CHAPTER NINE

9.2 Summary

This book examined legal recourse for recipients of things exchanged for money, if the thing exchanged turned out to be defective. It explored how continental Western European legal doctrine and practice of the early modern period (1500-1800) formulated the recipient's remedies against the background of Justinianic Roman law, which in the High Middle Ages had become part of the ius commune. Since early modern legal debate about remedies for defects in things exchanged for money mainly evolved around sales and lease of objects, this study focussed on the Roman law remedies in their ius commune-clothing available under those types of contracts.

Justinianic Roman law provided various remedies for sales and lease in which the exchanged item turned out to be defective. First, Justinian's Corpus iuris civilis contained remedies which had once been formulated by the aediles, the Roman supervisors of the slave market on the banks of the river Tiber. These had granted the buyer remedies based on defects in sold cattle and slaves. Under certain circumstances, a buyer could sue for the price paid upon returning the thing received (actio redhibitoria) or for reduction of price (actio quanti minoris). Justinian's compilation extended the aediles' remedies to all goods. Besides these aedilician remedies, Justinianic Roman law granted the buyer a contractual action, the actio empti, with which the buyer could bring similar remedies.¹

Justinianic Roman law was far from clear on how these various remedies related. As a result, controversies arose in medieval legal scholarship about the correct interpretation of the Corpus iuris civilis' provisions. The result was an intricate web of legal options which early modern legal scholarship had to come to terms with.

A second possibility to remedy a defect in a thing exchanged for money provided for by ius commune-scholars was rooted in C. 4.44.2. According to Justinianic Roman law, this provision granted a seller of a plot of land a remedy in the event of a significant imbalance between the land's just value and the paid price. Medieval legal scholarship extended this remedy to both buyers and lessees of both movables and immovables. If the sum the recipient had paid amounted to more than one and a half time the just value of the object or its use, the recipient had been enormously prejudiced (laesio enormis). He could then claim that the promissor restore the imbalance either by rescinding the contract or by paying back part of the price. Consequently, if a defect in a thing exchanged had brought about the prejudice, the recipient could besides the remedies based on the presence of a defect bring this remedy for lesion beyond moiety based on an imbalance between the parties' performances.

Early modern legal doctrine and practice expressed the legal options granted to a recipient of a defective thing in terms of these aedilician and civil remedies for defects and the remedy for lesion beyond moiety. This study explored how the interpretation of these Justinianic Roman law concepts changed throughout the early modern period by studying the works of scholars who were part of the major currents in legal thinking which the period

¹ See 1.1.1.
has known: early modern scholasticism, legal humanism, Roman-Dutch and Roman-Frisian law, 17th and 18th century natural law. To contextualize the developments in this period, medieval *ius commune* and the codification movement at the end of the 18th century have also been explored. It is investigated what changes occurred and also why these changes in the interpretation of the legal position of a recipient of a defective thing took place. By so doing, this study found a missing link in legal historical literature. In addition, it provides the reader with information about the origins of the law governing defects in things exchanged for money as found in today's codes of civil law.

Throughout this book a fairly simple factual situation has been used as a connecting thread and backdrop against which developments were pinpointed, illustrated and evaluated.

A agrees to deliver a thing to B. B agrees to give A a certain sum of money in exchange for receiving the thing in his possession. The thing appears to be defective and therefore does not correspond to what A and B had agreed on.

The corresponding question which the scholars and practitioners central to this study posed was:

What legal recourse is open to B now that the thing he received turns out to be defective?

The study consequently investigated which answers early modern scholars and practitioners who worked with the *ius commune* of their time offered regarding B's legal position. To enable a more precise study of how these answers were conceived, five controversial issues were selected which throughout the history of Western European civil tradition had continuously surfaced in the legal debate about B's legal quandary. These issues also served as connecting threads in and between the various periods and currents of legal thought which are covered by this study.

The present section contains concluding remarks based on the results of the investigation and it provides an overview of which shifts were made in answering the controversial issues through time and among the various currents of legal thought which emerged in the early modern period. These findings have been brought together in a summary of how B's legal options evolved in the event he had received a defective object in his possession in exchange for a sum of money. Let us first restate briefly the legal controversies which were dealt with in this study.

