potensialiteite, en nie verskillende kopers vir sy onderskeie potensialiteite nie.

Ons is namens appellant na 'n ander transaksie in die omgewing verwys waar grond met 'n sandneerslag daarop verkoop is, en 'n geval waar grond met ontginbare sand daarop te koop aangebied is, en wat, volgens die betoog, toon dat 'n sandneerslag op grond nie die waarde van die grond wesenlik verhoog nie. Daardie transaksies is by die beantwoording van die onderhawige vraag van twyfelagtige waarde, omdat die waarde van die grond as landbougrond in daardie gevalle nie bepaal is nie, en ook nie die omvang en waarde van die sandneerslae daarop nie. Ek meen dus nie dat daardie gevalle van enige hulp by die bepaling van die waarde van die onteiende grond met die sandneerslag daarop, kan wees nie.

Benewens die waarde wat, volgens die getuienis soos hierbo uiteengesit, aan die ontginbare sand op die onteiende grond geheg moet word, moet ook die beperkings wat luidens die Groepsgebiedewet op die ontginning van die sand bestaan, in aanmerking geneem word, sowel as die waarskynlikheid, in die sin waarin dit hierbo uiteengesit is, dat daardie beperkings by wyse van die uitreiking van die nodige permit ingevolge die Groepsgebiedewet opgehef sou word. 'n Ander omstandigheid wat in ag geneem moet word, is die getuienis van Lentzner, dat die rooi sand op die onteiende grond, wat 'n baie groot deel van die sandneerslag uitmaak, hom, by sy eerste ondersoek van die sand op die onteiende grond, nie beïndruk het nie. Dit was eers nadat hy sy praktiese toets uitgevoer het, dat hy van die geskiktheid van die sand oortuig was. Die denkbeeldige koper mag ook, by 'n eerste ondersoek van die sand en sonder om 'n praktiese toets daarop uit te voer, ongunstig daarop reageer. Aan die ander kant moet in gedagte gehou word dat 'n koper, wat in die onteiende grond belangstel, heel waarskynlik 'n praktiese toets, soos dié van Lentzner, daarop sal uitvoer of laat uitvoer.

Soos reeds daarop gewys, is die bepaling van die markwaarde van die onteiende grond, met al sy potensialiteite, noodwendig 'n kwessie van skatting in die lig van al die omstandighede. Gesien die beweerde waarde van die ontginbare sandneerslag op die onteiende grond, en sy waarde as landbougrond, en met die oog op al die omstandighede wat ek genoem het, meen ek, na die beste van my vermoë, dat die markwaarde daarvan op die datum van onteiening op R250 per morg vasgestel moet word, d.w.s. 'n totale bedrag van R45 750. Dit is die bedrag wat die Hof *a quo* na my oordeel aan die respondent moes toegeken het.

Die appèl slaag dus met koste.

Die bevel van die Hof *a quo* word vervang deur 'n bevel wat die aan die eiser betaalbare vergoeding op R45 750 vasstel, en die appellant (verweerder in die Hof *a quo*) ingevolge art. 10 (2) (*c*) van die Onteieningswet, 55 van 1965, beveel om 12 800 oor 205 050 van respondent (eiser in die Hof *a quo*) se koste van verhoor te betaal. Dié koste sluit die gelde van twee advokate in. Die Hof *a quo* se bevel met betrekking tot die kwalifiseringsgelde van respondent se deskundige getuies is nie in hierdie Hof aangeveg nie, en bly dus onveranderd staan.

JANSEN, A.R., TROLLIP, A.R., RABIE, A.R., en MULLER, A.R., het saamgestem.

Appellant se Prokureurs: *Broodryk en Ehlers*, Pretoria; *J. G. Kriek en Cloete*, Bloemfontein. Respondent se Prokureurs: *MacRobert, de Villiers en Hitge*, Pretoria; *Claud Reid en Haylett*, Bloemfontein.

PHAME (PTY.) LTD. v. PAIZES.

(APPELLATE DIVISION.)

1973. *March* 16; *May* 7. OGILVIE THOMPSON, C.J., HOLMES, J.A., POTGIETER, J.A., JANSEN, J.A., and TROLLIP, J.A.

Sale.—Purchase price.—Reduction in.—Innocent misrepresentation.—Purchaser entitled to relief under the Aedilitian remedies.—Dictum et promissum.—*Meaning of.—Purchase of shareholding in a company.—Asset of company a rent-producing property.—Representation false as to rates payable.—Had purchaser known true facts purchase price would have been lower.—Entitled to relief.—Whether aedilitian relief applicable to sale of incorporeals.—Question discussed.*

(1) The Aedilitian remedies (*actio redhibitoria* or *actio quanti minoris*, as the case may be) are available if the *res vendita* suffered from a latent defect at the time of the sale.

(2) The Aedilitian remedies are also available if the seller made a *dictum et promissum* to the buyer upon the faith of which the seller entered into the contract or agreed to the price in question; and it turned out to be unfounded.

(3) A *dictum et promissum* is a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation.

(4) Whether a statement by the seller goes beyond mere praise or commendation will depend on the circumstances of each case. Relevant considerations could include the following: whether the statement was made in answer to a question from the buyer: its materiality to the known purpose for which the buyer was interested in purchasing; whether the statement was one of fact or of personal opinion; and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been wont to do.

Quaere: Where there is a *dictum et promissum* as described in (3) above, followed by a written contract which is silent as to it, can it operate at all, having regard to the law as to written contracts and extrinsic facts.

Semble: The current climate of opinion is propitious and receptive for the Aedilitian remedies being extended to apply to the sale of incorporeals.

In October, 1970, the plaintiff had negotiated with the defendant for the purchase of defendant's shareholding in, and certain claims against, a company. The principal asset of the company was an immovable property which was rent-producing. To the knowledge of the defendant the plaintiff was interested in the purchase of this property because of the income derived from the property. Amongst the factors which affected the true value of the shareholding in the company were the expenses incurred by it in connection with the property, the rental which was being produced, and the potential additional rental reasonably expected to be produced. The defendant's agent represented to the plaintiff that the municipal assessment rates and other charges were R4 646. This representation was to the knowledge of the agent material. On 15th October, the plaintiff, believing the rate to be as disclosed, bought from the defendant the entire shareholding and all the directors and shareholders' claims against the company for R846 000. At the time the representation was made it was false for the company's annual liability for

rates and other charges was R14 736 and had been so prior to September, 1970. Had the plaintiff known this he would not have agreed to pay the price paid as the true value of the shareholdings and claims was R815 000. By far the greater part of the price was in respect of the shareholding. The rental income was R93 480 and the expenses R18 002 per annum. There had been an increase in rental in September, 1970, arising out of an actual increase in rates. An investor would therefore have realised, had the true facts been known to him, that potential rent increase was not likely to be achieved because it had been absorbed by the R11 500 increase of rates and the consequential very recent increase of rents. Plaintiff claimed a reduction of the purchase price by an amount of R31 000. In the alternative this amount was claimed as damages. The defendant excepted to the combined summons, which exception was dismissed. In an appeal,

Held, that the Aedilitian relief recognised under the Roman-Dutch law could, while retaining its basic principles, be adapted to apply to the modern circumstances of this case.

Held, further, that the pleadings laid the foundation for the Aedilitian relief of a reduction of the purchase price.

The decision in the Witwatersrand Local Division in *Paizes* v. *Phame (Pty.) Ltd.*, confirmed.

Appeal from a decision of the Witwatersrand Local division (CLAASSEN, J.). dismissing an exception to a combined summons. The nature of the pleadings appears from the judgment of HOLMES, J.A.

J. C. de Wet, for the appellant: Die Hof *a quo* het vir sy houding steun op *Hall* v. *Milner*, 1959 (2) S.A. 304; *Van Schalkwyk* v. *Prinsloo*, 1961 (1) S.A. 665; *Overdale Estates (Pty.) Ltd.* v. *Harvey Greenacre & Co. Ltd.*, 1962 (3) S.A. 767; *Elsie Motors (Edms.) Bpk.* v. *Breedt*, 1963 (2) S.A. 36. Van die vier sake is dit eintlik net *Hall* v. *Milner* en *Van Schalkwyk* v. *Prinsloo* wat onomwonde steun verleen aan die geleerde Regter se houding. In *Overdale Estates* v. *Harvey Greenacre* en *Elsie Motors* v. *Breedt* het dit slegs gegaan oor die vraag of 'n eis gegrond op onskuldige wanvoorstelling 'n *actio quanti minoris* is wat volgens art. 3 (2) (*b*) (iii) na 'n jaar verjaar, en bevind dat, indien sodanige eis bestaanbaar is, dit 'n *actio quanti minoris* is. In *Van Schalkwyk* v. *Prinsloo* is *Hall* v. *Milner* sonder byhaling van nuwe gesigspunte as korrek aanvaar. Die juistheid van *Hall* v. *Milner* het nog nie voor hierdie Agbare Hof ter sprake gekom nie. In *Breedt* v. *Elsie Motors (Edms.) Bpk.*, 1963 (3) S.A. 525, het dit slegs gegaan oor die betekenis van die uitdrukking „valse voorstelling" in die pleitstuk. Tot en met *Hall* v. *Milner* is daar geen gerapporteerde saak waarin „onskuldige wanvoorstelling" as grondslag vir 'n eis om skadevergoeding erken is nie. Daar was wel 'n *obiter dictum* in *Brink* v. *Robinson and Wife*, 1916 O.P.A. op bl. 90. waarin die retoriese vraag gestel word waarom iemand dan nie skadevergoeding by 'n onskuldige wanvoorstelling kan verhaal nie. *Stevn* v. *Davis and Darlow*, 1927 T.P.A. 651, is op hierdie punt neutraal. In *Dickson & Co.* v. *Levy*, 11 S.C. 33, is wel beslis dat onskuldige wanvoorstelling nie aanleiding gee tot 'n eis om skadevergoeding nie. Daar word egter nie na gesaghebbende bronne verwys nie. In *Ramon* v. *Jackson*, 1955 (1) P.H. A6, volledíger gerapporteer as *Ramos* v. *Jackson* in Farlam & Hathaway, *A Case Book on the South African Law of Contract*, bl. 228, het die Kaapse Provinsiale Afdeling in 'n saak wat groot ooreenkoms vertoon met hierdie een, beslis dat 'n eis om skadevergoeding gegrond op onskuldige wanvoorstelling nie bestaanbaar is nie. Weer eens is nie na gesaghebbende bronne verwys nie. In die betreklik onlangse saak *Hamman* v. *Moolman*, 1968 (4) S.A.

