scil. Ai.Ai.) victim esse, quanti ea res mancipio data est, tanta pecunia duplex iudex Nm.Nm. Ao.Ao. condemnato, si non paret absolvito.*<sup>32</sup> Where *denuntiatio* was absent there was clearly no question of *auctoritatem defugisse*, since the seller had not been informed about the real procedure and there was no eviction *sine dolo malo* of the buyer, since he had failed to request the seller’s assistance. This reasoning for the *stipulatio auctoritatis* (or *secundum mancipium*) is apparent in Paul D. 21.2.53.1.<sup>33</sup> This text is applicable here, because the *obligatio auctoritatis* based on this *stipulatio* was identical to that based on a *mancipatio*. Paul decided<sup>34</sup> that the buyer who could have made the *denuntiatio litis* to his *auctor*, but had failed to do so, was considered to have lost the real lawsuit *dolo malo* and was therefore not entitled to sue the seller. The thesis that the buyer’s failure to make the *denuntiatio* to the seller *mancipio dans* made it impossible for him to institute the *actio de auctoritate*, is further confirmed by the constitution of Alexander Severus of A.D. 222 incorporated in C. 8.44.8<sup>35</sup> which reads: *Emptor fundi, nisi auctori aut heredi eius denuntiaverit, evicto praedio neque [ex stipulatu] <de auctoritate> neque ex dupla neque ex empto actionem contra venditorem vel fideiussores eius habet.*

My conclusion is that the purchaser *mancipio accipiens* was obliged to inform the seller *mancipio dans* of the real procedure that had been initiated against him. If he failed to call on him to appear in this procedure or inform him about the procedure, he forfeited the right to institute the *actio de auctoritate* against the seller.

31 The *denuntiatio* could be made in an informal way, viz. orally or by letter; cf. Brägger (n. 5) 92.

32 In earlier publications I wrote erroneously: *vel Am.Am. in rei vindicatione victim esse sine dolo malo Ni.Ni.*; see H. Ankum ‘Alla ricerca della *repromissio* e della *satisdatio secundum mancipium*’ in *AARC* IV Convegno internazionale (Perugia, 1981) 782, note 135 = Ankum, *Extravagantes*, 44, note 135. See for a correction Ankum ‘Noch einmal: die *repromissio* und die *satisdatio secundum mancipium* im klassischen römischen Recht’ in *Festschrift für Christoph Krampe* (Berlin, 2013) 14, note 9.

33 Paul D. 21.2.53.1: *Si cum possit emptor auctori denuntiare, non denuntiasset, hoc ipso videtur dolo fecisse et ex stipulatu agere non potest.*

34 See the exegesis of this text in my study: ‘Noch einmal: die *repromissio* und die *satisdatio secundum mancipium*’ (n. 32) 25-26.

35 This text was mentioned in note 28. For a recent interpretation see Brägger (n. 5) 85-86 who holds that the problems of understanding the text are solved, “wenn man unter *ex dupla* das mit der *actio auctoritatis* zu erlangende Kaufpreisduplum versteht”. My slightly different reconstruction of the rescript of Alexander Severus seems more probable to me.

4. It is interesting to compare the position of the purchaser *mancipio accipiens* with that of the purchaser who – as a *stipulator* – made a stipulation against eviction.<sup>36</sup> Such a stipulation could be made in respect of *res nec mancipi* and *res mancipi*. The stipulation most frequently made, and nearly always in regard to slaves, was the *stipulatio duplae*. The effect of the *stipulatio duplae* differed from that in a *mancipatio*. If the *rei vindicatio* or a comparable real action had been adjudicated (in the *pronuntiatio* or the final sentence) and the buyer had lost the *habere licere*<sup>37</sup> of the thing as a result, the seller who had made a *promissio duplae* had to pay the buyer double the purchase price. In the context of this article, it is important to note that the seller *promissor* had no obligation to assist or defend the buyer in the real procedure. He had the right but not the duty to do so.<sup>38</sup> He could await the end of this procedure and if the *rei vindicatio* against the purchaser was dismissed, pay nothing. If, however, the action succeeded, he had to pay double the purchase price.