9.2.1 Research topics

(1) Justinian's *Corpus iuris civilis* has various remedies for defects in things received in exchange for a sum of money. These notably concern defects in a thing sold or leased. Some of them - the remedies formulated in the Aedilician Edict and the remedies available under the action on the sales contract - are almost identical. They all grant the buyer the

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2 For a more detailed description see 1.2.2.
right to sue for rescission and return of the paid sum of money on return of the thing (actio redhibitoria). Under circumstances, the buyer can sue for price reduction (actio quanto minoris). Ius commune-scholars discussed this seeming duplication of remedies in the Corpus iuris civilis by means of four subquestions. (1a) Did the various remedies have different scopes of applicability? (1b) Did the aedilician and civil remedies come with distinct methods to calculate the price reduction a buyer could claim? (1c) Did the aedilician and civil remedies have divergent periods of limitation? (1d) Finally, did the buyer-friendly characteristics of the aedilician remedies speak against their redundancy?

(2) As suggested by the factual situation which forms the background of this study, there does not appear to be much difference between delivery of a defective object as part of a lease or as an obligation under a sales contract. Hence, the question was posed whether the aedilician remedies for sales could not also be applied to lease, despite the explicit prohibition of such an extension in D. 21.1.63? What argues in favour or against such an extension? This issue formed a second topic which was used as lead to developments in the early modern approach to B’s legal position.

(3) Thirdly, the Corpus iuris civilis is not unequivocal about the scope of the A's liability for defects in the thing exchanged. What rules did ius commune-scholarship and legal practice employ to determine how much A had to compensate B?

(4) The fourth issues central to this study concerned the factual situation in which B turns out to have received an encumbered immovable for his money. Ius commune-scholarship frequently raised the question whether the separate provisions in the Corpus iuris civilis on A’s liability for selling an encumbered immovable should not be interpreted in keeping with those governing the liability of A as a seller of a defective movable thing.

(5) Finally, since medieval times, ius commune civil law gave B a remedy for a defective thing received in the event he had, due to the defect, suffered a prejudice of more than half the thing's just price (laesio enormis). By extension of C. 4.44.2, a remedy for such a lesion beyond moiety originally reserved for sellers of immovables, medieval ius commune granted a similar remedy also to buyers. Yet, the aedilician and civil remedies for defects, in theory, also remained available alongside the remedy for lesion beyond moiety. How did early modern scholars and practitioners offset these competing remedies against each other?

9.2.2 Findings

(1) A major branch of medieval scholarship had further deepened out and emphasised to what extent the two sets of civil and aedilician remedies for defects in the object remedies differed. Driven by a textual analysis of the pertinent Digest and Codex texts, the glossators Azo and Accursius and the commentators Bartolus and Baldus held that the aedilician remedy for returning the thing only lay in the event of corporeal defects. Non-corporeal defects could only be remedied with the civil remedy for fraud (1a). Similarly, these scholars held that the aedilician and civil remedies had separate methods for calculating the price reduction the seller of a defective item owed the buyer (1b). The
aedilician remedies presupposed an objective method based on the thing's common market value, as opposed to the civil remedies which came with a calculation method based on the buyer's personal judgement under oath about how much the thing would have been worth, if in good condition. Furthermore, medieval *communis opinio* accepted that the civil remedies remained available in perpetuity, whereas the aedilician remedy for rescission only lasted for six months and the aedilician remedy for price reduction for one year (1c). Finally, the medieval scholars mentioned, took the favourable features of the aedilician remedies for granted (1d). This marked distinction between remedies for defects based on the Aedilician Edict and those available under the action on the contracts is referred to, throughout this book, by the name of its main protagonist as the 'Accursian' distinction.

However, this Accursian distinction did not meet with every medieval scholar's approval. Notably two *ultramontani* from the School of Orléans, Jacques de Revigny and Pierre de Belleperche, rejected the existence of more than one method of calculation for price reduction and dismissed the view that the aedilician and civil remedies expired after different time periods. Yet, both the 'Accursian' and its competing view resulted from very similar techniques of interpretation of the *Corpus iuris civilis*. Texts were skilfully analysed, seemingly without heeding practical consequences of the chosen interpretations or their conformity with broader concepts of justice. That this method yielded spectacular results is illustrated by the work of Baldus. According to Roman law, the aedilician remedies can be brought against multiple sellers but only if they had joined in a partnership to sell slaves (*societas venaliciariorum*). Baldus applies this buyer-friendly characteristic to all sales in which multiple sellers jointly sell one item.

Broader concepts of justice played a more explicit role in early modern Castile. Since the 13th century, a tradition of statutory law-making had tackled the *ius commune* intricacy of the Accursian distinction. With regard to the method of calculation for the price reduction a seller of a defective thing is due, the *Siete Partidas*, a 13th century statute, applied only one objective method and ignored the view that remedies for defects could be brought perpetually. Early modern Castilian civil law scholars adopted similar views. Neither did these scholars betray any awareness of the buyer-friendly features of the aedilician remedies. Remarkably though, the same scholars left the distinction between corporeal and non-corporeal defects intact. This position of Castilian early modern civil law scholars can not only be ascribed to an established legal tradition which probably had the same roots as the School of Orléans. It might also be due to the changing winds blowing in the field of legal theory.