340, het hierdie Agbare Hof hom in 'n rigtingewende verklaring sterk uitgespreek teen die erkenning van aanspreeklikheid selfs vir nalatige wanvoorstelling. Hou mens in gedagte dat aanspreeklikheid vir wanvoorstelling in wese aanspreeklikheid *ex delicto* is (sien *Trotman and Another* v. *Edwick*, 1951 (1) S.A. op bl. 449-450; *Scheepers* v. *Handley*, 1960 (3) S.A. op bl. 58; *De Jager* v. *Grunder*, 1964 (1) S.A. 446 (A.A.), *passim*), dan is aanspreeklikheid vir skadevergoeding op grond van „onskuldige" wanvoorstelling soveel te meer onbestaanbaar.

In die Romeinse reg kon skadevergoeding en selfs tersydestelling van 'n ooreenkoms deur wanvoorstelling verkry, slegs geëis word by bedrog, d.w.s. opsetlike wanvoorstelling. By *negotia stricti juris* is met die *actio doli* opgetree—sien Jörs-Kunkel-Wenger, *Römisches Recht*, 3de ed., para. 62 (*d*), bl. 109, en para. 160, bl. 260; Kaser, *Das Römische Privatrecht*, band I (1955 ed.), para. 59 IV, bl. 214 en para. 146 IV, bl. 524 oor die klassieke Romeinse reg; *Kaser*, band II, para. 202 VII, bl. 61 en para. 273 III, bl. 318; Van Oven, *Leerboek van Romeinsche Privaatrecht*, 2de uitg., bl. 322, 359; Windscheid, *Lehrbuch des Pandektenrechts*, 8ste uitg., band I, para. 78, bl. 343; Dernburg, *Pandekten*, band I, para. 104, bl. 246. By *neqotia bonae fidei* is met die relevante kontraksakie opgetree, en wel omdat die *actio doli, infamia* meegebring het, en dus subsidiêr was. Sien *Van Oven, op. cit.*, bl. 360; *Kaser, op. cit.*, band I, bl. 524; *Jörs-Kunkel-Wenger, op. cit.*, bl. 260; *D.* 4.3.1.1 en 4 en 6 en 7 en 8 en *lex* 7; *C.* 2.20(21).2. Of daar nou met die *actio doli* opgetree word of met 'n ander *actio* was *bedrog* steeds voorvereiste vir aanspreeklikheid, sien die skrywers hierbo aangehaal *passim*, en *D.* 4.3.1.2 en 3; *D.* 2.14.7.9; *D.* 4.3.37, en vgl. ook *D.* 2.1.7.4.

Behalwe dat die onderskeiding tussen *negotia stricti juris* en *negotia bonae fidei* in die Romeins-Hollandse reg nie meer bestaan het nie, en bedrog ook nie meer *infamia* meegebring het nie, is vir skadevergoeding weens wanvoorstelling en tersydestelling van 'n ooreenkoms deur wanvoorstelling verkry, ook in die Romeins-Hollandse reg bedrog (ook genoem *arglist*) vereis, sien De Groot, *Inleiding*, 3.1.19; 3.17.3; 3.48.7; Groenewegen, *De Legibus Abrogatis, ad C.* 2.20(21).2 en *ad C.* 2.20(21).8; Decker se aantekening no. 1 op Van Leeuwen, *Roomsch Holl. Recht*, 4.42.1; Van Leeuwen, *Censura Forensis*, 1.1.4.42; Voet, *Commentarius ad Pandectas*, 4.3.1 e.v.; Van der Linden, *Koopmanshandboek*, 1.14.2(*c*); Van Bynkershoek, *Observationes Tumultuariae*, 1.62; 1.112; 1.590; 2.1153; 2.1161; 2.1886; 4.3249; 4.3287.

In *Hall* v. *Milner* word aanspreeklikheid vir onskuldige wanvoorstelling gebaseer op die edikte van die *Aediles Curules*, en veral op dié deel van die slawe-edik, waarvolgens die verkoper dan aanspreeklik sou wees indien die *merx* nie die eienskappe het wat deur die verkoper by wyse van *dicta et promissa* daaraan toegeskryf is nie. Dit is moeilik om die gedagtegang van die Hof in *Hall* v. *Milner* te volg. Die Hof skyn te aanvaar dat daar eintlik nie wesentlike verskille tussen *dicta* en *promissa* bestaan nie (bl. 309H-310C en weer op bl. 313B-C) en dat *dicta* en *promissa* „terms of the contract on which the parties have agreed" was (bl. 313E). Op bl. 316F word *dicta* en *promissa* egter gelyk gestel met 'n *material misrepresentation* waardeur die koper *has been induced to enter into a contract*, en wel omdat material representations inducing

a contract were regarded as part of such contract. Nogtans ontken die Hof op bl. 316H enige voorneme om te kenne te gee dat *dicta promissave* „should in our law be regarded as part of the terms of such contract, because the division of contracts into such compartments serves a very useful purpose to-day". Dat *dicta* net soos *promissa* terme van die ooreenkoms was, en dus verklarings vir die waarheid waarvan die verkoper kontraktueel instaan, skyn bo twyfel te staan, altans wat die Justiniaanse Reg betref. Sien *Kaser, op. cit.*, band I, para. 131 IV, bl. 464, en band II, para. 264, bl. 287; *Jörs-Kunkel-Wenger, op. cit.*, para. 144, bl. 233, en veral bl. 235; *Van Oven, op. cit.*, bl. 266; A. L. Olde Kalter, *Dicta et Pomissa*, diss. Utrecht, 1963, *passim;* B. Nicholas, *Dicta Promissave, in Studies in the Roman Law of Sale*, bl. 91. Van Warmelo, *Vrywaring teen Gebreke by Koop in Suid-Afrika*, bl. 25, en Haymann, *Die Haftung des Verkäufers für die Beschaffenheit der Kaufsache*, bl. 32, is enigsins onduidelik. Stein, *Fault in the Formation of Contract in Roman Law and Scots Law*, bl. 43, e.v. skyn te meen dat *dicta* ook *innocent misrepresentations* kan insluit. Dit skyn ook die houding te wees van Burchell, "Honest Misrepresentation and Damages," 1950 (band 67) *S.A.L.J.* op bl. 125. Hierteenoor beweer Mulligan, "No Orchids for Misrepresentation?" in 1951 (band 68) *S.A.L.J.* op bl. 158-160, dat *dicta* en *promissa* warranties was, en in hierdie opsig stem hy saam met *Monier*, wie se werk vir my ongelukkig nie beskikbaar was nie, en met *Van Oven*. Die standpunt van *Kaser, Jörs-Kunkel-Wenger, Van Oven en Mulligan* is die juiste; *Mulligan* se stelling is trouens ook deur die Hof in *Hall* v. *Milner* aanvaar, sien bl. 311G. Die tekste self bevestig ook hierdie indruk. Sien *D.* 21.1.14.9; *D.* 21.1.18.1 en 2; *D.* 21.1.19 pr., 1, 2, 3, en 4; *D.* 21.1.17.20; *D.* 21.1.52, en les bes; *D.* 4337. Dit gaan nie net oor verklarings of wanvoorstellings nie, maar oor verklarings wat gemaak is *ut praestentur*. Hierdie tekste, en veral *D.* 4.3.37, getuig ook dat in die Romeinse reg daar al wel deeglik onderskei is tussen 'n wanvoorstelling gemaak *decipiendi causa* aan die een kant, en *dicta promissave* wat gemaak is *ut praestentur*, d.w.s. tussen wanvoorstellings (misrepresentations) en waarborge of ondernemings (warranties), en dat die Hof in *Hall* v. *Milner* op bl. 312D-E, verkeerd is waar dit beweer dat daar in die Romeinse reg nie onderskei is tussen wanvoorstellings en terme van 'n kontrak nie. In die Romeins-Hollandse reg is daar geen gesag vir die stelling dat selfs by 'n koopkontrak onskuldig wanvoorstelling onder die vaandel van die *actio quanti minoris* aanleiding gegee het tot 'n eis om herstellende skadevergoeding (restitutionary damages) of prysvermindering nie. De Groot, *Inleiding*, 3.15.8, regverdig nie hierdie afleiding nie—sien Van der Keessel se aantekening hieroo in *Praelectiones Iuris Hodierni*, uitgawe *Van Warmelo, Coertze* en *Gonin*, band IV. bl. 412. Van Leeuwen, *Roomsch Hollandsch Recht*, 4.18.6, 10, 11, 12 en 13, dra niks noemenswaardig by nie. In sy *Censura Forensis*, 1.4.19.15 (waarna verwys word in *Hall* v. *Milner* op bl. 314D-E) sê Van Leeuwen wel dat die verkoper gebonde is vir *quaecumque de re dixerit, aut affirmaverit praestare*, maar hierdie kriptiese stelling kan nouliks uitgelê word as 'n stelling dat die verkoper vir onskuldige wanvoorstellings instaan—veel eerder slaan dit op waarborge, wat hy onderneem het. Dit

is immers uit para. 19 *eod.* duidelik dat *Van Leeuwen* die verkoper slegs vir bedrieglike wanvoorstellings aanspreeklik hou. Sien ook *Roomsch-Hollandsch Recht*, 4.18.7. Matthaeus, *De Auctionibus*, 1.8.23, praat ook nie noodwendig van 'n blote verklaring nie, maar eerder van 'n term van die ooreenkoms. Hierdie bewysplek word vermeld in *Hall* v. *Milner*, op bl. 314F. Op dieselfde plek word ook verwys na Huber, *Praelectiones Juris Civilis ad D.*, 21.1.2 en 3. Dit word aan die hand gedoen dat hierdie bewysplekke eintlik geen waarde het nie, want *Huber* skyn te meen dat daar in sy tyd eintlik geen bestaansreg vir die aksies van die Aediles was nie behalwe by koop van diere—sien 4 en 5. Huber, *Hedendaegse Rechtsgeleertheyt*, 3.5.40 e.v., werp ook nie lig op die probleem waarmee ons te doen het nie. Voet, *Commentarius ad Pandectas*, 21.1.3, laat duidelik blyk dat die verkoper slegs aanspreeklik is vir *dicta* gemaak *ut praestentur*. Prys die verkoper die goed aan met die doel om die koper te bedrieg, dan is hy nie *ex dicto promissove* aanspreeklik nie, maar weens bedrog. Nog duideliker stel hy dit in 4.3.4 waar hy verklaar dat die *actiones aedilitiae* nie beskikbaar is nie, maar wel 'n aksie gegrond op bedrog indien die verkoper iets sê *non eo animo, ut praestaret*, maar *decipiendi animo*. Dit is duidelik dat daar by *Voet* geen sprake kan wees van 'n *actio quanti minoris* weens onskuldige wanvoorstelling, onder die vaandel van 'n *dictum* of *promissum* nie. Voorts blyk uit hierdie passasie dat die stelling dat daar in die Romeins-Hollandse reg nie onderskei is tussen wanvoorstellings, aan die een kant, en terme van die kontrak, aan die ander kant, net nie waar is nie.