Many contracts of sale (nearly always of slaves), containing a combined stipulation against latent defects and eviction, have been conserved in the documents of practice. In this stipulation, the seller promised the buyer that the thing sold (slave) had no latent defects and that if it proved to have such defects he would pay him *id quod interest*. He promised further that in case of loss of the *habere licere* of the thing through eviction he would pay *duplum pretium*. This composite stipulation was called *stipulatio duplae*, though this term is only precise in respect of eviction. In this paper, to prevent misunderstandings, we reserve the term *stipulatio duplae* for the stipulation that related to eviction only, and “combined *stipulatio*” for the two-fold stipulation. Important examples of documents of the first or second century A.D. containing a combined *stipulatio* or a *stipulatio duplae* are TPSulp,<sup>39</sup> 42-44 = TPN<sup>40</sup> 83-85, TH 59-62,<sup>41</sup> FIRA III, nrs. 87-90 and 132-133, and P. Turner 22.<sup>42</sup>

The edict of the *aediles curules* contained the text of a model of the combined *stipulatio*<sup>43</sup> at the end of the part entitled *de mancipiis vendundis* concerning the contracts

36 See on the *stipulationes de evicione* Ankum (n. 8) ‘Problemi concernenti l’evicione del compratore’ 609-612 = *Extravagantes*, 207-210 and Th. Finkenauer *Vererblichkeit und Drittewirkungen der Stipulation im klassischen römischen Recht* (Tübingen, 2010) 50-94.

37 The jurists were of the opinion that there was loss of the *habere licere* if the buyer had surrendered the purchased thing or had paid the *litis aestimatio*: cf. Ulpian D. 21.2.21.2. On this text see Finkenauer (n. 36) 80-82.

38 Like the buyer *mancipio accipiens*, the buyer who had been the *stipulator* of a *stipulatio duplae* could appoint the seller as his *cognitor* or *procurator in rem suam*; cf. *supra* par. 3.

39 Giuseppe Camodeca *Tabulae Pompeianae Sulpiciorum* (TPSulp.). *Edizione critica dell’archivio puteolano dei Sulpicii* (Roma, 1999).

40 Josef Georg Wolf *Neue Rechtsurkunden aus Pompeji, Tabulae Pompeianae Novae*. Lateinisch und deutsch. Herausgegeben, eingeleitet und übersetzt (Darmstadt, 2010).

41 Giuseppe Camodeca ‘*Tabulae Herculaneenses*: riedizione delle *emptiones* di schiavi (TH 59-62)’ in U. Manthe and Chr. Krampe (eds.) *Quaestiones Iuris, Festschrift J.G. Wolf* (Berlin, 2000) 53-76.

42 Text edited by D. Hagedorn in P. Turner (London, 1981) 107-113.

43 See O. Lenel *Das Edictum Perpetuum* (3 ed. Leipzig, 1927) 567-568.

of *emptio venditio* of slaves on the market in Rome.<sup>44</sup> It is notable that several texts containing a *stipulatio duplae* as the second part of a combined stipulation did not include a complete wording but only a reference to the model incorporated in the edict of the *aediles*. These texts of the first century A.D. are TH 60 (before A.D. 63/64), TH 62 (A.D. 47); TPSulp 42 = TPN 83 (probably A.D. 47), TPSulp 43 = TPN 84 (A.D. 38) and TPSulp 44 = TPN 85. In TH 60, for example, the seller promises *duplam pecuniam ex formula edicti aedilium curulum, ita uti adsolet, quae hoc anno de mancipiis emundis vendundis cauta comprehensa est, dari* ... .

During the first half of the second century A.D., there was a rather simple solution if the parties did not want the seller to be liable for eviction: they could choose not to make a *stipulatio duplae*. When Pomponius and Julian recognised the possibility of the *actio empti* for damages in the event of eviction,<sup>45</sup> the parties to the contract of *emptio venditio* had to agree that the seller would not be liable in such a case.