Experiencing the heyday of scholasticism, early modern Spain became infused with scholastic natural law concepts. In particular, the view that contracts in which a thing was exchanged for money were instrumental to realising commutative justice became entrenched in the minds of Castile's theologians. These mostly Salamancan scholars formulated in legal terms how one should behave in commercial transactions in order to
save one's soul in the court of conscience (*forum internum*), where God weighed the scales and pronounced sentence about man's afterlife.

According to the demands of commutative justice, as explained in early modern Iberian scholasticism, contracts should be in balance. This meant that mutually executed performances had to be in proportion. For example, the value of the thing exchanged needed to be in proportion with the thing received. If a party found himself put at an advantage or disadvantage after the fulfilment of a contract, the party who had excessively benefited from the contract at the other's expense had to bring back the contract in proportion with what commutative justice required. In other words, contracts required fairness in exchange.

As a result of this demand of proportionality, the question whether a contract could be considered just focussed on whether the paid price was just. A defect in a thing did not necessarily mean that a disproportionality existed between price paid and thing received, since prices could be lowered in accordance with the thing's impaired condition. Hence, early modern scholastic scholars rejected remedies which took the defect in the object as means to evaluate a contract's validity.

Not long after Castile's theologians of Salamanca had incorporated the concept of fairness in exchange, Castile's legal scholars also made it part and parcel of their treatises about the law of obligations. Compared to their medieval colleagues they paid remarkably less attention to remedies for defects in things sold. The same applies even more to Castile's legal practice. Remedies based on defects are virtually absent in the case law of the Royal Chancery of Valladolid, Castile's highest appellate court in the period under investigation. The explanations of divine jurisdiction in *ius commune*-terminology may also have induced early modern Castilian law scholars to reject a reinterpretation of the *Siete Partidas* in keeping with humanist views in the majority of cases.

Sixteenth century legal humanism was characterised by an inductive approach to law and was only marginally influenced by early modern scholasticism as regards its views on the Accursian distinction. Humanist scholars resumed the discussion concerning the civil or aedilician remedies' redundancy in much the same way as their medieval predecessors had done, *viz.* humanists also reached their conclusions by skilfully distinguishing on the basis of an exclusive body of Roman law texts. However, there were some significant differences. Unlike medieval *ius commune* scholars, legal humanists read Greek and frequently referred to historical facts to underpin their interpretation.

Despite these different approaches a major branch of scholars within legal humanism known for its vilifying of medieval legal scholarship reached the same results as Accursius: the aedilician and civil remedies were distinct as regards their scope, limitation, and buyer-friendly characteristics. Only with regard to the method of computation for price reduction, did a majority of legal humanists reject the medieval view that the civil remedies were based on the buyer's subjective declarations. Personal notes from Viglius of Aytta, assessor to the *Reichskammergericht*, suggest that this method was also abolished in
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legal practice. It may be that the natural law preference for an objective price as a pivot around which the questions of fairness turned, had seeped through to legal humanism. On the other hand, the humanist scholars studied in this book demonstrate remarkably little awareness of the theological works espoused in the same period from the Salamancan collegios, so that definite inferences can not be made.

Another branch of humanists reached exactly the opposite positions. Though arguing even more in medieval fashion, this group, headed by the dissident medieval scholars of Orléans and those who subscribed to their interpretations, rejected the assertion that two different sets of remedies for defects in sold things existed in the Corpus iuris civilis.

A general theory of remedies for non-performance of which the remedies for defects in the thing are part could be glimpsed in the works of Doneau, although he was still far from equating the remedies for defects with the action on the sales contract for non-performance and left most of their particularities intact.

Roman-Dutch and Roman-Frisian scholars partly adopted the Accursian view which distinguished between an aedilician and a civil set of remedies. They upheld the view that the aedilician remedies only lay for corporeal defects and some scholars subscribed to the buyer-friendly characteristics of the aedilician remedies. Nevertheless, possibly driven by changes of procedural law, a majority of Dutch scholars no longer accepted the existence of various limitation periods. Some accepted only the short aedilician periods, others opted for a one-year period for all personal remedies. Furthermore, similar to their humanist colleagues, they questioned Accursius’ subjective estimation of the thing’s price in the determination of the price reduction which the seller was due. As regards legal practice, Cornelis van Bijnkershoek's personal notes, similar to those of the humanist Viglius, demonstrated that the Supreme Court of Holland, Zeeland and West-Friesland used an objective price estimation based on the common market price of the traded object.

