Book IV.
Title LXIV.

Concerning exchange of property and concerning the action on special facts.
(De rerum permutatione et de praescriptis verbis actione.)

Headnote.

Innominate contracts and actions in special terms. Innominate contracts (a modern term) were agreements, or pacts, not falling within the sphere of the contracts bearing a specific name, arising if one party gave something in order that another should give or do something; or if one party did something in order that another should give or do something. D. 19.5.5 pr. Exchange, compromise (C. 2.4), and the so-called aestimatum, a conditional sale agreement, under which a thing was handed over to another, either to be sold at an agreed price, or to be returned, are illustrations. They were not enforceable at the beginning of the empire, though the unjust enrichment action (condiction) might lie for the recovery of property turned over by one of the parties. C. 2.3 headnote. But such action was not always, as when one party had performed services, under an agreement that the other party should do something else. An action of the facts, or the case (D. 2.14.7.2), or an action for fraud (C. 2.20.4) came to be given in special cases. The Justinian compilers, who left the right of condiction, wherever available, as a concurrent remedy, gave the action in special terms (praescriptis verbis), literally an action, the formula of which, in the formulary period (C. 2.57.2 note) had a preliminary statement, similar to the preliminary statement in equitable actions. The action was one to enforce the agreement, and enabled the party who had fulfilled to recover his damages, which generally, but not always, might be higher than the amount recoverable by the unjust enrichment action. It was considered an equitable action, arising under the civil law (as opposed to the law of the magistrates), and had been given in classical time to enforce the aetimatum above mentioned. But the name of the action is due to the compilers, who also called it a civil action for an uncertain quantity, or a civil action on the facts. This action, and that on the facts or the case (in factum), were indeed sought to be identified by them (D. 19.5.13.1; D. 19.5.22 and 24), which, since the formula had then disappeared (C. 2.57.2 note) could be done without harm. Mention of the action in the Code, aside from this title, is found in: C. 2.4.6 and 33; C. 3.36.14 and 23; C. 4.54.2; C. 3.38.7; C. 5.12.6; C. 5.13.1.13; C. 8.53.9; C. 8.53.22.1. For the development of contracts and of actions, see C. 2.3 headnote; C. 2.57.2 note.

4.64.1. Emperor Gordian to Thrasea, a soldier.

If, when your paternal uncle had some land for sale, your father gave him other land for it as the price thereof, the amount was not fixed and your father was evicted from the land which he received without intentional wrong of the judge or without your father's fault, you do not unjustly ask, if you succeeded to your father's rights, an action for your damage, in analogy to an action on purchase. But, if the property was not for sale, and an exchange was made, and eviction took place from the property which your opponent gave, you will rightly ask, if you elect to take that course, restoration of the property which your father gave.[1]

[1] [Blume] See note C. 8.44; 47 S.Z. 134.

4.64.2. Emperors Diocletian and Maximian to Primitiva.

It is not unknown law, that exchange which by its nature is a contract involving good faith, takes, as you say, the place of a purchase.

4.64.3. The same Emperors and the Caesars to Barcius Leontius.

It is clear that no cause of action arises in favor of anyone out of an agreement of exchange which is not performed, unless a stipulation was added and he acquired a right of action by reason thereof.

Note.

There were certain contracts which, as we have seen, were binding as a result of the mutual agreement which the parties made. These were mandate, partnership, sale, and letting and hiring. The contracts are ordinarily called consensual contracts. Other contracts were not made that way, but the transaction was considered as entered into when the thing that was the subject of contract was delivered. The principal contracts of this kind were loan for use, loan for consumption (mutuum) and deposit. These contracts are ordinarily called real contracts, because perfected by the res being delivered; they are further called nominate real contracts, because the contracts were ancient and were long recognized by law.

The contracts that were binding by reason of the mutual agreement of the parties were limited in number. Exchange is similar to a sale, and yet it was not placed in the same category with sales so far as the elements are concerned that make up a contract. But it was placed on a similar footing as the real contracts, requiring delivery of the property on one side or a stipulation to make the contract effectual. D. 19.4.1.3. A mere agreement for exchange was a naked pact (C. 2.3) and was not enforceable.