Mens hoef egter nie net op skrywers te steun vir die ontkenning van aanspreeklikheid, volgens Romeins-Hollandse reg, vir onskuldige wanvoorstellings nie. Daar is ook die beslissings van die Hoë Raad, d.ws.. die Appèlhof vir Holland, Zeeland en Wes-Friesland. Sien, veral die beslissings deur *Van Bynkershoek* gerapporteer Obs. Tum. 1.62; 2.1161; 2.1886. In sy uitspraak sê CLAASSEN, R., verder dat hy geneig is om die beslissings in *Hall* v. *Milner* e.d.m. te beskou as „a very equitable, logical and much needed development in our law". Daarteenoor stel ek die houding van hierdie Agbare Hof op bl. 348 van *Hamman* v. *Moolman, supra.* Steun vir CLAASSEN, R., se houding is wel te vind in die reedsgenoemde artikels van Burchell en Mulligan in die *South African Law Journal* en 'n vlugtige blik op hierdie artikels sal seker nie onvanpas wees nie. Die bal is aan die rol gesit deur Burchell in 'n artikel „Honest Misrepresentation and Damages" in band 67 (1950) *S.A.L.J.*, bl. 121 e.v. Burchell bou sy betoog grootliks op die opvatting dat *dicta sive promissa* wanvoorstellings is. Hierdie uitgangspunt is verkeerd. Voorts meen Burchell ook (op bl. 126) dat daar in die Romeinse reg en die Romeins-Hollandse reg nie tussen „misrepresentation" en „warranty" onderskei is nie. Hierdie stelling kan nie aanvaar word nie. Verder sinspeel Burchell daarop dat daar by (onskuldige) wanvoorstelling gebrek aan *consensus* is. Indien dit die geval is, is daar natuurlik geen kontrak nie, en is die „misleide" se remedie aanvegting van die oëskynlike kontrak, en nie skadevergoeding nie (ook al noem mens dit „restitutional" of „restitutionary damages"). In sy artikel „No Orchids for Misrepresentation?"

in band 68 (1951) *S.A.L.J.*, bl. 157 e.v., wys Mulligan, met eerbied gesê tereg, daarop dat Burchell se uitgangspunt verkeerd is. Hy meen nogtans dat 'n eis vir *quanti minoris* damages, soos hy dit noem, geregverdig is, maar slegs *in subsidio*, waar restitusie nie moontlik is nie of nie wenslik nie. Sy betoog is dat dit onbillik is dat die „misleier" die voordeel wat hy deur „onskuldige wanvoorstelling" verkry het, behou (bl. 162), blykbaar omdat die behoud van die voordeel strydig is met die stelreël *nemo debet locupletari aliena jactura* (bl. 163). Indien die „misleide" weens „onskuldige wanvoorstelling" die kontrak ter syde kan stel, dan behoort hy onder gepaste omstandighede ook vermindering van sy teenprestasie, met instandhouding van die kontrak, te kan verhaal. In 'n later reeks artikels, nl. „Misrepresentation, Warranty Estoppel, etc." band 77 (1960) *S.A.L.J.*, bl. 193 e.v. en bl. 323 e.v., bespreek Mulligan weer eens di eprobleem van „innocent misrepresentation". Op bl. 202 e.v. staan hy, tereg krities teenoor die grondslag van die beslissing in *Hall* v. *Milner*, maar origens skyn hy nog by sy vroeër standpunt te staan, behalwe dat hy die uitdrukking *quanti minoris* damages terugtrek en vervang met „restitutionary damages".

Teen Mulligan se benadering kan, wat die Romeins-Hollandse reg betref, twee besware aangevoer word. Alhoewel vandag vrywel algemeen aanvaar word dat iemand, wat deur 'n onskuldige wanvoorstelling tot sluiting van 'n kontrak beweeg is, die kontrak kan aanveg en tersyde stel, is daar in die Romeinse reg en die Romeins-Hollandse reg geen gesag vir hierdie houding nie. Dit is 'n reël wat vanuit die Engelse „Equity" hier by ons ingevoer is. Om nou verder te gaan en as 'n „logiese" uitbreiding aan die „misleide" 'n eis om skadevergoeding (al noem mens dit, om die pil te versuiker, „restitutional" of „restitutionary damages") toe te ken, sou die uitbreiding wees van 'n vreemde gewas in ons regstelsel. Bowendien is dit oëverblindery om sogenaamde „restitutional damages" voor te hou as restitusie. By restitusie moet albei van weerskante teruggee wat ontvang is, maar by „restitutional damages" word aan die onskuldige wanvoorsteller teen wil en dank 'n kontrak opgedwing, wat anders is as die een wat hy wel gesluit het.

Dit is moeilik om die „billikheid" van die reëling in te sien. Die onskuldige wanvoorsteller handel per slot van rekening *bona fide* en selfs sonder *culpa*. Hy is nie oneerlik nie, en ook nie nalatig nie—welke billikheid steek nou daarin om hom vir skadevergoeding, en selfs „restitutionary damages", aanspreeklik te hou? Die poging om die „billikheid" te onderskraag met die stelreël *nemo debet locupletari aliena jactura* ruk laasgenoemde stelreël heeltemal uit verband.

Dit wil voorkom of diegene wat aanspreeklikheid vir onskuldige wanvoorstelling voorstaan, in die wanvoorstelling (misrepresentation) hoe onskuldig ook, al klaar iets onbehoorliks sien, en uit die oog verloor dat die Romeine al aanvaar het *in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire* (*D.* 4.4.16.5). Sien ook *D.* 19.2.22.3; *C.* 4.44.8. In Van Bynkershoek, *Obs. Tum.* 2.1886, word *D.* 4.4.16.5, met instemming aangehaal, en in *Poole and McLennan* v. *Nourse*, 1918 A.A. 404, haal WESSELS, R., (in die verslag van die beslissing van die Hof *a quo*, op bl. 411) weer *D.* 19.2.22.3 met instemming aan.

Wat die jongste Suid-Afrikaanse handboeke oor die koopkontrak betref: Mostert, Joubert en Viljoen, *Die Koopkontrak* (1972) gee in hoofstuk XI (bl. 184 e.v.) 'n historiese oorsig van die verkoper se aanspreeklikheid vir gebreke. Op bl. 188 vermeld hulle *dicta* en *promissa*, maar deel origens nie veel mee nie. Op bl. 237-238 verklaar hulle egter onomwonde dat *dicta* en *promissa* waarborge is. Mackeurtan, *Sale of Goods in South Africa*, 4 ed., (1972) deur *O'Donovan*, bl. 118, neem geen definitiewe standpunt in oor „innocent misrepresentation" nie. Op bl. 241 skyn die skrywer *dictum* as 'n „representation" te beskou, teenoor *promissum*, wat dan 'n warranty sou wees. Norman, *Purchase and Sale in South Africa*, 4 ed. (1972) deur *Belcher*, op bl. 80 e.v., skyn *Hall* v. *Milner* as gesaghebbend te aanvaar. Sien egter bl. 355.

Regsvergelyking. (*a*) Tot en met die Misrepresentation Act van 1967 kon volgens Engelse reg geen skadevergoeding weens „innocent misrepresentation" verhaal word nie. Die misleide kon slegs ontbinding van die kontrak eis. Art. 2 (2) van genoemde Wet het hierin verandering gebring. Dit bepaal dat waar iemand weens 'n „misrepresentation" wat nie „fraudulent" is nie, geregtig is om die kontrak weens die wanvoorstelling te ontbind, en ontbinding van die kontrak eis, 'n hof of arbiter ontbinding kan weier en skadevergoeding „in lieu of rescission" mag toestaan. Die misleide het dus nie 'n *reg* op skadevergoeding nie. Hy moet nog steeds ontbinding aanvra, en dan kan die hof ontbinding weier, en in plek daarvan skadevergoeding toeken—sien Treitel, *The Law of Contract*, 3rd ed. (1970), bl. 300, waar die teks van die artikel ook weergegee word. (*b*) Volgens die Duitse reg is 'n kontrak slegs weens opsetlike wanvoorstelling (arglistige Täuschung) aanvegbaar—sien Flume, *Das Rechtsgeschäft* (1965) bl. 541 e.v. Wat koop betref, vind die Romeinse reg weerklank in die B.G.B. Volgens art. 459 is die verkoper aanspreeklik vir gebreke in die saak, en ook vir „*Zusicherung*" betreffende eienskappe van die saak. Nie elke verklaring is 'n „*Zusicherung*" nie, maar slegs 'n verklaring wat in „vertragsmässig bindender weise" gemaak is—sien Staudinger se *Kommentar op die B.G.B.*, band II (1955), bl. 281 *ad* art. 459; Soergel-Siebert, *Kommentar op die B.G.B.*, band II (1962), bl. 82, *ad* art. 459, en ook Palandt, *Kom. op die B.G.B.* (1970 uitgawe) bl. 397. (*c*) In Nederland is 'n ooreenkoms weens bedrog, d.w.s. opsetlike misleiding, aanvegbaar; sien Algra, *Inleiding tot het Nederlands Privaatrecht*, druk (1971), bl. 222. Die koper se aanspreeklikheid vir gebreke volgens Nederlandse reg wyk sterk af van die Romeinse en Romeins-Hollandse reëlings, en vergelyking is vrugteloos—sien art. 1540 e.v. van die B.W.

Ook in die Ontwerp B.W. is 'n regshandeling vernietigbaar weens bedrog, en bedrog word omskryf as „enige opzettelijk daartoe gedane onjuiste mededeling"—Ontwerp B.W., boek 3, titel 2, art. 3.2.10.

