ROMAN PRIVATE LAW

IN THE TIMES OF CICERO AND OF THE ANTONINES

In two Volumes,
Vol. II

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ROMAN PRIVATE LAW

IN THE TIMES OF CICERO AND OF THE ANTONINES

by

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CORRIGENDA IN VOL. II.

p. 116, line 19 from top, *for* chap. xiii *read* chap. xv.
p. 289, line 19 from top, *for* (*Font.* 2 § 3 (17)) *read* cf. *Font.* 2 § 3.
p. 306, line 24 from top, after *mancipi est* add (ii 27).

BOOK V.

OBLIGATIONS.

Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum (Paul *ap.* D. xliv 7 fr 3 pr).

In personam actio est, qua agimus cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est, id est, cum intendimus dare facere praestare oportere (Gai. *Inst.* iv 2).

In personam actio semper adversus eundem locum habet (Ulpian *ap.* D. xliv 7 fr 25 pr).

Naturales obligationes non eo solo aestimantur, si actio aliqua eorum nomine competit, verum etiam eo si soluta pecunia repeti non possit (Ulpian *ap.* D. xliv 7 fr 10).

Servi ex delictis quidem obligantur, et, si manumittantur, obligati remanent: ex contractibus autem civiliter quidem non obligantur, sed naturaliter et obligantur et obligant (Ulpian *ap.* D. xliv 7 fr 14).

Creditorum appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes quibus ex qualibet causa debetur (Gai. *ap.* D. L 16 fr 11).

CHAPTER I.

CLASSIFICATION.

GAIUS, who is followed by Justinian in his Institutes, divides obligations into two classes, according as they arise *ex contractu* or *ex delicto*. Obligations from contract arise in four ways; *re, verbis, litteris, consensu*[1]. Contracts arising *re* are divided by Gaius, in his book of 'Golden things,' from which extracts appear in the Digest (xliv 7), which are followed in Justinian's Institutes, into four; *mutuum, commodatum, depositum, pignus.* Consensual contracts are also divided into four; *emptio venditio, locatio conductio, societas, mandatum.* Finally obligations *ex delicto* are also four; *furti, bonorum raptorum, damni injuriae, injuriarum.* The symmetry of these four groups of four excites suspicion of their artificial character, and we are not surprised to find that Justinian (following Gaius' *Aurea*) has to add another division consisting of obligations *quasi ex contractu*; viz. *negotiorum gestorum, tutelae, communi dividundo, familiae erciscundae, legati, indebiti* (a motley collection); and another of obligations *quasi ex delicto*; viz. *litem suam faciendi, dejecti effusive* and *recepti* (against innkeepers, *etc.*). Even thus some important actions find no place in the classification and are inserted, if at all, in strange places; *e.g. actiones praescriptis verbis, pecuniae constitutae* (Just. iv 6 § 8), *de pauperie* (*ib.* iv 9), *doli* (D. iv 3), *servi corrupti* (Just. iv. 6 § 23), *rei uxoriae* (by Justinian combined with an action *ex stipulatu*, Cod. v 13

[1] This division is referred to by Ulpian in D. ii 14 fr 1 § 3; xlvi 1 fr 8 § 1; tit. 2 fr 1 § 1 (literal contract having been of course struck out by Tribonian). Cf. A. Pernice *ZRG* xxii 220 foll.

fr 1), *etc.* But a worse fault of this classification is, that it puts together obligations widely different in character and history, such as *mutuum*[1] and *commodatum*, and neglects a far-reaching distinction such as that between *stricta judicia* and *bonae fidei judicia*[2]. Who was the author of this classification in fours we do not know, but it is noteworthy that no such classification is followed in the Digest (which mainly follows the order of the praetor's edict), or is mentioned in any other ancient authority extant, and that no adequate justification is alleged. The groups *quasi ex contractu* and *quasi ex delicto* are not suitably composed or labelled, there being in at least several of the former little or nothing analogous to contract, and of the latter, two being cases of liability for the delicts of others, and the first being as much *ex delicto* as the Aquilian action itself. Hence I have abandoned a classification which seems arbitrary and unfruitful, and an arrangement which interposes verbal and litteral contracts between real and consensual. Nor am I satisfied with the position of Aquilian damage along with theft and other obligations of a semi-criminal or malicious character. In the Edict and the Digest its place was far removed from theirs: and while theft, robbery, and insult rendered infamous those condemned and those who have bargained to avoid condemnation, Aquilian damage had no such effect (Gai. iv 182).

A better classification is suggested by Gaius in dividing actions according to their aim. *Agimus interdum ut rem tantum consequamur, interdum ut poenam tantum, alias ut rem et poenam.* The first class are contracts, the second torts, the third

[1] It is noticeable that Gaius in his Institutes gives *mutuum* alone as an instance of real contract, and omits altogether the other three which are classed with it in the *Aurea*. But the praetor's edict put *commodatum* and *pignus* along with *mutuum* under the title of *de rebus creditis*.

[2] Gradenwitz (*Interpolationen* p. 110) shews that *bonae fidei judicium* is a usual expression, but *actio stricti judicii* occurs only once (D. xii 3 fr 5 § 4). The use of *stricti juris* is a mistake due to Justinian. The opposite to *b. f. judicium* is naturally *strictum judicium*, which however is only found in Just. iv 6 § 30 and perhaps in D. xiii 6 fr 3 § 2. (*Stricto jure*, in another sense, as we say 'in strict law,' occurs D. xiii 5 fr 30; xxix 2 fr 86.)

an intermediate class where prompt admission and discharge of the obligation were demanded by its nature (Gai. iv 6—9). Following this suggestion, but dividing contracts again into those enforced strictly, and those treated by the rules of fair dealing, we get this arrangement:

1. Obligations leading to *stricta judicia*, viz. *stipulatio, litterarum obligatio, mutuum*; and I add (with Gaius iii 91) other *condictiones*, where there is at most a constructive contract, or claim analogous to that on a money-loan. Suretyship comes under stipulation. Two obligations, *operarum jusjurandum* and *dotis dictio* (cf. Gai. iii 95, 96), might claim a place by the side of stipulation as being verbal obligations, though made by a simple declaration (or oath), instead of by a promise in reply to a question, but they are applicable only to special classes of persons, and I treat them therefore in Book II (vol. I pp. 86, 140). To stipulation, partly as the abstract type of contract, I append the change, transfer, discharge, and release of obligations.

2. Obligations leading to *bonae fidei judicia*. This important class contains all the obligations *ex consensu*, and the remaining three of the *obligationes re factae*, as classed by Gaius in his *Aurea*, and by Justinian in his Institutes. The actions *tutelae* and *rei uxoriae* are also *bonae fidei*, but, like dowry and services due on oath, are more conveniently dealt with in Book II (vol. I pp. 109, 153). The suits for division, *familiae erciscundae* and *communi dividundo*, are also called *bonae fidei*, but are not really cases of contract. The former naturally belongs to Inheritance (vol. I p. 287): the latter I append, partly by way of contrast, to Partnership. Similarly I append *negotiorum gestio* to *mandatum*.

3. Having thus disposed of obligations from contract which give actions *quibus rem tantum persequimur* and the modes of fulfilling, transferring and extinguishing such rights, we come to cases of semi-delictal obligation, in which by the act of defendant or others, but without necessarily any conscious malfeasance on his part, plaintiff is so notably out of his property or rights, as to give rise to a peremptory obligation calling for discharge without dispute or delay. They are often spoken of

as a class where non-admission doubles the damages (*quae infitiando crescunt, adversus infitiantem in duplum agimus*), one value being for reimbursement, and the other as penalty for disputing the claim. In these cases *rem et poenam persequimur*. The type is the obligation arising from a judgment: other cases were expressly referred to this type, the statute either saying that the person obliged was to be treated as if he were judged (*pro judicato*), or directing the obligation to be created in the old words *dare damnas esto*, as in actions under the *lex Aquilia*.

Other actions of similar import to those under the *lex Aquilia* but without the same consequences are appended.

4. Having thus disposed of all obligations or actions *quae rei persecutionem habent*, we come to the last class, comprising obligations *ex delicto, i.e.* arising from wrongful and criminal acts, considered not as offences against the State, but as injuries to individuals. Such are theft, robbery, intentional insult, intimidation and fraud (all which involve disgrace), besides others of less importance.

5. A further section takes cases of liability on the contracts and delicts of persons other than the defendant himself, and especially of children under power and of slaves. They are not distinguished from other obligations by difference in the subject-matter, but are in fact enlargements of the capacity of persons to sue and be sued. The qualifications and conditions of their enforcement require however common treatment.

6. Last come proceedings for cancelling rights and liabilities which have been acquired in consequence or under the influence of the other party's insufficient age or experience, or absence, or captivity, or through a bankrupt's or freedman's fraud.

CHAPTER II.

AGREEMENTS [1].

A. It is not every agreement that forms a contract good in law. There is no limit to the agreements which one person may make with another. They may be legal or illegal, moral or immoral, fair or unfair, practicable or impracticable, serious or trifling; but it is clear that they do not all deserve to be enforced by law. The Romans acknowledged three classes as justifying in some degree the protection of the law.

1. The first class is composed of such as are sanctioned by statute or other quasi-legislative authority or long-recognised custom. Practically this includes all such agreements as are clothed with a special form, viz. mancipation (and others accompanied by the formality of the bronze and balance), stipulation, book-entry, declaration of dowry (*dotis dictio*). In these the serious intention of the parties is vouched for by the adoption of a special form of words or ceremony. A freedman's

[1] *Conventio* is the most general word for agreement; but is not technical (cf. D. ii 14 fr 1 § 3). *Pactum* is very general, especially of agreements to settle a question without carrying it, or continuing to carry it, before the Courts. It is often found side by side with *conventum* (adj.?). So *ex pacto jus est: si quidquid inter se pepigerunt, si quid inter quos convenit. Pacta sunt quae legibus observanda sunt hoc modo: 'Rem ubi pagunt, orato: ni pagunt, in comitio aut in foro ante meridiem causam coicito.' Sunt item pacta quae sine legibus observantur ex convento* (*ad Heren.* ii 13 § 20, quoting XII tables). *In foro tabulae, testimonia, pacta conventa, stipulationes, cognationes, etc.* (Cic. *Orat.* ii 24 § 100). *Quod foedus aut pactio, quod, ut ad privatas res redeam, testamentum, quae judicia aut stipulationes aut pacti et conventi formula, etc.* (Cic. *Caecin.* 18 § 51.) *Ait praetor; pacta conventa...servabo* (D. ii 14 fr. 7 § 7), *etc.* *Contractus* is not in Cicero, but is the technical phrase in the Jurists for contracts on which suit can be brought; cf. Gai. iii 88, 89; D. xii 1 fr 1 § 1, *etc.* Cf. Serv. Sulpic. ap. Gell. iv 4 *is contractus stipulationum sponsionumque dicebatur sponsalia.* In Cicero *rem contrahere* of business transactions is common; *Off.* i 5 § 15 *rerum contractarum fide*; 17 § 53; ii 18 § 54 *in omni re contrahenda, vendundo emundo, conducendo locando, etc.* See Pernice *ZRG.* xxii 196 sq., 218 sqq.

oath, pledging himself to the performance of certain services, may be classed with them.

2. The second class is composed of such as belong to the *jus gentium*, *i.e.* as are recognised by the law of the world as regular parts of the business of life. They have often their own special names, *e.g.* sale and purchase, letting and hiring, loan, deposit, pledge, partnership, mandate, *etc.* No special form is required to entitle the parties to the help of the law. But where there is no such regular name, still, if there is precise agreement or definite ground (*causa*) for the agreement, the praetor granted an action on the facts of the particular case (*in factum* or *praescriptis verbis*, cf. D. ii 14 fr. 7 §§ 1, 2; xix 5 fr 8; see chap. iv H). Some such cases were sufficiently important and frequent to make the praetor mention them specially in the edict, *e.g. constitutum debiti.*

3. The above two classes comprise all to which the law granted full effect. They gave rise to actions. They had either a special form, or they were of certain definite character, or they were accompanied with good consideration. To other agreements, not being illegal or immoral or fraudulent, the praetor gave a limited protection. They did not entitle either party to sue on them, but they could be pleaded in bar of a suit by the other. The praetor practically said: 'If you go outside of the regular forms and business agreements of the law, the law will not in all cases lend either of you its active assistance against the other to enforce the agreement. But still less will it enable you to act contrary to your own agreement, and therefore if you agree to give up any claim you may have against the other, I will bar any action to enforce the claim.' *Nuda pactio obligationem non parit, sed parit exceptionem* (D. ii 14 fr 7 § 4; cf. Gai. iv 116 *b*); *i.e.* a bare agreement, standing by itself without either formal words of the parties present, or regular book-entry, or real consideration in fact, produces no right of action, but may be pleaded as a surrender of rights of action. It is in this sense that the praetor declared in his edict that he would support agreements made without fraud, and not conflicting with or evading the standing law (D. *ib.* fr 7 § 7; Paul i 4). Hence an agreement not to sue on a

particular matter became practically tantamount to a formal release of an obligation. (See below, p. 61.)

4. Covenants, consistent with the character of the contract, and made in immediate connexion with a sale, or lease, or pledge, or grant of dowry, or other *bonae fidei* obligation, are regarded as part of it. There is good consideration for the covenant, and it does but arrange details or terms to give precision and effect to the contract. *Ea pacta insunt bonae fidei judiciis quae legem contractui dant, id est quae in ingressu contractus facta sunt.* The same rule held in the case of all conveyances of property, whether performed by mancipation, or delivery, or counting out money for a loan: but a bargain, *e.g.* for repayment of more than the sum lent, was invalid. Agreements intended to affect the business, but made afterwards, must be clothed with a stipulation[1], otherwise they will not avail for a plaintiff, for they produce only a plea. A bargain may be made to rescind a former bargain, and then, if the former is pleaded in bar, the latter is a good answer (*replicatio*), and the plaintiff can proceed. (Paul i 1 § 2; D. ii 14 fr 7 §§ 4—6; fr 17 pr, 48; xii 1 fr 7.)

As contrasted with stipulations, bargains do not create a right of themselves, but require the support of actual business (*in stipulationibus jus continetur, in pactis factum versatur*, D. ii 14 fr 27 § 2). But both alike as a rule must be taken to affect only the parties to the agreement, and only in reference to the matter in hand: at any rate other persons and other matters are not in any way directly prejudiced. *Ante omnia animadvertendum est ne conventio in alia re facta aut cum alia persona in alia re aliave persona noceat* (*ib.* fr 27 § 4).

B. Compromise (*transactio*).

An agreement made between parties for the arrangement or compromise of disputes was called *transactio*[2]. It might

[1] The *Constitutum* was an exception (p. 86).

[2] *Transigere* is often used for the settlement of any claim or dispute. Cf. Cic. *Att.* iv 16 § 8 speaking of clearances for the enlargement of the forum: *cum privatis non poterat transigi minore pecunia*; *Rosc. C.* 18 § 55 of the compromise of a suit; for which *decidere* is used *ib.* 11 § 32; *Rosc.*

take shape as an agreement only (*pactum conventum*), or might be, and usually was, confirmed by an Aquilian stipulation, *i.e.* a general renewal of all preceding claims accompanied with a formal release (see p. 58), and by a covenant of penalty for breach. Any suits not in the contemplation of the parties are not included in the settlement, however general the words of the stipulation or bargain may be. It was good only between the parties, and did not affect the rights of others. It presumed doubts to exist: *de re dubia et lite incerta neque finita transigit.* If a suit has been brought to judgment and no appeal is made or possible, there is no basis for a compromise, and (as a rescript of Caracalla decided) the judgment stands; but what has been actually paid under the compromise is allowed to reduce the amount of the judgment (D. ii 15 fr 1, 2, 7 pr, § 1, 9, 11; xii 6 fr 23). If defendant does not abide by the compromise, plaintiff can continue the original action, at least in some cases (D. v 2 fr 27 pr).

Where alimony (*alimenta*) was left by will or given *mortis causa*, a senate's decree, made at the instance of Marcus Aurelius, invalidated any compromise which was not made after full hearing by the praetor, who was to inquire into the cause of the arrangement, the sufficiency of the allowance, the necessities of the recipient, and the solvency of the person charged (D. ii 15 fr 8).

In two cases an agreement for settlement of a cause of suit not merely gains a plea *pacti conventi*, but extinguishes the action altogether (D. ii 14 fr 17 § 1). These are *injuriarum* (D. xlvii 10 fr 11 § 1) and *furti*. In the latter case a settlement is called *pro fure damnum decidere* (D. xlvii 2 fr 46 § 5).

Am. 39 § 114. (The English words *transaction* and *compromise* (from *compromissum* 'a common agreement to abide by an arbitrator's settlement of terms') differ widely in meaning from their Latin originals.)

CHAPTER III.

STRICT OBLIGATIONS (*STRICTA JUDICIA*).

THE first class of obligations are characterised by their definite nature, and the suits to enforce them have a clearly defined claim. Plaintiff is entitled to judgment for the whole or none: if the contract was made at all, defendant must pay: there is no adjustment of recognised claims: one or other of the parties is wholly wrong in the particular matter. Cicero's contrast between *judicia* and *arbitria* applies closely to the relative positions of the parties in strict and in *bonae fidei* actions: *ad judicium hoc modo venimus ut totam litem aut obtineamus aut amittamus: ad arbitrium hoc animo adimus ut neque nihil neque tantum quantum postulavimus consequamur* (Cic. *Rosc. Com.* 4 § 10). When issue was once joined, the object sued for was ascertained; if it was money, the amount is thereby given; if it was not money, the value had to be estimated as at that time (D. xiii 6 fr 3 § 2, *etc.*, tit. 3 fr 3: see Lenel *Paling.* ii 575). The claim was, at least before the time of the Antonines, separate and irrespective of any other, so that no set-off was admissible, and in early times (before C. Aquilius, cf. Cic. *Off.* iii 14 § 60) the contract once made bound by its terms, whether fraud had induced the contract, or the precise interpretation was harsh and inequitable, or not[1]. The plea of fraud and the action for fraud once introduced (it is uncertain when) could be used so as to modify this rigorous character, and M. Aurelius authorised the use of the plea of fraud in order to

[1] Cf. Cic. *Caecin.* 3 § 7 *Si quis quid spopondit, qua in re verbo se obligavit uno, si id non facit, maturo judicio sine ulla religione judicis condemnatur; qui per tutelam aut societatem aut rem mandatam aut fiduciae rationem fraudavit quempiam, in eo quo delictum majus est, eo poena est tardior? 'Est enim turpe judicium.' Ex facto quidem turpi.* The *stricta judicia* did not involve *infamia* on condemnation (D. xliv 7 fr 36).

admit set-off[1] (Just. iv 6 § 30). But in substance these actions remained types of the contract of freemen, who had a right to lay down a law for themselves, and a duty to abide the consequences of their own free disposal.

The three principal obligations of this class are contract by oral question and answer (*stipulatio*), contract by book-entry (*litterarum obligatio*), contract by cash loan (*mutuum*), which Cicero enumerates (*Rosc. Com.* 4 § 13) as alone giving a claim for money certain. The first of these naturally served the Roman lawyers with the opportunity for discussing the general principles of contract; for the contents of a stipulation were anything that the parties chose, and the uses to which a stipulation was put were as varied as its contents. Accordingly I put in this part the sections treating of renewal, transfer, fulfilment and release of obligations. With loan of money are closely connected, at least by analogy, actions (*condictiones*) for money, *etc.*, which has become another's property without due cause for retention, and is therefore subject like a loan to a claim for repayment (cf. Gai. iii 91). And I append such natural developments by the praetor as are found in the actions *de eo quod certo loco dari oportet* and *de pecunia constituta*.

A. Verbal obligation (*stipulatio*[2]).

1. (*a*) Form.

The only general and universally applicable mode of making an agreement which should be legally enforceable was by oral procedure between the parties present at the same place[3]. Writing was however frequently used not to make

[1] Seneca *Ben.* vi 4, 5 contrasts the legal practice of refusing 'set-off,' and trying each matter separately with the principles of benefit and gratitude.

[2] For conjectures on the history of the form and origin of the terms *stipulari*, *spondere*, *etc.* see *e.g.* Girard *Manuel* p. 472 sq.; Muirhead *Hist.* § 29.

[3] How usual it was for a record of a stipulation to be made is seen from Cic. *Top.* 25 § 96 *Ista sunt tria genera quae controversiam in omni scripto facere possint: ambiguum, discrepantia scripti et voluntatis, scripta*

but to prove the contract. It took the shape of a record either of the stipulation or of a declaration of the same before witnesses. A senate's decree in the time of Nero prescribed that all documents (*tabulae*) containing record of contracts whether public or private should be pierced in the middle of the margin, and tied with threefold thread, and the thread be sealed by the witnesses, the object being to have one copy of the agreement secured against alteration, while another on the outside was available for use. If this was not done the tablets were not to be allowed any weight in court[1] (Paul v 25 § 6; Suet. *Ner.* 17).

A stipulation consisted in a question and answer, the question being put by the person who was to acquire a right, the answer being given orally by the person who undertook the obligation. The matter of the agreement being stated, the binding words were usually simple; those used by (and peculiar to) Romans being *Spondesne?* or *spondes? Spondeo.* A stipulation made with a foreigner in these terms was invalid (Gai. iii 93, 94, 179). The questioner was called *stipulator*, sometimes *reus*[2] *stipulandi* ('person concerned with stipulating'), the answerer usually *promissor* (or *reus promittendi*), the natural word *sponsor* being practically confined to a particular class of stipulations (see p. 29). Other words used by Romans and

contraria. Jam hoc perspicuumst non magis in legibus quam in testamentis, in stipulationibus, in reliquis rebus, quae ex scripto aguntur, posse controversias easdem existere. Part. Or. 37 § 130 *Scriptorum privatum aliud est, publicum aliud: publicum: lex, senatusconsultum, foedus; privatum: tabulae, pactum conventum, stipulatio; ib.* 31 § 107 *In gravissimis firmamentis etiam illa ponenda sunt, si quae ex scripto legis aut testamenti aut verborum ipsius judicii aut alicujus stipulationis aut cautionis opponuntur defensioni contraria; Caecin.* 18 § 51; *Rosc. Com.* 13 § 38 *Quis est hujus restipulationis scriptor;* Quintil. vii 5 § 6; Dig. L 17 fr 92; Paul in D. xliv 7 fr 38 says *placuit non minus valere quod scriptura quam quod vocibus lingua figuratis significaretur.* Cf. Sen. *Ben.* iii 15 § 1 *utinam nulla stipulatio emptorem venditori obligaret, nec pacta conventaque inpressis signis custodirentur.*

[1] Examples of such tablets exist, and a copy of one is given in Bruns' *Fontes* p. 371 sqq.

[2] Cf. Fest. p. 273; Cic. *Orat.* 43 § 183; 79 § 321, and my note on D. *de usufructu* p. 46.

foreigners alike were *promittis* or *fide promittis? promitto*; *dabis? dabo*; *facies? facio*; *etc.* Greek or other languages, with the aid if required of an interpreter, might be used even by Roman citizens. The essential was clear understanding and expressed agreement (Gai. iii 92, 93; D. xlv 1 fr 1 § 6). In records of stipulations the question is described by *f. r.* for *fide rogavit*, the answer by *f. p.* for *fide promisit* (see Bruns nos. 105—108, 127, and cf. Gai. l. c.). See also p. 29 n. 2.

The promise must be in reply to a question, in order that the intention of both parties to make a legal contract might be in evidence. To meet any doubts on this point a rescript of Severus decided that, if a document stated a promise to have been made between persons present[1] it should be taken to have been made in a formal stipulation (Cod. viii 37 fr 1; cf. Paul v 7 § 2; D. xlv 1 fr 134 § 2). And similarly it was held as a general rule that if a man wrote that he had bound himself as surety (*fidejussisse*), it should be presumed that all requisite formalities had been observed (D. xlv 1 fr 30).

(*b*) Conditions of validity.

The answer must follow the question without any considerable interval or any interpolation of other business. A day's interval would prevent any obligation arising (D. xlv 1 fr 1 § 1; tit. 2 fr 12 pr).

The answer must fit the question. There must be agreement as to the object-matter, though a variance in the name given or the addition of superfluous language does not invalidate. If the question is absolute (*dabis?*), the answer must not be conditional (*si illud factum erit, dabo*). A different time or place in the answer from that named in the question spoils the stipulation from lack of agreement. A variance in amount only was held by some not to be fatal, because the larger sum includes the less, so that if the stipulator says, 'Will you give me twenty?' and the answer is 'I will give ten,' or *vice versa*, the agreement is good for ten only. Gaius however held such

[1] Paul does not mention the condition of presence of the parties, but I take the omission to be accidental or due to the Visigothic editors. Justinian gave a further extension to the rule (Cod. viii 37 fr 14).

stipulations to be invalid in accordance with the general rule[1] (Gai. iii 102; D. xlv 1 fr 1 §§ 3, 4, 83 §§ 1—4, 137 § 1).

A contract can be enforced only by one who has an interest (*i.e.* a money interest[2]) in it and is a party to it[3]. Hence every stipulation must be in the interest of the stipulator or of those in whose power he is[4]. Any stipulation framed wholly in the interest of an outsider is invalid. But a guardian giving up the management of his ward's affairs could, it was thought, stipulate from his fellow guardian *rem pupilli salvam fore*, for he is still responsible so far. And a stipulation by a contractor from a subcontractor for the due execution of work on another's house, which the contractor has himself undertaken to build, is valid. So is a stipulation for something to be paid to one's own son under power, or slave, or agent, or creditor; or for the building of a temple or tomb, though neither can be his property (Gai. iii 103; D. xlv 1 fr 38 §§ 20—25 fr 39). Any difficulty that might arise from the principle that stipulations are only for the stipulator could be removed by attaching a penalty to non-performance. Thus *dabisne Titio servum illum* (Titius being an outsider) shews no interest for the stipulator; but if there be added *si non dederis, centum nummos mihi dabis*? there is interest in the penalty, and this becomes the content of the stipulation, which is therefore valid (D. xlv 1 fr 38 § 17; xlvi 5 fr 16).

In view of this principle a stipulation for oneself and another (*mihi et Titio*) was of questionable validity. The

[1] Justinian (iii 19 § 5) follows Gaius: not so in the Digest. It is possible that Gaius meant only that the contract was not good *as framed* by the stipulator.

[2] Cf. D. xl 7 fr 9 § 2 *Ea in obligatione consistere quae pecunia lui praestarique possunt*; cf. D. xvii 1 fr 54. A. Pernice's criticism of these passages (*Labeo* iii p. 189 sqq.) seems to be overstrained.

[3] *Quaecumque gerimus, cum ex nostro contractu originem trahunt, nisi ex nostra persona obligationis initium sumant, inanem actum nostrum efficiunt: et ideo neque stipulari neque emere vendere contrahere ut alter suo nomine recte agat possumus* (Paul D. xliv 7 fr 11). *Nec paciscendo nec legem dicendo nec stipulando quisquam alteri cavere potest* (Q. Mucius, D. L 17 fr 73 § 4).

[4] For stipulations by slaves and others under power see vol. I p. 432 sqq.

Sabinians held that it was good for oneself only, the addition of another name being disregarded. The Proculians agreed that it was good for oneself, but held that it was good only for half the amount (Gai. iii 103; cf. D. xlv 1 fr 110). A stipulation for oneself or another (*mihi aut Titio*) was quite valid, but the stipulator alone had the right to sue on it and take the benefit, or to novate or release it: the other name was deemed to be put in merely to facilitate payment, Titius being treated as having no interest, but being merely an agent of the stipulator duly authorised to discharge the debtor by accepting payment or delivery. Unless allowed to retain it as a gift, Titius was compellable by an action of mandate to pay it over to the stipulator (D. xlv 1 fr 131 § 1; xlvi 3 fr 10). A different time or place could be inserted for payment to stipulator from that for Titius; nor did a different condition invalidate the stipulation, provided that the condition for the stipulator took effect. Again, payment to the stipulator might be stipulated unconditionally and payment to Titius conditionally, but if the reverse was done, and the condition did not take effect, the stipulation was invalid. Some lawyers held that the content must not be different, *e.g. mihi decem aut Titio hominem*; but if such a stipulation were made, payment to Titius would either discharge the obligation, or at any rate would support a plea (D. xlv 1 fr 141 §§ 5—9; tit. 3 fr 34 § 2, fr 98 §§ 4—6).

On an analogous principle the stipulation must be aimed at an action of the promiser's, not of some outsider. *Alius pro alio promittens daturum facturumve eum non obligatur; nam de se quemque promittere oportet* (D. xlv 1 fr 83 pr). General words were thus restricted by interpretation. If a stipulation for quiet enjoyment of property conveyed is in the simple terms *habere licere spondes?*, it was held to give only a guaranty against any interference with the stipulator's (and his heirs') enjoyment by the promiser (or his heirs). If a guaranty against others' interference was desired, a clause with penalty for interference must be added. So the ordinary covenant against fraud *dolum malum abesse afuturumque spondes?* without the addition of a penalty clause, such as *si hujus rei dolus malus non aberit, quanti ea res est* (or *xx milia sestert.*) *dari spondes*, includes

only fraud on the part of the promiser or his heirs (fr 38 pr—§§ 2, 5, 13; xlvi 7 fr 19). A promise, *e.g.* by an agent for the appearance of another (his principal) in court, is taken to mean that the promiser will procure his appearance (*qui alium sisti promittit, hoc promittit id se acturum ut stet*). And a negative form such as *per te non fieri quominus illud fiat* is not always satisfied by mere passive abstinence, but may require exertion of the promiser to secure fulfilment (D. xlv 1 fr 50 pr, 81).

A stipulation for something to be paid or done for me after my death or the promiser's death is bad: no obligation should begin with the heir (for at the time of stipulation he would be an outsider to the contracting parties). A stipulation for payment on the day before death meets with the same difficulty, for 'the day before' cannot be ascertained until death has taken place. But it is valid to stipulate for payment or performance at the time of death (*cum moriar* or *cum morieris*), the obligation being then put on the last of life. What has been said of natural death applies also to civil death (*capitis deminutio* Gai. iii 100, 101; cf. Cod. iv 11). A slave can stipulate for something 'after his death,' because the person really concerned with the acquisition is his master, and thus a usufruct stipulated for by a slave enures for his master's, not for his own, life (Vat. 57).

A stipulation which leaves performance (not merely the time of performance) entirely to the will of the promiser is nugatory (D. xlv 1 fr 17, 46 §§ 2, 3, 108 § 1). If a stipulation require the mode of performance to be at the discretion of a third party and he do not exercise the discretion, suit cannot be brought on it (fr 43, 44).

A stipulation to procure or reward an act permanently forbidden by statute or contrary to good customs, *e.g.* for the commission of a crime, or to procure a particular marriage (under a penalty for breach), or to get the promiser to make one his heir, or for the sale of a freeman 'when he shall become a slave,' is invalid (fr 27 pr, 61, 97 § 2, 123, 134 pr).

(*c*) Impossibility of performance.

A stipulation for what is impossible (not merely for promiser but for anyone) is bad; *e.g.* to stipulate for the conveyance to us of one whom we believe to be a slave but who is really a freeman; or of a slave whom we believe to be alive but who is actually dead; or of what is already our own property, under the belief that it belongs to others; or of a fabulous monster *e.g.* a hippocentaur; or of what is sacred or religious or public land, though supposed at the time to be ordinary land. And a stipulation on an impossible condition, *e.g.* 'if the sky be touched with the finger,' is on the same footing. So a stipulation for a usufruct by a slave belonging to a vacant inheritance is invalid even though conditional, for there is no person to whom it can attach; and the validity is judged at the time of stipulating, though suit may be postponed to some future time. And no stipulation (even expressly for the heir) by such a slave is valid or due, unless and until the inheritance is entered on (Gai. iii 97—99; Vat. 55; D. xlv 1 fr 73 § 1, 137 § 6; tit. 3 fr 16, 25). A stipulation for a right of road by one who has no neighbouring farm at the time, or has parted with it before the constitution of the servitude, is null (fr 98 pr, 130).

Whether a slave could covenant in the ordinary terms *habere licere* against eviction was disputed. Julian maintained that *habere* was a term technical to ownership, and inasmuch as a slave could neither hold nor alienate anything as civil owner, the covenant was null. Ulpian (in Digest) allowed the stipulation to be good both for slaves and sons under power, but interpreted *habere* as referring only to possession. A stipulation for a right of way (*non per promissorem fieri quominus sibi ire agere liceret*) was not open to the same doubt, because *ire, agere* denoted acts, not legal position (D. xlv 1 fr 31 § 6).

Performance of a stipulation may become impossible, although not so when made, *e.g.* by the stipulated object perishing or a slave becoming free before the due time for delivery. If the promiser was not in fault, the obligation drops. But if he has himself killed or destroyed the object (unless it be a criminal slave caught in the act) or has manumitted a slave

promised, or has made promised land religious or sacred, or has alienated it to one who has done so, he remains liable on his stipulation. It was an old rule that *quotiens culpa intervenit, perpetuari obligationem*, and it applied to sureties as well as to the principal. If the promiser of another's slave or building-plot (*area*) could not buy in consequence of the refusal of the owner to sell, the stipulation was still good for the value; but if the owner had manumitted the slave or he had died so that he no longer existed as an article of commerce, the promiser was free. If the owner had built on the plot its delivery is now impossible, at least for a time, but as it still exists it can be the object of a suit and the promiser is still liable (D. xlv 1 fr 33, 37, 83 § 5, 96, 137 § 4; xlvi 3 fr 92; Paul v 7 § 4). The promiser was freed, if the stipulated object had already become the property of the stipulator without cost (*ex lucrativa causa* D. xlv 1 fr 83 § 6; 98 pr).

Where the perishing of the promised object was attributable to the promiser's neglect (*non-feasance*) the promiser was not liable under the stipulation; he had not promised to *do* anything, and therefore was not in fault by the want of active exertions; and as the slave or other object no longer existed, it was impossible to give him or it; *ad dandum non ad faciendum tenetur* (fr 91 pr). The circumstances might however be such as to give the stipulator an action for fraud: and if a penalty clause had been added to the stipulation, the promiser would be liable for that.

The impossibility of performance, however it arose, did not free the promiser, if he had failed to perform at the due time. Delay was fault, and thenceforth the promiser bore all the risk. If no time is prescribed by the stipulation, the performance is due as soon as it can reasonably be executed. One who promises money is not bound to have it with him at the moment; if the performance is to be at a distant place, he is not bound to travel there night and day in all weathers; if he contracts to build a house, he is only bound to the ordinary speed and exertions of an active builder (D. fr 41 § 1, 72 § 2, 82 § 1, 137 §§ 2, 3; cf. xlvi 3 fr 105). If the stipulation included a positive promise to perform (*e.g. Rhodum te*

iturum; si non ieris, tantum dari spondes?) it was held by Sabinus and others that suit could be brought as soon as promiser was able to perform and did not. If however the negative condition and consequent penalty stood by itself (*Rhodum si non ieris, etc.*), and no limit of time was specified, suit could not be brought until the performance of the action had become impossible (D. xlv 1 fr 10, 115; cf. xvii 2 fr 71 pr). And if a time is named for execution of a promise, suit must await the time, though performance has become impossible, *e.g.* by death of the slave who was to be delivered on a named future day (D. xlv 1 fr 8, 99 § 1). Before issue has been joined, delay could, as good lawyers held, be purged by performance or tender of the thing promised (fr 84, 91 § 3).

(*d*) Options.

When a promise is in the alternative ('this or that') the impossibility of one makes the promise of the other absolute, the performance of one makes the other no longer obligatory. If the condition of a promise is in the alternative, *e.g.* 'if this happen or that,' the stipulation is due whichever first happens; and the result is the same if the alternative be the not happening of this or that; as soon as it is clear that one cannot happen, the stipulation is due. A combination of two events ('if both this and that') requires, if positive, both to happen; if negative ('if neither this nor that,' or 'if this does not and that does not') neither to happen (fr 63, 129).

The option, when nothing is expressed to the contrary, is with the promiser, whether specific alternatives are named, *e.g.* 'to give Stichus or Pamphilus,' or the promise is general, *e.g.* 'to give a slave' (fr 106, 109, 138 § 1, cf. xxiii 3 fr 10 § 6). Where a son under power or a slave stipulates and reserves the option (*illud aut illud quod ego voluero*) the election must be made by himself, not by his father or master (D. xlv 1 fr 76 pr, 141 pr).

A promise to make over (*dare*) a specific object is satisfied by giving it as it is, without any guaranty: but a promise to give a slave or other object of which promiser has the choice is not satisfied without a guaranty of title, and in case of a

slave, of his freedom from thefts and noxal acts. It is not necessary to guaranty *servum sanum esse*, for soundness has nothing to do with title (D. xxx fr 45 §§ 1, 46).

(*e*) Heirs, how far bound by a stipulation.

Whether heirs and *bonorum possessores* are entitled to claim the performance of their predecessor's stipulation or are bound by their predecessor's promise, without being named in the stipulation, was a disputed question (at least as regards stipulations *ad faciendum*), until Justinian settled it in the affirmative (Cod. viii 37 fr 13). But they could always be expressly included even in a stipulation for usufruct (D. xlv 1 fr 35 §§ 12, 14), and no doubt often, perhaps usually, were so added. When the stipulator or promiser left more heirs than one, the execution of the stipulation was sometimes difficult, and the character of the stipulation became important.

Stipulations lie *in dando* or *in faciendo*, in giving (*i.e.* making over, conveying), or in doing. The payment of money, the conveyance of a farm or slave, the constitution of a usufruct or other servitude, lie in gift (or conveyance): the erection of a house, the excavation of a trench, the delivery of possession, the grant of a release, lie in act (or performance). A third class might be made, so far as form goes, of stipulations requiring abstention from act, such as the common clause against fraud *dolum malum abesse afuturumque esse*, or even the constitution of a servitude in such words as *neque per te neque per heredem tuum fieri quominus mihi ire agere liceat*, but these may be held to be brought under the class of stipulations lying in act by the jurists' doctrine that the promiser was bound to secure the result promised (D. fr 2 pr, 50 pr, 72 pr, 83 pr; L 16 fr 189; cf. xvii 1 fr 45 § 5).

As regards the mass of stipulations lying in gift, a plurality of heirs is quite compatible with due execution. Money and other things stipulated for *in genere* admit of easy division by count, weight, *etc.*, and each heir of the stipulator can demand his share, and each heir of the promiser is liable for his share, proportionate to their respective shares in the inheritance. If however the promise has been made by testator under a

penalty, or a pledge has been given, the penalty becomes due unless the whole sum promised has been paid, and the pledge can be retained until this is done. In the case of a stipulation for a specific slave or horse or dish, ideal not material parts are alone possible; and the stipulator is not duly paid, if he has from the promiser's heirs halves or portions of different slaves or different horses: nor is one of the promiser's heirs discharged by conveying his share unless or until the other shares in the same horse or slave are also conveyed. If one convey the whole, or one of the stipulator's heirs receive the whole, the obligation is duly discharged; and the *judicium familiae erciscundae* in this as in other cases will secure due distribution among the coheirs of the burden or benefit, and the interchange of mutual guaranties of indemnity among the coheirs of the debtor. Whichever heir of stipulator sues first, will sue for the whole of the slave or horse: if he obtain a part, any subsequent suit by the others must be for the remainder only. In the case of land, as material division is possible, there was this difference: all promiser's heirs are liable in the first instance, but each is freed on conveying his share, unless the whole was due under a penalty (D. xlv 1 fr 2 § 1; 54 pr, 85 §§ 1—6; xlvi 3 fr 41 § 1; x 2 fr 25 §§ 13, 14).

Stipulations for what lies in act and also those for easements occasion more difficulty, though the Romans held that difficulty of performance was no reason for nullifying the obligation. In these cases each heir of the stipulator can *prima facie* demand the right of way or the erection of the house stipulated for, as they are indivisible; and each heir of the promiser is liable for the whole, the damages payable to each heir of the stipulator being however proportionate to his share of the inheritance. If only one heir of stipulator is prevented from enjoying the right of way, the others will have no effectual suit, for they have no grievance, and consequently no interest: they would be met by a plea of fraud. If however a penalty be attached to the infringement of the right of way, then the question of interest in the right of way itself drops: any breach of the right of way makes the penalty due from all the heirs of promiser, and gives a claim to all the heirs of stipulator,

the *jud. fam. ercisc.* rectifying, after payment to one or by one, the claims or liabilities of his coheirs. Even if there be no penalty, obstruction by any one of the heirs of promiser was held sufficient to make them all liable to the obstructed heir (D. xlv 1 fr 2 §§ 2, 4—6, 85 §§ 2, 3; x 2 fr 25 §§ 9, 10).

In the case of the judicial stipulations, for ratification (*Titium heredemque ejus ratum habiturum*) and for freedom from further suit (*amplius non agi*), division is automatic: only he who is sued or who suffers from the want of ratification has any interest in suing on the stipulation; and only he who has sued or refused to ratify, can be called on to fulfil it. As regards the common stipulation for double value in case of eviction, each heir of the stipulator who is evicted from his share has a proportionate claim to redress, but whether the whole or part be evicted, the vendor's heirs are liable each for his share of the damages. In such cases the words of the formula run *quanti ea res est*, and thus fix the claim by the value of the particular claimant's interest (D. xlv 1 fr 4, 85 § 5; x 2 fr 44 § 6; xlvi 5 fr 2 § 2; cf. xxxix 2 fr 18 § 10).

Where the stipulation lay in act and was indivisible (*insulam fabricari, etc.*) some lawyers[1] suggested that a value should be put upon it so as to enable a division of claim and liability to be effected, but how far this plan was followed, we do not know (D. xlv 1 fr 72 pr). A stipulation for a freedman's services admits of division by the number of days' service; if one service has to be divided, the readiest way is for the freedman to offer money value (fr 54 § 1). As regards grants of release see p. 57.

A stipulation for payment by promiser and his heir Titius did not operate so as to exempt promiser's other heirs from their share of payment (fr 56 § 1). And a guaranty against any interference with stipulator's enjoyment of a road by promiser or his heir Titius was good against interference by Titius's coheirs also (fr 131 pr).

(*f*) Drafting and interpretation.

In framing a stipulation it is desirable to state all special

[1] Celsus following Tubero. He makes a like suggestion in the case of *operae serviles* D. xii 6 fr 26 § 12.

points: if not stated either in the recital of agreement or in the operative words, they would not be taken to be part of the agreement. As the stipulator has the framing, the presumption in case of doubt is generally against him (fr 99 pr; 110 § 1, 134 § 1; xxxiv 5 fr 26; cf. xix 1 fr 21, 33). The interpretation was strict; *e.g. quicquid te dare facere oportet* includes only what is due at the time of stipulation[1]: if subsequent obligations are to be included, the words *oportebitve*, or *praesens in dienve* must be added. Again by a stipulation for *illud aut illud quod ego voluero* the choice is given to the stipulator (or his heir), but once made cannot be altered; if *volam* were used instead of *voluero*, the choice could be changed at any time before joinder of issue (fr 76, 89, *etc.*). If words are ambiguous and the parties took them in different senses, there was no agreement and the stipulation does not hold (fr 83 § 1). If the intention was not fully apparent, the usual habit of the district was followed (D. L 17 fr 34). It is rarely allowable to introduce by interpretation time or condition into a stipulation when it was not expressed (D. xlv 1 fr 126 § 2 *ad fin.*).

Stipulations for separate things or separate amounts are separate stipulations, though some words may comprehend a number of objects (*e.g. familia servorum, pecunia*) without thereby making separate stipulations for them to be necessary. Nor does the fact that a number of covenants may be embraced under one stipulatory question and answer (*Ea omnia quae dixi*, or *quae supra scripta sunt, dari fieri praestari spondes?*) prevent their being separate stipulations and capable of separate suit (fr 29 pr; 134 § 3, 140; xxi 2 fr 32). A stipulation containing alternatives (*Stichum aut decem dabis?*) is one only, being satisfied by performance of one of the alternatives (D. ii 14 fr 27 § 6). A stipulation for repayment of loan and interest is two stipulations. And one for payment by instalments, *e.g. annua bima trima die*, is three stipulations (fr 75 § 9, 140 § 1).

In stipulating for something to be done under a penalty,

[1] The same is true of a legacy (D. xxxi fr 46). Paul notes that the case is different in issues for trial (D. xlv 1 fr 76 § 1).

the usual words were *si ita factum non erit*, or *si non feceris*; for something not to be done, *si adversus ea factum erit* or *feceris* (D. xlv 1 fr 137 § 7).

In the praetorian stipulations (see Book VI chap. ix B) a clause against fraud was regularly inserted (*clausula doli*), and was held to refer not to what was expressed but to what was unforeseen (fr 53, 119). Consequently it had not the effect of putting stipulations on the same footing as *bonae fidei* obligations. But where a stipulation was contrary to the real agreement, even without actual fraud on the other's part, a plea of fraud could be used, bringing suit on such a stipulation being of itself a fraud (fr 36).

(*g*) Action to enforce a stipulation.

The form of action which was to enforce a stipulation depended on whether the stipulation was certain or uncertain. A *certain* stipulation (*certa* or *certi stipulatio*) is one which contains as its object what is certain in substance, quality and quantity (*quid quale quantumque sit*), *e.g.* two sovereigns (*aurei*), my, your, *etc.* Tusculan farm, my slave Stichus, a hundred bushels of the best African wheat, a hundred gallons of the best Campanian wine, the wine in my cellar, the wheat in my granary, *etc.* An *uncertain* stipulation is one covenanting for a slave or farm without any distinctive name being given, or for a hundred bushels of good African wheat, or for a hundred gallons of good Campanian wine, or for the produce or (probably) for the usufruct of a farm (though the farm itself be certain), or the future child of a female slave, or for what Seius owes to Titius, or for what is due to Titius under Seius' will[1]; or for one of several alternatives, unless the stipulator have the option, or for anything which lies not in conveyance (*in dando*), but in performance or non-performance (D. xlv 1 fr 74, 75). In the case of a certain stipulation the claim is made for the thing itself as described in the stipulation (or in default for its value

[1] Even, says Ulpian, though the promise or legacy was for a sum certain; but he appears to retract this immediately afterwards. I suppose Ulpian's first view was caused by the certainty not appearing on the face of the stipulation.

at the time of suit); in the case of an uncertain stipulation the thing requires further ascertainment, and the claim therefore can only be *quicquid eum dare facere oportet* or *quanti ea res est, i.e.* the amount of his interest in there being default (D. xlvi 5 fr 2 § 2, 11; xlv 1 fr 113 § 1, 114 *lex Rubr.* 20). The former was enforced by a *condictio certae creditae pecuniae* or *certae rei* with its advantages of summary procedure (see p. 71); the latter by an action *ex stipulatu* (D. xii 1 fr 24). On the *formula* see Gai. iv 53, 136, and below (Book VI chap. viii A 3).

Action on the stipulation can be brought until full satisfaction is obtained, *e.g.* an action for a thing promised is not concluded by delivery, if some right attached to the thing remain out. The form of action will still be for the thing (*ipsa res petenda est quamdiu aliquid juri rei deest* D. xlvi 3 fr 27).

(*h*) Who can enter into stipulations.

A mute or a completely deaf person cannot make a stipulation or promise, for they cannot utter or hear the words. A madman cannot for want of intelligence. A ward is competent for all business; but, if it is to bind him, he needs the authority of his guardian, though he can bind another without such authority. This of course only applies to such wards as can speak and are old enough to have intelligence. Infants and those of an age next to infancy have really not much more capacity than madmen, but practical convenience has prevented this being pressed in the case of those who are above the age of infancy. Women having guardians are in the same position as other wards (Gai. iii 105—109; cf. Just. iii 19 § 10; D. xlvi 6 fr 6). Minors above the age of puberty are capable of being bound without the consent of their caretakers (D. xlv 1 fr 101).

Slaves, persons in handtake, women under power or in hand, can stipulate for themselves or for those in whose power they are, the superior in both cases obtaining the right of action. But they cannot be legally bound by a promise either to him under whose power they are or to anyone else. Nor can a son under power enter into a stipulation with his father, but with other persons he can (Gai. iii 104; D. xliv 7 fr 39; xlv 3 fr 1 pr). If a son makes a stipulation under a condition, and when the

time comes he is emancipated, the right of action remains with the father, the date of stipulation ruling such matters (D. xlv 1 fr 78).

2. Correal obligation.

If two or more persons stipulate together for the same thing or two or more persons promise together the same thing, it would generally be taken that they are jointly, not separately, entitled and liable. But all depends on the intention, and it may be that each stipulator is to have a several as well as a joint claim to the thing, and each promiser to take a several as well as joint liability for it. Still, the obligation being one only, payment to or by one discharges all. Payment of two halves of the same due object to two stipulators or by two promisers is also effectual. Such legal relation usually arises from stipulation, whether the questions and answers are several or joint, *e.g.* *spondesne* and *spondesne?* or *spondetis? spondeo* and *spondeo*, or *spondemus*. It might be created by a common slave, if couched in appropriate words. It is not necessary that the double obligation should be made at the same time, but there must be no such interval and no such other business interposed as to make either two separate transactions instead of a single joint one, or the later to be regarded as a novation of the earlier (D. xlv 2 fr 2—4, fr 6 § 3; tit. 3 fr 29; xlvi 3 fr 34 § 1). The parties are spoken of as *duo* (or *plures*) *rei stipulandi* or *rei promittendi* (D. xlv 2 fr 1); and once the term *correus* is used (D. xxxiv 3 fr 3 § 3), whence the modern terms of *correal* and *correality* are derived.

This joint and several obligation is not vitiated by some difference in the terms. One may promise absolutely, and another conditionally; one promise payment immediately, another at some future day; one may have a surety, another not; but they must promise the same thing or the same amount, and it must be clear that the obligation is for one performance or one payment only, according to their respective terms (if there be a difference). The obligation was probably expressed by such words as *eandem rem dari fieri* or *eosdem centum aureos*

dari or *eandem summam, etc., ita ut duo rei stipulandi* (or *promittendi*) *essent* (D. xlv 2 fr 6 § 1, 7, 9 § 2, 11 §§ 1, 2; 12). In such an obligation each stipulator may at his choice demand the whole from any one promiser, or part from one and part from another. Discharge of one, and thereby of all, results not only from complete performance but from formal release, from novation, or joinder of issue on the part of any one stipulator. A bargain not to sue, though in general terms made by one joint stipulator did not affect the other's right to sue, but made by one joint promiser with a common stipulator freed the other promisers, if the bargaining promiser would otherwise be affected. Delay or obstructive action of one promiser does not hurt the others. Nor does the freedom of one promiser by *capitis deminutio* affect the liability of the others (fr 16, 18, 19; xlvi 2 fr 31 § 1; cf. ii 14 fr 25 pr). If one joint stipulator becomes heir to the other, there is no merger: each obligation continues to exist and can be exercised at choice (D. xlvi 3 fr 93 pr).

The like obligation is said to be also possible by other means than stipulation, *e.g.* by deposit, by loan, sale and purchase, letting and hiring, or by will (D. xlv 2 fr 9 pr).

The advantage of such arrangements was almost entirely on the side of the stipulator, who thus gained greater security by having more than one person fully liable as promiser. If he had another as co-stipulator, he had a fully competent representative in case perhaps of his own absence, but he was also liable to suffer by his acts. Whether one co-stipulator was always compellable to share with the others any payment obtained, and one copromiser who paid could obtain contribution from his fellows, is a question only incidentally touched in our authorities and the subject of much debate in modern times. Probably the circumstances which caused the joint stipulation, *etc.* to be made would determine this. If the relation of partnership or mandate existed between them, as would often be the case, contribution or sharing would clearly be obtainable (see Savigny *Oblig.* 1 §§ 23—26; Vangerow *Pand.* § 573 *anm.* 3, *etc.*).

3. Adstipulation.

In co-stipulation the stipulators are on an equal footing; but if one stipulator employs another merely as accessory, the latter is called *adstipulator*. He is not *reus stipulandi*, for he has no direct interest in the matter (Fest. p. 273). The form was for the adstipulator (after the principal's stipulation, *e.g. dari spondes?*) to say to the promiser *ĭdem spondes?* or *ĭdem fide tua promittis?* or some other appropriate words. The adstipulator can sue, and the debt can be paid him just as effectually as to the principal, but he is accountable for it to the principal or his heir by an action *mandati*. The accessory must not stipulate for more in quantity or for earlier payment than his principal: if the principal stipulates for ten, he may stipulate for five, or if the principal stipulate unconditionally, the accessory may stipulate conditionally, but not *vice versa*. The adstipulator's heir cannot sue. A slave adstipulating and, according to the better opinion, a person in handtake adstipulating, go for nothing. A son in the power of his father does not thereby, as in other cases, acquire for his father, but cannot sue on his adstipulation, unless and until he has passed from his father's power without changing his civic status (*sine capitis dem.*), *i.e.* not by emancipation, but by his parent's death or by being inaugurated as *flamen Dialis*. The like is true of a daughter under power or in hand.

The use of adstipulation[1] was, in Gaius' time, pretty well confined to cases where a stipulation was entered into for something to be given (*dari*) after the principal's death, so that there might be someone to enforce it (Gai. iii 110—114, 117, iv 113; cf. D. xvii 1 fr 59 pr). If an adstipulator played false, and gave the promiser a formal release, he was liable under the second clause of the *lex Aquilia* to an action for corresponding damages (Gai. iii 215). See below, p. 193.

[1] An *adstipulator* is mentioned in Cicero *Quint.* 18 § 58 in connexion with a *vadimonium*. In Pseudo-Cic. *ad Octav.* § 9 *Octavian* is referred to as one *cujus avus fuerit argentarius, adstipulator pater, uterque precarium quaestum fecerit.* Some such contemptuous reference to mean services is seen in Cic. *Pis.* 9 § 18. In *Acad.* ii 21 § 67 the technical meaning has receded.

4. SURETYSHIP.

(*a*) Accessory promisers, *i.e.* sureties, were much more common than accessory stipulators, and were indeed the usual form of security for engagements, when a creditor was not content with the debtor's own promise (*repromissio* or *promissio*). Sureties differed from copromisers. Copromisers were liable on one and the same obligation, but were independent and one as fully liable as another. Sureties depended on their principal, *i.e.* the person whose obligation they were to secure; they were affected by his conduct and could use his privileges, though they were equally liable with him to the creditor. On the other hand they could call upon their principal to repay them.

In Gaius' time there were three kinds of sureties, *sponsor*[1], *fidepromissor*, *fidejussor*, corresponding to the words used in the stipulation, which, following on the engagement of the debtor, was such as *idem dari spondes?* or *idem fide promittes*[2]*?* or *idem fide tua esse jubes?* But the stipulation might take the simple forms *idem dabis? idem promittis? idem facies*, and in such a case there is no special name for the surety (Gai. iii 115, 116), but the term *adpromissores* (cf. D. xlvi 3 fr 43) would include all. *Fidejussores* (and no doubt *fidepromissores*) could give their guaranty in Greek (D. xlvi 1 fr 8 pr).

(*b*) None but Romans could be *sponsores*, *spondere* being a word peculiar to them, and a stipulation by or with foreigners,

[1] Cf. Hor. *Ep.* i 16. 43 *Vir bonus est quis?...quo res sponsore et quo causae teste tenentur*; ii 2. 67 *Hic sponsum* ('to guaranty') *vocat*; *Sat.* ii 6. 23 *Romae sponsorem me rapis.*

[2] In Plaut. *Men.* 894 (of an ordinary promise) we have *mea ego id promitto fide* (cf. Sall. *Cat.* 47 *fide publica dicere jussus est*). Of the principal debtor's answer to a stipulation *fide* (without *sua*, *etc.*) *promittere* is often in the Transylvanian documents; cf. Bruns[6] nos. 105, 106, 107, 108, probably all of provincials. Of sureties *fide tua jussit* is found in nos. 105, 107, 110. Cicero does not (apparently) use either *fide promittere* or *f. jubere*, but speaking of a loan with a surety says *pecuniam credidit P. Fulvi Nerati fide* (*Flac.* 20 § 46); *Hermippi fide pecuniam sumpsit a Fufiis* (*ib.* § 46); *Hermippus Fufiis satisfacit et fidem suam liberat, hunc judicio persequitur* (*ib.* § 47). In rhetorical language we have *Audebo obligare fidem meam vobis populoque Romano...Promitto, recipio, spondeo, etc.* See Pernice *Labeo* i p. 408 sqq.

using *spondes spondeo*, was null (Gai. iii 93, 179). Foreigners were however capable of taking and being sureties, and the term *fidepromissor* was no doubt first and chiefly applied to them (cf. *ib.* 120), *fide* 'on my credit,' 'faithfully' being prefixed to distinguish a solemn promise in reply to a stipulation from other promises. The *sponsor* and *fidepromissor* were in the same legal position (Gai. iv 118).

These two kinds of sureties were accessory only to verbal obligations, that is, only when the principal debtor had himself promised in reply to a stipulation. Their heirs were not liable, at least by Roman law, though Gaius hints that the heirs of a *fidepromissor* being a foreigner might be liable under the laws of his own community (Gai. iii 119, 120, iv 113). The risk of the sureties themselves was mitigated by several statutes, all of uncertain date, but probably earlier than Cicero[1].

At first, if there were more sureties than one, each was liable in full. The *lex Appuleia* however made them to some extent partners in the obligation, and gave any who had paid more than his share an action against the others for contribution. This law extended beyond Italy to the provinces, *i.e.* to the Romans in the provinces (Wlassak *PG.* ii 157). The *lex Furia* (*de sponsu*, Gai. iv 22) divided the obligation among the sureties, whatever their number, at the time of the debts becoming due, so that each was liable for one equal share only; and to insure this, it gave a summary remedy against any creditor who exacted from a surety anything more than his share (see p. 185). Another clause freed all sureties from their obligation at the end of two years[2]. But this law applied only to (the Romans

[1] Cf. Girard *Dr. Rom.* p. 739 n. 4, p. 740 n. 2.

[2] Cicero speaks of having been called on to pay as a *sponsor*, although the engagement was made twenty-five years before. *Quod pro Cornificio me abhinc amplius annis xxv spopondisse dicit Flavius, etsi reus locuples est et Apuleius praediator liberalis, tamen velim des operam ut investiges ex consponsorum tabulis sitne ita* (*Att.* xii 17 § 2; cf. 14 § 2, 19 § 2). Huschke (*Beitr. zur Gaius*, p. 86) suggests that Cicero though really freed by the *lex Furia* thought it better not to plead the statute, as the principal was a man of means. See also Karlowa *RG.* ii p. 735. Others hold the *lex Furia* to be subsequent to Cicero's time.

in) Italy, practically superseding there the provisions of the *lex Appuleia*. The *lex Cicereia* aimed at securing the benefit of these restrictions on a surety's liability, by making it obligatory on everyone who took sureties to announce openly beforehand the matter of the obligation and the number of sureties intended to be taken. If this was not done, the sureties were allowed within thirty days to demand a preliminary trial (*praejudicium*) whether the law had been obeyed, and, if due announcement had not been made, the sureties were freed. None of these laws mentioned *fidejussores*.

(*c*) A *fidejussor* was a surety different in some important respects from a *sponsor* or *fidepromissor*. The words appear to be of a stronger type. 'I bid it be done on my credit' (*fides*), *i.e.* 'on my guaranty,' as if the attitude were that of a *mandator* ordering the business and taking the responsibility (cf. D. xvii 1 fr 60 § 1), but differing from a *mandator* in being necessarily present on the spot and making a legal contract in strict form. Accordingly a *fidejussor* was used to guaranty any kind of obligation, verbal, litteral, real, consensual, and not only civil but also merely natural obligations, as for instance a sale or promise by a slave or son to an outsider or to his own master or father. His liability is transmitted to his heir (Gai. iii 118, 119; D. xix 1 fr 24 § 2; xlvi 1 fr 8 §§ 1—6; 16 § 3, 4; 56 § 1).

A *fidejussor* whether alone or with others was liable in full. He obtained no relief under the *lex Appuleia* or *Furia*, but a letter of Hadrian's (followed by the edict, Paul i 20) directed creditors who had several *fidejussores* to claim from each only an equal share; but, as in reckoning the shares insolvent sureties were to be disregarded, those solvent might still have more than their own share to bear. (This letter of Hadrian's might also relieve in some degree *sponsores* and *fidepromissores* in the provinces where the *lex Furia* was not in force.) It was perhaps in consequence of this letter that the practice prevailed of announcing the number of *fidejussores*, as required for other sureties by the *lex Cicereia* (Gai. iii 121, 123; D. xlvi 1 fr 26 —28).

(*d*) A restriction of a different kind was enacted by the *lex*

Cornelia for all kinds of sureties. It limited the total amount of money on credit, for which any one surety could be bound in the same year for the same principal debtor to the same stipulator (*idem pro eodem apud eundem eodem anno*). The limit was 20,000 sesterces. Any excess was invalid. The law used the term *summa creditae pecuniae*; and under this term the lawyers included not only money actually lent but all money which at the time of obligation was certain to be due (though the time for suing might be deferred), *i.e.* all that is stipulated for unconditionally, whether to be paid now or at a certain future time. And 'money' (*pecunia*) in this law was taken to include wine, or corn, or land, or slaves[1]. The only cases in which the law allowed security to be unrestricted in amount were when the security was given for a dowry, or for something left by will, or when it was given by a judge's order. And the *lex Julia* exempted also any security required by that statute for the 5 per cent. tax on inheritances[2] (Gai. iii 124, 125).

(*e*) A surety is not bound, if there is no principal bound, *i.e.* if the principal is not under a lawful obligation recognised by the civil law as actionable or as so natural as to make payment of it irrecoverable (D. xlvi 1 fr 16 pr §§ 3, 4). It was questionable whether there was any obligation which could support suretyship in a promise by a slave or a foreigner using the word *spondeo*

[1] Cf. Savigny *Syst.* v. p. 536.

[2] Augustus A.D. 6 imposed a tax of 5 per cent. (*pars vicesima*) on all inheritances and legacies taken by Roman citizens, except the children of the deceased. Newly made citizens whether by Latin right (vol. 1 p. 23) or grant of the emperor were exempt only if they obtained specially the right of kinship (*cognatio*). Nero and Trajan extended the exemptions, without special grant, to inheritances of children from either parent and *vice versa*, in the case of Roman citizens, and also to cognates in the second degree (*i.e.* between brothers and sisters), and freed small inheritances and legacies altogether. Caracalla doubled the tax, abolished exemption of near relatives, restricted succession *ab intestato*, and to swell the proceeds of the tax gave Roman citizenship to all (see vol. 1 p. 24). Macrinus restored the tax arrangements to the State before Caracalla. Plin. *Paneg.* 37—40 (partly quoted vol. 1 p. 188); Dio Cass. lv 25; lxxvii 9; lxxviii 12. Some points are doubtful. See Huschke *Beitr. zur Gaius* p. 16 sqq.

(Gai. iii 119); and there was none in a promise by a father or master to his son or slave, for that is in fact a promise to himself, and no one can be surety for and to the same person (D. xlvi 1 fr 56 § 1), or in an oath to perform services by one who is not a freedman (fr 56 pr), or in an obligation which has by efflux of time ceased to bind (fr 37), or which has been nullified by the debtor being condemned to deportation (fr 47 pr), or in a professed loan where the money was not the lender's, was not spent and was not accompanied by any stipulation (fr 56 § 2). Nor does a stipulation between thieves for sharing the booty or paying the penalty allow of a surety (fr 70 § 5). A madman or spendthrift could hand over nothing and could not be bound by a promise: their action went for nothing and consequently there could be no surety in such a proceeding (fr 70 § 4; xlv 1 fr 6). A woman or ward promising without the authority of their guardian contracts a natural but not a legal obligation: it is however sufficient to allow of a surety. And the same, says Gaius, applies to a promise for something to be done after the promiser's death, which in itself is an invalid stipulation (Gai. iii 119).

(*f*) No surety can be bound for a different thing or for a larger amount than the principal debtor is; what is accessory should not be greater than the principal. But a surety may be bound for less than the principal debtor (Gai. iii 126). Nor can the principal be engaged only from a certain time or on condition, and the surety be engaged absolutely or at once. If the principal is engaged on one condition and the surety on another, the surety is bound only if the principal's condition occur first. If the surety is engaged on a condition additional to that on which the principal is engaged, he is bound only if both conditions occur; otherwise there would be more chance of his being bound than of the principal's being bound. If the principal promise 'Stichus or ten pounds,' surety can be liable only if the option be his. If principal promise only to give Stichus, surety cannot be bound for 'Stichus or ten pounds,' for if Stichus die the principal debtor may not be liable at all, and the surety would be responsible for ten pounds. But if the principal promised a farm, the surety may promise only

the usufruct, that being regarded for this purpose as a share of the same thing. And generally the engagement of the surety may be lighter, but must not be harder, than that of his principal (D. xlvi 1 fr 8 § 7 sqq., 34, 42, 70 pr—§ 2). A surety for a slave is bound in full whatever be the amount of the *peculium*. A surety for the master in a suit against him *de peculio* is bound only for the amount of the *peculium* at the time of judgment (fr 35 : cf. D. xix 1 fr 24 § 2).

(*g*) If the principal's obligation determines by course of law, that of the surety or sureties determines likewise (D. xlvi 1 fr 16 pr). Payment in full by either debtor or surety or co-surety frees all. If the debtor is freed by judgment or creditor's will, or by compromise, or novation, or formal release, or oath (affecting the liability of both), or any cause not special to the person of the debtor but extinguishing the debt morally as well as legally, the sureties are freed also (fr 37, 49 pr, 60, 68 § 2 ; tit. 3 fr 43 ; tit. 4 fr 16 ; ii 14 fr 22 ; xii 2 fr 42 ; Cod. viii 40 fr 4). If debtor become heir to creditor or creditor to debtor, the debt is extinguished by merger (*confusio*), and sureties taken for the debt now merged are freed : they cannot be liable for and to the same person (*pro eodem apud eundem*), and there is no existing debt to support their suretyship (fr 21 § 3, 38 § 1 ; cf. xxi 2 fr 40, 41 § 2). If surety become heir to creditor or creditor to surety, the debtor remains bound (xlvi 3 fr 43). If surety become heir to debtor or *vice versa*, and the debtor was under a civil obligation, surety's obligation no longer exists independently, and if the debtor was a minor and deserved reinstatement, the surety now could obtain reinstatement as his heir. If however a debtor was bankrupt, and became heir to his surety, the latter's creditors might demand separation of the estates, as if surety's obligation still existed (D. xlvi 1 fr 21 § 2 ; tit. 3 fr 93 §§ 2, 3, fr 95 § 3 ; xlii 6 fr 3 pr). Where the debtor was a minor and surety was not his heir, the reinstatement of the minor or his heir did not necessarily involve the reinstatement and consequent liberation of the surety : it was a question for the praetor to decide on the circumstances, who if he retained the surety's obligation would refuse him the right of recouping himself by action of mandate against the

minor (D. iv 4 fr 13 pr). Formal release to a surety, or judgment in his favour, or oath, on a point affecting the liability of both, frees the debtor to the same extent (D. xlvi 4 fr 13 § 7; xii 2 fr 42 §§ 1—3). But where the intention is to benefit surety only, the creditor may release him or receive payment from a third party on his behalf without relieving debtor from surety's action on the mandate (D. xvii 1 fr 10 §§ 13—fr 12 pr, 26 § 3).

(*h*) In the absence of any special agreement with surety, the creditor can, when the debt is due, sue either debtor or surety at his own choice. If he has also a pledge, he is not bound to realize that first, but if he sue surety, he must transfer to him the right over the pledge (Cod. viii 40 fr 2; D. xlvi 1 fr 51 § 3, 57). If he elect to sue debtor, he thereby frees all sureties[1], unless the surety was bound expressly for so much as should not be recovered from the debtor (Paul ii 17 § 16; D. xlv 1 fr 116; xii 1 fr 42). If he sue a *fidejussor*, the other *fidejussores* and the principal debtor appear (from Cod. viii 40 fr 28 § 1) to have

[1] The fact that joinder of issue with the principal or his procurators frees the sureties is mentioned in Cicero *Att.* xvi 15 § 2: *Etsi sponsores appellare videtur habere quandam δυσωπίαν* ('looks rather shamefaced on my part'), *tamen hoc quale sit consideres velim: possumus enim, ut sponsores appellemus, procuratores introducere, neque enim illi litem contestabuntur, quo facto non sum nescius sponsores liberari. Sed et illi turpe arbitror eo nomine, quod satisdato debeat, procuratores ejus non dissolvere, et nostrae gravitatis jus nostrum sine summa illius ignominia persequi.* Cicero is trying to recover from Dolabella the dowry which he had given with his daughter Tullia, and wishes to combine strong action against him with consideration for the sureties (which Dolabella had given for the restoration of the dowry, see vol. I p. 154), and also not to involve Dolabella in the disgrace of bankruptcy. Cicero therefore proposes to summon Dolabella's agents into Court, and thus shew the sureties that he does not proceed against them as he might do, in the first instance, but only on finding it hopeless to recover from Dolabella. The agents would be sure not to join issue, because then they would have to give security *judicatum solvi* (Book VI chap. vii B), and would never be repaid by the moneyless Dolabella. Then Cicero could proceed against the sureties, and Dolabella would have the practical disgrace of having exposed his sureties to loss without the legal ignominy which would follow if the suit were continued against himself, judgment obtained and execution issued. This is Huschke's explanation *ZRG.* xiv 42 sqq. See also Keller *Lit. Contest.* § 54.

been thereby freed[1], but this consequence was in practice often averted by previous bargain (Cod. *l.c.*; cf. Just. iii 26 § 2). A bargain in general terms against suit, if made with the principal debtor, supplies a plea to sureties also; for the debtor, being contingently liable to them, has an interest in their freedom; but such a bargain made with a surety does not as a rule benefit any other surety or the principal debtor; for the bargaining surety has no interest in their being freed (D. ii 14 fr 21 § 5—fr 26; cf. xxxiv 3 fr 5 pr, § 1). See below under section 11.

(*j*) A surety can meet the creditor's suit with any plea connected with the matter (*rei cohaerens*) which the debtor could use, such as 'matter brought to issue or decided,' 'fraud,' 'oath,' 'intimidation,' 'bargain in general terms not to sue,' 'burdensome services on a freedman,' 'loan contrary to the senate's decree in Macedo's case,' *etc.*: but a purely personal plea like that of (debtor's) 'inadequate means,' or 'a bargain limited to debtor' is not open to a surety. Nor is debtor's consent necessary to surety's use of a plea (D. xliv 1 fr 7; xlvi 1 fr 32). On the other hand the conduct of the debtor, *e.g.* in not paying when due, perpetuates the claim not only against himself but also against his sureties (D. xlvi 1 fr 58 § 1). Delay of the surety perpetuates the claim against himself (D xxxviii 1 fr 44).

(*k*) Sponsors had a specially stringent action (*depensi* p. 184) to enforce recoupment (Gai. iii 127; iv 22). Sureties in general have an action *mandati* (or in some cases *negot. gestor.*) against

[1] That suit against sureties freed the debtor is generally stated absolutely, *e.g.* by Baron *Inst.* § 118, 8; Keller *Lit. Contest.* p. 436, who however limits the freeing of cosureties to the case of *fidejussores*, as others were *ipso jure* liable only for a share. But a *fidejussor* might be expressly bound only for a part (D. xlvi 1 fr 8 § 7). Should this case be excluded? It is difficult in our ignorance of the details of formular procedure (see Book VI chap. viii F 3) to draw a precise doctrine from Cod. viii 40 fr 2. Justinian's alteration of the rule on this point, and omission of *sponsor* and *fidepromissor*, and consequent alterations in the Digest make the ground very slippery. Other passages quoted (*e.g.* D. xlv 2 fr 2; xlvi 2 fr 31 § 1) do not really apply: and Paul's omission of this point in *Sent.* ii 17 § 16 is very noticeable.

the principal debtor for relief or reimbursement, but cannot sue before they have either been condemned or have satisfied the creditor, unless the debtor long delay payment, or be running through his property (Gai. *l.c.*; D. xvii 1 fr 10 § 11, fr 38 § 1; cf. Cod. iv 35 fr 10). If they have paid before the due date, they must await this before suing their principal (D. xlvi 1 fr 31). After condemnation they can sue for due defence against the action on the judgment: after payment, for the amount paid, even if they have waived, or through some ignorance of fact have omitted, an effective plea (D. xlvi 1 fr 45, xvii 1 fr 29; cf. xii 6 fr 47). A surety who has become such *donandi animo* has no action for recoupment, nor right to use the plea of 'bargain not to sue,' which his principal may have obtained (D. ii 14 fr 32).

Against his cosureties a surety had no right of action except under the *lex Appuleia*, which applied only to sponsors and fidepromissors. A fidejussor, if sued for the whole debt and not disputing his liability[1], could by the edict under Hadrian's authority plead the solvency of his cosureties (*si non et illi solvendo sint*) and demand that he should be sued only for his share (D. xlvi 1 fr 10 § 1, 28). Or he could bargain with the creditor (by threatening the *doli exceptio*[2]) that if he pay the whole, the creditor should cede to him his actions against the cosureties and debtor: he is then regarded not as having paid the debt (for that would at once extinguish the actions against the others) but as having purchased the actions (fr 17, 26, 36, 39; Gai. iii 121—123).

(*l*) A woman cannot be a surety (D. xlvi 1 fr 48): nor can a slave without his master's authority; and anything paid by him as such unauthorised surety can be recovered by his master unless paid from his *peculium* on a matter concerning his *peculium* (fr 19, 20).

As written documents became usual, it came to be held that no proof was required of the oral ceremony, if a person stated

[1] The like rule is found in partnership, D. xvii 2 fr 67 § 3; xlii 1 fr 22 § 1.

[2] Cf. D. xxi 2 fr 65; xxx fr 57; x 2 fr 18 § 5; Savigny *Oblig.* i 242, 275; Vangerow *Pand.* § 573, *Anm.* 3 (vol. iii p. 74); Girard *Dr. Rom.* p. 742 sqq.

in writing that he had made himself surety (D. xlv 1 fr 30). See above, p. 13.

(*m*) A guaranty of another's debt might be given in two other ways:

(1) By a *constitutum debiti alieni* (see p. 87), which does not put the constituent in the position of a surety: his obligation is independent and limited only by its own terms.

(2) A guaranty may also be effected by mandate to a person to lend money or give credit to another at the mandator's risk (p. 121). [Justinian treats of *mandatores* in this sense along with *fidejussores*: *sponsores* and *fidepromissores* he ignores entirely.]

5. Novation (by stipulation).

(*a*) Novation is a renewal of an obligation, in this sense, that the old obligation is extinguished, and a new one relating to the same matter takes its place (*Novatio est prioris debiti in aliam obligationem transfusio atque translatio*, D. xlvi 2 fr 1 pr). Such a change was effected by three different legal acts; by stipulation, by book-entry, and by joinder of issue: but the term *novatio* is in the Digest regularly applied to the first only, book-entry being struck out of the Digest altogether. So also Gaius distinctly applies it to transfer by stipulation (ii 38), does not use it of book-entry (iii 128 sqq.), and clearly separates it from *litis contestatio* (iii 176—180; cf. D. xxvi 7 fr 22).

(*b*) For such renewal to take place it is unimportant of what nature the former obligation was, whether civil, or natural, or honorary (*i.e.* of Praetorian creation), whether it was verbal, litteral, real or consensual; but it is essential that the new obligation should be good, though, as happens in a few cases, it may not be valid for all purposes. Three cases are given by Gaius, a stipulation from Titius for something to be done or paid after his death, and stipulations from a woman or a ward without guardians' authority. Such stipulations though not enforceable are sufficient to kill the former obligation.

But a stipulation from a slave is a mere nullity in the eye of the law and leaves (though Serv. Sulpicius thought otherwise) the old obligation undisturbed (Gai. iii 176, 179; D. xlvi 2 fr 1). If however the slave owed as much to the former debtor as he was promising now, and was thus only transferring a (natural) obligation from one creditor of his to another, the stipulation was upheld as a pact not to sue the former debtor (D. ii 14 fr 30 § 1). A stipulation from a foreigner, made by the word *spondeo*, is null and cannot novate (Gai. iii 179).

(*c*) A stipulation does not novate, unless it relate to the same object, and this relation or identity will usually appear in the form of the stipulation. Nor does it novate if it is a mere repetition of a former stipulation; there must be either a new creditor (*e.g. quod Titius mihi debet, id dare spondes?*), or a new debtor, or a new condition, or a new time, *etc.* Whether a new surety was sufficient to allow of novation, was a matter of dispute between the schools: the Sabinians said, 'Yes'; the Proculians held that neither the withdrawal nor the addition of a surety affected the continuance of the former obligation. Again, where a new condition was made, the former obligation was not extinguished, unless and until the condition occurred, which gave life to the new obligation. Serv. Sulpicius however held that the old obligation was extinguished at once by the creation of the new obligation, whether the latter ever came into operation or not. Gaius suggests that even on the other view (which prevailed) any attempt to put the old obligation into force before the occurrence of the condition could be defeated by a plea of 'fraud' or 'bargain agreed,' on the ground of its being the intention of the parties that no suit should be brought unless the condition took effect (Gai. iii 177—179; D. xlvi 2 fr 8 § 1, 14 pr; cf. xii 6 fr 60 § 1). If the old obligation contained a condition, and the new one was absolute, novation took place only if and when the condition existed (fr 14 § 1).

(*d*) It is essential to novation that the second obligation should be intended to be established not beside, but in place of, the old obligation. It must be made *novandi animo*[1]. A

[1] Salpius argues that the jurists older than Papinian regarded novation

stipulation from *C* to guaranty (*fidejubere*) to *A* whatever amount of *B*'s debt he shall not have got from *B* does not affect *B*'s obligation, because that is not the intention; but a stipulation from *C* for defrayal of *B*'s debt to *A* would (if so intended) set *B* free. If a plaintiff takes the ordinary security *judicatum solvi*, he does not thereby novate and thus extinguish his action on the judgment; because his intention is only to get sureties for the judgment, not to waive defendant's obligation to perform the judgment. Where money is paid down for a loan, and a stipulation, whether immediately before or after, is made for due repayment, the intention in both cases is to create one obligation only, that of stipulation, and the payment down of the money is merely the fulfilment of what was contemplated in making the stipulation (D. xlvi 2 fr 6, 7, 8 § 3). If I have stipulated from you to convey to me the Cornelian farm, and afterwards stipulate for its value, and novation is not intended, there are two stipulations in force, one for land and the other for money. If the farm is conveyed to me, or if I sue for it and join issue, in either case the second stipulation remains unaffected, but the damages in the suit for the farm will be estimated according to the present value, in the suit for the value of the farm they will depend on the value of the farm at the time when the stipulation was made, which might be more or less than the present value. By avoiding novation the stipulator would be able to take his choice; he could not exact both, unless indeed he could shew that that was the intention of both parties (fr 28). If someone else promise to my creditor what I owe him, there is novation if that be intended, and I am freed whether I wish it or know it or not: if novation is not intended, both stipulations are good, and my creditor can sue which he pleases, but if either I or the other promiser pay, both are freed. On the other hand if another stipulates from my debtor what he owes me, be their intention what it may, it cannot affect my claim on the debtor without my consent (fr 8 § 5, 91; iii 5 fr 38). If I bid you stipulate for a usufruct which another

as taking place from the form of the stipulation, without reference to any intention on the part of the stipulator. See his book, esp. pp. 187, 192, 356. Justinian altered the law largely (Cod. viii 41 fr 8).

owes me, the nature of a usufruct, as adherent to a person, prevents actual novation (in which case you would have the usufruct for your life in place of my having it for mine), but you will by virtue of the stipulation have a usufruct for your life, and I shall be prevented, by a plea of fraud or a special plea on the case, from exercising my right of usufruct, even if I survive you (D. xlvi 2 fr 4). A stipulation may destroy a *condictio furtiva*, but the condiction does not revive if the stipulation loses its effect by after events (D. xlv 1 fr 29 § 1).

(*e*) As novation destroys the former obligation, all accessories such as pledges and sureties in connexion with it are discharged (unless severally renewed), and interest on anything due on it, if not secured by a separate stipulation, ceases to run (D. xlvi 2 fr 18; tit. 1 fr 60). The privilege which dowry and wardship have over other creditors is lost, if the woman after divorce stipulate for her dowry, or the ward after puberty similarly novate his action against his guardian. For in these cases the novation is deliberate. But where a somewhat like change takes place, made by joinder of issue in prosecuting their claims, there is no intention of giving up any pledges or privileges, and the procedure has no such effect (D. xlvi 2 fr 29). Sureties are however discharged by creditors joining issue with the debtor, as by novation (Paul ii 17 § 16).