However, unlike medieval and humanist scholars, some Roman-Dutch and Roman-Frisian scholars distinguished the aedilician remedies from their civil equivalents by pointing out the particular purpose for which they were allegedly brought to life: the correction of inequality in contracts. Here, evidently a reference to the early modern scholastic notion of commutative justice is made. A peculiar result of this view was that, against the current of time to abolish penal remedies in civil litigation, Roman-Dutch scholars, in keeping with views, ascribed a penal character to the aedilician remedy for returning the thing. Roman-Dutch scholars considered that a suitable means to correct contractual unfairness.

In the course of time, early modern scholastic natural law concepts became part of the vocabulary of legal scholars across Europe. The treatises of 17th and 18th century natural law scholars from the Netherlands, the German regions, and France most markedly demonstrate to have been influenced by early modern scholasticism. The concept of fairness in exchange became the point of departure in the debate about how
the law governing defects in things received should be. As a result of this deductive reasoning natural law scholars largely ignored medieval ius commune-subtleties concerning two sets of remedies which were supposedly transmitted in the Corpus iuris civilis. Whether different kinds of defects or more than one remedy based on defects in an object existed or not did not seem to occupy the natural law scholar's mind. Neither did natural 17th - and 18th century law scholars differentiate between the limitation of remedies for rescission and price reduction. To both they applied one and the same period. Finally, natural law scholars rejected the buyer-friendly features of the aedilician remedies as going against the natural law principle that a creditor should not gain more compensation than the damages he had truly incurred because of the defect.

However, there was always a tension between the ideal law as natural law scholars managed to construct it and the extent to which such ideal law could be realised. Though natural law theory held that personal actions did not expire, natural law scholars nonetheless limited the periods within which recipients had to bring their legal claims for practical reasons. They did so in accordance with the legal tradition of the regions in which they worked, so that throughout the various regions of Europe the periods of limitation which natural law scholars accepted differed. Thus, the first signs of legal fragmentation could already be observed which would later hallmark the civil codes which would emerge from the end of 18th century onwards.

Influenced by natural law theory's deductive reasoning, these civil codes approached a defect in a sold item through the lens of a breach of contractual fairness which had to be made good, as it was explored for the limitation of remedies for defects in things exchanged for money. The codes no longer differentiated between the limitation periods of aedilician and civil remedies. Neither did the periods within which a remedy died depend on whether the remedy was for rescission or price reduction. However, a new distinction based on whether the thing sold was a movable or immovable took the place of the former: most codes granted a longer period to bring a remedy in the event of encumbered immovables than for a movable. Finally, the civil codes do not always clearly delineate the remedies for defects or encumbrances of the remedies for non-performance. The latter in many cases had a longer period of limitation. As a result, problems of concurrence surfaced in the Code civil, BW 1838 and BGB 1900.

Thus, though the ius commune-controversy about the existence of two different sets of remedies with their own characteristics had largely been solved, other difficulties surfaced. Some varied the limitation of remedies in accordance with whether or not the object traded was an immovable. Some civil codes also introduced an artificial difference between breach of non-performance and something broadly translated as breach of the promisor's 'safeguarding duties (Gewährleistung, garantie, vrijwaring, saneamiento)'. As a result, it was possible that in one jurisdiction a recipient who had been sold an encumbered thing could start proceedings over a time period as long as 30-years (Code civil), whereas under another regime he had to act within three (ABGB). In short, though
the civil law had been pruned of its medieval intricacies, the law of limitation had not grown less complex. Questions about limitation would continue to haunt civil law systems until the present day.

(2) Throughout the early modern period legal scholarship and practice struggled with D. 21.1.63 which seemed to prohibit an extension of the aedilician remedy for returning the thing, because of a defect, to lease. Indeed, it seems that the aedilician remedies concentrate on the factual situation in which someone receives an item in his possession for which possession he had agreed to pay a sum of money. This may just as well qualify as lease. After all, a lessee holds and uses a thing in exchange for a certain sum of money, be it paid in total in advance or in several instalments.

Nevertheless, a majority of medieval legal scholars stuck to the text of D. 21.1.63 and excluded the extension of the aedilician remedy for returning the thing to lease. They justified their position by reasoning that 'in lease one does not intend to transfer property, as one does in sales'. Despite the spirit of early modern scholasticism pervading early modern Castile, the civil law in Castile of the period seems to adopt the medieval position. Yet, this may also be ascribed to the predominance of the remedy for lesion beyond moiety which the lessee could bring, if his prejudice amounted to more than half the just price for holding and using the thing. Due to the preponderance of that remedy in the early modern Castilian legal landscape, the remedies for defects were dealt with only cursorily.