The possibility of eliminating the seller's liability on the grounds of the combined stipulation should be analysed against the backdrop of recent academic discussions of the contents of the *aediles curules*' edict on the sale of slaves at the market in Rome. I agree with Berthold Kupisch, who harmonised two *prima facie* conflicting texts of Ulpian, D. 21.2.37.1<sup>46</sup> and D. 2.14.31<sup>47</sup> in a recent article on latent defects.<sup>48</sup> He formulated three possibilities for the parties to a contract of sale at the market in Rome: They could completely exclude the seller's liability for latent defects (*simplaria venditio*: cf. Pomponius D. 21.1.48.8), (which influenced the price). Or they could decide not to give a guarantee against defects, in which case the *actio redhibitoria* and the *actio quanti minoris* were applicable (the terms of these actions being respectively two and six months). Finally, they could conclude a stipulation that gave the buyer a claim for *id quod interest* where a guarantee against defects was given – a solution strongly recommended by the *aediles*; in that case, the buyer also had the right to restitution of the thing or diminution of the price within six months or a year. If this is correct concerning the first part (with regard to latent defects) of the combined stipulation as contained in the *aediles*' edict, the question remains what they could do in relation to the second part (on eviction) of the combined stipulation.<sup>49</sup> If the parties wanted to exclude the *stipulatio duplae* against eviction, they could make use of the first two possibilities mentioned for the first part of the combined stipulation. However, if they made use of the third

44 Camodeca (n. 39) 115 justly emphasises that the dispositions of this edict were in force in the whole of Italy.

45 On the role of these jurists in the field of the seller's liability for eviction, see *infra* par. 5.

46 D. 21.2.37.1: *Per edictum aedilium curulum etiam de servo cavere venditor iubetur*. According to Kupisch in a letter of 4 November 2002, referring to the lexicons of Georges and Lewis and Short, the word *iubere* did not create a *must*, but expressed a (strong) *wish* in this part of the edict of the *aediles*.

47 D. 2.14.31: *Pacisci contra edictum aedilium omnimodo licet, sive in ipso negotio venditionis gerendo convenisset, sive postea*.

48 B. Kupisch 'Römische Sachmängelhaftung: ein Beispiel für die ökonomische Analyse des Rechts' in *TR* 70 (2002) 21-54; cf. also the clear summary by Knütel in Max Kaser and Rolf Knütel *Römisches Privatrecht* (20 ed. München, 2014) 255-256 (Rz. 43).

49 There is no reference in Kupisch (n. 48) to the part relating to eviction in the combined stipulation found in the *aediles*' edict.

possibility and concluded the combined stipulation, the seller had to pay the buyer's interest in case of defects and the *dupla pecunia* in case of eviction.

We now turn to the role and the effect of the *denuntiatio* in cases where the parties to a contract of sale had made a *stipulatio duplae*. First, the clause *sine denuntiacione* appears in only four contracts of sale of a slave.<sup>50</sup> These texts are: TPSulp 42 = TPN 83<sup>51</sup> (probably of A.D. 26); P. Turner 22<sup>52</sup> of A.D. 142; FIRA III, nr. 133<sup>53</sup> of A.D. 151; and FIRA III, nr. 132<sup>54</sup> of A.D. 166. In these documents the seller, who guaranteed the absence of latent defects, promised to pay the buyer the *duplum pretium* if the latter lost the *habere licere* through eviction, even if the seller had not been informed, by means of a *denuntiatio*, of the real action instituted against the purchaser. The fact that a waiver of the required notification to the seller was and had to be expressly formulated is a decisive argument for the existence of this duty of the purchaser, which has never been mentioned in our documents.<sup>55</sup>

Together with Lenel,<sup>56</sup> Kaser<sup>57</sup> and Finkenauer<sup>58</sup> I suppose that the model of the combined stipulation at the end of the *aediles curules'* edict contained a clause relating to the buyer's *denuntiatio* of the seller.<sup>59</sup> Several texts of classical jurists may be invoked

50 On the texts containing this clause, see Camodeca (n. 41) 63.

51 On this text, see Camodeca (n. 39) 117. As we have seen, the parties in this text refer for the wording of the *stipulatio duplae* to the model of the combined *stipulatio* in the edict of the *aediles curules*. The seller promises duly to pay the *dupla pecunia ita uti adsolet sine denuntiacione*. As may be seen in the other documents of sale from Herculaneum and Pompei, the words *ita uti adsolet* are related to the promise of the double purchase price and not to the rather unusual clause *sine denuntiacione*. Wolf's translation of the quoted passage: "daß der Kaufpreis, wie es das Formular vorsieht und so, wie üblich ohne Anzeige, in gehöriger Weise gezahlt wird" (n. 40 at 121) is therefore not correct.