E. Morris, S.C. (with him *H. J. Erasmus*), for the respondent: The question of negligent representations inducing a contract arose in the case of *Hamman* v. *Moolman*, 1968 (4) S.A. 340. In regard to the *dictum* at p. 348D-F, modern commercial life is far more intense and complex than it was in the Roman times, but even in the Roman law there occurred development in the principles of the contract to meet

the evolving commercial needs of the age. Misrepresentation in a modern contract, such as the sale of shares in a company, is vastly different from misrepresentation in the sale of slaves or animals or wine or corn. The factors which go to make up the true value of shares are many and complex, often capable of interpretation only by skilled accountants. The verification of the assertions of the seller is often impracticable, especially in a competitive market, and the consequences of misrepresentation, as a matter of principle or of equity or of historical tradition, should be visited upon the party responsible rather than upon the innocent purchaser. Any other reasoning would allow the "guilty" seller to have a bet of an unjustified profit on the one hand against no loss on the other. The South African cases for nearly 70 years have indicated that there is a basis of liability by means of *actio quanti minoris*, not only in respect of actual physical defects in an article sold, but also arising out of statements made in regard to the qualities or properties of that article. The present argument is whether that liability is to be limited to statements which become incorporated in the contract as formal warranties. No reason should exist in principle for differentiating between a seller who has negligently warranted a quality in the *merx* and a seller who has negligently represented that the *merx* has the same quality where, in either case, the *merx* does not possess that quality. It is normally the policy of the law to protect the innocent party by affording him relief and, if the *actio quanti minoris* were confined to the case of an express warranty, then the negligent but wary seller would receive an advantage at the expense of the purchaser. He would thus benefit over his more rash counterpart who committed himself to the warranty or had the courage of his convictions. In the following cases there is judicial approval of the theory that the *actio quanti minoris* is available not only in respect of physical defects but also of the verbal ascription to the *merx* of a particular quality or condition. *Viljoen* v. *Hillier*, 1904 T.S. at p. 316; *Corbett* v. *Harris*, 1914 C.P.D. at p. 543; *Brink* v. *Robinson and Wife*, 1916 O.P.D. 88, especially at pp. 90-91; *S.A. Oil and Fat Industries Ltd.* v. *Park Rynie Whaling Co. Ltd.*, 1916 A.D. at pp. 404; 413-414; *Steyn* v. *Davis & Darlow*, 1927 T.P.D. at pp. 656-657; *Bell* v. *Ramsay*, 1929 N.P.D. at pp. 271-273; *Hackett* v. *G. & G. Radio & Refrigerator Corporation*, 1949 (3) S.A. 664. The point was crisply raised for decision in *Hall* v. *Milner*, 1959 (2) S.A. 304. In criticising the decision De Wet and Yates, *Kontraktereg en Handelsreg*, 3rd ed., p. 40, n. (E), suggest that the Court reasoned in a circle and, in effect, found that representations are portion of a contract and, therefore, are equivalent to warranties. *Hall* v. *Milner* has been followed in a number of cases; see *Van Schalkwyk* v. *Prinsloo*, 1961 (1) S.A. 665; *Overdale Estates (Pty.) Ltd.* v. *Hancy Greenacres & Co. Ltd.*, 1962 (3) S.A. 767; *Elsie Motors (Edms.) Bpk.* v. *Breedt*, 1963 (2) S.A. 36; *Van Niekerk* v. *Thompson Motors*, 1966 (2) P.H. A70. It may be of assistance if reference is made to current text-books in which the judgment in *Hall* v. *Milner* is discussed: Farlam and Hathaway, *A Casebook on the South African Law of Contract*, p. 238 to penultimate para. 239 (middle); Mackeurtan, *Sale of Goods in South Africa*, 4th ed., p. 118, para. 166; Norman, *Purchase and Sale in South Africa*, 4th ed., pp. 80-82; see also pp. 370-371. The exposition by Mostert, Joubert & Viljoen, *Die Koopkontrak*, pp. 188-189 (see also p. 189 n.l) is more satisfactory and more in accordance with the historical context in which the development took place. In view of the trend of judicial decisions, the Court, notwithstanding the academic disputes, should apply the *dictum* of SOLOMON, J.A., in *Union Government (Minister of Lands)* v. *Estate Whittaker*, 1916 A.D. at p. 206 (1st para.) quoted with approval in *John Bell & Co. Ltd.* v. *Esselen*, 1954 (1) S.A. at p. 154A-B. A further illustration of the weight attached to the trend of judicial decision is to be found in *Daniels* v. *Daniels*, 1958 (1) S.A. at pp. 522G-523B.

The state of the Roman and Roman-Dutch authorities on this point cannot be said to be so unequivocal and "glashelder" (cf. *de Wet & Yeats, op. cit.* at pp. 23 and 232-233) that it can with assurance be said that the decisions of the Provincial Divisions ought to be overruled. As to the Roman and Roman-Dutch authorities, there seems to be some dispute as to the manner in which the Roman law of sale became received as part of the Roman-Dutch law. See Wessels, *History of the Roman-Dutch Law*, (1908) at pp. 97-102. The liability for *dicta promissave* is derived from the so-called slave edict of the *aediles curules*. *D.* 21.1.1.1. The only remedy under the slave edict was originally redhibition, while the animal edict, which did not provide for liability for *dicta promissave*, originally provided only for a reduction of the purchase price. *D.* 21.1.38 pr. The scope of the aedilitian actions was gradually extended: (*a*) liability for *dicta promissave* was extended to the sale of animals by juristic interpretation. *D.* 21.1.38.10; (*b*) the animal edict was extended to the sale of all animals (stock) at the market; *D.* 21.1.38.4 and 5; (*c*) *Diocletian* applied the *actio redhibitoria* to the sale of a *pestikilis fundus*. *C.* 4.58.4.1; (*d*) the aedilitian remedies were extended to all sales: *D.* 21.1.1 pr. *Justinian* created a confused and confusing system of overlapping remedies in which the distinction between the aedilitian actions and the *actio empti* was obliterated, and the aedilitian actions had, in fact, become superfluous. Van Oven, *Leerboek van Romeinsch Privaatrecht*, p. 268; Kaiser, *Das Romische Privatrecht*, vol. II, p. 287; Buckland, *Main Institutions of Roman Private Law*, p. 276. Our Courts have long since recognised this overlap of remedies, and in particular that liability for *dicta promissave* could arise both *ex empto* and under the aedilitian actions. *Vivian* v. *Woodburn*, 1910 T.S. at p. 1289; *Hackett* v. *G.G. Radio and Refrigerator Corporation, supra* at pp. 677, 680-681. Also see *D.* 18.6.15; 19.1.6.4; 18.1.45; 19.1.13.3.4; 19.1.11.7, and numerous texts from *D.* 21.1. The meaning of the expression *dicta promissave* is not clear. There is only one attempt in the *Digest* to distinguish between *dicta* and *promissa*, and this attempt is not entirely satisfactory. In other texts in which the expression is explained, the expression is treated as a unit, e.g., *D.* 21.1.17.20: In this text *dicta promissave* are explained by reference to *adfirmo, dico* and *adsevero*, verbs which are all synonyms according to Lewis and Short, *A Latin Dictionary*. *D.* 21.1.31.1: From the use of *pronuntio, promitto* and *promissio* it is clear that there is no substantial difference between a *dictum* and a *promissum*. In numerous texts in *D.* 21.1 the words *si dixerit, si adfirmaverit* and *si promiserit* are used indiscriminately. The only distinction which is carefully drawn in the

Digest, is that between statements made *commendandi causa* which give rise to no liability, and statements which amount to *dicta promissave* which do give rise to liability: *D.* 21.1.19 pr; 21.1.193; 18.1.43. The Romans did not distinguish between representations and warranties and, hence, every assurance and representation, whether it took the from of a warranty or whether it formed a term of the contract or not, was considered part of the contract and had to be made good. See *D.* 19.111.1, in which it is emphasised that sale is a *bona fide* contract, and that parties should carry out *quod inter contrahentes actum sit.* Wessels, *Law of Contract*, vol. I, paras. 1019, 1024. Accordingly the Court in *Hall* v. *Milner*, *supra* at pp. 310A and 311G, correctly interpreted the expression *dicta promissave*. Reference has already been made to the unsatisfactory manner in which the Roman-Dutch writers dealt with these remedies. In this regard, reference may also be made to *Voet*, 21.1.3, who opens his discussion of the aedilitian remedies with the statement that the *actio ex empto* also lies for redhibition on account of defects (*vitia*) in things sold, but he nowhere considers the precise relationship between the various remedies. From a study of the Roman-Dutch authorities the following conclusions may be drawn: (*a*) They distinguish between statements made *commendandi causa* on the one hand, and *dicta promissave* on the other hand. (*b*) They do not distinguish between representations and warranties, and appear to take up the attitude that every assurance and representation must be made good, provided it was intended to form part of the contract. Wessels, *Law of Contract*, vol. I, para. 1024. (*c*) The meaning of *dicta promissave* is explained in the same terms as by the Roman writers, viz, as things *sic dicuntur, ut praestentur, non ut iactentar.* (*d*) Liability for *dicta promissave* is both aedilitian (i.e. either redhibition or reduction of price) and *ex empto*. (*e*) The expression *dicta promissave* is treated as a unit, and usually contrasted with statements made in praise of a thing (puffing) which do not give rise to liability. (*f*) Certain authors stress the equitable basis of the liability. See Cujacius, *Opera Omnia*, vol. IV, p. 805 (*ad D.* 19.1.13); Donellus, *Ad titulum de Aedilicio Edicto* (*Opera Omnia*, 1829 ed., vol. X, p. 1320; 1897 ed., vol. X, p. 1336); Donellus, *De Jure Civili*, 13.3.18-20 (*Opera Omnia*, 1829 ed., vol. III, pp. 795-796; 1897 ed., vol. III, pp. 816-818); Noodt, *Opera Omnia*, vol. II, p. 456; Huber, *Praelectiones*, 21.1.2, 3 and 6; Huber, *Hedendaegse Rechtsgeleertheyt*, 3.4.11 and 13; 3.21.4; A. Matthaeus, *De Auctionibus*, 1.8.23; De Groot, *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, 3.15.7-9. (See Bodenstein, (1914) 31 *S.A.L.J.* 157); Van Leeuwen, *Censura Forensis*, 1.4.19.5; Van der Keessel, *Praelectiones*, vol. IV, p. 413; Voet, *Ad Pandectas*, 21.1.3; 19.1.15; 4.3.4; Sande, *Decisiones Frisicae*, 3.4.6; Domat, *Civil Law*, 1.2.12. There is no adequate basis for denying a remedy based on misrepresentation where the representation is not embodied as an express warranty. If *dicta* are representations and *promissa* are warranties there is adequate authority for affording the same remedy in case of falseness. There appears thus to be adequate historical justification for the trend of judicial decisions and *dicta* in South African law and a sound basis for holding that an affirmation made regarding the quality or value of a thing sold should

be enforceable against the seller. If a statement is material to the assessment of the purchase price it is so connected with the contract that the seller should be bound to make it good as being part of the *dicta promissave*. *Aliter* in the case of mere puffery such as "a desirable residence" or "a first-class investment". Cf. *Voet* 21.1.3. (*Gane's* translation, vol. 3, p. 646). *Hall* v. *Milner*, *supra*, should be held to be good law, particularly in view of the fact that it has been accepted in the cases cited *supra*.

de Wet, in reply.

Cur. adv. vult.

Postea (May 7th).

HOLMES, J.A.: This is an appeal against a decision of CLAASSEN, J., sitting in the Witwatersrand Local Division, dismissing an exception to a combined summons. Leave to appeal was granted "as far as is necessary".

The appeal raises the following questions—

1. (*a*) Can an innocent misrepresentation ever entitle a buyer to a reduction of the price under the *actio quanti minoris*?
   (*b*) If so, under what circumstances? In other words, what factual foundation is required?
2. Has the excipient shown that the pleadings are incapable of being read as averring such foundation?