(*f*) Stipulations by sons under power or by slaves, if made at the bidding of their fathers or masters or afterwards ratified by them, are valid, and consequently can novate a former obligation of their superior. Practice also allows (*receptum est*) of a procurator's novating an obligation at his principal's bidding, or in virtue of his general authority (Paul v 8; D. xlvi 2 fr 20 § 1). A son under power or a slave, if they have the control of their *peculium*, can themselves novate debts in connexion therewith, especially if they thereby improve their position; but they cannot do so in order to give things away (D. *ib.* fr 34 pr). A guardian or agnate caretaker of a madman or of a spendthrift has power to novate, if it be expedient for his charge (*ib.* fr 34 § 1).

6. Delegation[1].

Delegation[2] (*i.e.* assignment, deputation) is technically used of one person deputing another to pay, or enter into an obligation to pay, a third person on behalf of the delegant. *A* desires to pay *C* a sum of money and deputes *B* to pay it for him, not as a messenger with money supplied by *A*, but with money of his own. Or perhaps *C* is willing to receive, instead of actual money, *B*'s formal promise to pay, and to treat it as equivalent to money. In either case *A* is said to delegate *B* to *C*. In our times *A* might give *C* a cheque on his banker *B*, and *B* might pay *C* in cash or give him a promissory note. *A* is said *delegare*, or *jubere promittere*, or *reum dare*. *B delegatur*, *solvit* or *promittit jussu alterius: C* is *cui delegatur*, delegatee; he stipulates from *B* at the bidding of *A*. (*Mandare* is rarely used in this

[1] See v. Salpius *Novation und delegation* (1864). I have thought it desirable to give separate sections to Novation, Delegation, and Transfer of Obligations, notwithstanding that this plan involves some repetition. They are all distinct, though often intermixed. Novation may or may not be produced by delegation: it may occur between the same persons. Delegation may not involve any novation or transfer of obligations but may relate to a simple payment or the creation of a new obligation altogether. Transfer of obligation is always between different persons, but may be effected either by stipulation, or by representation in joinder of issue.

[2] Cf. Cato *RR.* 149 *Donicum pecuniam* [add: *solverit aut*] *satisfecerit aut delegarit, pecus et familia quae illic erit pigneri sunto, i.e.* until he has paid the money or contented the owner or deputed another to pay; Sen. *Ben.* vi 5 § 2 *Nam et pecuniam dicimur reddidisse, quamvis numeraverimus pro argenteis aureos, quamvis non intervenerint nummi, sed delegatione et verbis perfecta solutio sit.* Cicero uses the word metaphorically in *Font.* 8 § 18 *Quid si hoc crimen optimis nominibus delegare possumus, et ita non ut culpam in alios transferamus?* 'What if we can transfer this charge to 'excellent names (very good accounts) without imputing any blame to 'others,' *etc.*; cf. *Dom.* 7 § 16. But it is used in a literal sense in *Att.* xii 3 § 2 *Nomen illud, quod a Caesare, tres habet condiciones aut emptionem ab hasta...aut delegationem a mancipe annua die...aut Vettieni condicione semissem; i.e.* I have the choice of three ways to deal with the claim on Caesar (as confiscator of some Pompeian, who owed Cicero money); either buy the whole estate at the auction, or take an assignment from the purchaser of the estate and wait a year for my money, or sell the debt to Vettienus for 50 per cent.

sense for *jubere*[1], *e.g.* D. xlvi 3 fr 56 *Qui mandat solvi, ipse videtur solvere.*)

The payment thus made to *C* by *A*'s order counts in law as if payment were made to *A* himself. *Quod jussu alterius solvitur, pro eo est quasi ipsi solutum esset* (D. L 17 fr 180; xxiv 1 fr 3 § 12). And if *C* accepts as payment a promise to pay from the person deputed, even though such person prove insolvent, it is as if he received payment: *solvit et qui reum delegat* (D. xvi 1 fr 8 § 3); *bonum nomen facit creditor, qui admittit debitorem delegatum* (D. xvii 1 fr 26 § 2)[2]. The most frequent case of delegacy is where *B* is a debtor to *A*, and *A* is a debtor to *C*. Then *B*'s payment on *A*'s order discharges at once both debts to that amount. *Qui debitorem suum delegat, pecuniam dare intelligitur, quanta ei debetur* (D. xlvi 1 fr 18).

The relations of *A* to *B* and to *C* may be of various kinds. *B* may be owing money to *A*, or may be making him a gift, or a loan: and a like variety may be the cause of *A*'s deputing him to *C*. Or the money may be paid on *A*'s account, and may form the dowry of *A*'s wife (D. xxiii 3 fr 19) or the dowry of *C*'s wife (fr 5 § 8). And the variety of purpose which is found in actual payments is found also in promises to pay (*ib.* fr 59; xlvi 1 fr 18, *etc.*).

There may be a further delegation added to the first. *C* may not desire to receive the money or the promise himself but to pass it on to *D*, so that *B* on *A*'s order may pay or promise *D* on *C*'s order. In modern times *C* would endorse to *D* *A*'s cheque in *C*'s favour on *B* (*Delegare est vice sua alium reum dare creditori vel cui jusserit*) 'to his creditor or order,' *i.e.* creditor's order (D. xlvi 2 fr 11 pr; cf. Goldschmidt *ZRG.* xxiii 387). In this case of double delegation the one payment (or promise) by *B* to *D* is in law equivalent to payments by *B* to *A*, by *A* to *C* and by *C* to *D*. Whether such payment discharges a debt or constitutes a loan or a gift or anything else, depends on the arrangements between the several parties leading to the payment (fr 19).

The delegation consists simply of the order by the delegant

[1] For the difference between these terms see below, p. 122.

[2] Cf. Windscheid *Pand.* § 412 n. 17.

and the performance by the person delegated. The order may be in any form, oral, or written or even a nod where the delegant is unable to speak (fr 17). If payment is made, no consent on the part of the delegatee is required in law[1]: if a promise is made, the delegatee stipulates and the delegated person promises. If he was under an obligation to the delegant, the stipulation (if so intended) novates this obligation, *i.e.* extinguishes the obligation of *B* to *A* and establishes in place thereof a new obligation of *B* to *C*, which is judged by its own terms. A similar delegation is given effect to by book entry (Gai. iii 130; see p. 65).

The content of the new obligation is usually the same as the previous obligation and subject therefore to the same restrictions. It would then refer to the previous obligation in some such terms as *quod Titio debes, mihi dabis?* or *quicquid ex vendito Titium dare facere oportet, mihi dare facere spondes?* (cf. D. xlvi 2 fr 27, 34 § 2, *etc.*). But the creditor is new to the debtor, and many pleas available against the former creditor are not good against the present one. If a debtor in name, who has however a complete answer (*e.g.* a plea of fraud) against his creditor's demand, chooses to submit to delegation by him in payment of a debt to another, he has thereby waived the plea, and made as it were a gift to his creditor: his new creditor stands on his own stipulation, and the debtor's promise to him is absolute within its own terms. If the debtor consented to delegation in ignorance of his not being indebted or of not being effectively indebted, he can sue—not the new creditor (*ille enim suum accepit*), but the delegant—either for relief from the new obligation, if he has not paid, or fulfilled the obligation (*condictio incerti*), or, if he has paid, he can sue him by a *condictio certi* for the amount paid (*ib.* fr 12, 13). The case is different if the old creditor was not in debt to the new creditor, but was either making him a gift or acting under a mistake; for then the promiser can defeat the new creditor's claim by a plea of fraud and can sue him for a release (D. xliv 4 fr 7).

[1] Cf. Sen. *Ben.* vii 18 § 2 *Obligare non possum nisi accipientem, liberari tamen si reddidi possum.*

If the delegatee decline, unless the delegant guaranty the fulfilment of the new promise, to credit the person delegated (*nomen* or *fidem ejus sequi*) and to stipulate from him, the delegant's guaranty is a mandate accompanying the obligation. He delegates *suo periculo* and is liable to the delegatee for whatever the latter cannot recover from the person delegated (D. xvii 1 fr 28 § 2, 45 § 7; cf. xxi 2 fr 68 § 2)[1].

7. Transfer of obligations.

An obligation is not susceptible, as a thing is, of bodily transference from the possession of one to the possession of another[2]. An active obligation is a right to have some performance made by another: a passive obligation is a liability to make some performance at the will of another. To take the simplest case of obligation, a right of *A* to receive money from *B*, and a corresponding duty of *B* to pay money to *A*: how is *A* to put *C* into his shoes so that *C* shall be entitled instead of *A* to receive the money, or *D* to be put into *B*'s shoes so as to be bound instead of *B* to pay the money to *A* (or to *C*)?

The Romans managed this in two different ways (Gai. ii 38, 39; D. xlvi 2 fr 11).

(*a*) By stipulation. *A*, *B* and *C* all meet. At *A*'s bidding *C* stipulates from *B* for the debt that *B* owes to *A*. *B* promises it and is thereby freed from his debt to *A*, and becomes bound for the same amount to *C*. This is the transfer of a credit or active obligation (the creditor being changed, the debtor remaining the same), and is a case of *delegatio*. It may be

[1] When the verb *delegare* is used, not with a person as object, but with *nomen* or *actionem*, it means (but compare Vat. §§ 260, 263) to transfer the debt or action to another by appointing him representative in the action (see *e.g.* D. xv 1 fr 51; xix 5 fr 9; xxi 2 fr 68 § 1). *Mandare actiones* or *praestare actiones* are used in the same sense.

[2] It is, in the English law-phrase, 'chose in action': cf. D. xxxiv 2 fr 34 pr *Si aurum suum omne paterfamilias uxori suae legasset, id aurum quod ei deberetur ex stipulatu non pertinet ad uxorem: id enim quod suum esset, non quod in actione haberet, legavit.*

expected to take place most frequently when *A*, the old creditor, is a debtor of *C*, the new creditor of *B*.

For the transfer of a debt or passive obligation *A*, *B* and *D* meet. *A*, say at *B*'s request, stipulates from *D* for the debt which *B* owes to *A*, *D* promises it, and thus accepts *B*'s position of debtor to *A* while *B* is freed. This is a case of *expromissio* (the debtor being changed, the creditor remaining the same). It may be expected to take place most frequently when *D*, the new debtor to *A*, is a debtor to *B*, *A*'s old debtor[1].

But the presence of all three persons is not requisite. In the first case *A* may signify by letter or message his order to *B* to give the promise to *C* (D. xlvi 2 fr 17): and in the second case *B* may take no part at all. If *D* promise to *A* in so many words to pay the debt which *B* owes *A*, *B* is freed even though ignorant of the proceeding and against his consent (D. xlvi 2 fr 8 § 5 *sub fin.*; iii 5 fr 38; Cod. viii 41 fr 1).

The transference of a debt is thus easier than the transference of a credit, because *B* in the second case gains his freedom, while in the first case *A* loses a credit. But in both cases the parties who are to enter into the new obligation *i.e.* *C* (or his slave) and *B* in the first case, *A* (or his slave) and *D* in the second, have to meet in order to go through the oral stipulation.

As any obligation can be dealt with by stipulation, all obligations are transferable in this way, but the old obligation should be referred to in the new stipulation so that it may be clear that the intention is to create a new obligation in place of, and not in addition to, the old one. And the new obligation will then be subject to the same conditions and limitations that the old one was. Pleas available against suit on the old obligation will be good against suit on the new, only if they relate to the matter of the obligation and not to the person of the debtor or creditor (D. xliv 1 fr 7; xlvi 2 fr 19).

[1] To use modern illustrations, if *A* have money at *B*'s bank, he can pay *C* with a cheque on *B* (transfer of credit): if *B* desire to pay off *A*, he can do so by sending *A* a cheque on *D* (transfer of debit). Or if *A* has got a mortgage on *B*'s property he can assign the mortgage to *C* (transfer of credit): if *B* desire to free his property he may get *A* to accept a mortgage on *D*'s property instead (transfer of debt).

The disadvantages of this mode of transference are (1) that the parties have to meet in person; (2) that the transfer of an active obligation requires the debtor's consent (D. xlvi 2 fr 8 § 5); and (3) that by the novation sureties and pledges cease to be bound (D. xlvi 2 fr 18; tit. 3 fr 43).

(*b*) By representation. *A*, wishing to transfer to *C* his right to be paid a sum of money by *B*, appoints *C* his agent to collect the debt, and, if necessary for that purpose, to sue *B*, and agrees that *C* shall have what *B* is bound to pay. *C* is said to be appointed *A*'s *cognitor* (or *procurator*) *in rem suam*, 'agent on his own behalf.' (See Book VI chap. viii G 2.) So, if instead of *A* transferring his credit to *C*, *B* wishes to transfer his liability to *D*, *B* appoints *D* his agent on his own behalf to conduct the defence against *A*'s suit. The claim itself is not affected and is subject to the same pleas as before.

The appointment of *C* is by *A*'s order (*jussus*), and is enforced on either side if necessary in accordance with the arrangements between them which led to the representation, *e.g.* by action *ex vendito* or *empto* if the representative has bought a *nomen*, by petition if he is trust-heir, *etc.* There is no suit *mandati* when a person is bidden to act *in rem suam* (D. iii 3 fr 42 § 2). *D*'s acceptance of liability in place of *B* may have, but does not require, *B*'s consent (D. xlvi 3 fr 23). In some cases the cession of an action or the acceptance of another's liability is imposed by the praetor or judge.

The position of agent is assured by the issue for trial being made to contain in the condemnation-clause the name of *C*, instead of *A*, as the person to whom the damages should be paid (Gai. ii 39). In the same way, if *B* gets *D* to accept his liability, *D*'s name is inserted in the formula instead of *B*'s, as the person who will be condemned to pay the damages. This is just as it would be, if *C* and *D* were intended to be really only agents on behalf of *A* and *B* respectively: the agents have the conduct of their respective cases, and are entitled (at least when on their own behalf) to receive, and liable to pay, the result of the trial as expressed in the condemnation-clause. Of course, if in the trial it be found that *A* was not entitled to the payment supposed from *B*, *C* will lose his suit and have to

come again upon *A*, according as the agreement between them may be.

The consent of the other party is not, at least as a rule, required to the change of opponent. But he has a right to protection against the principal's again bringing the suit which he has fought out against his representative: and against an insolvent defendant taking the place of a solvent one. An agent appearing as plaintiff in the absence of the person entitled to the action is required to give security for the latter's consent (*de rato*), and all agents appearing as defendants, whether their principal is present or not, are required to give security *judicatum solvi*, Gai. iv 84, 88—101; Vat. 317, 331—333; D. iii 3 fr 25.

It is not necessary that the matter should actually come to trial. In ordinary cases notice being given to *B* by *A* or *C* of the assignment of the credit, *B* will pay to *C*, and, if notice is given to *A* by *B* or *D* of the assignment of the debt, *D* will pay to *A*. But only by joinder of issue in a trial, *i.e.* by establishment of the formula containing the new names, does the position of transferee become assured[1].

The advantage of this method is that it does not require the presence of the parties, nor the consent of the debtor (*B*) for the transfer of a credit, nor, if due security be given, the consent of the creditor (*A*) for the transfer of a debit (cf. D. x 2 fr 3; cf. iii 3 fr 29). The disadvantage is that until joinder of issue the suit and consequently the assignment may be revoked by the will of the principal and may be extinguished by either's death. Moreover the position of the transferee is dependent generally on the conditions which attached to it in the person of the principal: it is another's claim that he is enforcing (though for his own interest): it is another's liability that he has accepted: the transferee is not in his own shoes but in his principal's. Pledges are not affected either by joinder of issue or judgment (D. xiii 7 fr 11 pr; xx 1 fr 13 § 4).

[1] When acknowledgments of debt (*chirographa*) were bequeathed, the debt was understood to pass to the legatee, but he would require the heir to cede his actions (D. xxx fr 44 § 5, 75 § 2, 105).

The Romans spoke in the first process (as said above, p. 42) of *qui delegat* (*A*), *delegatus* or *qui delegatur* (*B*), and *cui delegat* or *delegatur* (*C*). And in the second process of *qui cedit, qui ceditur, cui cedit* or *ceditur*; and the process is commonly spoken of as *cedere actione*, or *actionibus, alicui*, or *mandare* or *praestare actiones* (*e.g.* D. x 2 fr 2 § 5).

In passive obligations the new debtor is *expromissor*[1] in the first process, *defensor* in the second, but the general terms *procurator* or *cognitor in rem suam* are used both of the new creditor and of the new debtor indifferently; and the general terms *creditor, debitor, stipulator, promissor* are of course also found applied to the transferers and transferees of obligations.

Eventually a *utilis actio* was granted to the transferee of an obligation so that he could thereafter bring the appropriate suit in his own name. This appears to have been first allowed by Antoninus Pius in the case of the purchaser of an inheritance and gradually extended (D. ii 14 fr 16 pr; xviii 4 fr 2 § 8; cf. Cod. iv 10 fr 1, 39 fr 5; Savigny *Obl.* i 243 foll.).

A transfer was often the object of *litt. obligatio* (see p. 65).

Concerning the effect on obligations by the transfer of the whole (*universitas*) containing them, see the case of adoption (vol. I p. 62); of wife coming into hand (vol. I p. 70); of transfer of an inheritance (vol. I p. 228); of sale in bankruptcy of a person's whole estate (Book VI chap. XV B).

8. Payment or discharge of obligation.

(*a*) *Solutio*[2] 'loosening,' opposed to *obligatio* 'tying up,' or *contractus* 'drawing together,' is a general term applicable to

[1] *Expromissor, expromittere* are not confined to the case where one becomes debtor in place of another. They mean simply to take by promise (*stipulatio*) the position of debtor: cf. D. xv 1 fr 11 § 1; xxiii 3 fr 55; xxxviii 1 fr 37 § 4, *etc.*; Varr. *R.R.* ii 2 § 5; cf. Salkowski *Novation* p. 124. Some modern writers confine the term to cases where the promise is made without delegation (Arndts' *Pand.* § 268).

[2] *Solvere* is used like our 'pay' (properly 'pacify') both of the debt discharged and of the money or other thing given to discharge it: *solvere debitum* or *obligationem: solvere pecuniam* or *equum.*

every kind of discharge of an obligation, and not merely to the payment of money. The mode of discharge will usually follow the mode of contract: if a particular thing has been lent or deposited or pledged, the proper discharge is the return of the thing to the lender, depositor or pledger; if money has been lent, the same amount of money should be returned; if the contract was in words, the discharge should be made either by the performance of the content of the words or by a formal verbal release; if sale or letting was the subject of agreement, agreement to the contrary will reverse it (D. xlvi 3 fr 54, 80). And any form of satisfaction counts as discharge. An order to another to pay (if fulfilled), counts as payment by the person who gives the order (fr 52, 56).

(*b*) What is payment?

Payment in full requires both the right amount and the due date to be observed; but payment before the time is good. The debtor is discharged by payment when, and only when, his creditor has received what is due, without any cost to himself and without any liability to repay it (fr 61, 70, 85). It does not matter who pays a debt: neither the knowledge nor consent of the debtor is necessary for his discharge, provided it is paid on the debtor's account. The maxim applied *licet etiam ignorantis invitique meliorem condicionem facere* (fr 17, 23, 53; iii 5 fr 38). But if a husband bid his debtor pay something to his wife as a gift, the debtor is not discharged, because the money does not become the wife's property: the husband can still demand the debt, but the debtor can obtain a plea *doli*, if he surrender to the husband his action (*condictio indebiti*) against the wife for repayment. If the *bona fide* holder of a deceased person's estate pays the creditors, the real heir is not discharged, for the creditors are liable to repay the money which was paid them not on account of the heir but on account of another, who thought himself to be heir (D. xlvi 3 fr 38 §§ 1, 2 *fin.*; v 3 fr 31 pr).

Property pledged to another, a farm afterwards evicted, a slave entitled to freedom on condition (unless the condition fails, while the slave is alive), a slave of whom another person

has the usufruct, or who is liable to be surrendered noxally, or is seriously wounded, are not good payments, unless of course the express terms of the obligation provided for such temporary or restricted benefit, or the restriction in the event disappears (fr 20, 33, 38 § 3, 98 pr). If however a freedman has fully paid his creditor, the debt is not revived because his patron under the Fabian statute carries off the payment from the creditor (fr 98 § 1).

The debtor is not discharged if the thing delivered in payment is not accompanied by its accessories and securities. The creditor can still bring his action for the thing, whether bequeathed or promised on stipulation (fr 27).

Payment in another form than that promised or due (*datio in solutum* 'conveyance to effect discharge') is good payment, only if accepted by the creditor. Whether in such a case the debtor was discharged in strict law (*ipso jure*) or only entitled to a plea of fraud, was disputed, the Sabinians declaring for the former, the other school for the latter (Gai. iii 168; D. xii 1 fr 2 § 1; xiii 5 fr 1 § 5).

Part payment if accepted effects a partial discharge. If the debt was ten, payment of five leaves five only due. So if the slave Stichus was promised, the promiser by conveying one half is relieved of half, and only the other half of Stichus can be sued for. But if the promise was for a slave generally, and half, say of Stichus, is conveyed, the creditor will sue not for the other half of Stichus but for a slave generally, which may be met by conveyance either of the other half of Stichus or of the whole of some other slave (fr 9 § 1). If a man promises either ten or a slave and gives two sureties, neither surety is discharged if one only pay five, or if one pay five and the other convey half of a slave (fr 34 § 10). If a man had promised two slaves and handed over one, discharge may be effected, supposing the promiser to have again become owner of this slave, by handing him over again (fr 67). It was disputed whether a creditor was bound to accept part-payment but it was held the kinder course for the praetor to compel the acceptance (D. xii 1 fr 21).

If payment is made with the money or other property of

another than the payer, without the knowledge or consent of the owner, the payer commits a theft. The money, *etc.*, if neither spent nor inseparably mixed, remains the owner's; if inseparably mixed, it becomes the property of the payee; and the payer on his own account is discharged. If it is separable, he cannot demand payment of his debt without offering the money back. If the money paid was partly payer's, partly others' (whether the community extended to each coin or only to the amount), the payer gets partial discharge (fr 17, 78, 94 pr § 1). If a thing thus handed over to *A* in payment of *B*'s debt is evicted by the real owner, the original obligation remains in full, whether the eviction be whole or only partial; but if *A* gains it by usucapion, *B*'s debt is discharged (fr 46, 60). If I bid your slave discharge my debt to you and he borrow money for the purpose and pay you or put it to your credit in your accounts, my debt is not discharged, unless it was lent to the slave expressly on my account for that purpose (D. xvii 1 fr 22 § 8).

(*c*) To whom payment should be made.

Payment to the creditor himself, or to anyone by his order, or without his order but with his ratification, is good. And even if he has withdrawn his order or is dead or has forbidden payment to the person, it is good, if the payer was not aware of such fact. Payment to a guardian (not interdicted or under suspicion), or caretaker, or procurator appointed (not merely for conduct of suit, but) for general purposes or for receipt of money, is good (D. xlvi 3 fr 12 § 9; 34 §§ 3, 4, 86; L 17 fr 180). Payment to an acting pro-guardian is good if the money passes into the ward's estate (D. xlvi 3 fr 28). Payment to a mother, although managing her son's business according to the father's desire, does not discharge the son's debtor (D. iii 5 fr 30 § 6). Payment to a ward without his guardian's authority is not good[1], unless the ward be expressly named in the stipulation; but payment by a ward's debtor to the ward's creditor,

[1] Cf. Cic. *Top.* 11 § 46 *Non, quemadmodum quod mulieri debeas recte ipsi mulieri sine tutore auctore solvas, item quod pupillo aut pupillae debeas recte possis eodem modo solvere.*

by the ward's order, though without the guardian's authority, is good to discharge the ward, but only gets a plea of fraud for the paying debtor (fr 66). Where payment has been made to the possessor of an inheritance the debtors are discharged as of course, if the possessor hands over the money to the rightful heir (D. v 3 fr 25 § 17).

A slave, as he cannot alienate property, so he cannot give a good discharge, unless he is acting by the order of his master, or his act is ratified by his master, or he is dealing with his *peculium* and has the free management of it; but even then he cannot make a gift. If he has lent money on account of his *peculium* and is repaid, the debtor is discharged, but only if the money comes into his own (and therefore into his master's) hands, not if it is paid by his directions to someone else. If he is acting in his master's affairs and is manumitted or alienated, payment to him on his master's account is good, if the debtor did not know of his changed position; if he is acting on peculiar account, and his *peculium* has been withdrawn, it is enough if the debtor was ignorant of his *peculium* having been withdrawn (fr 18, 19, 32; xlvi 2 fr 34; xvi 6 fr 11; Gai. iii 160).

If the stipulation required payment *mihi aut Titio*, payment according to the terms of the stipulation to Titius (if he has not been adopted or has not otherwise gravely lost civic position) is a good discharge to the debtor, but payment to Titius' heir is not good (D. xlvi 3 fr 38 pr, 81 pr). And if payment was to be to me or Titius' slave Stichus, payment to Titius is not good unless the slave consented (fr 9 pr, 95 § 7). Titius' position in this class of stipulation is simply that of my agent, the terms of the stipulation being equivalent to an order to pay: and if payment was after all not due, the payer would bring his action to recover, not against Titius but against me (fr 59: see also p. 15).

If a debtor tenders payment and the creditor without good cause refuses to accept it, the praetor will refuse the creditor leave to sue for it afterwards, and if the money be lost or the slave or other thing duly tendered perish without fault of the debtor, the debtor is discharged (fr 30, 72 pr). On a creditor's refusal to take payment, it was customary to seal up the

money and deposit it in a temple, and, on this being done, interest would cease to run (D. iii 3 fr 73; iv 4 fr 7 § 2; xxii 1 fr 7; xxvi 7 fr 28; Cod. viii 42 fr 9)[1]. If the money was deposited at a money-changer's for examination, it would lie at the risk of the party who required this step and selected the money-changer (D. xlvi 3 fr 39).

(*d*) Marshalling of debts.

If the debtor owes the creditor on more accounts than one, it is for the debtor to specify to which debt the payment should be appropriated: if nothing is said by debtor, the creditor must appropriate it as he would if he were debtor. The appropriation must be made at the time, not afterwards: either party can object to the appropriation, taking of course the consequences of refusing or withdrawing the payment tendered. If nothing is said as to the appropriation by either party, it will be deemed to be appropriated in the order of importance or pressure of the several debts (D. xlvi 3 fr 1—3). Where interest is legally due, that should first be covered, and the principal be reduced by the surplus; but this does not apply when interest is due only by simple agreement (*pacto*, fr 5 § 2; Cod. viii 42 fr 1). The Antonines decided that when interest was due some on stipulation and some on simple agreement, any money paid without appropriation should be applied to both, not *pro rata* but equally (fr 5 § 2). The order of importance given by Papinian was (1) debt involving disgrace (*infamia*); (2) debt involving penalty for non-performance; (3) debt for which a mortgage (*hypotheca*) or pledge has been given; (4) debt due on one's own account rather than as surety; (5) and in other cases an earlier rather than a later debt (D. xlvi 3 fr 97). So also preference should be given to what is secured by sureties rather than on simple promise; for what is due on a judgment

[1] The Salaminians (of Cyprus) claimed to be allowed to deposit, but Cicero as proconsul, declined at the time to order it (*Att.* v 21 § 12; vi 1 § 7). In *Fam.* xiii 56 § 3 Cicero addressing a propraetor says (of another debt) *Caunii aiunt se depositam pecuniam habuisse. Id velim cognoscas, et si intellexeris eos neque ex edicto neque ex decreto* (*i.e.* neither under the general edict nor by special order) *depositam habuisse, des operam ut usurae Cluvio, instituto tuo, conserventur.*

rather than on a contract; for what is not disputed rather than for what is disputed; for what is actually due rather than what is not yet due (fr 3—7). If all debts are equal in time and character, the payment is deemed to be appropriated proportionally (fr 8). The like marshalling of debts applies when the money is raised by sale of a pledge not specifically appropriated (fr 96 § 3).

(*e*) Other modes of discharge.

Obligations could also be discharged by formal release (below) by the bronze and scales in some cases (p. 185); by delegation (p. 142); by novation (p. 38); by set off, *compensatio* (Book VI chap. xiii D 8).

They were also discharged by merger (*confusio*) *i.e.* by the credit and debt meeting in the same person, as when creditor becomes heir to debtor or *vice versa* (D. xxxiv 3 fr 21 § 1; xlvi 3 fr 95 § 2, 107). If only one of several creditors or of several debtors becomes heir, the merger is only partial. The sureties are also freed when by the merger they become bound to and for the same person (D. xlvi 1 fr 71 pr). See above, p. 34.

Joinder of issue technically discharged the obligation concerned (Book VI chap. xii), and 'Bargain not to sue' supplied a plea which reduced the obligation to impotence (p. 61).

A natural (though not legal) obligation is discharged as of course by payment of money, or a lawful bargain (*justo pacto*) or an oath (D. xlvi 3 fr 95 § 4).

9. Verbal release (*acceptilatio*).

A verbal obligation could be entirely dissolved by a verbal release composed of oral question and answer. The party who is to be released says to the other, 'What I have promised you, have you received?' and the other replies, 'I have' (*Quod ego tibi promisi, habesne acceptum? Habeo*). Or the form might be of this kind, 'Do you treat ten pounds as received? I do' (*Accepta facis decem? Facio*)[1]. Such a release was called by a

[1] *Acceptum fers? fero* is not found. In descriptive language the regular terms for a verbal release in the Digest are *acceptum facere* and *acc. ferre*:

name taken from book-keeping, *acceptilatio* 'entering a receipt: *i.e.* carrying to credit.' The releasing words had strictly to correspond to, or clearly cover, the expressed obligation, and if the obligation did not exist, the release was of no effect. If the release was general, *e.g.* 'what you have promised me,' then every stipulation which you have made me is released, unless it was shewn that the parties intended to refer to one or two only (Gai. iii 169; D. xlvi 4 fr 6, 7, 14). It must itself be absolute in terms; but if it related to an obligation due on the occurrence of a condition or at a future time, the release took effect only when the condition occurred or the time arrived (fr 4, 5, 12; L 17 fr 77). It counts as payment (*est velut imaginaria solutio*) at least for some purposes, and hence frees all who are under the same obligation, *i.e.* sureties and copromisers as well as the principal debtor (D. xlvi 4 fr 16; xxxiv 3 fr 5 § 2, 3). So a debtor for a loan, who had not entered into a stipulation, but had given sureties, was still held to be freed, if his sureties were released; but if a surety were bound in anticipation for a loan not yet made, a release to him would not affect the debtor's obligation on the subsequent loan. Again, if an heir charged with a conditional legacy gave promise and sureties for its due payment, a release to the sureties did not free the heir, when the condition arose, for though freed from the obligation created by his own promise, he still remained liable by testator's direction (D. xlvi 4 fr 13 § 7—9). One who had the same object promised to him by stipulation absolutely by one promiser and

the latter appears not to be used in this sense before Gaius (except Celsus, D. xlvi 3 fr 71 § 2, which see).

In lay writers the former is found in Cic. *Verr.* iii 60 § 139 *Scandilium cogis sponsionem acceptam facere*; Catull. 36, 16 *Acceptum face redditumque votum*; Plin. *Ep.* ii 4 *Acceptum fieri* (or *ferri?*); vi 34 *acc. fieri. Acceptum ferre* in lay writers is used only of book-keeping 'to credit'; cf. Plin. *NH.* xxxiv 138 *culpa ejus non naturae fiat accepta.* See Append. on *Litt. obligatio*; and Erman *Röm. Quittungen* p. 25 sq.

Accepto (probably a predicative dative) *facere, fieri, ferre, rogare* are found in the law writers in the same sense as *acceptum facere, etc.* of a verbal release. In two places only of the Digest (xxxv 2 fr 15 § 6; xlvi 3 fr 96 § 3 both from Papinian) *accepto facere* is used of simple crediting (*Vocab. Jur. Rom.* s.v. *accipio*).

conditionally by another, could release the former without losing the right of claiming it from the other if the condition arose (D. xlv 1 fr 56 § 8).

A son under power, as he can put himself under an obligation by promising in reply to a stipulation, so is capable of putting the question to obtain a formal release: his father is not put under a direct civil obligation by his son's promise and therefore is not required to effect the release, but is freed as well as his son. Similarly a slave can obtain a formal release from an obligation touching his *peculium*, and it is good to bar any suit *de peculio, etc.* against his master. A slave common to two masters can by express words obtain a release for one of his masters even on a debt due from him to the other. A slave of a fructuary or of a vacant inheritance can also obtain a release for the fructuary or for the inheritance (fr 8 §§ 1, 2, 4, fr 11 § 1). But a slave cannot give a release even by his master's order (fr 22), nor a woman without her guardian's authority (Gai. iii 171). A procurator can neither give nor obtain a release for his principal without a mandate (fr 3).

Whether a release of part of an obligation was good was a subject of doubt in Gaius' time (iii 170); later it appears to have been decided in the affirmative, provided the object was materially or ideally divisible. Thus if ten were due, five (or half) could be released: if a slave was due, a share could be released as is done when one heir of a promiser receives a release (fr 9, 10). A predial easement was not divisible: a usufruct of a farm was divisible in the sense that after release of a part, the usufruct continued in the remainder of the farm. But neither a usufruct nor a right of road was itself deemed to be part of the ownership, and therefore if a farm was due, the release of either of them was wholly ineffective. When a stipulation was for the usufruct, a release of the use was good[1], as that can exist without the usufruct. If one who had stipulated

[1] The result would be that the *fructus* could not be exercised; for *fructus sine usu esse non potest.* Accordingly a legacy of *fructus sine usu* was invalid, and an ademption of the use after a legacy of the usufruct was, according to Aristo, of no efficacy—a decision accepted by Ulpian as *benignior* (D. vii 8 fr 14 § 1).

for the transfer (*dari*) of a slave, without particularising, releases the promiser from transferring Stichus, the release extinguishes the obligation, for the transfer of Stichus would have been a good discharge of the stipulation. If the stipulation was for Stichus or ten pounds on a certain condition, the release of the promiser from giving Stichus would not discharge the obligation, if Stichus died before the condition occurred; for then the only obligation would be the payment of ten pounds, and that was not released (fr 13 §§ 1—4, 6; xlv 1 fr 2 § 3).

This formal release applied strictly only to verbal obligations. If the obligation was otherwise created, such a release had no effect in strict law, but founded a plea of fraud or bargain agreed (fr 8 § 3, fr 19 pr). But by novation any obligation can be made a verbal one, and then a formal release can be given. Again, if a guardian or caretaker of a madman or a procurator desires to release a debt due to his principal, he cannot do so directly because it is not in his own but in his principal's name; he can however novate the obligation, and then release it: and the same plan can be adopted to release an obligation due from the madman or other principal (Gai. iii 170; D. *ib.* fr 13 § 10).

In this way a general release might be made of all claims by first collecting them in a stipulation and then releasing them. A form for this purpose is stated to have been composed by Gallus Aquilius. We have it in the shape of a written record. 'Whatever you are or shall be bound to give 'me or do for me, whether due now or not until a future day, 'and for whatever things I have or shall have an action against 'you or claim to get or exact from you, and what of mine you 'have, hold, or possess; so much money as each thing of these 'things shall be worth Aulus Agerius stipulated, Numerius 'Negidius engaged should be given him. What Num. Negidius 'promised or engaged to give to Aulus Agerius, Num. Negidius 'asked A. Agerius whether he had received it from him. Aulus 'Agerius treated it as received to the credit of Num. Negidius' (fr 18; cf. Just. iii. 29 § 2). Such a proceeding was in practice in cases of compromise (*transactio*). However general the words, claims not intended to be released are not released (D. ii 15 fr 4; cf. fr 9 § 1).

A promise of services by a freedman on oath was held capable (without novation) of release by this form (fr 13 pr). Such a promise was part of the old civil law, as was *acceptilatio*.

10. Quittance or Receipt.

Quite different from *acceptilatio*, which required oral question and answer, was a quittance (*apocha*), *i.e.* a document given on receipt of money in such words as *accepi*, or *persolutum*, *numeratum habeo*, the latter being probably confined to freemen who alone could be said *habere* in a full legal sense (cf. D. xlv 1 fr 38 § 6). Such a quittance was merely evidence of payment: a formal release was a complete discharge in itself without payment or performance (D. xlvi 4 fr 19 § 1), just as in book-keeping *acceptum ferre* or *referre*, from which use comes (oral) *acceptilatio*, discharged the book obligation created by *expensum ferre* (see p. 65).

An instance of a quittance on receipt of money (probably a loan) is given in D. xlvi 3 fr 89 pr. *Titius Maevius dico me accepisse et habere et accepto tulisse a Gaio Titio reliquum omne ratione posita ejus pecuniae quam mihi Stichus Gaii Titii servus caverat.* 'I T. M. declare that I have received and have and 'have carried to credit from G. T. all the balance on the account 'of the money which Stichus his slave had acknowledged to 'be due.'

As examples of a quittance or receipt may be taken those found in 1875 in a box at Pompeii (and now fully and carefully edited by Zangemeister in a supplement to *Corp. I. L.* vol. iv[1] (1898). A selection is given in Bruns' *Fontes*). Most are quittances given by various persons to the auctioneer L. Caecilius Jucundus, who had sold for them certain property, had entered into a stipulation for the proceeds, and had paid over to the former owners the full amount either at once or by degrees, less his commission. They are written on wax tablets folded in the regular way and contain (usually) in the inside a statement of

[1] They are discussed by Mommsen *Hermes* xii p. 88 foll.; Bruns *ZRG.* xiii p. 360 foll.; Karlowa *RG.* i 798 foll.; Zangemeister *l.c.* p. 417 foll.; Erman *Römische Quittungen* (1883) p. 5 sqq. and a later discussion in *ZRG.* xxxiii p. 172 sqq.

the vendor's declaration of due receipt and on the outside an autograph acknowledgment of receipt by the vendor (or someone by his order). I give one numbered by Zangemeister xl (= No. 34 ed. Petra; Bruns[6] p. 316).

Internal. HS n IↃↃ ∞ ∞ ∞ DLXII *quae pecunia in stipulatum L. Caecili Jucundi venit ob auctionem Tulliae Lampuridis mercede minus persoluta habere se dixsit Tullia Lampyris ab L. Caecili(o) Iucundo. Act. Pomp. x. k. Januar. Nerone Caesare* II *L. Caesio Marti(ale) cos.*

External. *Nerone Caesare* II[1] *L. Caesio Martiale cos x. k Januarias Sex. Pompeius Axiochus scripsi rogatu Tulliae Lampyridis eam accepisse ab L. Caecilio Iucundo sestia nummum octo* [*milia*] *quingenti sexages dupundius*[2] *ob auctionem ejus ex interrogatione facta tabellarum signatarum.*

Affixed are eight seals, one being that of Sex. Pomp. Axiochus.

Int. 'Tullia Lampuris said that she had 8562 sesterces 'fully paid, less the commission, by L. Caecilius Jucundus which 'money came into stipulation with L. Caecilius Jucundus on 'account of the auction sale of Tullia Lampyris. Done at 'Pompeii 23 Dec. A.D. 57[3].'

[1] *Act(um) Pompeis* is here (at the end of a line) inserted subsequently.

[2] A blunder of the slave for *quingentos sexaginta duos* (Mommsen).

[3] In the external writing I should translate *ex interrogatione, etc.* 'in 'accordance with the stipulation made (by her and recorded) in the sealed 'tablets,' the stipulation being one made by the vendor with the auctioneer (cf. D. xlvi 3 fr 88), and loosely called in the inner writing 'Jucundus' stipulation,' as being one in which he took part (as promiser). Cf. *e.g.* D. xxvii 9 fr 5 § 6. Mommsen, Zangemeister and Bruns understand *stipulatum* of Jucundus' stipulation with the purchasers. This seems to me (and to Karlowa) to have nothing properly to do with this receipt. It could thus be only a roundabout way of describing the amount realised by the sale. But further, did an auctioneer really make a stipulation for every separate item in the sale, or at least with every purchaser for the total amount of his purchases? I doubt it. Delivery only against payment, or to well-known purchasers on credit, as nowadays, seems to me the safer and more likely course of business.

Mommsen, Zangemeister and Karlowa take the interior writing to be the record of an *acceptilatio*. I agree with Bruns and Erman (so also Benno Trese in *ZRG.* xxxi p. 255) in rejecting this view and taking it to be

11. *Pactum de non petendo*[1].

(*a*) A bargain not to sue had practically, at least in many respects, the same effect as a formal release and required no formality. The plea of 'bargain agreed' was fatal to the suit. The bargain might be *in rem* or *in personam, i.e.* might be couched in general words 'not to sue for a particular debt' or might be special to a particular person, 'not to sue Titius for the debt': but the fact that a person was named in the bargain was not conclusive as to the promise being confined to him. All depended on the intention: the words were not interpreted as strictly as if it were a stipulation. As a rule a promise not to sue Titius is no hindrance to a suit against Titius' heir, nor a promise that '*I* will not sue Titius' any hindrance to my heir's suing him (D. ii 14 fr 7 § 8, 57 § 1).

(*b*) The benefit of these agreements, as of stipulations, is as a rule confined to the parties making them. If I bargain that you do not sue Titius, or that you do not sue me or Titius, Titius has no right to plead the bargain, even if he become my heir. And as I am not named in the former bargain, I have no plea either, even if you sue me on his account (fr 17 § 4, 21 § 2). But a son under power or a slave (or a *bona fide serviens*) can bargain that his father or master be not sued,

a simple acknowledgment of receipt. My reasons are: (1) an *acceptilatio* (*i.e. veluti imaginaria solutio* Gai. iii 169) was not required and was probably very unusual, when actual payment of the full sum was made in a simple case of loan, sale, lease, *etc.*, and not in a complicated matter involving a variety of claims (cf. D. xlvi 3 fr 80 *vel re vel verbis*—not both); (2) *habere acceptum* or *facere acceptum* appear to be the technical words in an *acceptilatio*, not, as in these tablets, *numerata* or *persoluta habere*, which indeed are the natural words for a receipt of actual money to close a transaction as opposed to receipt of money as a loan, *habere* being opposed to *debere* (cf. Bruns[6] no. 127); (3) The external writing is more naturally taken to refer to the same acts of payment and receipt as the internal, and not as a distinct acknowledgment of receipt superadded to the formal release. *Ex interrogatione* may well refer, as I have taken it, to *stipulatum* mentioned in the internal writing (cf. D. xlv 1 fr 1 §§ 1—3; iii 5 fr 6), but could hardly stand for *acceptilatio*, when the internal writing has no allusion to any 'question' for that purpose.

[1] Some such bargain appears to be alluded to in Cic. *Rosc. Com.* 9 § 26 *Dic pactionem fecisse* (*Roscium*) *ut absolveretur: non pepigit.*

and the bargain is good, whether it relate to contracts made with them or with himself. If a son under power bargain for himself not to be sued, it avails to bar an action against his father *de peculio* or *de in rem verso* or as defender of his son, or a suit against his father's heir, so long as the son is alive, but after the son's death the plea is no longer available. The bargain of a slave for no suit to be brought against himself is of no force, but his master will have a right to a plea of fraud. If he bargain in general terms, *i.e.* that no suit be brought in the matter, then the plea of bargain agreed is available for his master and his master's heir. If a father or master bargain against any suit being brought against his son or slave, it is good not for his son or slave, but only if he himself be sued on their account: if a father bargain against any suit against himself or his son, his son will be only able to use the plea of fraud. *His qui in nostra potestate sunt paciscendo prodesse non possumus* (fr 17 § 7—fr 21 § 2).

(*c*) A debtor's bargain in general terms for no suit to be brought in the matter bars a suit against his surety, for, as he is liable to his surety on the mandate, he has an interest to that extent. Similarly bargains against suit, made in general terms by one of a number of joint promisers or bank-partners, bar actions against the others. But a bargain by surety or cosurety for no suit to be brought bars suit against himself only, there being no interest in him to support a bar to suit against the principal debtor or his cosureties. If however the intention was to bar suits against them also, a plea of fraud can be used (fr 21 § 5—fr 26, 32). On the other hand the indirect interest of the principal debtor was after some dispute held to bar a suit against surety, where debtor had bargained directly for this and not even named himself (fr 27 § 1). A ward's bargain against suit, made even without his guardian's authority, is good; and so also a caretaker's bargain is good on behalf of a madman or spendthrift (fr 28 pr § 1), and a guardian's on behalf of his ward (fr 15). A procurator's bargain against a suit creates for his principal a plea of fraud (fr 10 § 2).

(*d*) The burden of such bargains is still more strictly confined to the person making them. Neither a joint stipulator

nor a bank partner agreeing not to sue, whether *ne ipse petat* or (in general terms) *ne petatur*, bars a suit by the other stipulators or partners. An agreement by a son or slave *ne ipse petat* is worthless, for he cannot sue in his own person; an agreement *ne petatur* bars a suit by the father or master, only if it relate to the *peculium* of which the son or slave has full power of management, and if it be made in consideration of adequate advantage, and not by way of mere gift (fr 27 pr, 28 § 2). In the case of an insult to the son, who as well as his father, has an action *injuriarum*, he can bar his own suit, but not that of his father (fr 30 pr). A procurator's agreement not to sue bars his principal, if the procurator have full general powers, or have a special mandate for this purpose, and be not a mere representative in an action (fr 10 § 2—fr 13). A ward's bargain not to sue is of course invalid without his guardian's authority (fr 28 pr). And so is a like bargain made by a caretaker on behalf of his ward (fr 28 § 1).

(*e*) A bargain against a suit for future fraud or theft or injurious insult is not good, but a bargain against suit for past offences is good (fr 27 §§ 3, 4).

A bargain against suit can be revoked by a subsequent bargain, except in the case of a suit *injuriarum* or theft, which are killed altogether by a bargain not to sue (fr 17 § 1, 27 § 2).

(*f*) An agreement not to sue may be inferred, as for instance if a bond be returned to the debtor; but the like inference cannot be drawn from the mere return of a pledge (fr 2 § 1, fr 3). If I stipulate from a slave for a debt due from Titius, I am understood to agree not to sue Titius, but this is so only if the slave was not a mere surety but had an adequate ground for undertaking the obligation (*e.g.* because he owed Titius as much) so as to make his master responsible *de peculio* (fr 30 § 1). One who receives future interest on a loan is taken to agree not to sue for the principal within that time (fr 57 pr). A formal release (*acceptilatio*), if invalid as such, may yet be taken as an agreement against suit (fr 27 § 9).

A bargain not to sue for ten pounds, when I have stipulated for either ten pounds or the slave Stichus, is properly a bar to my suing on the stipulation at all, just as much as if I had

received payment or brought suit or given a release for one of the alternatives. But if the bargain was understood between us to negative only suit for ten pounds, I can sue for Stichus without being barred by the plea. A bargain not to sue for an inheritance is good against any suit for its components (fr 27 §§ 6, 8).

(*g*) Such words as *rogavit Titius spopondit Maevius* are often found subjoined to a record of a bargain; and generally mean that a stipulation was made; and consequently an action on the stipulation arises, special proof being required to shew that a formless agreement only was intended (fr 7 § 12). Where a bargain not to sue is followed by a stipulation for a penalty on breach, and the promiser sues, the stipulator can either sue for the penalty or (at his choice) meet promiser with a plea of 'bargain agreed,' but must then release the stipulation (fr 10 § 1).

(*h*) As in some cases already mentioned, a plea of fraud is often available where parties are not entitled to plead a bargain. Thus where a bargain with creditors is made by an own heir before meddling with an inheritance, or by an outsider, or slave made unconditionally free, before entrance on an inheritance, the bargain can be well pleaded against suit by the creditors. But if the slave is made heir conditionally, his bargain is null; for what is done while in slavery is not as a rule good for him as a freeman. He can however use a plea of fraud. So also (as was held after some doubt) can a son under power who made such a bargain and entered on an (outsider's) inheritance after emancipation, or who bargained with his father's creditors while his father was yet alive (fr 7 §§ 17, 18).

B. *Litterarum obligatio*[1].

Besides verbal contracts made by stipulation and promise, the Romans had another form of strict obligation which arose from book-keeping. Gaius is our only trustworthy source of

[1] See full explanation in Appendix (p. 279): also the Essay on Cic. *pro Q. Rosc. Comoedo.*

direct information, and he treats it very shortly. The obligation was made by book entries of transfer (*nominibus transcripticiis*). The transfer might be *a re in personam*, when a debt on account of purchase or hire or partnership was entered as if it had been money paid out; or it might be *a persona in personam*, when Titius gets you to undertake his debt to me, and I in the same way enter it in my books, as if I had paid out the money to you instead of to Titius. That is to say, taking the first case, I have you in my books entered as owing me money for a farm, which I have sold you or leased to you, or for my share of the profits of some joint transaction. I close this account and enter the amount against you as debtor for a liquidated sum of money, of course with your agreement (else how could there be a contract?). In the second case I close the account against Titius and enter the amount against you as a debtor, instead of against him, he having, as the Romans said, delegated you to me, in other words got you to promise to pay me and got me to accept you as a debtor instead of him. There is in each case a transfer from the existing account to another, and this transfer creates a new obligation[1] wholly independent of the previous obligation and resting simply on the book entry against you. Actual cash loans (*arcaria nomina*) though entered in the creditor's books derive their obligation from the payment of the money: the book entry is then only evidence. In the case of *litterarum obligatio*, it is unimportant whether any money has been actually paid. The entry in the ledger, declaring the fact of debt and disclosing no special cause, is in itself the cause and only cause of obligation. It supplies a formal element distinguishing it from a pact, and binds the debtor as much as he would have been bound by the words of promise in reply to a spoken stipulation. The parties were not required to meet to make the entry. Suit would be brought as for *certa credita pecunia* (cf. Cic. *Rosc. Com.* 5 § 14).

[1] In both cases there appears clearly to be a change analogous to that of novation, but Gaius uses that term only of stipulations: nor does he mention the extinction of the former debt *acceptilatione*, no doubt because this expression in his time applied to a *verbal* release. See p. 55.

There was a doubt among the lawyers whether this was so specifically a Roman form of obligation as not to be open to foreigners. Nerva (the lawyer) held that it was not open to them: Sabinus and Cassius held that foreigners could be bound by the former class of transfers (*a re in personam*)[1], but not by the latter. *Arcaria nomina* were of course applicable to foreigners as much as to Romans.

Gaius notes that *litterarum obligatio* is a phrase which might be used of a written acknowledgment of debt, or promise to pay, such as the *chirographa* ('notes of hand,' *i.e.* autographs), and *syngraphae*[2] ('bonds,' 'agreements') of the Greeks. In his time probably these were frequent, and the custom of relying on a book entry only had dropped out of regular use.

C. 1. *Mutuum.*

(*a*) *Mutuum* is cash-loan, *i.e.* a loan of money (*pecunia numerata*) or of other things lying in weight, count or measure[3], such as wine, oil, corn, bronze, silver, gold. The principle of the contract is that they are counted, measured or weighed over to the borrower and become his property, with the obligation of

[1] This might be considered as a mere restatement of the debt and hence common to all nations; but the latter involved a change of debtor and required some mutual understanding and custom of a particular community.

[2] Such *syngraphae* are often mentioned by Cicero, *e.g. Fam.* viii 2 § 2; *Att.* v 21 § 11. Their precise character is a matter of doubt. Mitteis (*Reichsrecht* pp. 459—485) holds that the term was specially, though not exclusively, applied to debt-agreements which of themselves proved the debt, whether the money had passed or not. But he rests much on Pseudo-Ascon. *ad Verr.* ii 1 § 91, a writer whom I believe to have had no independent knowledge either of law or business; and I doubt the word in itself having such special meaning.

[3] Such things are often called by a mediaeval term 'fungibles,' derived from such expressions as D. xii 1 fr 2 § 1 *in genere suo functionem recipiunt per solutionem quam specie* 'they admit of discharge by payment in kind rather than specifically.' Savigny (*Syst.* vi p. 123) calls them 'quantities' quoting D. xxx fr 34 § 3 where *corpus* and *quantitas* are contrasted; vii fr 15 § 4; xlvi 3 fr 94 § 1. So too in a constitution of Gordian. ap. *Just. Antejust.* iii p. 233 *debitores quantitatum debitarum.*

returning at some time the same count of money, measure of corn, weight of silver, *etc.*, but not the identical coins or corn or silver (Gai. iii 90). The contract is of a different character from *commodatum*, the loan of an article which is to be carefully used and itself restored[1]. In that case the owner, besides having an action on the loan, can vindicate the thing itself. But in *mutuum* it matters not whether the coins or wheat, *etc.* lent exist or not, whether they are still with the borrower or not, their free use or consumption is intended or expected, or is at any rate indifferent to the lender: his right is not thereby affected: they have become the property of the borrower, and the risk of loss or robbery is his: the lender's claim is to have these or other coins or other wheat, of the like fineness and count or weight, made over to him in due time in full ownership (D. xii 1 fr 3).

(*b*) This kind of loan involves and requires a transfer of property, and consequently, besides the intention to contract and convey, there must be delivery actual or constructive of the money or other thing lent. Physical transfer for this purpose by the lender as owner of the money was not always necessary (see vol. I p. 458): if a man has money of mine deposited with him, I can authorise him to use it and sue him as on a loan (D. xii 1 fr 9 § 9). Further it was held in practice that, if my debtor by my order paid money to another, I could sue this other for the loan thereby made, although the actual money had never been mine. Where however my agent has collected money on my account and proposes to treat it as a loan to himself, the lawyers differed, Africanus holding that there was no loan but only an obligation on mandate, Ulpian declaring for a loan (D. xii 1 fr 15; xvii 1 fr 34 pr). And the like difference is found where a man intending a loan, but not having the cash, hands over some article to sell[2] and use the proceeds as a loan (D. xii 1

[1] The two kinds of loan are both named in Cato *RR.* 5 § 3 *satui semen, ibaria, far, vinum, oleum mutuum dederit (vilicus) nemini. Duas aut tres familias habeat unde utenda roget et quibus det.*

[2] The plan of a sale was adopted sometimes by usurers in order to avoid the usury laws. The usurer sold something to the borrower at a high value and at once repurchased it from him at a low value and gave

fr 11 pr; xvii 1 fr 34 pr; cf. xxiv 1 fr 3 § 12; Savigny *Syst.* iv p. 594).

(*c*) But further it came to be recognised as a general rule that if a man pay his own money to some one as being my money and as a loan on my account, whether I have actually requested him to advance it in the particular instance, or am absent and ignorant of the matter, I can sue the recipient on the loan (D. xii 1 fr 9 § 8; cf. tit. 6 fr 53). This is stated broadly by Paul: *plane si liber homo nostro nomine pecuniam daret vel suam vel nostram ut nobis solveretur* (*i.e.* with the instruction to repay me) *obligatio nobis pecuniae creditae acquireretur* (D. xlv 1 fr 126 § 2; cf. Cod. iv 27 fr 3). It is in fact the ordinary case of a banker making investments for his customer whether he happen to have at the time and to use money which has passed through his customer's hands or not: *cottidie crediturі pecuniam mutuam ab alio poscimus ut nostro nomine creditor numeret futuro debitori nostro* (xii 1 fr 9 § 8) 'it is an every day occurrence 'that when we are going to make a cash-loan we ask another to 'pay the money as creditor on our account to the person who is 'to be our debtor.'

(*d*) On the other hand, if I profess to make you a loan on my own account and hand over another's money, it does not become your's; there is no cash-loan; the owner can claim the coins. And the same is the result, if a runaway slave or any other slave of mine contrary to my intention hands over my money to you as a loan. I can claim the coins, but I have no action as on a loan. But if you without any fraudulent intent spend (*consumpseris*) the money, it has passed beyond my power of claiming it, and I can sue you for the amount as if I had lent it you and made you owner of the coins. So a ward cannot without his guardian's authority alienate his money for a loan or any other purpose, but if he has done so (or rather professed to do so) and the borrower has spent it, he can sue (by a condiction) just as if the loan were valid (D. xii 1 fr 11 § 2, 13 § 1, 19; tit. 6 fr 29).

him cash, the borrower remaining debtor for the difference in value. This kind of contract was in the middle ages called by an Arabic term *Mohatra*. Pascal refers to it in the eighth of his 'Letters to a Provincial.'

(*e*) The paying or, as the Romans described it, the weighing out[1] (*expendere, dependere*) or counting out (*numerare*) of the money is the ground of the obligation, but the intention of the parties to give and receive as a cash-loan is also necessary to make the contract. (*Non satis est dantis esse nummos et fieri accipientis ut obligatio nascatur, sed etiam hoc animo dari ut obligatio constituatur* D. xliv 7 fr 3 § 1.) If I hand money over to you as a gift or as a deposit, and you receive it as a loan, there is no proper gift or deposit or loan[2]. Again, if you ask for a loan from me and from Titius, and I tell my debtor to promise it you, and you think it is Titius' debtor who promises it, there is no contract between us. But in all these cases, if you spend the money, I can sue for the amount (D. xii 1 fr 18, 32). And the result is similar where the want of agreement between the parties is due to one being insane (though supposed not to be so) or becoming insane before the completion of the contract (fr 12). The completion of the contract dates from the handling of the money by the borrower or from the agreement, whichever is latest. If the agreement was conditional, the occurrence of the condition must be waited for (fr 9 § 9, fr 10, 19 pr).

(*f*) The intention of the parties in thus giving and receiving money would be in some way stated, usually at the time, probably in an oral declaration, then or afterwards reduced to writing, and containing the conditions of the loan. *Omnia, quae inseri stipulationibus possunt, eadem possunt etiam numerationi pecuniae* (D. xii 1 fr 7). Such agreement might fix the condition, if any, on which the money paid should become a loan, the date and place for repayment, the person to whom

[1] In early times the metal was weighed, *asses, semisses, dupondius, etc.* being primarily weights. The *lex Rubria* (B.C. 49—42) describes *mutuum* as *pecunia certa credita signata forma p(ublica) p(opuli) R(omani), i.e.* bearing the public stamp of the Roman people = lawful Roman coin. Cf. D. xviii 1 fr 1 pr.

[2] It was not clear to the lawyers in the Digest, when both parties intended a transfer of ownership but differed as to the ground (*e.g.* one intending to make a gift, the other taking as a loan), whether the ownership of the money passed. Julian said it did (D. xli 1 fr 36): Ulpian inclined to think it did not (D. xii 1 fr 18 pr *magisque, etc.*).

it should be repaid; but it could not fix a larger sum to be repaid than the amount actually paid; for the contract would be *nudum pactum* as regards the sum; but it might fix a smaller (fr 11 § 1, 22, 40; ii 14 fr 17 pr).

A stipulation was often made to confirm such agreements, and, though good, was held not to novate the obligation arising from the payment, or to constitute a separate contract: the payment whether before or after was regarded as merely supplying content to the verbal obligation (*non duae obligationes nascuntur sed una verborum* Paul). And if the payment was not accepted, a stipulation made in anticipation had no effect. If payment had been made and for some cause or other the stipulation proved to be invalid, it was possible to fall back on the payment, and enforce the natural obligation thence arising (D. xii 1 fr 9 §§ 4, 5, fr 40; xlv 1 fr 126 § 2; xlvi 2 fr 6 § 1, fr 7; Cod. viii 37 fr 3; cf. xliv 7 fr 44 § 6). Where a ward received a loan without his guardian's authority, the lender could not recover, until Ant. Pius by a rescript granted him an action to recover so far as the ward was at the time of the action thereby enriched (D. xxvi 8 fr 5 pr; xlvi 3 fr 47 pr).

(*g*) A cash-loan did not carry interest unless special stipulation was made (D. xix 5 fr 24). Just as other real actions contemplated originally only the return of the thing lent, deposited, or pledged, so a cash-loan by itself contemplated only the return of the same quantity, and therefore interest could not become due on a mere bargain, as if it were part and detail of the loan (D. xxii 1 fr 41 § 2 probably relates to some provincial loan.)

(*h*) In early Roman times a loan of money, or rather of metal not properly coined, was made with the bronze and balance as in mancipation, they being necessary to ascertain the amount, and the accompanying declaration shewing the nature of the transaction. This was called *nexum*[1]. If the debtor made default in due repayment, his person was liable to be seized, and he was compelled, legally or practically, to work for his creditor. Admission of the debt was equivalent to judgment.

In later times the technical term in describing a suit for

[1] See Appendix (p. 296).

a loan of money appears to have been *pecunia certa credita*[1] (Lex Rubr. 21; Gai. iv 171). By a *lex Silia* a summary mode was introduced for recovery of a sum of money certain (*certa pecunia*), 30 days' notice (*condictio*) of trial being substituted for the old sacramental procedure (Gai. iv 18, 19), and this summary procedure was probably applied[2] to loans of money (*certa credita pecunia*). From the position of the title *de jurejurando* in the Digest (xii 2) and from the rubrics of Paul *Sent.* ii 1 *de rebus creditis et de jurejurando* and of Cod. iv 1, it is generally inferred that plaintiff could put defendant on his oath as to the fact of the loan or of its repayment; and probably this was the leading use of compulsory oaths[3]. Further the defendant, if defeated, might be mulcted in a penalty of one-third of the money lent (in addition to the sum itself), by being forced at the commencement of the suit to wager on the justice of his cause. The plaintiff would have to submit to a restipulation to the same effect (Gai. iv 13, 171). The *lex Calpurnia* extended the summary procedure to suits for any definite thing (*de omni certa re*). The oath was probably admissible in this case also (so said in D. xii 2 fr 34 pr), but the wager was not (cf. Gai. iv 19).

This action by summary notice was called *condictio* and was the regular action in the case of cash-loans or other claims for money certain, whether based on payment, or on book credit, or on stipulation (Cic. *Rosc. Com.* 4, 5 §§ 10—15; D. xii 1 fr 24).

(*j*) Defendant if sued on his bond (*cautio, i.e.* record of stipulation) when he had not received the money, could plead the non-payment (*exceptio non numeratae pecuniae*) and then

[1] The expression (without *pecunia*) occurs in Quintil. *Inst.* iv 2 § 61; viii 3 § 14 (speaking of the difference of style required from an advocate in different causes) *an non pudeat certam creditam periodis postulare aut circa stillicidia affici aut in mancipii redhibitione sudare;* xii 10 § 70. *Certa credita pecunia* is in Quintil. iv 2 § 6. Cf. Lenel *EP.* p. 186. In *lex Julia munic.* 44 the procedure for recovering a loan (*uti de pecunia credita judicium dari oporteret*) is applied to the recovery of expenses to which a town was put in discharging duties neglected by individual citizens, *e.g.* cleaning the streets.

[2] Karlowa argues against it (*RG.* ii 594).

[3] Cf. D. xii 2 fr 14 and note on *abjurare* Book VI chap. iii; Demelius *Schiedseid* p. 73.

the plaintiff had to prove payment. This plea is mentioned as early as the Antonines (Cod. iv 30 fr 1, 3); and a like plea was allowed when the amount named in the bond was larger than the sum actually lent: the creditor could recover only the latter sum (Cod. *ib.* fr 2). Where a liquidated sum of money was acknowledged in writing (*chirographum*) to be due, though not actually paid down, and there was a just cause of debt, this plea was not good (fr 5). A plea of fraud (*doli*) was also available, but that threw the burden of proof on the defendant (*ib.* 13, Gai. iv 116 *a*; D. xliv 4 fr 2 § 1).

The bond on payment was usually destroyed or given up to the debtor, but its retention whole gave the creditor no rights, if the debt had been fully paid, nor did its loss defeat his right, if the debt was not paid (Const. of Severus and Antoninus in Cod. Greg. iv = *Jur. Antejust.* iii 232).

2. Interest on loans.

Interest may be defined as the amount to be paid to the lender for the use of his money, and for the risk which he runs of not being repaid. It was called *faenus*[1] or *usurae* (sometimes *usura* sing.): *faenebris pecunia* is money on loan at interest. The capital is usually called *sors*.

The strict action on a money loan was for repayment of the capital sum lent, and, as has been said above, did not carry with it any claim for interest. A stipulation was required in order to create an obligation for this, and if the capital was stipulated for at the same time, still the two obligations were distinct: the claim for the capital was for an ascertained amount (*certum*); that for the interest was dependent on the length of time it remained unpaid, and consequently was, at the time of stipulation, for an unascertained amount (*incertum*, Paul ii 14 § 1; D. xix 5 fr 24; xlv 1 fr 75 § 9).

It appears to have been sometimes the practice to fix a near day (next Kalends?) for the repayment of the capital, and, as a penalty for the non-repayment of the capital on that day, to

[1] Cf. Plaut. *Asin.* 243 *Interii si non invenio ego illas viginti minas...Si mutuas non potero, certumst sumam fenore; Pseud.* 286 *Si amabas, invenires mutuom; ad danistam devenires, adderes fenusculum.*

stipulate for interest at so much per month (30 days), which might be made to run either from that day or from the day of the stipulation. At other times we find stipulation to be made for repayment on demand (*qua die petierit*). Sometimes the capital was to be repaid by instalments, and then interest would only run for the unpaid instalments, as they became due. Action for the loan or an instalment would not stop the interest continuing to run, that being conditioned on due payment or on satisfaction not having been made (D. xii 1 fr 40; xlv 1 fr 90, 126 § 2; Bruns no. 127). Tender of payment when due prevents interest running (see pp. 53, 54). For some purposes interest on money was put in the same class as *fructus* (D. xxii 1 fr 34): but *in fructu non est, quia non ex ipso corpore sed alia causa est, id est nova obligatione* (D. L 16 fr 121).

The rate of interest was fixed by the stipulation. It was not unusual to fix a lower rate of interest for punctual payment and an increased rate if payment were delayed. If payments on the lower rate continued for a time to be made and accepted when the higher rate might have been demanded, a bargain was presumed for the lower rate to continue. And when punctual payments for some years had been made, a bond providing for retrospective increase of the rate in case of unpunctuality was (by a rescript of M. Antoninus) not allowed to be enforced (D. xxii 1 fr 9 § 1, 12, 13 pr, 17 pr; Cod. iv 32 fr 5, 8). Delay exists as soon as claim has been made on the debtor in a suitable place for payment and payment has not been made (D. xxii 1 fr 32 pr).

The fact of stipulation for interest having been duly made admits of proof, even if it should not have been mentioned in the bond (Cod. iv 32 fr 1, 7). If no stipulation has been made, but interest has been paid as agreed, the money cannot be reclaimed or set against capital, unless in excess of the legal rate. And a pledge can be retained, until interest has been paid, though the agreement has not been confirmed by a stipulation (Cod. fr 3, 4). Loans by municipalities did not require a stipulation (D. xxii 1 fr 30); nor was it required for the demand of an accession in the nature of interest, in case of a loan of corn or barley (Cod. fr 11).

A maximum rate of interest was laid down by law. By the XII tables the maximum was one-twelfth of the principal (*unciarium fenus*), *i.e.* 8⅓ per cent. (Tac. *Ann.* vi 16). The history of the subject is obscure[1], but in the times of Cicero and of the Antonines the maximum was one per cent. per month of 30 days (*usurae centesimae*), *i.e.* 12 per cent. per annum. This was 'statutable interest' (*legitima usura*). Any agreement for interest above this rate was void as regards the excess (by a rescript of Severus), and the excess if paid went in diminution of the principal: if the principal was repaid, the surplus interest (or the principal itself, if repaid after being already covered by surplus interest) could be recovered as *indebitum* (Paul ii 14 § 2; D. xii 6 fr 26 pr; xxii 1 fr 29). Five per cent. and four per cent. or even less are also mentioned as usual in some cases and districts; and 'statutable interest' regarded as heavy (D. xxvi 7 fr 7 § 10).

Compound interest was forbidden altogether by Justinian, who tells us it was forbidden by ancient laws but ineffectually (Cod. iv 32 fr 28; vii 54 fr 3 pr)[2]. In the time of the Antonines interest left to accumulate and compound interest, together exceeding the amount of the capital, could neither be stipulated for nor exacted. The excess if paid could be recovered (D. xii 6 fr 26 § 1; Cod. iv 32 fr 10).

[1] Livy mentions (B.C. 347) *Semunciarium tantum ex unciario fenus factum;* a temporary measure? (vii 27 § 3); in B.C. 342 *Invenio apud quosdam L. Genucium trib. pl. tulisse ad plebem ne fenerare liceret* (vii 42 § 1). The restrictions on lending at interest which applied to loans made by Romans were extended in B.C. 193 to loans made by any of the allies or Latins to Romans (Liv. xxxv 7 § 5). Tacitus (*Ann.* vi 16) apparently refers to these statements. Cato (*RR.* 1) says *majores nostri sic habuerunt et ita in legibus posiverunt furem dupli condemnari, feneratorem quadrupli.* We know no more of this. Probably it was penalty for exceeding *unciarium fenus.*

[2] Cicero in his provincial edict for Cilicia said he should allow *centesimas cum anatocismo anniversario, i.e.* 12 per cent. per annum with annual rests (Att. v 21 § 11). In the case there related of a loan by Brutus and others to the Salaminians in Cyprus, the bond was drawn for 48 per cent. A decree of the senate about this time forbad compound interest (*ib.* § 13), but whether it was a general prohibition or limited to certain places or transactions we do not know.

3. *Trajecticia pecunia.*

The maximum rate of interest might be exceeded lawfully in loans on bottomry (*trajecticia pecunia*), *i.e.* when money is lent for a mercantile adventure beyond sea, on the condition of repayment only if the ship got safe to its destination. The creditor's risk in this case justifies a higher than the usual rate of interest, and no limit was put to *nauticum fenus* or *usurae maritimae* (Paul ii 14 § 3): but the higher rate was allowable only for the period over which the creditor's risk in the voyage extended. It was usual for the creditor to send a slave in the vessel to watch the shipper's proceedings and demand, if necessary by process of law, repayment of the loan as agreed. If the money and interest were not forthcoming on the agreed day, it was usual for further interest to be paid at a rate not exceeding 12 per cent. for the time after the goods had got safe, and also, by way of penalty, a sum per day for the slave's services (who might have to wait some time in a distant port), both amounts to be reckoned from the due date, the amount for services not to exceed the amount of legitimate interest[1]. The goods first embarked and any goods purchased with the proceeds of sale were pledged for the loan. A stipulation was usually made, but the principal sum could be recovered as a loan, and the additional sum by an action *praescriptis verbis* (see Chap. IV H) on the agreement. The claim for penalty was good on any delay in payment, unless the borrower was free from fault: subsequent offer did not purge the delay (D. xxii 2 fr 4, 7; xliv 7 fr 23; cf. xlv 1 fr 122 § 1; xix 5 fr 24).

[1] *Quod in singulos dies in stipulatum deductum est ad finem centesimae non ultra duplum debetur. In stipulatione faenoris post diem periculi separatim interposita, quod in ea legitimae usurae deerit, per alteram stipulationem operarum supplebitur* (Papin. in D. xxii 2 fr 4 § 1): *i.e.* 'the amount 'stipulated for the slave's services must not do more than double the 'interest at the maximum rate, unless a lower rate is agreed for interest, in 'which case the amount for services may be increased up to the limit afore-'said.' It is not clear whether each payment (for interest and for services) is limited by the amount of the maximum rate or both payments together. Ihering *Jahrb.* xix p. 16 takes the former view. Sieveking (*Das Seedarlehen* 1893, p. 44) with others takes *duplum* to mean double of the capital sum lent; as *supra duplum* in D. xii 6 fr 26 § 1.

Some other conditions of a similar character are mentioned as occurring in loans: *e.g.* loan to a fisherman for apparatus, payment to be dependent on a catch of fish: loan to an athlete for training expenses, to be repaid if he won in the contest. In these cases also a bargain (*pactum*) would suffice to support an addition to the amount of the loan as compensation for risk (D. xxii 2 fr 5).

Loan on bottomry differed in several ways from an ordinary loan of money (*mutua pecunia*): for in the latter the creditor's claim was absolute or at least not dependent on the result of the debtor's employment of the money; the rate of interest was limited by law; the action a *condictio certi*; and interest was not recoverable except on a separate stipulation.

D. *Condictiones.*

Condiction was a form of legal procedure, as mentioned above, first applied to the recovery of a loan of a definite sum of money, and afterwards applied to a loan of other things ('fungibles') where the return of the loan was required in quantity and quality, but not the identical things; in fact, where the borrower undertook to repay not *this*, but *so much* of the article and quality received. When condiction was applied to such things, it was said to be called *triticaria* ('relating to wheat') from one of the most important subjects, but this action (*condictio triticaria*) was afterwards extended so as to include all cases where things certain, other than coined money, were redemanded (D. xiii 3 fr 1). In practice the term *triticaria* was not used, or Justinian has cut it out.

The characteristic of the situation was that the property in the thing had been the lender's and had passed to the borrower. Whether the borrower retained the thing or consumed it or spent it was immaterial: vindication was not applicable, for whether the thing existed or not, it was no longer the lender's, but he had a right to an equivalent. An analogous situation occurred when money had been paid for a purpose not afterwards realized; or had been paid under the belief that it was due when it really was not; or when it had got into the hands

and ownership of someone without any real or sufficient ground at all; or when the purpose for which it was given was so unlawful or disgraceful that the law could not regard the recipient as entitled to retain it. The conditions under which a condiction is allowed are much the same as those which justify a plea of fraud (*exceptio doli*). In other words, where unfair enrichment, if it took place, would give rise to a condiction, a plea of fraud is allowed to prevent its taking place (cf. D. xliv 4 fr 2 § 3, fr 7, *etc.*).

Nor was either the inequitable situation or the remedy by condiction confined to cases where money or other fungibles had passed. If any defined thing had under such circumstances passed from the ownership of *A* to the ownership of *B*, *A* had a condiction to recover it (*repetere*), whether the ground was bad or insufficient originally, or turned out to be bad or to fail. *Constat id demum posse condici alicui quod vel non ex justa causa ad eum pervenit vel redit ad non justam causam* (D. xii 7 fr 1 § 3). If ownership had not passed, condiction was not applicable (D. xii 1 fr 14).

The action was strict in procedure, although resting on an equitable principle (D. xii 1 fr 32; tit. 6 fr 66); and the claim included any profits which had accrued to the receiver from the thing since acceptance of the issue for trial, so that plaintiff should have what he would have had, if defendant had discharged the obligation at that time (D. xii 1 fr 31; tit. 4 fr 7 § 1; tit. 6 fr 15 pr, 65 § 5).

The cases of condiction were referred by the lawyers to four[1] principal heads, not always clearly distinguished from one another.

1. *Condictio ob rem dati, re non secuta*[2], *i.e.* a condiction

[1] A fifth head is found in the rubric of D. xiii 2 *condictio ex lege*, but appears to be due to Tribonian.

[2] The name which I have given is taken from Celsus (in D. xii 4 fr 16) and Paul (*ib.* fr 9 pr, 14; xix 5 fr 5 § 1). In the rubric of D. xii 4 this is called *condictio causa data causa non secuta*, a phrase not elsewhere found and difficult to explain. In Cod. iv 6 the rubric is *de condictione ob causam datorum* which points to the meaning, that the action is for the recovery of what has been given for a purpose which has failed. The

for something handed over for a purpose which has failed, *e.g.* for the emancipation of a son, or manumission of a slave, or for securing a dowry, or settlement of a law suit, or as a condition of acceptance of a legacy or inheritance. If the son or slave is not freed, or the marriage does not take place, or the suit is pressed on, or the inheritance is not accepted, or the will is upset, the money or other property passed can be recovered, as a rule, subject to exception in cases where there is no fault on the recipient's part, and he has not in fact been enriched by the transfer. But if the owner of the slave would have sold him, had it not been for this bargain for his manumission, and he fled or died without there having been any fault or delay on the owner's part, there is no ground for refunding the amount paid. Condiction is also allowed where the event did not fail to follow, but the supposed ground for payment was a mistake, as where the slave who was to be manumitted is found to be a freeman, or the condition of acceptance of a legacy is found to be revoked by a codicil, *etc.* (D. xii 4 fr 1—fr 3 § 7, fr 5 §§ 3, 4). If a formal release was given and the consideration fails, a condiction will lie for the old debt (fr 10). A gift in view of death can be recovered in the same way by the donor on his becoming well again (fr 12).

language in the Digest makes *pecunia* or the like, not *causa*, subject to *data*; see this title fr 1, 14, 16, tit. 5 fr 1, tit. 6 fr 23 § 3, 65 §§ 2, 3; Cod. iv 6 fr 5, 10, *etc.* Yet it is hardly possible to suppose the expression in the rubric to be contracted for *causā* (*pecuniā*) *datā causa non secuta.* I have no doubt that it is a corruption for *causā dati*, *causa n. s.*, so that *condictio dati* is parallel to *condictio indebiti.* *Causā* is probably to be taken as dependent on *dati* and used absolutely, 'for reason,' 'on a consideration'='*ob causam*': compare *exemplo* in Cic. *Verr.* ii 2, 42 § 102 *dixerat se exemplo fecisse quod fecisset*, 'had done on precedent.' [To take *causā datā* as 'cause declared' would be a very unusual sense of *dare* and not well suited to the conditions of the action. Karlowa (*RG.* ii p. 769) takes *causā* as 'consideration,' but with *datā* it would refer to a different thing in the two clauses: Schilling's suggestion (*Institutionen* iii p. 592 followed by Voigt and Dernburg) that *data* is acc. plural (*dătă*) dependent on *secuta*, is right in meaning, but hardly possible in such a combination of words. Baron (*Condict.* p. 70 sq.) gives an enumeration and criticism of different views. I see there that others have also held the view that *data* is a corruption for *dati.*]

Mere general expectation of kindness or reward in consequence of the transfer is not sufficient to justify a disappointed donor in trying to recover his gift (fr 3 § 7). Nor probably was repentance of an offer or promise or gift sufficient basis for a condiction in Antonine times. (The cases in fr 3 and fr 5 are probably due to Tribonian: see Gradenwitz *Interpol.* § 18; and Lenel *Paling.* ii pp. 390, 391.)

2. *Condictio indebiti.* What has been paid in error as to matter of fact without being due[1] can be recovered from the person to whom it has been paid (Gai. iii 91). Thus if I pay in virtue of a supposed compromise, and the compromise has not been made or has been abandoned or is null, because made after judgment in the suit had been already given (D. xii 6 fr 23 pr, § 1); or if believing myself erroneously to be heir or *bonorum possessor*, I pay a creditor of the estate (fr 19 § 1); or, being freeborn, pay sums as condition of freedom given by will (fr 67 pr); or, being heir, have sold and delivered the inheritance without deducting a debt due to me from the testator (fr 45); or have paid a trust which turns out not to be due (fr 58); or pay a debt due only on an uncertain condition before the condition occur (fr 18, 48); or pay interest on what was supposed to be a debt but was not (fr 26 § 2); or pay (unless fraudulently, D. xlvi 3 fr 50) the wrong thing (fr 19 § 3), or an excessive amount (fr 19 § 4, 31), or pay one who is neither creditor (fr 65 § 9) nor creditor's agent (D. iii 5 fr 5 § 11; xlvi 3 fr 58 pr), and in other cases, I can recover what I have thus unduly paid. And it makes no difference whether I did not owe it at all, or owed it in strict law but had a perpetual plea to protect me (D. xii 6 fr 26 §§ 3, 7); nor whether the money or other thing paid was mine or not: in any case the possession had been transferred and is recoverable by me; unless indeed the owner vindicates the money (fr 15 § 1, 46).

If the excess over the real amount is not separable (*e.g.* in case of a farm) the whole can be recovered, the original obligation reviving in consequence (D. L 17 fr 84; xii 6 fr 26 § 4).

[1] The rules as to the burden of proof given in D. xxii 3 § 5 are generally held to be largely due to Justinian. See Lenel's *Paling.* i 1188 and others.