The first serious attempts to tear down the wall thrown up by D. 21.1.63 was made by the legal humanist Cujas who, with the help of an unglossed Greek Codex text and a grammatical analysis of the text of D. 21.1.63, concluded that the text did 'not at all' exclude the aedilician remedy for returning the thing to sales. Yet, Cujas' position was exceptional. The majority of humanist scholars did not go beyond what medieval scholarship had written on the matter.

Another shift in approach was observed in Roman-Dutch and Roman-Frisian legal scholarship. Contrary to Cujas, some Dutch scholars kept to the medieval view that lease does not transfer property and for that reason did not permit the aedilician remedy in lease. However, others argued that a defect in a leased object caused less damage than a defect in a thing sold. A lessor could simply return the object, as the lease contract already provided for a suitable remedy in the event the object leased out did not serve the purpose for which it was leased. Contrariwise, these scholars argued on historical grounds that in sales there was a need for additional remedies. Before the aedilician edict was introduced, a buyer who had concluded a sale on an object which turned out to be defective was definitely left in the possession of a defective thing. There was no action on the sales contract, since a seller had only the duty to ensure the thing's unhampered possession, not its being free from defects. This absence of a contractual remedy justified the particular remedy for rescission of a sale as mentioned in D. 21.1.63.

Despite the Roman-Dutch ingeniousness aimed at saving D. 21.1.63, *usus modernus*-scholars who were inspired by 17th and 18th century natural law thinking,
resumed the attack on the text initiated by Cujas. Yet, their arguments were of another kind than Cujas'. Some usus modernus-scholars demonstrated a clear tendency to have equity overrule the restrictive text. Sales and lease are very similar contracts, so that it would be against equity when remedies which the buyer could bring in the event of a defect in the thing sold were withheld from the lessee suffering from a similar problem under lease. Natural law scholars themselves had not explicitly pronounced upon the matter.

(3) The third controversial issue which was used as a lead to locate changed perceptions of the law governing the exchange of money for a defective thing concerned what rules ius commune-scholarship and legal practice employed with regard to the scope of A's liability. Medieval scholars agreed that D. 19.1.13(14)pr. about rotten beams and contagious cattle provided the general rule which had to be applied to all instances in which a defective or encumbered item was delivered. According to this text, a knowing seller is liable for more than the seller who had not been aware of any defect in the thing sold. However, contrary to this general rule, texts D. 19.1.6.4 and D. 19.2.19.1 hold a seller and lessor liable for all loss where ignorant of a defect in the barrel they exchanged. Medieval scholars put considerable efforts into aligning these unruly texts with D. 19.1.13(14)pr. However, their efforts did not go beyond explaining the text with casuistic arguments.

Contrariwise, early modern Castilian scholasticism argued from deductive principles based on the ideas about commutative justice, which included that someone should not benefit from a contract at the other party's expense. Hence, in principle, A has to compensate B's loss, but nothing more. At the same time, B's claims on A were curbed by the fact that he too should not gain more from the contract than initially agreed. Early modern scholastics were consequently ill at ease with holding a seller who was unaware of the defect in the thing liable for all contractual damages. Nonetheless, contemporary civil law doctrine held on to the medieval ius commune approach in the treatment of D. 19.1.6.4 and D. 19.2.19.1, which texts state a liability for all damages for a seller or lessor ignorant of the defects in the barrels sold or leased. To bring these Digest texts in line with the earlier stated scholastic principles, the theologian and legal scholar Molina read a presumption of fraud in them. Early modern Castilian legal practice, however, more in keeping with early modern scholastic views, held only fraudulent sellers liable for compensation.

An effort similar to Molina's to run with the hare and hunt with the hounds was already encountered in the somewhat older works of the legal humanists Dumoulin and Mudaesus. These scholars managed to interpret the unruly texts D. 19.1.6.4 and D. 19.1.2.19.1 in keeping with the general rule in D. 19.1.13(14)pr. by reading professional sellers and lessors into the first two. Apparently, professionals were subject to an increased liability regime, as Dumoulin and Mudaesus understood the texts. This doctrine of professio artis obligat would find its supporters throughout the subsequent periods investigated in this book. Other humanists, however, such as Cujas and Doneau, continued to explain the texts by means of a medieval casuistic approach.
Among Roman-Dutch and Roman-Frisian scholars all views found in medieval ius commune and legal humanism concerning the scope of the seller's liability are defended. Even Doneau's somewhat far-fetched argument to explain D. 19.1.6.4 that a leaky barrel is not a barrel, so that the seller of a leaky barrel acted in breach of an implicit warranty that the thing sold was really a barrel capable of containing liquids, turned up in Roman-Dutch and Roman-Frisian writings. On the whole, early modern Dutch legal doctrine proved highly eclectic. There were no signs of a lasting impression of Castilian views on the solutions proposed by early modern Dutch scholars. A more coherent picture was found among the 17th and 18th century scholars of natural law. Similar to their Castilian predecessors, they betrayed unease in holding an ignorant seller or lessor of a defective thing liable for more than the thing's value. A number of scholars approached D. 19.2.19.1 and D. 19.1.6.4, which contained such a liability for an ignorant seller or lessor of a defective barrel, with a presumption of fraud. Pothier explained the texts in terms of a professional seller. All natural law scholars studied adhered to some kind of fault or refrained from discussing the barrel texts at all. With the help of usus modernus-scholars, it seemed that the Verschuldensprinzip became generally accepted from the 17th century onwards.