The plaintiff's combined summons, read with the further particulars, includes averments to the following effect—

(i) In October, 1970, the plaintiff was negotiating with the defendant for the purchase of the defendant's shareholding in, and certain claims against, a company hereinafter referred to as "the company".

(ii) The principal asset of the company was certain immovable property in Johannesburg, referred to hereinafter as "the property".

(iii) There was a shopping centre on the property which consisted of 24 shops, a supermarket, and a service station. All of these were leased, and the property was thus rent-producing.

(iv) To the knowledge of the defendant, the plaintiff was interested in purchasing the shares in the company because of the income derived from the property.

(v) To the knowledge of the plaintiff and the defendant, among the factors which affected the true value of the shareholding in the company were the expenses incurred by it in connection with the property, the rental which was being produced, and the potential additional rental which was being produced, to be produced.

(vi) During the course of the negotiations, the defendant's agent on its behalf represented to the plaintiff in writing, under the heading of "annual expenses", that the company's annual liability on the property in respect of municipal assessment rates

and other charges was R4 646 and could be expected to continue at that amount until the local authority revised its valuation roll or its rate of assessment.

(vii) This representation was, to the knowledge of the agent, material. The agent intended that the plaintiff should believe and act upon the representation; and the plaintiff did believe and act upon it.

(viii) On 15th October the plaintiff, induced to believe as aforesaid that the company's annual liability on the property in respect of municipal rates and other charges was and would be R4 646, bought from the defendant, under a written contract, the entire shareholding in, and all the directors' and shareholders' claims against, the company for R846 000.

(ix) In agreeing as aforesaid the plaintiff relied upon the said representation and, in all the averred circumstances, was induced to believe that the price was fair and reasonable. He paid the price.

(x) At the time when the representation was made it was false, for the company's annual liability for municipal rates and other charges was R14 376. It had been so for some time prior to September, 1970, when the defendant paid that sum to the local authority.

(xi) Had the plaintiff known the fact just mentioned, he would not have agreed to pay the said price.

(xii) The true value of the shareholding and claims in the averred circumstances was R815 000.

(xiii) By far the greater part of the price paid was in respect of the shareholding; and by far the greater part of the R14 376 was in respect of assessed rates on the property.

(xiv) The rental income of the property was R93 480 and the expenses R18 002 per annum. In regard to all the tenants there had been an increase in rental in September, 1970, arising out of an actual increase of rates. An investor would, therefore, have realised, had the true facts been known to him, that potential rent increase was not likely to be achieved because it had been absorbed by the R11 500 increase of rates and the consequential very recent increase of rents.

In the premises the plaintiff claimed a reduction of the price by an amount of R31 000. In the alternative, such amount was claimed as damages.

I would add that details of the property which the defendant's agent gave to the plaintiff during the negotiations (they are annexed to the further particulars) contain all the information which an investor/purchaser would want to know, with particular reference to rental income and expenditure, with a view to establishing the percentage return, and thus the productivity or profitability of the shares. The said information included the statement. "The selling price required is R846 000 showing a net return of over 8,9%". This was on the footing that the rates and other municipal charges were R4 646 as represented. From the nature of the information contained in the annexure to the further particulars, it can be inferred that it was furnished to the plaintiff at his request.

I pause here to observe that, despite the averment in (x), *supra*, that the representation was false, the plaintiff does not aver that it was wilfully false. Hence it does not amount to fraudulent misrepresentation; see *Breedt* v. *Elsie Motors (Edms.) Bpk.*, 1963 (3) S.A. 525 (A.D.). The case is therefore one of innocent misrepresentation. This was accepted by both sides.

The plaintiff's case is not that he would not have contracted at all if he had been told the true facts about the rates and other charges. His case is that an investor, after taking into account the true figure for such expenditure, would have purchased at a price of R815 000, "which was the true value of the shareholding and claims"; and that consequently the plaintiff would not have agreed to pay more than R815 000. He does not sue for rescission, and his main claim is for a reduction of the purchase price by an amount of R31 000, being the difference between the price and the value.

The defendant excepted as follows:

"Insamuch as the plaintiff relies only on an innocent misrepresentation made by the defendant's authorised agent, and does not allege any fault on the part of the defendant or its authorised agent, the plaintiff's combined summons, as amplified by the further particulars thereto, lacks averments which are necessary to found a cause of action or to sustain an action.

Wherefore the defendant prays that the plaintiff's combined summons, as amplified by the further particulars thereto, be set aside, and that the plaintiff be ordered to pay the costs of this exception."

CLAASSEN, J., in dismissing the exception, said this—

"I am acquainted with the cases of *Hall* v. *Milner*, 1959 (2) S.A. 304 (O), followed in this Province by the case of *Van Schalkwyk* v. *Prinsloo*, 1961 (1) S.A. 665, also in *Overdale Estates (Pty.) Ltd.* v. *Harvey Greenacre and Company Ltd.*, 1962 (3) S.A. 767 (N), and again in *Elsie Motors (Edms.) Bpk.* v. *Breedt*, 1963 (2) S.A. 36 (O), where a reduction of the price has been approved as a result of innocent misrepresentation. These decisions have been much discussed, criticised and also approved in various learned articles in law journals. Sitting as a single Judge, I am not prepared to say that those cases have been wrongly decided. On the contrary, I am inclined to the view that those cases probably indicate a very equitable, logical and much needed development in our law."

With that prelude I turn to the legal issue posed at the beginning of the judgment. The *actio quanti minoris* was an Aedilitian remedy. It has descended to us from Roman law, *via* the Roman-Dutch law. The Curules Aediles were first elected in 365 B.C. They were, amongst other things, curators of markets, with legislative power to make relevant edicts. It would seem that their functions came to an end during the reign of Alexander Severus (A.D. 222-235). The *Digest of Justinian* was published much later, in A.D. 533. See, as to all the foregoing, *Hackett* v. *G. & G. Radio and Refrigerator Corporation*, 1949 (3) S.A. 664 (A.D.) at pp. 675-6. The actual date when the Edict was introduced is uncertain. In "*Studies in The Roman law of Sale*," edited by David Daube in 1959, the chapter by A. M. Honoré suggests at p. 134 that the year was 199 B.C.

The Edict is quoted in various passages of the Digest; see *D.* 21.1, 1.1, 19.5 pr. and 9.37.38 pr. and 5.40.1, 41.

D. 21.1, 1.1 reads as follows (*Scott's* translation)—

"The Aediles say: 'Those who sell slaves should notify the purchasers if they have any diseases or defects, if they have the habit of running away, or wandering, or have not been released from liability for damage which they have committed. All of these things must be publicly stated at the time that the slaves are sold. If a slave should be sold in violation of this provision, *or contrary to what has been said and promised* at the time the sale took place, on account of which it may be held that the purchaser and all the parties interested should be indemnified, we will grant an action to compel the vendor to take back the said slave."

(My italics).

The words translated "said and promised" are *dictum et promissum.*" They appear sometimes in the works of writers as *dictum promissumve* or, in the plural, *dicta promissave.*

D. 21.1.18 pr. Gaius on the Edict (*Scott's* translation) reads—

"Where a vendor asserts that a slave has some good quality, and the purchaser complains that this is not true, he will be entitled to an action for the return or the appraisement of the slave, in order to recover the deficiency in his value."

D. 21.1.38 pr. states (*Mackeurtan's* translation)—

"Let sellers of beasts of burden (*jumenta*) openly and correctly declare what defect or fault each has . . . and if this be not done we will give a remedy for rescission of the sale within six months, or to the extent of the difference between their true value and the price within a year."

Later the remedies were extended to all sales (save that the position of incorporeals will be considered later herein).

In addition, these remedies were granted if the seller had made what was called a *dictum et promissum* relative to the quality of the thing sold, and it fell short of this.

Dr. van Warmelo, in his work, "*Vrywaring teen gebreke by die koop in Suid-Afrika,*" (in regard to which the review in 1946 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* says at p. 236,

"This is a very learned thesis presented to the Universiy of Leiden, and is a work which deserves careful study by every South African lawyer")

devotes some attention to *dicta et promissa.* At p. 25 the learned author states—

"Kyk mens na die teks van die slawe-edik, dan sien mens dat die Aediles die aksies gee, nie alleen wanneer die bepaalde gebreke nie openbaar is nie, maar ook wanneer die slaaf anders is as *,quod dictum promissumve fuerit'.* Daar word g'n melding van so 'n beskikking gemaak by die diere-edik nie, maar mens vind dit is deur juristiese interpretasie daartoe uitgebrei."

At p. 27—

"Vir ons doeleindes is dit genoeg as ons kan konstateer dat met *,dicta et promissa'* bedoel word sowel formele as informele mondelinge bewerings dat die voorwerp een of ander hoedanigheid wel of nie het nie."

And at p. 50, with regard to the *actio quanti minoris*—

"Hierdie *actio quanti minoris* is gerig op vermindering van die koopprys, en. soos blyk uit die teks van die diere-edik, is dit gegee waar die voorwerp een van die bepaalde Aedilise gebreke het. Die edik maak g'n melding van *dicta* en *promissa* nie: tog kan ons konkludeer dat dit daar ook op van pas is—die juriste behandel *dicta et promissa* op gelyke voet met gebreke."

However, the primary question in this case is what was comprehended within the expresssion "*dictum et promissum*" in the Roman-Dutch law. This involves some reference to the old authorities. Unless otherwise stated, the following translations were kindly made by junior counsel on the respondent's side—a one-time lecturer in Latin—which have not been challenged by a learned opponent who reads Latin as facilely as Afrikaans and English.

In Voet, *Commentary on the Pandects* (*Gane's* translation, vol. 3), it is confirmed in 21.1.3 that the Aedilitian actions lie not only as a result of reticence as to disease, defect or race, but

"also as a result of a statement or promise, as when a seller has declared that certain good qualities or excellence or craftmanship are present, but it is not found to be so . . .".

Huber, *Praelectiones Juris Romani,* 21.1.2, confirms that the Aedilitian Edict in *D.* 21.1.1, 21.1.38 1-3 originally applied to sales of slaves and beasts of burden.

"But as appears from *D.* 21.1.1 pr., 21.1.49 and 21.1.63 it applies to all kinds of goods for sale, also to immovable things."

He goes on to say that the edict provided the *actio redhibitoria* and the *actio Aestimatoris* (i.e. *quanti minoris*) where the *res vendita* does not conform with the seller's *dicta promissave.*

Matthaeus, *De Auctionibus,* 1.8.23, deals with a misrepresentation by mistake in an advertisement as to the quality of the thing sold. He states that it is equitable that each man should furnish what he has stated to be present (*D.* 18.1.43, 4.3.37, 21.1.18). He continues—

"For as the jurist states in *D.* 18.1.43 and 21.1.18 *et seq.*, those statements which amount to mere praise and on account whereof the buyer does not pay a higher price, even though the vendor has stated such qualities to be present, need nevertheless not be made good . . . But if the buyer has stated that the slave is educated, or a painter, or that there is a grove of trees above the house, or something similar, then this is not ordinary commendation and therefore the statement must be made."