But mere repentance of a payment, made with eyes open, gives no claim to recovery, though the payment was not due (fr 24, 50, 62; cf. xxii 6 fr 9 § 5). Nor, if a person has received what he is entitled to (*qui suum recepit*), can he be called on to repay it because it was not paid by the true debtor; *e.g.* a legatee receiving his legacy from the inheritance by the hands of one who falsely supposed himself to be the heir (D. xii 6 fr 44; xliv 5 fr 1 § 10). Nor is recovery allowed, if there be a natural justification for the payment, though it may not have been legally enforceable. Such a case is that of a real debtor paying after joinder of issue but before judgment; for even if acquitted he is morally debtor (fr 60 pr); or of payment by a freedman to his master for manumission in accordance with an agreement made by him whilst a slave (fr 13 pr); or of a son under power taking a loan contrary to the *SC. Macedonianum*, and repaying it after he has become independent (fr 40 pr); or of a ward taking a loan without his guardian's authority and repaying it after puberty (fr 13 § 1; xxxvi 1 fr 66 pr); or of a father or master in debt to his son or slave, and paying the debt after the relationship of power has ceased (D. xii 6 fr 38 § 2); or a person paying interest on a loan, though interest had not been stipulated (fr 26 pr); or a debtor paying before the due date, or before the occurrence of a condition which is certain to occur (fr 10, 18, 56); or a father or master paying a debt of his son's or slave's in excess of his *peculium* (fr 11); *etc.*

If a freedman, erroneously thinking he owed services to his patron, paid them, he can bring a condiction for the amount at which the patron would have hired such services, provided they were industrial services; but if they were dutiful, he cannot; for they are natural to the relationship (D. xii 6 fr 26 § 12).

Payments made contrary to the *lex Cincia* were irrecoverable (Vat. 266). So also payments made in execution of a judgment, or of a damnatory legacy, or under the *lex Aquilia*, being for peremptory obligations (Just. iii 27 § 7; D. v 1 fr 74 § 2). The like is true of penalties for crime (D. xii 6 fr 41). Error in law does not form a basis for recovery, except in minors (under 25 years), D. xxii 6 fr 9 § 6.

According to some lawyers' opinions, money paid by mistake

to a woman or ward without guardian's authority, and consequently without raising any obligation, was not recoverable (Gai. iii 91): but a rescript of Ant. Pius gave an action against the ward who had received a loan without authority, to the extent of his enrichment (D. xxvi 8 fr 5 pr).

Payments by a ward without his guardian's authority, or by a madman or spendthrift interdicted from managing his estate, are as a rule recoverable by condiction if spent, by vindication if the moneys remain unspent (D. xii 6 fr 29).

A woman, who has made herself surety and has paid, can recover the money, because the protection given by *SC. Velleianum* is continuous through her life, whilst the *SC. Macedonianum* was intended only to protect persons while under age (fr 40 pr).

If payment was made expressly on behalf of another, this other (if anyone), not the payer, will have the right of recovery (fr 46, 53, 57 pr). Similarly if payments be made to legatees under a will which is afterwards upset, or if the payments be found to be excessive on account of the liabilities of the inheritance proving heavier than was thought at first, or hidden codicils being found which reduced the legacies; or the heir being under 25 years old obtain a cancelling of his acceptance (*in integrum restitutio*), the whole or the excess of the legacies can be recovered from the legatees by the person eventually taking the place of heir. Rescripts of Hadrian and Ant. Pius established this in some cases (fr 2—5; v 2 fr 8 § 16). So if guardians in good faith have paid some creditors of their ward's father, but finding the assets insufficient, have declined the inheritance on their ward's behalf, the other creditors will have the right of recovering the excess paid (xii 6 fr 61).

The person against whom the condiction is brought is as a rule the person who received the money (fr 49), but if the payer acted as a delegate under the wrong belief that he was debtor to the delegator and thereby discharged a debt due from the delegator, he must sue not the payee but the delegator (D. xlvi 2 fr 12). One who, though not his debtor, pays the ward's creditor at the ward's bidding, without the guardian's authority, cannot bring a condiction against the creditor with

whom he dealt only on the ward's account, nor against the ward except so far as he was enriched (D. xlvi 3 fr 66). If the payee was entitled on a stipulation to receive but not to keep (*e.g.* Titius in a stipulation *mihi aut Titio*), the condiction must be brought against the stipulator (fr 59). If a man in wrongful possession of another's houses lets them and takes the rents, he is liable on a condiction to the owner; but if he takes rents on lettings made by the owner, the tenant is not discharged and can recover his payments by condiction (fr 55).

3. *Condictio sine causa* is said to occur when payment is made or promised with no good ground either real or supposed, *e.g.* a gift from husband to wife or *vice versa* (D. xxiv 1 fr 6). The expression however seems to be used rather as a general one to include any cases which may seem not properly to come under the first two heads (D. xii 7; cf. tit. 6 fr 66 *Quod alterius apud alterum sine causa deprehenditur condictio (indebiti) revocare consuevit*).

4. *Condictio ob turpem vel injustam causam.* When money is paid or promised for a disgraceful or wrongful object, suit cannot be brought either for payment or for recovery of payment. But if money has been paid to induce a person to abstain from sacrilege or theft or murder, or to return a deposit, a condiction lies to recover it. So also to recover a payment which has been made on a stipulation extorted by force. The case is different when the payer is himself guilty. And thus payment made by a thief to prevent information being given, or by an adulterer to escape the consequences of detection, or payment on the ground of past adultery or other immoral connexion, is not recoverable. A suitor with a good case, who gave money to the judge to decide in his favour, was by some thought to have a right to recover, but Severus decided he should be treated as a wrong-doer (D. xii 5 fr 2—7).

5. A further case of condiction differs from the above-named classes by the absence of legal change of property. This is called *condictio ex causa furtiva,* sometimes shortened to *condictio furtiva.* Theft does not make the thief owner, but only deprives the owner of possession; who therefore, besides bringing an action (*furti* or *vi bonorum raptorum*) against the

thief or robber for double or quadruple damages, can claim his property by a vindication against the thief or anyone else who may happen to be in possession of it. Gaius recognises the anomaly of allowing condiction in this case, and accounts for it by the natural desire of accumulating penalties on thieves (*plane odio furum receptum est* iv 4). But something more than this may be urged for the *condictio furtiva*. What is stolen is often mingled with other moneys or goods so that identification is impossible; or it is spent and thus in fact appropriated by the thief. Hence the practical position being so far the same as if ownership had passed, there was no good reason for withholding from the owner any advantages which this special form of action might confer. And if the thing stolen was money or other fungible there was no anomaly in a claim *si paret furem dare oportere*. The anomaly lay rather in giving the action generally, whether the object was fungible or not, and whether it existed or not; instead of confining it to cases of consumption. Obviously convenience required that consumption should not need to be proved. Nor was it any answer to the suit that the slave or thing had perished from natural causes, a thief being always 'in delay.' The only defence was immediate delivery on demand.

Condiction went against the thief himself and his heir, but not, like the *actio furti*, against aiders and counsellors: they had not had the stolen thing and consumed or lost it. But theft had the same import in both actions. The measure of damages was the owner's interest in the thing stolen, the value of the thing being taken at the highest amount it had since joinder of issue, and incidental advantages (*e.g.* an inheritance falling to a stolen slave) being added. If a son under power was the thief, the action lay against him in full: against the father (*de peculio*) for what had come to him. A slave (in early times, a son also) could be surrendered noxally for the remainder which was not covered by the *peculium*. Condiction and vindication could not both be brought with effect. Condiction could not be brought against one who, when slave, had committed theft; unless he had handled the thing since he became free.

Plaintiff must be owner and have had possession before the theft. A legatee cannot sue, if he has not yet actually acquired the property. Nor can a usufructuary, if the thief gathered the fruit before the usufructuary severed it. Parting with the ownership or reacquiring the possession disqualify one from suing (D. xiii 1 esp. fr 1—11, 15; xlvii 1 fr 2 § 3; tit. 2 fr 81 §§ 5, 7; vii 1 fr 12 § 5). Celsus thought that a condiction for the possession would lie against one who had forcibly evicted plaintiff from land (D. xlvii 2 fr 25).

Condemnation on a condiction, though arising from theft, did not attach infamy to the defendant. It aimed at recoupment for loss (*rei persecutionem habet*), not punishment of the offender (D. xliv 7 fr 36; xiii 1 fr 7 § 2).

6. *Condictio incerti*[1].

In all the above-named cases the object of the suit is some definite thing: the action is either a *condictio certae pecuniae* or *condictio certae rei*. It is, in general words, an *actio qua certum petitur* and the claim[2] in the formula runs *si paret dari oportere*. But a *condictio* may also have a claim *si paret dari fierive oportere*, and it is enough to prove *fieri* only (Gai. iv 5; D. L 16 fr 53 pr)[2], and *fieri* ('performance') has not the definite character of *dari*. A stipulation too may be certain or uncertain (see p. 24); on a certain stipulation (*certa* or *certi stipulatio*) a condiction is the proper suit; on an uncertain stipulation the action appears to have been called simply *ex stipulatu* (D. xii 1 fr 24), or *actio incerti ex stip.* (D. xxii 1 fr 4 pr). So we find in the Digest beside the *condictio certi*[3] a *condictio*

[1] It is the claim (*intentio*) which makes an action into certain or uncertain. A claim for a thing certain may have an uncertain condemnation clause, the judge having to assess the amount of damages; cf. Gai. iv 51.

[2] Savigny v p. 589.

[3] The term *condictio certi* is found in D. xii 1 fr 9 pr and § 3 (a passage which appears to have been largely interpolated and altered by Tribonian) xlvi 2 fr 12 (also not free from suspicion): in both cases it appears to refer to money; cf. D. xiii 2 fr 1 where the *actio si certum petetur* is contrasted with *condictio triticaria* (see above, p. 76). *Condicere certum* is found

incerti. Its object was sometimes to recover an amount of money not yet ascertained (D. xxiii 3 fr 59 § 1; xxx fr 60); but generally to secure the performance (*facere, fieri*) of something unintentionally omitted at the proper time, *e.g.* the imposition of a servitude in selling and delivering a house or farm (D. viii 2 fr 35; xii 6 fr 22 § 1; xix 1 fr 8 pr); a usufructuary's usual bond (D. vii 9 fr 7 pr); a bond for due restoration under a special trust (D. iv 4 fr 16 § 2); release from an obligation (D. xii 7 fr 3; xxxix 5 fr 2 § 3; xlvi 2 fr 12); restoration of a pledge (D. xiii 1 fr 12 § 2); or of possession (D. xii 6 fr 15 § 1; xiii 3 fr 2); giving a surety (D. xvi 1 fr 8 § 8); *etc.* (In the three last passages *incerti* is omitted.) The action is also referred to simply as *incerti agere* (*e.g.* D. iv 8 fr 27 § 7; xxxix 5 fr 2 § 4). And in the case of legacies the suit is, according to the character of the legacy, sometimes a *condictio* if the claim be certain (D. xii 1 fr 9 § 1) and sometimes an *actio incerti* (D. vii 5 fr 8).

Gaius gives us information of the formula in suits on uncertain stipulations (iv 136, 137). Whether in uncertain condictions generally the same lines were pursued, we do not know. Some recent jurists throw doubts on the name and even on the existence of an *incerti condictio* (apart from stipulations) in Antonine times, and are inclined to treat them, not without reason, as due to Justinian only[1].

in D. xii 2 fr 28 § 4; *certi condicere* D. xxv 2 fr 17 § 2, and nowhere else (Lenel *EP.* p. 185; Pernice *ZRG.* xxvi p. 252).

[1] See Pernice *Labeo* iii p. 203; Trampedach *ZRG.* xxx p. 113 sqq.; Pflüger *ZRG.* xxxi p. 75 sqq. The last ingeniously suggests that what Justinian accomplished by granting a *condictio incerti* was often accomplished in a less direct way by the Antonine jurists by a *condictio certi*, *e.g.* by suing for the whole legacy, or the whole house or farm (cf. D. L 17 fr 84 pr; xii 6 fr 24 § 4); defendant, consenting to repay the overplus or to give the bond or allow the servitude, and thus having satisfied the plaintiff, claims an acquittal (*ib.* pp. 79, 80). It must be admitted that many of the passages naming *condictio incerti* seem to betray Tribonian's handling, but to get rid of *incerti condictio* altogether requires very slashing treatment of the text.

Earlier writers on the subject are Savigny *Syst.* v p. 687; Huschke *Darlehen* p. 212 sq.; Lenel *EP.* p. 121.

E. Three other actions, the first two at least of praetorian origin, are closely connected with stipulation and cash-loan.

1. *De eo quod certo loco dari oportet.* Where a sum of money is due to be paid at a particular place and is not paid, the creditor is allowed by the praetor to sue for payment elsewhere; and an arbiter will be appointed to fix how much more or less should be paid at the place now proposed, according as the change is for the interest of the debtor or of the creditor. If the debtor shews that he has already offered the money at the agreed place, or has it there on deposit, or can easily pay it there, the judge will probably acquit him, first taking security for the payment at the place agreed. If he finds for plaintiff, he will weigh the circumstances of the two parties, and allow in some cases a higher than the statutable rate of money interest, *e.g.* if the loan was on bottomry, or the delay in payment has led to forfeiture or to forced sale or loss of usual profit in business. The action can be brought against a surety, but not for any addition due to debtor's delay. Debtor cannot claim to discharge his obligation by payment elsewhere than originally agreed, if creditor objects.

This action applies when money is due on a strict obligation, as a stipulation, or money loan, or legacy, not on a sale or deposit or other *bonae fidei* contract, since, if a change is required in such matters, it can be effected under their proper actions. This action is specially called *arbitraria*[1] (D. xiii 4).

2. *Pecuniae constitutae*[2] 'money appointed to be paid.' An action was granted to enforce a definite engagement, though

[1] The Digest gives this term to one other action *quod metus causa*, and that only once (iv 2 fr 14 § 11; Lenel *EP.* p. 195 n. 1; Gradenwitz *Interpol.* p. 99).

[2] An instance of *pec. const.* occurs in Cic. *Quinct.* 5 § 18 *Quasi domi nummos haberet, ita constituit Scapulis se daturum.* It is not clear whether we should refer here Cic. *Att.* i 7 § 1 *L. Cincio* HS $\overline{\text{XX}}$CD *constitui me curaturum Idibus Februariis*, the word *curaturum* looking rather like practical arrangements for payment (as *e.g.* Cic. *Quinct.* 4 § 15). So in *Att.* xvi 15 § 5 *scis me pridem jam constituisse Montani nomine* HS xxv *dissolvere* we may understand *constituisse* either of a resolution of Cicero's or of a promise to his son or to Montanus (cf. *ib.* xii 52 § 1) or a formal appointment to Montanus' creditors. See Bruns *Kl. Schr.* i p. 226.

without stipulation, to pay or perform a debt previously contracted and yet unpaid, though, as was held after some doubt, the original debt might not yet be due. The debt must consist of money or other things lying in count, weight or measure; it might be one's own debt or another's, legal or only natural (unless barred by perpetual plea), civil or praetorian, arising from any contract or other cause (dowry, guardianship, *etc.*), even from a liability for theft, robbery or insult (D. xiii 5 fr 1 § 6—fr 3, fr 5 § 2; 29; Cod. iv 18 fr 2 § 1). The appointment (*constitutum*) might vary the time or place or form of payment, or add a pledge or surety, but could not increase the amount, or add interest on a loan (fr 1 § 5, 4, § 5 pr, 11 § 1—14 § 2). If no time for payment was named in the appointment, there were doubts apparently whether the agreement was void or whether suit could be brought at once; but by the Digest a moderate delay, at least ten days, was allowed (fr 21 § 1). The appointment must be for payment by the appointor and to the appointee, whether the original debt was or was not due by the one or to the other. The original debtor need not consent (fr 5 §§ 2—6, 27). The appointment created a distinct obligation, and bound by its own terms, even if the old obligation ceased by time or other cause; and it left the old obligation standing, at least until joinder of issue in this, and as some thought, until the debt was paid (fr 28; xv 3 fr 15; cf. xlvi 3 fr 59). But in the case of two joint stipulators an appointment by debtor to pay one disabled the other from receiving for his own account payment of the debt (D. xiii 5 fr 8—10). An appointor was not in strict law excused from payment at the time appointed by anything whatever (even *per rerum naturam*) except fault of the appointee, nor by subsequent offer before joinder of issue, but equitable considerations were allowed to prevail (fr 16 § 2—18).

The appointment might be made at an interview or at a distance, by words or letter[1] or messenger, slave or free, by any form of words or by oath duly tendered or retorted, affirming an

[1] Thus a letter to this effect: *Decem quae Lucius Titius ex arca tua mutua acceperat salva ratione usurarum habes penes me* (D. xiii 5 fr 26) was held to be a *constitutum*.

existing debt. But an oath denying an appointment does not of course affect the existing debt. Neither parent nor patron were exempt from the obligation to take an oath, if tendered by plaintiff (fr 14 § 3, 15; xii 2 fr 14, 36). Guardians, caretakers (of madmen) and borough managers (*actor*) could be appointees, and their principals were in practice allowed to sue, if the appointment was to pay the principals: if such agents were appointors, they were liable themselves. An appointment to a slave vested at once in his master. An appointment for payment *de peculio* was not affected by subsequent increase or decrease of the *peculium* (fr 5 §§ 7—10, fr 1 § 8, 20). What is bad as a stipulation, cannot be treated as a *constitutum*: it was not so intended (fr 1 § 4).

Like the *condictio certae creditae pecuniae* the suit on an appointment (probably an *actio in factum*) might be accompanied by a wager, so that defendant if condemned had to pay half as much again as the sum appointed (Gai. iv 171).

3. *Actio recepticia.* There was another action of somewhat similar character to the last, called *recepticia*, because it was 'based on an undertaking' (*receptum*), which action was free from some of the limitations of the *actio constitutae pecuniae*. It was not restricted to fungibles, but could relate to land or any moveable: it did not require as its ground a previously existing debt: it was not limited in duration, and ran for and against heirs; but could be brought only against a banker, and in a regular form (*sollemnibus verbis*). So much may be gathered from Cod. iv 18 fr 2 § 1; and Theophil. *Inst.* iv 6 § 8. See Lenel *ZRG.* xv 62.

CHAPTER IV.

Obligations *bonae fidei*.

1. Obligations of this class are as various as are the services required by one man from another in society. They were regarded by the Romans as in no way peculiar to themselves, but common to the world. Hence no special formalities were

used; consent of the parties was alone requisite; the judge had a larger discretion, and the standard set before him was what was fairly to be expected from business-like men dealing with one another in good faith[1]. Subsidiary agreements (*pacta adjecta*) are to be regarded as part of the contract, if made at the first in close connexion with the original contract (D. ii 14 fr 7 § 5; L 17 fr 27; xviii 5 fr 3, *etc.*); and the whole was to be interpreted not so much by the words used as by the real intention of the parties (D. L 16 fr 219): any action brought was to be tried with consideration of the equities[2] involved. In execution of this principle defendant was accountable for the fruits and other accessions of anything in his charge, not merely as in strict actions from the time of joinder of issue (D. xxii 1 fr 38 § 7), and if it was a female slave, he had to deliver up her offspring with her (D. xvi 3 fr 1 § 24). The value of any object of suit was taken as at the date of the judgment; not as in strict actions at the date of joinder of issue (D. xiii 6 fr 3 § 2). Interest was payable, as of course, when there was delay in fulfilling the obligation, and from the date of delay, not merely from joinder of issue (D. xxii 1 fr 32 § 2). Counter-claims could, if

[1] Cicero often dwells on the legal embodiment of the principles of good faith in business transactions: *Off.* iii 17 § 70 *Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis in quibus adderetur 'ex fide bona,' fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis venditis, conductis locatis, quibus vitae societas contineretur; in iis magni esse judicis statuere, praesertim cum in plerisque essent judicia contraria, quid quemque cuique praestare oporteret: Nat. D.* iii 30 § 74 *Inde tot judicia de fide mala, tutelae, mandati, pro socio, fiduciae, reliqua quae ex empto aut vendito aut conducto aut locato contra fidem fiunt;* cf. *Top.* 10 § 42; 17 § 66.

[2] The regular phrase for 'equity' was *aequum et bonum* (not *aequum* by itself). See *e.g.* Pl. *Curc.* 65; *Men.* 578; Cic. *Caecin.* 23 § 65; *Top.* 17 § 66; *Brut.* 39 § 145, 53 § 198; *ad Heren.* ii 10 § 14, 11 § 16, *etc.*; Sen. *Clem.* i 18 § 1; ii 7 § 3. In Pl. *Most.* 682 we have the order inverted *bonum aequomque oras*; Gai. iii 137 *Ex bono et aequo* and regularly in Digest; *e.g.* i 1 fr 1 pr *jus est ars boni et aequi*; *ib.* § 1; ix 4 fr 30 *ex bono et aequo*; xii 6 fr 66; xxi 1 fr 18 pr; xliv 7 fr 34 pr, *etc.* (In xvii 1 fr 12 § 9; xl 4 fr 22 *ex aequo et bono*; i 1 fr 11 *quod aequum ac bonum est.*) *Aequitas* is also found in the same sense, Cic. *Caecin.* 23 § 66; 27 § 77; 29 § 83, *etc.*

the judge thought fit, be set off to diminish the amount of the damages adjudged[1] (Gai. iv 63). Fraud justified the damages being fixed by oath of the plaintiff, which was not usual in strict actions (D. xii 3 fr 5; xiii 6 fr 3 § 2). The formula in these actions contained *ex fide bona* (or some such words) in the claim (*intentio*, cf. Gai. iv 47), and it was not necessary for defendant to have an express plea of fraud inserted. *Doli exceptio inest in bonae fidei judiciis* (Vat. 94; D. xxiv 3 fr 21). No one could contract out of responsibility for fraud (D. L 17 fr 23). If anything was left to a person's discretion, a reasonable, not arbitrary, discretion is meant (D. L 17 fr 22 § 1).

2. The actions (*judicia*) enumerated as *bonae fidei* by Gaius (iv 62) are *ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae*: to which may probably be added, as part of Gaius' original text, *commodati, pigneraticium, familiae erciscundae, communi dividundo*, which are given with the others in Justinian's *Institutes*, and may well have been omitted here by error of the copyist[2] (Just. iv 6 § 30).

3. Obligations of a *bonae fidei* character have several points of connexion or contrast with one another.

The first group is composed of such as are concerned with the transfer of possession without any payment being made therefor. The transfer may be for the transferee's convenience (*commodatum*), or the transferor's convenience (*depositum*), or as a security to the transferee for some loan or other obligation of the transferor (*pignus*).

The second group is where services of one are employed by or given to another, either by this latter's request (*mandatum*), or without any commission from him but in his interest (*negotiorum gestio*).

No payment is made for the services in this group any more than in the first. But expenses are chargeable in both groups.

[1] A constitution of M. Aurelius authorised 'set-off' in all strict actions by a plea of fraud (Just. iv 6 § 30).

[2] So Krüger and others. The line *mandati—uxoriae* is twice written in our MS. of Gaius, probably by confusion of the terminations of *mandati* and *commodati*.

The third group is where there is a community of interest; property, possession, and services being in common. This is partnership (*societas*). But only when this relation arises by voluntary agreement is there any contract: where it arises by operation of law (*commune sine societate*) each person may have duties to the other enforceable by law, but they are not mutually intended and obligatory in consequence of the consent.

The fourth group contains transfers for money, either transfer of property from one to another (*emptio venditio*), or transfer of the use of property, or of services (*locatio conductio*).

Loan, Deposit, Pledge.

The first group of *bonae fidei* obligations is composed of such as arise out of the transfer without payment of the physical possession of a thing. A man may lend for instance his silver plate to another for him to use; or he may deposit it with him for safekeeping; or he may put it in his power as security for a debt. In all these cases, loan, deposit, pledge (*commodatum, depositum, pignus*), the contract was held to be formed *re, i.e.* by the transfer into the other's possession. They are primarily one-sided contracts; the lender, depositor or pledgor having an action (*rectum judicium, actio directa*) to recover possession of the thing in good state, at the time or in the circumstances agreed on, the other party having no counterclaim, except for any incidental expenses he may have been put to in safekeeping (*contrarium judicium, contraria actio*). Loan is for the benefit of the borrower; deposit for the benefit of the depositor; pledge is primarily for the benefit of the creditor who thus gets security, but secondarily for the benefit of the debtor who thereby gets credit (Modest. in *Collat.* x 2 §§ 1, 2; Just. iii 14 § 4). In all any use of the thing, except as agreed on or approved by the lender, depositor, or pledgor, makes the user liable *furti* (D. xlvii 2 fr 55 pr § 1; xiii 1 fr 16). Any payment (rent, interest, *etc.*) for the loan or deposit

converts the contract into one of letting and hiring or of *mutuum*; or in some circumstances an action *praescriptis verbis* may be the right remedy (cf. D. xvi 3 fr 1 § 9).

A. Loan (*commodatum*).

1. This contract is also denoted by the words *utendum dare*[1], *accipere*, which are equally applicable to moveables and immoveables. Labeo wished to confine *commodare* to moveables, but this theory was not accepted, though the gratuitous use of other's land is more often the subject of *precarium* (cf. D. xliii 26 fr 1). What is consumed by the use (*e.g.* corn) is not subject of *commodatum* but of *mutuum*; nor is money, unless the coins themselves are intended to be returned, as when it is lent for mere show or for use as a symbol of price (D. xiii 6 fr 1 § 1; 3 § 6, 4).

2. Loan being entirely for the benefit of the borrower, he is responsible not only for fraud (*dolus*) but also for fault (*culpa*). That is to say he is bound to exercise the greatest care, to make only such use as was understood and intended by the lender, and to return the thing lent in safety according to the arrangement made, with all its belongings. Any profit which has been made from it, is usually returnable to the lender, but in the case of the article's being stolen and the borrower's recovering penalty in addition to the thing or its value, there was much doubt whether the borrower must give up the penalty to the lender: Papinian's final opinion was that, as the risk was the borrower's, he ought to have the benefit of the penalty (fr 5 §§ 2, 3, 9, fr 13 § 1; Cod. vi 2 fr 22 § 3 *a*). If the thing be stolen by the borrower's own slave, the borrower remains responsible, but no action of theft is possible (D. xlvii 2 fr 54 § 2; see p. 205). The conditions of use should be laid down at the time of lending, not afterwards, so as to change a contract already formed. The borrower is not responsible for mere fault, if the loan is really for the benefit of the lender, as for instance in the case of a praetor's giving a dramatic

[1] Cf. Plaut. *Asin.* 444 *Scyphos quos utendos dedi Philodamo rettulitne?... Non? si velis dare, commoda homini amico.*

show and lending dresses to the actors. Nor is he responsible for the sickness or death of a slave lent him, or for loss or damage by some irresistible occurrence, as fire, shipwreck, the falling of a house, a landslip, or pirates or brigands, where there has been no use of the thing beyond or other than was authorised, and no fault on his part (D. xiii 6 fr 5 § 10, 17 § 3, 18 pr). If a slave lent runs away, the borrower is responsible, provided the slave is of an age or character or in circumstances evidently requiring safekeeping (fr 5 §§ 6, 13, fr 18 pr). Where a loan, *e.g.* of a carriage, is made to several persons, each is responsible for the whole, but payment by one clears all (fr 5 § 15). If a borrower is sued for theft, he is not liable also to suit on the loan; and *vice versa* (D. xlvii 2 fr 72 pr).

3. The borrower has a counter action against the lender to recover any proper expenses, if at all considerable, to which he has been put in keeping or recovering the thing lent. The food of a slave is not chargeable to the lender: it is regarded as a set-off against his services. But if the slave has stolen from the borrower, or damage has been done to him by the thing lent (*e.g.* a cracked or tainted vessel), the lender is liable (by the counter action) if he knew of the vicious quality. If he did not know, he is still liable on a noxal action for theft (D. xiii 6 fr 18 §§ 2, 3, fr 22). Unreasonable withdrawal of the thing lent may render the lender liable (fr 17 § 3). A counter claim can be enforced either independently or as a set-off against a direct claim (fr 17 § 1, 18 § 4).

4. The lender retains not only the property but the civil possession of the thing lent; the borrower has only the physical possession. But his liability duly to return the object gives him a sufficient interest to entitle him to sue for theft anyone who abstracted the thing: for any injury to the thing by an outsider the lender alone can sue under the *lex Aquilia* (fr 5 § 15, fr 8, 19; ix 2 fr 11 § 9).

Borrower's heir is liable only so far as his share in the inheritance extends, unless he happens to have the physical power of restoring the whole and does not do so (D. xiii 6 fr 3 § 3).

The issue of an action *commodati* might be either *in jus* or *in factum concepta* (Gai. iv 47. See Book VI chap. v iii 4).

B. Deposit (*depositum*).

1. Deposit is the transfer of a thing to the possession of another for him to keep for the depositor and return on demand, or as agreed. Instead of *deponere*, *commendare*, or *servandum* or *custodiendum dare* are common expressions (Paul ii 12 §§ 2—4; Scaev. ap. Gell. vi 15). If any use is intended to be made of the thing deposited, the contract may be *commodatum* or *mutuum*: if any payment is to be made by either party, it would be a contract of letting and hiring.

(*a*) There was an action for deposit granted by the XII tables for double damages (Paul ii 12 § 11)[1]. The action in use was from the praetor's edict and was for single damages in ordinary cases, but for double if the deposit was made in consequence of an emergency such as fire, shipwreck, housefall, public tumult, or robbers (D. xvi 3 fr 1 § 1).

(*b*) The depositary was liable only for fraud or such gross negligence as was akin to fraud. No agreement could affect the liability for fraud; and fraud once committed makes the depositary liable whatever may happen to the thing. Otherwise (except by special agreement) he bears no risk, if the thing is lost or perishes. The depositor has only himself to blame if he has chosen a careless depositary (Paul ii 12 §§ 6, 10; D. xvi 3 fr 1 §§ 6, 7, 35, fr 14 § 1, 32; xliv 7 fr 1 § 5). Any use or handling of the thing contrary to what the depositary believes to be the depositor's intention makes the depositary liable for theft, as well as on the deposit (D. *ib.* fr 29 pr; xlvii 2 fr 77 pr). He is bound to restore all the produce of the thing, whether fruits, offspring of slaves or other accessions; and if there is any delay in restoring on due demand, he is liable for interest of money deposited (D. xvi 1 fr 1 § 24, fr 24).

[1] Ihering suggests that the action really meant was that for *furtum nec manifestum*, the XII tables having no action for dealings with deposit short of this (*Schuldmoment* p. 32).

Justinian (*Inst.* iv 6 §§ 23, 26) speaks of the damages being doubled in certain cases of deposit, if the action was disputed. I do not find this elsewhere.

(*c*) Restoration must be made of the thing itself, a set-off for it not being allowed. If it is in a damaged condition, the restoration may be treated as fraudulent non-restoration (Paul ii 12 § 12; D. xvi 3 fr 1 § 16). It should be made at the place where the thing is, or would be but for fraud on the part of the depositary (fr 12 § 1); and should be made as a rule to the depositor. If a slave deposited it, it should be returned to the slave, unless there be reason to think the slave's master would object, or the slave have been manumitted or alienated since the deposit. If the thing turns out to be the depositary's own, or to have been stolen and the owner claims it, the depositor has no right to the return. Otherwise the depositor is not disqualified from suing by want of rightful claim to hold: his responsibility to others gives him a lawful interest (fr 1 § 39, 11, 31).

(*d*) Where there are two, or more, depositors, they can claim their shares, or, if so agreed, either can claim the whole. If there are two or more depositaries, they are not discharged from their obligation, until the depositor has received back in full what he deposited, whether one or both have returned it. Where the depositor is dead, leaving several heirs, each can claim his share. Where some have received their shares and the depositary is (without fraud) unable to pay the rest, it was a disputed point whether these latter could claim from the former. But if the deposit is not divisible it should be returned to the heirs present, as soon as the majority in value have entered, security being given to the depositary against claims by the others; or in default of security the thing or things should be deposited in a temple (fr 1 §§ 37, 43, 44, fr 14; Cod. iv 34 fr 12).

(*e*) A depositary's heir is responsible to the full for depositary's fraud, not merely to the extent of what has come to him. If there be more heirs than one, each is responsible in the ratio of his share in the inheritance. In case of deposit on emergency, where the depositary was liable for double damages, his heir is liable only for single, unless the heir act fraudulently, when it becomes double, *i.e.* either double his share, if the deposit was divisible, or double the whole, if indivisible (D. fr 1 § 1, fr 22).

If a depositary has further deposited the thing with someone else, both he and the original depositor can (the latter by an analogous action) sue the second depositary (Paul ii 12 § 8).

A son under power can sue or be sued for a deposit made by or with himself. If a father or master is sued (*de peculio*) on a deposit made with his son or slave, he is liable not only for their fraud, but also for his own (fr 1 § 42, 19). Some lawyers held that if a slave when manumitted retained a thing deposited with him, he could be sued directly. Certainly in the case of an emancipated son suit should be brought against him and not against his father, even within a year from emancipation (fr 21).

(*f*) A counter action (*contrarium judicium*) can be brought by the depositary, similar in other respects to that brought by a borrower (*commodator*), but he can charge the depositor with a slave's or animal's maintenance (*Collat.* x 2 § 5).

Both the direct and the counter action are *bonae fidei*: but in the direct action only were the damages assessable on oath, and condemnation caused infamy (Gai. iv 62, 182; D. fr 1 §§ 23, 26; fr 5 pr, iii 2 § 1).

(*g*) The praetor set forth in his edict two forms of issue in cases of deposit, on which see Book VI chap. viii 4. In the *formula in factum concepta* it appears to have been necessary to specify the article deposited in precise terms, *e.g.* of gold and silver, the form and weight; of wool, the weight and dye; of a box containing several articles, then the description of each, unless the box was sealed and contents not disclosed; but even then the depositor might sue not only for the box but for any individual article contained in it (D. xvi 3 fr 1 §§ 40, 41).

2. Where money was deposited with a banker or other person, with the understanding that the amount, not the identical coins, was to be returned on demand, the transaction was not strictly a deposit. (Modern writers call it *depositum irregulare.*) But the suit *depositi* still applied; interest was not due, unless, as in other *bonae fidei* contracts, delay occurred in returning the amount. If however payment of interest was part of the understanding (*lex contractûs*) it could be enforced.

Such a deposit might by agreement easily be converted into a regular cash loan (D. xvi 3 fr 24, 25 § 1; xix 2 fr 31; xii 1 fr 9 § 9, fr 10).

Where a banker fails, ordinary depositors can claim before those who have put their money at interest with him or through him, and before privileged creditors. As between themselves all such depositors rank equally (D. xvi 3 fr 9, §§ 2, 3).

3. A special use of deposit was when an object of dispute was handed over to a stakeholder (*sequester*) to keep, produce and deliver according to instructions. There was an action called *sequestraria actio* to compel the *sequester* to fulfil the agreement (D. xvi 2 fr 5 § 1, 6, 7, 12 § 2, 33). The stakeholder was considered to have civil possession of the thing so as to prevent either party from gaining the property by usucapion. The successful party on obtaining possession would however be able to count the time during which the thing was held by the stakeholder (fr 17 § 1; xli 2 fr 39).

4. In early times deposit was sometimes accompanied with conveyance of the ownership in trust for restoration (*fiduciae causa mancipio dare, quo tutius nostrae res apud amicum sint* Gai. ii 59, 60). Similarly Boeth. *ad* Cic. *Top.* 10, in Bruns[6] *Fontes* p. 77. Of this we know no more: see below, C.

C. *Fiducia*: especially of pledge.

'Trust' (*fiducia*) occurred in several parts of the law, when a permanent relation was created which was intended to have only a special or temporary effect. A woman made a copurchase, and thus passed into the hands of a stranger, merely to change her guardian or enable her to make a will. A son or daughter passed into the power of an outsider, as a step towards emancipation. To evade the restrictions of the law, a man was made heir or legatee with instructions to pass on the property to another or to manumit a slave. So anything might be conveyed to another by mancipation or surrender in court in trust for reconveyance on a certain event or on request. This was done, we are told, for two purposes, either as a mere deposit for safekeeping or as security for

a loan. The friend in the first case, the creditor in the second case, was thus made owner, and had in law all the rights of an owner to hold and protect the property during his friend's absence or until the loan was repaid. And in order to facilitate the re-entry of the old owner into his rights, if he regained possession (subject in the case of a creditor to certain restrictions) a year's possession was held to be sufficient for usucapion, even if the thing was land (*res soli* Gai. ii 59, 60; cf. vol. I p. 477). Probably the words *fiduciae causa* or something to that effect[1] appeared, at any rate after the first fearless innocency had passed, in the formula of mancipation or surrender (cf. Gai. *l.c.* and i 114); or a distinct declaration was made at the time, as one of the terms of mancipation (*lex mancipii* i 140), to shew the limited purpose. Eventually the praetor granted an action (*judicium fiduciae*), at any rate in cases of pledge, to compel restitution of the object. It was *bonae fidei judicium*, and condemnation involved infamy (Gai. iv 62, 182).

1. (*a*) *Fiducia*[2] was one of three forms of pledge in use among the Romans, *fiducia, pignus, hypotheca.* The essential of pledge is that a creditor is put into control of a thing in order to insure, either by the desire of the debtor to re-possess his property, or by sale of the thing, if necessary, the total or partial satisfaction of his claim. If the claim is otherwise satisfied, the control of the creditor is removed. In the case of *fiducia* the

[1] The formal words used in *fiducia* are not known, but references to such are found in Cic. *Off.* iii 15 § 61 *Reliquorum autem judiciorum haec verba maxime excellunt; in arbitrio rei uxoriae 'melius aequius'; in fiducia 'ut inter bonos bene agier': ib.* 17 § 70 *Quanti* (how precious!) *verba illa 'uti ne propter te fidemve tuam captus fraudatusve sim'* (perhaps from the *lex mancipii*, cf. D. xvi 3 fr 1 § 42); *quam illa aurea 'ut inter bonos bene agier oportet et sine fraudatione.'* Cf. *Fam.* vii 12 § 2; see Lenel *EP* § 107.

[2] *Fiducia* originally 'trust,' 'confidence,' reposed in the depositary o creditor and so used in the phrases *pactum fiduciae, fiduciae causa,* came t be applied to the thing conveyed in trust. See Cic. *Flac.* 21 § 51 (belov p. 100 n.). Gaius (ii 59; iii 201) has *fiduciae causa dare*, or *mancipar etc.*; Paul (ii 13 § 6; iii 6 § 69) has *res fiduciae data* (like *pignori dat etc.*) where *fiduciae* may be either the thing (pred. dative) or the contra 'given to trust' (cf. *pignus contrahitur* D. xiii 7 fr 1 pr, *fiducia contrahit* Gai. ii 60).

creditor is made owner[1]; in that of *pignus* he is made possessor; in *hypotheca* he has only a power of sale. The differences between them appear to have been only such as arose naturally from the difference in their character, but our information is very imperfect, because *fiducia*[2] went out of use with mancipation and surrender in court, and the Digest expressly treats *pignus* and *hypotheca* as differing only in name (D. xx 1 fr 5 § 1). Some passages relating to *fiducia* appear to have been incorporated in the Digest with little change beyond the substitution of *pignus* for *fiducia*[3].

(*b*) In *fiducia* the creditor has no occasion for a power of sale to be expressly given him: that is one of his rights as owner; and even an agreement not to sell is not binding, only that before proceeding to exercise his right he must give the debtor notice, probably at three different times, and allow opportunity for repayment. For the debtor's right to redeem and have a

[1] The English mortgage forms a striking analogy to the Roman and was probably derived from it. In early times there were two kinds of pledges of estates, *vivum vadium* and *mortuum vadium*. A living gage was where an estate was granted to the creditor to hold till the debt was repaid by the profits (cf. *ἀντίχρησις* p. 107). This is an estate conditioned to be void as soon as such sum was raised. A dead gage, or mortgage, is where the estate is granted to the creditor on condition that, if payment be made on a certain day, the debtor may reenter or may demand reconveyance, but, if payment be not made, the debtor forfeits all claim, and the estate is dead to him: the creditor is absolutely entitled. So the law continued till the end of the fourteenth century, when the Courts of Equity interfered, and the debtor's equity of redemption, even after the day was passed, became recognized, and either party could apply to the Court for an account of the debt and interest, or of the profits, and then either payment was made and the estate reconveyed or else foreclosure took place. But the usual course was for a power of sale to be given by deed to the mortgagee in case of default. The mortgagor continued to have an estate in the land, which could be devised, granted and entailed, but he had not the possession, except perhaps as tenant at will (*precario*) (Butler's notes to Co. Litt. p. 205 a; Blackstone ed. *Kerr*, Bk ii ch. 10).

[2] It is said to be last named in Cod. Theod. xv 14 § 9, A.D. 395, and Sidon. Apoll. *Ep.* iv 24 § 1 A.D. cir. 470.

[3] See Lenel *ZRG* xvi 104; but I am not convinced as to all his instances, *e.g.* compare Gai. iii 201 and Paul ii 31 § 19 with his view of D. xiii 7 fr 22 pr. Karlowa (*RG.* ii 563) also disagrees from Lenel as to fr 22 and fr 24 (D. xiii 7).

reconveyance of the thing on payment of his debt was fully recognized by law. In some sort he was regarded still as owner, potential if not actual; he could bequeath his 'equity of redemption' as we should call it, by the form called *praeceptio:* and he could sell the thing itself, tender the creditor payment of his debt out of the purchase money, obtain reconveyance, and transfer the thing to his purchaser. Any profits which the creditor might have made as owner of the thing (*e.g.* through a fiduciary slave) had to be deducted from the debt. And the debtor's rights of latent ownership were further recognized by his not being liable for theft, if, having obtained possession of the thing without any agreement or permission of the creditor, he retained it without having paid his debt. Continued use, notwithstanding his knowledge of the formal ownership being in another, enabled him to reacquire the ownership (Gai. ii 59, 60, 220; iii. 21; Paul ii 13 §§ 2, 5).

(*c*) The creditor if he sold for more than the amount of the debt had to pay the excess promptly to the debtor. He could not be purchaser himself, being already owner, and if the sale was made to another for him without the debtor's consent, it was not a good sale and the debtor's right of redemption was not barred. It appears however to have been usual for a clause of forfeiture (*lex commissoria*)[1] to accompany the conveyance to the creditor, giving him the right of foreclosing the equity of redemption, if the debt were not fully extinguished by a certain day[2]. Such a clause was forbidden altogether by Constantine (Cod. viii 34 fr 3; Paul ii 13 §§ 1, 3, 4).

(*d*) The possession of the thing often remained with the debtor by the consent of the creditor, either gratuitously or for hire. Whether the *fiducia* was security for interest as well as for principal would depend on the agreement. The practice too

[1] Cf. Cic. *Flac.* 21 § 51 *Pecuniam adulescentulo grandi fenore, fiducia tamen accepta occupavisti. Hanc fiduciam commissam tibi dicis: tenes hodie ac possides* (where *fiducia* is probably the translation of a Greek provincial term for pledge, perhaps *ὑποθήκη*; Voigt *Jus Nat.* ii 418; Karlowa *RG.* ii 575): *Fam.* xiii 56 *Philocles ὑποθήκας Cluvio dedit. Eae commissae sunt. Velim cures ut aut de hypothecis decedat easque procuratoribus Cluvii tradat aut pecuniam solvat.*

[2] See below, p. 110, and Mitteis *Reichsrecht* p. 441.

of warranting the title when the thing was sold might vary with the circumstances of the case, but would presumably be necessary in order to get a good price. The *actio fiduciae*, mentioned above, would settle equitably the rights of creditor and debtor and would run for and against the heirs of both. If the creditor had improved the property, he could claim recoupment of the cost (Paul ii 13 § 7; cf. D. xlvii 4 fr 13). The debtor's heirs had no action against a creditor who had sold a thing pledged or mortgaged (*pignora vel fiducias*) unless the action was begun by the debtor himself (Paul *ap. Consult.* vi 8[1]). If the creditor bequeathed the property, the debtor's action would lie not against the legatee but against all the heirs (Paul ii 13 § 6).

(*e*) A tablet found at San Lucar in the Roman province of Baetica (Bruns ed. 5 no. 110), probably of the first century after Christ, may be quoted as illustrative of fiduciary contracts. It contains a form or precedent used by a banker for securing advances past and future. The first part is a record of a mancipation of a farm and slave, made in trust to a slave who *fidi fiduciae causa mancipio accepit*[2] on payment of one sesterce each. Subjoined is a *pactum conventum*[3] explaining the purpose and conditions of the mancipation. All advances made or to be made in actual cash or in credit (*credidit*)[4] or by book entry (*expensum tulit*), and all liabilities incurred by the

[1] Arndts (Glück's *Pand.* xlviii p. 210) questions this. See also Dernburg *Pfandrecht* i p. 15.

[2] The like combination occurs in Plaut. *Trin.* 117 *tuae mandatus est fide et fiduciae.* In the tablet *fidi* is an old form of the genitive of *fides.*

[3] The *pactum conventum*, explaining the absolute *fiducia*, resembles in an English mortgage the defeasance which is sometimes separate from the conveyance, though referred to its date and recorded together with it. But usually the condition of the conveyance is inserted in the conveyance deed itself (Kent *Comm.* iv 141—158 ed. 9).

[4] *Credidit* is taken by the expositors generally to refer to stipulations, on the ground of the parallelism in Cic. *Rosc. Com.* 4 § 13, 5 § 14; and Gai. iii 124. But there stipulation had a due place: in our case I do not see that the banker would necessarily or always make a stipulation with the debtor whenever he gave him credit on a purchase or other business. I take *credidit* to refer to any credit in general, other than book-entry which is mentioned separately.

banker in becoming surety for the mortgagor are covered by the mortgage. On any default of the debtor at the due day in repaying advances or discharging the banker's liability, the banker or his heir has the right of selling such of the mortgaged property as he chooses, where and when he chooses, for cash. He is not obliged to mancipate them for more than one sesterce, nor to give a surety for the guaranty of title (*satis secundum mancipium dare*), nor personally to warrant the title in the usual words, nor to promise either the single or double value in case of eviction. Here the tablet breaks off: probably another tablet contained a covenant for remancipation to the mortgagor on payment of advances in full. The mancipation for one sesterce is to shew that the transaction is not sale, but in this case pledge. The mortgagee is not required to sell for more than one sesterce: this is in order to reduce his obligation to a minimum, in case eviction took place. (See the essays referred to by Bruns; also Karlowa *RG.* ii 378.)

2. *Pignus* and *hypotheca* will be treated together as they are often put together in our authorities. If a corporal object was passed into the possession of the creditor as security for the discharge of an obligation, it was properly *pignus;* if it was not put into his possession but treated by agreement as such security, it was *hypotheca. Pignus* was of immemorial antiquity; *hypotheca* was, as the name shews, of Greek origin, and, though once mentioned by Cicero in connexion with the province of Asia, was, as a Roman institute, probably later than his time. Not being confined to corporal objects, it admitted of much wider application, and in practice would be the more readily resorted to, because the use and possession of the thing hypothecated was not withdrawn from the debtor until sale. When a pledge was in the creditor's possession, the debtor could enforce his rights by an *actio pigneraticia*, the creditor could enforce his against the debtor by a counter action (*contraria pign. actio*). When the pledge was not in the creditor's possession, he could obtain it by an interdict or *actio hypothecaria.*

(*a*) Pledge was a contract made by agreement (*pactum conventum*), either verbal or in writing, with or without delivery

real or constructive, of the object pledged. But the object must be agreed on (D. xiii 7 fr 1 pr; xx 1 fr 4). Pledge may be made as security for the fulfilment of any obligation, whether one's own or another's, whether a money-loan (which is the most common case) and the interest on the same, if that be agreed to be covered also, or dowry or purchase or hiring or mandate or suretyship, *etc.*, whether the obligation be present or future, absolute or conditional, civil, praetorian, or natural; and it may cover the whole or part of an obligation. If the pledge is for a conditional obligation, it exists only if the condition occur (D. xiii 7 fr 9 § 1; xx 1 fr 4, 5). A testator could also establish a pledge by way of legacy: this was decided by rescripts of the Antonines. A magistrate could do so by sending a person into possession of some object (xiii 7 fr 26; xxxiv 1 fr 12); or by seizure in execution of a judgment (D. xlii 1 fr 15). On tacit pledges see below (*d*, *e*).

(*b*) Anything saleable can be pledged, not merely corporal things, but a usufruct, or (if the creditor has a neighbouring farm) rural servitudes, but not urban servitudes. An undivided share of a common thing may be pledged, and division will still leave both parts subject *pro rata* to the pledge. A flock or herd may be pledged and will remain so, although all the individual components may be changed. Similarly a shop and its contents (D. xx 1 fr 9 § 1, 11 § 2—fr 13 pr, 34 pr, tit. 6 fr 7 § 4). Fruits not yet gathered, children or animals not yet born, may still be pledged either by full owner or by usufructuary (xx 1 fr 15 pr). A general charge might be created on all the goods (*bona*) of the debtor, what he had and what he should afterwards have; and a clause of this kind was often added in contracts after certain things had been specifically pledged. Such a general charge was held not to include things which a debtor would not be likely to pledge specifically, *e.g.* his dress, furniture, necessary slaves, concubine, natural children, *etc.* (*ib.* fr 6—8; cf. fr 34 § 2). Nor did it preclude manumission of slaves (Cod. vii 8 fr 3).

An investment (*nomen*) might be pledged; and in such case the praetor granted the creditor an action (*utilis*) to get in the money, which would then be set off against the debt, or if

the investment yielded something else than money, this would be held by the creditor in pledge. The praetor would also protect the person whose debt was thus pledged against his original creditor. The document shewing the debt would naturally be put into the creditor's hand, just as the purchase deed sometimes was on a pledge of the property (D. xiii 7 fr 18 pr, 43; Cod. viii 16 fr 2, 4).

(*c*) A pledge of what is the property of someone else is not a good pledge unless the owner consents. Anyone knowingly pledging such, or pledging what is already pledged to someone else, unless there be an ample margin in value over the first debt, is liable to criminal proceedings for 'geckotry' (*stellionatus*[1]), if he have not informed the pledgee or second pledgee of the fact (D. xiii 7 fr 1 § 2, 20 pr, 36 § 1). The creditor pursuing a pledge in the hands of others is not bound to prove that it was the debtor's own, but only that at the time of pledge it was *in bonis ejus, i.e.* acquired *bona fide* by the debtor, though his title may prove to have been bad (cf. D. L 16 fr 49). Such proof of the thing's being *in bonis* at the time of agreement is of course not required when the pledge was general and related to subsequent acquisition. If the slave or thing was not then in existence, the proof relates to the mother of the child or young, or to the land on which the fruit was produced (D. xx 1 fr 3 pr, 15 § 1; tit. 4 fr 11 § 3; L 16 § 49). If the debtor sue the creditor for return of his pledge, the creditor cannot object that it is not the debtor's: that point has nothing to do with the contract between them, provided the debtor pays his debt. As between them the contract is good to support their respective actions against one another (D. xiii 7 fr 9 pr, § 4, 32). As regards third parties the pledge is good, only if and when the pledgor afterwards acquire and retain the ownership, or if he was at the time entitled to the Publician action. Unless the pledge was intended

[1] From *stellio* (*stelio*) a kind of lizard (cf. Plin. *HN.* xxx 89; Verg. *G.* iv 243). Any criminal fraud, not coming under a regular name, was so called and was punished severely *extra ordinem* (D. xlvii 20). Specially mentioned are fraudulent alienation of things pledged, spoiling them, making away with them, substituting other goods, and imposture or collusion to ruin another (*in necem alterius*).

to operate only in the contingency of the debtor's acquiring ownership and the creditor knew of the debtor's having no right to pledge, subsequent acquisition of ownership does not remove the original invalidity of the pledge, but a *utilis* action is granted to the creditor (D. xx 1 fr 1 pr, 9 § 3, 18; xiii 7 fr 41; cf. xliv 4 fr 4 § 30; Vangerow *Pand.* § 372 *Anm.* 2, and others). Whether the owner of a thing, becoming heir to one who has professed to pledge it, thereby becomes subject to the creditor's action in respect thereof, was disputed (D. xiii 7 fr 41; xx 1 fr 22). A pledge of what is already the creditor's is no pledge at all (D. L 17 fr 45).

A temporary or conditional ownership is good basis for a pledge; *e.g.* a *statuliber*, or land subject to a rent (*vectigale*), may be pledged, but on the condition being fulfilled or the land being forfeited, the pledge ceases (D. xx 1 fr 13 § 1, 31).

(*d*) Fruits of farms (*praedia rustica*) were held to be pledged to the lessor without express agreement (D. xx 2 fr 7 pr; Cod. viii 14 fr 3). So also the offspring of slaves and, at least when owned by the pledgor, the young of animals (D. xx 1 fr 26 § 2, 29 § 1) according to the Digest, but Paul (ii 5 § 2) denies this of *fetus aut partus*. If a wood was pledged and a ship or other things were made out of the timber, they were not subject to the pledge, unless express words had been used to include them (D. xiii 7 fr 18 § 3). All legal accessions to the thing pledged, such as alluvion to land, or buildings erected on it, or the usufruct falling in after the bare ownership has been pledged, are included in the pledge (D. xiii 7 fr 18 § 1, 21). The *peculium* does not follow the pledge of a slave (D. xx 1 fr 1 § 1).

In tenancies of buildings in towns (*praedia urbana*) the practice was that whatever was brought in with the intention of its staying there (*e.g.* furniture, *etc.*) was without any express agreement deemed to be pledged for the rent, and for any damage caused by the tenant: but this rule did not apply to things brought in only temporarily. The most general terms are used: *illata, inducta, invecta, importata, ibi nata.* A lodger's things were held to be pledged only for his own rent, and if he was granted his lodging for nothing, they were still not pledged for the general rent of the building. Such tacit

pledge was no hindrance to the emancipation of a slave, unless rent was actually due and the house was shut up by the landlord to enforce payment (D. xx 2 fr 2—6, 8, 9; xiii 7 fr 11 § 5). A lodger, who has paid the full rent for the period of his lease and desires to move, has a special interdict (*de migrando*) to prevent the landlord detaining any of his things, and this protection extends to things lent or hired out to him or deposited with him (D. xliii 32). In tenancies of farms (*praedia rustica*[1]) only those things which were brought in by agreement with the lessor (*voluntate domini*) were deemed to be so pledged (Cod. iv 65 fr 5; see Dernburg *Pfandr.* 1 p. 312).

(*e*) By a senate's decree under Marcus Aurelius anyone who, at the owner's request, supplied money either to him or to his contractor for reconstructing a building in Rome and its territory, had thereby the house pledged to him (D. xx 2 fr 1, xii 1 fr 25; cf. Cod. viii 14 fr 7). For taxes or contracts with the fisc the whole property of those liable was held to be pledged (Cod. viii 14 fr 1, 2).

(*f*) When the pledge has been handed over to the creditor, he is responsible both for fraud and fault, as in the case of *commodatum*; he is bound to keep safely and without injury to the thing pledged, but he is not responsible for *vis major* (D. xiii 7 fr 13 § 1, 24 § 3; Cod. iv 24 fr 5, 6). His possession is protected, and he retains it even if he leases the thing to the owner, but he cannot gain ownership by usucapion, because he does not possess as his own, but as another's (D. xli 2 fr 37; tit. 3 fr 13 pr, 33 § 6). The debtor has no right to demand restoration of the thing pledged or of any part of it until he (or someone for him) has paid (or at least offers in court) the whole of the debt, including interest, if interest was intended to be covered by the

[1] In Cato's treatise on farming we find forms of contract containing somewhat similar covenants for pledges, *e.g.* in that for selling the olive crop ungathered (*olea pendens*) the purchaser is to gather, and his implements to be pledged till the crop is paid for; *Donicum solutum erit aut ita satis datum erit, quae in fundo illata erunt pigneri sunto: nequid eorum de fundo deportato: siquid deportaverit domini esto* (*RR.* 146 § 2). So for the sale of winter pasturage: *Donicum pecuniam (solverit aut) satisfecerit aut delegarit, pecus et familia quae illic erit pigneri sunto* (*ib.* 149).

pledge. It is at the creditor's choice whether he will accept anything in lieu of payment, *e.g.* another pledge, or sureties, or a new debtor, or surrender his claim on the thing altogether (D. xiii 7 fr 9 §§ 3, 5; xx 6 fr 6 § 1; xlvi 3 fr 40). If however, though the pledge was handed over, the pledgee had never actually paid the loan, or had given a formal release, or had bargained not to sue for it, or the condition of the intended obligation had never occurred, the debtor could bring his action at once for return of the pledge (*ib.* fr 11 § 2). If without payment the debtor carries off the pledge, he is liable to the creditor for theft of the possession (Gai. iii 204). On the other hand if the creditor make use of the thing pledged, he is liable for theft (D. xlvii 2 fr 56 pr).

(*g*) Sometimes a special agreement was made for the creditor to take the fruits and set them off against the interest and principal. This was called *ἀντίχρησις*. Or, instead of actually working the estate or occupying the house, *etc.* himself, he might let it and set off the rent. The debtor can, after payment has thus or otherwise been taken in full, obtain redelivery of the thing by the ordinary *actio pigneraticia*, but the creditor, if he have lost possession, must obtain an action *in factum* for its recovery, there being in fact no proper pledge, so as to enable him to use the *Serviana* (D. xiii 7 fr 33; xx 1 fr 11 § 1; Cod. iv 24 fr 1; viii 27 fr 1). If a pledge is given for a loan on which debtor pays no interest, the creditor was allowed to retain fruits up to the amount of lawful interest (D. xx 2 fr 8). And generally whenever a creditor, except under some special agreement, retained produce from the pledge whether fruits or timber, or offspring, or rents of land and houses, or wages of slaves, *etc.*, or indirect gains, *e.g.* such as would come from an action or condiction for theft, he has to account for them to the debtor, as he has also for any damage done to the pledge (Cod. iv 24 fr 1—3, 7). On redelivery of the pledge a debtor can call on the creditor for a guaranty against any fraud, or, in the case of land and houses, against any easements having been lost by nonuse (D. xiii 7 fr 15).

(*h*) On the other hand the creditor by the counter action can claim, even if the pledged object has perished, reimbursement

for any proper expenses to which he has been put for the maintenance of the thing: *e.g.* medical attendance for a slave, repairs to a house or highway, *etc.*, and for any improvements, not being excessive, made by him (*ib.* fr 8 pr; fr 25 : Cod. viii 13 fr 6), and for any impairment of the value made by the debtor (D. xx 1 fr 27).

A creditor of a slave in pledge, who steals from him, can sue the debtor (*furti*) and get noxal conveyance, and the debtor, if aware of the slave's thievish propensity, can be forced (by the counter action) to make full compensation for the creditor's loss (D. xiii 7 fr 31). The creditor can sue by this counter action if the debtor has pledged what does not belong to him, or what has been pledged to someone already, or in any other way has acted fraudulently (*malitiose* fr 9 pr 16).

(*j*) By pledging a thing the debtor did not lose his power of selling or otherwise dealing with it, but any disposition that he makes is subject to the pledge[1]. He has limited his own rights as owner, and subsequent transactions affect only what remains of them, until he has redeemed the pledge and thus regained his full power. Meanwhile he cannot emancipate a slave who is specifically pledged, and, if he disposes secretly of a pledged slave or other moveable, he is liable to the creditor for theft (D. xiii 7 fr 18 § 2; xl 1 fr 13; xlvii 2 fr 19 § 6). Whether an agreement with his creditor not to sell rendered a sale made by the debtor null is much disputed: it appears to be affirmed in the Digest (xx 5 fr 7 § 2).

(*k*) The creditor on the other hand has usually, as part of the agreement of pledge, a right to sell and convey unrestricted ownership in the thing pledged, so far at least as the debtor was owner (Gai. ii 64). Even if the right of sale was given, not generally (*in rem*), but to the creditor, it availed for his heir unless expressly excluded. And unless express agreement was made to the contrary, the right of sale was presumed to

[1] There is a question, whether the child of a pledged slavewoman, born after the debtor had sold her, was subject to the pledge (so D. xiii 7 fr 18 § 2 xliii 33 fr 1 pr) or the free property of the purchaser (so D. xx 1 fr 29 § 1 cf. fr 1 § 2). See Czyhlarz, Glück's *Pand.* on D. xli 1 p. 418, who takes fr 2 to be interpolated.

accompany a pledge, at least in later times (see however D. xlvii 2 fr 74). But the creditor can sell[1] only if the debt and interest remain unpaid on the due date; and only after notice (three notices ?) to the debtor, and after waiting some time (one year ? *annus luitionis* Cod. viii 33 fr 3 pr) to give debtor a chance to redeem. If more things than one are the subject of the pledge, he can sell all or which he likes. He is not compelled to sell. If he sells in any way contrary to his agreement, he is liable for theft (of a moveable), and the sale is invalid (Paul ii 5 § 1; D. xiii 7 fr 4—6[2]; 8 § 4; xx 5 fr 8; xlvii 2 fr 74; Cod. viii 27 fr 5). Apart from special agreement with the purchaser the creditor is not responsible for the debtor's title or for faults in the thing, and the purchaser cannot if evicted[3] reclaim the price; nor, if the price is not yet paid and vendor has expressly guarded against being held responsible, can he resist a demand for it. But the creditor is responsible for concealment of defect in the title and for any fraud of his own, and cannot resist redhibition in a proper case (D. xix 1 fr 11 § 16; xx 6 fr 10; xxi 2 fr 68). The purchaser takes the thing free from all obligation to the selling creditor or subsequent creditors, or, unless a right of repurchase was specially reserved, to the debtor. The proceeds of the sale must be applied, first to the payment of interest (if the pledge covered it) and of expenses incurred on the thing; next to discharge of the principal debt: the surplus (if there be no other pledgees) belongs to the debtor, who has a right to be paid without delay in cash and not by delegation of the purchaser. If the debt is repaid completely and there is no chance of redhibition, the debtor is freed from the creditor: if it is not repaid, the creditor retains a claim for the residue. If on the creditor's offering the thing for sale, the debtor purchase at

[1] A notice of intended sale appears to have been affixed to the property. Such a notice put up maliciously was held by Servius Sulpicius to justify an action for insult (D. xlvii 10 fr 15 § 32).

[2] On the interpolations in these see Gradenwitz *Interpol.* p. 22; Eisele *ZRG.* xxiii 304.

[3] The better opinion was that the creditor could be made to cede to the evicted purchaser the creditor's actions against the debtor (D. xxi 2 fr 38).

a price less than the debt, he gains nothing thereby (D. xiii 7 fr 7, 8 § 5, 35, 40 pr, 42; xx 5 fr 7 pr § 1, 9 pr; xlvi 3 fr 26; Cod. viii 27 fr 3).

(*l*) Sometimes, instead of a power of sale being given to the creditor, it was agreed that if by a certain day the debt (and interest) were not paid, the creditor should become owner—in fact be the purchaser at the price of the debt and interest. There was no legal objection to a sale of the pledge to the creditor at any time and whether conditionally or not, but the price must be fixed. In the case supposed the price is in fact fixed by the rate of interest and duration of the loan. In another case the price was left to be determined when the time for payment of the loan arrived; it was to be a fair price (*justum*); and this was confirmed by a rescript of Severus and Antoninus (Vat. 9; D. xx 5 fr 12 pr; tit. 1 fr 16 § 9; cf. xviii 1 fr 81 pr). The practical difference of such arrangements from the clause of forfeiture (*lex commissoria*) in mortgages was apparently that on a sale the debtor could secure by the *actio venditi* a fair account between him and his creditor, whereas on forfeiture the creditor was not accountable for any part payments made by the debtor, or any produce he might himself, if in possession, have got. (See Dernburg *Pfandrecht* ii p. 283.)

Sometimes when no purchaser for the pledge could be found, the creditor obtained from the emperor or praetor the right of retention as owner (D. xiii 7 fr 24 pr; xxxvi 1 fr 61 pr; Cod. viii 33 fr 1, 2, *etc.*).

(*m*) An unsecured creditor (*chirographarius, i.e.* having a written acknowledgment only) has no right forcibly to seize pledges from his debtor without an order from the governor (*praeses*). He is liable under the Julian law for private violence. If however he was authorised by a clause in the agreement, and proceeds to take possession, he is not liable for violence, but he ought first to obtain a magistrate's order. Where he has had a pledge or *fiducia* put into his possession by the debtor, he requires no order to justify him in recovering it if lost (Paul v 26 § 4; Cod. viii 13 fr 3[1]).

[1] This constitution (of Severus and Antoninus, A.D. 205) may refer merely to possession or to (eventual) ownership: *creditores qui non*

(*n*) The same thing may be pledged to two or more persons for different debts: if the later creditor is informed of the previous pledge, or if the value be ample to cover both, the proceeding is lawful; if otherwise, the debtor is liable to a criminal charge. As against third parties each pledgee can claim the whole: as against the debtor they can claim only for the amount of their debt (and interest), and only after earlier pledgees have been satisfied. Whether general or special they rank in order of date of valid constitution of pledge, and, if the money has been actually paid, it does not matter whether the pledge is absolute, or depends on a condition independent of pledgor's will but not yet realised, or on a time not arrived before the constitution of a later pledge; but the mere payment of the money without any constitution of pledge does not entitle the creditor to priority (D. xiii 7 fr 36 § 1; xx 1 fr 16 § 8; tit. 3 fr 1, 2; tit. 4 fr 9 § 1, 11 pr, § 1, 12 § 2; Cod. viii 17 fr 1—8). The first creditor has priority only for advances made before the pledge to others; and for interest (if the pledge covered it), whether accruing before or after subsequent loans. He cannot claim priority if he has consented to such subsequent pledging: but he does not lose his priority by novating his debt and getting additional pledges; and he alone has the right of selling the pledge (D. xx 4 fr 12 §§ 3—6, fr 16, 18). Subsequent creditors with a pledge on some object are entitled to pay off the first or earlier creditors, and stand in their place for the whole amount of the payment so made as well as of their own prior claims, but if they pay sums due for interest, they cannot charge the debtor with interest upon those. This right of a subsequent creditor to obtain his pledge by settling earlier claims cannot be enforced against a purchaser from the creditor, but can against a purchaser from the debtor who has paid the first creditor with the purchase money, or against

reddita sibi pecunia conventionis legem, ingressi possessionem, exercent, vim quidem facere non videntur, attamen auctoritate praesidis possessionem adipisci debent (Cod. viii 13 fr 3). Mitteis (*Reichsrecht* p. 431) shews that agreements giving the creditor rights over the debtor's property without further application to the courts (*καθάπερ ἐκ δίκης*, sometimes *ὡς ὠφληκὼς δίκην*) were common in the eastern half of the Mediterranean from cir. 200 B.C. to 200 A.D. and later; cf. Arndts' *Pand.* § 379 n. 2.

a surety who on discharging his own obligation gets the pledge as if by purchase (Paul ii 13 § 8; D. xx 5 fr 2, 3; Cod. viii 19 fr 1; cf. D. xvii 1 fr 59 § 1). A later creditor obtains priority over those preceding for any expenditure required for the preservation of the thing pledged; *e.g.* if a ship be pledged, then for money spent on its repairs or on food of the sailors; if goods be pledged, then for freight or carriage or warehousing, *etc.* And a minor had priority if the pledged thing had been bought with his money (D. xx 4 fr 4—6 pr). The Crown, in all matters except taxes, has no right to priority on property acquired by debtor before the Crown pledge was established (fr 21; Cod. iv 46 fr 1).

In case of death of either creditor or debtor the debt (or credit) is divided among heirs automatically, but pledges belong to each coheir, and the consequent arrangements are matter for a suit *fam. ercisc.* (D. x 2 fr 18 § 7, 29; xx 5 fr 11, 14; Cod. viii 31 fr 1, 2).

(*o*) A pledge is extinguished by destruction of the thing pledged, or by payment of the debt, or by acceptance of a surety for the whole debt in lieu of the pledge, or by a bargain not to sue for the debt, or by an oath duly tendered and taken denying the debt, or by novation, or by consent of the creditor to waive it, whether he waive the debt itself or not. If creditor consent to debtor's sale or disposal of the object pledged, it is a question of fact whether he does so knowing that the pledge remains, though the ownership is changed, or intending to give up his claim. The latter appears to be assumed in the absence of special circumstances or expression. If the sale is for the purpose of paying off the creditor, the safer course is for him to require a written undertaking (*cautio*) from the intending purchaser to pay him out of the purchase money (D. xiii 7 fr 11 § 1; xx 6 fr 4, 5, 6 pr, 8 §§ 10, 15; L 17 fr 158). If a sale is rescinded, the parties re-enter into their previous rights (D. xx 6 fr 10). A creditor may sell his rights without in any way impairing them (fr 5 § 2). Nor is the pledge affected by creditor's obtaining judgment against the principal debtor or surety (D. xx 1 fr 13 § 4); nor by anyone obtaining the ownership by usucapion (D. xx 1 fr 1 § 2; xli 3 fr 44 § 5).

(*p*) A ward could not take or waive a pledge without his guardian's consent, nor could a procurator or slave appointed manager (*actor*), waive one, unless this was specially allowed them; nor could a son under power or slave waive a pledge for a peculiar debt, unless they got value for the waiver (D. xiii 7 fr 38; xx 6 fr 7 pr § 1; fr 8 § 5). A procurator can receive possession of a pledge for which his principal has contracted, but cannot make his principal liable on a contract of pledge: nor can he give anything of his principal's in pledge, unless he have previous mandate or his act be ratified, or he have the general management of the estate of one who was in the habit of taking loans on pledge: even then it is the procurator himself who will have the right to bring the pledge-action (D. xiii 7 fr 11 § 6 fr 12; Cod. iv 27 fr 3; but cf. D. xx 1 fr 21 pr). A debtor can resist the pledgee's suit by pleading a bargain of waiver made for him by his slave, or by a plea of fraud, if the bargain was made by his procurator (D. xx 6 fr 7 § 2).

(*q*) Where a creditor who has a pledge is himself in debt to another, it is possible for him to make this pledge a security to his own creditor; but it is good only so long as both debts are unpaid: if the first debtor pay off his debt, he can recover the pledge, and the second creditor must look to the money or other thing so paid to satisfy or secure his own claim (D. xx 1 fr 13 § 2; xiii 7 fr 40 § 2).

(*r*) Creditor's actions.

Where a thing was pledged, but was neither in the ownership (*fiducia*) nor the possession (*pignus*) of the creditor, he had his action on the loan or against the debtor, but originally no actual hold over the thing, and no power of recovering it from third parties or from the debtor himself. To meet this want, the praetor provided gradually several remedies:

Where a farmer had pledged his goods for the rent, the landlord had an interdict (*Salvianum interdictum*, first granted by a praetor Salvius?) to recover the goods from the farmer

(Gai. iv 147). Whether this interdict could be brought against third parties is not clear[1].

An action called *actio Serviana* (author and date unknown) was also granted to the lessor in the case of farm tenancies, and apparently not only where there had been an express agreement of pledge, but in all tenancies. And it ran against third parties as well as against the farmer himself (Just. iv 6 § 7; D. xx 1 fr 10). On the analogy of this an action was granted to all creditors who had not received payment to get or re-get possession of hypothecated goods. It was called *quasi-Serviana* and also *hypothecaria* (Just. *l.c.*; D. xvi 1 fr 13 § 1). Both the *Serviana* and *quasi-Serviana*, practically treated as one, were actions *in rem* available against any possessor, and the creditor was said *vindicare pignus*. Defendant is condemned, if he possessed the pledge and did not either restore or pay the damages: he is also condemned, if he has fraudulently parted with the possession: and in this case the damages are fixed by plaintiff's oath. If defendant pay damages and debtor sue for the pledge, he cannot recover without offering the value of the debt for which it was pledged. If the debtor possesses the pledge, and the Servian action is brought against him, the damages will be, not as in the case of other possessors for the full value of the thing, but only for the amount of the debt (D. xx 1 fr 16 § 3, 21 § 3; tit. 4 fr 12 pr; tit. 5 fr 1; tit. 6 fr 2; xiii 7 fr 43 pr). If this action be brought by a second creditor against the first, being in possession, he would be met by the plea *Si non mihi ante pignori, hypothecaeve nomine, sit res obligata*: if brought by the first against the second, being in possession, and the second plead *Si non convenit ut mihi res sit obligata*, the first can retort in the words of the previous plea (*si non mihi, etc.* fr 12 pr). A purchaser from the creditor could not bring the Servian action, at least in his own name (D. xxi 2 fr 66 pr).

Where a debt had been pledged, the praetor (as stated above *b*) eventually granted an *actio utilis* to the creditor to enable him to recover from the debtor's debtor (D. xiii 7 fr 18 pr;

[1] Cod. viii 9 fr 1 says expressly, no: but D. xliii 33 fr 1 says, yes. Lenel (comparing this latter with xx 1 fr 10) supposes the passage corrupted by Tribonian. See *ZRG.* xvi 180 sqq.

Cod. viii 16 fr 4; iv 39 fr 7). So one who lent money for the repair of a house, and by agreement was to recoup himself out of the rents, had an analogous action against the lodgers (D. xx 1 fr 20).

3. *Pignoris capio.* 'Levying a distress.'

An old right of 'taking a pledge' is mentioned by Gaius. *Pignoris capio* was authorised by custom in the case of soldiers against the persons charged with giving them either their pay (*aes militare, stipendii nomine*), or the money for the purchase of a horse (*aes equestre*) or of barley for the horse (*aes hordiarium*). The soldier might seize something by way of pledge[1], if the distributor made default. What would happen, if the distributor did not ransom it, we are not informed.

By the XII tables a like right was given in two cases: against one who had bought a victim for sacrifice and did not pay the price; and against one who had not paid the hire-money for a draught horse (*jumentum*) which had been let out in order to raise thereby money for a sacrificial feast (*in dapem, id est, in sacrificium*).

By the censors a like right was granted to the farmers of the public taxes of the Roman people against those who made default in payment[2]. But later the tax-farmer had a regular action to recover the same amount, as defendant would have had to pay in order to redeem such a pledge, if it had been taken.

In all these cases the levying of a distress[3] was accompanied

[1] There is an allusion to this in Plaut. *Poen.* 1285 *Pro majore parte prandi pignus cepi, abii foras: sic dedero: aere militari tetigero lenunculum;* cf. *Aul.* 526 sqq.

[2] Comp. Cic. *Verr.* iii 11 § 27 *Omnibus in aliis vectigalibus...publicanus petitor aut* (most MSS. have *ac*) *pignerator, non ereptor neque possessor solet esse.*

A similar right is given in certain cases to a company which farmed a mine at Vipascum in Spain (Bruns[6] no. 97 lines 16 and 35. The date is about end of first cent. p. Chr.).

[3] On English and other analogies see Maine's *Early Hist. of Institutions*, Lect. ix.

by a declaration in a set form of words, so that most lawyers, says Gaius, considered it was a *legis actio*, which in the sense of a proceeding authorised by statute it was; but, as other lawyers pointed out, it lacked the characteristics of a judicial procedure: it was done out of court; it was mostly done in the absence of the other party; and it could be done on a non-religious day (*die nefasto*), *i.e.* when judicial *lege agere* was not permitted. It was obsolete in Gaius' time (Gai. iv 26—30, 32; cf. Wlassak *PG* i 251).

A magistrate in some cases levied a distress in order to compel obedience to his orders (*pignora capere, pignoribus cogere, coercere*)[1]. Thus in the *lex Quintia* (B.C. 10) providing for the protection of the Roman aqueducts, breaches of the law may be punished either by a fine or by taking pledge (*multa pignoribus cogito coerceto* Bruns[6] p. 116); so in cases of alimony (D. xxv 3 fr 5 § 10 *pignoribus captis et distractis cogetur*). And a procedure by such a levy of distress was made part of ordinary execution for debt by Ant. Pius (D. xlii 1 fr 15, 31). See below, Book VI chap. xiii C.

If municipal magistrates took pledges and allowed them to spoil, or if they thus took cattle and did not allow the owner to feed them, they were liable to an action under the Aquilian statute (D. ix 2 fr 29 § 7).

D. 1. (*a*) *Mandatum* is a commission or order given by one person to another to do something on the mandator's account without payment for his services. If payment for the service is a condition and is fixed in amount, the business is one of

[1] This exercise of executive power is recorded of consuls, praetors, censors, tribunes, and aediles (Mommsen *Staatsr.* i[2] 152). So of the *decemviri* Liv. iii 38 § 12. In Cic. *Orat.* iii 1 § 4 the consul Philippus is recorded to have taken this step as a retort to Crassus' speech against him in the senate: *graviter exarsit pignoribusque ablatis Crassum instituit coercere.* The pledges so taken were often destroyed by the magistrate; hence Crassus retorted: *An tu cum omnium auctoritatem universi ordinis pro pignore putaris eamque in conspectu populi Romani concideris, me his existimas pignoribus terreri;* cf. Liv. xxxvii 51 § 4; xliii 16 § 5; Suet. *Jul.* 17.

letting and hiring; if the payment is not fixed, an action on the case might be the mode of enforcement (D. xvii 1 fr 1 § 4; xix 5 fr 22). But occasionally remuneration was made for such services (*honorarium* or, if continuous, *salarium*), and could be demanded only by an extraordinary application to the praetor or governor. It is spoken of chiefly in connexion with the conduct of a suit at law. A bargain for a share of the proceeds of a lawsuit before it was decided was illegal (D. xvii 1 fr 6 § 7, fr 7; L 13 fr 1 § 12; Cod. iv 35 fr 1, 20).

(*b*) A mandate may be given orally or by letter or message: no special form of words is required. It may be conditional or to take effect only from some future time (*in diem*). Present knowledge and acquiescence, or even subsequent ratification may be tantamount to a mandate and make a person liable. Consent on the part of the recipient is of course necessary (D. xvii 1 fr 1; L 17 fr 60).

A mandator has an action (*directa mandati actio*)[1] against the mandatee (*cui mandatum est*) to secure the due fulfilment of the commission: the mandatee has a counter-action (*contraria mand. actio*) to recover his expenses and in some cases to enforce release from his charge. Condemnation made either party infamous (Gai. iv 182; D. iii 2 fr 6 § 5). For fraud of either party his heir was liable in full[2] (D. xliv 7 fr 12).

[1] Cicero shews the principle of the Roman law of mandate: *In privatis rebus si qui rem mandatam non modo malitiosius gessisset sui quaestus aut commodi causa, verum etiam negligentius, eum majores summum admisisse dedecus existimabant. Itaque mandati constitutum est judicium non minus turpe quam furti, credo propterea, quod quibus in rebus ipsi interesse non possumus, in iis operae nostrae vicaria fides amicorum supponitur: quam qui laedit, oppugnat omnium commune praesidium, et quantum in ipso est, disturbat vitae societatem. Non enim possumus omnia per nos agere: alius in alia est re magis utilis. Idcirco amicitiae comparantur, ut commune commodum mutuis officiis gubernetur. Quid recipis mandatum si aut neglecturus aut ad tuum commodum conversurus es? cur mihi te offers ac meis commodis officio simulato officis et obstas? Recede de medio: per alium transigam etc.* (*Rosc. Am.* 38 § 111 sqq.; *Top.* 17 § 66).

The judge was *arbiter* (Cic. *Rosc. Am.* 39 § 114).

[2] Cf. *ad Heren.* ii 13 § 19 *Fit ut de eadem re saepe alius aliud decreverit aut judicarit, quod genus; M. Drusus praetor urbanus, quod cum herede mandati ageretur, judicium reddidit, Sex. Julius non reddidit.* We know

(*c*) The death of either party while the mandate is still unexecuted puts an end to it, and if mandatee's heir executed it, he could not sue the mandator. If the mandator died and mandatee in ignorance proceeded with the mandate, practical convenience was held (*utilitatis causa receptum est*) to require that he should be able to sue the mandator's heirs (Gai. iii 160; D. xvii 1 fr 26 pr, 27 § 3).

A mandate for something to be done after the mandatee's death[1] is invalid; for no obligation should commence with the heir. And a mandate for the performance of what is immoral, *e.g.* to despoil a temple or to wound or kill a man, is also invalid. So execution of a young man's mandate to lend money to a prostitute, or be surety for her, gives the mandatee, knowing the facts, no right of action against the mandator: it is simply helping him to throw away his money (Gai. iii 157, 158; D. xvii 1 fr 12 §§ 11, 17, fr 22 § 6).

(*d*) A mandate may relate to the business of the mandator himself or to that of others or to that of the mandatee. The last case gives rise to doubt. If I tell you to invest your idle money, or to make some purchase for yourself, the question arises whether this is mere counsel or proper mandate. If it is counsel and you choose to follow it, you take the consequences, and I am not responsible, however it turn out. Servius appears to have held that instruction however specific

nothing of the circumstances of these decisions nor whether, as commonly supposed, it was in a suit against the heir of a mandatee.