Yet, similar to what was observed with regard to the extension of remedies for defects in sold things to lease, the liability of professionals was not uniformly applied in the civil codes of the 18th and 19th centuries. A clear division appeared between the natural law inspired ALR and ABGB, and the codes partly rooted in customary law, the Code civil and the BW 1838. The first two continued the course set by early modern scholasticism and natural law. Not only professional sellers, but all professional 'givers' or 'promisors' raised expectations which evoked an increased liability. In the Code civil, BW 1838 and BGB, however, similar provisions were absent. In France, the Cour de Cassation repaired this omission in its case law in which it equated professional sellers with sellers who were aware of defects in the things they sold. To my knowledge, no such thing had happened in the Netherlands and Germany until the introduction of consumer rights in the 20th century. The drafters of the Spanish Código again did what those of the Code civil had neglected to do; they implicitly incorporated Pothier's doctrine of professio artis obligat, which equated a professional seller with a knowing seller, so that he faces a corresponding liability in the event a sale turned awry.

(4) A fourth topic which has continuously been treated in early modern legal doctrine and practice was the seller's or lessor's liability for encumbrances on immovables. The Corpus iuris civilis contains distinct rules on the seller's liability for encumbrances on land, according to which sellers ignorant of burdens on immovables could not be held liable at all. Yet, from a factual point of view, deliveries of movable and immovable things are closely related. Legal scholars and practitioners consequently explored whether these situations should not be made subject to the same set of rules of liability.

The medieval glossator Accursius by means of an extensive interpretation of the
law-texts of the *Corpus iuris civilis* indeed managed to bring defects in movables and encumbrances on immovables under the same legal regime. To both, the rule of D. 19.1.13 (14)pr. applied according to which unknowing sellers were liable for the price paid at most but knowing sellers could be sued for all the buyer's loss. Only burdens which were so common that no buyer could with a deadpan expression contend not to have been aware of them - e.g. provincial land tax - formed an exception as encumbrances for which debtors could not be held liable.

Accursius' view not only turned out as the medieval *communis opinio* but also dominated discussions about the topic in subsequent ages. Early modern Castilian civil law likewise aligned the liability for encumbered things with that for defects in movables.

However, wishing to interpret the *Corpus iuris civilis* more precisely, legal humanists became inextricably lost in its contradictory texts on the seller's liability for encumbrances on immovables and gave up efforts to explain it in terms of a liability for sellers of defective objects in general. Accursius' solution, clear though it was, was dismissed as unsubstantiated by texts in the *Corpus iuris civilis* by Doneau. The French humanist maintained the rule in the *Corpus iuris civilis* that sellers ignorant of encumbrances on the immovables they sold could not be sued. Doneau defended this rule with the somewhat puzzling remark that, 'the thing encumbered with a servitude or tax, we can possess no less'. Since buyers continue to enjoy the encumbered immovable a rigorous liability is not required, so Doneau seemed to mean.

In Roman-Dutch and Roman-Frisian law both Accursius' and Doneau's along with new views were defended. Similar to Accursius, a number of Roman-Dutch writers had no qualms in stretching texts of the *Corpus iuris civilis* which seemed to indicate another liability regime than the one they wanted it to indicate. Also Doneau's restrictive reading of the *Corpus iuris civilis* made headway both among legal scholars and in the case law of the Supreme Court. On the other hand, Bronchorst and Grotius formulated a liability regime which was unheard of before. According to them, both sellers aware and unaware of encumbrances on land were liable for price reduction. Voet held only knowing sellers liable and then for all loss.