Gerard Noodt graced the chair of law at Leyden from 1686 to 1706. As a jurist he was acknowledged as a great authority on Roman law; see Wessels on the *History of the Roman-Dutch Law* at p. 331. In his *Opera Omnia,* vol. II, p. 456, he begins by saying that

"a second ground on which the aediles allow an action is, if something has been stated or promised by a vendor and it has not been made good".

He proceeds to discuss *dicta* which are mere praise. These are not to be taken into account. Then he says—

"*Dicta* are not mere praise if the vendor was specifically asked by the buyer whether the slave was of such quality (*an sit talis*), and the vendor confirmed that he was such and for that reason he sold the slaves at a higher price . . ."

And the learned writer concludes—

"The principle is accordingly as follows: that which the vendor has specifically stated, he must make good. Undoubtedly, because for this reason he sold at a higher price, as *Florentinus* states it so well in *D.* 18.1.43 in connection with the example of the educated slave and the cook, who were sold for a higher price because of their skills . . ."

Grotius, *The Jurisprudence of Holland,* has this to say in 3.15.8—

"Indien de zaecke geen gebreck en heeft, maer by den verkooper ten tijde van de handelings iet buiten de waerheid is ghezeit, ofte anderzins bedriechlick te kennen gegeven tot aenprijzinge des ghekochte zaecks, zoo mag den kooper eischen wedergeving zulcks deels des koopgelds, als hy daer door de zaecke te duirder heeft gekocht."

Dr. *Bodenstein's* translation, in (1914) 31 *S.A.L.J.* at p. 157, is—

"If the thing is subject to no defect, but the vendor made a false statement at the time of the transaction or had otherwise made fraudulent representations to commend the thing bought, the buyer may claim the return of such portion of the purchase-price, as he paid more for the thing on account thereof."

As to his qualifications in the matter of the foregoing translation, Dr. Bodenstein had studied at the University of Leyden, and had been professor in South African law at the University of Amsterdam since 1912; see 1931 *S.A. Law Journal,* p. 147.

With regard to the question whether *Grotius,* when dealing with ex-

press statements, was here confining his remarks to fraud, Dr. Bodenstein points out on the same page, *supra*, that—

(*a*) *Grotius* has just been dealing with fraud in the previous paragraph, with the words, "Further, if it appears that the seller at the time of the sale was aware of the defect . . .";

(*b*) the words "buyten de waarheid" mean false, *whether to the knowledge of the buyer or not;*
(My italics).

(*c*) *Groenewegen's* notes support this view.

Consistent with the foregoing, in *Beukes* v. *Bekker*, 1924 E.D.L. 4, VAN DER RIET, J., said as p. 13—

"In my view when a purchaser establishes that he has been induced through a representation made by the seller to offer a higher price than he would have given but for this representation and he elects to abide by the purchase, he is entitled to a reduction in price . . . See *Grotius* III, XV. 5.8."

Furthermore, in *Hall* v. *Milner*, 1959 (2) S.A. 304 (O) at p. 314D, the Court, after referring to *Groenewegen's* notes, accepts Dr. Bodenstein's interpretation. Moreover, this is in agreement with the *Roman Law of Sale, supra*, in the chapter by A. M. Honoré, in which, after reference to *Grotius*, 3.15.8, it is said at p. 145—

"But the better interpretation is that there is liability if the seller has either said something contrary to the truth or has fraudulently puffed or commended the goods."

In this connection, Van der Keessel's comment in his *Praelectiones* (the text is quoted at p. 412 of vol. 4 of *Gonin's* translation) is read by counsel for the appellant as stating that *Grotius, supra,* thought that a *dictum et promissum* was a term of the sale. The text seems to us ambiguous in view of the words "*nihil specialiter adfirmaverit.*" But in any event it must yield to the preponderant view as to the correct interpretation just referred to.

It is also helpful to refer to some French jurists famed for their grasp and exposition of the Roman law. Of these, *Cujacius* and *Donellus*, who wrote in the sixteenth century, are described as the greatest of all the civilians, and

"the leading figures of what is known as the golden age of jurisprudence".

The lawyers in the Netherlands

"were much indebted to them for their intimate knowledge and clear and masterly exposition of the *Corpus Juris*";

see the article by Mr. Justice KOTZÉ in (1909) 26 *S.A. Law Journal* at p. 396. *Domat*, who wrote in the seventeenth century, has been described as the most eminent jurist of his age.

Cujacius, *Opera Omnia*, vol. iv, *ad D.* 19.1.13.1., at p. 805, indicates the difference between unactionable commendation and *dictum promissumve*"—

"Moreover, an *indicatio* is often made in order to deceive a buyer, whereas a *commendatio* is made candidly; a candid commendation made without cunning and arising only from ostentation of speech, does not give rise to an action; a fraudulent *indicatio* does give rise to an action, not indeed an aedilitian action which is granted in the case of *dicta promissave* (see *D.* 21.1.1. and 47; *D.* 4.3.37). For this action for a *dictum promissumve* concerns only those things which a vendor has stated (*dixit*) or promised he would make good (*D.* 21.1.19; 19. 1.6.9) . . ."

Donellus, *Ad titulum de Aedilicio Edicto*, (1897 edition: vol. X, p. 1336), has this to say—

"In the second place the aediles promise an action for the redhibition of the *res* if something was done in contravention of what was stated or promised and which the vendor ought to make good. A person has stated something

(*dixit*), when he has affirmed something about the *res*, that something is present or absent. A person has promised something (*promisit*), when he has not only stated, but also promised that something would be present, or has given a guarantee (*spopondit*) (21.1.19.2). Accordingly those appear to act in contravention of what has been stated or promised who do not make good that which they have stated to be, or would be present in the *res*. For example, if they say that (a slave) is not a thief, and he is a thief; or an artisan, and he is not one (*D.* 21.1.17.20). However, not every *dictum* is to be made good. For that reason the following words have been added in the edict: 'If something was done in contravention of what was stated and which the vendor ought to make good.' What *dicta*, then, are not to be made good? Ulpianus says in *D.* 21.1.19 that those *dicta* are not to be made good which amount to mere praise of the *res* . . . However, when the vendor expressly mentions a definite skill, or good quality, and on account thereof he usually sells his wares at a higher price, and he has stated that he is selling a thing of such a kind, then without doubt he will be obliged to furnish what he has stated . . . These are *dicta* that must be made good . . . Finally, it will be a certain indication that something has been said so as to be made good (*ut praestentur*), if by reason of that which was said, and the *res* was confirmed to be of such quality, the vendor succeeded in selling it at a higher price."

Domat, *Civil Law*, vol. I, p. 85 (1.2.12) (*Strahan's* translation) puts it thus—

"If the seller has declared the thing sold to have some other quality, besides those which he is bound to warrant naturally; and that quality happens to be wanting, or that even the thing sold happens to have the contrary defects; we ought to judge of the effect of this declaration of the seller, by the circumstances of the consequences of the qualities which he has expressed, of the knowledge which he might or ought to have of the truth, contrary to what he has said, of the manner in which he engaged the buyer and above all, it is necessary to consider if these qualities have made a condition without which the sale would not have been concluded. And according to the circumstances, either the sale shall be dissolved, or the price diminished; and the seller shall be bound in damages if there is ground for it."

A point strongly pressed by counsel for the appellant was that, in the Roman law, only *fraudulent* misrepresentation could found an action for relief, whether for damages or rescission of contract; and that this was also the position in Roman-Dutch law. As to that, the Roman-Dutch authorities, already quoted, allow Aedilition relief, for redhibition or a reduction of the price, where a *dictum et promissum* was made by the seller and he has not made it good. In such a situation fraud is not required as a pre-requisite to Aedilitian relief. Counsel for the appellant also cited, *inter alia,* several cases from van Bynkershoek, *Observationes Tumultuariae*. These cases deal with fraud. Take, for example, II, 1153, at p. 75. Two merchants loaded salt in Portugal destined for Amsterdam. In Amsterdam the captain of the ship fraudulently obtained an order which confirmed that the two merchants' agent had no title to the salt. The two merchants were subsequently granted *restitutio in integrum* and the confirmatory order ("acte van homologaie") was set aside.

And IV, 3287 at p. 290. It concerns a contract of insurance of a ship in which the insurers denied liability. The dispute turned to a large extent on the construction of the written contract in question. The Court found that there had been a fraudulent misrepresentation, the finding of the Court reading as follows:

"And all these factors convinced the members of the Court, with one exception, that the insurers were deceived by the improper suggestion of the insured and were induced to think that they were insuring for the risks of summer whereas in truth they insured for the risks of winter. The contract of insurance was accordingly rescinded as it was induced by fraud . . ."

In our view those decisions, either in themselves or inferentially, do

not provide authority against the granting of the Aedilitian relief sought by the plaintiff in the present case.

I turn now to judicial decisions in South Africa. A convenient starting point is *Vivian* v. *Woodburn*, 1910 T.P.D. 1285, in which DE VILLIERS, J.P., pointed out, at p. 1289, that, in the Roman law at any rate, the purchaser had the Aedilitian actions in the case of *dicta et promissa*. (The learned Judge also referred to the availability of the *actio empti;* but the extent to which the one absorbed the other, or the two have remained concurrent, is not here relevant).

Corbett v. *Harris*, 1914 C.P.D. 535, concerned a sale of a farm by written agreement (see p. 537, line 2). There had been a prior verbal representation, in answer to a question, that the established lucerne lands amounted to 18 morgen. This turned out to be incorrect, KOTZÉ, J., said at pp. 543-4—

"When a man offers a farm or anything else for sale, it is not every statement made by him, which subsequently turns out to be untrue, that will justify either a rescission of the contract or a diminution of the purchase price . . . But, where the vendor makes a representation or an assertion of a positive and material fact in regard to the quality or quantity of the thing the case will be different. Such conduct on his part will amount to a definite promise or warranty, for a breach of which he will be liable. It matters not whether the vendor was aware or ignorant of the deficiency or fault in the quality or quantity of the thing sold, and the *actio redhibitoria* or the *actio quanti minoris* will lie against him, according to the circumstances . . . it makes no difference whether the purchaser was misled by the fraud or ignorance of the vendor, who must perform what he has represented or promised . . . In the words of the edict, the vendor is liable *ex dicto promissove* (*Voet*, 21.1.3), and under such circumstances the *actio quanti minoris* lies, at suit of the purchaser."

Judgment was accordingly granted in favour of the plaintiff for £525. The case is not decisively in point: the plaintiff averred the representation to be fraudulent, but the Court (at p. 544) did not find it necessary to go the length of so holding, although it did conclude that the seller knew that two of the 18 morgen were not under lucerne when he made the verbal representation. Hence the case is not wholly one of innocent misrepresentation; but it does confirm that Aedilitian relief is available where there is a *dictum et promissum* which is not made good.