[1] The reading in Gaius iii 158 is somewhat awkward but it appears to relate to the mandatee's death. (The MS. has *si quis post mortem meam faciundum mandet.*) A mandate for something to be done after mandator's death is taken by many (*e.g.* Huschke *Gaius ad loc.*; Arndt's *Pand.* § 294, *etc.*) to be valid, and not revoked by his death, on the strength of D. xvii 1 fr 12 § 17, 13, 27 § 1. I am inclined to think that such a mandate is no exception to the general rule of revocation by death, but it is not invalid *ab initio*, and consequently supports an action whenever execution has proceeded in mandator's life (cf. Cod. iv 35 fr 15). This would explain the first and third passages and perhaps fr 13 if we had the detail. D. xlvi 3 fr 108 is clear for revocation where the mandate has not been already carried into a stipulation by a third party. Justinian altered the old rule (Cod. iv 11); and the Digest is therefore open to suspicion on this matter (cf. Windscheid *Pand.* § 411).

to anyone to act on his own behalf never made the giver responsible to the doer. Sabinus held that it amounted to mandate if the doer acted only on account of the instructions. The mandatee then relied on the mandator's guaranty (Gai. iii 155, 156; cf. D. xvii 1 fr 2). See below, p. 121.

(*e*) The terms of the mandate must be closely followed: otherwise the mandatee cannot claim reimbursement (at least in full), and the mandator, if damnified, can claim the amount of his interest in having the mandate executed as undertaken. A mandate to lend money, taking proper security (*cautio idonea*), is not followed if neither pledge nor surety is taken. A mandate to buy a farm for 100,000 sesterces may be well fulfilled by purchasing for less, but not for more, not even, according to the Sabinians, if the mandatee is willing to let the mandator have it for the sum he named; for that would be to make a contract exist or not at the will of one party. The Proculians however held that he could compel acceptance at that price. If one is commissioned to sell a thing at a certain price and sells at less, the sale will be upheld only if mandatee make up the amount (Gai. iii 161; D. xvii 1 fr 3 § 2—5 § 3, 33, 59 § 6; Paul ii 15 § 3). The principle was that the mandatee might improve the position of his mandator but might not make it worse: and it is only if the mandator can shew that he is damnified by mandatee's improper action or neglect that mandator can sue (D. *ib.* fr 8 § 6; cf. fr 49 pr). The mandatee is liable for any breach of good faith or for gross negligence in the matter: he is bound to deliver up all profits from the business, is chargeable with interest if he has delayed the payment of what he has obtained, and is bound to hold, transfer, or deal with, any property or obligation he may have acquired in the matter as mandator may direct, or, if no direction be given, then for his best interest (fr 8 § 9—fr 10 § 3, § 6).

(*f*) On the other hand a mandatee can recover from mandator all expenses *bona fide* incurred, though more than the mandator himself might have spent; and suit need not be postponed till the conclusion of the business. Sometimes he will have an equitable claim to interest on any money which he has found

it necessary to advance for the discharge of his commission. But if he has in pursuing the business been robbed or shipwrecked and lost his goods, or if he himself or his servants have fallen ill and caused medical expenses, he cannot charge the mandator with what is his own bad luck and not properly incidental to the business (D. fr 12 § 9; 26 § 6; 27 § 4; 56 § 4). If however mandator has commissioned him to buy a particular slave and the slave steals from him, mandator is bound to make up the loss in full (D. xlvii 2 fr 62 § 5; xxx fr 70 § 2).

(*g*) A mandatee may in some cases claim release from his engagement, or that his mandator should take upon himself the obligation he has incurred, as for instance if he has bought a thing by instructions and has no ready cash to pay the price; or has become bail for mandator's appearance to a suit and mandator has failed to appear; or has undertaken another's obligation either by his direction or as *negotiorum gestor*, and has been condemned to pay (D. xvii 1 fr 38 § 1, 45 pr—§ 5). Of his own motion mandatee can renounce the charge, only if it be untouched, and he give timely notice to mandator so that he can conveniently commission someone else: the mandator then would not be damnified. Any renunciation without these guards would require good reason, such as mandatee's sudden illness, a necessary journey, a quarrel between the parties, the hopelessness of success (*inanes rei actiones*), or unfair loss (*captio*) resulting to the mandatee. The mandator can revoke his mandate so long as the matter is untouched. The equities of such cases, as of all occurring in a *bona fide* contract, would be for the judge to settle on action being brought (Gai. iii 159; Paul ii 15 § 1; D. fr 22 § 11—fr 5, 27 § 2).

(*h*) If two persons give the mandate, either may be sued for the whole amount, but if judgment be given expressly against both, each is then liable only for his own share. Of two mandatees each is liable for the whole, but only one whole can be exacted (D. fr 59 § 3, 60 § 2).

A mandatee can employ others to do the business, and is responsible to them on the mandate he has given, and to his own principal for its proper execution. His obligation to his own mandatee is the measure of his claim on his

mandator. The principal can demand surrender of the middle man's actions against the actual executant (D. iii 5 fr 20 § 3, 27).

(*j*) In two cases of mandate the mandatee is generally called *procurator* and the mandator *dominus*: (1) when the subject-matter is not one piece of work only but a regular part of a man's business (D. iii 3 fr 1): and (2) when it is the conduct of a lawsuit (Gai. iv 84). For the latter see Book VI chap. ix.

(*k*) In two other cases the relation created by the mandate is that of surety or guarantor. A *fide promissor* or *fidejussor*[1], if he duly discharges the debt, and sometimes before discharging it, had a right of action as mandatee against the principal debtor: provided that he became surety at the debtor's request or at least with his knowledge or acquiescence (D. xvii 1 fr 40, 50, 53). But a like relation in some respects may be created by a mandate to the creditor to lend money or otherwise trust the debtor[2]. The mandator in effect guarantees the account. The difference however between a *fidejussor* and a *mandator* is, that the surety is bound to the creditor by a stipulation, and recoups himself for anything paid by a counter action (*mandati*) against the debtor, the guarantor is bound to the creditor by a formless agreement, and recoups himself only by getting a surrender of the creditor's actions against the debtor. The obligation of a surety is accessory to that of the debtor, and is destroyed, if the creditor joins issue with the principal: the obligation of a guarantor is independent and therefore unaffected by the fact of suit against the debtor: he remains liable for any balance of the debt which the principal is unable to meet. Or the creditor can, if he choose, sue the mandator without first suing the debtor or selling pledges, and the debtor is not thereby released. Suit against one co-surety in certain cases frees all, but suit against one co-guarantor leaves the others still liable, until payment is made in full (Paul ii 17 § 16; D. xvii 1

[1] A sponsor had a special action (*depensi*). See p. 184.

[2] The mandator used such expressions as *negotium mihi gere, periculum est meum, periculo meo crede, etc.* The mandatee was said *fidem mandantis sequi* D. xvii 1 fr 12 § 13, 48 § 1; 60 § 1, iii 2 fr 6 § 5.

fr 27 § 5, 28, 56 pr, 60 pr; xlvi 1 fr 13, 41 § 1, 52 § 3, 71; Cod. viii 40 fr 28 pr)[1].

Jussus[2]. 'Order.'

Mandate must be distinguished from order (*jussus*), though the words are often used loosely of the same business. *Mandatum* is a contract: *jussus* a one-sided declaration of will. In the execution of the business a mandatee may have dealings and make contracts with third parties, but they are not thereby in relation with the mandator: whereas a person receiving and acting on an order puts third parties into direct relation with the person giving the order, but has himself no contract with him (cf. D. xlvi 3 fr 66). *Jussus* is used (not to speak of orders by public authority such as the senate or praetor) of an order which directly affects the giver's financial position, as of a testator making his slave free and heir, *liberum et heredem esse jubet* (Gai. ii 186); or of a father or master directing his son or slave to enter on an inheritance; or authorising anyone to contract with his son or slave, whence the outsider gets an action *quod jussu* against the father or master (Gai. ii 188—190; iii 167 *a*; iv 70); or of an order to a procurator to novate an obligation (Paul v 8); or of a creditor's directing his debtor to promise someone on a stipulation (Gai. ii 38); or to pay the debt to a third party: *Cum jussu meo id, quod mihi debes, solvis creditori meo, et tu a me et ego a te liberor* (D. xlvi 3 fr 64; cf. L 17 fr 180).

[1] Where a slave is said to give a third person a mandate to buy him from his master with the slave's money and then manumit him, there is no real mandate. A slave cannot buy, or give a real mandate; nor can he be conceived as acting for his master, for that would be for the master to give a mandate to buy his own slave. The purchaser is liable for the price, and if the price is taken from the slave's *peculium* it is in law the vendor's own money, and only by his knowledge and consent can it be treated as effective payment. If the purchaser does not manumit the slave, an action on the mandate can be brought by the vendor, based, according to Papinian, on his affection for the slave, who may be supposed to be the vendor's natural relative.

[2] Cf. Salpius *Novation* p. 50 sqq.; Pernice *Labeo* i 504 sq.; Brinz *Pand.* ii § 282, p. 375 n. ed 2.

An order should precede, not like a guardian's authority await, the performance of the action ordered (D. xxix 2 fr 25 § 4). It may be oral or by letter or messenger or formal declaration before witnesses (*testato*): and may be revoked before being acted on (D. xv 4 fr 1 § 1) and is revoked by the death of the giver (D. xlvi 3 fr 32). If the order is given by the medium of another, the person responsible is he on whose account it was given (*cujus nomine jusserit* D. xliii 24 fr 5 § 12).

2. *Negotiorum gestio.* 'Unauthorised agency.'

(*a*) Management of another's business was recognised by the praetor as a good basis for suits between the parties. The edict on this matter was couched in quite general terms; *Si quis negotia alterius gesserit*[1], *judicium eo nomine dabo.* But as mandate, guardianship, *etc.* had special actions, the action for 'business done' was used where the agent had no authority, either special or general, but was justified by the risk of serious loss to the absentee if no one volunteered to act for him. The swift process of the law courts in the case of absent and undefended debtors gave frequent occasion for a friend's interference. Or again a pledge might be sold by a creditor, a penalty on a stipulation might be incurred, a right of returning a faulty slave might be lost, or some injury might be done to a person's rights or property, if no one interfered in time, when the principal had been suddenly called away or been unexpectedly detained. Nor was it only conscious action for a particular person's benefit that justified the suit against him. Misapprehension whose business it really was, or wrong belief that he had a commission to do it, did not prevent an obligation arising. But there must be an intention to put someone under an obligation, and this action would then serve to adjust the matter between him and the real principal (D. iii 5 fr 1—3 pr § 10, fr 5 § 1; x 3 fr 14 § 1; xliv 7 fr 5 pr).

The person, whose affairs had thus been handled without his authority, has a direct action to call the agent to account

[1] These words were originally not technical, cf. Cic. *Inv.* i 26 §§ 37, 38.

for any failure in the duty which he has undertaken, and for any retention of what belongs to the principal. The agent has a set off and, if necessary, a counter action to recover any useful expenditure he has made, and to be held harmless for any obligation he has properly incurred on the other's account (fr 2, 7 § 2).

(*b*) Direct action. As special instances of liability to this action may be mentioned a mother's interfering in the affairs of her son who is under guardianship; a father's managing his son's property after emancipation, the property being given him without reserve; a guardian continuing in the administration of his ward, after the guardianship is really ended (Paul i 4 §§ 2, 4, 7); a caretaker managing the affairs of a madman or spendthrift or of a minor above the age of puberty (D. xxvii 3 fr 4 § 3, fr 13). If a father by will appoint a guardian for his postumous son, and the person appointed acts in the affairs but no postumous son is born, he is not liable to a suit for guardianship, for he was no guardian, but is liable for business done (D. iii 5 fr 28). If I order a freeman in *bona fide* slavery to me to do something, there will be no relation of mandate between us, for he acts, not as in a voluntary contract but under supposed compulsion; he will be liable however to this action (fr 18 § 2). If under a mistaken belief that Titius owes you money, I collect it for you, and you ratify my conduct, you thereby make the business yours, and can sue me for business done: Titius can recover the money from you by *cond. indebiti* (fr 5 §§ 11, 12). If you have sold what you erroneously believed to be in the *peculium* of a slave whom you have bought, or in a bequest to yourself, the real owner or legatee can claim it, and, if it has perished, can sue for the price by this action, or by a condiction (fr 48, xii 1 fr 23). I can sue by this action anyone who has received money or anything else and undertaken to bring it to me (D. iii 5 fr 5 § 4).

If a son or slave manages another's business at his father's or master's command, the latter is responsible by this action in full: if without such command, the action is good only to the extent of the *peculium*. Similarly in the reverse case, if another manages business for a son or slave, looking to the

father or master, this latter is responsible in the action; if however the *negot. gestor* does so, looking only to the son or slave himself or from friendship to them, the limitation to the *peculium* comes in (Paul i 4 §§ 5, 6; D. iii 5 fr 5 § 8). A slave who becomes free is not himself responsible for management of another's affairs any more than for other acts done whilst a slave, unless it was so continuous with his management afterwards that it could not be separated. The Proculians however held that if he retained in his *peculium* what was due to the person whose business he had managed, he should be liable just as a freeman would on the principles of good faith. Sabinus appears to have agreed that he should be liable for anything actually due in his accounts, but not for any fault or fraud committed while in slavery (fr 16—18 § 1).

(*c*) As a volunteer, whose action moreover might prevent others more competent from interfering, such an agent is as a rule responsible not only for fraud but for fault also, though if the emergency be great, some fault may be excused (fr 3 § 9; L 17 fr 23). He cannot without good cause drop business which he has taken up, nor can he confine himself to certain matters only, if a careful man would be expected to do other things as well. He must act for the other's interest against himself, whenever the other was entitled so to act, especially if speedy action is important: must collect any debt due from himself, and, if the debt was without interest originally, it will carry interest from its due date, at such rate as the creditor was getting on other loans (D. iii 5 fr 5 § 14, fr 34, 37). Having no mandate, he cannot usually collect debts from others by legal process, but in some cases, *e.g.* if the business is his son's or father's or kinsman's or patron's, he does not require mandate, provided he offer security for ratification; and then it may be his duty to do this and sue on their behalf (fr 7 pr; cf. tit. 3 fr 35 pr). He must pay interest on any of his principal's money remaining after deduction of expenses; and must as a rule bear the risk of any investments he may make for him, if, when issue is joined in this action, they are found to be bad. And if he has made purchases or entered into business of any kind not usual with his principal, he may have to bear any loss which may accrue

(fr 10, 30 § 3, 36 § 1; Paul i 4 § 3). The fact that he is managing the other's affairs does not disable him from gaining by usucapion the property in a thing belonging to the other, which he has bought in ignorance of the real owner; but if he has discovered, before usucapion is completed, whose it was, he ought to get someone to sue for it in the absentee's name so that the usucapion may be broken, and he may be entitled to reimbursement from his vendor under the stipulation for eviction (fr 18 § 3).

(*d*) Counter action. A *negotiorum gestor* can claim reimbursement for expenses of management only so far as it has really been for his principal's interest (*utiliter gestum*), or (whether useful or not) has been approved by him. But he cannot charge more expenses than were really necessary, although he may have spent more, nor can he, at least in Julian's opinion, recover any expenses, however useful, incurred after the principal has forbidden him to interfere. But it is not necessary that his action should have been successful; *e.g.* if he has repaired (*fulsit*) a house or tended a sick slave and his action was right, the fall of the house or death of the slave does not impede his claim (fr 8, 9, 21, 26; Cod. ii 18 fr 24 § 1). He is not entitled to any payment for his own services, and if he has meddled with a view to his own profit, he can charge only so much as he has enriched his principal (fr 5 § 5). Nor can he recover at all, if he has acted from affection or duty to children or parents or patron's children, and not as a matter of business. Thus a mother cannot recover from her son's estate for the cost of his nurture or his household, unless she has declared, or the facts shew, that she intended not a gift, but an advance to be repaid afterwards (fr 33; Cod. ii 18 fr 1, 5, 11).

(*e*) Some instances of the cases where the doer of the business can sue the principal may be given. If I defend your slave in a noxal action without your knowledge, I can sue you for the full amount, not merely *de peculio* (fr 40). If in the belief that I am heir, I hand over to legatees things of my own, the real heir is thereby cleared of an obligation, and I can recover the value from him (fr 48). Where a person has acted in business common to him and others, he can recover expenses by the

partnership action or that *communi dividundo*, provided he could not separate his interest; if he could, as for instance in giving security *damni infecti*, limit it to his own share of the suspected house, but has not so limited, he can get contribution only by the action *negot. gest.* (D. x 3 fr 6 §§ 2, 7). Where one of several owners of water-rights defends the right in a suit, the action *com. div.* not being applicable to incorporal things, he must use the action *negot. gest.* to recover from his co-owners (D. iii 5 fr 30 § 7). Where of three captives one was released by the Lusitanians on condition of bringing ransom for all three but did not return, and the two others had to pay for him as well as for themselves, Servius held that the praetor ought to grant them an action against him (fr 20 pr). Where a loan of money has been made to *A* on the faith of a letter from *B* or on other evidence of its being intended to pay *B*'s debts, the creditor can pass over *A*, and sue *B* instead, by an action *negot. gest.*, on the analogy of an action by the creditor of an *institor* (fr 31 pr; D. xvii 1 fr 10 § 5; cf. xxvi 9 fr 5 § 1). Where *A* is a recognised procurator of *B*, the creditor can sue *B*, but not *A* (D. iii 5 fr 5 § 3). A surety without mandate can sue the principal by this action (D. xvii 1 fr 20 § 1).

(*f*) Both actions are *bonae fidei*: just as in mandate, the parties *aeque invicem experiri possunt de eo quod ex bona fide alterum alteri praestare oportet* (D. xliv 7 fr 5 pr; cf. iii 5 fr 2, 17).

Both women and heirs could sue and be sued, either by direct or by counter action (D. iii 5 fr 3 §§ 1, 7). The edict expressly recognised action on behalf of one who was dead, *i.e.* a vacant inheritance, and it did not matter whether the heir turned out to be of full age or not: he takes over this obligation along with others (fr 3 § 6, 20 § 1). The *actio funeraria* is an action of this nature (cf. D. xi 7 fr 14 §§ 7, 11, 13).

E. *Societas.* 1. Ordinary partnership.

(*a*) Partnership is a contract whereby two or more persons agree to work together for common profit, or to acquire and hold property in common, sharing the gains and the losses.

They may combine only for one particular piece of business, or to carry on a continuous trade or enterprise, or they may even agree to put all they have into a common stock and share each other's fortunes of whatever kind[1]. In the absence of any wider intentions clearly shewn, the partnership will be taken to relate only to business matters and to the gain and loss thence arising, in which case inheritances, legacies, gifts will be outside the contract. The technical expression for forming a partnership was *coire societatem*[2]. For any failure in the performance of the contract the proper remedy was an action, usually called *judicium pro socio, i.e.* 'a suit in the character of partner,' brought against the offending partner or partners. It was an action *bonae fidei*; and condemnation brought infamy[3] (D. xvii 2 fr 1, 5, 7—9; Gai. iii 148; iv 62, 182). The judge was often called *arbiter*[4] (D. fr 38 pr).

[1] It is probable that this thorough-going partnership sprang from the position of brothers and sisters living together as joint heirs to their father. *Consortes* appears to have this special application. Gellius (i 9) speaking of the Pythagoreans says, *quod quisque familiae, pecuniae, habebat, in medium dabat, et coibatur societas inseparabilis, tamquam illud fuit anticum consortium, quod jure atque verbo Romano appellabatur 'Ercto non cito'* (*?erctum non cito*, 'where there was no summons to divide the inheritance'). Cf. Ovid *Her.* iii 47 *Vidi ego consortes pariter generisque necisque tres cecidisse.* Dig. xvii 2 fr 52 § 8 *Si inter fratres voluntarium consortium initum fuerat*; cf. *ib.* § 6 (Leist *röm. societas* p. 20). An instance appears to be found in Plin. *Ep.* viii 18 § 4 *Consors frater in fratris potestatem emancupatam filiam adoptionis fraude revocaverat.*

[2] Cf. Cic. *Quinct.* 24 § 76; *Rosc. Am.* 8 § 21; *Rosc. Com.* 18 § 55; Suet. *Aug.* 32; Gai. iii 148; D. xvii 2 fr 1; *etc.*

[3] Cf. Cic. *Rosc. Am.* 40 § 116 *In rebus minoribus socium fallere turpissimum est, aequeque turpe, atque illud de quo ante dixi* (*i.e. mandatum negligere*); *Rosc. Com.* 6 § 16 *Si qua enim sunt privata judicia summae existimationis, et paene dicam, capitis, tria haec sunt fiduciae, tutelae, societatis. Aeque enim perfidiosum et nefarium est fidem frangere, quae continet vitam, et pupillum fraudare qui in tutelam pervenit, et socium fallere qui se in negotio conjunxit; Top.* 10 § 42; 17 § 66.

[4] Cf. Cic. *Rosc. Com.* 9 § 25 *Cur non arbitrum pro socio adegeris Q. Roscium, quaero*, 'why you did not drive him before an arbiter on a partnership action.' *Quinct.* 3 § 13 *Quasi qui magna fide societatem gererent, arbitrium pro socio condemnari solerent* (Cicero is speaking ironically). The expression *arbitrium...condemnari* is strange (see note in Orelli

(*b*) Partnership is formed by simple consent without any formality, either by words, writing or message, either for a definite period or not, and may commence from a future time. Whether its existence could be made conditional on the occurrence of some event was a disputed point (D. fr 1, 4; Cod. iv 37 fr 6). It can always be dissolved by consent, or by one of the parties renouncing; but, if the renunciation is made unseasonably or with the view of securing unfair advantage, the renouncing partner is liable (*a se liberat socios, se autem ab illis non liberat*): and accordingly if the other be absent at the time, the one renouncing must share all gain he receives and all loss occurring to either, and has no claim on any gain coming to the absentee, up to the time when knowledge reaches him. Even if the partnership arrangement provided against dissolution within a certain period, circumstances may justify earlier renunciation. Partnership is dissolved by the death of a partner, by his bankruptcy, by confiscation and sale of his estate, by the conclusion of the business, or destruction of the thing which was the object of the partnership, or by the action *pro socio* being brought (D. fr 14—17, 63 § 10—65 § 6, §§ 9, 10; Gai. iii 151—154).

A partner's heir did not become a partner, even if it were so provided at the commencement of the partnership, but he should assist in winding up the business, and can claim and is responsible under the action *pro socio* for fraud and negligence, and for anything accruing from the common property or business until his predecessor's death, though not received till afterwards (D. fr 35, 36, 40, 53 § 8, 65 § 9). *Capitis deminutio* was also said to dissolve partnership, but the dissolution in this case might be got over at once by consent of all to continue. According to the Digest indeed, a partner continued notwithstanding arrogation or emancipation, but the arrogator did not become a partner (Gai. iii 153; D. fr 14 § 1, 63 § 10, 65 § 11). A partner could himself take a partner so far as he was himself concerned, but he does not thereby make him a partner with the

ed.). *Arbitrum adigere* to compel a person to go to an arbiter, *i.e.* accept an arbitration, is frequent and technical; cf. Cic. *Top.* 10 § 43; *Off.* iii 16 § 66.

others, and is alone responsible to him and for him to them; *socii mei socius, meus socius non est* (fr 19—22).

(*c*) Each partner is bound to be as careful in conducting matters of partnership, as he is in his own business, and is responsible to his partners for any loss arising either from fraud or from fault. His diligence and success in some matters cannot (as was clearly decided by M. Aurelius) be set off against the loss from negligence in others (fr 23—26, 72). Any costs or loss rightly incurred by a partner on the partnership business, the interest of any money advanced out of his own pocket, and even, as was eventually held, his medical expenses for hurts received in the defence of the partnership property, are chargeable against the partnership. A partner is not responsible for loss of what is under his charge by brigands, fire or shipwreck, *etc.*, where there was no fault of his own; but he might be responsible for loss by thieves, as being due to his negligence. And if he does not contribute what he has received on the common behalf, and especially if he has used it for his own affairs, he is liable to make them compensation in the nature of interest (fr 52 §§ 3, 4, 15, 60 pr; Paul ii 16).

Where there is a universal partnership, gains even from actions for Aquilian injury to himself or son, or from insult to himself, must be paid to the partnership, which is however not bound to take upon itself any payment he has been condemned to make for his own insulting conduct or crime, unless his condemnation was unjust. Gains from theft or other crime should not be paid to the partnership: if they are paid, then they become common property, but if paid with the knowledge of the partners, they can be drawn upon by the contributor for any damages and penalty payable by him in the like cases; if paid in without his partners' knowledge, they can be drawn upon for damages only. A partnership for the purpose of crime (*maleficium*) is no partnership at all (D. fr 52 § 16—fr 57).

A partner is liable to his fellows for theft or Aquilian injury of the common property, both by those actions and by the partnership action. The whole damages in the action *furti* are

additional; in *damni injuria* and *condictio furtiva* they are good only for the excess over what is obtained by the action *pro socio*.

The case however must be very clear to justify a charge of theft, the presumption being that a part-owner is exercising only his right (fr 45—51).

(*d*) The shares of partners, in the absence of any special agreement, are taken to be equal: but they can agree on unequal shares, or on one contributing money and the other services, or on one having a larger share of profits and a smaller share of loss, or even no share of loss, if for instance his services were so valuable, or he be so exposed to personal trouble and danger as to justify the arrangement. Some old lawyers disputed this last as being contrary to the nature of partnership, and as being unintelligible, unless the accounts were kept separate for each transaction, profit being only the balance after deducting loss. A leonine[1] partnership, *i.e.* where one took all the profit and the other all the loss, was held to be no partnership. If only the share of profit or of loss is expressed, the other is taken to be the same (Gai. iii 149, 150; D. fr 29, 30; Just. iii 25 § 2). If the shares were left to be fixed by some arbitrator, he must make a reasonable decision; *ad viri boni arbitrium res redigenda est* (D. fr 6, 76—80).

(*e*) The relation between partners was regarded as approaching that of brothers, and consequently claims could not be pressed without regard to their pecuniary position. The judge was to condemn only *in id quod facere possunt*, provided they did not deny their partnership and had not fraudulently reduced their means. This privilege was certainly granted to universal partners, but its application to partnerships in a single matter appears to have been disputed. It was confined to the partner himself, and not extended to surety or heir, or to the father who may have ordered him to form the contract. His means are estimated, without deduction of his debts to others, as they stand at the date of judgment, and he has to promise to pay in full, if his means afterwards admit it (fr 63 pr—§ 7; xlii 1 fr 16, 22).

[1] Alluding to the fable: cf. Phaedr. i 5.

(*f*) The action *pro socio* could only be brought once. The judge took account not merely of property in hand but of debts due to the partnership, liquidated the partnership concerns, settled the mutual claims of the partners, took the accounts as between them, condemned them to pay one another according to the result, and directed reciprocal guarantees to be given where future claims were expected. He had no power to adjudge any property in ownership to any of the partners. If that were necessary, it could be done by the action *communi dividundo* (D. xvii 2 fr 27, 43).

(*g*) In a universal partnership the things belonging to the several members become common property without any actual delivery by one to the others. Debts remain as they were, and if my partner is to sue for a debt due to me, he requires a cession of my action just as if he were not a partner. Where the partnership is only for a particular business, the contributions of the partners become common property only by actual or personal delivery. As regards all dealings with third parties, the partners act as individuals; they cannot alienate more than their own share of a thing, and if they profess to be alienating the whole, and the alienee is evicted, they are liable of course themselves, not their partners. If they buy anything, it becomes the buyer's only; he is bound, if it be bought on partnership account, to make it common to his partners, but that is not the vendor's concern. The contract of partnership like other contracts affects only the parties to it: to the world in general the partners are only single persons and cannot act for each other, unless duly authorised (fr 1 § 1—3 pr, 68 pr, 74, 82; xlvii 2 fr 52 § 18)[1].

(*h*) Bankers (*argentarii socii*) were however an exception

[1] In *Rosc. Com.* 17, 18 §§ 51—56 Cicero argues that a partner sues only for himself, and only if appointed *cognitor* (see Book vi) can he sue for his partner. He compares the position of a partner with that of an heir: *Ut heres sibi soli, non coheredibus petit, sic socius sibi soli, non sociis, petit; et quemadmodum uterque pro sua parte petit, sic pro sua parte dissolvit, heres ex ea parte qua hereditatem adiit, socius ex ea qua societatem coiit* (§ 55). Cicero is here ignoring the ultimate liability of a partner to account, but his language is hardly stronger than D. xvii 2 fr 62.

to this. They could severally both sue and be sued *in solidum*[1]. A bargain for their creditor not to sue if made with one partner in general terms could also be pleaded by the other, but a bargain by one partner not to sue the debtor did not prevent the other from suing him (D. ii 14 fr 9 pr, 21 § 5—27 pr).

(*i*) The term *socius* is frequently applied to tenants in common[2], who have become so by external causes (inheritance, legacy, gift, *etc.*) without any contract between them. The action *pro socio* is not open to any except such as are partners by voluntary agreement. *Ut sit pro socio actio societatem intercedere oportet, nec enim sufficit rem esse communem...Communiter autem res agi potest etiam citra societatem, ut puta, cum non affectione societatis incidimus in communionem* (D. xvii 2 fr 31).

2. Companies.

The large companies of tax-farmers differed in many respects from private partnerships. They were not dissolved by a partner's death, and, if the company registered (*adscripsit*) the share of the deceased as belonging to his heir, the latter became thereby partner (*adscitus*). Without this the heir would be in the ordinary position of a partner's heir. In these companies it was possible on particular matters to sue *pro socio* without winding up the company (D. xvii 2 fr 59, 63 § 8, 65 § 15). Such companies were said *corpus habere, i.e.* to form a corporation; they had a common chest and a manager (*magister* usually in the case of tax-farmers, *actor* or *syndicus* in other cases) to sue and be sued or make bargains on behalf of the body. Other cases of such corporations, authorised by senate's decrees or imperial constitutions, were those for working gold and silver mines, or saltbeds. At Rome there

[1] The writer *ad Heren.* ii 13 § 19 says *Consuetudine jus est id quod sine lege, aeque ac si legitimum sit, usitatum est, quod genus* (as for instance) *id quod argentario tuleris expensam ab socio ejus recte petere possis:* 'What you have debited a banker with you can lawfully sue his partner for.' I see no reason for confining this statement to cases of contract by book-entry.

[2] Cf. Cic. *Quinct.* 16 § 52 *Quis ad vadimonium non venit? Socius. Etiam gravius aliquid ei deberes concedere quicum te aut voluntas congregasset, aut fortuna conjunxisset.*

was an association of bakers (*collegium pistorum*), and others (D. iii 4 fr 1; ii 14 fr 14).

No *collegium*[1] was lawful without permission of the public authority, except for religious purposes, not contrary to the senate's decree. Burial and dining clubs existed, and statutes for some of these or others are preserved wholly or partly in inscriptions (Bruns[6] no. 146 foll.). Slaves are named as members of a burial club (no. 147), a thing which was illegal without the consent of their masters (D. xlvii 22 fr 3 § 2). All lawful *collegia* could own slaves, and were enabled by M. Aurelius to manumit them (D. xl 3 fr 1).

Towns and other civil communities had common property and a common chest and could manumit slaves (D. *l.c.*) and be trust heirs of an inheritance (D. xxxvi 1 fr 27). They had a council (*decuriones*), two-thirds of which formed a quorum, and a majority of the quorum was required for important acts. A manager (*actor*) was appointed to conduct their suits, and, as a consequence, also to defend them. He had much the same powers as a private agent, but could not sue upon the judgment: he was not however as a rule required to give security *ratum haberi*. A *constitutum debiti* made with him was valid, and if he made a stipulation on behalf of the community, the administrator of the community had a *utilis actio*, but usually for any security to be given to the community a public slave was preferred as the medium. A community might be liable for interest on delay in executing a trust, and for costs of litigation (D. xxxi fr 78 § 2). Execution was made on the common property, and, if necessary, on the debts due to the community. *Si quid universitati* ('to the corporation') *debetur, singulis non debetur, nec quod debet universitas, singuli debent* (D. iii 4 fr 7; comp. fr 2, 10; *lex Malac.* (*ap.* Bruns) 29, 61, 67, *etc.*). A community could not commit fraud, but if they benefited by their agent's fraud, an action would lie: for councillors' fraud the individuals could be sued (D. iv 3 fr 15 § 1). If a legacy was

[1] Cf. Suet. *Jul.* 42 *Cuncta collegia praeter antiquitus constituta* (*Caesar*) *distraxit; Aug.* 32 *Plurimae factiones titulo collegii novi ad nullius non facinoris societatem coibant: igitur...collegia praeter antiqua et legitima dissolvit.*

left them (*'municipibus'*) conditioned on taking an oath, the oath might be taken by those who managed their business (D. xxxv 1 fr 97). If a usufruct was left to a town, it expired in 100 years, that being taken as the period of longest life (D. vii 1 fr 56).

Towns, clubs and other like bodies could possess and gain by usucapion and were subject to suits *ad exhibendum* (D. x 4 fr 7 § 3). Since Hadrian's time towns, since M. Aurelius' clubs, could receive legacies (see vol. 1 p. 307). A town was bound by a cash-loan, if the money was applied to its benefit: otherwise those who made the contract were alone liable (D. xii 1 fr 27).

3. *Judicium communi dividundo*[1].

This was a proceeding open to all who in any way, by legacy, by gift, by purchase, *etc.*, find themselves owners, or possessors with good title, in common of corporal things. While tenants in common they share in every part of the thing, and only by agreement or judicial proceeding can they become exclusive owners of a portion. As in the proceeding for division of an inheritance, possession is not required in either party: all the partners are in an equal position, and not properly either plaintiffs or defendants. The judge is often called *arbiter* (*e.g.* D. x 3 fr 7 § 1, 18, 26); the proceeding is *bonae fidei*, and the judge has large powers of making an equitable settlement (*e.g.* fr 14, 24 pr). The suit is confined primarily to the division of the things held in common, or of such of them as the partners or some partners desire to be divided, and secondly to making the partners mutually contribute for any loss or damage caused by them to the common property, or by their slave, *etc.*, to the private property of a partner, or for any expenses incurred or gain obtained in respect of it (D. x 3 fr 1—4 § 3, 8 § 1, 30; xvii 2

[1] Cicero rallying the lawyer Trebatius on his becoming an Epicurean says: *Quod jus statues communi dividundo, cum commune nihil possit esse apud eos qui omnia voluptate sua metiuntur?* (*Fam.* vii. 12 § 2). Trebatius might have replied that a jurisconsult or judge is not a litigant, and that *com. div.* regards not the philosophy of tenants in common or their motives of action, but only whether their actions were authorised or necessary so far as they affected the common property.

fr 34; xlvii 2 fr 62). Only such expenditure can be charged as has been incurred by common agreement, or as a partner has necessarily made on the common property in the protection of his own share. Nor is the suit excluded by the fact of the thing itself having perished. But if a partner went beyond what was necessary for the proper dealing with his own share, he can get contribution from the others only by suing them for business done (*negot. gest.* D. x 3 fr 6 § 2, 14, 25). Although suit for Aquilian damage cannot be brought against an heir, yet, if his predecessor has committed such damage on a thing held in common, the heir is liable to account by this proceeding to his predecessor's partner (fr 10 pr). Any partner condemned on account of a common slave can sue for contribution before he performs the judgment (fr 15).

This proceeding applies when expenses are incurred on property in common, though the person spending is ignorant or mistaken who his partners are. But if he believes the whole to be his own, he has no *animus obligandi*, and has therefore no right either to this action or to that for business done. If however a vindication or a suit *comm. div.* is brought against him by his partner, he can under a plea of fraud (*exceptio doli*), retain the property until reimbursed for a due share of the expenditure, and, if he part with his share of the common thing, the purchaser can exercise the like right of retention (fr 14 § 1, 29 pr).

This suit can be brought as often as may be required, and is open to coheirs when their proper procedure for division (*fam. ercisc.*) has taken place, and something is found undivided (D. x 2 fr 44 pr); and to voluntary partners within its own limits; but it is not concerned, like the action *pro socio*, with the duties of the partners, except incidentally (D. xvii 2 fr 43, 65 § 13). Where a corporal object has to be divided between heir and legatee, either by the terms of the will or in consequence of the *lex Falcidia*'s applying, the judge may have incidentally the duty of examining whether and to what extent the *lex Falcidia* applied (fr 8 § 1).

It is the duty of the judge to make as fair a division as possible, and to give effect to any agreement of the partners

in connexion therewith. He has the power to assign in severalty parts to each, or to give, for instance, the ownership to one and a usufruct to another, or to give the whole to one at a price determined by competition among the partners, or even to extend the competition to outsiders. He has to determine the payments to be made to the others by way of compensation, or the guaranties to be mutually given (Ulp. xix 16; D. x 3 fr 6 §§ 9, 10, fr 19 § 3, 21; Cod. iii 37 fr 2, 3). Acquisitions made by a common slave from the property of one of the owners are in common, but by this action will be appropriated to him (D. fr 24 pr). Things whether mancipable or not, so legally adjudicated, become at once the assignee's (Ulp. xix 16).

Persons entitled in common to a usufruct or a pledge, or to possession *ventris* or *legatorum causa*, or to an aqueduct, have an analogous (*utile*) procedure for severing their connexion, or adjusting their relations, or apportioning common loss or gain. The judge may *e.g.* allot usufructs in different portions of the land, or may let the usufruct to one and divide the proceeds, or may arrange for alternate enjoyments, and may require reciprocal securities (D. x 3 fr 7 §§ 3—10; xliii 20 fr 4). A common right of water may be divided by allotting to each certain quantities and prescribing certain times of enjoyment (D. x 3 fr 19 § 4). Breaches of such arrangements may be dealt with by this suit (fr 23). If a thing held in common is pledged by one of the owners, a division can still take place, the creditor's right will be unaffected, and its value will be charged against the pledgor. If a thing is pledged to two persons in common, it may be adjudged at the value of the debt only, power being reserved to the debtor to redeem (fr 6 § 8, 7 § 12).

The division made affected only the parties, and did not alter the rights of others (cf. D. xxxiii 2 fr 31). If property not belonging to the litigants but to someone else was adjudicated to one of them, he did not thereby acquire it as his own, but his ground of possession was such that he could gain it by usucapion (D. xli 3 fr 17). A person claiming a share of something could bring this action to get his right to the share affirmed and the thing apportioned (D. xxi 2 fr 34 § 1). Where there was no real title to the holding, as between farmers (*coloni*) or

depositaries or *praedones* or holders on sufferance, or when one or both were alleged to be holding by force or stealth, this proceeding was not available (D. x 3 fr 7 §§ 4, 5, 11).

F. Purchase and sale (*Emptio, venditio*).

1. Contract of sale.

(*a*) Purchase and sale (one thing under two names[1], D. xix 1 fr 19) is an exchange of commodities by mutual consent, one of such commodities being money[2]. The purchaser is he who makes over the money, the vendor is he who makes over the thing. At one time it was a subject of dispute whether anything but money could be the price, the Sabinians maintaining the affirmative, and quoting Homer[3] in proof of the antiquity of barter as a mode of purchase; the Proculians maintaining the necessity of money to make it clear which of the commodities exchanged was the thing sold, and which was the price given. Where a thing was for sale, and by consent of the parties a slave or something else was made over as and for the price, some lawyers at least held the contract to be purchase and sale (Gai. iii 141; D. xviii 1 fr 1 § 1; cf. Cod. iv 44 fr 9). Where the consideration in such a contract was not, at least partly, in money, the action *ex vendito* did not apply, and resort must be had to an action on the case: where there was no transfer of property, the contract was loan, not sale (D. xix 1 fr 6 §§ 1, 2).

[1] The double description of this contract, as also of lease, is found in Cicero (*Off.* ii 18 § 64) *Conveniet in omni re contrahenda vendundo emendo, conducendo locando, vicinitatibus et confiniis aequum facilem esse.*

[2] Paul's account of money is worth quoting: *Olim unusquisque secundum necessitatem temporum ac rerum utilibus inutilia permutabat...Sed quia non semper nec facile concurrebat, ut cum tu haberes quod ego desiderarem, invicem haberem quod tu accipere velles, electa materia est, cujus publica ac perpetua aestimatio difficultatibus permutationum aequalitate quantitatis subveniret. Eaque materia formâ publicâ percussa usum dominiumque non tam ex substantia praebet, quam ex quantitate; nec ultra merx utrumque sed alterum pretium vocatur* (D. xviii 1 fr 1 pr).

[3] *Il.* vii 472 sqq. Paul (D. xviii 1 fr 1 § 1) rightly says this only mentions barter as in vi 235, and that *Odyss.* i 430, where πρίατο is the word used, would have been a better quotation for the Sabinians.

(*b*) The contract rests on agreement only, and requires neither special words nor writing nor earnest money[1] nor formalities of any kind. It may be formed between parties at a distance, by message or by letter. It is complete without actual payment of the price or delivery of the thing sold, provided that both the price and the thing are ascertained, and that, if the sale be made on a condition, the condition has occurred (D. xviii 1 fr 1 § 2, 2 § 1, 7 pr, 9 pr; Gai. iii 139). Gaius implies that at one time doubts were entertained whether a thing could be sold (or let) under a condition (Gai. iii 146 *fin.*).

Special agreements may be made at the time, and will be regarded as part of the contract and enforced by vendor's or purchaser's ordinary action: *Solemus dicere pacta conventa inesse bonae fidei judiciis...Ea pacta insunt quae legem contractui dant, id est, quae in ingressu contractûs facta sunt* (D. ii 14 fr 7 § 5). Such agreements[2] may provide for this or that being included in, or excluded from, the purchase, or for a guaranty of or against this or that servitude, or for or against some special use of the thing sold. Or they may provide for the rescission of the contract, if by a certain day the price is not paid or the thing delivered, or if better terms are offered by someone else, or if the thing sold prove unacceptable, or on other grounds. Any such agreement may be revoked or varied by new agreement, and the whole contract may be rescinded by

[1] A ring was sometimes handed over as an earnest (*arra*, *arrabo*) or pledge (*pignus*) for the payment of the price, and on the contract being fully executed its return could be enforced by *actio empti* or *condictio* (D. xix 1 fr 11 § 6). Sometimes the earnest was a substantial part of the price itself; *e.g. Arraboni has dedit quadraginta minas* (Pl. *Most.* 647), which is spoken of afterwards as a *pignus* (*ib.* 978). *Arra*, *arrabo* are also used of pledges for loans; Ter. *Haut.* 603; Apul. *Met.* i 21; and (esp. of a ring) in betrothals; Pl. *Mil.* 957; D. xxiii 2 fr 38; Cod. v 1. In Plin. *HN.* xxxiii § 28 a *consuetudo volgi ad sponsiones etiamnum anulo exiliente* is spoken of by which a ring was used as *arra* in connexion with loans of money, so that *sponsiones* is probably 'stipulations.'

[2] A special agreement on the sale of half a farm was that the purchaser should have a lease of the other half for ten years at a fixed annual rent. The question arose whether the vendor could enforce this by action *ex vendito*. Labeo and Trebatius said no. Javolen said yes, provided that the price taken for the half sold was a reduced one in consideration of the lease. The practice followed Javolen (D. xviii 1 fr 79).

agreement, provided that matters remain as they were, or, though part performance has taken place, have by agreement been replaced in their old position. In the interpretation of the contract the first question always is, *quid inter contrahentes actum est?* 'What was the real intention of the parties?' The action to enforce the sale, *i.e.* the vendor's action, is *actio venditi* or *ex vendito*; the purchaser's action to enforce the purchase is *actio empti* or *ex empto* (D. xviii 1 fr 3, 6 §§ 1, 2; tit. 5 fr 2, 3, 5 § 1; xix 1 fr 11 § 1; ii 14 fr 58).

(*c*) Anything can be a subject of sale which can be a subject of private property. Not only moveables and immoveables, but incorporal rights (as a usufruct or right of way) and collective unities (such as an inheritance) and even rights of action are saleable. But a sale was invalid, when, for instance, it was a sale of sacred or religious land, or of a moveable which had been stolen, or of a supposed slave who was a freeman, or of what was the purchaser's own already. If the purchaser knew that a thing was stolen and the vendor did not, the former would be liable to the other on the contract, supposing the other were prepared to perform his agreement. Whether the vendor knew or not of the unsaleable character, the purchaser, if ignorant, could sue on the contract for the amount of his interest in not having been deceived: if both knew, the contract was invalid (D. xviii 1 fr 4, 6 pr, 34 §§ 1—4, 62 § 1). If a man ignorantly bought that of which he had already the usufruct, the sale was not invalid, but the judge would cut down the price. If he owned part of the thing, the sale would be good for the other part only (fr 16 § 1—18 pr). A thing which is at the time the object of a suit (*res litigiosa*) could not be alienated by either of the parties (D. xliv 6). Some decrees of the senate (A.D. 44, 56) made null any sale of buildings for the purpose of making a profit by pulling them down or as a speculation (*negotiandi causa*), the purchaser being liable to a fine of double the price (D. xviii 1 fr 52; cf. Bruns no. 51)[1]. Poisonous drugs were unsaleable, if incapable of being made useful or harmless (fr 35 § 2).

[1] See also Book III chap. viii c 4 (invalid legacies). It was part of the same policy to make it the duty of a provincial governor to inspect

(*d*) A guardian was disqualified from buying anything belonging to his ward; and the like rule applied to caretakers, procurators or other managers of others' business. A public officer could not buy anything from what was under his charge, under a penalty (by a constitution of Severus and Caracalla) of fourfold, besides the loss of the thing (fr 34 § 7, 46). Sale by one who is interdicted from dealing with his property or is otherwise incapable of alienation, will not enable a purchaser, knowing the fact, to acquire the property (fr 26).

(*e*) There must be agreement on what is sold (*in corpore consensus*). If the vendor is thinking of one farm or slave and the purchaser of another, the sale is null; but a difference in the name is of no consequence. If a farm is sold and Stichus is to go with it, and there are several slaves of the name, the sale of the farm is good, and Labeo held that the Stichus sold is the one intended by the vendor. A mistake as to the material, *e.g.* brass for gold, lead for silver, vinegar (not merely sour wine) for wine, a woman slave for a man slave, is fatal: but if a thing is covered with gold and is not stated to be solid gold, the contract may still be good, subject to compensation if there be fraud (fr 9—11, 14, 34 pr, 41 § 1, 45; xix 1 fr 21 § 2). A difference in the quality or quantity does not vitiate the sale, where the parties are agreed on the *corpus*. Thus if a particular farm or plot of land is sold at so much per acre according to measurement, the purchaser must take and pay for the acreage actually found, though slightly more than what was stated by the vendor (D. xviii 1 fr 40 § 2). In reckoning the acreage of a farm, only what is saleable is included as a rule; and if public roads, shores, balks, or sacred or religious ground are to be reckoned in, express words are required (fr 51).

If the thing is adequately defined, it is unnecessary that the precise contents should be known. Thus the contents of a box, the fish caught by the next throw of a net, the game within a certain drive, are all good subjects of sale, though nothing be found there. The purchase of a 'catch' is sometimes called *emptio spei* (D. xviii 1 fr 8 § 1; xix 1 fr 11 § 18). If an alternative

buildings and compel the owners (after due hearing) to repair them (D. i 18 fr 7).

is sold (*illa aut illa res*) the choice is the vendor's (D. xviii 1 fr 25 pr).

(*f*) The price must be ascertained, or ascertainable by the rule agreed between the parties. If it was left to be fixed by some other person, Labeo and Cassius held that there was no contract: Ofilius and Proculus held that there was a contract (Gai. iii 140; cf. Cod. iv 38 fr 15). Probably these latter required that the person named should actually fix the price: whether they held also that there was any remedy against a wholly unreasonable price so fixed, as was apparently Proculus' opinion in an analogous matter (cf. D. xvii 2 fr 76—80), we do not know. Sale at a reduced price by way of gift is a good sale none the less (D. xviii 1 fr 38). But see vol. 1 p. 160.

(*g*) In the case of goods sold by weight, measure or count, the contract is not complete (at least according to Sabinus and Cassius) until the weighing, measuring or counting is done, as that ascertains both the thing and the price. If however they were sold in block (*per aversionem*), *i.e.* at a price for the whole, the contract is complete at once (D. xviii 1 fr 35 § 5). What measure should be used was in the choice of the parties. So a rescript of Antoninus and Verus in a sale of wine (fr 71).

2. Obligation under contract of sale.

(*a*) When the contract is complete, the parties may proceed to put it into force; that is to say, they may enforce whatever has been actually agreed on, and, in default of any special details, they may enforce what is naturally involved in a *bona fide* sale and purchase (D. xix 1 fr 11 pr). Here as in other consensual contracts, *alter alteri obligatur de eo quod alterum alteri ex bono et aequo praestare oportet* (Gai. iii 137). The duty of the vendor is to secure to the purchaser the full possession and enjoyment of the thing sold: the duty of the purchaser is promptly to pay the price; and if it is not wholly paid, when he sues on the purchase, he must tender it (D. xix 1 fr 13 § 8).

(*b*) The vendor is bound to deliver the thing purchased to the purchaser or to his order at the place agreed on, or,

if there be no such agreement, at the place where it is (D. xvi 1 fr 12 § 1). If the price is not paid, vendor has a lien until he is satisfied (D. xix 1 fr 13 § 8). Besides delivery, if the thing is mancipable, vendor can be called on to mancipate it[1] or surrender it in court, and in the case of incorporal rights to surrender them, or make the necessary promise on stipulation. If the vendor is himself the owner, he thereby transfers the property to the purchaser: if he is not owner, he by delivery puts the purchaser into the position of acquiring the ownership by usucapion, and meanwhile of using the Publician action to protect himself against third parties. If the vendor become owner subsequently or the owner become heir to vendor and attempt to claim the thing sold, the purchaser can defeat his claim by pleading the sale and delivery (*exceptio rei venditae et traditae*, D. xxi 3 fr 1 pr § 1). And further he is bound to guaranty the purchaser quiet and lawful possession (*habere licere*); but he is not bound to make him owner[2]. The purchaser lies under a different obligation: the price is to be paid in money, and the use and enjoyment of money lies in its free disposal and alienation. Hence the purchaser must make the vendor owner of the money, and either pays it down, or gives a pledge for the payment or surety or *expromissor*, or in some way satisfies him. In the case of both parties, the transference, whether of the thing or of the money, is with intent to fulfil the mutual contract of sale; and if the vendor has neither received the price nor agreed to give credit for it, the purchaser does not become owner of the thing: if the purchaser has neither got the thing nor acquiesced in the vendor's retention or disposal of it, the vendor does not become owner of the money[3] (D. xix 1 fr 11 § 2; tit. 4 fr 1 pr; xviii 1 fr 19,

[1] Cf. Plaut. *Trin.* 420 sqq. *Minas quadraginta accepisti a Callicle et ille aedis mancipio aps te accepit?* LE. *Ad modum.* PH. *Pol opinor adfinis noster aedis vendidit.*

[2] It is otherwise where one has promised a farm or other thing in reply to a stipulation (D. xlv 1 fr 75 § 10; xviii 1 fr 25 § 1).

[3] Varro *RR.* ii 2 § 6 (speaking of sheep) *Cum id factum est* (*i.e.* agreement), *tamen grex dominum non mutavit, nisi si est adnumeratum* (money paid down): *nec non emptor pote ex empto vendito illum damnare, si non tradet quamvis non solverit nummos, ut ille emptorem simili judicio, si non reddit pretium.*

25 § 1, 53, 74; Ulp. xix 7; cf. Gai. iv 131 *a*). The person on whose account the purchase is made, not the person who merely pays over the price, is deemed to be the owner, provided he has got delivery (Paul ii 17 § 14; cf. Cod. iv 50 *passim*). In case of non-delivery by vendor's fault the purchaser can sue for the value of his interest in having the thing at the time agreed on; and thus if meanwhile the thing has risen in value, the purchaser can claim the increased value, but cannot claim for remote consequences of the delay, *e.g.* for the loss of a favourable sale, or the death of slaves starved to death from want of the purchased corn[1] (D. xix 1 fr 1 pr, 21 § 3).

(*c*) No delivery frees the vendor from responsibility unless the purchaser is thereby given possession of the thing sold, free from all interference, not only by persons claiming a legal possession as owners, pledgees, or others, but also by persons claiming to occupy on behalf of legatees or creditors[2]. If anyone can lawfully withdraw the possession, there has been no proper delivery (D. xix 1 fr 2 § 1, 3 pr). And if eviction is threatened, the purchaser cannot be compelled to pay, even though sureties are offered (Vat. 12, reversed in D. xviii 6 fr 19 § 1). If an agent sells a thing for less than he was authorised, the property does not pass to the purchaser (D. xxi 3 fr 1 § 3). If a slave, either by mistake or malice, in shewing the bounds or delivering vacant possession, shews a larger plot of land than the vendor intended to sell, the excess does not pass to the purchaser (D. xviii 1 fr 18 § 1): but if the vendor himself shewed

[1] Paul says the vendor is liable for *omnis utilitas emptoris*, but limits it by adding *quae modo circa ipsam rem consistit, neque enim si potuit ex vino puta negotiari et lucrum facere id aestimandum est etc.* The matter has given rise to much discussion. See Vangerow *Pand.* iii pp. 44, 45 who holds that the indirect consequences which are excluded are such as were only possible and could not be foreseen. Cf. D. xiii 4 fr 2 § 8; xviii 6 fr 20.

[2] The usual course as regards land was for the bounds to be shewn (*fines demonstrari*) to the purchaser and vacant possession (*vacua possessio*) to be given, *i.e.* the purchaser entered on the estate when there was no one claiming title on the place. (See vol. 1 pp. 457, 458.) Cf. Cic. *Tull.* 7 § 17 *Fines Acerronio demonstravit neque tamen hanc centuriam Populianam vacuam tradidit* (the *cent. Pop.* being land adjacent to that sold). Cf. D. xix 1 fr 48; xxi 2 fr 45.

the bounds, he was liable if part were evicted, although what was left was more than he had stated (D. xxi 2 fr 45).

(*d*) From the date of completion of the contract, though delivery has not taken place[1], the risk (as well as the fruits or other gain) belongs to the purchaser: and therefore the vendor is bound, so long as the thing is not delivered, to such care for safekeeping as, or even more than, a good housefather (*bonus paterfamilias*) uses to his own things (D. xviii 6 fr 3, 8 pr; Vat. 15). If the thing sold should be stolen from him, the vendor must cede to the purchaser his actions of vindication and condiction (D. xviii 1 fr 35 § 4). If a slave dies or is injured, or if land has been seized by the State, or if a house has been burnt down, *etc.* after contract for sale completed and without fault of the vendor, the purchaser must still pay the vendor the agreed price (D. xviii 5 fr 5 § 2; tit. 6 fr 12; xxi 2 fr 11). If wine has been sold for price certain but has not been definitely marked or set out, the purchaser does not bear the risk of its turning sour or mouldy; but if a specific lot of wine has been sold, the purchaser bears the risk, even though the condition of the purchase does not actually occur until later (Vat. 164; D. xviii 1 fr 35 § 7; tit. 6 fr 4 §§ 1, 2). Where vendor has made delivery impossible, *e.g.* by manumitting a slave whom he has sold with his *peculium*, he is liable to the purchaser for all the slave had in his *peculium* and his future acquisitions, which would otherwise have come to the purchaser; and he must give him a bond for whatever should come to him from the inheritance of this freedman (D. xix 1 fr 23).

(*e*) The thing sold (and the same is true if it is bequeathed) carries with it all natural appurtenances. Thus the sale of a house includes many things which are not physically attached to it, but are of permanent use with it, such as well-covers, wheels for raising water, troughs, pipes, leaden cisterns (*castella*), keys, tiles or other things waiting to be replaced where they were in use before. So also pipes leading water to the house, even if the right to the water is lost by non-use.

[1] The apparently discrepant passages D. xviii 6 fr 13—14; xix 2 fr 33 *med.* are perhaps best explained by assuming that there was fault on the part of the vendor. Cf. Fr. Mommsen *Beitr.* i pp. 332—336.

Warehouses carry with them jars (*dolia*) sunk in the ground. Land carries as a rule only what is fixed to the soil, and does not include the plant (*instrumentum*), *e.g.* oil-presses, sunk jars, *etc.*, nor trees fallen before completion of the contract; but vine poles temporarily pulled up, and beds of straw or dung intended for use on the farm and lying there, pass to the purchaser. *Ruta et caesa*[1], *i.e.* sand, chalk, timber, charcoal, or other things won or cut, and still remaining unused above the ground, do not pass with the land, though it is usual for greater certainty to reserve or except them (*recipere, excipere*). Fruits, ungathered though ripe, pass with the land, unless expressly excepted (D. xviii 1 fr 47—49, 76 pr; tit. 6 fr 9; xix 1 fr 13 § 10, fr 15, 17; L 16 fr 205, 241). A reservation of all the fruits includes reeds and underwood (xviii 1 fr 40 § 4). The rents of lands and houses, already due, do not pass to the purchaser unless promised; nor in strict law do the future rents under a lease made before the sale, for the purchaser is no party to the personal contract between his vendor and the lessee. If nothing is said about the lease in the contract of sale, the purchaser can ignore it, and turn out the lessee, leaving him to his remedy against the vendor for breach of contract. Or, if he cannot do that, he can sue the vendor for failure to deliver vacant possession, or for breach of his covenant of quiet enjoyment (D. xviii 1 fr 68; xix 1 fr 13 § 11; tit. 2 fr 25 § 1; Cod. iv 65 fr 9). In the case of lands belonging to towns or other communities and let by them for a perpetual rent. any sale of the lands must be subject to the rights of the lessee (D. vi 3 fr 1). The benefit and burden of servitudes duly constituted pass (though not mentioned) with the estate to which they are

[1] Cf. Cic. *Top.* 26 § 100 *Feci quod saepe liberales venditores solent, ut cum aedes fundumve vendiderint, rutis caesis receptis concedant tamen aliquid emptori quod ornandi causa apte et loco positum esse videatur.* In the last words Cicero probably referred to rocks or pebbles, or trunks of trees, not permanently affixed, but disposed by way of rustic ornament, or perhaps to wooden buildings not affixed to the soil, for such were counted among *ruta et caesa* (D. xix 1 fr 18; Cic. *Orat.* ii 55 § 256). Cf. Cic. *Part. Or.* 31 § 107 *Cum ex testamentis quid sit penus, aut cum ex lege praedi quaeritur, quae sint ruta caesa,...verbi interpretatio controversiam facit.*

attached; but the vendor, if cognisant of a burden of the kind, is liable to the purchaser for fraud if he does not name it expressly—not merely in general terms[1] (D. xli 1 fr 20 § 1; xix 1 fr 39). So also acquisitions of any kind since the contract, whether fruits gathered, moneys for hire of slaves or of beasts or of ships accruing due, the offspring of animals and children of female slaves born since, inheritances and legacies acquired through slaves, actions acquired such as *damni infecti, aq. pluv. arcendae, quod vi aut clam*, or *legis Aquiliae*, come to the purchaser (D. xix 1 fr 13 §§ 12, 13, 18; xxii 1 fr 4 § 1; Vat. 15). A slave's *peculium* did not pass with him, unless that be agreed (D. xviii 1 fr 29). In general the rule holds that *abalienatio cum fit, cum sua causa dominium ad alium transferimus, quae esset futura, si apud nos ea res mansisset; idque toto jure civili ita se habet, praeterquam si aliquid nominatim sit constitutum* (fr 67; xli 1 fr 20 pr), *i.e.* apart from any special agreement, the purchaser steps into the vendor's shoes from the date of the contract's being duly completed, and is entitled and subject to all natural or duly constituted accessories and restrictions, benefits and burdens of the ownership: but personal obligations whether active or passive remain with the vendor.

(*f*) The vendor is liable to the purchaser for any serious defects which he has not declared and of which the purchaser was reasonably ignorant, either in the thing sold or in any accessory. And he is especially liable if he has declared what was not true. The liability is much more onerous, if he has known of the fault and has concealed it. If he has been ignorant, for instance, that the cattle were diseased, or the timber faulty, or the slave a runaway, or the

[1] In selling a farm or house, if the vendor declared that he sold it *ita ut optimus maximusque* (cf. Bruns[6] no. 108), *i.e.* 'in the largest extent and best condition,' it was held by Q. Mucius that the vendor guaranteed its freedom from servitudes to others, but if nothing of the kind was said, it was sold for what it actually was, the vendor taking no liability on this score either for beneficial or burdensome servitudes (D. xviii 1 fr 59; xxi 2 fr 75). A dispute on this point is mentioned in Cic. *Orat.* i 39 § 178; *Off.* iii 16 § 67; in which latter place the important fact of the purchaser's having been at one time previously owner of the premises is named, though omitted in *Orat.* See vol. 1 p. 536.

wine bad or not likely to remain good till the time of delivery, or the land, or house subject to easements or water rate, *etc.*, he is liable to the purchaser for so much as the purchaser would have given less if the facts had been known to him. But a fraudulent vendor is liable for all the loss which the purchaser has suffered from the purchase, *e.g.* for the value of the house, if it fell in consequence of the timber being rotten, for the value of cattle which had caught a disease by contact with those sold, for the value of things stolen by the runaway slave or of other slaves whom he may have induced to run away also. And one who without knowledge of a slave's fault makes bold assertion to the contrary is nearly as bad (D. xix 1 fr 1, 6 § 4, 11 § 17, 13 pr—§ 3, 27, 41; xviii 1 fr 45; tit. 6 fr 16; xxi 1 fr 4 § 4, 33).

If purchaser brings action more than once on account of several defects or breaches, vendor is not liable in account for more than the purchaser's interest (*quanti emptori intersit*), and therefore damages in later actions will if necessary be reduced by what has been paid on former ones (D. xix 1 fr 11 § 10).

(*g*) Purchaser is bound to take delivery at the time agreed on. Thus wine bought from the cask (*doliare*, 'jar-wine') must be taken without unreasonable delay and at any rate before the vintage, if vendor is a grower and requires the jars. If purchaser delays, vendor can, after notice given, pour out the wine, or charge the purchaser with the cost of hiring other jars (D. xviii 6 fr 1 § 3—fr 2; xix 1 fr 9). So if purchaser of a slave does not take delivery, he can be charged with the cost of keeping him (xix 1 fr 38 § 1). Purchaser is liable for interest on unpaid purchase money from the time of delivery—such delivery as enables him to take the fruits (Paul ii 17 § 9; Vat. 2; D. xix 1 fr 13 §§ 20, 21). Any bargain for interest exceeding the lawful rate was invalid for the excess (Vat. 11). Purchaser is liable for any expenses reasonably incurred by vendor on the thing sold (fr 13 § 22).

(*h*) [A rescript of Diocletian allowed the vendor, if he or his father had sold for less than half the value, to claim rescission of the sale or payment of the deficiency, the purchaser having the option (Cod. iv 44 fr 2, 8). This rescript was followed

in practice, and in modern times became the subject of much discussion, the loss to the vendor being spoken of as *laesio enormis*.]

(*i*) As sales rest on informal agreement and are similarly dissoluble, a formal release (*acceptilatio*) has no proper application, but is evidence of agreement to dissolve (D. xviii 5 fr 2, 3, 5).

Two matters require further treatment in some detail: viz. the vendor's liability (i) for defect in the thing sold; (ii) for want of title. Both were part of the ordinary law, but the obligation was further secured and accentuated, for the former by the Aediles' Edict, for the latter by a stipulation.

3. AEDILES' EDICT.

Liability for faults was recognised by the XII tables, so far as the vendor had made any declarations at the time of mancipation. The lawyers extended this liability to the case of any suppression of facts important for the purchaser to know, and applied it to sales in general, whether made by mancipation or otherwise[1]. The (curule) aediles in their edict made special regulations for the sale of slaves, and certain animals; and these, so far as applicable, were extended to

[1] Cic. *Off.* iii 16 § 65 *De jure quidem praediorum sanctum apud nos est jure civili ut in iis vendendis vitia dicerentur, quae nota essent venditori. Nam cum ex duodecim tabulis satis esset ea praestari quae essent lingua nuncupata, quae qui infitiatus esset dupli poenam subiret, a jurisconsultis etiam reticentiae poena est constituta; quicquid enim esset in praedio vitii, id statuerunt si venditor sciret, nisi nominatim dictum esset, praestari oportere. ib.* 17 § 71 *Nec vero in praediis solum jus civile ductum a natura malitiam fraudemque vindicat, sed etiam in mancipiorum venditione venditoris fraus omnis excluditur. Qui enim scire debuit de sanitate, de fuga, de furtis, praestat edicto aedilium. Heredum alia causa est* (heirs' position being different because responsible not for their own knowledge but for that of their predecessor). The extension by lawyers is put by Cicero as relating to land; and he gives a further instance in the case of one who sold his house after he had notice from the Augurs that it obstructed their view and that he must pull it down (§ 46). Labeo (see text, p. 151) made the principle general, doubtless on the analogy of the curule aediles' edict.

other sales; but the special actions given by this edict did not oust the general action *ex empto*, except so far as satisfaction may have been got.

(*a*) Under this edict the vendor was to declare plainly at the time of sale any disease or vice a slave had, and whether he was a runaway or truant or liable to be surrendered for thefts or injuries committed[1]; whether he had committed any capital offence or had attempted suicide or had been sent into the arena to fight with beasts. An old hand was not to be sold as a novice (*veterator*[2] *pro novicio*). If such declaration was not made, or if the slave was found to have faults not declared (perhaps unknown to the vendor), the purchaser or other person concerned (*e.g.* heir, *etc.*) could, within six months from the sale, require the slave and all accessories and profits to be taken back (*redhiberi*), and could demand restitution of the price and of any accessory to the price[3]; or, within twelve months, could demand compensation for the inferior value of the slave on these accounts. A like rule was laid down for the sale of *jumenta* (*i.e.* horses, mules and asses), and was further extended to other cattle (*pecus*). If the trappings (*ornamenta*)[4] of the animals worn at the time of sale were not delivered, the purchaser could within two months sue for them, or return the animals on that account; and if a pair were sold,

[1] Varr. *RR.* ii 10 § 5 *In servorum emptione solet...intercedere stipulatio sanum esse furtis noxisque solutum.*

[2] The distinction between 'new' and 'old hands' is in some cases made by length of service in the city, one year's service being that which makes an old hand (D. xxxix 4 fr 16 § 3). But in interpreting the aediles' edict more weight was attached to the kind of employment and the state of education. The new hands were thought preferable because more easily governed and more readily adaptable to a master's wishes (D. xxi 1 fr 37, 65 § 2).

[3] Cf. Pl. *Pers.* 669 where, after the sale of a (supposed) slave has been agreed upon, an accession both to the slave and the price is proposed: *Heus tu, etiam pro vestimentis huc decem accedent minae.* Cf. Cat. *RR.* 144—146; Cic. *Verr.* iii 32, 36, 49, 50; *Rab. P.* 11 §§ 30, 31.

[4] Plautus alludes to this *Stich.* 171 *Nunc si ridiculum hominem quaerat quispiam, venalis ego sum cum ornamentis omnibus. Pseud.* 342 *Jam pridem vendidi (tuam amicam).* Ca. *Quo modo?* Ba. *Sine ornamentis, cum intestinis omnibus.*

both could be returned on account of the faults of one (D. xxi 1 fr 1 §§ 1, 2, 18 § 6, 37, 38 pr § 5). The times named are all *utiles* and run from the day of sale or declaration or promise.

The lawyers are said by Labeo (in Digest) to have extended the edict so as to comprehend all other things whether moveable or immoveable (*ib.* fr 1 § 1; cf. fr 49, 63).

(*b*) The action to have the purchase rescinded and the price returned was *judicium redhibitorium.* If the price was not repaid or the surety for the price not released, the damages were double the amount of the price and of any accession to the price. The action for compensation was called *jud. aestimatorium* or *quanti minoris.* Both actions ran for and against heirs (*ib.* fr 18 pr, 23, § 5, 45, 48 § 5). Within six months purchaser could bring either action at his choice, and, if he sued by the latter and the defect were shewn to be such as would have prevented the purchase altogether, he can demand that the slave, *etc.* be taken back (D. xliv 2 fr 25 § 1).

(*c*) What particular defects or infirmities came under the names of *morbus vitiumve* were discussed in detail. Both terms related to the body; and the criterion was whether the use and service of the slave was thereby hindered[1]. When the defect was palpable or betrayed by ordinary indications, so that an intelligent purchaser was in no risk of deception, the edict hardly applied. For faults of character (*animi vitia*), redhibition was not granted, unless the vendor had denied them, and on this account the edict required[2] a distinct statement

[1] Thus, where the defect was no practical hindrance to the use or service of the slave, the following were held not to be cases for redhibition: *gutturosus, gibberosus, curvus, varus, vatius, balbus, blaesus, lippus, pruriginosus, scabiosus, impetiginosus, spado,* having too many fingers or toes, unequal eyes or jaws or arms, squinting, *etc.* On the other hand the following were generally considered subjects for redhibition: lame, having tongue cut out, or fingers or toes cut off, or fingers joined together, *varicosus,* near-sighted, having a *clavus,* or diseased tonsils, by malformation incapable of bearing children, having tertian or quartan fever, or gout, or epilepsy (D. xxi 1 fr 4 § 6—fr 15, 50, 53).

[2] Cicero, putting a case of conscience, says *In mancipio vendundo, dicendane vitia, non ea, quae nisi dixeris, redhibeatur mancipium jure civili, sed haec mendacem esse, aleatorem, furacem, ebriosum* (*Off.* iii 23 § 91).

Cf. Hor. *Sat.* ii 3 284 *Sanus utrisque auribus atque oculis; mentem,*

whether the slave was a runaway or truant (*fugitivus errove*); a truant being one who often loiters and stays out, a runaway one who leaves his master's house or service with the intention of not returning (*animus fugitivum facit* and cf. D. L 16 fr 225). Flight to an asylum or Caesar's statue does not make a runaway. Nor is a slave returnable who for the first time runs away at the buyer's. When there is no other evidence attainable, credit will be given to the slave's own answer on the point of this being his first running away (D. xxi 1 fr 17 § 12, 54, 58 § 2; Paul ii 17 § 12). The vendor had also to state the slave's nation. Mere puffing of a slave's good qualities is no ground for these actions, and even distinct declarations must be interpreted reasonably; but any serious difference of character from what was asserted or promised by the vendor is ground for suit; and if such assertion was made in order to deceive the purchaser, an action for fraud could be brought. Suicide, if attempted not from guilt but merely from physical pain, is not ground for suit. Condemnation or having incurred penalty for criminal offence ought to be declared (D. *ib.* fr 1 §§ 6—8, 4 §§ 3, 4, 14 § 10, 17 pr—§§ 16, 19, 18 pr, 19 pr—§ 4 fr 31 § 21; iv 3 fr 37; cf. xviii 1 fr 43). If a farm is malarious (*pestilens*), redhibition applies: if it was subject to an undeclared servitude *quanti minoris* applies (fr 49, 61).

(*d*) The scope of the redhibitory suit is to restore the parties to their old position. The purchaser has to restore the slave and anything which accompanied him and all that he has gained by the slave, including *partus ancillae*; and damages recovered on account of robbery of, or injury to, the slave, but excluding damages for insult through him (*injuriarum*) and any gains made by use of the purchaser's own property (*ex re mea*). Further he must give security against any fraud of his own, and must compensate the vendor for any

nisi litigiosus, exciperet dominus cum venderet. (In the particular case however it is a freedman who is spoken of: Horace is supposing him a slave.) *Ep.* ii 2 14 sqq. where a vendor of a slave says *Semel hic cessavit et ut fit in scalis latuit metuens pendentis habenae. Des nummos, excepta nihil te si fuga laedat. Ille ferat pretium poenae securus, opinor: prudens emisti vitiosum: dicta tibi est lex.*

deterioration either in the slave's body or character, which has been occasioned by his or his people's[1] or manager's treatment of him (*operae familiae procuratorisve*). If the manager was in fault, it is enough if the purchaser surrender his action. If the purchaser has pledged the slave, he must redeem him. On this restitution being made, in accordance with the judge's decision, or if vendor be regarded as impecunious, on a bond being given by the purchaser to this effect, the vendor has (under a penalty of double the value if he refuse) to repay the price and anything given with it as part of the bargain, and also accrued interest and expenditure (*e.g.* tax or rent charge, *vectigal*) made by purchaser, and to free him from all obligations in that behalf. Further the purchaser is entitled to retain the slave until he is reimbursed by vendor for the expenses of the slave's illness (not his keep), the value of things stolen from him by the slave, and any payment he may have made as damages for the slave's delicts. If the vendor declines to pay these expenses as allowed by the judge, he must give up his claim to the slave (who will remain with the purchaser), and condemnation will then be for the amount of the price and accessories only (D. xxi 1 fr 21 § 1, 23 pr §§ 1, 7—fr 31 pr, 45, 58; xxx fr 70 § 2). If the slave is dead before trial without any fault on the purchaser's part, the purchaser's claim is still good (D. xxi 1 fr 31 § 13).

(*e*) The vendor is responsible for the good condition of the accessories to the thing sold, provided that they are ascertained either by name or description (*e.g.* 'all the slaves on the estate'); but not if they are merely part of a general term, *e.g.* an inheritance, the working stock (*instrumentum*) of a farm, the *peculium* of a slave (none of which necessarily includes slaves). On the other hand a slave, though not diseased or vicious, may be returned, if appendant to the principal thing sold and found deficient, or if he be one of a band; or a near blood-relation of a slave returned. A similar rule obtained in the case of yoke beasts (fr 33—35, 38 §§ 13, 14, 39).

[1] For the corruption of the slave by the purchaser's own slave, the purchaser could not make a noxal surrender of his own slave, for the harm was done to one who was at the time his own slave also (D. xxi 1 fr 25 § 7).

(*f*) Knowledge by the purchaser of the fact of flight, *etc.* is fatal to any claim against the vendor based on non-declaration (fr 48 § 4). Where the purchaser of a slave, *etc.* was himself a slave, whether buying for his *peculium*, or by his master's order, the master's suit cannot be met by a plea alleging the master's knowledge of an undeclared fault; the slave's knowledge is alone of importance, unless the master knowing of the actual fault directed this very slave to be purchased. In the case of a procurator, his knowledge defeats his suit, his principal's knowledge does not (fr 51).

(*g*) If a master sue by the *redhibitoria* in respect of a slave, *etc.* purchased by his slave, the whole that he has gained with or by him must be returned, irrespective of the amount of his *peculium*. But if a slave (or son under power) be vendor, and the master (or father) is sued on his behalf, he is liable only to the amount of the *peculium* (in which however the value of the slave sold is reckoned): so that if the slave is much in debt to his master, the result may be that the purchaser will have returned the slave and get nothing back (fr 57).

If the purchaser gives back the slave and accessories, and the vendor receives him, the redhibitory suit is no longer necessary, and the purchaser has an action on the case (*in factum*) for repayment of the price, *etc.*, in which the only issue for trial is, whether the slave, *etc.* has been actually returned (fr 31 § 17; cf. Vat. 14).

(*h*) The suit '*quanti minoris*' can be brought more than once, if a new cause occur, *e.g.* first for a slave's running away, then for discovered disease, *etc.*; but the total damages should be controlled, so as not to let the purchaser make a gain (fr 31 § 16; xxi 2 fr 32 § 1). This suit can be proceeded with notwithstanding that the redhibitory has been defeated by a plea of more than six months having elapsed (D. xxi 1 fr 48 § 2).

(*i*) Where the purchaser leaves several heirs, the consent of all is required for redhibition, and they should act by the same procurator: each can claim separately his share of the price and the accessories, and each is separately liable for damage; but if the damage has been caused by one only, he is liable in full. Where the vendor leaves several heirs, each

can be sued in proportion to his share of the inheritance; the purchaser would not redeliver the slave until he had been wholly repaid or secured. The same is the case where a slave common to several owners has been bought by separate shares, but if each or one professed to sell the whole, he will be liable to redhibition for the whole (fr 31 §§ 5—10). Where a number of slave-dealers are the vendors and act as a company, the redhibitory suit can be brought against that one of them who has the largest share or at least as large a share as any of the others. Action on the purchase lies against each for his own share only (fr 44 § 1).

(*k*) Redhibition was not in practice allowed in cases of such small value that the single value only was demanded for their eviction (*simplaria venditio*); and it was also inapplicable to sales by the fisc; which indeed never paid more than the single value (D. xxi 1 fr 48 § 8, fr 1 § 3; xlix 14 fr 5 pr).

(*l*) In order to secure further the obligation of the vendor under this edict it was usual to add to or include in the stipulation against eviction (*stipulatio duplae*) a guaranty of the truth of the vendor's declarations[1]: and action on the stipulation was not limited to the six (or twelve) months of the edict; and once acquired was not lost by eviction or the death or manumission or flight of the slave. Such an engagement came to be regarded completely as a part of the *bonae fidei* contract, so that the purchaser could sue *ex empto* to compel the vendor to make it, or could within two months make redhibition, or within six months sue *quanti minoris*, to have

[1] Varro gives such covenants in the case of many animals, *e.g. Cum emptor dixit 'tanti sunt mi emptae?' et ille respondit 'sunt' et expromisit nummos, emptor stipulatur prisca formula sic: 'Illasce oves, qua de re agitur, 'sanas recte esse uti pecus ovillum quod recte sanum est, extra luscam surdam 'minam (id est ventre glabro) neque de pecore morboso esse habereque recte 'licere: haec sic recte fieri spondesne'* (*RR.* ii 2 § 6). *Boves cum emimus domitos, stipulamur sic: 'Illosce boves sanos esse, noxisque (solutos) praestari?' cum emimus indomitos, sic 'Illosce juvencos sanos recte deque pecore sano esse, noxisque (solutos) praestari spondesne.' Paulo verbosius haec qui Manili actiones* (*i.e.* the forms drawn by the jurist Manilius) *secuntur lanii qui ad cultrum bovem emunt; qui ad altaria, hostiae sanitatem non solent stipulari* (*ib.* ii 5 §§ 10, 11).

the price reduced on account of the absence of this stipulation (D. xxi 1 fr 28, 31 § 20; tit. 2 fr 16 § 2).

(*m*) Where the vendor had wrongly magnified the quantity of land sold, he was liable for the difference as if the purchaser had been evicted to that extent. The value was estimated in proportion to the number of acres if the price had been fixed per acre or for the whole without distinction: but if the acreage had been given separately for vineyard or oliveyard, *etc.* the estimate had regard to the particular quality of the land. And the like regard was paid when a specific portion of the farm was evicted. If the vendor had lied respecting the quantity, he had to pay double value[1] (Paul ii 17 § 4; D. xix 1 fr 4 § 1; xxi 2 fr 1, 53 pr, 69 § 6).

(*n*) It was allowable for the parties to contract themselves out of this edict by a bargain (*pactum*) made at the time or subsequently (D. ii 14 fr 31).

4. Liability for want of title.

(*a*) Liability for eviction was of the very essence of a *bonae fidei* contract. Sales by mancipation carried with them a guaranty of title to double the value[2], and, when there was no mancipation, a stipulation of the like amount was usual. It is doubtful whether surrender in court had the same effect as mancipation[3], but for the conveyance of mancipable things mancipation was the almost invariable practice (Gai. ii 25). The vendor in his character of guarantor of title was called *auctor*, and the action against him to enforce the

[1] Paul in i 19 speaks of an *actio de modo agri* which is classed with those which *infitiatione duplantur*. This classification is by Krüger and others taken to be a mistake. So also Mitteis (*ZRG.* xxxv 111). On such a separate *actio* see Lenel *ZRG.* xvi 190 (who holds that it was originally of a delictal character); Pernice *Labeo* iii 115; Karlowa *RG.* ii 576 who makes two actions.

[2] Cf. Pl. *Pers.* 524 *Suo periculo is emat qui eam mercabitur: mancipio neque promittes neque quisquam dabit*, the girl being sold without any guaranty of title. The usual practice is given by Varro *RR.* ii 10 § 5 *In servorum emptione, si mancipio non datur, solet dupla promitti, aut, si ita pacti, simpla.*

[3] It had not according to Bekker *Act.* i 33; and Karlowa *RG.* ii 383.

guaranty was *auctoritatis actio*[1]. At one time it was the practice for the vendor to give bail (*vades*) for his due appearance to defend the purchaser when the title (to land) was attached[2]. Afterwards sureties for title were usual, at least in sales for value by mancipation (*satisdatio secundum mancipium*); but the ordinary practice, in imperial times, even in sales by mancipation, was for the purchaser to stipulate, without requiring sureties, for twice the value in case of eviction of the whole or part, or for the single value only when the value was small. More than twice the value was occasionally promised. Where no mancipation or stipulation or special bargain was made, the vendor would not be liable *ex empto* for more than the purchaser's interest in not being evicted (Paul ii 17 §§ 1—3; Vat. 8; D. xxi fr 4 pr, 37 pr, 56 pr, 60, 70; Varr. *L. L.* vi 74; *Tab. Baet.* vv 16, 17 *ap.* Bruns[6] no. 110).