52 This Greek text, which is in accordance with Roman law, relates to the sale of a slave girl aged ten, concluded in Side in Pamphylia; the relevant sentence runs as follows: "ἔὰν δέ ... ἐπαφῇ αὐτοῦ ἡ ἔκ μέρους γένηται καὶ ἔγνεικηθῇ, τότε διπλῆν τὴν τιμὴν χωρὶς παραγγελίας καλῶς δοθῆναι ..." (if a claim for the girl or for part of the girl is instituted and eviction follows, then twice the price will be duly paid). See on the meaning of "a claim to the slave by a third party" (246) J. Urbanik 'P. Cairo Masp. I 67120 recto and the liability for latent defects in the late antique slave sales. Or back to Epape' in *JJP* 40 (2010) 210-247.

53 This is a Roman contract of sale of a twelve-year-old slave girl written in Greek, also from Side in Pamphylia. The wording of the relevant passage is nearly identical to that of P. Turner 22 (n. 42) of A.D. 142.

54 This document concerns the contract of sale of a seven-year-old slave, the parties to which were a sailor and an *optio* of a ship belonging to the fleet of Misene. The sale took place in Seleucia of Pieria (the harbour of Antioche in Syria). After a guarantee, in accordance with the *aediles'* edict, of the slave's health, the seller promises: *si quis eum puerum partemve quam quis eius evicerit, simplam pecuniam sine denuntiacione recte dare*.

55 Camodeca (n. 41) 63 writes that, in the documents of sale known to us, the buyer's duty ("obbligo") is not mentioned and then continues: "esso era quindi imposto implicitamente a favore del venditore e la sua esclusione doveva dunque essere previsto espressamente dalle parti". See, also, H. Weßel *Das Recht der Tablettes Albertini* (Berlin, 2003) 186.

56 Lenel (n. 43) 568, note 18.

57 M. Kaser *Das römische Privatrecht* I (2 ed. München, 1971) 555.

58 Finkenauer (n. 36) 77.

59 Weßel (n. 55) 186, note 49, explicitly denies this.

in favour of this hypothesis.<sup>60</sup> A possible reconstruction of the part regarding eviction in the model of the edict of the *aediles curules* is the following:<sup>61</sup> *et si quis eum hominem partemve ex eo quis evicerit quominus me eumve ad quem ea res pertinebit habere licere recte liceat, qua de re lis tibi recte denuntiata erit, tum quanti is homo emptus est, tantam pecuniam duplam partemve eius duplam mihi recte<sup>62</sup> dari spondesne?* From this wording and from the buyer's implied obligation to inform the seller of the *rei vindicatio* instituted against him, we may deduce that if he did not make a *denuntiatio*, he was not entitled to institute the *actio ex stipulatu*, based on the *stipulatio duplae*, against the seller.

This is confirmed by the rescript of Alexander Severus of 222 incorporated in C. 8.44.8 referred to above with regard to the *actio de auctoritate*. The relevant part of this constitution is: *Emptor fundi, nisi auctori aut heredi eius denuntiaverit, evictio praedio neque [ex stipulatu] <de auctoritate> neque ex dupla neque ex empto actionem contra venditorem vel fideiussores eius habet.* In respect of the action based on the *stipulatio duplae* too, the emperor decided that the buyer could not sue the seller of a *praedium* if he did not inform the *vendor* of the real action against him for the land.