4.64.4. The same Emperors and the Caesars to Leontius.

Since you have stated in your petition that an exchange was made between you and another, and that such other sold the farm given by you, you can see that you have no right of action against the purchaser, since he received ownership from the party to whom you have not denied to have transferred it by reason of the exchange. You are not, however, forbidden, if a stipulation was added to your contract, to sue the heirs of the party with whom you made your contract. If no stipulation was added, then it will be ordered in an action on the special facts (praescriptis verbis) that the contract be performed, or (if that cannot be done) that you be awarded the value of what you gave for the purpose of getting another property, since the consideration failed.

Note.

In this case one of the parties to the exchange had delivered his property and the other had not. Bas. 20.3.6. Nevertheless, the exchange was valid as a contract and passed ownership. There was then a right of action on the part of the party to whom delivery had not been made. If a stipulation had been entered into, the well known action on the stipulation could be brought. But if there was no such stipulation, there was still a remedy—not one of the old well known remedies that had a definite name, but one on the special facts—praescriptis verbis. The result was the same in either action. Where the property delivered in such case remained in the hands of the party to the contract, there was also a right to bring an action to recover it—by condictio—as in law 1 of this title.[2]

---

[2] Blume seems to have had doubts about this sentence, penciling four horizontal lines through it and adding in the margin alongside it and next to the next several sentences:

Bas. 20.3.3. That action seems, in fact, to have been permissible in any case where one party had performed and the other not (law 7 of this title), and the value could be recovered. 8 Cujacius 374 says that the action "condictio" lay whenever the one who had performed preferred to recover what he had given rather than to demand what had been promised in return. He says further that in some cases only an action on the special facts (praescriptis verbis) lay, as in the case of law 1 of this title. Bas. 20.3.3, however, states that the recovery should be had by "condictio" if there was an exchange, and if the property exchanged was for sale, an action was given in pattern of the action on "sale." Cujacius thinks that the action "in pattern of that on sale," refers to the action "praescriptis verbis," in which he is probably right, since that action, in the formulary procedure, referred to nothing more than stating the facts in the beginning of the formula. See Buckland 521.

4.64.5. The same Emperors and the Caesars to Theodolana.

Since you allege that your father gave the party against whom you direct your petition a farm upon condition that he would in turn receive a certain house, the president of the province will, if you go before him, order that the agreement be performed, or if he sees that the purpose for which the farm was given cannot be fulfilled, then, be reason of (an otherwise) unjust enrichment, he will order that the property given be restored, as you demand.

4.64.6. The same Emperors to Protogonia.

If things are delivered upon a certain condition, and this condition is not complied with, then, as the law teaches, an undefined civil action on the special facts (praescriptis verbis) is given.

4.64.7. The same Emperors and the Caesars to Timotheus.

It was long ago decided that a purchase cannot be made with property (other than money). Since you, therefore, allege that you gave to Callimachus and Acamatus a certain amount of grain, upon condition that they should give you, in turn, a designated amount of oil, and they do not perform the agreement which was not accompanied by a stipulation, you may, as you wish, bring a personal action (condictio) for what you gave, since the consideration failed.

4.64.8. The same Emperors and the Caesars to Paulina.

When property was given to Candidus upon condition that he should, in turn, give you certain agreed things monthly or yearly, an action lies, as you demand, on the special facts to compel performance of the agreement, since such a contract is not considered to be without consideration (nudi pacti), but the stated condition is valid by reason of the delivery by you of your own property.
Subscribed at Nicomedia December 5 (294).

Note.

In C. 8.54, it is stated that if a gift was made upon condition of the support of the donor, a personal as well as a real action lay for the recovery of the property given in case the condition was not complied with. The facts in that case and the facts in the present

---

"But where in jus [illegible] Why difference? Only diff. that in condictio 'certain' sum asked? What about condictio incerte? "

case do not seem to be distinguishable, so that in such case three different forms of action lay.