In *Bowditch* v. *Peel & Magill*, 1921 A.D. 561 at p. 572, INNES, C.J., remarked, *obiter*, that innocent misrepresentation gave no right to claim damages. The learned CHIEF JUSTICE was not, however, referring to a claim such as that in the present case, within the context of a *dictum et promissum* and the Aedilitian remedy.

In *Steyn* v. *Davis & Darlow*, 1927 T.P.D. 651 GREENBERG, J., held, at p. 659, penultimate paragraph, that an innocent misrepresentation inducing a contract cannot found a claim for damages. But the learned Judge was not at that point referring to a claim such as that in the present case. Indeed, at p. 656 the *actio quanti minoris* was considered, but was held to be inapplicable on the ground that the sale was in respect of a dairy as a going concern, and no price could be fixed in relation to the four cows to which the misrepresentation related.

The question of so-called innocent misrepresentation was crisply raised, for the first time, in *Hall* v. *Milner*, 1959 (2) S.A. 304 (O). In an alternative claim the plaintiff claimed a reduction of the price on the ground of a prior innocent misrepresentation. Exception was taken. GROBLER, J. (POTGIETER, J., concurring) dismissed the exception in a

most painstaking judgment, holding, *inter alia*, that *dictum et promissum* referred to a single concept (at p. 313 C: this agrees with the view of Prof. Burchell in (1950) 67 *S.A.L.J.* 125, and Buckland, *Main Institutions of Roman Private Law*, at p. 272); and that the real cause of action was the failure to make good the *dictum et promissum*; and that that expression means any statement by the vendor during the negotiations which bears upon the quality or value of the *res vendita*, and which can reasonably be construed as intended to be acted upon by the buyer. If the reasoning can be criticised here and there, e.g., in regarding a *dictum et promissum* as a term of the contract, the judgment stands as the first decision in which innocent misrepresentation, within the connotation of a *dictum et promissum* which had not been made good, was held to justify a claim for the reduction of the price under the *actio quanti minoris*. The decision was followed by KUPER, J., in *Van Schalkwyk* v. *Prinsloo*, 1961 (1) S.A. 665 (T). It was assumed to be correct in *Overdale Estates (Pty.) Ltd.* v. *Harvey Greenacre and Co. Ltd.*, 1962 (3) S.A. 767 (D). It was referred to with approval in *Elsie Motors (Edms) Bpk.* v. *Breedt*, 1963 (2) S.A. 36 (O). Its principle was applied, without citation of authorities, in *Van Niekerk* v. *Thompson Motors*, 1966 (2) P.H. A70 (N).

The only apparently dissident judicial note is in *Ramon* v. *Jackson*, 1955 (1) P.H. A6 (C). The full text of the judgment is conveniently set out in *A case book on the South African Law of Contract*, by Farlam and Hathaway, p. 228 (apparently the correct name is *Ramos*). The claim was for £70 as being the estimated capitalised value of damages arising out of an innocent misrepresentation (made prior to the purchase of a house) that the rates were £20 per year, whereas in fact they were £24 per year. The Court, on appeal, held that innocent misrepresentation does not give rise to a claim for damages. As to that, the claim was not expressed to be one for reduction of the price; and it was not pleaded in the way that the present case is pleaded. Hence it may well be distinguishable. But if it is not, it fell to be decided along the lines indicated in this judgment.

I would also cite the following passage written by Mackeurtan, an eminent lawyer and authority, in the second edition (1935) of his work on *Sale*, at p. 131—

"It is, however, quite clear that the aedilitian actions are available not only when the seller says nothing in particular about the goods sold but also when he makes any representation or warranty about their quality or condition. An innocent misrepresentation may, therefore, give rise . . . to a reduction of the price if he (the purchaser) founds upon the *quanti minoris*. But it is only a purchaser who can get this relief and *only if an aedilitian action will lie.*"
(My italics).

In other words an innocent misrepresentation *per se* will not give rise to such right: it must amount to a *dictum et promissum* within the aedilitian concept.

The foregoing passage was repeated in the third edition (1949) at p. 126. It was dropped from the fourth edition (1972) in favour of a statement at p. 118 that "this branch of our law cannot be said to be settled". No doubt this was because of the phalanx of divergent articles from the able pens of writers in legal journals and textbooks.

Because the approach to the subject under discussion has sometimes

been somewhat deflected by recourse to English decisions not substantially consistent with Roman-Dutch law, it is worth noting that, in the preface to the first edition of Mackeurtan on *Sale*, published in 1921, the learned author, after mentioning "our own splendid system of jurisprudence" and the propriety of guarded reference to English law, wrote this—

> "But I believe it to be the duty of every South African lawyer to see (as far as he can) that the Roman Dutch system, of which we are now almost the sole inheritors, is in no way obscured in its practical application by undue reliance upon authorities other than our own."

According to Sir John Kotzé, the Aedilitian remedies "both of them of great usefulness in a commercial country" were introduced among the Romans "simply from a sense of equity."; see that eminent Judge's translation of Van Leeuwen, *Roman-Dutch Law*, 2nd ed., vol. II, p. 141, note (C). It is therefore of interest to consider the equity of allowing the buyer to obtain a reduction of the price because of material innocent misrepresentation relative to the quality of what was sold, which, in all the circumstances can properly be regarded as one which should be made good because the buyer paid a higher price on account of it.

In such a case, on the one hand the seller is innocent; and he might not have wanted to sell at a reduced price even if he had known the truth. On the other hand, one must spare a thought for an innocent out-of-pocket buyer, having paid a higher price than he would have, and eyeing with chagrin the unmerited increment retained by the complacent seller. In such circumstances, as between a seller who would not have sold at a reduced price, and a buyer who would not have bought at the agreed price, both being innocent, it seems equitable that the true value should prevail.

This might be a convenient stage to deal with a further argument by counsel for the appellant. He submitted that the notion of rescission on the ground of innocent misrepresentation came to us from England and is not well founded in Roman-Dutch law; and that, even if it has taken root here, there is no justification for extending the importation by allowing damages on the ground of innocent misrepresentation, whether under the guise of "restitutional" damages or otherwise. In our view the answer is that what has to be considered is not innocent misrepresentation *per se*, but the *dictum et promissum* of the Roman-Dutch law and the consequential aedilitian relief, as pointed out by Mackeurtan as far back as 1935 in the second edition of his work on *Sale*, at p. 131, *supra*.

I pause here to observe that it is both unnecessary and confusing to try to fit a *dictum et promissum*, as just explained, into some modern juristic niche like warranty or term; and then to draw conclusions therefrom as to the buyer's rights. The Roman-Dutch authorities in particular do not require this. They are simple and clear—

(i) If there is a latent defect, at the time of the sale *ipso facto* the aedilitian remedy is available (unless excluded by agreement). The seller's obligation and the buyer's right arise by *operation of law*, and not by reference to the intention of the parties. It is unnecessary for the buyer to try to fit his resultant right into the concept of a so-called implied warranty against such defects.

Nor does the buyer have to aver and prove a breach of a term of the contract, Mackeurtan on *Sale*, 4th ed., at p. 238, para. 335; De Wet & Yeats, *Kontraktereg en Handelsreg* 3rd ed., p. 235, last para., to p. 236; *Crawley* v. *Frank Pepper (Pty.) Ltd.*, 1970 (1) S.A. 29 (N) at p. 36.

(ii) Similarly, if during the negotiations the seller made a *dictum et promissum* bearing on the quality of the *res vendita* and it falls short of it, *ipso facto* the aedilitian remedy is available, by operation of law. There is no need to invoke any warranty or term or to aver the breach of either. Indeed, that is one of the reasons why the aedilitian remedy is useful to buyers; see Mackeurtan on *Sale*, 4th ed., at p. 244. It still exists (*S.A. Oil and Fat Industries, Ltd.* v. *Park Rynie Whaling Co., Ltd.*, 1916 A.D. 400 at p. 413, lines 2 and 3) whether or not as part of the *actio empti* as it appears to have evolved; see *Hackett's* case, *infra* at p. 685.

I have only to add that in *Hackett* v. *G. & G. Radio and Refrigerator Corporation*, 1949 (3) S.A. 664 (A.D.) at p. 679, WATERMEYER, C.J., after referring to the *actio ex empto* and the aedilitian action, said—

> "It seems clear in any event that in the case of express warranties (*dicta* and *promissa*) either action could be brought. *Dig.*, 21.1.19.2."

This, however, must be read in the light of what the learned CHIEF JUSTICE said on p. 677 (penultimate paragraph, *in fin*),

> "I have used the word warranty because it is the customary word to use, it means here nothing more than a representation or undertaking by the seller, on the faith of which the contract was entered into."

Well, when all's said and done, one comes back to the statement by *Grotius*, an outstanding authority on Roman-Dutch law (and see *Van Duyn* v. *Visser*, 1963 (1) S.A. 445 (O) at p. 450B), in his *Jurisprudence of Holland*, 3.15.8, *supra*. Insofar as here relevant, it is to the effect that if the vendor has made a false statement, the buyer may claim a return of such portion of the price as he paid more on account thereof.

Before finally formulating the rules, I would add this. The diligent use of a fine comb, in considering the authorities, reveals here and there a statement which seems to afford a foundation for the suggestion that the *dictum et promissum* was a matter of the mutual intention of the parties, and therefore amounted to a term of the contract, as contended for by counsel for the appellant. In our view these occasional *indiciae* must yield to the main stream of thinking, on the basis already discussed. And here I would refer also to the view of Dr. van Warmelo, in his *"Vrywaring teen gebreke by die koop in Suid-Afrika"*, *supra* at pp. 181, and 183 (second para.), to the effect that a *dictum et promissum* should not be regarded as a term of the contract.

To sum up so far, on a *conspectus* of all the foregoing authorities, decisions and discussions, we consider that the relevant law in South Africa may be stated as follows—

1. The Aedilitian remedies (*actio redhibitoria* or *actio quant iminoris*, as the case may be) are available if the *res vendite* suffered from a latent defect at the time of the sale.
2. The Aedilitain remedies are also available if the seller made a *dictum et promissum* to the buyer upon the faith of which the

seller entered into the contract or agreed to the price in question; and it turned out to be unfounded.

3. A *dictum et promissum* is a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation.

4. Whether a statement by the seller goes beyond mere praise or commendation will depend on the circumstances of each case. Relevant considerations could include the following: whether the statement was made in answer to a question from the buyer; its materiality to the known purpose for which the buyer was interested in purchasing; whether the statement was one of fact or of personal opinion; and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been wont to do.

I think that this answers questions 1 (*a*) and (*b*) posed at the beginning of this judgment.