The classical Roman lawyers discussed several problems concerning the *denuntiatio* the buyer made to the seller who had made a *promissio evictionis*, in texts that were incorporated by the compilers in title 21.2 of the Digest entitled *De evictionibus et duplae stipulatione*. In chronological order they are: Pomponius D. 21.2.29.2; Julian D. 21.2.39.1;<sup>63</sup> Paul D. 21.2.56.4-7;<sup>64</sup> and Ulpian D. 21.2.55.1.<sup>65</sup> I shall examine two that are instructive on the operation of the *denuntiatio* in practice.

First, from Pomponius D. 21.2.29.2 we may deduce that that part of the *aediles curules'* edict that related to eviction did not specify the moment when the *denuntiatio* had to take place. For this reason, the jurist had to be specific on this point.

#### D. 21.2.29.2 Pomponius *l.11 ad Sabinum*

Quolibet tempore vendori renuntiari [read with the Vulgate: denuntiari] potest ut de ea re agenda adsit, quia non praefinitur certum tempus in ea stipulatione, dum tamen ne prope ipsam condemnationem id fiat. (A notice can be given at any time to the seller in order that he may be present to litigate, since a specific moment is not fixed in the stipulation, provided that it not be given shortly before the condemnation.)

60 See, e.g., Neratius-Ulpian D. 21.2.37.2, Pomponius D. 21.2.29.2, Paul D. 21.2.56.4-7 and Ulpian D. 21.2.55.1.

61 Cf. Kaser (n. 57) I 555, note 13; Kaser-Knütel (n. 48) 251 (§ 41 Rz.29).

62 Weßel (n. 55) 205, note 142 argues correctly that this word appears regularly in the texts.

63 Fragment 39 was taken by the compilers from the context *De auctoritate*; cf. O. Lenel *Palingenesia iuris civilis*, I (Lipsiae, 1889) nr. 735, col. 463. The second part of the text D. 21.2.39.1, however (from *alias autem* until *denuntiatum est*) concerns a slave who sold a slave and made a *stipulatio duplae* to the purchaser. This part contains (in the case of an imminent eviction) a discussion of the question whether the purchaser had to make the *denuntiatio* to the selling slave or to his master; cf. Ankum 'La responsabilité du vendeur pour éviction dans le cas de sous-aliénation en droit romain classique' in *Viva Vox Iuris Romani, Essays in Honour of J.E. Spruit*, (Amsterdam, 2002) 231-235.

64 Fragment 56 is from the context of the *stipulatio duplae*: see Lenel (n. 63) I nr. 849, col. 1096.

65 Fragment 55 is from the context of the *stipulatio duplae*: *idem* II nr. 1797, col. 898.

Pomponius grants the buyer substantial freedom to determine the moment when he will inform the seller of the eviction procedure pending against him. He may see how the procedure unfolds and address himself to the seller only when he discovers that the plaintiff is in a strong position. There is, however, a time limit: he cannot contact the seller at a moment too close to the time of judgement; for then his influence on the proceedings is too limited.<sup>66</sup>

Paul in D. 21.2.56.4-7 discusses various practical problems concerning the *denuntiatio* to the seller who had made a *stipulatio duplae*. In paragraphs 5 and 6 the jurist gives his opinion on cases where the buyer is unable to give notice in time but nevertheless retains his right to sue the seller in the event of eviction.

D. 21.2.56.5-6 Paulus *l.2 ad edictum aedilium curulum*

5. Simili modo tenetur et qui curavit, ne sibi denuntiare possit. (In the same way, the seller is liable [for eviction] when he ensures that notice cannot be given to him.)

6. Sed et si nihil venditore faciente emptor cognoscere ubi esset non potuit, nihilo minus committitur stipulatio. (But when the buyer could not know where the seller was, even if the latter did nothing, nevertheless the stipulation [for eviction] enters into force.)

It would be unjust if a seller, expecting that the buyer would soon institute an action against him based on a *stipulatio duplae*, fraudulently hid his address from the buyer or travelled without leaving an address, thus escaping liability on the basis of the *stipulatio duplae*, because it was impossible for the buyer to give him notice that proceedings (about the ownership of the bought slave) had been instituted against him. Paul does not accept this result and concludes that where the seller made a *denuntiatio* impossible, it is considered that the buyer had informed the seller and might be held liable in the event of eviction with the *actio de auctoritate*. In addition, even if the seller had not acted fraudulently, but the purchaser could not ascertain his whereabouts, the seller would bear the risk and could be sued on the basis of the *stipulatio duplae*.