Grotius seemed to reason that encumbrances should be considered as any other defect in a sold object. This approach is reminiscent of how Castilian scholastics framed the sale of a defective item in the more general terms of unjust enrichment, error or mistake. Natural law scholars of the 17th and 18th centuries carried this further. Domat defined a safeguarding duty applying to various troubles relating to immovables. This was a first step toward a legal approach in which not the kind of defect, but the seller's duties vis-à-vis the seller became the determining factor in defining liability. Domat's *garantie* would find its sequels in the *Code civil's garantie*, the BW 1838's *vrijwaring* and the *Código's saneamiento*. The ALR, ABGB and BGB all coined the term *Gewährleistung* for, roughly speaking, the same concept.

Other natural law scholars overruled Doneau's view that encumbrances should be
treated differently than defects in movables. The French scholar Pothier certainly did so. In
taking with Accursius’ position, he applied D. 19.1.13pr. about contagious cattle and
rotten wood to all impairments of sold items, including encumbrances on immovables.
Pothier also held that there were burdens for which the seller's liability should not be
accepted, because the buyer should have been aware of them.

(5) The last topic which elicited legal debate in *ius commune*-doctrine and its practice
throughout the early modern period concerned the use of the remedy for lesion beyond
moiety (*laesio enormis*) as a means to remedy defects in things sold or leased which
reduced the things' value by more than half. Originally, according to C. 4.44.2 and 8, this
remedy came within the *seller's* reach in the event he had suffered a prejudice of more
than half the object's just value irrespective of whether or not the prejudice was caused by
a defect. The seller could claim that the buyer of the object either accepted rescission or
compensated him for the difference between the object's just value and the insufficient
sum actually paid. Despite the fact that C. 4.44.2 and 8 mention a prejudiced *seller*,
medieval scholars, already at an early stage, started to also grant the *buyer* the possibility
of disputing a sale, because of a disproportion between price paid and thing received due
to a defect. Medieval moral theology probably contributed to the acceptance of an
extensive version of the remedy, although it is not altogether clear whether theologians
and canon lawyers were the first to assign it a wider field of application or whether they
simply borrowed concepts of civil law to express their moral viewpoints. Be that as it may,
leaving aside the rather opaque theory of 'fraud in the situation itself' (*dolus in re ipsa*), the
remedy with its long period of limitation, its straightforward objective method of price
assessment, its applicability to lease, and its procedural clarity made it a formidable
competitor to the remedies for defects in the thing sold.

Nevertheless, the potential of the remedy for lesion beyond moiety as a suitable
means to remedy contracts in which the delivered thing appeared defective was not fully
realised before the 16th century, when early modern scholasticism proved a catalyst for the
growing preference of the remedy for lesion beyond moiety to the aedilician and civil
remedies. The remedy, which evolved around an equilibrium of performances, proved well-
suited for translating the Catholic moral perception of contracts as a token of commutative
justice into worldly legal terms. Catholic confessors who concerned themselves with the
Christian duties of confessing parties in commercial matters expressed those duties in *ius
commune*-terminology. The remedy for lesion beyond moiety became a vehicle to
elucidate what was expected of the confessing party. Hence, an approximation of the rules
which applied to the heavenly jurisdiction (*forum internum*), in which confessors appealed
to the confessing party's moral conscience, and the worldly jurisdiction (*forum externum*),
in which the contractual party's behaviour was judged in Court in accordance with worldly
legal norms.

A result of this approximation was that interpretations of civil law became influenced
by the content of the moral duties a confessing party had to answer to. One difficulty with
which early modern Castilian theologians and legal scholars had to come to terms with was that Justinian’s *Corpus iuris civilis* contains provisions which allow outwitting the other party in the bargaining process (D. 4.4.16.4 and D. 19.2.22.2). These provisions do not find fault with whatever disproportion between price and thing exchanged. How could it then be explained that in the same *Corpus iuris civilis* a Codex text does just that? Medieval scholars had developed the theory of ‘fraud in the situation itself (*dolus in re ipsa*)’, according to which a deviation of half the thing’s price constituted a kind of objective fraud. Early modern Castilian civil law scholars, however, gave *dolus in re ipsa* a more subjective colouring. Though they retained the terminology of ‘fraud in the situation’, Castilian scholars explained the concept in terms of a presumption of subjective fraud (*dolus ex proposito*). Thus, the seller could prove that the presumption of his fraud was unwarranted and so escape liability. This was more in keeping with the reluctance among moral theologians to hold sellers in good faith responsible for the other party’s loss.

A second result of the approximation of moral and worldly duties was that legal concepts which were less apt to express moral norms, also disappeared from the worldly jurisdiction of early-modern Castile. Such seemed to have been the fate of the aedilician and civil remedies for defects in the thing sold. Theologians such as Vitoria held that selling a defective item was not necessarily a sinful act. If the seller had sold for an accordingly low price, there was no breach of his duties in the court of conscience. Again, this view rhymes with the early modern scholastic hesitation to accept a liability for defects on the seller’s side without fraud.