[1] Cicero refers to this in *Mur.* 2 § 3 *Quod si in iis rebus repetendis quae mancipi sunt is periculum judicii praestare debet qui se nexu obligavit, profecto etiam rectius in judicio consulis designati is potissimum, consul qui consulem declaravit, auctor beneficii populi Romani defensorque periculi esse debebit.* In *Caecin.* 19 § 54 *Actio est in auctorem praesentem his verbis 'quandoque te in jure conspicio.'* See Val. Prob. 4 who refers the words to the *legis actio* and completes them with *postulo anne far (fuas?) auctor.* Plaut. *Curc.* 498. In D. xiii 7 fr 43 pr we have *instrumentum auctoritatis* 'title deed of sale.' To 'name' or 'call on' the authority for the title was *laudare auctorem* D. xix 1 fr 6, 25; xxi 2 fr 63 § 1; Cod. viii 44 fr 7, 14; cf. Gell. ii 6 § 16 *Laudare significat prisca lingua nominare appellareque. Sic in actionibus civilibus auctor laudari dicitur, quod est nominatus.* Cf. Cic. *Orat.* iii 18 § 68; *Brut.* 11 § 44.

[2] Cf. Varr. *L. L.* vi 74 *Consuetudo erat, cum reus parum esset idoneus inceptis rebus, ut pro se alium daret. A quo caveri postea lege coeptum est ab his qui praedia venderent 'vadem ne darent'; ab eo adscribi coeptum in lege mancipiorum 'vadem ne poscerent nec dabitur.'* Cic. *Att.* v 1 § 1 *De satisdando te rogo, quoad eris Romae, tu ut satisdes: et sunt aliquot satisdationes secundum mancipium, veluti Memmianorum praediorum vel Attilianorum.* Cicero no doubt had sold some lands and had to give security for title to the purchaser in accordance with the terms of mancipation.

A surety for title was commonly called *auctor secundus* (D. xxi 2 fr 4 pr). The stipulations on sales given in Bruns[6] nos. 105—108 are all supported by a *fidejussor*, who in no. 107 calls himself σεκοδο αυκτωρ. For this habitual practice in Greek sales see Mitteis *Reichsrecht* p. 503 sqq.

By the contract of purchase the purchaser could demand the acceptance of such a stipulation: and a refusal to make the promise gave the purchaser a right to double damages (D. xxi 2 fr 2). An agreement for no guaranty or for the addition of sureties could be made, but would only serve as a plea, unless made at the time of the original contract (D. xviii 1 fr 72 pr).

(*b*) The ordinary stipulation against eviction (*stipulatio duplae*) imported (in accordance with the ordinary law) not that the vendor was owner, or conveyed the ownership of the thing sold, but that he guarantied to the purchaser lawful holding (*recte habere licere*), and in case of disturbance, double the value. The terms of the stipulation varied, the vendor sometimes guarantying (by a penalty attached) the purchaser against any interference from any quarter with his hold of the thing (which would be the effect of a simple promise *habere licere*), sometimes giving a guaranty only against interference by himself and his successors (*per se venientesque a se personas nihil fieri quominus emptori habere liceat*). Even in the latter case vendor would still be liable on any eviction of the purchaser, if he knew that he was selling what was not his own. If he did not know it, and was acting in good faith, it was held, or at least suggested, by Julian, that the purchaser if evicted by outsiders, could at any rate claim the return of his purchase money, not under the stipulation, but on the general equity of the contract. Julian puts on the same footing a definite bargain by vendor that no claim at all against him should be brought in case of eviction. It is much disputed[1] whether Ulpian approved or dissented[2] from Julian, and Julian's suggestion is not adopted by modern lawyers. That it was possible for the parties to agree that the purchase money should or should not be returnable, cannot be doubted (D. xix 1 fr § 18; xlv 1 fr 38 pr—§ 5). When a slave is sold, the eviction-clause should contain the addition *partemve*; otherwise if someone established a claim to a share in the slave, the purchaser would not be protected, as the slave (being physically indivisible) would not have been evicted (D. xix 1 fr 56 § 2).

[1] Cf. Vangerow *Pand.* § 610 Anm. 4.

[2] The words *ex empto non tenebitur* favour the view of Ulpian's dissent.

(*c*) The stipulation comes into play (*committitur*) only if by rightful judicial decision the purchaser is deprived of all or part of his rights, whether it be that he has to give the thing (or part) up to a claimant, or is condemned to pay damages for its value, or that the possessor is acquitted, when the purchaser sues for it (D. xxi 2 fr 16 § 1, 51 pr); or if by judicial proceeding the thing is shewn to be under pledge, or only partly the property of vendor, or subject to a usufruct in favour of another, or to an easement when he asserted it to be free (fr 10, 34 §§ 1, 2, 46 pr, § 1, 48); or if the purchaser has resold the thing and the second purchaser is evicted for want of title in his vendor (fr 33, 39 § 1). Or further, if a slave is sold and purchaser is not informed that he is *statu-liber*, or if the purchaser is deceived as to the condition of the slave's contingent freedom, or if a purchased slave has to be surrendered noxally for fault committed before the sale; in all these cases the vendor is liable on the stipulation (fr 46 §§ 2, 3, 54 § 1). But the purchaser cannot recover from the vendor, if the loss of the thing or its possession is really due to himself; *e.g.* if he has let judgment go by default; or has consented to an arbitration and been defeated; or has neglected to secure himself by usucapion; or has broken the conditions of the sale of a slave (*e.g. ne prostituatur*) so that he or she becomes free; or has allowed vendor to be buried in the land purchased and thereby lost its ownership (fr 29 § 1, 34 pr, 51 § 2, 55 pr, 56 §§ 1, 3). It is only an eviction by rightful decision after fair defence by the purchaser, that makes the vendor liable on his guaranty (Vat. 8, 10).

(*d*) The purchaser if sued on the point of title should give notice (*denuntiare*) to the vendor time enough before the judge's decision to enable him to defend. If the vendor is absent, or shirks notice, or declines to defend the title (*defugiat auctoritatem*), and judgment goes against the purchaser, the vendor is liable. Vendor's heirs are each entitled to notice and each is liable to be sued for the whole amount, and anyone avoiding (*defugiens*) defence of the title makes all liable to payment in the ratio of their shares in vendor's inheritance. If one appears and defends and the rest purposely keep aloof, the success or defeat of the one is good for all. Notice to the vendor or his

heirs was as a rule a necessary condition of purchaser's right to recover from them (fr 29 § 2, 53 § 1, 62 § 1; xlv 1 fr 85 § 5, 139; Cod. viii 44 fr 8). If vendor was a slave, notice must be given to him, not to his master; and if eviction takes place the master can be sued only *de peculio* (D. xxi 2 fr 39 § 1). Notice is not essential, if vendor purposely avoids it or is absent or purchaser cannot ascertain where he is (fr 55 § 1, 56 §§ 4—6).

(*e*) When vendor is a creditor selling things pledged to him, he is responsible for his title to sell as creditor, but is not liable for eviction on account of the debtor's want of title, not even to restore the price, unless he knew that the pledgor was not owner (D. xix 1 fr 11 § 16; xx 5 fr 10, 12). If creditor has without fraud expressly guarded himself against any liability for eviction, purchaser has no plea to resist demand for the price (D. xxi 2 fr 68).

5. Action *ex empto*.

The general action *ex empto* is wider than the action *ex stipulatu*, and applies to all cases where, owing to vendor's fault, purchaser has not obtained by the purchase the benefits which he had a right to expect from the vendor's conduct and declarations. The stipulation was not as a rule intended to novate all obligations arising from the contract, and therefore the action on the purchase remained often available, where the stricter action on the stipulation was not available or effective. The action *ex empto* can be brought as soon as a defect is ascertained, without waiting for actual damage as an action on the stipulation requires (D. xix 1 fr 4). It can be brought on the ground of fraud before eviction, if vendor knew and purchaser was ignorant that vendor had no title; and this power would be especially useful, if the purchaser required not merely the possession but the ownership, *e.g.* in order to manumit a slave or to pledge the thing (fr 30 § 1). Declarations made by vendor may afford sufficient protection to him against the stipulation, but if the purchaser was reasonably deceived by them, would not be good against a suit on the purchase (D. xxi 1 fr 69 § 5). Easements the vendor is not held to guaranty, unless he has declared them, but if he knows of their purtenance to the land

or house sold, and his silence leads the purchaser to neglect their use, the better opinion was that the vendor was liable to an action on the purchase (D. xviii 1 fr 66 pr § 1). If a purchaser of a farm, with the understanding that there was no right of way for others through it, is defeated on an interdict by a stranger asserting a user of such a way, he cannot sue on the stipulation (which would be broken only by the success of an adverse claim of right), but his quiet *de facto* possession being disturbed, he can sue *ex empto* (xix 1 fr 35). On the other hand if purchaser has become heir to the real owner or has otherwise obtained the ownership without cost, his possession will not be disturbed, but he has got nothing for his money, and action on the purchase is his remedy (D. xxi 2 fr 9, 41 § 1; cf. fr 57; Paul ii 17 § 8). If a farm has improved or deteriorated since the purchase and is evicted, suit on the stipulation will lie for the value as at the time of purchase[1], whereas suit on the contract is for the amount of loss to the purchaser by his vendor's want of title; and this amount may be less, but may also be much more than the original value (fr 16 pr, 64 pr). Fruits of a thing plucked by vendor, young of an animal or slave born since the sale, and other accessories since obtained (*e.g.* an inheritance through a slave), do not come strictly within the terms of the regular stipulation (*rem dari, vacuam possessionem tradi, habere licere*), but if they are not delivered by vendor, or if they are delivered and subsequently evicted, their value could be recovered by action on the purchase (D. xix 1 fr 3 § 1; xxi 2 fr 8, 42, 43; xxii 1 fr 4).

A *bonae fidei emptor* like any other *bonae fidei possessor* holding as owner takes and keeps as his own all fruits separated from the tree or ground, the produce and young of animals, and, if usucapion of the mother has proceeded, the young of female slaves, but his right to take or keep becomes doubtful as soon as issue is joined in suit for eviction (D. xli 1 fr 48 pr; vi 1 fr 20; xxii 1 fr 25 § 1, 28). On this doctrine, much disputed, see Windscheid *Pand.* § 186; Czyhlarz, Glück's *Pand.* § 1732 e. For the consequences in this respect if purchaser is evicted see vol. 1 p. 441.

[1] Including however any alluvial accession though subsequent (D. xxi 2 fr 15 pr).

6. Some special subjects of sale require notice.

(*a*) *Venditio hereditatis.* Transfer of the position of heir altogether could only be effected in the case mentioned in vol. I p. 228. But any heir after full acceptance of heirship could sell to another the inheritance, *i.e.* the complex of assets and debts, rights and liabilities. As between themselves the transfer was complete, but as regards third parties it had no effect. The heir was liable to them as before: and the purchaser could until the time of Antoninus Pius (who granted a *utilis* action D. ii 14 fr 16) sue them only in the heir's name: since that time a bargain made with the purchaser could be used as a plea against suit by the heir. The corporal assets of the inheritance were transferred by delivery.

As with other sales the contract varied with the intention of the parties. Sale of the inheritance of one who is alive or does not exist is null. There may however be a sale of the prospect of an inheritance, and in that case, if vendor is not heir he is liable for nothing. But usually it was understood to be the sale of a known inheritance, which belonged to vendor, who guarantied its existence but not any particular contents. Vendor sells his right and that only. Apart from special agreement or particular exception purchaser took over all incomings[1] and outgoings from the death of testator including the funeral expenses. If the inheritance contained a house which was the subject of security for possible damage (*damni infecti*), and the vendor excepted the house from the sale, the liability for damage caused up to the date of the contract would presumably be the purchaser's; subsequent liability would be the heir's. If vendor reserved a slave but not his *peculium*, he would be entitled to reimbursement by the purchaser for what he has had to pay to the slave's creditors suing him *de peculio* or *in rem verso*, so far as their claims were for what had been expended on the master's own property or were chargeable on such part of the *peculium* as ordinarily accompanied a slave when sold. If the

[1] *Non solum quod jam pervenerit sed et quod quandoque pervenerit restituendum* (D. fr 2 § 4). This appears to include any share of the inheritance which may accrue to the share sold. The matter is much disputed. Cf. Vangerow *Pand.* § 494 n. 6.

slave with his *peculium* was excepted and nothing further was expressed, the vendor would be understood to take all the responsibility for the slave's debts, so far as the *peculium* extended. If vendor excepted a farm, the exception is interpreted very strictly, and thus if vendor afterwards acquired something in virtue of the farm he must cede the accession to the purchaser, unless the intention be shewn to be otherwise. If vendor, besides being heir to testator, was also substituted heir to a child of testator's under age, this inheritance does not necessarily go with testator's own, though for some purposes the will is regarded as one only. But if the pupillar inheritance has already fallen in at the date of the sale, in the absence of proof of contrary intention, the sale would be taken to carry both. All actions acquired by vendor in connexion with the inheritance sold have to be surrendered to the purchaser, who on the other hand has to reconstitute servitudes between testator's and heir's properties which have been lost by temporary merger. Any claims which the heir may have had against testator and could have enforced against anyone else as heir, though merged temporarily, will in equity be enforceable against the purchaser; and reciprocally the purchaser will be able to enforce testator's claims against the vendor, and so far as their *peculium* extends, against vendor's son or slave (D. xviii 4 fr 1, 2, 7—13, 14 § 1, 25; ii 14 fr 16 pr; Cod. iv 39 fr 2).

The relation of vendor and purchaser of an inheritance came especially into notice in its use as the mode of transferring, before the *SC. Trebellianum*, an inheritance from heir by law to heir by trust (Gai. ii 252; see vol. I p. 370).

Where an inheritance was sold by the Crown (*fiscus*) on account of debts or confiscation, the purchaser became directly answerable to creditors, and could directly sue debtors by analogous actions (Cod. iv 39 fr 1; D. xlix 14 fr 41; v 3 fr 13 § 9, 54 pr).

(*b*) *Venditio nominis.* Upon the sale of a debt, the vendor was held to guaranty the existence of the debt but not the solvency of the debtor. The purchaser had a right to all pledges given for the debt, and to a surrender by the vendor of his actions against the principal debtor and sureties if any. Should the vendor obtain any payment in satisfaction of the debt or a

set-off, he must surrender it to the purchaser (D. xviii 4 fr 4—6, 23). The consent or knowledge of the debtor is not required for the sale of the debt (Cod. iv 39 fr 3).

(*c*) The sale of a usufruct is an ambiguous expression. It may mean the establishment for the purchaser in return for his payment, of a usufruct in something belonging to the vendor, in which case the usufruct would last for the purchaser's life, natural or civil. Or it may mean the exercise in return for payment by the purchaser of the right of usufruct in a thing of which vendor is not owner but has only a duly established usufruct, which therefore expires with the vendor's life (D. xviii 6 fr 8 § 2).

7. Sales on condition.

Sales are sometimes made subject to a condition. Much depends on the character of the condition, *i.e.* whether it is suspensive or resolutive. If the condition be suspensive, the contract awaits the condition and is not formed until that occurs. If the condition be resolutive, the contract is complete, and the occurrence of the condition rescinds it. In the former case although the terms of the contract may have been agreed, no rights have passed from the vendor, whether he has made delivery or not, and nothing has yet been gained by the purchaser. In the latter case the vendor has parted with his rights in the thing, and the purchaser has got them instead: he is entitled to the fruits and accessions, can pledge it, bears the risk, and is in a position, if the vendor was not owner, to gain the ownership by usucapion. If the condition occur, both vendor and purchaser re-enter their original position: any pledge of the thing made by the purchaser drops, and he has to give back to the vendor all that he has got by the sale, and the vendor has to refund the purchase money if received. But the purchase and sale, though rescinded, were so far recognised as to entitle the parties to the actions *empti* and *venditi* to enforce the terms of the rescission (D. xviii 1 fr 6 § 1; tit. 2 fr 2 § 1; tit. 3 fr 4 pr; tit. 6 fr 18 § 5).

Certain special conditions of sale may be noticed:

(*a*) *In diem addictio*[1], 'assignment for a future day,' is a contract of sale subject to the condition that vendor has no better offer before a day named. Usually, but not necessarily, this is intended and treated as sale completed but subject to rescission, if the vendor gets a better offer. If such an offer is not made, or if vendor die and no heir be ascertained before the agreed day, the sale stands good and the purchaser cannot be ousted, whatever offer be made subsequently. If a better offer be made the vendor may still disregard it, and the purchaser will then be unaffected (unless indeed by the terms of the sale he was in that case to have the right to throw up the purchase). But if vendor deem the proposal worth accepting, he must give notice of it to purchaser, so that if he choose he may improve his own offer. Whether the vendor accepts the offer of the second purchaser or the new offer of the first, the old contract is rescinded, and the first purchaser must surrender to the vendor all fruits and other gains and rights of action acquired in the meantime, but can by a rescript of Severus claim reimbursement for any necessary expenses incurred upon the thing purchased and any part of the price which he may have paid (D. xviii 2 fr 2, 4 §§ 3—5, fr 6—9, 15 pr, 16; cf. xlix 14 fr 50). Better terms (*melior conditio*) may consist in higher price, easier or quicker payment, a more convenient place for payment, a more substantial purchaser, or one offering lighter terms or requiring no sureties. If higher price be offered by one who is insolvent or otherwise unsuitable, still the vendor was entitled to accept him and rescind the sale. But the right to claim from the first purchaser the mesne profits does not make an offer of the same price as the first purchaser a better offer within the meaning of this agreement (fr 4 § 6, 14 §§ 2, 5).

(*b*) *Lex commissoria*, 'terms of forfeiture,' occurs where the vendor bargains for the rescission of the sale if the purchase money is not paid by a certain date (*si ad diem pecunia soluta non sit, ut fundus inemptus sit*). This also was usually

[1] Cf. Plaut. *Capt.* 179 where a parasite proposing himself to dinner, says *Age sis roga emptum, nisi qui meliorem adferet quae mi atque amicis placeat condicio magis, quasi fundum vendam, meis me addicam legibus, i.e.* 'on my own terms.'

understood as a sale on resolutive condition. It was usual also to bargain that if the vendor in consequence have to sell elsewhere at a less price, the defaulting purchaser should be liable for the difference. If any part of the price or earnest money had been paid, it was usually agreed that this should be forfeited to the vendor, and any fruits gathered should be surrendered, or (at least according to some lawyers) so much of the fruits as were not covered by the forfeiture of part price. To prevent forfeiture purchaser must tender the price. The rescission is at the vendor's discretion, but he must elect, once for all, as soon as the due date arrives: and acceptance of the price or demand for it after that date is a waiver of the forfeiture (Vat. 3, 4; D. xviii 3; cf. iv 4 fr 38 pr).

(*c*) *Ut si displicuerit, res inempta sit*[1], 'purchase on approval,' *i.e.* that the buyer should have the right of returning the thing and its fruits if he did not like it. This also was held to be sale on a resolutive condition, and resolution could be enforced and return of price and earnest obtained by action on the purchase (D. xviii 1 fr 3; xix 1 fr 11 § 6; cf. Vat. 14). If no time was fixed, the purchaser under the aediles' edict was allowed to bring, within sixty available days (or longer if good cause be shewn), suit (*in factum*) to compel the vendor to take the thing back (D. xxi 1 fr 31 § 22).

In the case of wine the sale is often made dependent on approval after tasting: if no delivery takes place the condition is suspensive; and the risk remains with vendor until tasting (D. xviii 6 fr 1 pr, 4 pr § 1).

(*d*) A condition is sometimes attached to a sale by way of limitation of the purchaser's use, and may be intended either to compel or to forbid certain dealings with the thing sold. In modern writers this is called *modus* (cf. D. xxviii 5 fr 93; *hoc modo vendidi* D. xix 5 fr 6; *sub modo legatum* xxxv 1 fr 17 § 4). Its due observance would be enforced either by an action *ex vendito*, if it were made a *lex mancipationis*, or a *pactum* in connexion with the sale; or, if a stipulation were entered into, by an action on that. Sometimes the vendor reserved

[1] Cf. Plaut. *Merc.* 420 *Dixit se redhibere* (*ancillam*) *si non placeat* 'that he takes her back if she does not give satisfaction.'

the right, in case of breach, of seizing the slave as forfeited (Vat. 6). Instances frequently occur on the sale of slaves, the *modus* or bargain being (*ea lege ut manumitteretur, etc.*) that the slave should be manumitted immediately, or after a certain time or event, or should not be alienated so as to have any other master than the purchaser; or, in case of a female slave, that she should not be prostituted. The first seller under such an agreement could enforce it, even if the woman has been sold repeatedly. A condition against manumission altogether was held not lawful (D. xviii 1 fr 56; tit. 7). But a condition that the slave should not reside in a particular place (*e.g.* Rome, Italy, *etc.*) was good. If the purchaser manumitted the slave, and he returned to the forbidden place, he might be reduced to perpetual slavery; the vendor however for whose protection such a condition was deemed to be made could waive it, and manumit the slave (Vat. 6). The sale even of criminal slaves for fighting with beasts was declared unlawful by M. Aurelius (D. xviii 1 fr 42).

(*e*) The particles *ita ut* are ambiguous, *Erit mihi emptus fundus ille, ita ut eum intra Kal. Jun. a Titio liberes* may either mean 'I buy the farm, you undertaking to redeem Titius' mortgage before June 1st,' or 'I buy, provided you redeem, *etc.*' On the former meaning the purchaser can sue on his contract for the redemption of the mortgage as well as for the delivery of the farm: on the latter meaning the purchase is conditional on the mortgage being already redeemed by the time named (D. xviii 1 fr 41).

8. It is well here to give one of the documents found in Dalmatia which shew the form of a record of sale dated 162 A.D. (edited by Mommsen and Zangemeister *C.I.R.* iii p. 941, see Bruns *Fontes*[6] p. 288).

Dasius Breucus emit mancipioque accepit puerum Apalaustum sive is quo alio nomine est n(atione) Graecum apocatum pro uncis duabus[1] ✳ DC *de Bellico Alexandri, f(ide) r(ogato) M. Vibio Longo. Eum puerum sanum traditum esse furtis noxaque*

[1] The meaning of these words *apocatum pro uncis duabus* 'receipted for two ounces,' is not clear.

solutum, erronem fugitivum caducum non esse, prestari; et si quis eum puerum q(uo) d(e) a(gitur) partenve quam quis ex eo evicerit q(uo) m(inus) emptorem s(upra) s(criptum) eunve ad q(uem) ea res pertinebit uti frui habere possidere(que) recte liceat, tunc, quantum id erit, quod ita ex eo evictum fuerit, t(antam) p(ecuniam) duplam p(robam) r(ecte) d(ari) f(ide) r(ogavit) Dasius Breucus, d(ari) f(ide) p(romisit) Bellicus Alexandri, id(em) fide sua esse iussit Vibius Longus; proque eo puero q(ui) s(upra) s(criptus) est pretium eius ⚹ DC *accepisse et habere se dixit Bellicus Alexandri ab Dasio Breuco.*

Actum kanab(is) leg(ionis) XIII *g(eminae)* XVII *kal. Junias Rufino et Quadrato cos.*

(*Signatores septem.*)

We have here

(1) Purchaser (Dasius Breucus);
(2) Fact of purchase and conveyance by mancipation;
(3) Description of thing sold, *i.e.* name and nation of slave;
(4) Price (600 *denarii*);
(5) Vendor (Bellicus Alexandri);
(6) Surety (M. Vibius Longus);
(7) Delivery in sound condition;
(8) Guaranty of absence of (mental) faults; also that he is not epileptic (*caducus*);
(9) Promise of double value if purchaser or person concerned is disturbed in his quiet enjoyment by total or partial eviction;
(10) Promise by surety;
(11) Acknowledgment of receipt of price;
(12) Date and place of contract (*kanabae* are huts or barracks for soldiers and sometimes grew into towns);
(13) Seals of five witnesses and of surety and vendor (so described).

G. *Locatio conductio*, 'letting and hiring,' is an agreement for the use of a thing belonging to another or for the use of another's services in consideration of an agreed payment. It is in many respects under similar rules to those which regulate purchase and sale, being indeed a purchase and sale not of a thing itself but of its use. The price is called *merces* 'hire-money,' which we should translate 'rent' in the case of land or houses, and 'wages,' *etc.* in the case of personal services. The contract is formed by consent, without any special form of words or writing or other formality being required. It may be made subject to condition, though this was at one time doubted, and is complete when the subject-matter and the amount of hire or rent is agreed on (Gai. iii 142, 146; D. xix 2 fr 1, 2 pr, 20 pr). The *locator* has an action called *locati* or *ex locato*; the *conductor* an action *conducti* or *ex conducto*.

If the *merces* was left to be fixed by someone else, it was an open question in Gaius' time whether the contract was good. So also if it was left to be fixed by agreement of the parties after the job was done; or if, instead of money, the use of one thing was to be the consideration for the use of another. In the case of land we hear of the rent being sometimes partly in corn: and of a letting on the metayer system (still common in Italy) where the rent consists in a certain share of the produce (Gai. iii 143, 144; D. xix 2 fr 19 § 3, 25 § 6; cf. Cod. iv 65 fr 8, 21)[1]. The question was not whether such agreements were enforceable by action but whether the action would be the ordinary one of lease and hire. Eventually there was a special action *praescriptis verbis*. In the case of payment by share of produce the action *pro socio* might sometimes apply (D. xvii 2 fr 52 §§ 2, 3 and below, p. 176).

Three cases are mentioned by Gaius in which doubt was entertained whether they belonged to sale or letting. The first is land let for ever (*in perpetuum*). Thus lands belonging to towns were let on the terms that so long as the ground-rent

[1] The farmer is called *colonus partiarius*. Cf. Cato *RR.* 136, 137; Liv. xxvii 3 § 1 *Agrum qui publicatus erat locavit omnem frumento;* Plin. *Ep.* ix 37 *Medendi una ratio si non nummo, sed partibus locem.* Hence when the rent is in money we have *qui nummis colit*, D. xlvii 2 fr 26 § 1.

(*vectigal*)[1] was paid (cf. D. xx 1 fr 31) the lands should not be taken away from the tenant (*conductori*) or his heir. (They passed also to legatee, D. L 16 fr 219; cf. xxx fr 71 §§ 5, 6.) The better opinion was that this was lease. (Zeno and Justinian made it a special contract *emphyteusis* Just. iii 24 § 3.) The second case was where one man supplies gladiators to another on the terms that for each one who survives unhurt (*integer*) 20 *denarii* should be paid for his toil, but for each one killed or crippled (*debilitatus*) 1000 *denarii*. The better opinion was that this was lease so far as the men were unhurt, sale so far as they were killed or crippled; the contract being conditional till

[1] Cicero writes on behalf of the borough of Atella which owned land in Gaul and derived such a rent from it: *Locutus sum tecum de agro vectigali municipii Atellani. Velim existimes, quod res est, municipii fortunas omnes in isto vectigali consistere* (*Fam.* xiii 7 § 2).

Pliny the younger (*Ep.* vii 18) wishing to settle an endowment for poor freemen at Como of the value of 500,000 sesterces, mancipated one of his farms to the town agent, who then restored it to Pliny, reserving a perpetual annual rent of 30,000 sesterces, *i.e.* 6 per cent. on the capital (*Agrum actori publico mancipavi, eundem vectigali imposito recepi, tricena milia annua daturus*). The land would thereafter be subject to this rent-charge, and being itself of much greater value would, as Pliny thought, always find a holder (*dominus*), and the town would be sure of a fixed payment; whereas if he paid over the capital sum it might gradually be lost or spent; if he made over land absolutely for the amount it might be badly managed and not produce the amount required. Pernice thinks the bare ownership of the land actually conveyed would remain in the town, like any other land which a town lets for a perpetual fixed rent (*Labeo* iii p. 162). So also Karlowa *RG.* ii 1273 n. 4, who says *recepi* does not imply 'received back by mancipation.' This may be so, but the word *dominus* (cf. D. vi 3 fr 1 § 1) rather suggests that the ownership was in Pliny, subject to what in Manchester would be called an annual chief-rent. (So Huschke also, quoted in Karlowa.) In an inscription at Ferentinum (Bruns[6] no. 125) an endowment for doles is made by the founder's purchasing (*redemit*) land belonging to the town and giving it back charged with a payment of 4000 sesterces a year for doles, *in avitum rei publicae reddidit* (so in some Greek inscriptions εἰς πατρικά, see Karlowa); cf. Bruns[6] no. 131 where *ob avitum et patritum* is apparently 'on account of land subject to a permanent (as it were, "hereditary") rent'; or as Karlowa takes it *ob avitum, etc. vectigal.* Another plan for endowments was to lend the endowment money to owners of lands who then paid interest and 'underscaled' the lands to the communal treasury; cf. Bruns p. 305.

the fact was ascertained. The third case was of a contract with a goldsmith to make some rings of a certain weight and shape, he to supply the gold, for the sum of 200 *denarii*. Cassius held that this was purchase of the gold, hiring of the service. Most lawyers held that the contract was purchase. But all were agreed that if the customer supplied the gold, the contract was hire of his services (Gai. iii 145—147; D. xviii 1 fr 20). Analogous to the second case is that of farm-plant or slaves of agreed value (*aestimatum*) being let with the farm (D. xix 2 fr 3, 54 § 2).

This contract of lease and hire was treated by the Roman lawyers as one, but there are clearly three principal varieties in its application, and these differ in some of their incidents. The subject-matter (1) may be a thing, slave, land, *etc.* (*locatio rei*); or (2) it may be personal services (*loc. operarum*); or (3) it may be a work to be effected (*loc. operis faciendi*). The *locator* is the person who provides the thing, or services, or the subject of the work (*e.g.* land to be built on, house to be repaired, *etc.*). We should call him in the first case the lessor; in the second the hireling or employee; in the third the employer or putter out of a contract. The *conductor* is the person who gets the use of the thing or of the services, or effects the work. We should call him in the first case the lessee or hirer; in the second the employer; in the third the contractor. The third class is distinguished from the first two by the fact that in them the *locator* receives the rent or wages, and his action is *ex locato*: in the third he pays it and his action is *ex conducto*. In the second case the *locator* does the service, in the third the *conductor* does it.

1. *Locatio conductio rei.* The lessor was bound to grant and maintain to the lessee quiet use and enjoyment of the land (with its fruits), house, *etc.* for the term of the lease. The lessee of land is frequently called *colonus*, of a house *inquilinus* ('lodger'). The lessee, if turned out from want of title in the lessor or from the lessor's own action, can claim the value of his interest; and the same rule holds if the thing let was plainly unsuited for its known purpose, *e.g.* leaky casks for wine. If land containing poisonous herbs is let for pasture, the lessor with knowledge is

liable for loss of the cattle, if ignorant, he cannot claim rent. If the lessor was ignorant of his want of title, *e.g.* to a house, and was ready to provide the lessee with another equally convenient, he could demand acquittal. If the house let was confiscated by public authority or burnt down or destroyed by earthquake or other irresistible force, the tenant could only claim remission of rent for the time of non-use. If it was not fit for habitation at the time for commencing the tenacy and for months after, or if it had its lights obscured by a neighbour's building, the lessee could throw up the contract, and rent would cease (D. xix 2 fr 9 pr, 15 § 8, 19 § 1, 25 §§ 1, 2, fr 33, 60 pr). But the lessor may effect necessary repairs during the term, only he must remit the rent or provide other accommodation, if the inconvenience to the tenant is so great as to justify him in removing (*ib.* fr 27, 28).

In letting a farm the lessor was required to provide a farm house and stabling fit for tenant's use, and necessary plant (*instrumentum*) in good repair, such as an olive press and tackling, cauldron, oil jars, wine casks, *etc.*, but not moveables such as baskets (fr 15 § 1, 19 § 2). If irresistible damage was done, *e.g.* by rivers, or jackdaws, or starlings, or locusts, or earthquake, or landslip, or blight, or unusual heat, or sudden fire, or by an invasion of the enemy, the lessor (in the absence of special agreement) has to remit the current rent. But if the wine produced on the farm turn sour, or the standing crops are spoilt by worms or weeds, or if any other misfortune occur of an ordinary character arising from the nature of the farm, the loss is the tenant's and he must pay rent all the same. Against the barrenness of one year the landlord has a right to set off the fertility of subsequent years, and the rent may then be demanded which had been previously remitted (Ulp. in D. fr 15, quoting for the main principle Servius; cf. Cod. iv 65 fr 8).

The lessee was bound to pay the rent as agreed, to maintain the property unimpaired both physically and in rights (*e.g.* to keep in use a right of road, *etc.*), duly to cultivate (if it be an agricultural tenancy), and to deliver up at the expiration of the term. In the absence of any special agreement, good faith and the custom of the district rule the contract (fr 11 § 2, 25 § 3;

Cod. iv 65 fr 11). The lessee cannot cut down trees (being liable to other actions as well as this), and is even responsible for his neighbour's doing so, if such cutting down was occasioned by quarrelling with his neighbour (fr 15 § 4). Generally a tenant is responsible for damage caused by his slaves or guests, and if there was any want of care on his part in introducing them or otherwise, he is responsible in full and cannot free himself by surrendering slaves noxally (fr 11 pr). If a lessee having taken a house or farm for a term (five years was usual) at periodical payments abandons it before the time without good cause, or is not allowed to enjoy, he can be sued or sue at once for the whole (fr 24 §§ 2, 4, 55 § 2).

Necessary or useful additions or improvements, though made without agreement, are ground for a suit *ex conducto*. The tenant can as a rule recover his expenditure. Other additions he can remove, making good any damage caused thereby (fr 19 § 4, 55 § 1; cf. fr 61 pr). All things or animals brought on to a farm by the tenant with the lessor's consent are deemed to be pledged for the rent: things, *etc.*, brought into a house and intended to remain there are pledged whether the lessor was aware of them or not (*ib.* fr 5). In the absence of agreement a tenant can sublet. A sublessee's things are not so pledged, but the fruits are pledged just as if the original lessee had gathered them (fr 24 § 1; Cod. iv 65 fr 6).

The contract of lease and hire is personal to the contracting parties and their heirs, and does not run with the land or house, *etc.* A purchaser or legatee (*per vindicationem*) of anything in lease cannot (without special covenant) claim the rents, but can gather the fruits and turn the lessee out, leaving him to his remedy against the lessor or lessor's heir (D. fr 25 § 1, 32; tit. 1 fr 13 § 11; Vat. 44; Cod. iv 65 fr 9, 10; cf. D. xxxiii 4 fr 1 § 15; xxiv 3 fr 25 § 4). If a fructuary has let for a term of years and dies before the term expires, his heir is not liable for the continuance of the tenancy unless he has represented himself as owner: nor is the reversioner bound by the lease (D. xix 2 fr 9 § 1).

If a tenant remains after the term of the lease without express agreement, in the case of a farm a new contract for

a whole year is deemed to be made, in the case of a house (*praedium urbanum*) the new contract is only for so long as he actually occupies. This presumes that the parties are capable of consent (not lunatic, *etc.*). Pledges remain bound (fr 13 § 11, 14; cf. Vang. *Pand.* § 644).

2. *Locatio conductio operarum.* This applies to the hire of a freeman's services, *i.e.* of his daily labour (cf. Paul ii 18 § 1)[1]; and practically to the hire of a slave's services if he is acting for his own *peculium*: otherwise a slave's services come under *locatio conductio rei.* The hirer of the services or his heir is bound to pay for the full term agreed on, whether he use the services or not, if the person hired (*locator*) is ready to render them (D. xix 2 fr 14 § 9, fr 38). Negligence or fault on the part of the person hiring himself out makes him liable for the consequences (fr 60 § 7).

A special contract of this kind was that of a freeman hiring himself out for fighting in the arena (*auctorari*)[2] when he engaged himself '*uri vinciri ferroque necari.*' He was no longer capable of conducting another's suit (D. iii 1 fr 1 § 6), or being witness in criminal cases (*Collat.* ix 2 § 2; Gai. iv 3), and, like a slave, could be object of theft (Gai. iii 199).

3. *Locatio conductio operis faciendi*[3]. In this case the engagement is for the performance of a particular piece of

[1] Some hire-notes are given in Bruns[6] p. 328. They provide for fines for each day's absence from work or delay in payment of wages.

[2] An oath of a *quasi*-military character was taken by the gladiator: cf. Sen. *Ep.* 37 int. *Promisisti virum bonum; sacramento rogatus es. Deridebit te si quis tibi dixerit mollem esse militiam et facilem; nolo te decipi: eadem honestissimi hujus et illius turpissimi auctoramenti verba 'uri vinciri ferroque necari.' Ab his, qui manus arenae locant et edunt ac bibunt quae per sanguinem reddant, cavetur ut ista vel inviti patiantur: a te, etc.* Petron. 117 *In verba Eumolpi sacramentum juravimus 'uri vinciri verberari ferroque necari' ...tanquam legitimi gladiatores, etc.* Hor. *Sat.* ii 7 58 *Quid refert uri virgis ferroque necari auctoratus eas an, etc.*

[3] Pernice suggests that in contracts *opera* (sing.) was the technical expression for the work of the contractor; cf. D. xix 2 fr 2 § 1 *Si aurum dedero mercede pro opera constituta, etc., ib.* fr 22 § 2 *Locat enim artifex operam suam* (in building a house) *id est faciendi necessitatem,* Plaut. *Trin.*

work, as for the erection of a house, the teaching and training of a slave, tending and feeding of cattle, carriage of merchandise, making of a gold ring, setting of jewels, making cloth into clothes, cleaning of clothes. Usually the *locator* supplies the material or the principal material; if the *conductor* supplies it, the contract is rather purchase and sale. In a contract for building a house, though the *conductor* may supply the materials, the *locator* supplies the site, and the house being only an accession to the site, the business as a whole comes under *locatio conductio* (D. xix 2 fr 2, 22 § 2; xviii 1 fr 20).

The contractor (*conductor*, *redemptor*) is liable by action *ex locato* for non-execution of the work, for want of due skill, and for negligence of himself or his employees (D. fr 9 § 5, 13 § 5, 25 § 7, *etc.*). If a fuller loses clothes given him to clean, or allows the mice to gnaw them; if a driver races with other vehicles and upsets the gig and kills or hurts the slave whom he has contracted to carry; if a shipmaster transships the goods which he has to carry in order to get them up a river and does so against the will of the *locator*, or at a wrong time, or in a bad boat, and the boat is lost; or if one undertaking to train a slave takes him abroad without consent, and he is captured by the enemy or killed; or if a shoemaker corrects his apprentice so violently as to injure him; in all these cases the contractor is liable *ex locato* as well as in some of them under the *lex Aquilia* (D. fr 13 pr—§ 6; cf. xiv 2 fr 10 § 1). But the contractor is not liable for *vis major* or otherwise, when there is no fault on his part (D. xiv 2 fr 10 § 1; xix 2 fr 13 § 8, 24 § 7, *etc.*).

When a work is to be done subject to the *locator's* approval as a whole (*aversione*[1] *locatum*) it is at the risk of the contractor until approval: if the contract is at so much per certain measure, it is at his risk until measured. 'Subject to the *locator's* approval' is interpreted to mean subject to a reasonable, not arbitrary, approval (D. fr 24 pr, 36; xvii 2 fr 77).

843 *Ego operam meam* (as sycophant) *tribus nummis hodie locavi ad artis nugatorias, etc.* (*ZRG.* xxii 246). *Opera* is really an abstract term for service: *operae* is either different kinds of service or, usually, 'days' labour' (see vol. 1 pp. 86, 87), and therefore appropriate for employment of handwork by time.

[1] 'At a sweep' (from *averrere*).

Where cattle are put out to pasture on the terms of the owner and farmer sharing the young (and other produce?) the contract was usually deemed to be partnership (D. xvii 2 fr 52 §§ 2, 3; cf. Cod. ii 3 fr 9).

4. When corn was shipped by several parties and was not kept in separate partitions, it was held to become the property of the carrier, who was liable only for the like quantity. So with money deposited at a bank and not made up or sealed separately. The same rule applied with silver or gold given to be made into vases or rings: the goldsmith was liable only for giving due weight, not for using the metal actually supplied. An old action brought against carriers *oneris aversi* 'for making away with the load' (from *avertere*) was held by some lawyers to be superfluous, the carrier's act being theft if he was bound to deliver the precise thing and did not do so, but if he was liable only for the due amount, not for the specific article, the action *locati* was sufficient for any failure of delivery (D. xix 2 fr 31).

5. *Superficies.*

A special case somewhat like that of *emphyteusis* (above, p. 170) was when a man had erected a building on another's ground, under an agreement to pay him a ground-rent (*solarium*). The relation is similar to what we should call a building-lease[1]. If, instead of lease for periodical payment, the builder bought the surface for one sum, the relation was not essentially altered. In either case the builder and groundowner can maintain their rights against each other by action on the lease or the sale, or by a plea on the facts. And a purchaser of the ground, if evicted by the superficiary, can of course proceed on the warranty of title or on the purchase, like any other acquirer. But against third parties the superficiary (or builder) could at first protect himself only by getting a surrender of the groundowner's actions. Later however the praetor allowed all superficiaries an interdict, by

[1] Cf. D. xxxix 1 fr 3 § 3 Ulp. *Si ego superficiarius sim et opus novum fiat a vicino an possim nuntiare? movet* (there is a doubt) *quod quasi inquilinus sum sed praetor mihi utilem in rem actionem dat, etc.*

which they could recover possession without any necessity of shewing their title, provided that (as in the case of the interdict *uti possidetis*) they had not obtained it from their adversaries by force, stealth or entreaty. And further, on cause being shewn, the praetor granted to all superficiaries who were not merely temporary lessees (*non ad modicum tempus*) an action *in rem*, such as a usufructuary would have. In this way a building-lease became a limited ownership subject to the payment of the ground-rent; the right could be sold or given or bequeathed or pledged, and servitudes could be established in relation to it and other rights against neighbours, with analogous (*utiles*) actions for their protection. If two persons had the right in common, an analogous action *com. div.* would be granted them (D. xliii 18; 17 fr 3 § 7; xx 4 fr 15; xxxix 1 fr 3 § 3). The right of *superficies* could not be gained by usucapion apart from the ownership of the ground (D. xli 3 fr 26).

6. Jettison (*lex Rhodia de jactu*), 'general average.'

The actions *locati conducti* were applied in the special case of sea carriage. The law of Rhodes on this point was adopted by the Romans, and provided that, if goods carried on a ship labouring at sea are thrown over in order to lighten it and are lost, the owner has a right to a *pro rata* contribution from the property saved by this sacrifice. The goods jettisoned were valued at their cost price. The goods saved whether cargo or personal effects of a passenger (*vector*) are valued at their selling price; the ship itself is also valued: provisions intended for consumption on the voyage are alone exempted. If a mast or other tackling of the ship is sacrificed for the same purpose the ship-owner is entitled to contribution. But contribution is due only if the ship is saved and the goods are thereby saved also. If goods are put into a boat to lighten the ship and come safe, while the ship is lost, no contribution is due from the saved goods. But if the boat be lost and the ship come safe, the owner of the goods in the boat is entitled to contribution just as if they had been jettisoned. If in making the jettison other goods are damaged by exposure, they must still make a contribution but only at their damaged value. Goods saved, not by

the preservation of the ship, but by their owners' exertions or by paid divers, are not called to contribute, unless the ship now lost had in a previous part of the voyage been saved by a jettison. Passengers being freemen are not liable to contribution, as a freeman's person is deemed incapable of pecuniary valuation. Damage to the ship itself or its equipment or repairs to the same give no claim to contribution, any more than injury to a workman's tools in the performance of his contract. Goods jettisoned are not deemed to be abandoned: they remain the property of their owners; but if they are recovered, any contribution already made can be reclaimed.

If a ship is ransomed from pirates, the cargo, *etc.* must contribute to the ransom, but ransom of particular goods or robbery gives no claim to contribution.

The contribution is enforced by the owner of the jettisoned goods suing the skipper (*magister*), either *ex locato* if his contract was for the carriage of the goods, or *ex conducto* if it was for a place on the ship. The skipper will either retain the goods saved, until contribution is made, or will sue their owners *ex conducto* or *locato* as the case may be. If some do not pay the skipper is not liable for the deficit (D. xiv 2 fr 1—9; Paul ii 7; see also D. xix 6 fr 1 § 1).

7. *Receptum nautarum, etc.* 'Shipmasters', innkeepers *etc.* undertaking.'

Special liability was attached to shipmasters, innkeepers and stablekeepers, or, if those actually in charge were only deputies, then to the principals. By the praetor's edict they were made responsible for the safe delivery of everything which in the ordinary way of their business they had undertaken to carry or keep safely (*quod salvum fore receperint*[1]). It was not necessary that the master should receive the goods himself: any officer with general management or appointed for this purpose could bind. Whether any disclaimer of responsibility was allowed is not said; the rule was, that no special consignment was necessary, but the placing in the vessel or inn or even on

[1] Lenel (*ZRG.* xxvi 403) suggests that the undertaking was by announcement on the house, *e.g. sarcinae salvae erunt.*

the shore, if defendant has accepted them, was enough[1] to make him responsible not only for his own act, but for his servants or passengers or travellers, although not himself to blame; and he could not free himself by surrendering a slave noxally. But he was not liable for loss due to shipwreck, pirates or *vis major*. Clothes, *etc.* of travellers had also the benefit of the guaranty. The action was *in factum*, and ran for and against heirs. It was wider than an action *locati conducti*, because no fault was necessary to found the action, and than *depositi*, where it is necessary to prove fraud. When concurrent with other actions it was subject to the usual treatment. It could be brought by anyone who had an interest in a thing's being safely kept, *e.g.* a lender on bottomry (D. iv 9 fr 1—5 pr). An action on the case was also granted for delicts; see p. 182.

H. Actions on the case.

Agreements are sometimes made which do not come strictly under well-known descriptions and yet are not confirmed by stipulation. If, however, they are of a definite character, containing mutual engagements and intended to raise obligations, the party who performs his engagement was recognised by the Roman law as entitled to the performance by the other or to compensation for his failure. Many such cases bordered on sale or hiring or mandate or partnership, or other contracts. The want of a short title was supplied in framing the issue for trial by a statement of the facts of the case. This appears to have been denoted by two expressions: the plaintiff *agit praescriptis verbis*[2] or *agit in factum*: and sometimes both were combined (*in factum praescriptis verbis*). *Praescriptis verbis* refers to the mode of prefixing to the ordinary formula a brief explanation of the case or incorporating it with the demonstration

[1] Ude (*ZRG.* xxv 66) gives a somewhat different view, but he is dealing with the Justinian law which has half amalgamated two actions in this title (D. iv 9).

[2] *Agere praescriptis verbis* is a correct expression: but there was probably no such phrase in Antonine times as *actio praescr. verb.*, certainly no such action as a common type. Gradenwitz *Interpol.* p. 123.

as a limiting clause (*e.g.* Gai. iv 130—137); the claim was put as one of right (*formula in jus concepta*) but of uncertain character (*quicquid paret N. Negidium A. Agerio dare facere oportere*) and hence came under the general class of *civiles*[1] *incerti actiones*; cf. Gai. iv 45—52, 54, 60.

The other expression *agere in factum* is more general, and is frequently applied to a somewhat different class of untitled actions, where there was little or no appearance of a contract or agreement, but the facts of the case shewed a wrong deserving of a remedy. In these cases the praetor did not profess that it was a matter of civil law, but stated the facts themselves and directed the judge to condemn the defendant in damages to the plaintiff if he found the facts to be so. These were praetorian, not civil actions; they were pre-eminently *actiones in factum*; the claim (*intentio*) was contained in the facts stated, and only the condemnation clause was uncertain (*quanti ea res erit*). This kind of action was sometimes adopted in the case of relatives in order to avoid the infamy which attached to condemnation in a civil action (cf. Cod. v 12 fr 1 § 2).

The limits of these expressions are not clearly ascertainable, as Justinian endeavoured to make only one such class of actions and to fuse the expressions (D. xix 3—5; cf. Pernice *ZRG.* xxii 253). Earlier lawyers seem to have differed in opinion on the matter, Julian proposing an *actio in factum* where Ulpian and others gave an action *praescriptis verbis* (D. ii 14 fr 7 § 2; cf. xix 5 fr 5 § 2).

1. *De aestimato,* or *aestimatoria praescriptis verbis actio*[2]. When a person was given a thing to sell with a price affixed, the usual agreement was that he could keep for himself any excess which he might obtain, but he bore the risk of whatever happened, and was liable either for the return of the thing in

[1] *Civilis* added to *in factum* in fr 1 pr § 1 and fr 5 § 2 is held to be an interpolation by Polkrowsky *ZRG.* xxix 88 foll., and so is *praescriptis verbis* in fr 15, 27, *etc.* by Gradenwitz *Interpol.* pp. 125, 135, whom see on the title generally, esp. on fr 17 and 20.

[2] Cf. Plaut. *Merc.* 93 *Quas merces vexeram omnis vendidi: lucrum ingens facio praeterquam meus pater dedit aestimatas merces: ita peculium conficio grande.*

good condition or for the affixed value. The case was not one of sale, for there was no obligation on the receiver to take the thing at the price; nor was it *conductio venditoris* or *locatio rei vendendae* for there was no fixed *merces*, and even if a *merces* was agreed on, the distributor's chance of gain by asking a higher price than the value affixed was too important to be disregarded; nor was it mandate, for the receiver was not presumed to act gratuitously; nor was it partnership, for there was no arrangement of definite shares in the gain, and the thing never became the common property of giver and receiver. Doubts were settled by making it a special action and giving it a separate place in the edict (Lenel *EP.* p. 238). It was deemed to be *bonae fidei* (D. xix 3; cf. 5 fr 13). Where no agreement as above was expressed or implied, the seller would be liable only for fraud or fault; if the transaction was solely at the request of the seller, for fraud only (D. xix 5 fr 17 § 1; Paul ii 4 § 4).

2. Another class of cases which occasioned much doubt as to its character was barter (*permutatio rerum*). The Sabinians, fortified by Homer[1], thought it a form of sale; the Proculians held that it differed essentially, by there being nothing to decide which of the parties was purchaser and which of the commodities was price (Gai. iii 141). A purchaser has to make the vendor owner of the money-price; a vendor has only to covenant for quiet enjoyment by the purchaser. But in barter each party has to make the other owner; and mere consent is not sufficient to ground an action, but part performance is required. The action goes to the due performance by the other party, or for damages to the amount of our interest in it (*in id quod interest nostra, illam rem accepisse de qua convenit*). The liability for faults appears to be the same as in sale (D. xix 4). A condiction would also lie (as an alternative action) for restoration of the thing (D. xix 5 fr 5 § 1).

3. Analogous cases are where the exchange is not of thing for thing (*do ut des*) but of thing or services for services (*do ut facias* or *facio ut facias*)[2]. Thus, I give you a house on condition

[1] See above, p. 138 n. 3.

[2] The famous division of such cases into four: *do ut des*, *do ut facias*,

that you repair another for me (D. xix 5 fr 6); or I give you a vacant plot of land to build on in consideration of your erecting a house on it, and giving me a part (fr 13 § 1); or I lend you my ox for ten days at a time in consideration of your lending me yours for like periods (the *actio commodati* is not applicable, because the loans are not gratuitous, and there is no fixed *merces* to make it *locatio conductio*, fr 17 § 3; cf. D. x. 3 fr 23 and Gai. iii 144). Or I put a slave for safekeeping in your bakery and agree that you shall be compensated by his services (D. xvi 3 fr 1 § 9). The due performance of the agreement, or responsibility for ill-treatment of the ox or slave will be secured by a civil action *praescriptis verbis*. So also if I bargain with you to manumit a certain slave, and in consideration give you another slave, or agree to manumit one of my own, and I perform my part, I can sue for compensation if you do not manumit as agreed (D. xix 5 fr 5 pr and § 1), as you can sue me if *e.g.* the slave I have given you is evicted (*ib.* § 2 and cf. ii 14 fr 7 § 2). If I give you money to manumit your slave, it is not hire, for manumission is not a hireable service; and I must sue in the same way (*ib.* fr 7).

4. Other cases are various. I release a debt of yours on your agreeing to delegate a debtor of yours to me (fr 9); or you happen to know where my runaway slave is, and I agree to pay you a certain sum, if you give me information which will enable me to seize him (fr 15); or instead of money for a loan I give you a thing to sell, and you either do not sell it, or sell it and decline to accept the price as a loan (fr 19 pr); or I give you a slave, with value affixed, to be put to the question on an accusation of theft; he is not convicted, and you return neither the slave nor his value (fr 8). Where I have given money or a thing, I can recover it by a condiction, but to enforce the agreement I require to sue *praescriptis verbis*.

5. One-sided obligations of a delictal character were enforced by an *actio in factum, e.g.* without good cause to throw others' goods overboard in order to save one's own; to strip

facio ut des, facio ut facias, attributed to Paul in D. xix 5 fr 5, is, with much else of this fragment, the creation of Tribonian, according to Gradenwitz *Interpol.* p. 131. See however Lenel *ZRG.* xxii 181.

another's slave so that he dies of cold; to throw another's silver cup into the sea for mischief's sake: and if such acts were done in order to make a gain, the doer would be liable for theft. If acorns fall from your trees into my land, and I admit cattle which eat them, I am not liable under the XII tables (*de pastu pecoris*), for they are not trespassing on your land; nor is the act *pauperies*, for the animals are acting quietly and naturally; nor is it under the *lex Aquilia*, for I have done no direct act of violence. An action *ad exhibendum* might apply; or, if there was any fraudulent intent, an action *de dolo*; otherwise an action *in factum* is the remedy (fr 14; x 4 fr 9 § 1; cf. Cod. v 12 fr 1 § 2). Other cases are mentioned under Aquilian damage. See also *de recepto nautarum* (p. 178), *calumniae causa* (p. 234), *si quis mensor* (p. 236).

(Some cases named in this title (xix 5) for *actio in factum* are however not of the character of delicts: *e.g.* of an agreement (fr 12); of a one-sided matter where a condiction would appear suitable (fr 10); of hiring, with price to be fixed by subsequent agreement (fr 22; cf. Gai. iii 143).)

CHAPTER V.

SEMIDELICTAL[1] OBLIGATIONS.

i. These obligations are characterised by the rule that if restitution was disputed and judgment obtained, the defendant had to pay double damages, *i.e.* once for reimbursing the plaintiff, and the like amount again as penalty for non-admission of the claim. They consisted in Gaius' time (so far as we know) of obligations (or actions) *judicati, depensi, de sponsu, damni injuriae* (under the *lex Aquilia*) and *legati per damnationem certi*, including no doubt *legatum sinendi modo*. The history of these actions, at least as regards the first three, is given by Gaius in treating of execution *per manus injectionem*, and will be found below (Book VI ch. XV A). They all had these characteristics: non-admission (*infitiatio*) doubled the damages; a mere bargain (*pactum*) was not sufficient to

[1] This term seems convenient, but I have no authority for it.

settle the case; any money paid in excess of what was due was not recoverable (Gai. iv 9, 171; Paul i 19; Just. iii 27 § 7). The first two (*judicati* and *depensi*) had the further marks of stringency, that the *vadimonium* was put at the full amount of the judgment debt, or of the money paid down, and that defendant was required to give security *judicatum solvi*. The *actio de sponsu* was probably in the same position, but we know little of it (Gai. iv 22, 25, 102, 186; iii 127; *lex Urson.* 61). The first three would be strict actions; *damni injuriae* probably at first relatively strict (the measure being given by statute); an action on a legacy would be strict or not, according as the object was certain or uncertain. Only *certa legata* belong to this class (Gai. iv 9).

The damages were not doubled if defendant admitted the claim before suit or tendered an oath to plaintiff who thereupon swore to the debt (D. xii 2 fr 30 pr). An heir could bring these actions, but was not liable under the *lex Aquilia*, unless his predecessor had joined issue (Gai. iv 112; Just. iv 12 § 1), or the heir had any profit from the act causing the loss to plaintiff (D. ix 2 fr 23 § 8). To the other actions the heir was liable.

1. The *actio judicati* was not limited to any time; it was *perpetua* (D. xlii 1 fr 6 § 3). For the procedure see under Execution, Book vi ch. xv.

2. *Actio depensi*[1], 'on money paid down by weight,' was granted by the *lex Publilia* against a debtor who had not within six months repaid his surety (*sponsor*). The law expressly gave the right of *manus injectio pro judicato*, and thus made the debtor liable to arrest, and disabled him from conducting his own case in court (Gai. iv 22, 25).

[1] For the use of *dependĕre* cf. Plaut. *Trin.* 425 *Trapezitae mille drachumarum redditae. Nempe quas spopondi. Immo 'quas dependi' inquito*: and metaphorically Cic. *Fam.* i 9 § 9 where Pompey says to Q. Cicero, *Nisi cum Marco fratre diligenter egeris, dependendum tibi est quod mihi pro illo spopondisti*; also *Ep. ad Brut.* i 18 § 3; Sen. *Ben.* iii 8 § 2 *Hic pecuniam pro addicto dependit.*

Eisele (*Beitr.* p. 30) suggests that the money paid by a sponsor was paid with the formalities of the bronze and balance. Karlowa (*RG.* ii 773) argues that the expression belongs to a time when *aes grave* and not coined money was used, *i.e.* before 486 B.C.

3. *Actio de sponsu* was granted to sponsors by the *lex Furia* (see p. 30): it was against any creditor who had made a sponsor pay more than his share of the debt: and made him liable to *manus injectio pro judicato* (Gai. ii 121; iv 22).

4. *Legati certi per damnationem relicti, i.e.* for a legacy left in such words as *Heres meus Stichum servum meum dare damnas esto*, though Gaius says the word *dato* was sufficient of itself (ii 201). Probably this was a relaxation of the old formula, when the full significance of *damnas esto* was no longer realised. The claim of the legatee in the formula was *heredem sibi dare oportere* (Gai. ii 204; iv 55).

Liberatio per aes et libram.

There was an old form of release[1] by a fiction of payment (*imaginariae solutionis*) which was applicable to a judgment debt, to legacies bequeathed in the damnatory form, and also to contracts made by the bronze and balance, *i.e.* by mancipation and *nexum* (see p. 308). It consisted in the application of a form like that used in mancipation (cf. D. L 17 fr 35 *nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est*), and was thus. Five witnesses and a balance holder are present. The person whose obligation is to be released says, 'Whereas I am condemned to thee in so many thousands 'I now loose (*solvo*) and free myself from thee in that matter 'with this bronze and bronze balance[2]. This pound[2] I weigh 'out to thee as first and last[3] in accordance with the public 'law.' He then strikes the scale with an *as* and hands it over to the creditor by way of payment (*solvendi causa*). When the release is given by a legatee to the heir, the words *testamento*

[1] For the application of this old form of release to free a legatee from the obligation under the priestly code of keeping up the sacred rites attached to an inheritance see vol. I p. 390.

[2] *libra* is used for both 'balance' and 'pound.'

[3] The bit of bronze is to represent the whole sum supposed to be paid. Cf. the old formula in Livy i 24 § 7 *Ut illa prima postrema ex illis tabulis cerave recitata sunt etc.*; D. xxxviii 16 fr 2 § 4 *Idem primus postremusque qui solus occurrit.*

dare damnatus are substituted for the simple *condemnatus* of the judgment debtor. It is however only a legacy consisting in a certain weight or certain count of things that is released by this form; but some lawyers thought that it could be applied also to the legacy of a certain measure (Gai. iii 173—175). Evidently measure was at first deemed inconsistent with the original conception of scales and money.

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5. *DAMNI INJURIA* (*i.e. damni injuria dati*[1]), or *DAMNI INJURIAE.*

(*a*) The *lex Aquilia* of early but uncertain date[2] (stated by Ulpian to have been a plebiscite proposed by a tribune of the Commons) granted an action for any loss wrongfully (*injuriā*) caused to another by injury to his slave or animal or other thing. It superseded previous enactments on the subject, even that of the XII tables. The first and third clauses (the second being comparatively unimportant) were apparently in the following terms (though in more archaic language):

I. *Qui servum servamve alienum alienamve quadrupedemve pecudem injuria occiderit, quanti in eo anno plurimi ea res fuit, tantum aes dare domino damnas esto.*

III. *Ceterarum rerum* (*praeter hominem et pecudem occisos*) *si quis alteri damnum faxit, quod usserit, fregerit, ruperit injuria, quanti ea res fuerit in diebus* XXX *proximis, tantum aes dare domino damnas esto.* And it was added

Adversus infitiantem in duplum actio erit (Gai. iii 210—218; D. ix 2 fr 2 § 1, 27 § 5).

The first clause therefore provided for the case of anyone killing wrongfully another's slave or fourfooted farm-animal, *i.e.* horse, mule, ass, ox, sheep, goat, pig. Elephants and camels

[1] For *dare* used with *damnum* in this sense see Gai. iii 211, 218, 219; D. ix 2 fr 5 § 2, *etc.* The short phrase without *dati* is also used by Cicero; *judicium damni injuria constitutum, Rosc. Com.* 11 § 32 and again in 18 § 54. Gaius has *damni injuriae actio* (iii 210; iv 76) where *injuriae* may be an attraction into the genitive, or a simple combination of the elements of loss and wrong as *uti frui; ruta caesa, etc.*

[2] Theophilus (iv 3 § 15) refers it to the time of a secession of the *plebs.* This seems to be merely an inference from what Ulpian says here (D. ix 2 fr 1) and what Pomponius says in D. i 2 fr 2 § 8.

were also held by the lawyers to be within the terms, but dogs, bears, *etc.* were not.

The third clause provided for the case of any wrongful wounding of any slave or animal of the above class, and for the case of killing or wounding any other animal, or damaging any thing belonging to another person. The old (*i.e.* republican) lawyers took *ruperit* to mean *corruperit*, and gave a wide interpretation to the terms used in the statute so as to include cutting, burning, breaking, bruising, tearing, smashing, letting out (of liquids), in fact spoiling of any sort (Gai. iii 217; D. fr 27 §§ 13—17). 'Wrongfully' included negligence, even though slight (*et levissima culpa* fr 44; cf. xl 12 fr 13 pr), and was not restricted to cases of malice or evil purpose; for it included *damnum culpa datum etiam ab eo qui nocere noluit* D. ix 2 fr 5 § 1: nor had it here, as in the *actio injuriarum*, any special connexion with 'insult' (*contumelia* fr 5 § 1). But killing or hurting in self-defence, *e.g.* killing a robber by night, whom one could not seize, is not within the statute. Nor does action lie against a madman, or infant, or an *impubes*, who is not intelligent of wrong (Ulp. in *Collat.* vii 3; D. fr 5 pr § 2; xlvii 2 fr 23; tit. 4 fr 1 § 2).

(*b*) Thus liability attaches to one who uses excessive violence in training or correcting pupils, or strikes a slave when ill, so that he dies in consequence, or to a surgeon who performs on a slave unskilfully or administers a wrong drug; or to a muledriver who from incompetence to control his mules crushes some slave; or to sailors who by their bad management collide with others' ships or nets, or cut others' ropes; or to a porter who has taken too great a load or walks so carelessly that he slips, and his load kills or hurts someone; or to one who strikes a pregnant woman or mare so as to cause miscarriage; or who corrupts another's slave girl, being an immature virgin. So also the act covers one who is practising with missiles in a place not intended for the purpose and kills or hurts a passing slave or animal; or who is lopping a tree near some road or path and does not cry out to warn people, with the result that a branch falls and injures them; or who digs pits or puts nets in the roads without notice or precautions so that

cattle, *etc.* fall into them and are injured (D. ix 2 fr 5 § 3, 7 §§ 2, 5, 8, fr 8 pr §§ 1, 8, fr 9 § 4, 11 pr, 27 § 22, fr 28, 29 pr—§ 2, 31; Paul i 13A § 6). Again, one who tears or soils another's dress, or throws another's corn into the river, or mixes it with sand, or casts tares or oats into cornfields[1], or fouls or turns sour another's wine, or lets it run to waste, or cuts down standing corn or vines, or gathers another's olives before the grain or fruit is ripe (if it be ripe, there is no cause for suit as he only saves the owner trouble), or cuts another's fowling nets, or cuts off the beams of another's house which without right project over his own house, or so repairs the banks of a public river as to injure the riparian proprietors, are all liable under this statute. So is even a wife who without her husband's consent pierces (so as to string them) pearls lent her by him; or anyone who rubs out or obliterates another's will, or documents containing proof of debt (D. ix 2 fr 27 §§ 15, 18—20, 25, 30, 31, fr 29 §§ 1, 3, 41, 42; xliii 15 § 5). But consumption of another's wine or corn was not matter for a suit under the statute itself[2], but for an analogous (*utilis*) action (D. ix 2 fr 30 § 2).

(*c*) Strictly speaking the law required the injury to be caused *corpore corpori* (cf. Gai. iii 219; D. fr 51; Just. iv 16), *i.e.* by direct physical force causing physical injury; and hence arose much discussion among lawyers and subtle distinction (see *Collat.* xii 7). Thus, if a man threw a slave into the river and the slave was drowned, still, though the death was only indirectly caused by the force used, the Aquilian action was held to lie. But if he had persuaded a slave to go up a tree or down a well, and the slave in doing so had fallen and been killed; or if he had irritated a horse which the slave was riding, so that it threw him off into the river and he was drowned, the *lex Aquilia* did not apply. Nor did it apply if a man only held a slave, or led him into an ambush, and another killed him; nor if a midwife gave drugs, without actually administering them, to a woman, and the woman

[1] Oats were thought to cause barley, *etc.* to degenerate, tares to cumber the ground (Plin. *HN.* xviii 149, 153); cf. Verg. *Buc.* v. 37.

[2] Apparently because consumption of food, being its natural use, hardly comes under the terms of causing damage to a thing.

died thereof; nor if a patient died from his surgeon's or another's neglect after a skilful operation; nor if a person set fire to his own stubble or sticks without due care or watching, and the fire caught and burnt a neighbour's farm; nor if a person confined slaves or cattle so that they were starved to death; or drove another's beast so fast that it was injured; or smoked another's bees so as to put them to flight or kill them (Gai. iii 219; D. fr 7 § 7, 8 pr, 9 pr §§ 2, 3, 30 § 3; *Collat.* xii 3). If a farmer's slave lighted a furnace, and another who had to watch it fell asleep, and the farmhouse was burnt down, it might be said that the farmer was not responsible for either; one slave had done what he ought, the other had done nothing. If a man set a dog at another and held the dog, the Aquilian law applied, but if he did not hold him, Julian considered the case was not within the statute. The praetor however in all cases coming within the spirit of the law granted an action 'on the precedent of the Aquilian law' (*ad exemplum legis Aquiliae* Gai. iii 219; Ulp. in *Collat.* xii 7 §§ 6, 7; D. fr 53). Such an action is usually called *in factum* (D. fr 33 § 1, *etc.*), sometimes *utilis* (fr 27 § 32, *etc.*).

Mere continued neglect of duty, *e.g.* neglect to plough land, to prune vines, to clear water-courses, is not within the statute at all (D. vii 1 fr 13 § 2).

(*d*) It is a good defence that the doer took due precautions, or was acting in self-defence against plaintiff (if plaintiff and not innocent third persons were injured), or was acting only under irresistible force, or was exercising his own right, or did the injury while engaged in an honourable athletic contest[1], or was in such a position that if anyone were to blame, it was the injured rather than, or as much as, the injurer. A slave hurt while crossing a place intended for shooting at the time of practice, or going on private ground, where there was no right of road, and falling into a pit made for catching stags or bears, gives his owner no right of action (D. ix 2 fr 9 § 4, 28 pr, 52 § 1)[2]. A sudden gust of wind on a calm day causing fire to spread, a storm driving vessels against one

[1] Cf. D. xi 5 fr 2 § 1, 3.

[2] For other interesting cases see fr 11 pr, 52.

another or making it necessary for sailors to cut others' cables, a push by a third party causing defendant involuntarily to do the injury, are recognised as grounds for excuse (fr 7 § 3, 29 § 3, 30 §§ 3, 4, 52 § 2; cf. fr 11 pr). A man cutting waterpipes laid by another without right through defendant's house is not liable under this law (fr 29 § 1). Nor is one liable under this statute (according to Servius and others against Labeo) who, to stop a fire from reaching his house, breaks down a neighbour's house, whether the fire actually reach his house or not; but if it does not, he is liable to his neighbour under the interdict *quod vi aut clam* (fr 49; xliii 24 fr 7 § 4; xlvii 9 fr 3 § 7). A man finding another's cattle on his land is not justified in shutting them up or driving them off otherwise than he would treat his own cattle (D. ix 2 fr 39).

(*e*) Plaintiff is primarily the owner of the slave or thing hurt, or heir to the owner. One who has the use or usufruct is entitled to an analogous action, even against the owner himself, if he has caused the death or injury (fr 11 §§ 6, 10, fr 12, 43), as is the owner also against him in the like case (D. vii 1 fr 15 § 3). If the slave be in pledge and the debtor is insolvent, or the time for creditor's action on the debt has passed, the creditor can sue under the Aquilian law, being of course liable to the debtor for any excess recovered above the amount of the debt (D. ix 2 fr 30 § 1). If a slave belonging to an inheritance is killed before the heir enters, the heir can sue, and, even if the slave have been bequeathed away, retains the right of action (the legacy having failed with the death of the slave). If the slave be only wounded, the heir must cede his action to the legatee. If he be slain after the heir has entered, and the legatee has not yet accepted the legacy[1], the legatee has no claim (fr 13 § 2—fr 15 pr). If the killer is a slave, his owner is liable to the action, even though the slave be in flight: it does not lie against the master of one serving *bona fide*. But it does lie against one who, having the right to command, orders another freeman to commit an injury (fr 27 § 3, 37 pr). An owner is liable, if he has killed his slave or animal, to a *bona fide* possessor or to a pledgee (by an action *in factum*): a pledgee is

[1] See vol. 1 p. 294, where the dispute about acceptance is mentioned.

liable by the Aquilian law as well as by the pledge action (fr 17—19). Any co-owner can sue for his share of the damages (fr 20, 27 § 2). The action can be brought against heirs of the injurer, only so far as they have been enriched (fr 23 § 8).

(*f*) The measure of damages for killing under the first clause was the highest value of the slave or animal at any time within the year (*i.e.* 365 days) preceding the death, or if the death was not till long afterwards, within the year preceding the fatal wound. Under the third clause the measure was the depreciation caused in what was the value to the plaintiff within the last thirty days. The word *plurimi* being here omitted, some thought that the judge had the power of taking the lower estimate, but the practice followed Sabinus in treating the omission of *plurimi* as accidental (Gai. iii 218; D. fr 21, 29 § 8, 51). Two wounds inflicted at one time by the same person counted as one offence; not so, if inflicted at different times. But if suit be brought and damages obtained for a wound to a slave and he afterwards die of the wound, suit can be brought again, but only for the residue (after deduction of these damages) of what the owner would have obtained if suit had been originally brought for the killing (fr 32 § 1, 46, 47). If a slave, being mortally wounded by one, is after a time killed by another, both are liable, though the estimate of damages may differ in the two cases on account of the differences in reckoning the period of value (fr 51). Where several persons are directly concerned in the same offence, all are liable, and the penalty on one did not relieve the others, unless they were all of the same family of slaves,—an exception due to unwillingness to excessive cumulation of penalty on the owner (fr 11 §§ 2, 4, fr 32).

(*g*) In estimating the value or loss by a slave's death or injury, all has to be included that would have been gained through him and all cost to which plaintiff has consequently been put. Thus the damages would be increased if the slave had an inheritance left him, and he was killed before he could accept; or if his manumission was the condition of his owner's becoming heir; or if he had committed frauds in his accounts, and his death prevented his being put to the question to reveal his

confederates; or if he was one of a band of comedians or musicians, and the rest were depreciated by his loss; or again if a mule was killed which was one of a pair, or a horse which was one of a four-in-hand. If suit be brought against the owner of an animal which has caused damage (*pauperies*) and the animal is killed, the owner can sue under the *lex Aquilia* for so much as was his interest in not paying damages but surrendering the noxious animal (Gai. iii 212; D. fr 22, 23 pr §§ 2, 4, fr 33 § 1, 37 § 1). Mere sentimental considerations, *e.g.* ties of relationship or affection, were not regarded: the loss must be of a substantial character such as would be felt by any owner (fr 33 pr). Again, at the time of injury a slave might be lame or have lost the use of an eye, or of a thumb, and thereby the slave being a painter have lost his value as an artist; but if he was sound within the period prescribed, the higher value was taken. If a slave proved eventually none the worse for the injury, still the action was good for the cost of healing (Gai. iii 114; D. fr 23 § 3, 27 § 17; cf. *Collat.* ii 4). In any case if defendant disputed his liability and was condemned, the damages were doubled. If he admitted the fact and disputed only the estimate of damage, double damages were not due, and the trial was confined to the determination of the value (Gai. iv 9, 71; D. fr 23 § 10, 25 § 2, 26).

(*h*) Injury to the body of a freeman did not come within the *lex Aquilia*, which dealt only with damage done to others' property. Moreover *nemo membrorum suorum dominus videtur* (*i.e.* limbs are not property) and it was a maxim that *liberum corpus aestimationem non recipit.* But an analogous action was granted (D. fr 13 pr; cf. xiv 2 fr 2 § 2). The measure of damages would be in this as in some other cases the costs of healing and the loss of services. Disfigurement would not come into the calculation (D. ix 1 fr 3; tit. 3 fr 7; cf. xxi 1 fr 42). A father could however sue for damage to a son in his power (D. ix 2 fr 7 pr).

(*i*) If a slave appointed free and heir by will be killed before testator's death, neither the substitute (if any) nor statutable heir to testator can sue under the *lex Aquilia.*

If he be mortally wounded, but die after testator, the wounded man's heir cannot sue where he himself had no action; if however he was only part heir, his coheir can sue for the diminution of his share of the inheritance, the right once acquired to the testator by the wounding of the slave not being lost by his manumission (D. fr 23 § 1, 36; xliv 7 fr 56).

(*k*) For offences under this statute committed by a slave or son under power, or by a vicar at his slave master's order, the owner for the time being was liable (*noxa caput sequitur*), and he could, instead of paying damages, surrender the delinquent. See below, chap. vii C.

(*l*) In many cases other actions are available concurrently with this, *e.g.* pledge, hire, loan, theft, spiteful injury, or *ad exhibendum*. If one suit was successful, another could be brought only for the excess thereby recoverable (D. fr 18, 27 §§ 11, 34, fr 42; xliv 7 fr 34). If a slave were killed maliciously (*dolo*) the killer would be liable also to criminal proceedings, but there might be a question whether both should be allowed (Gai. iii 213; D. ix 2 fr 23 § 9; xlvii 10 fr 7 § 1).

(*m*) The second clause of the *lex Aquilia* gave an action against an *adstipulator* who formally released the promiser so as to cheat the stipulator. The damages were to be *tanti quanti ea res est*. The connexion of this clause with the first and third is obscure. Gaius himself is puzzled at this grant of a special action, when, as he says, the action *mandati* was sufficient, though it was true (he adds) that by the *lex Aquilia* he could get double damages if the defendant denied the act (Gai. iii 215, 216). Modern writers are inclined to doubt whether in those early days an action *mandati* would have been good. But I think it possible that the real solution of the difficulty may be that the second clause was due to some particular circumstances which led to Aquilius' proposing this law. An *adstipulator* was chiefly used when the promise was to be performed after the stipulator's death (Gai. iii 117), in order that there might be someone to enforce the contract. Suppose such a stipulation to have been made by a slave, the slave to be killed and the master to die before bringing suit: suppose the *adstipulator* to be persuaded by the promiser (himself

perhaps the killer of the slave) to give him a release. Nothing could be more natural than that Aquilius should provide that in such a case (the case on my theory actually before him at the time) the *adstipulator* should be liable to the full amount for the loss caused by the death of the slave and his own fraud. But without knowledge of the actual words of this clause (of which indeed even Gaius may have had only a brief traditionary account) it is useless to speculate further.

The words *dare damnas esto* are often used in exacting fines for breach of public statutes. See *lex Jul. Agrar.* 54, 55; *lex Julia municipalis* vv. 19, 125; *lex Quinct.* 25; *lex Urson. passim etc.* and sometimes in private inscriptions on tombs, Bruns[6] p. 338. In an old inscription on a grave in Luceria the right of *manus injectio pro judicato* is given against offenders. Actions for exacting the fines were *populares, i.e.* could be brought by anyone, like English *qui tam* actions (*lex Jul. Agrar.* 54 *ejus pecuniae qui volet petitio hac lege esto*). The fine under such actions was not doubled by non-admission.

That *damnas esto*, used in a public statute, had originally the same effect as *judicatus*[1] I do not doubt (cf. Gai. iv 21): but how long this continued is a more difficult question. And it is doubtful what was the effect of it when used in a private will or in an inscription by a private person *qui legem suae rei dicit* (cf. D. xxiii 4 fr 20 § 1; Mommsen *ap.* Bruns[6] p. 259).

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ii. There are other cases of semidelictal obligation similar in general character to those under the *lex Aquilia*, but the amount of damages was not affected by admission or denial of the offence. In several however the damages are put from the first at double the value.

1. *Arborum furtim caesarum.*

This was a special action against one who stealthily cut trees. The XII tables had a like action with a penalty of 25 *asses*. It was an old dispute whether vines were included

[1] This is contested by Monro (see his edition of D. ix 2, App. II.), and very recently by Mitteis (*ZRG.* xxxv 113).

under trees. Most of the old lawyers (cf. Gai. iv 11) said they were. Ivy, reeds, and osiers were held to be included. Not only cutting down, but any cutting (*caedere, subsecare*) or ringbarking (*cingere*) was within the law: pulling up by the roots was not. If my tree puts its roots into a neighbour's land, he must not cut them, but bring an action denying my right to let the trees do it (*immissum habere*). The damages are laid at double the owner's interest in not having the trees hurt: the value of the wood is deducted from the amount of the damage. The action did not lie against an heir; and is not open to a usufructuary. It could be brought at any time (*perpetua est*). The *lex Aquilia* will apply where this action fails, and is concurrent with this where it lies, but if both are brought, that brought second is good only for the excess over what has been recovered. If the wood or branches cut are carried away, an action lies for theft (D. xlvii 7). Paul appears to extend this action to the cutting of standing corn (*Sent.* ii 31 § 24; cf. D. xlvii 2 fr 21 pr).

For the right of an owner to cut a neighbour's overhanging trees see vol. I p. 508.

Other actions for damage similar to that which was the subject of the *lex Aquilia* were granted by the praetor against persons who had not themselves caused damage but were presumed to have had the power to prevent it. Such are (2) *de dejecto effusove*, (3) *de suspenso, exposito, etc.*, (4) *de damno in nave aut caupona facto.* (5) To these may be added some old actions granted by the XII tables for damage caused by animals. Denial did not involve double damages.

2. *De dejecto effusove.* If anything was thrown down or fell or was poured out so as to cause damage to a person in a place where people in general pass or stand, the occupier of the house or apartment, whence the damage came, was liable to an action on the case. It was not necessary to prove fault. The damages were double the estimate of the injury, irrespective of confession or denial. If a freeman was killed, the damages are fixed (by Justinian) at fifty *aurei*; if he was only hurt, then at whatever the judge shall think fair, reckoning the fees

to doctors and other cost of his illness, and the value of his services for the time, and, if he is disabled, for the future also, but not reckoning anything for scars or deformity. The action did not run against heirs, but could be brought by an heir, except where the damage was done to the person of a freeman. In that case he himself could sue at any time, others must sue within a year, whether he was killed or only wounded. It was open to anyone to sue, parties interested or related to him by blood or marriage being however preferred; but heirs as such had no claim, where as in this case the matter was not regarded as compensation for a pecuniary loss, but as a matter of justice only (D. ix 3 fr 1 §§ 1—6, fr 5 § 5, 7).

