CHAPTER FOURTEEN

EMPTIO VENDITIO (1)

1. Gai., 3.140: TEXT AND CONTROVERSY

Pretium autem certum esse debet. Nam alioquin si ita inter nos conve-
nerit, ut quanti Titius rem aestimaverit, tanti sit empta, Labeo negavit
ullam vim hoc negotium habere; cuius opinionem Cassius probat.
Ofilius et eam emptionem et venditionem; cuius opinionem Proculus
secutus est.

However, the price must be certain. For otherwise if we thus have agreed
that the thing is bought for as much as Titius will estimate, Labeo denied
that this transaction had any effect whatsoever. Cassius approves his
view. Ofilius thought that even this was *emptio venditio* and Proculus
has followed his opinion.

It is not clear whether this text really refers to a controversy between
the Sabinian and the Proculian schools. Whereas Baviera, Kübler,
and Falchi do not include Gai., 3.140 in their list of texts mentioning
school controversies,1 other scholars, including Voigt and Liebs, do.2
According to the latter, Labeo and Cassius represented the opinion of
the Sabinian school. Ofilius and Proculus, on the other hand, spoke
for the Proculian school. Their opinion seems incorrect because these

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1 G. Baviera, *Le due scuole dei giureconsulti romani*, Firenze 1898 (repr. Roma
1970); B. Kübler, Rechtsschulen, *RE* 2.1 (1914), cc. 380–394; G.L. Falchi, *Le contro-
Thomas, *The Institutes of Justinian. Text, Translation and Commentary*, Oxford 1975,
p. 231, and V. Scarano Ussani, *L’ars dei giuristi: considerazioni sullo statuto epistemol-
ogico della giurisprudenza romana*, Torino 1997, p. 80, n. 84. According to Thomas,
the dispute had been between individuals and not between the schools. I agree with
these scholars that the dispute in question is not a school controversy.

240–241; D. Liebs, Rechtsschulen und Rechtsunterricht im Prinzipat, *ANRW* 2.15
(1976), p. 264. In their discussion of the question of whether a contract of sale at a
price to be determined by a third party was valid, K. Schindler, *Justinius Haltung zur
Klassik: Versuch einer Darstellung an Hand seiner Kontroversen entscheidenden Konsti-
tutionen*, Köln-Graz 1966, pp. 147–149, and G.P. Solinas, A proposito dell’ arbitrium
boni viri, in: G. Grosso (ed.), *Studi in onore di Gaetano Scherillo*, II, Milano 1972,
p. 539, refer to the Sabinian and Proculian opinions without any further comment and
do not even remark that the controversy may not have been a school controversy.
scholars did not sufficiently take into account the peculiarities in the text. Although M. Antistius Labeo and Proculus had both been leaders of the same school, they disagreed on this matter. A second peculiarity is that C. Cassius Longinus, a Sabinian, supported the view of the Proculian M. Antistius Labeo. Thirdly, Proculus approved the view of Ofilius, a jurist who lived in the 1st century BC and who had been a teacher of Capito, whose school was later called the Sabinians. Gaius, fourthly, did not use the unambiguous ‘nostri praeceptores’ to indicate the Sabinians, nor ‘diversae scholae auctores’ for the Proculians. Therefore, the controversy in Gai., 3.140 is not a genuine school controversy, but a mere controversy between individual jurists. As such, it sheds a new light on the widespread ideas about the schools. This controversy demonstrates incontestably that the contrast between the representatives of the Sabinian school and the Proculian school has not been as sharp as assumed thus far.

The text in question is situated in the part on the law of obligations in Gaius’ Institutiones and, more precisely, in the discussion on emptio venditio, covered in Gai., 3.139–141. According to Gaius (3.139), a contract of sale was concluded when the parties agreed on the price. In the subsequent paragraphs (3.140–141), two further requirements regarding the price in a contract of sale are discussed: the price must be certain and must consist of money.

In Gai., 3.140, Gaius discusses the former requirement: ‘Pretium certum esse debet’. Obviously, this requirement was met when the parties had fixed a definite price. Yet, the sources mention some borderline cases, i.e., cases in which the price was in the grey zone between certum and incertum: (1) when the price was set, though unknown to

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3 Pomp., D. 1.2.2.47.
4 A.A. Schiller, Jurists’ Law, Columbia Law Review 58 (1958), p. 1233, acknowledged that in some cases ‘members of the same school took opposing views on a given question’ and illustrated this assertion with the controversy described in Gai., 3.140.