Before going to the pleadings, I would mention the following aspect, although it was not raised in the exception or the written heads of argument. Where there is a *dictum et promissum*, in the sense just described, followed by a written contract which is silent as to it, can it operate at all, having regard to the law as to written contracts and extrinsic facts? As to that, it may be (I express no opinion) that the words of SCHREINER, J., in *Veenstra* v. *Collings*, 1938 T.P.D. 458 at p. 461, could be invoked—

"Where, however, the oral agreement, though in a broad sense affecting the consideration of the main contract, takes the form of a promise inducing one of the parties to enter into the main contract it may be proved, whether or not the latter is required by law to be in writing."

See, too, Hoffman, *S.A. Law of Evidence*, 2nd ed., p. 217, penultimate paragraph; and, as a matter of interest, an article by Mulligan in (1960) 77 *S.A. Law Journal*, pp. 206 *et seq.* In the present case the contract is not required by statute to be in writing. In *Corbett's* case, *supra*, and *Hall* v. *Milner*, *supra*, there was a written contract, but this point was not raised. For the same reason, in the present case it is not necessary to pursue the matter further or to decide it.

At the request of the Court, counsel kindly submitted written argument on the following point—

"Whether the aedilitian relief, or any modern extension thereof, claimed by the plaintiff, is available in relation to a sale of incorporeals, such as the company shares in the present case."

In reply, counsel for the appellant submits that there is no specific authority, whether Roman or Roman-Dutch, for applying aedilitian relief to the sale of incorporeals. So far as that goes he is substantially correct; and this is probably what *Mackeurtan* had in mind in saying, in his first edition (1921) at p. 289 *in fin.*, to p. 290,

"There does not, in any event, seem to be the least authority for the extension of the aedilitian remedies to the sale of incorporeal rights."

The learned author was not concerned to pursue the matter further, for his book was expressed on the title page to relate to the purchase and sale of *corporeal* movables.

That, however, does not conclude the matter, for there remains the question whether the relevant principles of the Roman-Dutch law can be

adapted to a modern situation of company law such as the present one. As to that, in 1920 *S.A.L.J.*, p. 265, there is published a lecture by Sir John Wessels, author of "History of Roman-Dutch law," and later CHIEF JUSTICE of this country. The lecture is entitled "The Future of Roman-Dutch law in South Africa." The learned Judge said:

"If the Roman-Dutch law is to survive, it must adapt itself to changing circumstances, whilst retaining its essential features . . ."

The learned Judge went on to refer to the need for

"making the life of the law coincide with the life of the people".

Consistent therewith, in the case of *Pearl Assurance Co. Ltd.* v. *Union Government*, reported in the appendix to the 1934 A.D. reports, the Privy Council (then the highest court of appeal for this country) at p. 563 referred to the Roman-Dutch law as—

"a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent principles to deal effectively with the increasing complexities of modern organised society".

In this regard there is already more than a muted rustle of judicial authority for adapting the aedilitian remedies to the sale of incorporeals. Their availability was hinted at, *obiter*, by DE VILLIERS, C.J., in *Doyle and Another* v. *Botha*, 26 S.C. 245 at p. 247; and was assumed in *Douglas & Nolan* v. *Ohlsson's Cape Breweries Ltd.*, 1903 T.H. 424 at p. 427. Moreover, in *Ohlsson's Cape Breweries Ltd.* v. *Levison*, 1905 T.H. 330, MASON, J., after argument on the very point (see p. 338) decided that the *actio quanti minoris* applied to the sale of rights under a lease of an hotel for a latent defect in the property. And in recent years academic writers have begun to express correlative views positively. Thus Mostert, Joubert & Viljoen, *Die Koopkontrak*, at p. 195, assert that aedilitian remedies do extend to incorporeal rights. And the aforementioned passage by *Mackeurtan* (repeated in the second and third editions) has been dropped from the recent fourth edition.

Reviewing all the foregoing considerations, it seems to us that the current climate of opinion is propitious and receptive to such extension by the Courts, in appropriate circumstances.

In the present case, *de facto* the buyer bought immovable property, a rent-producing building complex. *De jure*, however, he bought the incorporeal shares in the company which owned it, as well as the loan accounts, which is a recognised mercantile transaction under the company law of modern organised society. Thus, in *Van Heerden* v. *Sentrale Kunsmis Korporasie (Edms.) Bpk.*, 1973 (1) S.A. 17 (A.D.), cited by counsel for the respondent, RUMPFF, J.A., giving the judgment of the Court, said this at pp. 32E *et seq.*—

"Hoewel die maatskappy, en nie die aandeelhouers nie, juridies die eienaar van die maatskappy se bate is, kan daar m.i. nie by restitusie, wat op billikheid gegrond is, agter hierdie juridiese begrip geskuil word nie wanneer wat gekoop is nie net sekere aandele in 'n maatskappy is nie, maar in werklikheid die hele maatskappy met al sy bate en waarby die koop bewerkstellig word deur die koop van al die aandele in die maatskappy. Die feit dat dit die duidelike bedoeling van die partye was om 'n lopende besigheid te koop met bate w.o. leningsrekenings waarvoor 'n aparte koopsom gestipuleer is (die aandele self se koopprys was R3) en waardevolle patentregte, toon dat die aandele in hierdie saak, hoewel *jura in personam*, beskou is as 'n formele en tegniese middel om beheer oor die werklike, *die substansiële res vendita, te ontvang*."

(My italics).

To sum up on this aspect, we consider that the aedilitian relief, recognised under the Roman-Dutch law, can, while retaining its basic

principles, be adapted to apply to the modern circumstances of the present case.

I turn now to an examination of the pleadings. The first question is whether the excipient has satisfied the Court that the combined summons, read with the further particulars, is incapable of being construed as averring that the representation was a material one, going beyond mere praise and commendation. As to that, the tenor of the pleadings is that both sides knew that the buyer, as an investor, was interested in purchasing the shares because of the income derived from the property; that relevant factors were the expenses incurred by the company in connection with the property, and the potential additional rental income; that, by fair inference, the buyer asked for full particulars; that these were furnished; that they included a materially wrong and low figure for annual rates and other charges; that it was because of the true and high figure for rates etc., that the rents had just been increased, thus impairing the possibility of further income from further potential rent increase; that the seller intended the buyer to believe and act upon the material representation as to rates; that the basis, on which the stated return of 8,9 per cent on the price of R846 000 was calculated, included this materially low figure represented to be the annual expenditure or rates, etc., and that the latter wrong figure affected the buyer's decision to buy at the price asked. I would add that the pleadings do not aver a term or a warranty; and the plaintiff's case was not presented to us on the footing of any such averment. In all these circumstances, taking a practical view of the pleadings, in relation to a contract of such financial magnitude, entered into after meticulous calculation as to expenses and returns, I do not consider that it can be said that they are incapable of being read as laying a foundation for a material statement by the seller going beyond mere praise commendation.

The next question is whether the representation as pleaded is incapable of being read as bearing upon the quality of the shares. Now quality is a word of fairly wide connotation. To preserve the mercantile usefulness of the Aedilitian remedies, I do not consider that the word should be given a restricted meaning. When one speaks of company shares of good quality, a relevant consideration is the percentage return after deducting expenses from income. If one speaks of buying "9 per cent shares," I consider that that can be said to relate to their quality. Similarly, the expenditure figure producing that percentage is not incapable of being said to bear upon the quality of the shares.

In the result, it cannot be said that the pleadings do not lay a foundation for the Aedilitan relief of a reduction in the price. CLAASSEN, J., was therefore right in dismissing the exception.

The alternative claim—couched in two lines, for the same amount as damages—need not be considered in view of our decision on the main claim. We do not think that this should affect the question of costs. The exception essayed the destruction of the plaintiff's claim; and this it has failed to compass.

In conclusion we wish to record our appreciation for the assistance derived, in the preparation of this judgment, from counsel's arguments; from articles *pro* and *con* by writers in the *S.A. Law Journal*, *Die Tydskrif van Hedendaegse Romeins-Hollandse Reg* and the *Annual Survey of S.A. Law*; and from the text-book writers. The view-points espoused in such publications have been many, divergent and challenging.

To sum up, the appeal is dismissed with costs, including those occasioned by the employment of two counsel.

OGILVIE THOMPSON, C.J., POTGIETER, J.A., JANSEN, J.A. and TROLLIP, J.A., concurred.

Appellant's Attorneys: *Hofmeyr, van der Merwe and Botha*, Johannesburg; *J. G. Kriek & Cloete*, Bloemfontein. Respondent's Attorneys: *Arthur Sagar*, Johannesburg; *Goodrick & Franklin*, Bloemfontein.

MJUQU v. JOHANNESBURG CITY COUNCIL.

(APPELLATE DIVISION.)

1973. *March* 5; *May* 8. OGILVIE THOMPSON, C.J., RUMPFF, J.A., WESSELS, J.A., JANSEN, J.A. and TROLLIP, J.A.

Municipality.—Actions against.—Exemption from liability under sec. 47 *of Ord.* 17 *of* 1939 (*T*).—*Scope of.—No protection against consequences of own negligence.—Insurance.—Motor Vehicle Insurance Act,* 29 *of* 1942, *as amended.—Claim for damages for bodily injury under sec.* 11 (1).—*Claim against municipality as its own insurer in respect of negligence of its servant in scope of his employment.—Municipality cannot invoke proviso to sec.* 11 (1) *read with sec.* 47 *of Ord.* 17 *of* 1939 (*T*).

In section 47 of Local Government Ordinance, 17 of 1939 (T), in the phrase "no matter or thing done or omitted by any councillor or officer or servant or other person acting under the direction of the council . . .", the words "acting under the direction of the council" must be read as "by order or authority of the council", and as governing not only "other person" but also "councillor or officer or servant". Those acting pursuant to the order or authority are exempt from personal liability provided they act "in good faith for the purposes of the Ordinance . . ."; in so far, however, as they act outside such order or authority, they remain personally liable.

The appellant, a servant of the respondent, had been run down by a motor vehicle owned by the respondent and negligently driven by a servant of the respondent in the course of his employment. In an action for damages for bodily injuries sustained, the claim was founded on section 11 (1) of Act 29 of 1942, the respondent being the holder of a certificate under section 21 (1) and alleged to be liable by virtue of section 19 (3). The respondent had, in a special plea, sought to invoke the provisions of the proviso to section 11 (1), alleging that, by virtue of section 47 of Ordinance 17 of 1939 (T), both the driver and it were absolved from liability in terms of such proviso. A Local Division having dismissed appellant's exception to such plea in bar, in an appeal,

Held, that the driver was not exempted by section 47 of the Ordinance from the consequences of his own negligence.

Held, further, that the proviso to section 11 (1) of Act 29 of 1942 therefore did not preclude a claim in terms of section 11 (1) against the respondent