The occupier is alone chargeable, even though he may have given gratuitous lodging to clients or freedmen, or may use the house as a workshop or school, or may have let off a small part of it in apartments, but if the bulk is let off all the occupants are chargeable; the praetor however will find it reasonable in some cases to allow the action only against the person actually occupying the chamber whence the mischief was caused. Occupiers in common are all liable: payment by one frees the others, who can then be made to contribute. Where an occupier has had to pay for the act of his guest, *etc.*, he can recoup himself by an action on the case against the offender (who is also liable under the *lex Aquilia*). A son under power occupying separately is responsible himself, as there is no contract to make his father liable *de peculio*. If a slave was occupier, his master was not liable either *negot. gest.* or *de peculio*, and hence he was dealt with *extra ordinem*. If he actually committed the offence, without his master's knowledge, he could be surrendered noxally (D. *ib.* fr 1 §§ 4, 7—fr 5 § 4).

3. *De suspenso, exposito, etc.* A like action was granted against anyone whether owner or lodger, dwelling there or not, who allowed anything to be placed on, or hang from, the eaves or a projection, which might fall and hurt passers by in a public place. If harm was actually done, the person who placed the thing there, instead of the occupant, was liable. And a like action was granted against one who exposed in a booth a picture or jar, *etc.*, so that it fell and did hurt. The penalty

was put (by Justinian) at ten *solidi*. Anyone could bring the action, but being penal it did not run against heirs (D. ix 3 fr 5 §§ 6—13). (N.B. *aureus* = *solidus* fixed by Caracalla at $\frac{1}{72}$ lb. gold.)

4. A somewhat similar action (*in factum*) was granted by the praetor against shipmasters, innkeepers and stablekeepers (*qui naves, cauponas, stabularia exercent*, cf. p. 178) for acts of theft or damage committed in the ship or tavern, *etc.*, by their sailors or servants or lodgers, not being merely travellers or passengers. The liability attaches where there is no fault on the part of the principal except for a bad selection of servants or other residents. If the offender is one of his own slaves, the master is entitled to some indulgence, because they are not chosen for this purpose, but are a family plague (*quasi domesticum malum*): he can therefore free himself by noxal surrender. If another's slave be employed in the ship or tavern and do theft or damage to his owner, the owner can sue the *exercitor* by this action (as well as by an *actio furti* or *Aquilia*). But damage done by one sailor or employee to another is not ground for this action. The injured person can proceed directly against the offender (if ascertained) by the *actio furti* or *Aquilia*; but, if he prefer to sue the principal, he must cede to him his actions against them: if the principal be acquitted on this action, the other actions will be barred. Damages by this action are for the double value, and the action is not limited to a year. It lies for the heir but not against him. If a slave be working the ship or tavern without his master's consent, the master is liable *de peculio* for such offence committed by an assistant, but if it have been committed by the slave *exercitor*, the master can surrender him noxally. If the slave die, suit *de peculio* cannot be brought at all. A master or father, whose slave or son is working the ship or tavern with his consent, is liable in full. Notice to the passengers of non-liability and their assent to it free the shipmaster (Paul ii 31 §§ 16, 18; D. xliv 7 fr 5 § 6; xlvii 2 fr 42 pr, tit. 5; iv 9 fr 6, 7).

5. *Pauperies.* 'Damage caused by an animal.'

An action was granted by the XII tables against the owner of a fourfooted animal, which had caused any damage (*pauperies*) without provocation. If the beast was irritated by any harsh treatment or by the difficulty of the road or the weight of an excessive burden, this action would not lie, but resort must be had to an action under the *lex Aquilia* or an analogous action *in factum*. It does not matter whether the mischief is caused by the horse, *etc.* himself, or by the cart or anything else to which he is attached. But, only when the beast does harm spontaneously from his own wildness or temper (*commota feritate*), is the owner liable under this action. If another beast excited him, the owner of this other beast is responsible. If two rams or oxen fought and one was killed, the owner of the aggressor if surviving was liable. Paul makes this or like action applicable if a horse or other animal with the mange was allowed to mix with neighbours' herds, so as to communicate the disease. And grazing on another's pasture was ground for this action (*si quid depasta sit* Paul i 15 § 1). It was the owner of the animal for the time being (*noxa caput sequitur*) who was liable to suit, not the owner at the time of the hurt. And not only the owner could sue, but anyone who was interested in keeping the damaged thing safe, *e.g.* one to whom it had been lent. It ran both for and against heirs in their capacity as owners. The claim was in the alternative: defendant had either to make compensation or to give up the animal; *aut noxam sarcire aut in noxam* (or *noxae*) *dedere*. If the animal died before joinder of issue, the action dropped: if after joinder of issue the animal was killed by someone else, the defendant must either pay the damages or make over to plaintiff his action under the *lex Aquilia* against the killer. If a free person was damaged, it was eventually decided that he (or his father) could sue, not for any disfigurement, but for the expense of his cure and the loss of his services present and future (D. ix 1).

6. (*a*) The case of dogs was specially dealt with by a *lex Pesolania*. If a dog was in a square or public road and not tied up in the day-time and did mischief, the owner was liable: and if a dog was led by one incompetent to hold him or in

a place where he ought not to be and did mischief, the leader, not the owner, was liable (Paul i 15 § 1; D. ix 1 fr 1 § 5).

(*b*) An analogous (*utilis*) action to that *de pauperie* was granted in case of mischief done by animals not fourfooted. Wild animals (*e.g.* a bear) are not properly within the scope of the law, for if they escape from confinement they cease to have an owner (D. ix 1 fr 1 § 10, 4).

(*c*) The aediles' edict forbad keeping, unless securely tied, in any place where people commonly pass, a dog, boar, wild boar, wolf, bear, panther, lion or any other hurtful animal. In case of injury to a slave the penalty was double the damage; in the case of a freeman, if hurt, what the judge thinks right, if killed, a fine of 200 *solidi* (20,000 sesterces? cf. Just. iii 7 § 3). This action would be concurrent with that *de pauperie*, both being penal (Just. iv 9 § 1; D. xxi 1 fr 40—42).

The praetor forbad keeping such animals in such places even if tied; and for any damage caused by them, or on account of them, gave an action according to the offence (especially if a man was killed) either against the owner or the keeper. This was granted *extra ordinem*. And any damage caused through fright of snakes made those who carried them about liable to suit (Paul i 15 § 2; D. xlvii 11 fr 11).

CHAPTER VI.

OBLIGATIONES EX DELICTO (TORTS).

Obligations, arising from a wrong act of one person which causes loss or injury to another, have certain common characteristics which do not apply to contractual obligations.

1. They do not run against the heirs of the offender, unless issue has been joined with the predecessors. But if the heirs retain any profit arising from the delict, they are liable to restore it. If the obligation arise from taking a thing by fraud or violence, they are liable to an action for production and consequent vindication (D. xliv 7 fr 33, fr 59; xlvii 1 fr 1

pr; L 17 fr 38, fr 164). All delicts, except insult, could be subject of action by heirs (Gai. iv 112).

2. If several torts are combined in one proceeding, the actions arising therefrom are concurrent, but do not destroy one another. Thus if a man has stolen and killed or wounded a slave, he is liable to an action for theft and also under the *lex Aquilia.* So if he took the slave by force, he is liable for robbery, and also under the *lex Aquilia.* If he stole him and whipped him, he is liable for theft and insult; if further he killed him, he is liable under a third action for that (D. xlvii 1 fr 2; xliv 7 fr 60).

3. If the offender is a slave, the master is liable not *de peculio* but in full. On the other hand he can free himself from the penal actions, whether one or more, by surrendering the slave noxally, provided he had neither ordered the wrong deed nor had guilty knowledge of it. It is the owner at the time of action, not at the time of offence who is liable. The action for fraud is not always noxal (D. xlvii 1 fr 1 § 2; ix 4 fr 2 pr, fr 7, fr 20).

4. Condemnation for the principal delicts makes the offender infamous. This is declared of theft, robbery, insult, fraud, violation of a tomb; and, in the case of the first three, infamy follows not only condemnation but bargain to avoid condemnation (Gai. iv 182).

5. In most delicts condemnation was to damages of twofold or fourfold the value, *viz.* in theft, robbery, damage in a crowd, corruption of a slave, calumnious bribe, intimidation; but not in fraud or the action against land-surveyors. Insult had a special estimation of damages. Set-off was admissible in all delictal actions for damages (D. xvi 2 fr 10 § 2).

6. All arise from acts done maliciously, *i.e.* with evil intention and consciousness of wrong-doing; *maleficia voluntas et propositum delinquentis distinguit* (D. xlvii 2 fr 54 pr).

The action for Aquilian damage resembles delicts in the first three points, but it did not involve infamy, nor did it inflict double damage, unless the charge was contested, nor was it at all confined to cases of evil intention: it included mere negligence. A partner who had injured partnership property

was liable to the Aquilian action as well as *pro socio*, but to condemnation only under one: whereas if he stole it, he could be condemned for theft in addition to *pro socio* (D. xvii 2 fr 45, 50).

A. *Furtum.* Theft.

(*a*) Theft is taking, secretly or forcibly, anything moveable, with the intention of appropriating it without the owner's consent: and not only the fraudulent appropriation of the thing itself, but the like appropriation of its use or possession is also theft. *Furtum fit, non solum cum quis intercipiendi causa rem alienam amovet sed generaliter cum quis rem alienam invito domino contrectat* (Gai. iii 195). Forcible taking is, however, usually subject of another action (p. 216). To make theft there must be not merely an intent or thought but actual dealing with the thing (D. xlvii 2 fr 1 § 1; xli 2 fr 3 § 18); not mere dealing in words or writing but in physical touch (fr 52 § 19); not merely wrongful action but handling with intent to make gain thereby (fr 1 pr, 54 pr); without the owner's consent and without a belief that the owner would consent[1]. If the owner consents, there is no action for the theft; if the owner is believed to consent, or the taker believes the thing to be his own, there is no fraudulent purpose, and no *actio furti* (Gai. iii 197, 198; ii 50; D. fr 46 §§ 7, 8). In some cases the owner himself may be guilty of theft, if he furtively resume possession in spite of others' rights (fr 54 § 4, *etc.* see below).

(*b*) Thus, besides ordinary cases of stealing, theft is chargeable if a man make any use of what is deposited with him merely for safekeeping; or borrows from another's slave, when he knows that the owner is not consenting; or if a borrower lend to another what has been lent to him only, or use it otherwise than the lender intended or is believed to approve, *e.g.* if a man borrow plate for a dinner party and then take

[1] Gellius (xi 18 § 19) quotes from Sabinus *ex libro juris civilis secundo* as follows: *Qui alienam rem adtrectavit, cum id se invito domino facere judicare deberet, furti tenetur*: and from another chapter: *Qui alienum jacens lucri faciendi causa sustulit, furti obstringitur sive scit cujus sit sive nescit.*

it abroad with him, or borrow a horse for an ordinary ride, and take it to battle or to a long way off (Gai. iv 196; D. xiii 6 fr 14; xlvii 2 fr 40, 55 § 1, 77 pr; Scaev. *ap.* Gell. vi 15); or if a fuller or tailor use clothes given them only to clean or mend (fr 83 pr). It is theft, if a creditor use what is only pledged to him, or after the debt is paid, do not return but conceal the pledge, or when he has no power of sale, sell it (fr 52 § 7, 55 pr, 74); or if a debtor, before paying the debt, surreptitiously take the pledge away from his creditor or sell it, even though the creditor were not in possession of it (fr 19 §§ 5, 6, 67 pr; Gai. iii 200). So if a farm tenant who has agreed as usual that the fruits should be pledged to the lessor for the rent, secretly carries them off, or sells them to one who gathers and removes them, both farmer and purchaser are chargeable with theft, for the fruits are the farmer's only if gathered with the lessor's consent (fr 62 § 8). It is theft if, after the expiration of his lease, a farmer gathers the next year's crops; or if an owner secretly takes the fruits or conceals the thing from one who has its usufruct or is in *bona fide* possession, or secretly takes back a thing borrowed by another who has a lien on it for expenses (fr 15 §§ 1, 2, 20 § 1, 60, 68 § 5; Gai. iii 200). It is theft for the owner of a thing to take by force the price from the thief who has sold it (fr 48 § 7; cf. ix 4 fr 38 § 2). One who picks up anything lying in the road is not chargeable with theft, if it has been abandoned or he believes it to have been abandoned by its owner, or if he intends to return it to anyone who may prove to be its owner: and the same applies to the case of goods thrown overboard (fr 43 §§ 4—11). Resuming without fraud what has been conveyed to another in trust (*fiduciae causa*) is not theft (Gai. ii 59, 60; iii 201).

(*c*) Anyone pretending to be creditor, and receiving money as such, is chargeable with theft, and the money does not become his. So there is theft if the owner by mistake deliver a thing to another, who knowing it not to be his appropriates it; or if a man, instead of himself receiving money not due to him, directs it to be paid to another in his presence. If, however, it be paid in his absence, he cannot be charged with theft, when he has never handled or seen the coins. If one,

assuming to be agent for another, receives payment on his behalf and keeps it for himself, it is theft, provided the debtor gave him the money for delivery to the creditor, or if the false agent assumed the name of the real agent; but it is not theft if the agent was intended to be owner of the actual money and to account for the sum to his supposed principal (D. fr 43 pr—§ 2, 44 §§ 1, 2, 81 § 6; cf. xlvi 3 fr 18). It is theft if a man receives money from me to pay my creditor, and does pay him, but on account of a debt of his own (fr 52 § 16)[1]. One who gets a loan for himself by false pretences, such as that he is solvent, or is going to invest it in goods, or will give good sureties, or will repay directly, or being a slave professes himself a freeman, or being a son under power professes himself *sui juris*, is deceitful, but does not commit theft: if liable in no other way he can be sued for fraud (fr 43 § 3). Nor is obtaining by fraud a promise to pay, or mere denial of a deposit, theft (fr 76, 88 pr). Carrying off or concealing a female slave, who is a prostitute, is not theft, because the motive is gratification of passion; but if she is not a prostitute, although the motive is the same, it is held to be theft and also plagiary (fr 39, 83 § 2; Paul ii 31 §§ 12, 31 seems to differ on the former point).

(*d*) Aid or counsel to a thief for the purposes of theft makes the giver liable as for theft[2], provided theft be actually committed (*ope consilio alicujus furtum factum*). This liability attaches to one who directs his son or slave to commit a theft (Gell. xi 18 § 24); or who knocks money out of your hand that another may carry it off, or blocks your way that another may rob you, or frightens your sheep or oxen (*e.g.* with a red

[1] So if *A* gives a thing to *B* to present on *A*'s behalf to *C*, and *B* presents it as from himself, he commits a theft, and the property in strict law does not pass; but as *C* was intended to have it, he was allowed (by a kindly construction) to resist by a plea of fraud any action of *A*'s to reclaim it (D. xxxix 5 fr 25). (In the earlier issues of Mommsen's stereotype edit. D. xlvii 2 fr 52 § 16 there is a typographic error *furtum non facere* for *furtum eum facere*, which has probably misled Lenel *Paling.* i 376, ii 676 to give *non* for *eum*).

[2] Cf. Cic. *N. D.* iii 30 § 74 *Inde illa actio* '*ope consilioque tuo furtum aio factum esse.*'

cloth) that another may catch them; or lends tools or a ladder knowingly for the purpose of a theft; or lends a purchaser overheavy weights in order to cheat a vendor; or conceals a runaway slave, or persuades a slave to run away, if the slave carry off things with him or be himself stolen by someone else[1]. But merely shewing the road to a runaway slave, or refusing information of his whereabouts, or frightening cattle in mere sport or from malice to the owner, or from pity setting free a fettered slave, may be in some cases subjects for action (*in factum, lege Aquilia, etc.*) but not *furti*, if there is no thievish intent (Gai. ii 202; D. fr 39, 48 § 1, 50 §§ 1, 4, 52 §§ 13, 19, 22, 55 § 4, 69; iv 3 fr 7 § 7; cf. Paul ii 31 § 33). If when you intend to make a loan to a respectable man Titius, I substitute a needy man of the same name and divide the money with him and he knows it and takes the money, he is guilty of theft, I of aiding and counselling (fr 52 § 21, 67 § 4). The republican lawyers (*veteres*) held that a man who with a fraudulent intent (*dolo modo*) summoned a muledriver into court was chargeable with theft if the mules meanwhile were lost (fr 67 § 2). If Titius persuades my slave to carry off chattels of mine and bring them to him, and the slave tells me of the plan and performs his part by my instructions in order that I may catch Titius in the act, Titius is not liable to me for theft, for I consented to his handling of the goods, nor is he liable for spoiling my slave (p. 219), for my slave is not spoilt (Gai. iii 198; Justinian iv 1 § 8 says some lawyers held him guilty of theft).

(*e*) When a thief has taken part of a larger whole, *e.g.* part of a cask of wine, some of the articles in a cupboard, part of the contents of a bale or box which was too heavy for him to carry off, he is (as was held eventually) chargeable with theft only of the part or things taken, but if he handled all and could carry the whole, he is chargeable with theft of the whole. So several persons combining to steal and carry a heavy beam are each chargeable with stealing the whole (fr 21). A man digging

[1] Gellius tells us that Sabinus mentions the case of a man judged guilty of theft who, when a fugitive slave happened to be passing before his master, prevented his seeing the slave by holding up his *toga* under pretence of putting it on (xi 18 § 14).

sulphur or chalk or cutting timber or taking stones or fruit in another's land is liable for theft if he carry it off (fr 25 § 2, 52 § 8, 58). An immoveable is not capable of being stolen, though at one time some old lawyers thought *fundi furtum fieri posse*[1] (Gai. ii 50, = D. xli 3 fr 38).

(*f*) Free persons might in some cases be stolen, viz. a child under power, a wife in hand, or a person in a quasi-servile condition, such as an adjudged debtor or one hired out as a gladiator (*judicatus vel exauctoratus meus* Gai. iii 199). But though an action *furti* may thence arise, there is no *condictio furtiva*, at least in the case of a child or wife (D. xlvii 2 fr 38 § 1).

(*g*) The right to sue for theft belongs to him who has a lawful interest in the safekeeping of the thing stolen (*cujus interest rem salvam esse*), whether it be the owner for the time being or fructuary or anyone in honest possession of others' things and effectively responsible for them. The suits of such are independent of one another, as one co-owner's action is of another co-owner's. Thus a hirer or fuller or tailor or borrower can sue for theft of the thing given him to use or clean or mend, and the owner in these cases has not the action, for he can recover the value from them by the ordinary actions (*locati, commodati, etc.*). But if they are insolvent (at the time of the theft; cf. Cod. vi 2 fr 22 § 1), or if he has given them a release from liability, the interest has shifted back to him and he can sue the thief. If the borrower have paid him for the loss, and the thief turn out to be a slave of the lender, repayment by the lender is sufficient to destroy the borrower's action for theft. A depositary is responsible for fraud only, not for safekeeping (unless he has expressly promised it), and has therefore no lawful interest upon which to base an action for theft (Gai. iii 203—207; D. fr 10, 12, 14 §§ 3, 4, 16, fr 46 § 5, 47, 54 § 1; cf. xlvii 8 fr 2 § 23). A holder on sufferance is not responsible by the ordinary law; but if an interdict *de precario* is issued

[1] Gellius (xi 18 § 13) mentions that in a book of Sabinus 'on thefts' a generally unexpected proposition was laid down *fundi quoque et aedium fieri furtum*, and that a farmer who rented a farm and sold it was condemned for theft because he had done his landlord out of the possession (*quod possessione ejus dominum intervertisset*).

against him, he becomes responsible and then has an interest to justify his suing the thief (D. xlvii 2 fr 14 § 11). One who farms at a money-rent so as to be entitled to the crops when gathered can sue for theft of them when standing (fr 26 § 1). The bearer of a letter, if hired or otherwise responsible for its safekeeping, or if its contents were intended to benefit him, has sufficient interest (fr 14 § 17). The owner of a bond or receipt can sue for the full value of the amount named therein, even if the document be cancelled, for it may be necessary to prove payment (Paul ii 31 § 32, fr 27—32). If a thing in pledge is stolen, not only the debtor (if the thing is of greater value than the debt) but the creditor also (if his debt is unsatisfied) can sue, whether the debtor be solvent or not, and for the full value of the thing, having of course to account to the debtor for the surplus over the debt (fr 12 § 2, 14 § 6, 15 pr, 46 § 4). One who has only a claim to a thing by will or stipulation cannot sue for theft of what is not yet his either in ownership or possession (fr 13, 86; cf. fr 81 § 7). A purchaser before delivery cannot sue for theft, but can call on the vendor to surrender to him his actions, or if vendor has already got damages, to pay over the amount (fr 14 pr: according to Paul (ii 31 § 17) both vendor and purchaser can sue). One who of his own motion manages others' business or acts as guardian (*pro tutore*) has no right to sue for theft, but if he is himself sued by the owner for the loss, can claim a surrender of the owner's actions (fr 54 § 3, 86). A thief has no action against one who steals the same thing from him: the owner will have an action against both; and if there be no owner to sue, still (though Servius had a different opinion) the thief cannot sue for what is in no way his: but if a stolen slave steal from the thief, it was held that to prevent the mischief of the master being enriched by the fraudulent increase of the slave's *peculium* the thief might sue the master (fr 14 § 4, 68 § 4, 77 § 1). One who without title is possessing a thing in the character of heir has in his hope of gain by usucapion no such interest as would enable him to sue for theft of the thing (fr 72 § 1).

(*h*) A father or master can sue for theft of a thing from his son or slave as he is the legal owner of their *peculium*, and liable

to others so far as it extends. If, however, there be nothing in it, his interest ceases; and thus if a slave has undertaken to clean clothes and they are stolen from him, the master has in such case no right of suit, and only the owner of the clothes can sue (Paul ii 31 § 20; D. fr 52 § 9). A son is however in a different position: he can always be sued for the full amount of a debt (as well as his father *de peculio*), and can himself sue on a loan (*commodati* D. xv 1 fr 44; xliv 7 fr 9, 39): if therefore a thing lent him be stolen, as he is liable for its safekeeping, he, not his father or surety, will have the title to sue for its theft (D. xlvii 2 fr 14 § 10; cf. §§ 14, 15). If a slave in usufruct (or use) be stolen, the fructuary (or usuary) can sue for the loss of his services or other fruits accruing to him, the owner can sue for the value of his propriety (fr 46 §§ 1, 3). Guardians and caretakers of lunatics could bring and settle an action for theft from their wards and also bring a condiction on their account (fr 57 § 4). For theft from dowry the husband has the right of suit, though the risk is really the wife's (fr 49 § 1).

No one can sue his children under power or his slaves, not because of any law forbidding it but from the nature of the case: they are part of his family; what is theirs is his; and he has power to deal with their offences himself. Nor if they be alienated or set free does a right of action arise, which did not exist when the act was committed (fr 16, 17 pr § 1). Nor can a part-owner of a slave who has stolen from him sue for the theft, even if he acquired the share of ownership since the theft (fr 43 § 12, see p. 211). If a son has a camp-*peculium*, he is responsible for his slave's thefts from his father, and possibly, as he has property of his own, responsible by an *actio utilis* for thefts of his own: his father will be responsible to him for thefts from such a *peculium*. A wife is not liable *furti* for theft from her husband, except on account of her slave: for her own theft she is liable in an action *rerum amotarum*. Anyone who aids his son or slave or wife when committing a theft, is liable to this action even though the principals may not be sued (fr 52 §§ 1—6; 36 § 1). A patron cannot sue for theft his freedman or client; nor a hirer sue his hired servant (fr 90).

An *impubes* according to the better opinion was chargeable

with theft, only if he was near the age of puberty, and therefore understood that he was doing wrong (Gai. iv 208). He was not held capable of aiding and counselling theft (fr 23).

(*i*) An heir could sue for theft from his predecessor (D. xlvii 1 fr 1 § 1). If a slave of the inheritance stole from the heir before the inheritance was entered on, the heir could sue the man himself if made free by the will, or the legatee, if he was directly bequeathed, as in neither case was the slave ever the property of the heir (D. xlvii 2 fr 44 § 2, 65). On theft from a vacant inheritance see p. 213.

An heir was not liable to be sued for his predecessor's theft, but if he possessed or had fraudulently parted with the thing, he was liable *ad exhibendum*, and also to vindication and condiction (D. xlvii 1 fr 1 pr). A usufructuary of a slave was not liable for the slave's thefts but could sue the owner (D. xlvii 2 fr 18).

Whether a *bona fide* possessor of another's slave was liable to suit for a theft committed by the slave was disputed, but eventually, as appears, decided in the affirmative; and, this being so, he was held to have no action against the real owner for theft committed by the slave, until this last had returned to his owner's power (Cod. vi 9 fr 21 § 1; D. xlvii 2 fr 17 § 3).

(*k*) Destruction of the thing stolen, or death or manumission of a slave stolen, is no bar to action for theft; nor is its capture by the enemy or abandonment by the owner subsequent to the theft. The action once arisen continues as long as the thief lives, until it is either settled for (*dum quis pro fure damnum deciderit*[1]) or judgment is obtained (fr 46 pr; cf. § 5). If the thief be *sui juris* he is liable himself; if he is not, the action is against whoever is his father or master at the time of suit; if he becomes free since the theft, the liability shifts to him (*noxa caput sequitur* fr 41 § 2; xliv 7 fr 14; Paul ii 31 §§ 8, 9). The settlement (*pro fure decidere*) could be made by a simple agreement, and was operative *ipso jure* (D. ii 14 fr 17 § 1).

[1] The phrase *damnum pro fure decidere* 'to settle the loss in the character of thief' was used of defendant in the *intentio* of the *formula* (cf. Gai. iv 37).

(*l*) The amount of damages varied according to the title of the plaintiff and the character of the theft. If plaintiff was not owner, the measure of damages was his interest in the thing not being stolen (fr 50 pr). If he was owner, the measure was the maximum true value which the slave or thing stolen had at the time of or since the theft. If however he was not permanent owner, but owner only till some condition occurred which made the slave free or transferred the ownership to a legatee, the measure was what a purchaser would give for the slave in the circumstances. A slave, stolen when a child, is estimated at its worth when grown up (if still stolen). The value of any inheritance falling to the slave or of any penalty due for non-delivery of him before a certain day, comes into the estimate, if he be stolen and die before entry or be not delivered as due (fr 50 pr, 52 § 29, 68 §§ 1, 2, 81 § 1). But it is not the single value that forms the damages, but a multiple according to the character of the theft.

(*m*) Ser. Sulpicius and Masurius Sabinus made four kinds of theft; *manifestum, nec manifestum, conceptum, oblatum.* Labeo more rightly rejected the latter two as not theft but only connected with it (see p. 215). Theft manifest was defined (1) by Sabinus and others to be when the thief is caught (*deprehenditur*), not merely seen (cf. D. fr 7 § 1), in the act; (2) by others again to be when the thief is caught while still on the spot, *e.g.* theft of olives or grapes, while the thief is yet in the oliveyard or vineyard; theft of articles in a house, detected while the thief is still there. Another (3) definition made it theft manifest, if the thief was caught before he had brought the thing stolen to the destination he intended. A fourth (4) still further extended it to include whenever the thief was seen anywhere in possession of the thing (*rem tenens*). Gaius tells us that this last definition was not approved, and that the third seemed not to be approved, because of the doubt whether it should be limited to cases where the thief is caught within one day or in several, especially where a thief had carried the thing off to a different town or province. Of the first two definitions the second, he considered, met with most favour (Gai. iii 183, 184). Paul accepts

the first three (*Sent.* ii 31 § 2). Julian and Ulpian (in D. fr 3—5) agree with Paul. Aid and counsel to a thief was never considered to be theft manifest: robbery was clearly so (D. fr 34, 81 § 3). A carrier of goods, knowing them to be stolen, is if caught with them guilty of theft manifest (fr 35 pr).

Theft manifest was a capital offence by the law of the XII tables. They permitted a thief to be killed, if he was caught stealing in the night, or if in daytime he defended himself with a weapon, but before killing there was to be a cry as a kind of notice to the public. If the theft was in the daytime and there was no armed defence, a freeman could only be beaten (*verberatus*) and assigned (*addictus*) to the person on whom the theft was committed. It was a question with the old lawyers (*veteres*), whether the thief was thereby made a slave or was in the same position as a judgment debtor assigned to his creditor (*adjudicati loco*). A slave who committed theft was beaten, and, if *pubes*, thrown from a rock; if *impubes*, was liable to be given up noxally. The praetor however substituted an action for fourfold the value in each case; and the action (contrary to the usual rule) was not limited to a year. Theft not manifest was subject to an action for twofold the value (Gai. iii 189, 190; iv 111; *Collat.* 7 § 2; D. ix 2 fr 4; Gell. xi 18 §§ 6—10).

Both the quadruple and the double were regarded as penalty only[1], the owner having the right also to recover the thing or value either by vindication against the possessor whoever it might be, or by condiction (*furtiva*, see p. 82) against the thief or his heir if not in possession (D. xlvii 2 fr 48 pr, 55 § 3). But it would be the judge's duty to restrict the plaintiff to the produce of one of these two actions (fr 9 § 1). If the thief be brought by the plaintiff before a police magistrate (*praefectus vigilibus vel praeses*), and the thing or its single value recovered, the civil action for theft was deemed to be waived, especially if punishment was inflicted as well (fr 57 § 1). Settlement for

[1] Quintil. vii 6 § 2 gives as an instance of obscurity in the law: *Fur quadruplum solvat. Duo subripuerunt pariter decem milia; petuntur ab utroque quadragena: illi postulant ut vicena conferant; nam et actor dicit hoc esse quadruplum quod petat, et rei hoc quod offerant.*

theft (*si pro fure damnum decisum sit*) did not bar vindication or condiction (D. xiii 1 fr 7 pr).

(*n*) Both condemnation and settlement in an action for theft made the defendant infamous; and this consequence followed *ipso facto* without the praetor or governor having power to prevent it (Gai. iv 182; Paul ii 31 § 15; D. xlvii 2 fr 64).

(*o*) As in the case of other torts, when a slave has committed a theft, his owner unless having himself guilty knowledge could escape payment of damages by surrendering the slave (*noxae servum dedendo*, see p. 252). Ordinary actions of contract were often sufficient to compel the slave's master either to settle for the loss or to give up the culprit (*aut damnum decidere aut pro noxae deditione hominem relinquere*). Thus if a slave in pledge stole from the creditor, the counter pledge-action was enough for this purpose. If a slave is bought and is to be given back by the purchaser, the latter can call on the vendor in the proceedings for redhibition (for he has no interest to support an action for theft) either to compensate him for any theft which the slave has committed, or to abandon to him the slave. A like use may be made of the actions on hire and loan in the case of a slave committing theft when hired or lent. But if a man has directed his agent to buy a particular slave for him, and the slave turn out to be a thief and steal from the agent, the *mandator*, whether he knew of the slave's character or not, is compellable by the counter action of mandate to compensate the agent without having the alternative of noxal surrender. And the like applies in the case of deposit, as both agent and depositary are acting for their principal's benefit and not for their own. If a slave steal from one of his co-owners, the sufferer can by the action *com. div.* force the other to repair the loss or surrender the slave (D. xlvii 2 fr 62 pr—§ 7, 68 § 3, 17 § 2).

(*p*) The issue had to describe the thing stolen sufficiently for practical purposes. If a dish or plate or cup was stolen, its weight need not be given, but the metal should. If unwrought metal was stolen, the weight and kind of metal must be stated; the number and metal of medals or coins, the colour (if remembered) of robes. If silver has been stolen and wrought

into cups, either the weight or the wrought article may be given: if grapes have been stolen and crushed, the demonstration may name them either as grapes or must or raisins (fr 19 §§ 1—4, 52 § 14).

(*q*) Besides the private action for theft criminal proceedings might be taken, and Ulpian (fr 93) says that in his time this was the more usual case. Thieving by night or stealing in public baths were punished by being put to public labour for a term; burglars or thieves who defended themselves with a weapon were sent to the mines or relegated according to their rank. Killing a thief was not allowed unless it was necessary in self-defence (*Collat.* vii 2—4).

B. Other actions for stealing.

1. Where a beam had been stolen and joined to a house or vineyard the XII tables directed that it should not be capable of vindication, but he who joined (*junxit*)[1] it to the building (*i.e.* practically the ground owner) should be liable to an action for double the value (*actio de tigno juncto*). An action for production (*ad exhibendum*) would also lie against one who joined it knowing it to be another's, on the ground of his fraud in precluding himself from being able to restore. All building materials (stone, tiles, pots, lime, sand) and all things necessary for vines (props, poles) were held to be included (D. xlvii 3 fr 1).

2. There was an action given by the XII tables against anyone who sent in his cattle to feed on another's land, but we know no more about it (*Act. de pastu pecoris* D. xix 5 fr 14 § 3).

3. Cattle-lifting (*abigeatus*) was generally punished criminally, being taken out of the category of private theft by its frequent practice as a business, by the scale on which it was done, and by the use of armed force in defence. Driving off one horse, two mares or oxen, ten goats or sheep, five pigs, came within the law. But driving off a straying ox or horse in desert places, or fewer goats, sheep or pigs than this number

[1] Pernice suggests that the XII tables had not *junxit* but *junctum habuit*; cf. D. xli 1 fr 7 § 10 (*Labeo* ii 1 p. 320).

was merely theft (Paul v 18; *Collat.* xi; cf. D. xlvii 14 fr 3 *de abactoribus* or *abigeis*).

4. An old action (*oneris aversi*) against carriers is mentioned by Alfenus (lawyer of Cicero's time) but regarded as superfluous (see p. 176; D. xix 2 fr 31).

5. Theft by a wife and some other persons was the subject of an action *rerum amotarum*, the relationship making a disgraceful action unsuitable (D. xxv 2).

6. Theft in a tavern, *etc.* (*in caupona, etc.*) was the subject of a special action against the proprietor, see p. 197.

C. Abstraction of things belonging to a vacant inheritance was the subject of two special procedures. Theft (as Q. Mucius Scaevola said) was concerned only with possession; an inheritance before the heir entered was not possessed by anyone, and, though for some purposes regarded as a legal person, had no power to hold, and no *animus* to act, as possessor of the things belonging to it. When the heir enters he acquires all the rights of the deceased, and all the things belonging to the inheritance, but possession of them is not included under either category; and, until he actually takes possession, there is no possessor against whom theft could be committed. It was therefore a recognised principle that *hereditariae rei furtum non fit*[1]. But things lent or hired out or pledged by the deceased had a *de facto* possessor in the borrower or hirer or pledgee; and the like was true where another had the usufruct: in these cases therefore the heir (as well as the borrower, *etc.*) after entry was held capable of suing for theft. But in other cases the heir could only sue for production (*ad exhibendum*) so as to vindicate the thing stolen. (See D. xlvii 2 fr 14 § 14, 69—71; tit. 4 fr 1 § 15; tit. 19 fr 2 § 1, 6.) Special means were therefore

[1] Cicero probably refers to this doctrine when he wrote to Trebatius (*Fam.* vii 22) to prove that there was an old dispute *possetne heres quod furtum antea factum esset furti recte agere.* Trebatius maintained that no one had ever thought he could. Cicero produced opinions of Sex. Aelius, M'. Manilius and M. Brutus to that effect, and mentions Q. Mucius Scaevola's opinion to the contrary. This opinion is apparently given in D. xlvii 4 fr 1 § 15 as above.

taken to prevent thefts before the heir entered or actually got possession.

(*a*) By a decree made under Marcus Aurelius anyone who pillaged an inheritance before the heir's entry or taking possession was liable to criminal proceedings *extra ordinem* (*crimen expilatae hereditatis*), but Severus and Antoninus declared the heir to have the option of either prosecuting the offender or vindicating the things stolen (D. xlvii 19 fr 1, 3). It could not be brought against the wife nor against a coheir (fr 5; Cod. iii 36 fr 3).

(*b*) An action for double the heir's interest (*dupli judicium*) was given by the praetor against anyone, declared free in a will, whose fraud (*dolus malus*) prevented anything which was included in the goods of the testator from coming to the heir. The fraud must have been since testator's death and before any heir's entry. A slave in this position might, it was thought (so Labeo), act with less scruple, because, even if the inheritance be regarded as his mistress, he could not be controlled and punished as a slave, and no action lay for a mistress against her freedman for torts committed in slavery. The language was so general as to include all fraudulent damage as well as abstraction, and was applied whether the freedom was given directly or by way of trust; and also when the doer remained a slave but was unconditionally bequeathed. If there was a condition either of freedom or legacy he remained a slave and was subject to chastisement (D. xlvii 4 fr 1, §§ 2—7, fr 3). Nor was it confined to loss or damage of things actually *in bonis* of the deceased; things lent or pledged or honestly possessed by others and fruits come within the action—wherever in fact an action for theft could have been brought if the slave had been a freeman and the inheritance a living person. The action must be brought within a working year, and was open to heirs, and did not exclude vindication; but if deceased's heir could come to his own in other ways this action did not lie. If several slaves so acted, they were each liable for the double, and payment by one did not free the others (fr 1 §§ 10, 16—19).

D. Further actions not for theft, but connected with theft, are the following:

1. *Furtum conceptum*[1], 'taking to oneself,' 'receiving,' was when a stolen thing was found, witnesses being present, in the possession of a person (*apud aliquem*). The penalty was threefold, both by the XII tables and the praetor's edict (Gai. iii 183, 186, 191).

2. *Furtum oblatum*, 'putting a theft on to another,' was when a stolen thing was given to someone in order that it might be found with him (*concepta*) rather than with the giver and was so found. The person with whom it was found had an action *f. oblati* against the giver. The penalty was the same as for *f. concepti* (Gai. iii 183, 187, 191).

3. *Furtum prohibitum*, 'hindering (search for) theft,' was when a person desirous of searching for a stolen object was hindered from doing so. The hinderer was liable to an action for fourfold by the praetor's edict. The XII tables affixed no penalty, but provided that anyone who wished to search should search naked, having his loins girt with a linen cloth, and holding a dish; and that if he found anything, the theft should be theft manifest. Gaius criticises this regulation severely. If a man meant to hinder the search, he would hinder a naked man as much as if he were clothed, and all the more because of the increased penalty on detection. What use is carrying the dish? to put the stolen thing on? or to occupy the man's hands so that he cannot bring the thing in secretly and declare it to be stolen? The thing may be too big to suit either hypothesis. One thing however, says Gaius, is certain, that the law is satisfied, whatever the material of the dish: and though the discovery of a thing under these circumstances may perhaps not strictly turn the theft into theft manifest, all agree that the law can prescribe the same penalty (Gai. iii 188, 193[2]).

[1] All these expressions belong to the class where gerundives often, and sometimes participles, are used to denote not the thing or person acted on, but the action itself; *e.g. dubitabat nemo quin violati hospites, legati necati, fana vexata efficerent vastitatem* (Cic. *Pis.* 35). Lat. Gr. § 1410.

[2] Gellius (xi 18 § 9) says *Ea quoque furta quae per lancem liciumque concepta essent proinde ac si manifesta forent decemviri vindicaverunt.*

Paul apparently gives the later practice, that one who means to search had first to declare what he sought, giving both its name and description (*Sent.* ii 31 § 22). Certainly in a suit name, colour, weight, number, *etc.* were required to be stated (D. xlvii 2 fr 19, 52 § 25; above, p. 211).

4. Justinian mentions an analogous action *furti non exhibiti, i.e.* for non-production of a stolen object; but the practice of search in this fashion becoming obsolete, these actions went out of use, anyone who knowingly received or concealed a stolen thing being guilty of theft not manifest (D. xlvii 2 fr 48 §§ 1, 3; Just. iv 1 § 4).

E. 1. *Vi bonorum raptorum*, 'Robbery by force.' This action was introduced by the praetor, M. Lucullus[1], probably in 76 B.C., in order to meet the lawless acts committed by large bands of slaves who were kept in farms and pastures at a distance from Rome. The early form of the edict appears to have been directed against anyone who forcibly and maliciously collected or armed men, and inflicted loss or carried off goods. (*Si cui vi dolo malo hominibus coactis armatisve damni quid factum esse dicetur sive cujus bona rapta*[2] *esse dicentur, etc.*, comp. Cic. *Tull.* 3, 4.) In the Digest (xlvii 8 fr 2 pr; cf. § 7) *vi* and *armatisve* are omitted, but the omission does not appear to have affected the statement of the law. Force indeed characterises the action throughout and distinguishes it from mere theft. If there is not actual force, there must be contrivance to use it, by getting people together for the purpose. Acts of mere stealth are not within the edict. The men may be armed or not; they may be free or slave; collected by defendant or another; they need not be numerous, one is sufficient; nor need defendant be with them in person. It did not require participation in the act to make the contriver liable.

[1] See Cic. *Tull.* 4 § 8 and my essay on this speech (vol. II, Appendix).

[2] Keller arguing from the formula given in Cic. *Tull.* 3 § 7 thinks *bona rapta* was originally included in *damnum*, and this clause added in the edict, only when *damnum*, by its use in the Aquilian *lex*, came to be used specially of damage other than robbery (*Semestr.* pp. 578—584).

Carrying off one's own goods or one's own runaway slave is not within the mischief. Nor is a tax-farmer liable if he carry off my cattle under a mistaken idea that I have committed a breach of the revenue-law; for the act is not malicious; but otherwise, if cattle have been carried off forcibly, one who shuts them up so that they die of hunger, is liable also. As regards the goods, it is not requisite that they should be part of plaintiff's estate, if only they are in his *de facto* possession[1], so that he has an interest in them (as a usufructuary, *etc.*), or in their safekeeping, as depositary, pledgee, *etc.*

The action could be brought by an heir, but not against one, condiction sufficing, if the heir has been enriched. It must be brought within a working year (*annus utilis*), and lay for fourfold the value of the things (not of the plaintiff's interest)[2]. Slaves who were concerned in the robbery could be surrendered noxally, and their owner thus relieved. Besides vindication and condiction the actions for theft and Aquilian injury are often applicable, but fourfold damages is the maximum recoverable (D. xlvii 8 fr 1, 2). Restitution before trial was not enough to avoid the penalty (D. fr 5).

Goods taken by force were incapable of usucapion until they had returned to the possession of the owner (D. xlvii 8 fr 6). The incapacity was created by the *lex Julia et Plautia* (Gai. ii 45; D. xli 3 fr 33 § 2); the extinction of the incapacity apparently by a *lex Atinia* (D. xli 3 fr 4 § 6). See vol. I p. 475.

An analogous action was granted against anyone who forcibly ejected another from a ship and carried off any goods, or who seized and carried off a carriage or horse (Paul v 6 § 5).

2. *Ex incendio ruina naufragio, etc. rapti recepti dolo malo damnive dati.* Robbery or other damage, on occasion of a fire or fall of buildings or shipwreck or violent attack on a raft or ship, subjected the offender by the praetor's edict to an action for fourfold damages, if action be brought

[1] For the distinction of *in bonis* and *ex bonis* see vol. I p. 428 note.

[2] Under the interdict *de vi* the whole interest was recoverable but not fourfold. See vol. I p. 464.

within a year from the suit being possible; if after a year, for single damages. The attack on a ship, *etc.* (*navis expugnata*) might consist in sinking, scuttling, cutting ropes or sails or anchors. Any kind of malicious damage or removal, whether by force or not, came within the edict. But it must be on the spot and at the time of the fire, *etc.* though not necessarily from the house or ship itself, but also from adjacent parts. A guilty receiver was also chargeable. Labeo extended the edict to the occasion of an attack on a house or villa. Where a person broke down (*dissipavit*) a neighbour's house to save his own catching fire and had no other way of preventing it, Celsus and Ulpian (against Labeo) held him not to be liable under this edict: there was no malice. A senate's decree made anyone who robbed persons shipwrecked liable, besides the amount recoverable by the individual, for as much more to the fisc (D. xlvii 9 fr 1—3, 6; Paul v 3 § 2).

There were criminal proceedings with severe penalties for such offences, especially against wreckers (D. *ib.* fr 4, 7, 10).

3. *Damni in turba facti.* Damage suffered in or by occasion of a crowd or insurrection (*seditio*), if due to malice, was the subject of an action under the praetor's edict. The crowd might be collected purposely or might have gathered of itself on hearing cries or seeing some act of violence. Anyone who caused the damage, or wrongfully caused the crowd which afforded occasion for it, came under the action, which lay for twofold the value, if brought within a year, afterwards for the single value. Loss of goods or damage, not robbery, was the subject. Personal injury was the subject of extraordinary proceedings. Three or four persons were held not to make a crowd, ten or fifteen did. The action lay against a slave or body of slaves, who presumably could be surrendered noxally as in case of robbery; which action is the same as this as regards the liability of heirs (D. xlvii 8 fr 4; Paul v 3 § 1).

F. *Servi corrupti.*

The praetor granted an action against anyone who fraudulently harboured another's slave, or persuaded him

to any act which made him worse (*qui recepit persuasitque ei dolo malo quo eum deteriorem faceret*). It lay against anyone, even a partner or fructuary, who harboured a slave, not in order to deliver him to his master or from mere humanity, but with fraudulent intent; or who persuaded him to any wrong act, or to run away or to embarrass his *peculium*, or destroy or falsify his master's accounts, or confuse accounts of which he had the management, or be contumacious to his master, or become seditious, or a lover, or go much to shows, or take to a wild, extravagant or shameful life. Malicious persuasion to an act which led to his injuring his body was also within this action. Whether defendant confessed or denied, the damages were laid at double the amount both of depreciation of the slave and of the value of anything he may have carried off. Account will be taken also of any other loss or risk for which his master is liable, *e.g.* theft or Aquilian injury to another, or compensation to one who has hired the slave from me (before deterioration). If the slave is utterly spoilt, plaintiff can at his option keep him and get the damages, or make defendant take the slave and pay him the price. In this last case if the slave is not in his possession, plaintiff must surrender his actions to defendant. The action remains after alienation, death, or manumission of the slave. It may be brought effectively as well as theft (*ope consilio*) and condiction. If a slave has committed the offence, the master is liable but can surrender him noxally. A fructuary can sue the owner and has an analogous action against a stranger. The action can be brought at any time and lies for but not against heirs. If during marriage it be brought by a husband against his wife, the damages are for single value only (*favore nuptiarum* D. xi 3).

An analogous action was granted for the like conduct to a son or daughter under power, though in their case it is not a mere pecuniary loss but the dignity and reputation of the house that is chiefly concerned. The judge has to decide the proper amount of damages (*ib.* fr 14 § 1).

(The admission and protection of runaway slaves in country estates was punished by a fine; and facilities were given on application to the magistrates for the owners to pursue them

on private land. This was by a decree of the senate, apparently A.D. 228, but the *lex Fabia* (before Cicero *Rab. ad pop.* 3 § 8) had provisions for the same purpose. The same statute (and the Antonines still more severely) punished any concealment or sale of freemen whether freeborn or freedmen (D. xi 4; xlviii 15; *Collat.* xiv).)

G. 1. *Injuriarum*, *i.e.* insulting conduct.

(*a*) The XII tables[1] gave actions for ruptured limbs, broken bones, libellous writings, spoken abuse, and evil incantations (see Bruns p. 28). For ruptured limbs the penalty was retaliation, for broken bones a fine of 300 asses, if the sufferer was a freeman; 150, if he was a slave. For other injuries 25 *asses*[2] (Gai. iii 223; *poena* 25 *sestertium*, *Collat.* ii 5 § 5; Paul v 4 § 6). For libel and abuse other writers say beating with clubs was inflicted (Cornut. *ad* Pers. *Sat.* i 137; Porph. *ad* Hor. *Ep.* ii 1 152). The Antonine lawyers mention the XII tables in connexion with the *actio injuriarum*, but in part refer to the class of offences which were more fully dealt with by the *lex Aquilia*.

(*b*) The praetor's edict gave an action *injuriarum*[3], which

[1] Cf. Cicero *R. P.* iv 10 (*ap.* August. *C. D.* ii 9) *Nostrae contra duodecim tabulae, cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt, si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri*; *T. D.* iv 2 § 4; Hor. *Epist.* ii 1 153 *Lex poenaque lata, malo quae nollet carmine quemquam describi*; *Sat.* ii 1 82 (quoted below). See also the notes in Bruns *Fontes* (on XII tables). A person condemned *ob carmen famosum* was made by a senate's decree *intestabilis* 'incapable *testandi*,' which is explained by Ulpian to be one who could not make or witness a will, and by Gaius to be incapable of being a witness or having others as witness (D. xxviii 1 fr 18 § 1, 26).

[2] A. Gellius xx 1 § 13 quotes Labeo *L. Veratius fuit egregie homo improbus atque inmani vecordia: is pro delectamento habebat os hominis liberi manus suae palma verberare. Eum servus sequebatur, ferens crumenam plenam assium; ut quemque depalmaverat, numerari statim secundum duodecim tabulas, quinque et viginti asses jubebat. Propterea, inquit* (*Labeo*), *praetores postea hanc abolescere et relinqui censuerunt injuriisque aestumandis recuperatores se daturos edixerunt.*

[3] Cicero mentions the action *Caecin.* 12 § 35 *Actio injuriarum dolorem imminutae libertatis judicio poenaque mitigat*; Quintil. vii 4 § 32 *Alia*

shewed a more reasonable appreciation of the nature of such wrong (*ex bono et aequo est* D. xlvii 10 fr 11 pr). It was distinguished from the Aquilian, so far as bodily injury was concerned, by the slight physical character of the wrong act in comparison with its significance. There were three principal classes of injury: blows, abuse, and anything else of an insulting character (*quae ad infamiam alicujus fiunt*). The insulting act might be done to a person himself, or to his children under his power, or to his wife (whether in hand or not[1]); or to his betrothed (*sponsae*) or daughter in law, or to his slaves; and an insult to a corpse may give a right of action to the heir. Any kind of personal violence (*e.g.* throwing filth, tearing clothes), any public abuse (*convicium*) or shouting against a person, even at his house or shop in his absence, come within the law, if improper (*contra bonos mores*), and calculated to throw disgrace on a person or excite odium against him[2] (Gai. iii 220, 221; D. xlvii 10 fr 1 pr—§ 4, 15 § 2—12; cf. Paul v 4 § 13). The third general head included very various acts: indecent or improper soliciting, following, molesting respectable women or youths, or withdrawing their attendants from them (fr 15 §§ 15—23, 9 § 4); wearing mourning clothes[3] or letting hair or beard grow so as to excite odium against anyone; writing, issuing, or singing an insulting composition (*carmen* fr 15 § 27); doing any act to reflect on another's financial position, *e.g.* wrongfully seizing

quoque multa controversiarum genera in qualitatem cadunt; injuriarum; quamquam enim reus aliquando fecisse negat, plerumque tamen haec actio facto atque animo continetur, i.e. 'sometimes it is a question of fact but generally both fact and intention are concerned.'

[1] Gaius appears to have *cum in manu nostra sint*; which Mommsen regards as a gloss. Krüger gives in text *quamvis in manu nostra non sint*. Paul v 4 § 3 has simply *aut uxori*.

[2] *Mimus quidam nominatim Accium poetam compellavit in scena. Cum eo Accius injuriarum agit. Hic nihil aliud defendit, nisi licere nominari eum cujus nomine scripta dentur agenda* (*ad Heren.* i 14); *C. Caelius judex absolvit injuriarum eum, qui Lucilium poetam in scena nominatim laeserat; P. Mucius eum, qui L. Accium poetam nominaverat, condemnavit* (*ib.* ii 13 § 19).

[3] One of the elder Seneca's specimens of rhetorical treatment is on the theme of a poor man in mourning following a rich man whom he suspected of having killed his father (*Contr.* x 1 30).

his goods, calling upon his sureties when he himself is ready to pay, affixing a notice of sale to a pledge given by him, demanding payment when he owed nothing, preventing him from selling his own slave (*ib.* §§ 31—33, 19, 24); summoning another wrongfully before a court of law; not allowing him to fish in the sea, or bathe in the public baths, or sit in the amphitheatre, or in any way interfering with the exercise of his private or public rights (fr 13 §§ 3, 7; xix 1 fr 25; xliii 8 fr 2 § 9); beating improperly another's slaves or putting them to the torture or doing any other act to them which the praetor shall consider offensive to the slave's master and unjustifiable in a slave of such character and position. Even a municipal magistrate ordering a man's slave to be flogged without proper reason is liable to this action (xlvii 10 fr 15 §§ 34—45). Some lawyers held that the occupant of a lower floor smoking one above, or a higher neighbour throwing something into a lower house, incurred liability to this suit, if he did it to give offence (fr 44).

(*c*) Intention was necessary to constitute this offence. *Pati quis injuriam, etiamsi non sentiat, potest, facere nemo nisi qui scit se injuriam facere, etiamsi nesciat cui faciat* (fr 3 § 2). A blow in an athletic contest or in fun, or given to a freeman mistaken for one's own slave, is not insult. If insult is intended, but as in some libels the person at whom it is aimed is not named, the offence is best met by a criminal indictment (fr 6). On the other hand, if on receiving the insult a person passes it over, he cannot afterwards take it up again and bring an action: it had caused no such abiding sense of insult as to justify action of a penal character. And thus it was thought equitable that a bargain not to sue, or a settlement or an oath, should bar a suit of this kind. A man is liable to suit, who has promoted or encouraged an insult, or ordered or persuaded or hired one to do it, as much as the doer himself (fr 11 pr—§ 6; Paul v 4 § 20).

(*d*) The praetor required the nature of the insult to be properly described, so that its importance might be estimated, and in some cases the admissibility of the suit be decided. The description should be positive not alternative; if a blow is

charged, plaintiff must specify the part of the body struck and the instrument, whether a hand, or a stick or a stone, but it was not necessary to say which cheek was struck or with which hand. If an incorporal insult is charged, it should be stated whether the insult was by word or writing, so that the issue may be precise (Paul ap. *Collat.* ii 6). If several offensive acts were done at the same time, they should be combined in one action (D. fr 7 § 5).

(*e*) An insult may be aggravated (*atrox*) either from its own nature as wounding or beating so as to cause pain (*verberatio*, distinguished from a painless blow, *pulsatio*) or striking with rods, especially if in the face or the eye; or from the place, as if it be done in the forum or theatre or before the praetor; or from the time, as during the public games or in the open day; or from the dignity of the person insulted, as a magistrate or senator or decurion or other person of distinction; or from the disparity of the parties, as when a person of low rank insults any of the above or a Roman knight or aedile or judge. A blow is not necessary in such circumstances to make the insult aggravated; tearing (another's) dress, withdrawing an attendant, abusive cries are sufficient (Gai. iii 225; *Collat.* ii 5; Paul v 4 § 10; D. fr 7 § 8—fr 9). Justification of an insult, as addressed to a guilty person, was allowed (fr 18 pr).

(*f*) No action could be brought by one under power against his father; nor, unless the insult be aggravated, by one no longer under power. Nor could a freedman sue his patron for any slight correction, whether with words or blows, but severe beating or wounding will justify the suit. 'One who was a 'slave yesterday though free to-day cannot be allowed to complain 'of trifles' (fr 7 §§ 2, 3). Nor can he sue his patron on account of slight insults or correction given to his son or wife, though they themselves are not necessarily prevented on that account from suing in their own person (fr 11 §§ 7, 8). A freeman, or one claiming to be free, has an action *injuriarum* against anyone claiming him as his slave, though knowing the contrary (fr 11 § 9, fr 12).

The same act may give rise to more than one action. If a married woman still under her father's power is insulted, her

father can sue for her and also for himself, and her husband can sue also: and one action does not bar the other. Except under the *lex Cornelia* a son cannot sue for insult to himself, unless his father is incapable or absent or otherwise unfit, and his father's procurator is negligent or not adequate to the occasion. Whether one under power should sue is for the praetor to decide after hearing the case (fr 17 §§ 10—22; Gai. iii 221).

The owners of a common slave can sue severally for insult sustained through him, and recover damages proportioned to their share. They cannot on his account sue one another for beating their slave, nor can owner and fructuary sue one another on that account. As between the latter, suit for beating or torturing the slave belongs to the owner (fr 15 §§ 36, 37, 47). There can be no insult to a slave, but only to others through him (Gai. iii 222).

(*g*) The damages were assessed by the plaintiff, subject to the judge's decision to take a lower estimate, but if, as was usual in aggravated insults, the praetor himself assesses it for the purpose of fixing the bail (*vadimonium*), the plaintiff takes this estimate, and the judge, though not bound to the full amount, usually defers to the authority of the praetor. Condemnation involved infamy (Gai. iii 223, 224; iv 182, Paul ap. *Collat.* ii 6). Where the offender is a slave he may be surrendered noxally, or, if the owner chooses, he may instead produce him to receive a beating (*verberandum*), such as the discretion of the judge may think right (D. fr 17 § 4). If he was emancipated, he was personally liable, even, as Labeo thought, if he had acted on his master's order (Gai. iv 77; D. fr 17 § 7). A plaintiff could be met by a counter suit in which the damages were laid at one tenth (Gai. iv 177, see p. 234).

(*h*) Some insults were dealt with under one of Sulla's laws (*lex Cornelia*). Blows, beating, forcible entry into another's house; writing, composing, publishing anything to throw disgrace on another, or causing such things to be done, were liable to be punished criminally; and a decree of the senate made the like punishable, although no one was named. An oath could be tendered to the accused, and this was allowed in the praetorian action also under the influence of this law. Under this law

a son could prosecute for himself, and his father could not sue for him. Criminal prosecution when brought barred private suit, and *vice versa*. The praetor will however prefer criminal indictment, whenever the offence is of so grave or public a character as to make it rather an offence against public order than an injury or insult to an individual (D. xlvii 10 fr 5, 6, 7 § 1). Paul treats the subject mainly from the criminal side. Deprivation of rank, banishment, and death are penalties named (v 4).

2. *Interdictum de homine libero exhibendo.*

The wrongful retention of a freeman in confinement would probably justify an action for insult. But the case was specifically met by an interdict to compel production of any one, male, female, old, young, *sui juris* or not, known to be free and concealed or confined against his will. If defendant shewed that he had ransomed the freeman, he was justified in retaining him until the price was tendered. If he shewed that he was his own child though not under his power, or his nursling, and was acting from affection, or that he had been surrendered noxally, the retention is not wrongful. Nor if defendant was unaware of his being a freeman, or if he contested the fact, or had bought him *bona fide* as a slave, did the interdict apply. For a trial of contested *status* see vol. I p. 46.

It was open to anyone to bring the interdict, even to a woman or one under the age of puberty, if the person confined was a parent or near relative. If more than one applied for the action, the praetor would select. If defendant was absent, without being defended, his estate would be taken possession of. The interdict could be brought at any time, but not more than once unless good reason be shewn. If the man was not produced, and defendant paid damages, the interdict could be repeated (D. xliii 29).

For *lex Fabia de plagiariis* see above, p. 220.

3. *Patronum in jus vocandi.* Action against a freedman for summoning his patron into court.

This action was in the praetor's edict and could be brought only by the patron himself: it could not be brought by or

against the heir, and was limited to one year. In Gaius' time it was tried before Recoverers. The formula is given in Gaius iv 46. Ulpian in the Digest (ii 4 fr 24) speaks of a penalty of 50 *aurei*. See Book vi ch. ii.

H. Intimidation.

In cases of intimidation or fraud[1] the praetor exercised a salutary jurisdiction by granting according to circumstances an action or a plea, so as to prevent the user of such methods from benefiting by his conduct. Intimidation was dealt with still more severely than fraud, and, besides possible criminal proceedings under the *lex Julia*, involved a heavy penalty on anyone who did not comply with the judge's order for restitution. In other respects there was much similarity in the way in which the law dealt with such acts.

The edict ran: *Quod vi metusve causa gestum erit ratum non habebo.* 'Business done under force or fear I will not allow to stand.' In Ulpian's time *vi* was omitted as superfluous, all fear being accompanied by force (D. iv 2 fr 1). The edict did not apply to lawful force used by magistrates, or to force or threats used by brigands (*latrones*), or by the public enemy or the people (popular tumults are probably referred to); and anything, given or promised under such influence to one who himself took no part in it, was regarded as the price of protection or deliverance, and not a subject for legal interference (Paul i 7; D. fr 9 § 1). But in other cases the edict applied, provided there was serious danger to life, liberty or body of

[1] Cf. Cic. *Off.* i 10 § 32 *Jam illis promissis standum non esse, quis non videt, quae coactus quis metu, quae deceptus dolo promiserit? quae quidem pleraque jure praetorio liberantur, non nulla legibus. Flac.* 36 § 89 *Si vis erat, si fraus, si metus, si circumscriptio, quis pactionem fieri, quis adesse istos coegit?* A formula for such cases had been drawn by a praetor Octavius: cf. Cic. *Verr.* iii 65 § 152 *Postulavit ab L. Metello ut ex edicto suo judicium daret in Apronium, 'Quod per vim aut metum abstulisset,' quam formulam Octavianam Romae Metellus habuerat.* The Octavius was apparently C. Octavius, father of the Emperor Augustus, cf. Cic. *Q. Fr.* i 1 § 21. For rhetorical dealing with this matter see Sen. *Contr.* ix 3 (=26) §§ 8, 9.

oneself or children, and the apprehension was such as would be felt by a reasonable person. Paul gives as instances, shutting a person up in a house or chaining him or putting him in prison in order to force him to mancipate or deliver or promise or sell a slave or other chattel or extort anything, *e.g.* a release from obligation (Paul i 7 §§ 8—10; D. fr 3—6, *etc.*). Even one detected in theft or adultery, if the circumstances are not such as to justify his being killed on the spot (see p. 210), is not excluded from the benefit of the edict. On the other hand the language of the edict is general (*in rem*), and applies not only to the intimidator himself but to anyone who has taken advantage of the violence or threats exercised (fr 9 § 1).

If property has been transferred under intimidation, the praetor regarded it as still part of the intimidated person's estate (*in bonis*), and accordingly was ready to allow a vindication (*utilis*) or other action for its recovery, and for the recovery of all fruits accrued which might have been taken but for the intimidation—such as children of slaves, offspring of cattle, fruits of land, acquisitions of a slave, *etc.* Plaintiff can demand also that defendant should give a guaranty against fraud in his treatment of the thing. If money has been paid, the amount must be given back. If a debt or obligation or pledge or sureties have been released, the former position must be fully restored. If full restoration was not made, as the judge ordered, before he gave final judgment, plaintiff was entitled to damages of the amount of fourfold the value of the thing or of the plaintiff's interest in his former position. If several persons were liable for this offence, payment by one, according to the better opinion, freed the others. The value could be established if the judge thought fit by an oath *in litem*, subject to a limit fixed by him. If the intimidation was by slaves, the owner could escape the penalty by surrendering them noxally, but was still liable to surrender any profit or advantage he had gained by their act (D. fr 9 §§ 4—7, fr 10 pr, 12 pr, 14 §§ 1, 14, 15; tit. 3 fr 18 pr).

Plaintiff had to prove that force or threats of force had been used (not necessarily by defendant), that he had been damnified thereby and that defendant had been enriched. If a thing had

been lost without defendant's fraud or fault, or a slave who had been taken was in flight, defendant might be acquitted on giving a guaranty for restoration of the thing or slave if recovered and for exertion to recover. The action could be by heirs, and lay against them, so far as at joinder of issue it was found they were enriched, and, this once established, the action runs against heirs of heirs. After a year, on cause being shewn, action could still be brought, but for the single value only. The quadruple included the value of the thing, the triple only being for penalty (fr 14 §§ 1, 3, 10, 11, fr 16, 17, 20).

This action was granted only if there was none other adequate (fr 14 § 2). Where the payment of a just debt was taken by force, the edict did not apply, for the debtor suffered no loss: but a decree of M. Aurelius declared the creditor's right forfeited, *i.e.* the creditor would be subject to a condiction for the thing or money exacted as if it had not been owed (fr 12 § 2, 13).

If criminal proceedings were taken under the *lex Julia* the penalty was one third of defendant's estate; and infamy followed conviction (D. xlviii 7 fr 18).

A plea (*si in ea re nihil metus causa factum est*) was granted when a person was sued on a stipulation or other engagement extorted by intimidation whether of plaintiff or anyone else, excepting only of a person in whose power defendant was. Cassius considered this plea unnecessary as being included in a plea of fraud, but other lawyers held a special plea preferable, the plea of fraud being limited to fraud by the plaintiff, *si in ea re nihil dolo malo actoris factum est* (D. iv 2 fr 9 § 3; xliv 4 fr 2 § 1, 4 § 33).

J. Fraud (*DOLUS MALUS* or *DOLUS*)[1]. The praetor promised to grant an issue (*judicium*), where any business

[1] C. Aquilius was the first who introduced this action: cf. Cic. *N. D.* iii 30 § 74 *Inde everriculum malitiarum omnium, judicium de dolo malo, quod C. Aquilius familiaris noster protulit, quem dolum idem Aquilius tum teneri putat cum aliud sit simulatum, aliud actum; Off.* iii 14 § 60 *Nondum protulerat C. Aquilius de dolo malo formulas*, where the same definition is repeated (see below, p. 287). The plural *formulas* may probably refer to his

transaction was alleged to be due to fraud, provided just cause were shewn, and there was no other action. Fraud was defined by Servius, who was followed by Paul, to be 'contrivance 'for deceiving another person, when what is done is different 'from what is professed' (*cum aliud agitur, aliud simulatur*). Labeo's definition, approved by Ulpian, was 'all cunning, covin and device used to get round, cheat or deceive another' (*omnis calliditas, fallacia, machinatio ad circumveniendum fallendum decipiendum alterum adhibita,* Paul i 8; D. iv 3 fr 1 §§ 1, 2).

This action is not granted, unless the fraud is clear and important; nor if there is any other mode of redress or protection, whether by action, plea, replication or interdict, either against the fraudulent person or another. Sometimes even if there is such other action, yet if the defendant to such action is insolvent, so as to be unable to give adequate redress, an action for fraud will be allowed. On the other hand if plaintiff has had such other means of redress, and has lost it by his own neglect (not by the fraud of his adversary), this action will not be granted (D. fr 1 § 4—fr 6, 7 § 10). Action would not be allowed according to the Digest for anything not exceeding two *aurei* (fr 9 § 5—11 pr).

Examples of cases where action for fraud will be granted are—persuading a person to refuse an inheritance by deceitful representation of its being insolvent; or persuading one, who has an option, to choose a particular slave by craftily representing him as the best in the household; obtaining an acquittal by noxal surrender of a slave when he was subject to a pledge; refusing when manumitted in accordance with a bargain to take upon himself the liability for the price of his freedom from one whom he has persuaded to guaranty it; persuading another's slaves to give up possession, provided the occupant is thereby damnified; contesting ownership of something which another is selling until he loses a purchaser, and then abandoning the contest; obliterating or spoiling a will deposited with him; giving permission to dig stone or lime,

allowing a plea as well as an action (cf. Wlassak *Edict* p. 122; Pernice *Labeo* ii p. 198 ed. 2), or perhaps to some differences in the frame of the formula according to the circumstances to which Aquilius proposed its application.

and then, after expense has been incurred, refusing to allow its removal; promising a slave or a farm, and then before delivery poisoning the slave, or imposing servitudes on the farm or cutting down timber; consenting to my depositing a disputed thing with a stakeholder till decision of the dispute, and then refusing to accept trial; *etc.* (fr 7 § 8, 9 §§ 1, 3, 4 fr 31, 33—35). In the last case some held that an action for fraud was needless, because an action on the case might be brought against the stakeholder to compel him to give up the thing, although there had been no decision of the dispute. In the case before, if the promise was accompanied by a clause against fraud, or the slave or farm were purchased, action on the stipulation or *ex empto* rendered an action for fraud needless. If a third person killed the slave, the promiser could not bring an Aquilian action, for he is freed from his promise, and has no interest in the matter; but the promisee would have an action for fraud against the killer (fr 18 § 5).

Plaintiff has to specify both the fraud and the doer. The action aims at restitution, and only if restitution according to the arbiter's order is not made, does condemnation ensue. Damages are for the single value of plaintiff's interest (*quanti ea res est*); if defendant is contumacious, plaintiff can fix the value by oath, subject to limitation by the judge (fr 15 § 3, 16, 18 pr; iv 1 fr 7 § 1). If more than one person has committed the fraud, restitution or even payment of the value frees all. Heirs and other successors are liable only for so much as has come to them (D. iv 1 fr 17). Conviction in the suit brings infamy on the doer, and hence it is not granted to a wife against her husband, or to children or freedmen against their parents or patrons, or to one of low condition against one of high dignity such as a consular of authority, nor to a wild liver against one of upright life. An action on the case is granted instead. Against heirs no such distinction is made, as no disgrace attends their condemnation. A ward is liable for his own fraud, if he is near the age of puberty; and, so far as he has been enriched, is liable for his guardian's fraud. So is a principal for his agent's fraud. Burghers if enriched are liable for their manager's fraud: members of the council

(*decuriones*) are also liable for their own fraud (fr 11—15; Cod. v 12 fr 1 § 4). If the action is on account of a slave's fraud, it may be noxal or *de peculio* according to the character of the fraud (fr 9 § 4 *a*). Where the fraud consisted in preventing an action being brought within the proper time, Trebatius held that the judge should not allow restitution of the action, as that would be against the policy of the law, but should condemn in damages for the plaintiff's loss (fr 18 § 4).

Action for fraud must be brought within a year against the doer: against heirs and others who are sued for enrichment it is perpetual; and so also against the doer so far as he is enriched (fr 28, 29; xliv 7 fr 35 pr).

Doli mali exceptio.

Fraud was frequently pleaded to defeat an action. Examples of cases in which this plea could be used are—where plaintiff sues on a stipulation for which there was no ground or no still subsisting ground; or for a loan of money which has never actually been paid; or against a plaintiff who sues in breach of an agreement made by defendant with plaintiff's superior; or against a ward's suit for debt of which he has received payment, though without his guardian's authority, and is still enriched; or against a fructuary who has consented to the sale of the estate and now claims the usufruct; or against one who claims both the object itself and the penalty for non-delivery within a certain time; or against suit for a penalty for non-appearance at an arbitration, when the non-appearance was caused by illness; or against a coheir by will who has sold his share and sues for the price, while a trial to prove the will forged is yet undecided; or against a creditor suing for a debt, when he has by his own fault lost the pledge given him for it; or against a suit for execution of a judgment made by bribing the opponent's agent; or against an heir who sues for a debt for which testator has forbidden him to sue; *etc.* (D. xliv 1 fr 4; tit. 4 fr 2 § 3, fr 4 §§ 2, 4, 7, 12, fr 8, 9, 17 § 2; ii 14 fr 16 § 1). If sureties for a debt plead the *SC. Vellaeanum*, alleging that they were directed to become sureties by debtor's mother, creditor can meet it with a replication of fraud, if he was ignorant of the

mother's intervention (D. xvi 1 fr 6). If under the belief that I owe you money, I submit to delegation by you to someone to whom you purpose making a gift, and my belief is wrong, I can plead fraud against the delegatee's suit, and I can also bring a condiction to obtain a release. The same holds also if, by the delegation, you meant to pay the delegatee a debt which, as it turns out, you did not owe; but if you owed the debt, I cannot resist the suit, for the delegatee is in his right (*suum petit*). If I delegate to my creditor one who is desirous of making me a gift in excess of the statutable limit, and my creditor sues on the stipulation, the statute cannot be pleaded against him; for he is only seeking his due, and the fraud is not his (D. xliv 4 fr 5 § 5, fr 7).

This plea is often available to compel reparation of a neglected duty such as a deduction for the Falcidian fourth, which has not been offered by plaintiff in suing for a right of way bequeathed him; or the cost of an erection made on other's land in the builder's possession, even (as most held) on an erection by husband or wife on land given by one to the other; or when the heir, without offering security for repayment in case the condition occur, sues for a debt which has been conditionally forgiven (fr 5 pr § 1, 10, 14). A surrender of plaintiff's actions may often be obtained by this plea (*e.g.* D. xlvii 2 fr 81 §§ 5, 7).

It was necessary to specify whose fraud it was that grounded the plea, but it was not necessary that it should have been fraud against the defendant; it sufficed that it should have been fraud in the matter concerned and committed either by plaintiff or someone in his power or his procurator. But a fraud by a subordinate is not always a good plea against the principal. Against a plaintiff himself a plea is good which rightfully alleges his fraud in bringing this very action if it is not just, *i.e.* if he thereby seeks to get what he has no true claim to get or no true claim to keep. *Dolo facit quicunque id quod quaqua exceptione elidi potest petit* (Ulp.). *Dolo facit qui petit quod redditum est* (Paul). So that an action which can be defeated by any other plea is therefore also liable to the plea of fraud. And even if plaintiff's fraud has been committed since joinder of

issue, or, though committed some time before, has led to the suit in question, this plea is good. If the suit is *de peculio*, any such pertinent fraud by a son or slave is good basis for the plea, for they are the real principals. The same responsibility for all frauds is true also of a procurator suing on his own account and also of one's universal procurator. But if the suit is not *de peculio* and the fraud pleaded is the fraud of plaintiff's son or slave, it is not allowed when the fraud is past or subsequent, but only if it be fraud in the matter then in suit. And this applies also to a procurator appointed for the particular suit, except that as by joinder of issue he may be considered to have made the suit his own, subsequent fraud on his part may, if proved, justify the plea. Fraud on the part of a guardian or caretaker may be pleaded against the ward or minor's suit, if it was committed in respect of the matter in question and is found at the time of suit to have enriched him (D. xliv 4 fr 2 §§ 1—5, fr 4 §§ 17, 18, 23, 25; xlvi 3 fr 47 pr).

If my debtor by false pretences gets you to accept his liability to me (*te mihi reum dederit*) and I accordingly stipulate from you, it was the better opinion that you could not plead my debtor's fraud against my suit, but must pay me and sue him (fr 4 § 20). Nor can the fraud of his predecessor in title be pleaded against a purchaser for value. Thus if I am heir by will, and you being statutable heir fraudulently induce me to renounce, and you then sell the inheritance and pocket the price, I cannot plead your fraud against the purchaser's suit for the inheritance. But if a man claim as legatee or donee, fraud on the part of his testator or donor can be effectively pleaded to defeat a claim which has no support independent of the fraudulent predecessor (fr 4 §§ 28, 29).

The plea of fraud could not be met by a replication of fraud, for no one should be allowed to enforce the results of his fraud (fr 4 § 13). Nor was it subject, as the action of fraud was, to any limitation of time, the time of bringing suit being in plaintiff's not in defendant's power (fr 5 § 6).

K. *Pecuniae acceptae calumniae causa.*

An action was granted by the praetor's edict against anyone who took a bribe for bringing or not bringing a lawsuit maliciously (*ut calumniae causa negotium faceret vel non faceret*). The right of action on account of a bribe to bring a suit belonged to him against whom the suit was to be brought: action on account of a bribe to suppress a suit could be brought by the person who gave the bribe. Defendant was the person who took the money or ordered or ratified its payment to another, or made any disgraceful bargain (*qui depectus est*) of this nature, whether before or after joinder of issue, and whether he did as was intended or not. The bribe might consist in money or anything else, or in a release from obligation, or in reduction of price for a purchase, or in a gratuitous loan, *etc.* The reasonable compromise of a suit was not interfered with by this action. A condiction could also be brought to recover the money by the heir of the giver or, if given from pity to another without any corrupt intent, by the giver himself. In that case the receiver is liable to both actions, but not to a greater extent than fourfold, which was the amount of damages under this action, if it was brought within a year. After a year single damages only could be demanded, and not those if a condiction lay. The year was reckoned in the case of one who gave money to avoid a lawsuit from the date of payment; in the case of one against whom a suit was to be brought, from the date of his knowing of the payment of money for the purpose. This action did not lie against parents or patrons, or patrons' children or parents: an action on the case (*in factum*) was substituted (D. iii 6; xxxvii 15 fr 5).

Calumniae judicium.

An action so called is mentioned by Gaius as one which may be challenged by defendant in reply to any action. Plaintiff in the principal action is not condemned in this trial of his good faith, unless shewn to be aware of the injustice of his claim and to be suing only to harass his adversary. The penalty is usually one tenth of the amount claimed in the principal action, but against an *assertor* of a person's freedom, one third. It is

quite a different action from *pec. acc. cal. causa* (Gai. iv 174, 175, 178).

L. Fraudulent allowance of sale of oneself.

If a freeman over twenty years old, in order to deceive a purchaser, allowed himself to be sold as a slave and shared the price, he became a slave (vol. I p. 43). But if he did not share the price, although knowing his freedom, he was not prevented from afterwards claiming his freedom and thereby ousting the purchaser (D. xl 12 fr 7 pr—§ 3). The purchaser or each purchaser, if more than one, has an action *in factum* granted by the praetor's edict against the person so supposed to be purchased. The damages were double the price and double anything accessory to the price. The action was additional to the purchaser's ordinary action against the vendor for double in case of eviction, and being penal, payment of damages by one did not lessen the damages recoverable from the other. If however the purchaser knew of the freedom at the time, he has no case. If the purchaser was a son under power, and either he or his father knew of the freedom, the father has no action, unless the purchase was on peculiar account, and the father knew nothing about it. If the purchase was by a procurator on mandate for the purchase of the particular man by an innocent principal, the procurator's knowledge will not prevent his principal's having the action. The action has to be brought within a year. The heir and other successors can bring an action which their predecessor could have brought: their own knowledge or ignorance does not affect the question (fr 14—22).

M. Publicans' exactions[1].

The large companies for farming the public revenues with their numerous retainers were the subject of several clauses in the praetor's edict not clearly distinguishable from one another with the meagre information before us.

[1] Compare Cic. *Verr.* iii 10 sqq.

1. If a publican or his staff (*familia*) took anything by force on account of a public tax (*publici nomine*) and did not restore it, he was liable to an action for the double value, or after a year for the single value. The value of the thing itself was included in the double. A similar suit was available if any wrongful damage was done by them or any theft committed. If restitution was offered after joinder of issue, though the offender was strictly liable, he would be acquitted. Only one penalty was exacted, though several persons were concerned in the offence. Under the term *familia* were included not only the publican's own slaves, but also others, or freemen who were employed in this particular service. If plaintiff required the production of the persons charged, and defendant did not produce them, the company were liable for the whole amount without having the right to surrender slaves noxally. No excuse was admissible for non-production: defence of the absent was not allowed.

If plaintiff preferred, he could bring the ordinary actions for robbery or theft or Aquilian injury instead (D. xxxix 4 fr 1—3, 5; cf. fr 12 § 1; Lenel *EP.* §§ 138, 183).

2. Any unlawful exaction, whether made publicly or privately, was the subject of a suit for double the value; and, if it was extorted by force, for triple the value, besides criminal proceedings (D. xxxix 4 fr 6, 9 § 5).

3. If a publican retained slaves (belonging to private persons) and received money on that account which was not due, he was liable to an action on the case for fourfold the value for having got money on a false charge (*calumniae causa* D. iii 6 fr 7 § 2; see above, p. 234).

N. Action against land surveyors and others.

The praetor granted an action *in factum* against a land surveyor who had *dolo malo* made a false report of the acreage of land, which he was appointed either by the judge or by agreement of the parties to measure. Only fraud or gross negligence (*lata culpa*), or the fraud or gross negligence of one deputed by him to do the measurement, made him liable (D. xi

6 fr 1, 2). The action was open to anyone who was interested in the report being true, that is either to vendor or to purchaser or to litigant provided they were injured. But if the purchaser paid too much on account of the report, he could bring a condiction or sue *ex empto* for the money over-paid, and if the vendor delivered too much land, he could sue *ex vendito* for the excess, and therefore neither has any real interest to enable him to sue the surveyor, unless the other party is insolvent, or plaintiff has not recovered the full excess (fr 3 § 1—4; 5 § 1). The action can be brought by, but not against, an heir, and at any time (fr 3 § 5, 4). If a slave made the false report, he could be surrendered noxally (*ib.* fr 3 § 6).

The praetor extended the action to include measurements not only of land but of anything else; *e.g.* measurement of buildings or of breadth of roads, or projection of beams in connexion with a servitude; or of beams themselves, of stones, corn, wine, *etc.* Severus applied it also to architects and contractors; and Ulpian thought it applicable to accountants (fr 2 § 2, 6, 7).

CHAPTER VII.