5. It was also possible that there had been no *mancipatio* nor *stipulatio duplae* and that the parties had only concluded a consensual contract of *emptio venditio*. As from the time of Pomponius and Julian, if the *actio empti* were instituted for eviction the buyer could claim *id quod emptoris interest* that he could keep the purchased thing.<sup>67</sup>

66 Iavolenus is more definite about the moment when the *denuntiatio* has to be made in the similar case of a slave who was bequeathed in general terms *per damnationem*: see D. 32.29.3 Iavolenus *l.2 ex posterioribus Labeonis Si heres tibi servo generaliter legato Stichum tradiderit isque a te evictus fuisset, posse te ex testamento agere Labeo scribit, quia non videtur heres dedisse, quod ita dederat, ut habere non possis et hoc verum puto. sed hoc amplius ait debere te, priusquam iudicium accipiatur, denuntiare heredi nam si aliter feceris, agenti ex testamento opponetur tibi doli mali exceptio*. In this case of a legacy in which the heir is exceptionally liable for eviction, the legatee has to give notice of the *in ius vocatio* before *litis contestatio* in the procedure on the ownership of the slave *generaliter* bequeathed. If the legatee fails to make the *denuntiatio* at that early stage and institutes the *actio ex testamento* against the heir after the eviction of the slave, the *exceptio doli* will be raised against him. For an interpretation of D. 32.29.3, see W. Ernst *Rechtsmängelhaftung* (Tübingen, 1995) 109-111.

67 See H. Ankum 'Pomponio, Juliano y la responsabilidad del vendedor por evicción' in *RIDA* 3<sup>e</sup> série 39 (1992) 57-84 and *id.* (n. 8) 'Problemi concernenti l'evizione del compratore nel diritto romano classico' 615-616 = *Extravagantes*, 213-214.

In addition, the question arose whether the purchaser had to inform the seller that a *rei vindicatio* had been instituted against him. The seller certainly had no obligation to defend the buyer in the real procedure, but had the right to do so in order to try to prevent the purchaser's eviction and the seller's consequently being condemned to pay the latter's damage. Certainly the buyer had a duty to make a *denuntiatio litis* to the seller; if he failed to inform him, he could not successfully institute the *actio empti* in the case of eviction. According to Gaius<sup>68</sup> the buyer was obliged to notify the seller when a *vindicatio usus fructus* with regard to the purchased thing was instituted against him, just as it was necessary for the buyer to inform the seller if a *vindicatio pro parte*<sup>69</sup> was instituted against him. This is understandable: a buyer who loses a real procedure without having given the seller the opportunity to defend him and try to prevent his condemnation, is surely not acting in accordance with the requirements of *bona fides*; and this reproachable attitude prevents him from suing the seller successfully for eviction with the *actio empti*.

Several imperial rescripts from the third century A.D. confirm the necessity of a *denuntiatio* to the seller. A very clear constitution is that of Alexander Severus, promulgated on 6 December 222, which was incorporated by the compilers in C. 8.44.8. Reference was made to this in paragraphs 3 and 4 above with regard to the *actio de auctoritate* and the action based on a *stipulatio duplae*. Of importance here is that the imperial chancery decided that on eviction the purchaser of a piece of land had no *actio empti* against the seller if he had not notified the latter or his heirs.

On 22 December of the same year, the jurists of the chancery of the same emperor addressed themselves to a certain Terentius in a rescript included in C. 8.44.9 reading as follows: "If someone institutes a lawsuit against you with regard to an immovable which you maintain that you bought in good faith, you have to give notice thereof to the seller or to his heir (*auctori heredive eius denuntia*). And if you are successful in this suit, you will have what you purchased; if, however, you are evicted, you will receive from the seller or her heirs as much as your interest amounts to . . .".