Early modern Castile’s legal practice seemed more susceptible to such deliberations than doctrine. Indeed, an investigation into the legal practice of the Royal Chancery of Valladolid, Castile’s highest appellate court at the time, revealed an absence of remedies based on defects in the thing. Likewise, cases in which sellers in good faith were held liable did not surface. A study of more than 50 manuscript records of cases brought before the Chancery and executory writs it issued revealed that buyers or lessees of defective items either sued because of lesion beyond moiety or because of fraud on the seller’s or lessor’s side. Could it be that scholastic views had brought about the obsoleteness of remedies for defects in the thing in the case law of the Royal Chancery of Valladolid? Or was it simply the advantageous features of the remedy for lesion beyond moiety (longer limitation, plain method of price calculation, etc.) which induced plaintiffs to frame their claims in terms of a lesion. It is tempting to think that scholastic notions had percolated into civil law practice. Nevertheless, I have not been able to trace more than only circumstantial evidence to prove that hypothesis. Additional research on the topic might yield more convincing material about the effects current moral norms exercise on worldly legal practice.

Contrary to early modern Castilian civil law, legal humanism did not demonstrate a preference for the remedy for lesion beyond moiety in order to solve sales of defective things. It accepted the remedy as a subsidiary to the remedies based on the aedilician
edict. In keeping with the tendency to keep close to the text of the *Corpus iuris civilis*, Cujas denied that the remedy for lesion beyond moiety was also at the disposal of buyers. This position would eventually make it into the *Code civil*.

Early modern Dutch legal scholarship neither professed a preference for either remedy. Nevertheless, a significant number of Roman-Dutch and Roman-Frisian scholars interpreted the remedy for lesion beyond moiety in early modern scholastic fashion as a means to safeguard fairness in exchange. Grotius' desire to form a society (*appetitus societatis*) necessitates fairness in exchange as regards the parties' performances. Huber, Tulden and Noodt followed suit. Both doctrine and practice, as Bijinkershoek's notes demonstrate, accepted the remedy in its extended version. In this respect, Roman-Frisian legal scholarship appeared far removed from a 'pure' application of Justinianic Roman law. In the various positions taken, medieval *ius commune* is the order of the day.

The early modern Castilian predominance of the remedy for lesion beyond moiety was also patchily adopted by 17th and 18th century natural law scholars. Admittedly, as could be expected from the propagators of early modern scholastic concepts, the majority of 17th and 18th century natural law scholars submitted views about liability for defects in things sold or leased out which were firmly rooted in the concept of fairness in exchange. Yet, the remedy for lesion beyond moiety was no longer the unrivalled champion when solving a breach of fairness in exchange. Natural law scholars considered the standard of a deviation of more than half the thing's just price as too arbitrary. Furthermore, commercial interests demanded a cautious approach as regards the remedy for rescission because of a disproportionate price. Finally, to determine whether fairness in exchange had been breached, natural law scholars considered a lack of quality in the item a similarly suitable criterion alongside prejudice of price. A dogmatically fuelled attack against the remedy for lesion beyond moiety was initiated by Thomasius. Inspired by Hobbes' natural law view, Thomasius argued that all prices should stand, if consented to under free will. Consequently, contrary to what early modern scholastics had contended and contemporary natural law scholars still defended, remedies could not take the thing's just price as point of departure for determining whether or not the contract was just. Under influence of Thomasius' learning, the remedies based on defects in the object sold again stepped into the limelight. As defects in a thing impeded buyers to exercise their free will, *i.e.* in determining what they wanted to spend on the thing, the presence of defects bore upon the question whether or not a contract could be considered just.

Though Thomasius' contemporaries were not impressed by his views, as chance would have it the drafters of some 18th and 19th century civil codes took Thomasius' discrediting of the remedy for lesion beyond moiety to heart. The BW 1838, *Código*, and BGB 1900 left the solving of sales of defective things exclusively to remedies based on the thing's quality. Its drafters had rejected the remedy for lesion beyond moiety, sometimes in very strong terms. By contrast, the ALR and ABGB kept true to their natural law
background. Yet, these codes no longer grounded the remedy in fraud. More precisely, the ALR qualified a lesion beyond moiety as error. It likewise explained the remedies for defects in terms of a recipient erroneously entering into a contract because of the item's deviating quality. As a consequence, the ALR determined the effects of the remedy for lesion beyond moiety and the remedies for defects in a similar fashion. All of them were subject to one and the same limitation period. Furthermore, the scope of the creditor's liability did not depend on the cause of the liability but was determined by general provisions applicable to all relations between creditors and debtors.