A. Liability on contracts of persons under power.

1. *Actio quod jussu.*

Any business conducted with a slave (or other person under power) at the bidding of the master (or father) makes the master liable in full, for it is to him that the creditor looks. There is no special form required for the order: it may be in writing or by messenger or oral before witnesses, or a subscription to a slave's acknowledgment of debt; it may be special for a particular business or quite general. Subsequent ratification counts as an order. The action applies not only to an order given by the owner but to one given by a fructuary or by the master of a *bona fide serviens*, or by the

caretaker of a madman or spendthrift, by a ward with his guardian's authority or, if for the benefit of the ward, by the guardian. An order by a true procurator binds his principal in this action; if the procurator is not really appointed, he himself only is bound. But if a contract is made with someone else's slave at my bidding, I am not bound *quod jussu*, even though I afterwards purchase the slave. Nor, if I become surety for my own slave, am I bound *quod jussu*; for I am acting not as his master but as an outsider: as surety I am liable on the same conditions as any other surety (D. xv 4 fr 1, 2).

This action cannot be brought after that *de peculio*, unless the creditor has been deceived (D. xiv 5 fr 4 § 5).

2. *Actio de peculio.*

(*a*) The nature of a *peculium* has been described above (vol. 1 p. 54 foll.)[1]. It was in fact the slave's (or son's) private property, though held on a precarious tenure, but recognised by the praetor, with due regard both to the rights of the master or father, and to the practical necessities of daily life, in which slaves and sons played inevitably a great part. They acted in economic matters sometimes as representatives of their superior, making him liable in full, sometimes for themselves, in which case his liability was limited to the amount of the slave's property *i.e. peculium*. (For convenience I speak of slaves, and defer to the end any difference between them and sons.)

(*b*) If a slave made a contract or incurred an obligation by his master's order or on his account, or in connexion with a business or a ship of which he had appointed the slave manager or skipper, the master was responsible. In other cases the slave

[1] Cf. Cic. *Cael.* 7 § 17 *Nam quod aes alienum objectum est, sumptus reprehensi, tabulae flagitatae, videte quam pauca respondeam. Tabulas qui in patris potestate est nullus conficit. Versuram numquam omnino fecit ullam, etc.* Karlowa (*RG.* ii 757) concludes from this that a *filiusfamilias* who had a *peculium*, had entries of expenses and receipts in his father's books, but kept separate. I conceive the son would keep books like anyone else if he had transactions requiring them, though in law the books would be his father's. I take Cicero to be speaking rhetorically with an eye to the particular case. Caelius was a young man with no business to conduct and no investments: he kept no books.

was taken as acting for himself, and his creditors had a claim against him just as they might have against an independent person to the extent of his property. But slaves were not recognised as persons, and had no footing in a law court. Any action to enforce their contracts or other claims against others had to be brought in the name of their master: any action to enforce others' claims against them had to be brought against their master *de peculio, i.e.* in respect of the slave's *peculium*, he being its owner in law and its very existence and amount being dependent on his actual or presumed will. But while it existed, or if it had existed, he could not decline the suit of the slave's creditors and is liable even if the slave was *impubes*, provided he has been thereby enriched, and even if he has forbidden contracts with the slave (D. xv 1 fr 1 § 4, 21 § 3, 29 § 1, 41, 49 pr). He is liable *de peculio* on a condiction for a slave's theft, so far as the *peculium* has been thereby enriched: for the rest, he can surrender him noxally (fr 1 § 1; xiii 1 fr 4). In the case of *bona fide servientes, i.e.* freemen or others' slaves honestly taken to be slaves of another, actions will lie on their contracts against their apparent master until the real ownership becomes known. And where a person has the usufruct of a slave, action lies primarily against the fructuary according to the usual distinction respecting acquisitions (vol. I p. 435). The sex of the owner or fructuary or of the person under power does not affect the question (D. xv 1 fr 1 § 3—3 § 2, 50 § 3).

(*c*) A slave has a *peculium* only if allowed by his master. The establishment of it requires the will of a sane master of full age, but once established it continues though the heir be under age or mad. No special form or declaration is required for its establishment: tacit allowance was thought by some lawyers at least to be sufficient. But a thing does not pass from the master into his slave's *peculium* without delivery, nor is one made debtor to the other without definite ground, such as would be required in the case of a freeman under the civil law (fr 4 § 1, 7 § 1, 8, 49 § 2 *Nuda ratio non facit debitorem*).

(*d*) Included in a slave's *peculium* may be anything moveable or immoveable, slaves (*vicarii*) and their *peculia*, debts due from outsiders or fellow-slaves, inheritances and legacies, obligations

to him of others than his master for theft or damage, debts due from his master (*e.g.* for expenses in the master's service or moneys collected by his master by suits on *peculiar* account). The value of the slave himself is not counted as part of the *peculium*; nor is a vicar's debt to the master of both slaves chargeable against the *peculium* of his slave-master (D. xv 1 fr 7 §§ 4—7, fr 9 pr, 38 § 2). From the (apparent) *peculium* must be deducted for the purposes of this action everything due by the slave to the master himself or to anyone in his power (excepting to the slave's own vicars) or to his wards or others under his care or administration, whether on contract or delict or otherwise; *e.g.* moneys collected by him with his master's approval or ratification. For any theft committed by the slave from his master, only the simple value, not penal damages, can be deducted. Anything paid to a creditor, or due on stipulation or judgment obtained on the slave's account, diminishes the amount of the *peculium* for subsequent creditors, the principle being first come, first served (*occupantis melior est condicio*). If two suits are pending, priority is determined not by date of joinder of issue, but by date of obtaining judgment. The master however himself is regarded as always on the spot and claiming before anyone else, privileged or not. Where the master is under an obligation on the slave's account, but has not yet paid anything nor been condemned, some lawyers held that the master should not deduct for his possible liability on this head, but take security from the creditor to refund the amount for which judgment might be got. Where a creditor of the slave has been made heir, and the slave himself is bequeathed or manumitted by the will, the creditor can deduct his debt from the *peculium*, although he has not been even for a moment owner of the slave (Gai. iv 73; D. xv 1 fr 9 § 2—11 § 2, § 9, fr 52). Debts due to a slave by outsiders are not always to be taken into account at their full amount, as there may be costs of collection and delay and uncertainty of result to be considered. Hence a master sued *de peculio* may be allowed in such a case to claim acquittal on surrender of his actions to plaintiff (fr 51).

(*e*) Any fraudulent withdrawal or diminution of the *peculium* on the part of the master, *e.g.* if made in contemplation of a suit,

is not good against the slave's creditors; but payment to one creditor is not fraud against the others. Fraud ought to be charged within the time which is allowed for an action of fraud. Sale while a suit *de peculio* is pending makes vendor liable to the extent of the *peculium*, including all acquisitions made since the sale (fr 21 pr, 30 § 6, 43). Heirs, purchasers, *etc.* are not responsible for the fraud of their predecessors except so far as it has brought them some profit (fr 21).

(*f*) An action may be brought even if there is nothing in the *peculium* when issue is joined. That does not affect the right: and condemnation may follow if there is something in the *peculium* at the time of judgment. Whether in such circumstances, if the father kept out of the way, possession could be taken of his estate was answered in the negative by Papinian, in the affirmative by Ulpian (fr 30 pr, 50 pr; xlii 4 fr 7 § 15).

(*g*) When a slave is manumitted or sold or otherwise alienated (*e.g.* by legacy or dowry) his *peculium* may be retained by vendor, *etc.* or allowed to pass with him. In the former case, the vendor is liable (within one working (*utilis*) year from the alienation) on any action *de peculio* for debts incurred by the slave before alienation, and he cannot deduct any debts of the slave to him incurred since. The *peculium* will be reckoned with allowance of natural increase or decrease since the alienation. If the vendor sold the slave with his *peculium* and delivered it, he is not liable to any action *de peculio* even within a year, unless he has received a price for the *peculium*, in which case he and not the purchaser is considered to hold the *peculium*. In transferring the *peculium* vendor is deemed to have deducted or not transferred any portion which is due to himself in repayment of a loan or otherwise, the *peculium* being always lessened *ipso facto* by any amount due to the slave's master. The vendor has therefore no action *de peculio* against the purchaser for any debt before the sale took place. And this is true whether the loan, *etc.* was made to the slave while he was the vendor's, or when he was another's slave before purchase by vendor. If however vendor has in fact not deducted the amount due to him, he can bring a condiction

(*indebiti*) against the purchaser as for so much overpaid, or sue him *ex vendito*, if the *peculium* contained at the time of sale sufficient to discharge what was due to vendor. On the other hand the purchaser, if he has made a loan to the slave before purchase can within a year from the purchase sue vendor *de peculio* for the amount, less the amount of *peculium* now with purchaser. The like holds generally between alienor and alienee (D. xvi 1 fr 11 § 8, 28 §§ 4—7, 32 § 2—35, 47 § 4; tit 2 fr 1, 3).

The new master (purchaser or other) is always liable to be sued *de peculio* by the slave's creditors, if the slave has had his old *peculium* confirmed to him, or has acquired a new or additional *peculium*; but creditors cannot sue at the same time the old and new master. If however they have not been fully satisfied by the suit against one, they can sue the other for the residue (fr 27 § 2, 30 § 5, 47 § 3).

If a slave has been set free by will or bequeathed with his *peculium*, neither slave nor legatee are liable in strict law for his previous debts: the heir is liable (within a year), but is entitled before delivery of the *peculium* to require a bond from the legatee to discharge any liability which may arise (D. xv 2 fr 1 § 7; xxxiii 8 fr 17). If a slave received a deposit and after manumission retained it, he only could be sued by the depositor, at least according to Trebatius. There was no doubt about this, where a *filiusfamilias* was the depositary (D. xvi 3 fr 21).

If a slave die, his *peculium* becomes extinct; but his master is liable *de peculio* for one year. A usufructuary is liable for a year from the extinction of the usufruct (D. xv 2 fr 1).

(*h*) The heirs of a person responsible *de peculio* are each severally liable to be sued *de peculio*, but cannot be condemned to more than the amount of the *peculium* with them after deducting what is due to them or theirs. If one heir be sued, all are freed, though the amount of damages does not cover the creditor's claim[1]. And the like is true where

[1] The cause probably was that the frame of the formula put the whole debt in suit. In the Digest we are told that equitable considerations were allowed to prevail over this strict law, and the creditor was allowed to sue

there are several fructuaries or *bonae fidei* possessors of one slave. The case is different when a slave is common to two or more joint owners, so that the whole *peculium* wherever it may be belongs to one as much as to the other. Creditors can sue each for a share or one for the whole: and the one who may thus be condemned to pay for both can get contribution by a suit *pro socio* or *com. div.* Whichever co-owner is sued can deduct what is due to his partner as well as to himself. It may however happen that one of the co-owners is entitled to all the *peculium* (*e.g.* if the other co-owner had (without fraud) simply withdrawn the *peculium* so far as he was concerned, *etc.*), and in that case is of course alone liable to the creditors (D. xv 1 fr 11 § 9, 14, 15, 27 § 8, 30 § 1, 32 pr; cf. x 3 fr 9).

(*j*) Some complications arise in case of vicars (*i.e.* slaves' slaves), or of slaves in usufruct. Vicars' *peculia* are included in their master's, the ordinary slave's, *peculium*. If I am sued in respect of my slave's vicars' *peculia* I can deduct not only all debts due by them to me or to my slave, but also all debts due by him to me (because the vicars' *peculia* are liable for the slave their master's debts). On the other hand any debt due to them by their master goes to increase their *peculia*; and any debts due by them to me are not deducible, if I am sued in respect of their master's *peculium*, their debts not being chargeable against him (otherwise than *de peculio*) any more than my ordinary slave's debts are chargeable against me (fr 17, 18, 38 § 2). A slave in usufruct may have two *peculia*, one arising from his relations to the fructuary, another arising from his relations to the owner. Outside creditors can sue the fructuary or owner whose *peculium* was primarily involved, and if not satisfied can then sue the other. And so the fructuary himself, if the slave's *peculium* with him is not sufficient to satisfy a debt due to the fructuary, can sue the owner for the balance and *vice versa*, persons

the other heirs for what was still unpaid to the extent of the *peculium*. But this is held with good reason to be an interpolation by Tribonian (cf. *ZRG.* xxxii p. 243, xxxiv p. 194; *Vocab. Jur. sub voce 'Aequitas'*). Whether in classical times any other remedy was granted (*e.g. in integrum restitutio;* cf. Keller *ap.* Bekker's *Jahrb.* iii p. 166) we do not know.

contracting with a slave usually looking to the whole of his *peculium* without distinction. Similar is the position of a husband who has a slave in the dowry, the *peculium* partly relating to him, partly to his wife (fr 19 §§ 1, 2).

(*k*) There is a difference between the position of a son under power and a slave. A slave's creditor has only one person to sue, viz. the master *de peculio*: a son's creditor can sue both him in full and his father *de peculio*. Moreover a slave is not liable for a penalty on an agreement for arbitration, nor as a surety of any kind for any debt or business unconnected with his *peculium* or his master's property. And consequently no action lies against his master *de peculio* on these accounts. But a son is capable in all these as in other cases of incurring an obligation, and his father is therefore liable *de peculio*. Even if no action could originally have been brought against the father, yet, if the action is brought against the son and he is condemned, the father is liable (*de peculio*) on the judgment (fr 3 §§ 5—11). Again, if a slave of testator's is one of several coheirs, and an action is brought for a debt incurred by him before testator's death, he is liable only for his share: but if it be on a son's *peculium* that the action is brought, the son though only one of several heirs is liable for the whole. He is however allowed to purchase the liability of his coheirs, *i.e.* to obtain a cession of the creditor's actions against them so as partially to recoup himself (fr 30 §§ 2, 3).

(*l*) If a son under power is emancipated (or otherwise becomes *sui juris*), he is liable in full for his delicts. For his contracts before emancipation, whether made by order of his father or of his own will, and whether on his father's or his own account, he is liable also, but, said the praetor, only so far as his means permits (*in id quod facere potest*). The same applies to the execution of a judgment, already passed while he was under power. In estimating his means no deduction must be made for debts contracted before emancipation, *etc.*, unless they are privileged, the rule being still as regards all ordinary contracts, first come, first served. Debts contracted after emancipation can be deducted. The same limitation on his liability applies to a son disinherited, or who has declined his father's inheri-

tance, or has been made heir only to a very small amount. But if he is restored to the inheritance under a trust, or if he has when contracting professed to be *sui juris*, he is liable in full like any other heir (D. xiv 5 fr 2 pr).

(*m*) A daughter under power, a person in handtake and a woman in hand were incapable of being bound by a stipulation (Gai. iii 104), and presumably by any other obligation any more than a slave. As regards any debts actually incurred by the two latter, if their superior declined to defend them in full (*in solidum*) the praetor allowed their creditors to sell, and divide the proceeds of all property which would have been theirs if they had not passed into his power (Gai. iv 80; cf. iii 84; iv 38).

Whether an arrogator was liable *de peculio* for the arrogatee's debts incurred previously was disputed. Sabinus and Cassius held that he was not (D. xv 1 fr 42). But the praetor's action in making the arrogatee's property liable just as if he had not suffered *cap. dem.* was more effective (Gai. iv 38; see vol. 1 p. 62).

3. *De in rem verso.*

Whenever a slave (or son) contracted a debt really for his master's service, the master was liable for the full amount, and not merely to the extent of the *peculium*. Anything spent on the cultivation of the master's land, the support or repair of his buildings, the maintenance or clothing of his servants, the payment of his creditors, the purchase (at a proper price) of a farm or any other thing necessary or really useful to him, was for his service and deemed to be converted into his property (*in rem domini versum*). The test was whether the expenditure was such as would entitle a procurator or *negotiorum gerens* to recover from his principal without order or ratification. Any loss (*e.g.* the death of a slave or loss of money or destruction of corn, *etc.* purchased for the master) or mistake in such application was at the master's risk and charge. Ratification is not required, but it is required that the creditor who furnished the money should have given it for the master's service, and he should look to its application. It is not for the master's service if the

slave did not so intend it and the creditor was credulous. If money borrowed for such a purpose was lost and the goods were obtained on credit, both lender of money and vendor of goods would have an action *de in rem domini verso*, but the master having paid on one would not be further liable to the other. If a son under power borrows and gives his daughter or sister or granddaughter a dowry, such as his father would have given, the creditor can claim the whole as laid out on the father's estate. And the same if a slave does it: but in both cases he must be doing it as and for the father or master, *patris* or *domini negotium gerens*. So if a son (under power) accepts suit on his father's behalf and is condemned or is surety for him and pays, the amount is chargeable to the father (Just. iv 7 § 4; Paul ii 9; D. xv 3 fr 3, 4, 5 pr, 7 § 5, 8, 10 pr, § 1, 12, 17 pr; cf. Gai. iv 73).

This action does not cover a loan to a slave to pay debts due by him to his master or any other contract on his own account, nor a payment from a surety on the slave's account, nor payment for the slave's manumission. It is only the new and unearned gain of the master that counts as 'converted into his property.' If the slave is in debt to his master, any expenditure on his master's property up to the amount of his debt will not be *in rem versum*. If he is not in debt at the time but become so after the expenditure, the expenditure ceases to be *in rem versum*, as it does if the master repay the slave for it. Nor, if the master take away the slave's *peculium* entirely, or sell something belonging to it and keep the price, has anything thereby been converted: it was his before. The master would of course remain liable *de peculio* to the slave's creditors. In fact this action was not a separate action from that: under the same formula the judge first inquires whether any part of the money has been *in rem domini versum*, and condemns the master for so much, if any: and then, if the claim is not satisfied, inquires into the amount of the *peculium*, and up to that amount condemns the master further (D. xv 3 fr 2, 5 § 3, 10 §§ 6—8, fr 11; cf. Gai. iv 75; Just. iv 7 § 4).

The liability *de in rem verso* was not limited, like that *de peculio*, in case of alienation or manumission or death of the slave, to one year (D. xv 2 fr 1 § 10).

4. *TRIBUTORIA ACTIO.*

(*a*) Where a business is being carried on by a slave (or other person under power) appointed by his master, the master is liable under the *institoria actio* in full. He is also liable in full if the master has given an order either for the particular piece of business or a general order for all business done with the slave. Or again if the business has been done for the master's account so that he is thereby enriched (or was intended to be enriched), the master is liable in full. Otherwise he is liable only as the legal representative of his slave, and only to the extent of his slave's *peculium*; and before paying anyone else he pays or deducts what is due to himself from the slave whether for a loan of money or anything else. But this deduction is not allowed if the master was aware of the slave's carrying on business with his *peculium* and did not forbid it. In that case he has no privilege as master. Whatever goods there may be in the business, or profits accumulated from it, must (if the slave is insolvent) be divided (*tribui*) rateably among all the creditors, including the slave's master. *In tributum vocatur* 'He is summoned to division.' This proceeding is called *tributoria actio*. Not only our own slaves but any *bona fide* servient whether free or slave, and any in whom we have the usufruct, if trading with our goods, may subject us to this action (D. xiv 4 fr 1, 2). And this applies to the case of a ship where the *exercitor* is acting with the knowledge but not with the consent of his master (D. xiv 1 fr 6).

(*b*) A guardian or caretaker's knowledge makes the ward or madman liable to this action: for their fraud the ward or madman is not responsible, except so far as he has profited by it; and he is held also liable to transfer his action against the guardian. A procurator's knowledge or fraud affects his principal (fr 3 § 1—5 pr).

(*c*) Only so much of the slave's *peculium* comes into division under this action as is employed in his business or has been gained from it (Gai. iv 74 *a*). Creditors only for a particular class of goods or at a particular shop are entitled to a distribution separately from more general creditors or from those at another of his shops, the credit being really given not to the

slave's total *peculium* but to the special stocks. Pledge-creditors have a preference even over the slave's master. If anyone has sold the goods to the slave and passed the possession but not the property, he can vindicate them. Otherwise creditors are all in an equal position: the rule is not 'first come, first served'; and those who are paid their share can be called on to give security (*cavere*) to make a rateable refund, if other debts unknown or conditional call for payment (fr 8 § 7—fr 17 pr). The distribution belongs to the master: if he decline the task and surrender his claim, the praetor will appoint an arbiter to divide the property liable (fr 7 § 1).

(*d*) The action may be brought at any time and against the heir or other successors so far as they have received anything. If the slave is manumitted by will and his *peculium* bequeathed to him, the heir must deduct from the *peculium* what is to be distributed or take security from the slave for its refund; else he will be liable to this action on the ground of fraud. No one can sue both by this and *de peculio* in reference to the same goods, and if the slave is trading only with part of his *peculium*, the action *de peculio* may be preferable, notwithstanding the master's being thus able to deduct for his own debts (Gai. iv 74 *a*; D. fr 8, 9, 11).

B. Liability on others' contracts.

Actiones exercitoria et institoria.

(*a*) As a rule direct liability on others' contracts is found only in case of contracts made by persons under power, and then only to the extent of their own (so-called) property: but there were two cases where there was no such restriction and for which, in addition to any other actions (*e.g. de peculio, redhibitoria, mandati, etc.*), the *actiones exercitoria* and *institoria* were granted by the praetor (Gai. iv 71; Paul ii 6, 8; D. xiv tit. 1 *de exercitoria* (esp. fr 5 § 1); tit. 3 *de institoria* (esp. fr 17 pr)).

(*b*) When a person provided a ship and appointed a skipper in charge of it, he was held liable in full for the skipper's contracts in connexion with it, if the person contracting chose

to sue him instead of the skipper. The person working (*qui exercet*) *i.e.* providing or employing the ship, whether owner or hirer of the ship, was called *exercitor*[1], the skipper was *magister*. So also when a person had a shop (*taberna*) or business and appointed a manager (*institor*) the manager's contracts bound him who appointed the manager (*qui institorem praeposuit*). In both cases this rule held, whether the person appointing was man or woman, slave or free, under or over age, under power or independent, though of course in some cases with restrictions. A ward acting without the authority of his guardian was bound only so far as he was enriched by the contract. In the case of a son under power or a slave having a shop the father or master was not liable (except *de peculio*) on the contracts of the manager appointed by the son or slave. But in the case of a ship, the great importance of the shipping trade made an exception to this, and the father or master was liable in full on contracts made either with any skipper appointed by his son or slave, or with the son or slave himself, provided his son or slave was carrying on the business with his superior's consent. Mere knowledge was not enough to make the superior liable in this action. Prohibition of employment of a particular person did not remove responsibility in the case of ships (D. xiv tit. 1 fr 1 pr—§ 5, § 15, § 19—23; tit. 3 fr 1, 7 § 1, 8, 10).

Similarly it mattered not whether the person put in charge of the ship or shop was free or slave, or of what age or condition he was. That was at the risk of the person who appointed him. In the case of a shop, boys or women or girls were not unusually appointed in charge (D. tit. 1 fr 1 § 4; tit. 3 fr 7 § 1, 8).

(*c*) A ship was taken to include boats and rafts, either on sea, river or lake. A shop was only one of many businesses included. The *institor* might be manager of a block of dwellings (*insula*), a bank, a farm, a laundry (*fullonica*), a stable, a bakery, or carry on the business of a tailor, an undertaker (*libitinarius*), a corn dealer or other merchant, a mule keeper, or he might be a shopkeeper's traveller or hawker. So the skipper might be appointed

[1] *Exercitor* is also used in the praetor's edict of the manager of a bank, D. ii 13 fr 4 pr.

to carry goods or passengers or to trade. But in all cases the skipper or manager bound his principal only within the limits of his charge; if appointed to sell, he could not buy; if to lend money, he could not borrow and *vice versa*; if to lend money on pledges, he could not (as a rule) guaranty others' purchases. A skipper appointed only to take goods could not take passengers; if he was only to let the accommodation, he could not take the fares or the freight and *vice versa*; if he was only to carry hemp and seeds, he could not take marbles; if appointed only to voyage on a river or for the cross passage to Greece, he could not bind his principal for other voyages. If not expressly forbidden, both skipper and manager might be justified in borrowing money for the purpose of the business, especially a skipper, as from the nature of the case he is often forced to buy what is required for the service of the ship. But anyone who lent money to either skipper or manager must, if he is to sue the principal, satisfy himself of there being reasonable cause for the loan. If nothing is said by the borrower of the loan being for the ship's needs, and the borrower applies the loan to his own purposes, it is a question whether the principal will be liable. If a person is put in charge of a shop but without power of sale, notice in clear letters ought to be put up and kept up on the place, and then he will not be considered an *institor*. If restrictions are put on an *institor's* power of making contracts, such as by requiring the approval of another person or the taking of a pledge or by forbidding any dealings with certain persons or classes of persons, it must be so done as to prevent purchasers from being misled (tit. 1 fr 1 §§ 6—14, fr 7; tit. 3 fr 3—5 § 15, fr 11 §§ 2, 6, fr 16, 18; tit. 5 fr 8; xii 1 fr 29). A manager is bound in full by the contracts of his foremen or apprentices appointed in charge of the business or workshop (Paul ii 8 § 3; D. xiv 3 fr 5 § 10). An *exercitor* would usually be liable on the contracts of a deputy appointed by his skipper; or of a manager appointed by his agent, or (so far as the ward is enriched) by his guardian or caretaker (tit. 1 fr 1 § 5; tit. 3 fr 5 § 18). A surety of skipper or manager might sue by these actions (tit. 3 fr 5 § 16).

(*d*) When two or more persons appoint a skipper or manager, whether one of themselves or not, all are liable in full,

and the one who has to pay can make his partners contribute by an action *pro socio* or *com. div.* (tit. 1 fr 1 § 25—fr 4 § 2; tit. 3 fr 13 § 2). If they act separately in making appointments, each is liable only for his department: they are not regarded as each appointing the others (tit. 1 fr 4 pr). If a man appoints a slave as *institor* and dies, giving freedom to him, his heirs, having now no right to the action *com. div.*, should be sued only for their several shares (tit. 3 fr 14).

Both actions ran for and against heirs; and when a slave has provided the ship with his master's consent and dies, the master can be sued without limitation to a year (tit. 1 fr 4 § 4; tit. 3 fr 15).

(*e*) If a slave (or other person under power) of one man is put in charge of another's ship or business, there is nothing to prevent the owner of the slave from making contracts with him and suing by these actions the proprietor of the ship or business. This latter will of course have a right of suing the owner of the slave by action on mandate or hire, so far as the slave's *peculium* extends. Other persons who make contracts with such a slave as skipper or manager can sue either the person who appointed him by these actions or the owner *de peculio* (tit. 1 fr 5; tit. 3 fr 11 § 8, 12, 17 § 1).

It is only the original obligation which justifies suing by the *institoria* (or *exercitoria*?): if anyone novates it by stipulating from the manager or anyone else, he can no longer bring the special action (tit. 3 fr 13 § 1).

(*f*) Neither of these two actions had counterparts for the owner of the ship or business. If he worked them through his own slave or a *bona fide serviens*, he acquired rights of suit through them. If he worked through another's slave or a freeman, he could sue, according to circumstances, either the slave's master or the freeman himself *conducti* or *mandati* or *negotiorum gestorum* so as to get their actions ceded to him. Some lawyers however held that, if he could not get what was due to him in any other way, the praetor would grant him an action against the purchaser (tit. 1 fr 1 § 18; tit. 3 fr 1 § 2).

Analogous to these actions is the practice of allowing a creditor who has lent money to my mandatee on the strength

of my letter to the latter, to sue me for the loan, as business done on my account (D. iii 5 fr 30 pr; above, p. 127).

C. Liability on others' torts. (*Noxales actiones.*)

(*a*) When a son under power or a slave committed a delict without the knowledge of his father or master, these latter were liable to suit on account of the son or slave, and the damages were not limited to the amount of the *peculium*, but they had the right of freeing themselves by giving up the delinquent, instead of paying the damages. (I speak first for brevity's sake of slaves.) It was, says Gaius, unfair that a master should have to bear any greater loss for the wrong acts of his slave than that of the slave's own person. The condemnation clause was therefore couched in the alternative, *aut noxam sarcire* (*i.e.* as Gaius puts it, *litis aestimationem sufferre*) *aut noxae*[1] *dedere*, and the option of surrendering the slave was open until the owner was

[1] *Noxa* (from *nocere*) meant originally 'hurt,' 'harm.' This regarded from the side of the injurer is 'fault' or 'guilt'; *noxius* is 'harmful' or 'guilty,' *noxia* 'harmfulness' or 'guilt.' The injured requires compensation; hence the old phrases were *noxam nocere* 'to do harm' (*e.g.* Liv. ix 10 § 9); *noxam sarcire* 'to make good the harm' (Gell. xi 18 where the reading varies *noxiam*, *noxam*, D. ix 1 fr 1 § 11). A natural way of making compensation was to hand over the offender to the offended person. This was *noxae dedere* 'to give up to the hurt.' A hurt done leaves the offender liable to make amends, and this side of the *noxa* is expressed in *noxā solutus* 'freed from guilt,' not liable to make amends; *noxa caput sequitur* 'the guilt or liability follows the agent.' Plautus, Terence and Cicero do not use *noxa* but *noxia*, though even this is rare in Cicero; Livy has both, but chiefly *noxia*. In the lawyers *noxa* is most usual. There is no clear distinction in meaning. *Noxam mereri* (Liv. viii 28 § 8) is not 'deserve punishment' but 'get guilt,' *i.e.* 'commit a guilty act.' *Noxae dare* is not a Latin phrase, but a very common blunder arising from a confusion of the perfect of *dare* (*dĕdi*) with the forms of *dĕdere*. See fuller details in my commentary on *De usufructu* fr 17 § 2. (I see Gradenwitz *ZRG.* xxi 257 agrees with me that *noxae dare* is a blunder.) Pernice (*Lab.* ii 2 1 p. 16) takes *noxae* as genitive '*der Schuld wegen*,' comparing *quadrupli manum inicere* (Plaut. *Truc.* 762); *damni infecti in possessionem mittere* (D. xxxix 2 fr 15 § 16), *etc.* To take *noxae* as dative (see above) seems to me more natural and easier.

sued on the judgment (Gai. iv 75; D. v 3 fr 20; cf. xlvii 2 fr 62 § 5). The XII tables gave this right in the case of theft; the *lex Aquilia* in the case of wrongful damage; the praetor in the case of insult, robbery, and other acts, *e.g.* where a slave refused admission to one sent into possession *damni infecti*, or had done some work which injured a neighbour's field by the flow of rain water (Gai. iv 76; D. xxxix 2 fr 17 pr; 3 fr 6 § 7; xliii 24 fr 7 § 1). The theory appears to have been that the primary liability for such acts was personal: an independent freeman ransomed his person by a money payment: a slave (or other person under another's power) was at his master's disposal, and the master could either ransom him or not as he chose.

(*b*) Suits of this character were called *noxal*, and lay against the owner for the time being, the liability following the delinquent under any change of ownership or status (*noxa caput sequitur*). If he is alienated after commission of the offence, the new master is liable on his account; if he is emancipated, he becomes directly liable himself, just as if he had been independent at the time of committing the act; unless he had acted on his master's order and his action had not been criminal. If he was independent at the time and afterwards came under the power of another (*e.g.* by arrogation or otherwise; cf. Gai. i 160), the injured person's right of suit shifts from suing the delinquent himself to suing the person in whose power he now is, with the consequent alternative of surrender (Gai. iv 76; D. xliv 7 fr 20). The death of the slave before joinder of issue (if there was no delay on the part of the owner), or his becoming free without fault of the owner, removes liability to a noxal suit (D. ix 4 fr 14 § 1—fr 16, fr 39). It was against rule to surrender a dead slave, but if it was done and the slave had died a natural death the owner was freed (Gai. iv 81: text mutilated and uncertain: see also the Autun interpretation prefixed to Krüger's 4th ed. p. LIX).

(*c*) If several slaves of the same master joined in the offence, he is *prima facie* liable on all, but as this might mean his ruin, the praetor allowed him to admit his slaves' offence and, if he preferred to retain the slaves, to pay only so much damages as a single freeman would have to pay (D. xlvii 6 fr 1 pr; ix 2 fr 32).

If, having been sued on account of one or more slaves and having surrendered them, he is sued again for others for the same offence, he is liable only if the prices got from sale of those surrendered do not amount to as much as the double in the noxal suits and the single in the condiction added together (D. ix 4 fr 31).

(*d*) If the master knew of the offence at the time, that is to say, knew and could have prevented it, still more if he actually ordered the slave so to act, he is liable in full, as for an act of his own, without being allowed the alternative of surrendering the delinquent slave, and remains liable even after alienation or manumission or death of the slave, and notwithstanding that the manumitted slave may have been sued and paid damages. If several slaves of the same master were concerned in the offence and he knew of it, he is liable both on his own account and for all of them, and cannot claim the benefit of the above-named provision of the praetor's edict for reduction of the damages. When a slave is alienated after the offence, the present owner is also liable, but penalties cannot be exacted from both. One who knew of the offence at the time and afterwards purchased the slave is allowed to surrender noxally. If the slave is owned in common by several persons, any of them is liable to suit: if all were ignorant, the surrender of the slave or payment of damages frees all: if all knew, any of them is liable to be sued for the whole damages without the alternative of surrender, and suit against one does not free the others. If one knew and the others were ignorant, suit against him frees the others, but his payment of damages gives him no right to contribution from them in excess of their share of the value of the slave who is thus preserved to them: if these others were sued and paid, they could recover from him his full share of the damages, and sue him besides for having spoiled the slave: if instead of paying damages they surrendered the slave, the partner with guilty knowledge could also be sued for so much of the damages as might exceed the value of the slave, and could not get any relief for this from his partners, besides being liable to them in an action *pro socio* or on the case. If he not only knew but ordered the guilty act, he is not entitled to any

contribution from them. If, all being ignorant, one is sued, he can free himself by surrendering his share of the slave before issue is joined: after issue joined, he must surrender the whole slave, or pay the damages and recover from his partners by an action *com. div.* or *fam. ercisc.* There was however a question whether, if defendant surrendered his share before joinder of issue, plaintiff who thus became a part owner of the slave could then sue the others for their share by the action *com. div.*, seeing that one partner has no noxal action against his partners, and *com. div.* does not usually apply to wrong acts committed before community arose: Ulpian (in Digest) was disposed to allow it (D. ix 4 fr 3—5, 8, 9, 17 pr, 39 pr; cf. x 3 fr 15; xlvii 6 fr 1, 5; Sell, *Noxalrechte* p. 203).

(*e*) If your slave is a shipmaster, and one of his vicars, employed on the ship, does damage to someone, the action will lie against you in respect of the *peculium* of your slave, but allowing the surrender of the vicar. If however the vicar acted on his master's (your slave's) order or with his knowledge and allowance, the action is against you with the alternative of surrender of your slave (D. ix 4 fr 19 § 2).

If several persons are entitled to sue for a noxal offence, the rule is first come, first served: surrender of the slave may in some cases be made to all together, but if this is not done, surrender to the one who first gets judgment frees the owner from all (fr 14 pr, 19 pr). Successive actions for several delicts of the same slave can be brought against his master, only if he has chosen to pay damages and retain the slave (fr 20).

(*f*) It is the owner (or father) who is liable to a noxal suit but in order to be condemned he must either have not only the legal power but the present control so as to be able to deliver, or have fraudulently put it out of his power to deliver. A slave in flight or abroad was held not to be in his (physical) power: a slave pledged or lent or deposited was in his power. The practice was to interrogate the defendant in court whether he had the slave in his power[1]. If he admitted this, he had to produce him

[1] See generally Demelius *Conf.* § 23; Lenel *EP.* § 58 and *Nachträge* p. xiii. *Habere in potestate* was certainly ambiguous. Apparently the distinction was left to the defendant to put forward in reply to the interrogatory.

or to give security for his production as soon as he could, and either surrender or defend him or be treated as contumacious. If he denied it, the praetor's edict gave plaintiff the option either of challenging him to swear that the slave was not in his power and that his being out of his power was not his fault, or of taking an issue for damages without the alternative of surrender. If defendant took the oath, or if on the trial of the issue plaintiff did not prove defendant's denial to be false and thus lost his case, he could yet sue again, if he contended that the slave had afterwards come into defendant's power. Defendant's denial of having the slave in his power could be revoked before joinder of issue. A guardian or caretaker was admitted to swear: a procurator was not (D. ix 2 fr 27 § 3; tit. 4 fr 21, 22 § 4, 26 § 5; ii 9 fr 2; xi 1 fr 8; L 16 fr 215).

(*g*) In case of surrender it was the owner's duty to convey the ownership and deliver the slave to plaintiff. If the slave was lent or deposited or pledged, *etc.* so that he had not the actual possession, he was bound to get it; if the slave was pledged, he must redeem him, at least if he have the money, but is not bound to sell other property to raise it. The pledge creditor, if not willing to defend the slave, loses his right of pledge, the praetor refusing him an action. A usufructuary, if not willing to defend, will be compelled by the praetor either to contribute to the damages proportionally to his interest, so as to avert the surrender, or to give up (*cedere*) his usufruct: else the praetor will refuse him an action and the usufruct will die by non-use. If a slave was actually serving another than his owner, the possessor, whether in good faith or not, was liable to suit[1]; and if he surrender the slave, the owner in this as in the case of a pledgee, *etc.* will be barred by a plea of fraud from claiming the slave, unless he offer the full amount of damages *i.e.* the double or quadruple, *etc.* according to the offence (D. ix 4 fr 11, 13, 17 § 1, 22 pr —§ 2, 27, 28; vii 1 fr 17 § 2; xlvi 3 fr 69).

(*h*) If the master has alienated or set free the slave so as no longer to have him in his power, he is liable as well as the new

[1] If the offence was under the first clause of the *lex Aquilia* (killing a slave, *etc.*), the owner, not the person whom the offender was *bona fide* serving, is liable (D. ix 2 fr 27 § 3).

master or the manumitted slave, and the plaintiff can elect which to sue. But if the new master or manumitted slave are willing to accept suit, the old master is protected by a plea (fr 24, 25). If several slaves were concerned in a theft and one of them is manumitted, action against him will not bar subsequent action against the master *familiae nomine* (D. xlvii 6 fr 3). If the slave was a *statuliber* at the time of judgment, Sabinus and Cassius and others held that surrender freed the master: if the slave become free before surrender, the praetor transferred the suit on to him (fr 14 § 1, 15; xl 7 fr 9 § 2).

If the owner is absent and no one else (*e.g.* fructuary, pledgee) undertake the defence, the slave could be led off by plaintiff under the praetor's order, and then becomes his *in bonis*. An owner, or other person entitled, returning after *bona fide* absence, could obtain permission to defend the slave (D. ix 4 fr 26 § 6; 28 *ad fin.*, 30; vi 2 fr 6).

(*j*) Noxal actions are perpetual and can be brought by heirs. As owners they can also have such actions brought against them (fr 42 § 2).

A person who has paid damages for a noxal offence of one supposed to be slave, but afterwards found to be free, can sue him for the amount by an action on the case so far as the defendant had acted wrongfully. For an act done *culpa*, not *dolo*, he must sue by the Aquilian action (D. xl 12 fr 12 § 6, 13 pr).

(*k*) No delict committed by one under power against his father or master gives rise to any action: plaintiff and defendant would be the same person. Nor does it arise for his previous act if such delinquent afterwards pass under the power of another or become independent. Whether if another's slave or child commit a delict against me and then come under my power the right of action is lost altogether or only suspended, was a disputed point, the Sabinians holding that it was lost altogether, because it had now come into a position with which it was incompatible, the Proculians holding that it revived, if the delinquent subsequently passed from my power (Gai. iv 78; D. xlvii 2 fr 62 pr). If I had joined issue on the delict with his master, my subsequent acquisition is no hindrance to the condemnation of his former master (D. ix 4 fr 37).

(*l*) Children were in theory as liable to be surrendered for delicts as slaves were, and the same rule no doubt applied to persons in hand and in handtake. (Gaius' text is mutilated.) Papinian said that, when as much had been acquired through a freeman so surrendered as amounted to the damage he had caused, the praetor should compel his manumission; but the noxal receiver was not liable to an action *fiduciae* (*Collat.* ii 3), the surrender being an absolute conveyance. The lawyers in Gaius' time disputed whether one mancipation was enough for due conveyance of a son surrendered, as it sufficed in the case of a daughter or grandchild or slave. The Proculians held that the words of the XII tables requiring three mancipations applied to sons in all cases; the Sabinians held that they referred only to voluntary emancipations. In Justinian's law noxal delivery of children is indignantly rejected as an ancient but unworthy practice. And the Digest accordingly in the case of sons speaks only of their being liable, if not defended by their fathers, to be sued themselves, and their fathers being liable to pay damages on their account only to the amount of their *peculium*. One can hardly think that in Antonine times the surrender of a child could be anything but exceptional (Gai. i 140; iv 79; Just. iv 8 § 7; D. ix 4 fr 34, 35).

CHAPTER VIII.

REINSTATEMENT OF PERSONS AND CANCELMENT OF TRANSACTIONS.

In a number of cases, partly by the praetor's edict[1], partly by senate's decrees, the law sanctioned the annulment of acts

[1] An early instance of such interference on the part of the praetor is found in Cic. *Verr.* II ii 25, 26 §§ 62, 63, Metellus as praetor of Sicily cancelling wholesale judgments of his predecessor Verres and acts done by his order: *Fecerat Metellus ut omnes istius injurias quas modo posset rescinderet et irritas faceret.* Metellus enforced it by summary arrest of any who did not obey. *Quod Heraclium restitui jusserat ac non restituebatur, quisquis erat eductus senator Syracusanus ab Heraclio, duci jubebat; itaque permulti ducti sunt.*

of a legal character and the reinstatement of persons, injuriously affected by such acts or by adverse circumstances, into their former position. The justification of such proceedings was the intimidation or fraud of others, infirmity of sex or age, change of civic *status*, capture by the enemy, absence from home.

Intimidation and fraud were subjects of special delictal suits which have been already dealt with (pp. 226, 228). But fraud is a very important allegation in many other proceedings.

A. Reinstatement of minors.

Any business transaction with one less than twenty-five years of age[1] was subject on due application to review by the praetor, who, if the minor appeared to have been done (*captus*[2], *circumscriptus*), or to have acted in a way in which a vigilant person of full age would not have acted, and if no ordinary remedy was open, cancelled the transaction and restored the minor to his former position. It was no bar to this interference that the minor had honest guardians or caretakers and had acted with their authority. On the other hand the fact that the business had turned out badly was no sufficient ground as a rule for interference if it had been done with reasonable prudence. The praetor did not grant the application lightly or as a matter of course, for then people would decline altogether to do business with minors: he summoned (*evocavit*) the parties affected to the hearing and either granted an issue for trial of the question or gave other directions according to the circumstances (D. iv 4 fr 1, 11 §§ 3, 4, 16 pr, 24 §§ 1, 5, 29 § 2, 44, 47 pr; Cod. ii 41 fr 1). Express or tacit approval of the act after attaining majority barred the minor's application (Paul i 9 § 3; D. fr 3 §§ 1, 2).

[1] In reckoning minority a different principle prevailed from that used in reckoning the age under the *lex Aelia Sentia*. The act of a minor must be done earlier than the birth hour of the day on which the twenty-fifth year is completed (D. iv 4 fr 3 § 3).

[2] *Captus* 'caught' was almost a technical word in such cases: cf. Cic. *Off.* iii 17 § 70 *Quanti verba illa 'ne propter te fidemque tuam captus fraudatusve sim'* (see p. 98); D. xvi 3 fr 1 § 42 *Si eorum nomine qui sunt in potestate agatur, veniat in judicium et siquid per eum in cujus jure sunt captus fraudatusve est;* iv 6 fr 28 § 1; xix 1 fr 39. Hence the use of the word *captiosus*.

Almost any act might be cancelled, on a sufficient case. Acts mentioned are arrogation, constitution of a dowry, sale, purchase, borrowing money, partnership, becoming surety or giving a pledge, accepting an impecunious debtor for a solvent one, exercise of an option, repudiation of a legacy, acceptance or non-acceptance of an inheritance, or possession of a deceased's estate, agreement to an arbitration, miscarriage of a suit, either as plaintiff or defendant, failure to appeal in due time, sale at an undervalue of his estate or of specific assets to satisfy a judgment, or of property mortgaged by his father, *etc.*[1] (D. fr 3 §§ 5—8, fr 7 §§ 1, 3—8, 11, 12, fr 9 § 1; Cod. ii 33, 38, 39, *etc.*; Paul i 9 § 8). But reinstatement was not granted where the minor had committed a delict or acted fraudulently in a business transaction, except that if he had failed to settle for theft (*pro fure damnum decidere*), or to admit Aquilian injury, he might be restored so as to avoid the multiple penalties. An offence against the revenue laws was not regarded as a delict incapable of reinstatement (fr 9 §§ 2, 5). A minor could not get reinstatement to enable him to prosecute a penal action *e.g. injuriarum* (fr 37 pr). Where an act was invalid, *e.g.* contract with a ward without his guardian's sanction and without his being enriched, there was no need for this extraordinary remedy (fr 16 pr). Where a minor had declined an inheritance and the substitute had entered and the estate been distributed, the minor's prayer for reinstatement was held to be too late (fr 24 § 2).

The reinstatement was effected as thoroughly as circumstances admitted. If a minor had sold land at an undervalue, he recovered the land and its profits and repaid the purchase money so far as he had gained by it. If he had bought land at too high a price, he restored the profits which had accrued to him and received back the purchase money and all interest which had or might have been got from it. If he had given a formal release, he recovered his right of action, not only against the debtor but against his sureties and recovered his pledge. If land sold by him had been resold, the minor could claim it

[1] Paul gives an interesting account of a case in which, contrary to his advice, the emperor (from dislike of a forfeiture clause) granted reinstatement (see D. iv 4 fr 38).

back from the second purchaser, if he knew of its being bought from a minor; if he did not know, then the minor could claim its value from the first purchaser if solvent; but if he was not solvent, then the minor was allowed to claim the land from the second purchaser though ignorant of the circumstances, and leave him to his remedy for eviction (fr 13 § 1—15, 27 §§ 1, 2; Cod. ii 47; cf. Paul i 9 § 7). If the minor had received money either as loan or in payment of a debt, and had spent it, the praetor would refuse an action to the creditor or cancel the discharge of the debtor, who has himself to blame for putting the money into the minor's hands instead of depositing it in a temple (cf. p. 54) or paying it to the minor's caretakers. If the minor had lent the money to someone in need, he must cede his actions to his own creditor (fr 7 §§ 1, 2, 27 § 1). Where a minor after entry on an inheritance obtains reinstatement, he is not called on to repay the legacies which he may have paid or the prices of slaves who by his entry have obtained their freedom (fr 22). If the business lay between two minors and both had been done, reinstatement was not granted (fr 11 § 6).

Reinstatement of a minor does not release one who has been surety for him with his eyes open; nor, if a minor has been surety, does his reinstatement free the principal debtor (Paul i 9 §§ 5, 6). One who has employed a minor in doing his business cannot on that account get reinstatement; but if the minor acted for him without mandate, the case is different, and if the minor refuse to apply for reinstatement, he will have no protection against the principal's suit *negotiorum gestorum* and may be compelled to allow his principal to apply for reinstatement in his name (fr 24 pr).

A son under power, being a minor, can rarely obtain reinstatement, for the father is really responsible. But if the son be sued in his own person or has lost some advantage which he might otherwise have had, reinstatement is possible; and if the son die, his father might obtain it, as if he were his heir (fr 3 §§ 4—9).

A slave once emancipated could not be put back into slavery by a minor's reinstatement. All that could be done was to grant the minor an action (of fraud or an analogous

action) for the value of what he has lost by the manumission, the action being against the manumitted slave himself or whoever had done the minor (fr 9 § 6—11 pr, 48 § 1; Cod. ii 30).

Application for reinstatement was made by the minor himself, or with his consent. His father however, if the minor was still under power, could apply even without his consent. Other relations could apply only with the minor's consent, unless he be such as to require interdiction as a spendthrift (fr 27 pr). An exile can make application to the praetor by a procurator, or to the governor of the province (fr 20). Application has to be made within one year after completing the age of twenty-five (fr 19 pr).

No magistrate could grant reinstatement by cancelling a decision of a superior magistrate, but he could do so against a former decision of his own. The praefects of the *praetorium* could cancel decisions of their own, notwithstanding that their judgments admitted of no regular appeal. The jurisdiction in this matter was not in the nature of an appeal from an erroneous decision of a court, but was a petition for relief from the consequences of the minor's own blundering or the fraud of the other party to the transaction (fr 16 § 5—18 pr).

B. Reinstatement of *majores*.

Reinstatement (*in integrum restitutio*) was also granted by the praetor to persons above twenty-five years of age in two classes of cases.

The first class is where persons have either suffered positive loss either of a thing or a right, or have been prevented from bringing a suit within the time limited in consequence of absence due to intimidation or to the public service, or of being in prison or chains or in slavery or in the power of the enemy. Intimidation must be serious, causing fear of death or torture. Absence on the public service must be *bona fide* absence from one's domicile, and obligatory, not optional. It includes service in the army, even at Rome, but magistrates at Rome are not reckoned absent. Confinement may be either in a public prison or in an island or by brigands: and a person is deemed

to be in chains, if so bound as to be unable to appear in public without disgrace. 'Slavery' applies to a freeman serving *bona fide* or to one forcibly detained, but not to actual slaves, who have no property; nor to slaves made heirs and free by will, until the will takes effect; nor to persons suing for freedom, for they are treated as freemen while the suit is in progress. 'In the power of the enemy' includes those captured as well as those born in captivity, and relief is given to themselves if they return, or to their successors if they die in captivity. But the applicant must have used due diligence to prevent the loss: and the relief is granted to enable a person not to gain by another's loss, *e.g.* by completing usucapion, but to retain or recover what was his own (D. iv 6 fr 1—7, 9—13, 15, 16, 19—20, 36, 40). If the applicant had an adequate representative, an appeal only was granted (D. iv 1 fr 8; 6 fr 39). Besides those whose cases are specifically mentioned in the edict, others on just grounds might obtain the like relief, *e.g.* persons summoned from home to give evidence, or to prosecute an appeal, or persons who had given sureties not to leave a certain place, or absent students whose procurator has died, *etc.* (D. iv 6 fr 26 § 9, fr 28 pr § 1).

The second class consists of those who have incurred loss owing to the absence of others without leaving a proper representative, to whom notice could be given or against whom suit could be brought. The result might be that the absentee might complete usucapion or gain freedom from a servitude or from an action. And not only absence, but confinement in chains, or keeping out of the way, or appeal to a higher court, or privileged exemption from compulsory summons, or extraordinary holidays preventing the sitting of the courts, might enable one's opponent to make an unfair gain calling for the praetor's interference (fr 1 § 1).

In this second class of cases any absence however caused may justify the relief, provided the absentee is not duly defended. It is the duty of the applicant to call upon the friends of his absent opponent to defend him. Cases for relief are the more numerous because usucapion may proceed through the possession of persons in the power of the absentee as well

as through himself, and even when he is in captivity, although he himself is unable to possess. This relief is often a better means of redress than the ordinary remedy of being sent into possession of a defendant's estate who fails to appear, for that would only be granted when a defendant was wrongfully hiding (fr 21—25).

The reinstatement may consist according to circumstances in the grant of an action or of a plea or in the suspending of the opponent's usucapion for the minimum of time which has been lost by his absence or by the non-sitting of the courts, *etc.* Where fruits have been gained, reimbursement may be required to complete the reinstatement (fr 26 §§ 7, 8, fr 28 § 5, fr 23 § 2). Where the condition of a legacy or stipulation is presence in Italy at a particular time, the praetor will reinstate a person absent on public business (fr 17 § 1, fr 41, 43).

Application for reinstatement must be made within a year from the earliest opportunity to apply (fr 1 § 1).

C. *Postliminium.* 'Reverter.'

1. Persons who had been taken captive by the enemy and had returned to their own country with the intention of remaining, re-entered *ipso facto* into their old position as if they had never been captive. This was the law of *postliminium* (on which as regards *status* see vol. 1 p. 42). A captive's children, whether born at home or in captivity, became again in his power, either as children or grandchildren as the case might be. If the captive's father had been arrogated, the captive on his return would fall into the power of the arrogator, even if the father be emancipated. During a captive's absence the position of his children is in suspense; if he return, or die while still in the power of a redeemer, they are held to have been in his power all along, and anything acquired by them is acquired for him; if he die in captivity, they are held to have been *sui juris*, not merely from the date of his death but from the moment of his capture (Gaius had doubts on this point, i 129), and their acquisitions are consequently not part of his estate but their own (D. xlix 15 fr 12 § 1, 13, 22 § 2). Acquisitions by

slaves whether by stipulation or release or otherwise, form part of his estate (D. xlv 1 fr 73 § 2; xlvi 4 fr 11 § 3).

A captive appointed heir or legatee by another's will can accept and enter if he return; and is entitled to possession of his deceased father's estate as if he had not been captured, bringing into hotchpot what his estate amounted to at the time of the death. If he does not return, the appointment or legacy drops. If his slaves are appointed heirs, they can accept at his bidding if he return, at the bidding of his heirs if he die in captivity. (D. xxviii 5 fr 32; xxx fr 108 § 5; xxxvii 6 fr 1 § 17.) As to the validity of his own will see vol. 1 p. 210.

This law of reverter cannot alter facts, and therefore possession by the captive himself is interrupted, and new possession cannot be begun while he is in captivity. But possession through slaves or children in his power is effective for usucapion so far as their *peculia* are concerned, for knowledge on his part is not required. If he does not return, children's usucapion avails for themselves (D. xlix 15 fr 12 § 2, 29; iv 6 fr 19, 23 §§ 1, 3; xli 3 fr 44 § 7).

A caretaker was usually appointed to look after a captive's property (D. iv 6 fr 15 pr). Actions in respect of business done for him are good for and against him or his successors according to the event (D. iii 5 fr 18 § 5, 19). For theft, whether committed before or during his captivity, he can sue on his return (D. xlvii 2 fr 41 pr, § 3). His son and daughter were not precluded from marrying during his absence, if three years had elapsed, and even before, if the marriage was one which he would have consented to if present (D. xlix 15 fr 12 § 3; xxiii 2 fr 9 § 1, fr 11). His own marriage was dissolved by his captivity[1] as by death, except, according to the better opinion, in the case of a freedwoman married to her patron. Of course the marriage could be renewed by a fresh consent (xlix 15 fr 8, 12 § 4, 14 § 1; xxiii 2 fr 45 § 6; xxiv 2 fr 1; fr 6 is interpolated).

2. The law of reverter (*postliminium*) applied to chattels as well as to persons. Land, slaves, horses, warships, if taken by

[1] Cf. Hor. *Od.* iii 5, 41 of Regulus, *Fertur pudicae conjugis osculum parvosque natos ut capitis minor ab se removisse.* In the eye of the law he was a slave, and a slave's marriage was no marriage.

the enemy, revert on being freed to their former owners[1]. Arms and dress do not; for disgrace attends their loss (D. xlix 15 fr 2, 3, 20 § 1). The case of slaves, probably from its frequency, received much attention. A slave who re-entered the Roman territory resumed his old position with his Roman master, subject to any mortgage or usufruct or trust for freedom or disability for freedom or to punishment which attached to him before. Anyone who redeemed him from captivity had a lien for the ransom, and a constitution (unknown) made him the property of the ransomer at once, but on the old owner's tendering the amount the slave reverted to him. A creditor of the old owner who had lent money on the slave could tender the ransom, obtain the slave, and add it to the amount of his mortgage. The slave, if a *statuliber*, could not apply to be freed under the trust, till that was paid. And any punishment to which a captive slave may be liable would be in abeyance, until the fisc paid it. If the redeemer had bought the slave without knowledge of his being a Roman's slave in captivity, he could by usucapion extinguish the owner's right of redemption; and, if he had knowledge himself, still a *bona fide* purchaser from him was not bound by the former owner's claim. How far manumission by the ransomer conferred full freedom or only relinquished the manumitter's right, so that the old owner could yet claim him as a slave if found in Roman territory, was a question of some difficulty, except where usucapion had proceeded. But even a ransomer with knowledge appears to have been held to confer full freedom, where no offer of repayment had been made and there was no opportunity of calling on the former owner to make it (fr 12 §§ 7—17; vii 4 fr 26).

D. *Capitis deminutio.* When a person's *status* is changed *e.g.* by adoption, emancipation, coemption, it was provided in the praetor's edict that his obligations of whatever kind, contracted previously, might be enforced, just as if he had not experienced *capitis deminutio* (D. iv 5 fr 2 § 1). Where citizenship or liberty

[1] Cf. Cic. *Top.* 8 § 36 *Postliminio redeunt haec: homo navis mulus clitellarius equus equa quae frenos recipere solet.*

was lost, actions were granted against the possessors of the goods, including the fisc, and if the case was not defended, plaintiffs were sent into possession (fr 2 pr, 7 § 2; xlix 14 fr 11).

E. The *Senatus consultum Macedonianum* made in the time of Claudius (Tac. *A.* xi 14) or Vespasian (Suet. *Vesp.* 11) in consequence of the usurious practices of one Macedo decreed that 'no one who gave money on loan to a son under 'power should be granted any suit (*actio petitioque*) even after 'the death of the parent in whose power he was.' Its avowed object was to prevent any loan of money to such a person being a good debt (*bonum nomen*) at any time (D. xiv 6 fr 1 pr; Paul ii 10). The decree was treated as applicable (*a fortiori* says Ulpian) to a *filiafamilias* (fr 9 § 2) and to grandchildren and further descendants (fr 14; Cod. iv 28 fr 6). It was strictly interpreted to refer only to loans of money actually paid down to such a person, not to sales on credit, or to novations by the son of loans to others, or to other transactions, provided they were not used to evade the law. It protected, if necessary by a peremptory plea, not only the person under power but also his heirs, father, and any surety or guarantor (*mandator*) that may have been given for the loan (D. fr 3 § 3, 7 § 6, 9 §§ 3, 10, 13). It applied however only where the creditor knew, or might have known, that the borrower was not independent (fr 3 pr, § 4, fr 19). It did not apply if the loan was really for the father, or had passed into his property, or where the father (being independent) knew of, or acquiesced in, or had recognised the loan. Whether subsequent ratification by the father took the loan out of the statute was disputed (fr 7 §§ 12, 15; Cod. iv 28 fr 7). Nor did it apply where the loan was for an object within the duty of the father; *e.g.* for a daughter's dowry, or for the usual expenses of a student away from home, or for necessary expenses (fr 7 § 13, 17; xlvi 3 fr 47 § 1; Cod. iv 28 fr 11 pr; cf. D. xiv 6 fr 7 § 2); nor to pay a debt which could certainly be enforced (fr 7 § 14); nor where the loan did not exceed the borrower's camp-*peculium*; nor where he openly acted in every way as if independent; but the mere fact that he was consul

or otherwise in high office does not bar the senate's decree (fr 1 § 3—3 pr). If a son under age was put in charge of a shop and took a loan, the decree barred any suit against him, but not against the principal (whether father or not) who appointed him as *institor* (fr 7 § 11). Loans to a *filiusfamilias* who farmed the public taxes (*qui vectigalia conducta habebat*) were not within the decree (fr 3 § 1). Whether the loan was to bear interest or not did not affect the question (fr 7 § 9).

If a *filiusfamilias* repaid the loan, his father could vindicate the moneys, but if the creditor had spent them, the father could not bring a condiction: at least so Marcellus held. If a son after becoming independent repays part of the debt, the rest can be sued for; and any payment made by the borrower or his sureties cannot be recovered, whether paid in error or not: there was a natural, though not a legal, obligation. If however the creditor got judgment for the money, because this decree was not pleaded, the plea could be used against suit on the judgment (fr 7 § 16, 9 § 4—fr 11; xii 1 fr 14).

F. *Senatus consultum Velleianum* (*Vellaeanum*).

1. Edicts of Augustus and Claudius are said by Ulpian (in the Digest) to have been directed against women's intervening (*ne intercederent*) on behalf of their husbands. The praetor appears to have extended this prohibition; and in A.D. 46[1] a decree of the senate was passed, at the instance of the consuls M. Junius Silanus and C. Vellaeus Tutor, which 'directed the 'praetors to refuse as heretofore actions against women who 'contracted cash loans or offered security on behalf of other 'persons who were under legal obligations. Such engagements 'were in the opinion of the senate men's business and unfit 'for women' (D. xvi 1 fr 2 pr § 1).

2. Interpretation of this decree was wide in some respects, and strict in others. The edict was held to nullify a woman's intervention for this purpose in whatever form of contract it was

[1] So Mommsen: but it is usually referred to A.D. 27 which had consuls of these names. That date however would be inconsistent with Ulpian's putting it after Claudius. *Velleianum* is an old corruption for *Vellaeanum*.

attempted (fr 2 § 4; Paul ii 11 § 1); and not only the woman's obligation was cancelled, but all other obligations which were attendant or consequent upon it. On the other hand the edict did not stop a woman from making gifts or from any form of payment on behalf of others; nor from incurring obligations in favour of persons who were not themselves under an obligation in the matter; nor from obligations or expenses on her own affairs; nor from being sued on a prohibited obligation, if her creditor was innocent of any offence against the decree. For an obligation to come under the decree, it must be an obligation contracted by a woman to a person who acted wittingly, such obligation being intended to relieve another from a valid obligation already contracted or about to be contracted, and imposing on the woman financial risk without compensation. The theory of the law was that women might easily be induced to give a promise or guaranty to relieve others from embarrassment, while more consideration would be given, if they were to pay money or make a gift on the spot. But fraud disentitled her at once to the protection of the law: *infirmitas feminarum, non calliditas, auxilium demeruit.* So rescripts of Ant. Pius and Severus (fr 2 § 3, 4 pr).

3. Thus a woman could not defend in a suit even her husband or son or father, for she would thereby be liable to the damages in their place (fr 2 § 5). Nor could she authorize persons to be sureties for the defender of her absent son. If she did, both she herself and the sureties could plead the decree against suit to enforce the mandate or stipulation. But if the plaintiff, who accepted the sureties, was ignorant of the woman's mandate, he could defeat the plea by a replication of fraud. The sureties who had to pay might however fairly claim an action *negotiorum gestorum* against the defender who had been freed by their money. They could not sue the mother on the mandate for they were cognisant of the breach of the decree (fr 6, 7). If a woman intervened on behalf of another's debtor and gave the creditor a surety, both are released by the decree, and the old action will be restored against the debtor (fr 16 § 1). If a woman borrows money as for her own purposes, and lends it to another, this comes within the decree, provided her creditor was

not deceived in her purpose of intervention; if he was, the decree cannot be pleaded, for otherwise no one would enter into business with a woman at all (fr 11, 12). If a person wishing to lend money to Titius' heirs distrusts them, and lends it instead to testator's wife and takes pledges from her, and she gives the money to the heirs, the creditor is debarred by the decree from suing her, and the pledges are not bound: it was however thought reasonable that the heirs and any pledges that they had given to the woman should be held liable to the man who advanced the money (fr 29 pr). A woman who in order to pay *C*'s debt to *A* delegates *B* to *A* is protected by the decree, if she thereby becomes obliged to *B*; but if *B* was her own debtor for that amount, she is then incurring no obligation, but simply paying off *C*'s debt to *A* by this transfer of *B*'s debt, just as she might have done by so much cash of her own. *Solvit enim et qui reum delegat.* If *B* was not her debtor, he can plead the decree against *A*'s suit, who would then have to sue his old debtor *C*, notwithstanding any discharge he may have given him. If the woman had obliged herself to *A* in order to relieve *C*, and now either pays money or delegates a debtor to *A* in fulfilment of the obligation, the obligation being invalid under the decree, the woman (at any rate if previously ignorant of the invalidity) can bring a condiction against *A* for the money he has received from her or from her debtor; or she can bring it against *C*, but in that case must guaranty him against any claim from *A* in respect of the old debt which she assumes to have paid (fr 8 §§ 3—7, 31; Cod. iv 29 fr 9). If a woman being in debt to *A* is delegated by him to his creditor *B* and promises to pay *B*, the senate's decree does not come into play: she has novated her debt to *A*, is freed from him, and is bound only to *B*. But if she is not delegated by *A*, and yet promises to pay *B* what *A* owes him, she thereby undertakes *A*'s obligation to *B* while remaining obliged to *A*: the decree nullifies her obligation to *B* (D. fr 24 pr § 1; Cod. fr 2).

4. A mother urging her son's guardians not to sell his land, and undertaking to indemnify them if they follow her advice, is not within the decree, for she is not adopting another's

obligation but creating one for herself (fr 8 § 1; Paul ii 11 § 2). If *A*'s guardian dies leaving *B* as heir, and *B* from fear of the ward *A*'s claims against his guardian's estate hesitates to enter, but does so on getting a guaranty of indemnity from *A*'s mother, the case does not fall within the decree; there is no proper intercession where the guaranty is given to *B* on behalf of himself. If the ward were guarantied against *B*'s failure by the ward's mother, the decree would apply and the guaranty be cancelled (fr 19 pr). If a woman buy an inheritance and guaranty the seller against claims, or if she has given a surety and takes his obligation on herself, in neither case is her obligation liable to be cancelled by the decree; for she is acting in her own interest. The same is the case if a woman slave undertakes after manumission the obligation which some person has incurred with her master as the price of her freedom (fr 13 pr). If a woman and another, co-owners of an estate, borrow for the necessities of the estate, the decree does not apply if she would have suffered greater loss by not obtaining the joint loan (fr 17 § 2). If a woman obtain a loan for another, who however expends it on the woman's own estate, she cannot plead the decree against her creditor. If I give money to a woman for her either to pay it or to promise it to my creditor and she promise it accordingly, she will not be relieved of her liability to my creditor by the senate's decree, for by the promise she fulfilled the mandate and has payment beforehand (fr 21 pr, 22). If a mistress authorized a loan to her slave, she is liable for the loan under an action *quod jussu*: but if he borrowed on his own account and she became his surety, she can plead the decree to a suit by the creditor (fr 25).

5. Many cases depend for their validity or invalidity on the intention of the woman, whether it is an actual gift that she intends or only relief of another from the immediate pressure of a debt. A woman may borrow money from *B* and pay it over to *A* or pay it to *A*'s creditor *C*, or may hand over to *C* something of her own in satisfaction of *A*'s debt to *C*, or may sell a farm to *D* and give the price to *C*, or instead of receiving the price herself delegate *D* to *C* in discharge of *A*'s debt to *C*, or may sell a farm to *C* the creditor himself and direct him to credit *A*

with the price. In all these cases if the woman from the first means to make *A* a gift, the senate's decree does not apply and the transaction is unimpeachable (so far as any gift from the woman to *A* is unimpeachable). But if in all these cases she undertook *A*'s obligation to *C*, and in order to discharge that incurred another obligation either by borrowing, or by a contract of sale, without deliberately intending a gift to *A* but taking the risk of not being repaid, the transaction is void under the decree. The woman is then freed from obligation to pay; if she has paid, she can bring a condiction to recover the money; and if she has delivered or mancipated in order to fulfil the contract of sale, she can vindicate the thing sold; as she can also, if she gave a pledge and the creditor sold the pledge (fr 4 § 1, 5, 32 § 4; vi 1 fr 39 § 1). It is assumed in such cases that the woman has been guilty of no deception when she borrowed money or made any other contract for this purpose, and that in paying money or making delivery she has acted in ignorance of her full rights; and that the lender or purchaser was not in ignorance of her purpose (cf. D. xvi 1 fr 12, 17 pr, 23, 28 § 1, 30 pr; Cod. iv 29 fr 1, 5, 7, 9).

6. The actions which were given by the praetor to restore the position as before the woman's intercession, were often called *restitutoriae*, but were really the old actions which were capable of enforcement, if she had not interfered. If her interference prevented an obligation being formed, which otherwise would have been formed, the praetor granted an action against the person relieved by the woman similar to that which lay against the woman, *e.g.* if she had promised in reply to stipulation, the other was treated as if he had entered into the stipulation, but if she had promised conditionally and the original debt was unconditional, the restitutory action would be unconditional. And such restitutory actions were granted to and against heirs, *etc.* without limit of time. If the person for whom the woman had made herself liable was a ward, he would be now made liable only so far as he had been enriched: if he was a minor, he could apply for *in integrum restitutio*; if he was another's slave, the action would be against the master (D. fr 8 § 12—fr 10, 13 § 2). If pledges had been given by the original debtor, the

creditor could regain them by the *quasi Serviana* without any fresh action, because his claim (*intentio*) would still be true *i.e.* 'that the pledges had been given by agreement with the debtor 'and the debt had not been paid' (fr 13 § 1; Cod. iv 29 fr 8 § 1). If sureties had been given for the debt, the actions against them would be revived also (fr 14).

7. It appears from Justinian's constitutions (Cod. iv 29 fr 22, 23, 24) that in former times doubts were entertained whether a woman was bound notwithstanding the decree (1) if after intercession she gave a bond or pledge or surety to support it; or (2) if she at first or afterwards received some compensation; or (3) if she promised money on condition of another manumitting one of his slaves.

G. *Actio Pauliana*[1].

1. When a debtor's goods had been taken possession of by his creditors, no dealing with them calculated to defraud the creditors was permitted. Both an interdict (*int. fraudatorium* D. xlvi 3 fr 96 pr) and a suit were granted to effect the restoration of anything wrongfully alienated, and the revocation of any deed or proceeding (*quae fraudationis causa gesta sunt*) which had the effect of impairing the bankrupt's estate. The suit is called in one place *Pauliana* (D. xxii 1 fr 38 § 4). The relation of the interdict and suit is obscure: the Digest treats them together under the style of an action. I have no choice but to follow.

2. The suit is of a practical, not punitive, character. It is brought by the caretaker of the estate or other whom it may concern within a year after its being first possible (D. xlii 8 fr 1 pr, § 1, 10 pr, § 1, 25 § 1). The acts specifically mentioned as

[1] This action is apparently referred to by Cicero, who had been requested by Atticus' uncle Caecilius to assist a suit against Satyrus, who had in fraud of Varius' creditors received a conveyance of some of Varius' property. *Caecilius A. P. Vario cum magna pecunia fraudaretur, agere coepit cum ejus fratre A. Caninio Satyro de iis rebus quas eum dolo malo mancipio accepisse de Vario diceret. Una agebant ceteri creditores, in quibus erat L. Lucullus, P. Scipio, et is quem putabant magistrum fore, si bona venirent, L. Pontius...Rogavit me Caecilius ut adessem contra Satyrum* (*Att.* i 1 § 3).

modes of fraud for this suit are alienation, *e.g.* by way of gift, or of sale at an inadequate price, release of a debtor or surety, either formally or by agreement, paying a debt before it is due, giving up a pledge, giving a pledge for an old unsecured debt, payment of legacies by a necessary heir, constitution of a usufruct or dowry, incurring an obligation, preference of a creditor, deliberate non-appearance in court, or failure to demand payment so that a claim expires, deliberate non-use of a servitude or usufruct, abandonment of a thing as derelict (D. xlii 8 fr 1 § 2—fr 5, fr 6 § 13, 10 §§ 12—14, fr 25 §§ 1, 2). But simple non-acquisition or declining to do what would improve the estate (*e.g.* accepting an inheritance or legacy) or non-fulfilment of a condition to bring a stipulation into force is no ground for this suit (fr 6 pr, § 2; xxxvi 1 fr 69 § 1).

3. The suit can be brought against anyone who dealt in such matters with the insolvent, provided he knew of the fraud or at least knew the estate was insolvent. But the suit lay, irrespectively of knowledge, against a master or father whose slave or son was aware of the fraud, or who was enriched thereby; against a donee or a ward whose guardian or caretaker was aware; or against a legatee, to whom a necessary heir has paid the legacy from an insolvent estate (fr 6 §§ 8, 10—13, fr 10 § 5). None of the above-named acts are frauds within the scope of the law, if done before the estate was seized by the creditors. And a creditor who, with full knowledge of the debtor's insolvency, still enforced a lawful claim before seizure, is not acting fraudulently but is only vigilant for his own interest; *sibi vigilat; jus civile vigilantibus scriptum est* (fr 6 §§ 6, 7, fr 24). Even after the estate has been seized, a *bona fide* purchaser from a fraudulent purchaser is not within the scope: nor one who handed over a trust inheritance without taking the Falcidian fourth; he was regarded only as a faithful executant of the trust. Nor is one within the scope who at the instance of the heir by trust entered on an inheritance and restored it to him, if the inheritance was wholly outside of the estate on which the creditors had a claim (fr 9, 19, 20; xxxvi 1 fr 69 § 1). The praetor will on sufficient cause being shewn grant a special action against one who had no knowledge of the fraud (fr 10 pr).

4. The existence or knowledge of fraudulent intention was not enough to found the action, unless the creditors were actually defrauded. If the insolvent satisfied those who were his creditors at the time of the fraudulent act, subsequent creditors could not claim the revocation, unless, as Severus and Antoninus laid down, the first creditors were paid with the money supplied by the second. It is only the creditors who sell up the insolvent who have a right to this action. If a fraudulent insolvent makes his will giving freedom to slaves[1] and afterwards pays off his then creditors, and has others before he dies, the freedoms are valid; there was no fraudulent intent against the latter, and no fraud against the former: *Libertates ut rescindantur, utrumque in eorundem persona exigimus et consilium et eventum* (fr 10 § 1, 15).

5. The action aims at complete restoration both of property and of rights of action, so that all may be in the same state as it was before the fraudulent act. Whatever was part of the thing before it was alienated and all produce and profits, which could have been taken since joinder of issue, must be restored. Produce whether of land or slaves, wholly grown in the intermediate period, could not be part of the insolvent's estate (*in bonis*), and therefore does not come into the action. Interest on debts improperly collected or remitted[2], and interest naturally due on a *bonae fidei* contract was recoverable, but not other interest which had not been made the subject of stipulation. All necessary expenses must be repaid to defendant (fr 10 §§ 19—23, 25 §§ 4—6). A fraudulent purchaser cannot recover the price he has paid, unless the actual money is found in the estate (fr 7, 8). Where the fraud consisted in the establishment of a dowry, whether by the wife, or her father or an outsider, both husband and wife are liable to this action, if they knew of the fraud, and the wife as a donee, if she did not know: an innocent husband is not liable, as he would not have taken a wife without dower (fr 25 §§ 1, 2).

If the insolvent had squandered property beyond chance of recovery, the action would be granted against him, by way of penalty (fr 25 § 7).

[1] This was forbidden by the *lex Aelia Sentia*. See vol. I p. 32.

[2] *medii temporis commodum* (fr 10 § 22).

H. *Actio Fabiana vel Calvisiana.*

On allegation of any act of a freedman done to defraud his patron of his due share of the inheritance, whether the freedman dies with or without a will, the praetor hears the case and applies a suitable remedy by cancelling the act or otherwise. A gift in view of death can be cancelled without proving fraud, but if made to a son is not revoked, being within the freedman's rights; if made to a copatron, he has to share it. If a sale has been made at less than the real value, the purchaser has his choice either to surrender the thing or pay the additional price. If a purchase has been made at an exorbitant price, the vendor has the choice of receiving his thing back at the price given or of repaying the excess. But the patron cannot insist on rescinding a sale made by the freedman if the price was fair, though it may have been land for which he had a special affection on sentimental or other grounds. Lease or exchange are in the same position as purchase and sale. If the freedman borrowed money and gave it away, the patron can sue the recipient, but if he squandered it, there is no remedy; for the lender has a right to recover from the inheritance. Nor has the patron any action against a creditor to whom the freedman has become surety or given a pledge for another, but he can sue the debtor on the mandate, or, if the freedman was making a gift so as to have no action of mandate, the patron can use the Fabian action. A gift by the freedman to a slave or son under power gives the patron a right to sue the master or father: if the slave be manumitted or alienated or dies the action must be brought as usual within a year: there is no action against the slave himself if manumitted. If the freedman has given a dowry to someone not his daughter, the patron can sue either husband or wife according as the dowry is still with the husband or has been repaid.

In all cases the only fraud to be proved is fraud by the freedman; whether the other party was aware of his being a freedman or not, does not affect the patron's right to sue him. If the freedman both sold at too low a price with intent to defraud his patron and gave the price away to another, the patron can sue both purchaser and donee. Failure to acquire is not fraud: but the freedman's abandonment of a suit or

consent to a verdict against him, if fraudulent, entitles the patron to sue.

The action is personal, not general (*in rem*); it is not penal and can be brought at any time; it goes for and against heirs and other successors, but is special to the patron and not for other claimants to the freedman's estate generally. All fruits gathered since joinder of issue are recoverable. If restitution is refused, the damages can be fixed by oath of the plaintiff. If the thing fraudulently alienated no longer exists, the action cannot be brought; nor can the thing be followed in the hands of a *bona fide* purchaser from the donee. Two or more patrons or patronesses can each sue for an equal share: the shares of those who do not sue accrue to the others (D. xxxviii 5; Paul iii 2 § 3; Frgm. *de form. Fab.* in *Jus Antejust.* iii p. 299).

The *lex Fabia* (or *Favia*) and the *lex Calvisia* had the same import, but applied the first to testate, the second to intestate inheritances (fr 3 §§ 2—4). Neither applied to the inheritance of an emancipated child *a parente manumissi* (D. xxxvii 12 fr 2).

Where a freedman alienated property in order to reduce the amount of his estate under 100,000 sesterces (see vol. I p. 271) the alienation, being in fraud of the Papian law, was *ipso facto* invalid, provided it would have had the effect intended. But if the estate was still 100,000 sesterces, the alienation was not void, but only gave ground for suit under the Fabian or Calvisian statutes as being in fraud of the patron. If several things together were alienated, the alienations were all void, though the revocation of one or two only might have sufficed. But if the alienations were at different times, those later, if they left the estate still of the value of 100,000 sesterces, were not *ipso facto* void (D. xxxvii 14 fr 16).

I. *De alienatione judicii mutandi causa.*

Anyone who, anticipating a law suit respecting something which he owns or possesses, alienates it maliciously, in order to put difficulties in the way of his opponent, is liable to an action on the case for the amount of his opponent's interest in the alienation not having taken place. Such a case is found if you

alienate it to a man of greater influence or to one in a different province; or manumit a slave whom I am claiming (because the praetor favours freedom); or where, having carried out some work on your land, which makes you liable to me by the interdict *quod vi aut clam*, or by the action for keeping off rainwater, you alienate it; for then I cannot make the new proprietor remove it at his expense as I could you, but can only get the right of removing it myself; or, when I have given you notice not to carry out some work (vol. I p. 518), you alienate it, and the purchaser carries it out, for then I cannot sue him because I have not warned him, nor you because you have done nothing in it (D. iv 7 fr 1—3). Alienation of a rural or urban servitude is within the edict (fr 4 § 4). For the purpose of this edict alienation will include transfer of a thing not really one's own (fr 8 § 2); and transfer of possession where the transfer is made maliciously (*dolo malo*), to give the other a troublesome opponent. But a transfer to another from dislike of continual litigation or from ill health or age or necessary business is not within the edict (fr 4 §§ 1—3). Nor does the edict apply to dealing with a thing by will; or to alienation followed by taking the thing back; or to one who has returned it under the aedile's edict to the vendor from ordinary motives, or has paid it in discharge of an obligation to another, notwithstanding my intention to claim it (fr 8 § 3—fr 10 pr).

The action is not of a penal character, but aims at recovering the position. The judge has it in his discretion to make condemnation dependent on failure to restore (fr 4 § 6, fr 7 pr). Indeed the action will not be granted at all, if the intended defendant offers to accept an analogous (*utilem*) action to that contemplated before alienation (fr 3 § 5).

The action can be brought by an heir, but not against an heir nor after a year (fr 4 § 6—fr 6).

APPENDIX TO BOOK V.

A. *Litterarum obligatio* (Obligation by Book-Entry).

(See p. 64.)

Until the discovery of Gaius' Commentaries there was no professed account of this matter except in Pseudo-Asconius and Theophilus, two late unsatisfactory authorities, to whom I think no attention is due on such a question. But Gaius gives a definite and trustworthy account (iii. 128—134, 138), and since the publication of his book many writers have treated of it[1]. Notwithstanding this there still appears to students an air of mystery about it. They think that *obligari litteris* meant that *A* by entering in his ledger *B* as a debtor for a certain sum of money thereby made *B* a debtor for that amount, and could call on the courts to compel *B* to pay. Not unnaturally this has seemed a strange state of the law. Perhaps, too, Gaius' over-neat classification of contracts has contributed to some misapprehension. *Litt. obl.* is distinguished from contracts made *re*, where there was delivery of something as the basis of the contract; and from contracts made *consensu*, where there were reciprocal obligations; and from contracts made *verbis*, where the person bound had made a formal promise. It looks, therefore, as if *litteris obl.* rested on a one-sided act of the

[1] See Danz *Gesch.* § 151 vol. ii p. 43 foll. The most important are Savigny *Verm. Schrif.* i 205 foll., Keller *Inst.* § 125 p. 102 foll., and Karlowa *RG.* ii § 66 p. 746 § 99. Voigt, *Die Bankiers*, is as usual elaborate, but he is quite wrong in his principal new contentions. See the excellent review by T. Niemeyer *ZRG.* xxiv 312 sqq. I am amazed that Czyhlarz (who so well exposed Voigt's construction of a *lex Maenia de dote*) should have adopted (*Instit.* 1889) Voigt's theory of a special *codex*, and his absolutely baseless invention of *expensum referre* for the debtor's entry of his debts. Sohm who adopted it in the 3rd and 4th editions of his *Institutionen* has now (7th ed., 1898) reverted to Keller's view, and Czyhlarz later (see 4th ed. 1899) has also abandoned Voigt, and given a very cautious account of the matter.

creditor, without value having passed, without reciprocal obligations to counterbalance, and without acknowledgment on the part of the debtor.