The same emperor decided in the constitution of C. 4.48.1 of A.D. 223 that an *actio empti* would succeed against the seller only for reasons that preceded the contract and had caused the eviction, provided that the seller had been notified (*et ita si ei denuntiatum est*).<sup>70</sup>

In the same year a rescript to Eustochia, which is known to us as C. 8.44.23, concerns another interesting case that the chancery of the same emperor examined. This woman bought immovable property from a person who died shortly afterwards. She approached the imperial chancery asserting that the *actores* of the town of Thessalonica had instituted

68 D. 21.2.49 Gaius *l.7 ad edictum provinciale*: *Si ab emptore usus fructus petatur proinde is venditori denuntiare debet atque is a quo pars petitur.*

69 It is also possible that Gaius was thinking of the comparable case in which a physical part was claimed by a *rei vindicatio*.

70 In the text "*et ita, si ei denuntiatum est, ut causae agendae adesser*" we cannot translate the last four words by "in order that he had to be present to plead the case" because the seller, who only had the right to assist or defend the buyer, had no such obligation. An exact translation would be "so that he could be present to plead the case (if he wanted to do this)".

against her an *actio Serviana* based – as they said – on a right of *pignus* on the land. The chancery ordered her to inform the seller's heirs with a view to their possible assistance in the lawsuit. The chancery added that it was generally known that the heirs were (only) liable in the case of eviction after the *denuntiatio* had been made (in terms of the *actio empti*) for the interest of the *emptrix* that the land not be evicted.

In a rescript addressed to Solidus and others of 293 (incorporated in C. 8.44.20), the jurists of the chancery of Diocletian and Maximian also considered the necessity of notice of a *quaestio dominii* that had been initiated against the purchasers. I quote and translate the second paragraph of this constitution: *Empti sane iudicio pro evictione si conveniri coeperitis, nec vobis, ut defendatis, negotium denuntiatum probetur, intellegitis, quatenus vosmet ipsos tueri debeatis.* (If the *actio empti* has been instituted against you because of eviction and it is not proved that you were informed of the case with a view to your (possible) defence of the buyers, you understand how you will have to defend yourself (against the *actio empti*).) From the last words, we may deduce that according to the imperial chancery, the action for purchase cannot succeed against the sellers' heirs in the event of eviction if the purchasers could not prove *denuntiatio*.

In a rescript of 294 (C. 8.44.29) the chancery of the same emperors declares that in the event of eviction of *praedia* received by a certain Rhesus *permutationis gratia*, he could institute an action only if he had made a *denuntiatio* or if such notification was impossible. The buyer's obligation to provide information applied here to the person who had received the property in an exchange.

These imperial constitutions confirm what has already been established: if the buyer loses the *habere licere* of the purchased thing through eviction, he can only institute the *actio empti* for damages against the seller if he has given him notice of the real claim.

Finally, as indicated in paragraph 4, the buyer could be released from the duty to inform the seller by the words *sine denuntiatione* in the case of a *stipulatio duplae*. Likewise, the need to inform the seller could be waived by a *pactum* in the case of a consensual *emptio venditio*. Modestinus' text D. 21.2.63pr. is clear on this point:<sup>71</sup> *Herennius Modestinus respondit non obesse ex empto agenti, quod denuntiatio pro evictione interposita non esset, si pacto remissa esset denuntiandi necessitas.* If there had been no notification to the seller and the parties had agreed that it was not necessary to inform him, the buyer could still institute the *actio empti* against the seller for damages in the event of eviction.

71 Modestinus' fragment D. 21.3.63 was taken by the compilers from the part *de actionibus empti et venditi* of the 5th book of his *responsa*; see Lenel (n. 63) I nr. 299, col. 745.

## Abstract

As will be shown in this article, in classical Roman law the buyer of a thing, against whom the *rei vindicatio* or a comparable real action had been instituted, had the duty to notify the seller. This holds true in the cases where a *res mancipi* had been transferred to the buyer by *mancipatio*, where the seller had made a *stipulatio* (e.g. a *stipulatio duplae*) against eviction and where the parties had concluded a consensual *emptio venditio*. The buyer who had not informed the seller of the real lawsuit initiated against him, could for different reasons institute neither the *actio de auctoritate*, nor the *actio ex stipulatu*, nor the *actio empti* against the seller.