Cicero, in his speech *pro Roscio comoedo*, speaks of accurate bookkeeping as a criterion of an honest Roman. Many writers have taken his rhetoric (which is on a par with Macaulay's references to the knowledge of school-boys) as a statement of fact, and spoken as if every Roman *paterfamilias* kept books as fully and regularly as a banker. It is probably true that many Romans kept a ledger[1], just as many Englishmen have a copying-press for their letters. But many Englishmen have not the latter, and many Romans, doubtless, did not do the former. Business men with capital to put out, and especially bankers, kept ledgers; and perhaps the circumstances of Roman business made it necessary for private persons to do so, to an extent which is not now required. There were then no public stocks in which a man might invest his capital, and be saved from trouble by receiving his interest regularly, and getting his principal repaid or selling his stock. The usual period for loans was apparently very short, and therefore reinvestment was going on frequently.

A ledger is not a record of transactions but only a statement of the result of such transactions expressed in money. For the purpose of the ledger it is immaterial what the nature

[1] Keller and Savigny speak of a *codex accepti et expensi* as a *cashbook*, and distinguish it from a ledger (*Contocurrentenbuch*). I do not think anything really turns on the distinction, if the cashbook is a regular and orderly book and not a mere collection of hurried temporary entries (*adversaria*). Bankers would have several permanent books; ordinary persons probably only one. These litteral-contract entries would, in such a system of bookkeeping as I am acquainted with, probably not go into the cashbook, which is confined to entries of actual money, but into the ledger, which collects all entries from the journal (of invoices, *etc.*) and from the cashbook, and enters them in separate accounts for each debtor or creditor. Transfers from one account to another would be made directly in the ledger. I see no necessity for assuming a separate part of the *codex* for *res*, nor an invariable system of double entry, but otherwise I agree largely with Karlowa (*RG.* ii § 66), whose book was published long after I first wrote this essay.

of the transaction was. If it claims a place in the ledger at all, it must be because on some day or other, past or future, it produced, or in its nature would or will produce or extinguish, an obligation on the one part or the other to pay a sum of money. An orderly ledger, as now kept, has usually a separate page or portion of the book giving the results of transactions between the owner of the ledger and each person in constant business relations with him. Whether the owner pays him money, or pays money for him to someone else, or gives him goods, or has been promised money by him, and the time has come for payment without payment being made, in each case the owner enters the amount as a debt against him in a separate line, and in fact treats the matter as if he had in each case paid out that sum of money to the debtor. To make such an entry as if of a loan the Romans called *expensum alicui ferre*. On the other hand if the owner of the ledger has received money from a person, or from another on his behalf, or taken goods from him at a certain price, or has promised him money, and the time has come for payment without payment being made, in each case the owner enters the sum to his credit, or as the Romans said 'as received (by himself) for the other,' *acceptum alicui referre* (or sometimes *ferre*). If the ledger is regularly kept and in due order, persons being kept separate, and transactions duly dated and arranged accordingly[1], it is *prima facie* entitled to credence, at least as much as any other document in the owner's possession. Nay, it is entitled to more credence than most such documents, because of the importance of a regular record, and the probability of its being accurately kept for the owner's personal information. But any document may be false, and got up for the purpose of establishing a fictitious claim; and so each entry in the ledger may be fictitious, and the order cunningly devised for fraudulent purposes. Whether it is so or not is a matter for evidence and argument, whatever be the reason for the production of the books in a law-court. If no ledger is kept, the same transactions may be recorded, but

[1] The letters *AFPR* were often added to an entry which was made later, out of its right place. They stood for *ante factum, post relatum*, 'done before, entered afterwards' (Cic. *Orat.* ii 69, § 280).

dealings with one man are not kept separated from dealings with others.

If a person is debited with a loan of money or with the value of goods purchased, and if the borrower or purchaser refuse payment, the lender or vendor must of course prove payment of the money or delivery of the goods: if there is an entry debiting a man with interest, the lender must prove loan, agreement for interest, and accrual due: if there is an entry debiting a man with a sum for services rendered, or expenses incurred on his behalf, the claimant must prove the fact of their being rendered or incurred, and his right as *locator* or mandatee, or *negotiorum gestor* or *tutor* or the like, to charge him with them. The ground of obligation in these cases is the money actually paid down (*pecunia numerata*), or the sale, or the agreement for interest, or the *mandatum, etc.* In the case of a loan the Roman lawyers said the debtor was bound *re, i.e.* by actual transfer of physical object, viz. the coins; in the case of interest, that he was bound on an express verbal agreement (*verbis i.e. stipulatione*); in the other cases, *consensu*, by agreement to reciprocal benefits. The entry in the ledger might be used as evidence, but it was evidence only. The borrower, or purchaser, or hirer, or person otherwise served was not in any way, more or less, bound by such a book entry; he was not *obligatus litteris.* Possibly he might more easily be proved to be a debtor by the production of a ledger shewing the entry in due place, just as the direction of the wind may be more easily shewn by a weathercock; but the weathercock does not cause the wind, and the ledger does not create the obligation. Both exist independently.

But now suppose the moneys thus entered in the ledger to be due. If they are paid, the ledger-keeper enters on the credit side of his debtor's account the fact of payment, the two entries balance each other, and the matter is squared. But perhaps they are not paid, and some arrangement is made for delay. The creditor may of course refrain from enforcing payment, and simply wait and do nothing, or if there are several claims he may submit an account, get it confirmed or amended, and carry the balance to a fresh account. Or he may desire to close

this transaction or series of transactions, and arrange for a definite settlement. In modern times he might get his debtor to accept a bill of exchange. In Rome he made an entry to the debtor's credit, just as if he had received the money from him, and then made another entry to the debtor's debit of the same amount, as if lent him (*creditum*). The debtor then was bound not by any actual delivery of the money lent to him, not by the old business transaction which had first led to this matter and was agreed to be closed, not by any formal stipulation, but simply by the entry in the ledger (*ipso nomine* Gai. iii 132). He was *litteris obligatus* 'bound by writing.' That this entry was justified by the agreement of the parties had of course, if necessary, to be proved as any other contract might have to be proved. But the proof need not go further back than the ledger to give a *prima facie* good ground of action. It was not a mere vague understanding, nor an informal *pactum*, but had the requisite legal requirements of being definite and intentional. If disputes arose, what had to be proved or disproved was the defendant's consent to the entry, not plaintiff's having given consideration for the debt.

Suppose again that the creditor, *A*, was unwilling to give his debtor, *B*, any further delay, but was willing to give credit instead to a friend, *C*, of the debtor's. The arrangement then might be that *A* should enter the amount on the credit side of *B*'s account, and thus close the transaction with him, but enter the like amount to the debit of *C* in another account. *B* was now free, and *C* was now *litteris obligatus* to *A*[1]. In modern times a banker would do the same in receiving a cheque on himself from *C* to be put to *B*'s credit. Gaius mentions both cases, the first is a transfer *a re in personam*: the second a transfer

[1] In Livy xxxv 7 *Via fraudis inita erat (a feneratoribus) ut in socios qui non tenerentur fenebribus legibus nomina transcriberent: ita libero fenore obruebant debitores.* The object here was to substitute a non-Roman creditor for the real creditor, so that the rate of interest might be free from restriction. Probably the Roman creditor booked to the credit of the debtor an acceptance of the money lent, and debited the non-Roman ally with the same amount, who in his books debited the Roman debtor with principal and usurious interest and credited the original Roman creditor with it.

a persona in personam. And the second case might equally well occur when *B* had previously been in *A*'s books as *litteris obligatus*, or as *re* or *verbis*, or *consensu obligatus.*

It must be remembered that the use of forms and the legal value attached to them was a matter of growth and not of skilful device. The Romans did not say, 'we want a form of 'valid obligation for oral contracts, and another form of valid 'obligation for parties in commercial relations at a distance.' The first (*stipulatio*) arose from recognition of the clearly expressed intention of the parties; and just as mancipation was simply the dry residuum of a sale in public, with delivery of the object by one party, and delivery of the price in metal of full weight duly ascertained by the other, so *litteris obligari* was the result of the practice of merchants and bankers, and the usages of bookkeeping. The Roman lawyer found entries produced which, on the face of them, disclosed no independent ground of action, no purchase, no actual cash loan, no formal stipulation. But they were entries of a definite character, usual among business men, they were not mere oral agreements (*pacta*), but had a recognised precision and formality from their place in a regular ledger, which was analogous to the precise question and answer of a stipulation. The custom of business men procured them legal validity. The obligation was deemed to be created by the book-entry, because there was nothing else to base it on; and that an enforceable obligation should exist was the intention of the parties.

Of course the debtor, if he kept books, ought to make a corresponding entry in his own ledger[1], and the production of his books would form a natural part of the evidence (cf. Cic. *Rosc. Com.* §§ 1, 2; *Verr.* ii 1, 39 § 102). But creditors often keep much more complete accounts than their debtors, and their books are not on that account less worthy of acceptance, because their debtor has been negligent or dishonest. The entry which created the obligation is that made by the creditor in his own books (Gai. iii 137), just as in other cases, *e.g.* manci-

[1] A mere entry in a man's ledger that he owed *B* money did not avail as a gift: *nuda ratio non facit aliquem debitorem* (D. xxxix 5, l. 26).

pation (Gai. i 119), surrender in court (*ib.* ii 24), stipulation (iii 92, 116), formal release (iii 169), release by the bronze and balance (iii 174), it is the party who thereby gains a right or release, not the party who is to be charged, or from whom the right is gained, that gives as it were voice to the transaction. In these other cases the parties had to meet; in obligation by book-entry the debtor was not required to be present (Gai. iii 138), bookkeeping would not usually be so conducted, and the entries would often be the result of correspondence, and not of personal intercourse at the time.

It is easy to see that this one fact would give a reason in the interests of commerce for the acceptance of book-entries as a ground of obligation. And the convenience to the creditor especially, but really to both, of having only a claim or liability for an ascertained sum of money instead of a balance of claims and counterclaims, of debts and credits, would be a further reason. The law treated suits on book entries as it treated suits on actual cash loans: both came under the description of *certa pecunia credita* (Gai. iii 124; D. xii 1 fr 1 § 1, 2 § 3); and hence the procedure allowed a wager to be made which involved the condemned debtor in a fine of one-third the amount, and (probably) an oath to be peremptorily tendered. (Cf. Cic. *Rosc. Com.* 4 § 10; 5 § 14; Gai. iv 171; above, p. 71.)

Gaius (iii 128) speaks of *litt. obligatio* as created *veluti nominibus transcripticiis* 'for instance by transferred entries of debts.' The use of *veluti* does not imply in this case any more than in others[1], that there are other modes of obligation *litteris* than those given: it is merely a cautious expression in a popular lecture or treatise, where the writer does not choose to consider or discuss whether the enumeration is exhaustive[2]. I believe *litt. obl.* was confined to such cases of transfer. In original entries there was the cause in the actual payment, or actual business, or formal promise, and this cause was probably made part of the entry; it was only when a transfer took place that the entry constituted the ground of the obligation. But

[1] *E.g.* Gai. iv 141. See Schmidt *Interdicten-verfahren*, p. 234. Savigny *Verm. Schr.* i p. 251 note.

[2] Even if anyone presses *veluti*, the mode mentioned in § 134 is sufficient to satisfy such a supposed implication.

though original entries of business were presumed, I imagine they did not always exist. Accommodation bills in modern times afford an easy analogy. They may be drawn up just as if a sale of goods had taken place, and yet may be accepted without real value received. And so it may have suited Romans to make entries of feigned transactions, or otherwise arrange their books so as to make the real debt appear only as a transfer. How far in a suit for payment it was possible to go behind a book-entry, admitted to have been made by agreement for a liquidated amount, and contest the consideration which gave it birth, or the circumstances and intention of the parties, is a matter on which we have little information. It can hardly have been usual, and seems to require a plea of fraud. See the case of Otacilia, p. 295.

Gaius contrasts these 'book-entries' or 'debts' with *arcaria nomina*, 'box' or 'cash debts,' *i.e.* ordinary entries of loans or investments booked as such. The obligation, arising in the eye of the law, not from the entry of debt, but from the actual payment of the money (*numeratione pecuniae obligantur*) was of a character not specifically Roman, but part of the business of the world generally. I see no reason (quite the contrary) for supposing always a separate book for the different kinds of entries. That would depend on the particular person's choice, and on the extent of his transactions. Nor was there any special form of words required for a book-entry, or used by others in describing it. Inspection of the ledger shewing such a transfer professing to debit a person with a definite amount of money, and proof or presumption of such transfer having been made by consent, were enough to find a ground of obligation without any proof of payment, or sale, or other transaction. Such transfer or entry was no mere *pactum*; it stood by the side of stipulation as creating a legal obligation.

An anecdote given by Cicero (*de officiis* iii 14 §§ 58—60) has been rightly cited by Savigny as a case of *litterarum obligatio*. Canius goes to Syracuse for amusement, and is entrapped into purchasing a seaside villa from Pythius, a banker of the place. *Emit homo cupidus et locuples tanti quanti Pythius voluit et emit* (*hortos*) *instructos; nomina facit, negotium conficit, i.e.* Canius is wealthy and impatient, he accepts the price named

by Pythius, and agrees to buy the villa with its appurtenances and furniture just as it was. He desires to complete the purchase and become owner at once: for this purpose he must either pay the money down or give security or get Pythius to give him credit without security (D. xviii 1 fr 19). He has not the money with him, but Pythius is willing to give him credit. Accordingly Pythius[1] makes in his ledger three entries. 1. He debits Canius with the purchase money. 2. He credits him with the price as if received. 3. He debits him with a loan to the same amount. This is described generally as *nomina facit* 'he makes entries.' The second entry at once closes the sale and entitles Canius to demand delivery of the villa. The third entry binds Canius to the payment of the liquidated sum irrespective of the prior proceedings. With this last entry Pythius closes the business (*negotium conficit*), the result being that Canius owns the villa and gardens, and Pythius has invested their value in a loan to Canius. Canius afterwards finds his expectations disappointed and sees that Pythius has fraudulently made the villa appear more valuable than it really was. But he had no remedy; the sale was complete, and the loan was agreed on and duly entered in the ledger. He has himself to blame for his impatience and credulity. Cicero implies that if it had occurred in his own time Canius would have had a remedy. He might either have brought an action for fraud, or he might have pleaded fraud so as to defeat Pythius's demand for payment of the so-called loan. These remedies were introduced by Aquilius. In a somewhat similar case (but without book-entry) Papinian said the *actio empti* would apply to remedy the fraud (Vat. 13). But law had made progress between Cicero's time and Papinian's.

This special form of obligation went out of use before Justinian's time (Just. iii 21[2]), probably as Savigny (after

[1] I take Pythius to be subject to *facit*. Others (cf. Madvig *Verfassung* ii p. 187) take Canius as the subject. No doubt Canius is the last named subject; but the inference from this is rebutted by the repetition of Canius in the next succeeding sentence, as if Pythius had been just referred to. For the use of *nomina facit* see below, p. 291.

[2] Compare D. xliv 7 fr 1 § 1 (Gaius) with Gai. iii 89.

Schüler) suggests (pp. 244, 248) in consequence of the full development of the *constitutum debiti*[1], and perhaps the more frequent use of Greek bankers and Greek forms of commercial engagements. Gaius himself speaks of what might be considered (*fieri videtur* iii 84) as an obligation by writing (*litt. obl.*), viz. an acknowledgment of debt testified by promissory notes or written agreements (*chirographis et syngraphis*, cf. Cod. Theod. ii 4 fr 6), which are said by Gaius properly to belong to foreigners; *i.e.* they were the ordinary mode of dealing between parties who were not both Roman citizens. Justinian speaks (*Inst.* iii 21) of the applicability of the term to the case of a person who has given an acknowledgment of debt without having actually received the money. In this case he was not allowed to dispute the debt or its amount after five years according to Cod. Hermog. i 1 (p. 234 ed. Krüger) or after two years according to Justinian (Cod. iv 30 fr 5, 10, 13, 14, *etc.*). After this period the writing was unimpeachable, and hence might be considered to constitute for the future the ground of the obligation.

Something may be said on the terms used, and some special passages may be quoted and explained.

The terms *litteris obligari*, *litterarum obligatio*, *litteris* (*sc. facta*) *obligatio* are terms used by Gaius: *scriptura obligari*, *obligatio nominibus fieri dicitur* are expressions found in Justinian's *Institutes* in speaking of the same thing. *Litterarum obligatio* is also found in Cod. Theod. ii 4 fr 6 of written acknowledgments of debt, as in Gai. iii 134, nowhere else is the expression *litt. oblig.* found. In Cicero and other writers we have only bookkeeping expressions, *expensum ferre* and *nomen* or *nomina facere* being used for these entries of credit as well as for entries of actual expenditure.

Thus *expensum*, (*expensam, etc.*) *alicui ferre* is the regular phrase for debiting a person; *acceptum* (*acceptam, etc.*) *referre* for crediting, *e.g. Quod minus Dolabella Verri acceptum rettulit quam Verres illi expensum tulerit* (Cic. *Verr.* II 1, 39 § 100, cf.

[1] An instance of a *const. debiti* for balance of account is given in D. ii 14, fr 47 § 1.

§ 102): 'the balance of the amount debited against Dolabella by Verres over that credited by Dolabella to Verres.' *Quas pecunias ferebat iis expensas quibuscum contrahebat, eas aut scribae istius aut Timarchidi aut etiam isti ipsi referebat acceptas* (*ib.* 2, 70 § 170): 'all sums which Carpinatius debited 'against those with whom he had business, he used to put to the 'credit of Verres' secretary or of Timarchides or of Verres him-'self'; *i.e.* he was carrying on the business for Verres' account. *Deinde in codicis extrema cera nomen infimum in flagitiosa litura fecit; expensa Chrysogono servo* HS *sescenta milia, accepta pupillo Malleolo rettulit* (II 1, 36 § 92): 'in the last tablet of the 'ledger, the place of the last entry shewed over a criminal 'erasure a debit against Chrysogonus his ward's slave' (so I take him to be) 'of 600,000 sesterces which were credited to his 'ward Malleolus,' *i.e.* he had paid Chrysogonus the amount due to Malleolus. *In argentarii tabulis ei expensa pecunia lata est acceptaque relata* (*Caecin.* 6 § 17): 'in the banker's books he was 'debited with the purchase money, and credited with it when 'it was paid' (*Font.* 2 § 3 (17)). So in other writers *scimus non amplius quam terna milia peraeque in singulos menses ex ephemeride eum expensum sumptui ferre solitum* (Nep. *Att.* 13 § 6): 'we know that the regular amount of Atticus' monthly table 'expenses were not more than 3000 sesterces, the expenses being 'entered in a day-book and then every month summed and 'posted in the ledger under the head of *Sumptus*.' *Pecuniae locupletibus imperabantur, quas Longinus sibi expensas ferri cogebat....Accersit omnes qui sibi pecunias expensas tulerant acceptasque eas jubet referri* (*Bell. Alex.* 39, *i.e.* 'Longinus made 'requisitions of money from the rich and insisted on their 'being entered to his debit (as if on loan); afterwards directed 'them to credit him for them (as if repaid).' *Id quod argentario tuleris expensum, ab socio ejus recte petere possis* (*ad Heren.* ii 13 § 19): 'what you have booked against a banker, you are legally entitled to sue his partner for[1].' *Nec legata percepit Tiberius ulla aliter quam ut peculio referret accepta* (Suet. *Tib.* 15): 'Tiberius, after being adopted by Augustus and therefore

[1] Savigny refers this to 'litteral contract.' *Obl.* i p. 151. I think it is general.

'no longer *sui juris*, credited every legacy he received to his '*peculium*' (as a son under power would do).

In the Digest we have *expensum* (*-sam, etc.*) *ferre e.g.* xx 4 fr 12 § 5; xxxvi 1 fr 23 § 4; *expenso* (predicative dat.?) *ferre* xxxiii 10 fr 10 (where perhaps we should read the dative *supellectili* instead of the genitive); *acceptum ferre, e.g.* xlvi 3 fr 1; *accepto ferre, ib.* fr 3; xiii 7 fr 35; xxvi 7 fr 56; xxxii fr 91 §§ 4, 6; Cod. v 37 fr 3; *acceptum* (*-tam, etc.*) *referre* xxiii 3 fr 48 § 1; xxxii fr 29 § 2; xl 1 fr 6; *in acceptum referre* xlvi 3 fr 10 § 1.

These expressions are sometimes used metaphorically, *e.g. Nemo fuit qui mihi non vitam suam fortunas liberos rempublicam referret acceptam* (Cic. *Phil.* ii 5 § 12); cf. *ib.* 22 § 55; Liv. x 19 § 7; and in poets; *Acceptum refero versibus esse nocens* (Ov. *Trist.* ii 10), 'I owe my criminal character to my verses'; *incultis versibus et male natis rettulit acceptos regale nomisma philippos* (Hor. *Ep.* ii 1 234). So *acceptum ferre*[1] in Sen. *Ep.* 78 § 3 and in Plin. *HN.* cited below; *expensum ferre* in D. xxxvi 4 fr 3 § 3; xliii 1 fr 24.

Expensum ferre seems sometimes to mean simply 'to lend,' *e.g.* Liv. vi 20 § 6, *homines prope quadringentos produxit quibus sine fenore expensas pecunias tulerat*; Cael. ap. Cic. *Fam.* viii 4 § 4 *Eam legionem expensam tulit C. Caesari Pompeius.*

It is used of obligatory book-entries in Cic. *Rosc. Com.* 1 § 2; 4 § 13; 5 § 14 *Haec pecunia necesse est aut data aut expensa lata aut stipulata sit: expensam latam non esse codices Fanni confirmant.* So in the Baetic fiduciary bronze (Bruns[6] no. 110) *quam pecuniam Baianio dedit dederit, credidit crediderit, expensumve tulit tulerit* (see above, p. 101); and in Val. M. viii 2 § 22 (quoted p. 295): Papinian in *Vat.* 329 *sub cognitione cognitor non recte datur, non magis quam mancipatur aut acceptum vel expensum fertur; nec ad rem pertinet an ea condicio sit inserta quae non expressa tacite inesse videatur.* In Plin. *Ep.* ii 4 *quicquid mihi pater tuus debuit, acceptum tibi fieri* (*al. ferri*) *jubebo,* a book-credit is apparently intended.

Referre is sometimes used with *acceptum* of obligatory entries, but is of general use for entry in a ledger, *e.g.* Cic. *Verr.* II 1, 39 § 102; *Rosc. Com.* 1; D. xxxv 1 fr 82.

[1] For *acceptum* (*accepto*) *ferre* or *facere* of verbal release, see p. 55 n.

An account book is *codex accepti et expensi* (Cic. *Rosc. Com.* 1 § 4; 2 § 5; 3 § 9), often referred to as *tabulae* 'boards' (*ib.* § 2), of which, covered with wax, it was in fact composed. Into this, especially if kept as a ledger with each customer's account separate, the entries would be posted from the rough day-book (*adversaria, Rosc. Com.* 2 § 5), perhaps originally a number of loose sheets or tablets. To post the ledger is *conficere tabulas* (*ib.* §§ 6, 8 *Verr.* ii 1 39 § 102; 2, 76 § 186; *Cael.* 7 § 17).

The separate entries or items were *nomina*, properly 'names of debtors' (or creditors). So *nomina referre in codicem* (*Rosc. Com.* 1 §§ 2, 3, *etc.*). Each account is *ratio;* hence Plaut. *Truc.* 750 *ratio accepti scribitur*; Cic. *Verr.* ii 1, 39 § 100 *Hinc ratio cum Q. et Cn. Postumis Curtiis multis nominibus, quorum in tabulis iste habet nullum*; Sen. *Ben.* iv. 32 § 4 *Apud me istae expensorum acceptorumque rationes dispunguntur* 'are examined' (cf. D. L 16 fr 56 *dispungere est conferre accepta et data*).

Rationibus inferre is to enter an item in the accounts (Suet. *Jul.* 47; D. xl 7 fr 40 pr). The credit and debit sides of each account were usually on separate (facing?) pages, cf. Plin. *HN.* ii 22 *Huic* (*sc. fortunae*) *omnia expensa, huic omnia feruntur accepta, et in tota ratione mortalium sola utramque paginam facit.* The dates were added to the entries *e.g.* Cic. *Verr.* II 2, 77 § 188 *in his tabulis magnam rationem C. Verruci permultis nominibus esse, meque hoc perspicere ex consulum mensuumque ratione* 'looking to the consuls (*i.e.* years) and months'; cf. D. ii 13 fr 1 § 2.

Nomen facere is 'to make an entry,' hence 'to make a loan,' *e.g.* Cic. *Fam.* vii 23 § 1 *Accepi Aviani litteras, in quibus hoc inerat liberalissimum, nomina se facturum cum venisset, qua vellem die* 'that he would make me loans any day I liked.' So in Cic. *Off.* iii 14 § 59 of a contract *litteris* (above, p. 287). It is frequent in the Digest, *e.g.* ii 14 fr 9 pr; xv 1 fr 4 § 1; fr 52 pr *si ex re pupilli nomina fecit vel pecuniam in arca deposuit*; xvii 1 fr 12 § 15; xxvi 7 fr 16; fr 39 § 14; xl 5 fr 41 § 17 *Stichus arcarius probante domino nomina fecit, etc.* (In D. xv 1 fr 4 § 1 it means to debit one's self. In D. xxxiii 1 fr 1 *si ex stipulatu aut nomine facto petatur* it may have meant a *litt. obl.*) The book containing such loans or investments was called

Kalendarium, which was also used for a man's investments collectively *e.g.* D. xxxii fr 64 *cum quis kalendarium praestari alicui voluerit...ipsae quoque pecuniae, si adhuc kalendario id est nominibus faciendis destinatae essent, eidem fidei commisso cedere debeant*; xxxiii 2 fr 37 *calendarii usus fructus*, xxvi 7 fr 39 § 14 *actio kalendarii* 'the right of suing for the investments.' Cf. xxxii fr 34 § 1; fr 41 § 6, *etc.*

Cicero says of himself *bonum nomen existimor* (*Fam.* v 6). So in *S.C. Macedonianum: ut scirent qui pessimo exemplo faenerarent, nullius posse filii familias bonum nomen expectata patris morte fieri* (D. xiv 6 fr 1 pr).

The genitive with *nomen* denotes the debtor, very rarely the creditor (v. Salpius *Novation, etc.* p. 98). The debt may be not in money but some other thing; cf. D. xiii 7 fr 18 pr; xx 1 fr 13 § 2.

Three other words, all compounds of *scribere*, and more or less connected with bookkeeping, may be mentioned.

Perscribere[1] is to 'write in full,' 'write out,' *e.g.* Cic. *Verr.* ii 1, 21 § 57; *Cat.* iii § 13, *etc.*; so of writing an acknowledgment of debt and pledge (*chirographum*, D. xx 1, fr 6 § 1); and it and the noun *perscriptio* are specially used in money matters in two senses: (1) of the person, credited or debited with sums of money, writing entries in his account books, *e.g. Rosc. Com.* 1 § 2 *Aeque tabulae condemnantur ejus qui verum non rettulit et ejus qui falsum perscripsit*, the former phrase being here used of the debtor, the latter of the creditor; *ib.* 2 § 5. In Cic. *Flac.* 19 § 44 the object of the expenditure is named; *in aedem sacram reficiendam se perscripsisse dicunt.* So also *Verr.* v 19 § 48.

(2) Of writing an order (cheque) on a banker; Liv. xxiv 18 § 14 *a quaestore perscribebatur.* So apparently in Cic. *Att.* xiii 51 *Tiro narravit perscriptionem tibi placere*; xvi 2 § 1 *quod perscribi oportet.* In the wax tablets found at Pompeii, con-

[1] Since writing this I have seen a somewhat similar account by L. Mitteis in commenting on the use of *διαγράφειν* in some Greek records *ZRG.* xxxii 213 sq. He takes *διαγράφειν* in these documents regularly to mean 'to pay,' and takes *perscribere* and *perscriptor* often in this sense. 'To give a cheque' is in English use the same as 'to pay,' presuming of course that the cheque is honoured.

taining receipts to an auctioneer L. Caecilius Jucundus for the sale money for different persons' goods sold by him for their account, the external docquet is '*perscriptio*,' which perhaps describes the contents as a warrant for payment to the vendor (framed as a receipt—like Treasury warrants). See Bruns[6] no. 131, and Mommsen *Hermes* xii p. 111 (above, p. 59).

In many places the precise meaning is uncertain, *e.g.* Cic. *Orat.* i 58 § 250 *si de tabulis et perscriptionibus controversia est*; *Phil.* v 4 § 11 *sestertium septiens miliens falsis perscriptionibus donationibusque avertit*; *Att.* ix 12 § 3 *Viri boni usuras perscribunt*, 'are entering up their interest'? 'are giving cheques for the interest?' Suet. *Jul.* 42 *deducto siquid usurae nomine numeratum aut perscriptum fuisset.*

Rescribere is 'to book a credit' or 'give an order for repaying' Ter. *Phorm.* 922 *Transi sodes ad forum atque illud mihi argentum rursum jube rescribi.* PH. *Quodne ego discripsi* (*al. perscripsi*) *porro illis quibus debui?* Cic. *Att.* xvi 2 § 1 *De Publilio quod perscribi oportet, moram non puto esse faciendam; de residuis* $\overline{\text{CCCC}}$ HS $\overline{\text{CC}}$ *praesentia solvimus, reliqua rescribimus*; Hor. *Sat.* ii 3 76 *Dictat* (gives an order for a loan) *quod tu nunquam rescribere possis.* So *scribe decem a Nerio*, 'give a cheque on Nerius for ten' (Hor. *ib.* 69)[1].

Transcribere is to make a transfer in the ledger, *e.g.* D. xvi 1 fr 13 *Si hereditatem emerit et aes alienum hereditarium in se transcribat*, 'debit herself with the debts due from the estate.' (It is also used of transfers of landed property D. xix 5 fr 12; xxxii fr 41 § 9.)

A practice seems to have prevailed, in order to get either greater secrecy or better security, of interposing between lender and borrower, some other persons, called by Seneca *pararii* 'balancers.' Thus *Ben.* ii 23 *Quidam nolunt nomina secum fieri nec interponi pararios nec signatores advocari, chirographum tantum dare.* 'Some persons like as little fuss as possible 'made about a loan, simply an acknowledgment in writing, no 'book entries, no interposition of 'balancers,' no summoning of

[1] Besides the proof thus afforded by the bankers' books (cf. D. ii 13 fr 9 § 2), the creditor adds ever so many acknowledgments drawn up by Cicuta (*adde Cicutae nodosi tabulas centum*).

'witnesses to seal a deed.' *ib.* iii 15 § 2 *Adhibentur ab utraque parte testes, ille per tabulas plurium nomina interpositis parariis facit: ille non est interrogatione contentus nisi reum manu sua tenuit* ('by an autograph bond'?). What the *pararii*[1] were (accountants? brokers?) is not known. Some writers on *litteris obligatio* have imagined book-entries made by one person in another's books and used these passages and Cic. *Att.* iv 17 (quoted below) in illustration. I cannot understand book-entry giving rise to an obligation between parties whose books are not used. There is nothing in any of these passages to prove that entries binding *A* to *B* were made in *C*'s ledger. If book-entries are intended, it could only be by binding *A* to *C* (a banker perhaps) in *C*'s books, *C* to *D* in *D*'s books, and *D* to *B* in *B*'s books. Whether in Cic. *Rosc. Com.* i §§ 1, 3 something of this kind was referred to, is a question insoluble in the present state of the MSS. Borrowing a note-book or blank tablets (*codex, pugillares*) from a person in order to get a written acknowledgment from a debtor (D. xiii 6 fr 5 § 8; fr 17 § 3) is a totally different affair: it is merely what would in modern times be borrowing a sheet of paper[2] for the purpose. Only conceive a merchant's borrowing another merchant's ledger to make binding entries of his own transactions!

A passage in Cicero (*Att.* iv 17) is often quoted in this connexion. He is referring to a monstrous agreement made between the consuls of the year B.C. 54, and two of the candidates for the consulship of the following year. One of the candidates C. Memmius read this out in the senate. The consuls were to use their influence on behalf of himself and Domitius. They in turn were to procure for the consuls the provinces they desired. To do this they were to produce three

[1] *Pariator* is used of one who pays up and thus balances his account D. xxxv 1 fr 81; Inscr. *ap.* Bruns no. 140. I derive both words from *par* not *parare*. L. Havet in Wölfflin's *Archiv* x 525 takes *pararii* to be persons to whom the loan is made in the first instance in different amounts and who then lend these sums to the real debtor.

[2] The difference is due to modern improvements. The ancients used wax tablets in which the wax could be smoothed again and used afresh (analogous to our slates). If we borrow paper, it is a case of *mutuum*, not *commodatum*: we should repay the like, not the same.

augurs to declare they were present when a *lex curiata* was passed to give the consuls the proconsular *imperium*, and two men of consular rank to declare that they were present in the senate when the distribution of the provinces was arranged, no such law having been passed, and no meeting of the senate having been even held on the day named in the fictitious resolution. And they bound themselves to do this under a penalty of 40,000 sesterces to be paid to each consul. Cicero proceeds: *haec pactio non verbis sed nominibus et perscriptionibus multorum tabulis cum esse facta diceretur, prolata a Memmio est nominibus inductis auctore Pompeio, i.e.* The agreement was not made by a stipulation (*verbis*) but by book-entries and orders for payment passed through several persons' (bankers?) books. No doubt the three augurs and two consulars were secured beforehand; book-entries or money orders in their favour were made. When at Pompey's instance the agreement was produced, the names of the consulars and augurs were obliterated (*nominibus inductis*). It is useless to conjecture in what precise mode the bargain was made. Probably there was some further *pactum ne peteretur* to prevent the parties claiming the penalties if the bargain was duly performed[1].

A story given by Valerius Maximus (viii 2 § 2) appears to relate to book-entry. C. Visellius Varro, when seriously ill, allowed a woman named Otacilia, who had been his mistress, to debit him with 300,000 sesterces (*expensa ferri sibi passus est*), his intention being that if he died she should sue his heir for that amount. It was in fact a *mortis causa donatio* made by book-entry. Varro recovered, much to Otacilia's regret: and she sued him for the money. The great lawyer C. Aquilius was *judex*, and having some of the leading men as his assessors gave judgment against the claim. If the case was after C. Aquilius had introduced (as praetor, or advising the praetor on other occasions) the use of a plea *doli* (see Cic. *Off.* above, p. 287), the decision would be easy to understand, provided the

[1] Other views may be seen in Rein *Priv. R.* p. 691; v. Salpius *Novat.* p. 94; Tyrrell *Cicero's Corresp.* vol. ii, letter cxlix. See my article in *Class. Rev.* i 67.

issue contained such a plea. It would as Savigny says (*Verm. Schr.* i 255) be justified from the disgraceful ground of the gift (D. xii 5 fr 8), from its being contrary to the rules of the *lex Cincia* (*Vat.* 310, 311), and from its being a *mortis causa don.* (D. xliv 4 fr 4 § 1). True, a condition of payment only after death would render a book-entry nugatory (*Vat.* 329). But Valerius' words (*eo consilio*) seem to point to no such condition having been expressed. As *judex* Aquilius would be bound by the issue, and if the issue alleged debt on book-entry one does not see how the judge was to go behind the simple entry and consider the ground or conditions of the gift, unless fraud was pleaded[1]. Valerius says nothing of this and regards the whole case and judgment as exceptional. But as he confuses book-entry and verbal obligation, by calling the entry *inanis stipulatio* one cannot trust to the accuracy of his report.

B. *Nexum*[2]. (See p. 70.)

1. There is no doubt of the original meaning of *nexum*. *Nectere* is *to tie* or *bind* (*nectere ligare significat* Fest. p. 165) and is used with an accusative both of the thing tied and of the band produced by tying. *Necte comam myrto, nectere colla lacertis, pars brachia nectit* (link their arms), are instances of the first; *Veneris, dic, vincula necto, Medo nectis catenas,* of the second. Both are found in Horace's *Apricos necte flores, necte meo Lamiae coronam.* The metaphorical use is seen in Cic. *N. D.* i 4 § 9 *Est enim admirabilis quaedam continuatio seriesque rerum ut alia ex alia nexa et omnes inter se aptae conligataeque videantur*; *T. D.* 8, 17 *Omnes virtutes inter se nexae et jugatae sunt, etc.*; D. xxvii 4 fr 3 § 8 *quod negotiis tutelae tempore gestis nexum probatur.* Hence *nexum* is a tie or band or link, and *nexus* (subst.) is 'tying' and differs from it no more than 'banding' or 'bandage' does from 'band.' Our English 'bond' used both of a legal obligation in writing and a prisoner's

[1] Cf. Pernice *Labeo* II[2] pp. 198, 239: Kübler *ZRG.* xxvii p. 85.

[2] The literature of the subject is given in Muirhead's *Hist. Rom. Law* p. 151. An essay by Mitteis has since appeared in *ZRG.* xxxv, principally directed against Huschke's publicist views.

chains illustrates the ambiguity which attends the Latin words in some passages.

Roman history and law furnish at least three uses of the term which deserve attention; the use in Livy's account of the early struggles at Rome arising from the harsh treatment of insolvent debtors which was ended by the *lex Poetelia* B.C. 326; the general use in Cicero and the early lawyers; the use in the Digest and Codes.

2. Livy recounts the public disturbances arising from insolvent debtors in four books of the early history; viz. first, ii 23—32, when the plebs seceded to the *Mons Sacer* and were brought back by Menenius Agrippa B.C. 495; next in vi 14—20 Manlius' sedition B.C. 385, and again *ib.* 27 B.C. 381, and *ib.* 34—36 B.C. 377—371; next in vii 19—21 B.C. 353, 352; last in viii 28 B.C. 326. In three of these books (ii, vii, viii) he uses the term *nexum* and *nexus*; in the vith book though describing similar scenes of distress he speaks of *judicati* and *addicti* but not of *nexi*. It is probable that the difference of language is simply an echo of the authority he had before him.

The principal passages from Livy are as follows:

B.C. 495. Livy ii 23 § 1 *Civitas secum ipsa discors...maxime propter nexos ob aes alienum. Fremebant se foris pro libertate et imperio dimicantes, domi a civibus captos et oppressos esse.* A centurion of advanced age in miserable plight burst into the forum and said (§ 5) *Sabino bello se militantem, quia propter populationes agri non fructu modo caruerit sed villa incensa fuerit, direpta omnia, pecora abacta, tributum iniquo suo tempore imperatum, aes alienum fecisse.* (§ 6) *Id cumulatum usuris primo se agro paterno avitoque exuisse, deinde fortunis aliis, postremo velut tabem pervenisse ad corpus; ductum se ab creditore non in servitium sed in ergastulum et carnificinam esse. Inde ostentare tergum foedum recentibus vestigiis verberum*[1]. *Ad haec visa auditaque clamor ingens oritur. Non iam foro se tumultus tenet sed passim totam urbem pervadit. Nexi vincti*

[1] ὅθεν διαλῦσαί μου τὸ χρέος οὐκ ἔχων ἀπήχθην δοῦλος ὑπὸ τοῦ δανειστοῦ σὺν τοῖς υἱοῖς δυσίν· ἐπιτάττοντος δὲ τοῦ δεσπότου τῶν οὐ ῥᾳδίων ἔργων τι ἀντειπὼν αὐτῷ πληγὰς ἔλαβον μάστιξι πάνυ πολλάς κ.τ.λ. Dionys. vi 26 p. 1099.

solutique[1] *se undique in publicum proripiunt, implorant Quiritium fidem.*

The Volscians making an attack on the Roman territory, the plebeians are reluctant to take arms until the consul Servilius (24 § 6) *edixit ne quis civem Romanum vinctum aut clausum teneret, quo minus ei nominis edendi apud consules potestas fieret, neu quis militis donec in castris esset bona possideret aut venderet, liberos nepotesve ejus moraretur*[2]. (§ 7) *Hoc proposito edicto et qui aderant nexi profiteri extemplo nomina, et undique ex tota urbe proripientium se ex privato, cum retinendi jus creditori non esset, concursus in forum ut sacramento dicerent fieri.*

(27 § 1) After defeating the Volsci, Sabini, and Aurunci, the Roman people *victor tot intra paucos dies bellis promissa consulis fidemque senatus expectabat, cum Appius et insita superbia animo et ut collegae vanam faceret fidem, quam asperrime poterat, jus de creditis pecuniis dicere. Deinceps et qui ante nexi fuerant creditoribus tradebantur et nectebantur alii.* (§ 8) *Desperato consulum senatusque auxilio, cum in ius duci debitorem vidissent, undique convolabant.*

Disturbances take place and eventually a dictator is appointed (30 § 4), viz. M. Valerius, who issues an edict similar to that of Servilius. An army is again formed, and the Volsci, Aequi and Sabini are defeated. Valerius then, (31 § 8) *omnium actionum in senatu primam habuit pro victore populo rettulitque quid de nexis fieri placeret.* The motion is rejected through the influence of the *feneratores* (§§ 7, 9), and a secession to the *Mons Sacer* takes place, which is ended by the institution of the tribunate and by the release both of insolvents from their debt, and of those from confinement who were detained either on account of failure to pay at the time agreed on or for judgment debts[3].

[1] οἱ πρὸς τὰ χρέα δουλωθέντες κομῶντες ἀλύσεις ἔχοντες οἱ πλεῖστοι καὶ πέδας. *ib.* p. 1100.

[2] τὰς τούτων οἰκίας μηδένα ἐξεῖναι μήτε κατέχειν μήτε πωλεῖν μήτ' ἐνεχυράζειν μήτε γένος αὐτῶν ἀπάγειν πρὸς μηδὲν συμβόλαιον. *ib.* 28 p. 1105—6.

[3] These terms were stated by Menenius, τοὺς ὀφείλοντας χρέα καὶ μὴ δυναμένους διαλύσασθαι πάντας ἀφεῖσθαι τῶν ὀφλημάτων δικαιοῦμεν καὶ εἴ

Time passes, the XII tables are enacted, and the next we hear in Livy of disturbances on account of debtors is connected with Manlius in B.C. 385.

Livy vi 11 § 8 *Manlius non contentus agrariis legibus quae materia semper tribunis plebi seditionum fuisset, fidem moliri coepit; acriores quippe aeris alieni stimulos esse qui non egestatem modo atque ignominiam minentur, sed nervo ac vinclis corpus liberum territent. Et erat aeris alieni magna vis, re damnosissima etiam divitibus, aedificando contracta.* (This was in consequence of the destruction of Rome by the Gauls.)

(14 § 3) *Centurionem, nobilem militaribus factis, iudicatum pecuniae cum duci vidisset, medio foro cum caterva sua accurrit et manum iniecit...*"*tum vero ego*" *inquit* "*nequicquam hac dextra Capitolium arcemque servaverim, si civem...in servitutem ac vincla duci videam.*" *Inde rem creditori palam populo solvit libraque et aere liberatum emittit.*

The centurion declared (§ 7) *se militantem, se restituentem eversos penates, multiplici iam sorte exsoluta, mergentibus semper sortem usuris*[1]*, obrutum fenore esse.*

Manlius (§ 10) *Fundum in Veienti, caput patrimonii, subiecit praeconi,* "*ne quem vestrum*" *inquit* "*Quirites, donec quicquam in re mea supererit, iudicatum addictumve duci patiar.*"

Summoned before the dictator Cornelius Cossus, Manlius (according to Livy) addressed him (15 § 9) "*Offendit*" *inquit* "*te,*

τινων ἤδη τὰ σώματα ὑπερημέρων ὄντων ταῖς νομίμοις προθεσμίαις κατέχεται, καὶ ταῦτα ἐλεύθερα εἶναι κρίνομεν· ὅσοι τε δίκας ἁλόντες ἰδίας παρεδόθησαν τοῖς καταδικασαμένοις καὶ τούτους ἐλευθέρους εἶναι βουλόμεθα, καὶ τὰς καταγνώσεις αὐτῶν ἀκύρους ποιοῦμεν (Dionys. vi 83 p. 1231). See Schwegler *Röm. Gesch.* ii 259. Livy mentions only the appointment of tribunes.

[1] Moneylending is the same in modern times. The following three cases are from the evidence given before a Committee of the House of Commons in 1897; and the facts were admitted by the moneylender:

A. Loan £115; repaid £175; debt sued for £689.

B. Loan £400; promissory note £648 (Feb. 1888); repaid (by Sept. 1888) £175. 10*s.*; balance £472. 10*s.*; add default interest from Sept. 1888 to Jan. 1889, at ½*d.* per shilling per week; amount still due £787. 10*s.*

C. Loan £460; repaid £456; interest £280; default interest £213. 16*s.* 8*d.*

The moneylender said in defence that he was always open to a reasonable reduction (*Times* July 28 and 30, 1897).

A. Corneli, vosque patres conscripti, circumfusa turba lateri meo? Quin eam diducitis a me singuli vestris beneficiis, intercedendo, eximendo de nervo cives vestros, prohibendo iudicatos addictosque duci, ex eo quod affluit opibus vestris sustinendo necessitates aliorum? Sed quid ego vos de vestro impendatis hortor? Sortem reliquam[1] *ferte; de capite deducite quod usuris pernumeratum est; iam nihilo mea turba quam ullius conspectior erit.*

Manlius is imprisoned (*vinctus in carcere*), and eventually released by the senate. He again recommences (B.C. 384) similar proceedings. *Plebs, dum tam potentem habebat ducem, spem cepit fenoris expugnandi* 18 § 2. Two tribunes of the commons indict him. At the trial (20 § 6) *homines prope quadringentos produxisse dicitur, quibus sine fenore expensas pecunias tulisset, quorum bona venire, quos duci addictos prohibuisset.* Manlius is after trial put to death (§ 12).

In the year B.C. 380 there were no censors, two attempts at creating them having failed, the first from the death of one, the second from informality. A third attempt was prevented by scruples. (27 § 6) *Eam vero ludificationem plebis tribuni ferendam negabant: fugere senatum testes, tabulas publicas, census cuiusque, quia nolint conspici summam aeris alieni, quae indicatura sit demersam partem a parte civitatis, cum interim obaeratam plebem obiectari aliis atque aliis hostibus....*(§ 8) *Quod si sit animus plebi memor patrum libertatis, se nec addici quemquam civem Romanum ob creditam pecuniam passuros, neque dilectum haberi, donec inspecto aere alieno initaque ratione minuendi eius, sciat unusquisque quid sui, quid alieni sit, supersit sibi liberum corpus, an id quoque nervo debeatur. Merces seditionis proposita confestim seditionem excitavit. Nam et addicebantur multi et...novas legiones scribendas patres censuerant. Neque duci addictos tribuni sinebant, neque iuniores nomina dabant. Patribus minor in praesens cura creditae pecuniae iuris exsequendi quam dilectus erat.*

(31 § 4) *Condiciones impositae patribus, ne quis, quoad debellatum esset, tributum daret, aut ius de pecunia credita diceretur.*

B.C. 377. The debts of the commons are increased by

[1] So Madvig (*sortem aliquam* MSS.). 'Take the remainder of the principal sum, having first deducted what has been paid as interest.'

having to pay a tax for building a wall (32 § 1). Then (34 § 2) *Cum iam ex re nihil dari posset, fama et corpore iudicati atque addicti creditoribus satisfaciebant, poenaque in vicem fidei cesserat.*

(35 § 4) *Creati tribuni C. Licinius et L. Sextius promulgavere leges omnes adversus opes patriciorum et pro commodis plebis, unam de aere alieno, ut deducto eo de capite quod usuris pernumeratum esset, id quod superesset triennio aequis pensionibus persolveretur; alteram de modo agrorum, etc.*

B.C. 369. (36 § 12) Licinius and Sextius asked *an placeret fenore circumventam plebem, potius quam sorte creditum solvat, corpus in nervum ac supplicia dare, et gregatim quotidie de foro addictos duci et repleri vinctis nobiles domus, et ubicumqae patricius habitet, ibi carcerem privatum esse.*

Both the above-named laws were carried B.C. 368 (Liv. vi 39 § 2).

In the viith book of Livy the word *nexum* recurs.

In B.C. 357 (16 § 1) a law *de unciario fenore* is carried by the tribunes.

B.C. 354. (19 § 5) *Etsi unciario fenore facto levata usura erat, sorte ipsa obruebantur inopes nexumque inibant.*

A commission of five *mensarii* were appointed to relieve the general insolvency of the commons B.C. 352. (21 § 8) *Tarda nomina et impeditiora inertia debitorum quam facultatibus aut aerarium, mensis cum aere in foro positis, dissolvit, ut populo prius caveretur, aut aestimatio aequis rerum pretiis liberavit.*

In the next year (22 § 6) *Quia solutio aeris alieni multarum rerum mutaverat dominos, censum agi placuit.*

In B.C. 347 (27 § 3) *Semunciarium tantum ex unciario fenore factum et in pensiones aequas triennii, ita ut quarta praesens esset, solutio aeris alieni dispensata est; et sic quoque parte plebis affecta, fides tamen publica privatis difficultatibus potior ad curam senatui fuit. Levatae maxime res, quia tributo ac dilectu supersessum.*

In B.C. 342 (vii 42) a bill is stated to have been brought forward and perhaps carried by L. Genucius a tribune of the commons *ne fenerare liceret,* but Livy's authorities were not agreed.

In viii 28 we have the story of the abrogation of *nexum.*

B.C. 326 *Eo anno plebei Romanae velut aliud initium libertatis factum est quod necti desierunt; mutatum autem ius ob unius feneratoris simul libidinem, simul crudelitatem insignem. L. Papirius is fuit, cui se C. Publilius ob aes alienum paternum nexum dederat*[1]. Papirius attempts to seduce Publilius, but fails, and orders him to be stripped and flogged. The youth after being flogged bursts from the house and excites a tumult. *Victum eo die ob impotentem iniuriam unius ingens vinculum fidei, iussique consules ferre ad populum, ne quis, nisi qui noxam meruisset, donec poenam lueret, in compedibus aut in nervo teneretur; pecuniae creditae bona debitoris, non corpus, obnoxium esset. Ita nexi soluti, cautumque in posterum ne necterentur.*

In B.C. 216 (Liv. xxiii 14 § 3) we hear that the dictator M. Junius Pera *edixit, qui capitalem fraudem ausi quique pecuniae iudicati in vinculis essent, qui eorum apud se milites fierent, eos noxa pecuniaque sese exsolvi iussurum*, a step which Livius calls *ultimum prope desperatae rei publicae auxilium.*

3. It is difficult to imagine that the state of things described in Livy's vith book was really different from that described in the iind, viith and viiith. In all we find the disturbances arose from distress, and the distress from debt; the debt was caused by loans payable with interest, and the accumulation of unpaid interest exceeded the amount of the original loan. The debtors were led off into confinement; were put in chains or prison; were slaves in fact though not in the eye of the law, and were disgraced and often ill-used. The difference is that in the vith book they are spoken of as *iudicati addictique*, in the other books as *nexi*. The law described in the viiith book deals distinctly with *nexi*, and says that the *nexi* were freed and that *necti* was abolished for the future.

There is nothing in Livy which suggests any other than a corporal meaning for *necti* and *nexus*. 'To be bound' and 'bondsman' appear to be the proper translation. *Nexi vincti*

[1] Cf. Val. Max. vi 1 § 9 *Cum propter domesticam ruinam et grave aes alienum P. Plotio nexum se dare (T. Veturius) adulescentulus admodum coactus esset.*

solutique are 'Bondsmen (or 'prisoners for debt') in chains and at large[1],' confinement being in fact carried out sometimes by shackles (*vinclis, compedibus*) or stocks (*nervo*), sometimes by mere imprisonment, or the *parole* or practical consent of the debtor. *Nexum inibant* and *nectebantur* are 'entered into bonds,' 'became bond' or 'bound,' *i.e.* passed from a state of personal liberty into one of bondage or practical slavery. *Nexum se dare alicui* is like *nuptum se dare* 'to give oneself to someone to bind.' If it were not for other writers than Livy, a metaphorical instead of a corporal meaning would not have been thought of with *necti, nexus, nexum.* Nor can we give any other meaning to the word in Columella i 3 § 12 where he speaks of the overpowerful *qui possident fines gentium, quos proculcandos pecudibus et vastandos feris derelinquunt, aut occupatos nexu civium et ergastulis tenent.* So Justin xxi 1 § 5 *Dionysius nexorum tria milia carcere dimittit; ib.* 2 § 2 *nec, uti pater, carcerem nexis sed caedibus civitatem replet.*

The XII tables were enacted between the events described by Livy in his ii[nd] and vi[th] books. Gellius (xx 1 § 41) describes the procedure ordained by them, applicable especially to debt on loan. It deals with admissions of loans and with judgments. *Duci* is applied both to taking into court and taking from court into confinement: the debtors are *vincti aut nervo aut compedibus*, and unless they come to terms with their creditors are kept by them *in vinculis* for sixty days; but during this time are produced in the *comitium* on three market days and notice of their debt is given. If at last they are not redeemed they become *addicti* and either *capite poenas dant aut trans Tiberim peregre venum eunt.* With the exception of this last clause the whole procedure agrees well with Livy's description; only that he applies *nexus* to the debtor, and does not make any difference between their state before and after final addiction. The law of the XII tables in this matter probably only confirmed existing practice.

4. One mention of *nexum* in the XII tables has come down

[1] Madvig *Verfassung* ii p. 193 n. Cf. Huschke *Nexum* p. 70; D. L 16 fr 216 *Verum est eum qui in carcere clusus est non videri neque vinctum neque in vinculis esse nisi corpori ejus vincula sint adhibita.*

to us. Festus, p. 177 sub v. *nuncupata* quotes: *cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto.* Here we are placed in a different sphere altogether from that of Livy. *Nexum* is evidently a contract of some sort, a bond perhaps, but a bond not of a physical but of an abstract nature. With this the use of the term in Cicero accords. It is (except in *RP.* ii § 9) used with or for *mancipium*, apparently to denote mancipatory conveyance of property or the legal guaranty of title thence arising. These are the passages.

Caecin. § 102 *Sulla ipse ita tulit de civitate (Volaterranorum), ut non sustulerit horum nexa atque hereditates.*

Mur. § 3 *In iis rebus repetendis quae mancipi sunt, is periculum praestare debet, qui se nexu obligavit.*

Har. Resp. § 14 *Multae sunt domus in hac urbe...jure optimo sed tamen jure privato, jure hereditario, jure auctoritatis, jure mancipi, jure nexi*[1].

Orat. i § 173 *In causis centumviralibus, usucapionum, tutelarum, gentilitatum, agnationum, adluvionum, circumfluvionum, nexorum, mancipiorum, parietum, luminum, stillicidiorum, testamentorum ruptorum aut ratorum, ceterarumque innumerabilium jura versentur.*

Ib. iii § 159 *Omnes translatis et alienis magis delectantur verbis, quam propriis et suis: nam si res suum nomen et vocabulum proprium non habet, ut pes in navi, ut nexum quod per libram agitur, ut in uxore divortium, necessitas cogit quod non habeas aliunde sumere.*

RP. i § 27 *Huic soli licet omnia, non Quiritium sed sapientium jure, pro suis vindicare, nec civili nexo sed communi lege naturae, quae vetat ullam rem esse cujusquam nisi ejus qui tractare et uti sciat.*

Ib. ii § 59 *Sunt propter unius libidinem omnia nexa civium liberata nectierque postea desitum*[2].

Parad. 5 § 35 *Non ita dicunt eos esse servos ut mancipia quae sunt dominorum facta nexo aut aliquo jure civili.*

[1] These three words, *auctoritatis mancipi nexi*, refer to the same thing (cf. Huschke *Nexum* notes 15 and 269), 'sale mancipation and assurance.'

[2] This is no doubt from the old annalist: cf. Liv. viii 28 above.

Top. § 28 where he gives as an instance of a definition which proceeds by enumeration of all the species of the genus: *Ab-alienatio est ejus rei quae mancipi est aut traditio alteri nexo aut in jure cessio inter quos ea jure civili fieri possunt.*

Ep. Fam. vii 30 writing to Curio (who had said in *ib.* 29 *sum χρήσει μὲν tuus, κτήσει δὲ Attici nostri; ergo fructus est tuus, mancipium illius*). *Quoniam proprium (Attici) te esse scribis mancipio et nexo, meum autem usu et fructu, contentus isto sum: id enim est cuiusque proprium quo quisque fruitur atque utitur.*

5. Cicero's contemporaries Varro and Aelius Gallus give us express information in two important passages.

Varro *LL.* vii 105[1] *Nexum Manilius scribit omne quod per libram et aes geritur, in quo sint mancipia. Mucius quae per aes et libram fiant ut obligentur, praeterquam mancipio detur. Hoc verius esse ipsum verbum ostendit, de quo quaeritur; nam id est, quod obligatur per libram neque suum fit, inde nexum dictum. Liber qui suas operas in servitutem pro pecunia quam debet dat dum solveret, nexus vocatur, ut ab aere obaeratus. Hoc C. Poetelio Libone Visolo[2] dictatore sublatum ne fieret, et omnes, qui bonam copiam jurarunt, ne essent nexi, dissoluti.*

Festus p. 165 *Nexum est, ut ait Gallus Aelius, quodcumque per aes et libram geritur, id quod necti dicitur, quo in genere sunt haec, testamenti factio, nexi datio, nexi liberatio*[3]. (For these last two I suspect the real expressions were *nexui* or *nexu* (dat.) or *nexum* (supine) *datio*, *nexu* (abl.) *liberatio*.)

Notwithstanding the bad state of the text it is clear from these passages that in its legal use *nectere* was *per aes et libram gerere*, Manilius and Gallus Aelius holding mancipation to be a species of *nexum*, and with this Cic. *Orat.* iii 159 agrees; Mucius Scaevola putting *nexum* and *mancipium* side by side as species of *per aes et libram gerere*. Varro supports Mucius' view by an etymology of his own. He does not notice the relationship of *nexus* to *nectere*, but supposes it to be a compound of *nec suus* (!) and thence argues that *mancipium* and *nexum* are opposed: by *mancipium* a thing becomes one's own,

[1] I have followed Mommsen's text as given in Bruns' *Fontes*.

[2] MS. has *C popillio vocare sillo*.

[3] MS. *nexi dando nexi liberando*.

by *nexum* a person becomes for a time a slave and not one's own.

6. Besides the other expressions quoted, Festus p. 165 has *nexum aes apud antiquos dicebatur pecunia quae per nexum obligatur.* I hesitate to assign any definite meaning to this in the absence of an example of its use. It appears not applicable to money paid over as a loan, for that does not remain 'bound,' but is intended to be spent. Nor does it better fit the money claimed in replacement, for that cannot be bound before it is produced. True, Varro (*LL.* v 102) says *qui pecuniam alligat stipulari et restipulari dicunt* as if to get a binding promise to pay money were to bind the money itself, but he gives no instance of its use from which we can see whether it is a phrase of law or of business or of light conversation, satire or comedy. Possibly it is a mere general phrase for a loan secured by the *nexum.* Nor do I think *pecunia nuncupata* 'money named in the declaration of the *nexum*' (Fest. p. 173, Varro *LL.* vi 60) throws much light on the matter, though M. Voigt (XII *Tab.* § 122) elevates it into the title of the action for recovery of a loan!

7. In the only passage in which Gaius speaks of *nexum* (and that passage very imperfectly read) he identifies *nexum* with mancipation. *Admonendi sumus...provincialis soli nexum non esse...solum Italicum mancipi est, provinciale nec mancipi est.* Frontinus (or Aggenus Urbicus) *Grom.* p. 36 Lachmann, has the like. *Stipendiarii* (*Afri*) *nexum non habent neque possidendo ab alio quaeri possunt: possidentur tamen a privatis, sed alia condicione: et veneunt, sed nec mancipatio eorum legitima potest esse.*

Of any money-contract by the use of the bronze and scales Gaius has nothing, but *nexi liberatio* is clearly given us in iii 173. *Est etiam alia species imaginariae solutionis per aes et libram. Quod et ipsum genus certis in causis receptum est; veluti si quid eo nomine debeat quod per aes et libram gestum sit sive quid ex judicati causa debeat.* The ceremony is like that of mancipation, but with a declaration appropriate to release.

8. In the Digest and Codes we find *nexus, nexum* used as equivalent to *obligatus, obligatio,* but especially of pledge.

Thus *Pactum, ut si quis summas propter tributiones praedii pignori nexi factas creditor solvisset, a debitore reciperet* (D. ii 14 fr 52 § 2 Ulp.); *partem nexu pignoris liberam consequatur* (x 2 fr 33 Pap.); *si quis ideo creditorem possessione arcuerit quia rem suam putabat vel sibi nexam vel certe non esse debitoris* (xliii 4 fr 1 § 4 Ulp.); *nexum non faciat praediorum nisi persona quae jure potest obligari* (Cod. Theod. ii 30 fr 2 = Cod. Just. viii 15 fr 8); *qui hypothecae seu pignori rem sibi nexam vendiderit* (Cod. Just. viii 27 fr 2); *sciens alienam rem velut propriam suo nexuit creditori* (*ib.* ix 34 fr 2). But the words are also used in other connexions, *e.g. nexu venditi liberare* (D. xii 6 fr 26 § 7 Jul.); *accepti latio est utriusque ab eodem nexu liberatio* (D. xlvi 4 fr 1 Modest.); *nexu sanguinis teneri* (Cod. Theod. xii 1 fr 122); *etc.*

9. From this review of the use of the words we find three special meanings; (1) physical confinement for debt, which meaning Livy appears to have always given to the words, though probably his early authorities were better informed; (2) mancipation, which was its ordinary meaning to Cicero and his contemporaries, Varro excepted; (3) legal tie or bond such as arises from pledge, used somewhat rhetorically in the lawyers. All these meanings may be said to be combined in the *nexum* which we are seeking. It was a contract, with similar ceremony to that of mancipation, and constantly leading to imprisonment for debt. According to Varro it was a pledge or surrender of a man's personal services until he found means to pay his debt.

It has been seen that Livy speaks of two classes of prisoners, *nexi* and *judicati*, and that the language used of their fate is similar to that of Gellius in describing execution following a judgment debt. Manlius is said (in Liv. vi 14 quoted above) to have seen a judgment debtor (*judicatum pecuniae*) being led off by his creditor to his private prison: he at once takes the position of *vindex* and openly pays the debt to the creditor. On doing this he doubtless acquired an analogous right to that of a *sponsor* (Gai. iv 22, above p. 36), but, instead of exacting repayment, he released him with the bronze and balance. This form of release was applicable not only to discharge judgment debts but also any contract made by the bronze and balance; in other words to discharge

a *nexum*. Dionysius of Halicarnassus (vi 83 quoted above) speaks of two classes of unfortunates, those whose persons were detained from having made default in the legal times of payment, and those who had lost their private suits and had been given up to their opponents. Gaius (iv 22) mentions a practice in many old laws of making the penalty for breach to be 'arrest as for a judgment debt' (*manus injectionem pro judicato*). Whether these laws were as old as the events in Livy we do not know, but the practice was no doubt old. It is hardly therefore an assumption to say that *nexum* was a contract, especially applied to the loan of money, by which the borrower bound himself, in default of payment at the agreed time or times of a sum covering principal and interest, to accept the position of a judgment debtor[1], possibly in some form of words, accompanying the ceremony of bronze and balance, like *pro judicato damnas ero* (cf. Gai. iii 175). The *nexum* was thus analogous to a warrant of attorney (or *cognovit actionem*) in English law given by a debtor confessing a cause of action[2] and authorising judgment to be entered up against him without further proceeding. Such warrants, says Blackstone (iii 397 ed. Kerr), constitute a very usual form of security for money. (Since 1837 they have been subjected to severe regulation.)

10. Business done by means of the bronze and scales (*quod per libram et aes geritur*) contained in old times two chief species, *mancipium* and *nexum*. Both consisted originally in handing over bronze by weight, as price or as loan, accompanied by some declaration of the purpose and conditions of the transaction. The effect varies with the nature of the business. A purchaser parts with his money, but in return the seller hands over the thing with a warranty of title. A lender parts with his money, and in return the borrower binds himself to repay, or in default to submit his services without more ado to his creditor's will. When money came to pass by count (perhaps dating from the introduction of silver coinage B.C. 269), the balance remained in use as a symbol of

[1] Cf. Karlowa *RG.* ii 549, 559.

[2] Muirhead takes *aeris confessi* in the XII tables to refer to nexal debtors (*Hist. Rom. Law* pp. 157, 205).

the binding nature of the contract[1]. For valid sale the price had still to be definitely ascertained—a certain count of coins, *i.e.* of *materia forma publica percussa* (D. xviii 1 fr 1 pr). So a loan of actual money (which was entitled to a summary remedy for repayment) is called, in the *lex Rubria* 22, *pecunia certa credita signata forma p(ublica) p(opuli) R(omani)*. Sale and loan would be the principal business transactions in a young community: in sale both seller and purchaser can secure themselves by not parting from the money or the thing, until they have the other: but want of title is possible; and therefore it was understood that double the value had to be paid in case of eviction of a thing sold. In a cash loan the lender risks the loss of his money, for he gets nothing immediately in return except a promise to pay: it is natural and inevitable that the lender should be empowered to put strong pressure on the borrower to induce him to keep his bargain. An impecunious debtor may first sell his stock or house or land: after that he has only his services or those of his family to offer: the creditor naturally insisted on having a ready means of compelling the sale or transfer of his property or the use of his or his family's labour, by keeping him in chains or prison. This was Livy's *ingens vinculum fidei* (viii 28). Hence Varro's description of a *nexus* as 'one who 'gives his services *in servitutem* (*i.e.* like a slave[2]) in return for 'money which he owes,' was in terms a true description of the result, though perhaps not so expressed in the original contract. Whether any calculation was made of the value of the services to set against the interest or capital of the debt is a question which, I imagine, must be answered in the negative. The debtor once in the control of his creditor was not in a position to make a bargain or to protect himself from harsh or cruel treatment. Only in so late a time as Papinian's do we hear of something analogous in the statement that a free person (*filius familias*), who has been given up for

[1] Compare in England the continued use of seals (now commonly represented by wafers bearing no mark of identity) attached to documents which thereby have superior efficacy as deeds over writings bearing only the parties' signatures.

[2] Hence Dionysius xvi 5 (fragm.) calls them *οἱ δουλωθέντες*.

a noxal offence, will be restored to liberty by the praetor, if the injured party has received through him full compensation (*Collat.* ii 2). In theory the *nexus* did not become a slave, for he was capable of serving in the army (Liv. ii 24); and see Bk vi chap. xv a (p. 428).

11. The *lex Poetelia* according to Livy had the following provisions:

(1) All *nexi* were freed, *i.e.* from chains. Varro however qualifies this by saying that all *nexi* were freed, who declared on oath that they had sufficient means.

(2) For the future no one was to be kept in fetters or stocks, except criminals till they had made amends. (Prison is not abolished.)

(3) A debtor's property and not his person was to be liable to be taken for non-payment of a money loan (*i.e.* when there has not been a proper judgment?).

(4) The *nexum* (*i.e.* any agreement with the creditor beforehand to accept treatment as a judgment debtor) was abolished.

Livy's statement is not precise, and it is to me doubtful in what sense he understood the words which he found in the old annalists *cautum ne necterentur*, for which Cicero gives us *nectier postea desitum*. But in the sense which I believe the law really had, we have a parallel in the abolition by Constantine of the forfeiture-clause (*lex commissoria*) in agreements for fiduciary pledge. (See p. 100.)

The restriction mentioned by Varro implies the existence of *nexi* who yet had property. Such may have been unable to realize their property in time to prevent legal process, or may have been determined to sacrifice themselves in order to preserve the family estate. The relief of debtors by a kind of landbank is mentioned in Liv. vii 21 (quoted above); and was resorted to also by Caesar (*Bell. Civ.* iii 1). Perhaps something of this kind may have been meant by the third provision. The bankruptcy law of the later republic was scarcely so early as 326 B.C.: and execution on the person, though doubtless in some degree modified, was certainly not abolished, as we may see from Liv. xxiii 14 § 3 (above), Sall. *Cat.* 33 and other writers. But there is no trace of the *nexum* with its onerous conditions in subsequent times.

BOOK VI.

JUDICIAL ADMINISTRATION AND PROCEDURE.

CHAPTER I.

COURTS.

A. Praetor.

The principal organ of justice at Rome was the Praetor. The first praetor was created in 367 B.C. *qui jus in urbe diceret* (Liv. vi 42). He was distinguished as *praetor urbanus*, on another being created cir. 242 B.C. *qui inter peregrinos jus dicet* (*Lex repet.* 12, Bruns no. 10), or as described later *qui inter civis et peregrinos jus dicet* (*Ed. Venafr.* Bruns no. 73 *ad fin.*), sometimes *praetor peregrinus* (Pompon. D. i 2 fr 2 § 28; Gai. i 6). The number of praetors was afterwards increased to six, and by Sulla to eight, chiefly for criminal jurisdiction; by the Emperors to sixteen or eighteen. Claudius created two praetors for *fidei commissa*; M. Aurelius, one for guardianships (Pompon. D. i 2 fr 2 § 32). But so far as private law was concerned, the two early praetorships continued to have the chief place, and the praetor (in the singular number) is usually spoken of in the law-books without distinction (cf. Mommsen *St.R.* ii 185 sq.).

The praetor had the arrangement of all trials of private suits and the formal appointment of judges for them. To him was committed a large oversight of guardians and the appointment of such in default of legal acting guardians. Of his edict, and the quasi-legislative functions which he thereby exercised, I have spoken above in the Introduction (vol. I p. 10 foll.). Many important private acts required his presence and authority, *e.g.* adoption, manumission, and in some cases the conveyance of property and especially of incorporal rights.

In the provinces the *proconsul* or *praeses* had as full authority as the praetor in Rome (D. i 16 fr 7 § 2; 18 fr 4).

For public audience in republican times the praetor sat in a curule chair (*sella curulis*) on the front of a raised platform (*pro tribunali*) in the forum or comitium; afterwards in one of the pillared halls (*basilica*) in or near the forum. He was often surrounded by a number of advisers (*consilium*) and clerks. This was for full hearing of a matter (*causae cognitio*), which was followed by his decree or by sanction of an issue for trial. Interlocutory questions, ordinary orders and the sanction of private acts could be decided or made without form, even as he was walking in the streets or at the baths. The former acts are done *pro tribunali*, the latter *de plano* (cf. D. xxxvii 1 fr 3 § 8; xxxviii 15 fr 2 § 1; Gai. i 20). Compare the English distinction between 'in court,' and 'in chambers.'

The sanction of private acts was so much a matter of course, that a praetor (or consul or governor) could emancipate his sons or give them in adoption or manumit slaves *apud se*, *i.e.* without requiring the presence or sanction of any other magistrate. If he was himself a *filius familias*, he could be adopted or emancipated *apud se* (D. i 7 fr 3; tit. 14 fr 1, 2; tit. 16 fr 2), and the like is true of such borough magistrates as have *legis actio*, *i.e.* are competent to give authority to others' acts of this kind (Paul ii 25 § 4; D. i 7 fr 4). A praetor could manumit slaves before a consul as a higher authority, but he could not do so before a praetor, who has no higher *imperium* than he has himself (D. xl 1 fr 14; tit. 2 fr 18 § 1).

B. Consuls.

The Consuls were superior to the Praetors in imperial as well as in republican times, but their jurisdiction was chiefly in trusts (Gai. ii 278, cf. D. xxxv 1 fr 50) and in sanctioning manumissions, and dealing with questions of *status* (D. i 10; xl 12 fr 27 pr; 14 fr 4; 15 fr 1 § 4, *etc.*). Claudius gave them the right of appointing guardians, which M. Aurelius transferred to the Guardianship Praetor first appointed by him (Suet. *Claud.* 23: Hist. Aug. *Mar. Aurel.* 10). Cf. Mommsen

St.R. ii pp. 98, 99. Pliny (*Paneg.* 77) speaks of consuls *jus dicentes*, and Gellius (xii 13 § 1) of their appointing *judices*.

C. The *CENTUMVIRI*[1] or 'Court of the Hundred men' is said by Festus (p. 54) to have been composed of three from each of the 35 tribes of Rome, and called 'the Hundred' in round numbers (Varr. *RR.* ii 1 26). This would make its establishment later than 241 B.C. (Mommsen *St.R.* ii p. 220). A suit did not come before them until after the formal procedure of the *legis actio sacramento* had been gone through before the city or foreign praetor (Gai. iv 31). The Court is mentioned by Cicero in connexion with the case of *Curius v. Coponium* (*Or.* i 39 § 180, *etc.*), and also in *Agr.* ii 17 § 44 as a Court for suits in matters of inheritance. He gives a list of the classes of suits within its jurisdiction (*causae centumvirales*) but adds, in rhetorical fashion, that there were innumerable others (*Or.* i 37 § 173)[2]. What he names are all connected with the old civil law: rights of usucapion, of guardianship, clanship, and agnatic relation; the breaking and confirmation of wills, bonds and handtakes (*nexa, mancipia*)[3], urban servitudes, alluvial acquisitions. In Vespasian's time the number of cases before this Court was so great as to require special assistance (Suet. *Vesp.* 10). Tacitus speaks of

[1] There is an elaborate article on the *centumviri* by Wlassak in Pauly's *Realencycl.* vol. iii new edit.

[2] Cicero is speaking of advocates who are ignorant of law and says: *Volitare in foro, haerere in jure ac praetorum tribunalibus, judicia privata magnarum rerum obire, in quibus saepe non de facto sed de aequitate ac jure certetur, jactare se in causis centumviralibus, in quibus usucapionum tutelarum gentilitatum agnationum adluvionum circumluvionum nexorum mancipiorum parietum luminum stillicidiorum testamentorum ruptorum aut ratorum ceterarumque rerum innumerabilium jura versentur, quom omnino quid suum, quid alienum, quare denique civis aut peregrinus, servus aut liber quispiam sit ignoret, insignis est impudentiae.* Bethmann-Hollweg (*ZGR.* v 369 sq.) brings all these centumviral cases under three heads; actions for property, predial servitudes, and inheritance, referring *nexorum* to the first and *tutela* to the last head. Wlassak seems to approve (*PG.* i 87). In fact they were mainly concerned, at least originally, with vindications (cf. Keller *CP.* p. 27).

[3] See essay on *Nexum*, esp. p. 308.

their having the most important cases (*Dial.* 38). Pliny the younger frequently pleaded before them, though he complains of the Court's being sometimes occupied with trifling cases and stripling pleaders (*Ep.* ii 14). So far as he tells the nature of his cases, all related to inheritance, especially to the *querela inofficiosi testamenti*: and such were perhaps in practice at that time its principal occupation. But we do not know what were the limits of their competence in imperial times, or on what principle suits to be sent before them were selected. Their jurisdiction was concurrent with that of a single judge (Quint. v 10 § 115; cf. Wlassak *Pr. G.* i p. 206 foll.).

The 'Hundred men' appear to have been divided into four sections (*consilia, hastae*), as we hear of *duplex judicium* (Quint. *Inst.* xi 1 78), and *quadruplex*, consisting in one case of 180 judges (Plin. *Ep.* iv 24; vi 33. See also D. xxxi fr 76). A spear was put up in the Court (Gai. iv 16; Quint. v 2 § 1; Mart. vii 63, 7, *etc.*; cf. p. 341). They were presided over by ex-quaestors until Augustus transferred this duty to the *decemviri* (Suet. *Aug.* 36). Pliny (*Ep.* v 9 (21) § 5) speaks of the praetor presiding over them, apparently in the sense not of personal presence but of control of their proceedings.

D. The *DECEMVIRI stlitibus judicandis* were perhaps as old as 449 B.C. (Liv. iii 55) or older, but appear in inscriptions from 139 B.C.[1] Cicero speaks of their deciding a case where a woman of Arretium claimed freedom, and Cicero was advocate (*Caecin.* 33 § 97).

Augustus, as above stated, made them presidents of the *Centumviri*. Pomponius mistook this for the cause of their creation (*qui hastae praeessent*, D. i 2 fr 2 § 29).

E. *RECUPERATORES.*

1. 'Recoverers' are said to have been first appointed in accordance with arrangements made between the Roman people and foreign kings and communities for the restoration and recovery of property and for carrying on private suits between

[1] Mommsen *St.R.* ii 590. Wlassak denies any connexion of the older with the later body (*Pr. G.* i 144 foll.).

them (Fest. p. 274). Three recoverers were appointed by Scipio (210 B.C.) to decide a dispute for a prize of valour between two claimants belonging to one of the legions and the naval allies (Liv. xxvi 48 § 9). And recoverers, five in each case, were named to try charges made by Spaniards against some Roman magistrates, B.C. 171 (Liv. xliii 2 § 3). Plautus in two plays (cir. 192—189 B.C.) speaks of recoverers in suits between foreigners (*Rud.* 1282, on a question of freedom; *Bac.* 270, on a debt). In Cicero's third speech against Verres 'recoverers' are frequently mentioned as appointed by the praetor of Sicily to decide suits of the Sicilian farmers against the tax-farmers (*publicani*, 11 § 28; 14 § 35; 22 § 55; 28 § 68, *etc.*). In Cic. *in Caecil.* 17 § 56 they decide a claim of a Lilybaean woman for some slaves who had been carried off for a band of music in the fleet. We hear also of recoverers in a suit between two citizens of Temnus in Asia (*Flac.* 20 § 47); and Cicero's speech for Tullius on a trial for armed wrong, and that for Caecina on the interdict for armed dispossession were both made before recoverers. Caecina was a Volaterran and his citizenship was one of the points in dispute: Tullius was apparently from *Thurii* (*Tull.* 6 § 14) and his opponent from Asia (*ib.* § 19). Recoverers act on a charge of extortion (*repetundarum*) in Tac. *A.* i 74; and in fiscal cases (Suet. *Ner.* 17); and in a trial whether slave or freeborn (*ib. Vesp.* 3; cf. *Dom.* 8; Cic. *Flac.* 17 § 40).

Gaius speaks of *recuperatores* to try a plaint by patron on account of his being summoned into Court by his freedman (iv 46); of either *judex* or *recuperatores* being used in interdict issues (iv 141); of *recuperatores* being sometimes employed to try at once (*protinus*) a breach of *vadimonium* (iv 185). They were according to Labeo (Gell. xx 1 § 13) promised by the praetor for estimating insults (*injuriis aestimandis*). And so in Cic. *Inv.* ii 20 § 60. They appear as alternative with *judices* in *lex Agrar.* 35 (Bruns no. 11); *lex Rubr.* 21; *lex Anton.* ii 1; *Tab. Bant.* 2; *Frag. Atest.* 15.

2. We do not know the number of recoverers usually appointed, probably three (so in a Sicilian case, Cic. *Verr.* iii 12 § 30; 21 § 54; but cf. §§ 28, 69; and apparently in Asia, Cic. *Flac.* 17 § 40; three or five in Livy *l. c.*; in *lex Agrar.* the text is

uncertain), nor the mode of selection: a power of challenge is given to each party in the *Ed. Venafr.* (Bruns no. 73; cf. *lex Agrar.* 37, *ib.* no. 11) and in Verres' edict for suits against publicans in Sicily (*Verr.* iii 11 § 28). The proceedings appear to have been quicker than with an ordinary judge (Cic. *Tull.* 5 § 10; cf. § 41; Gai. iv 185; Plin. *Ep.* iii 20 § 9); and the municipal charter of Ossuna (*lex Urson.* 95) gives special instructions for getting them to sit and come to a decision at latest within 20 days from their appointment. On the qualifying age (24?) see a papyrus fragment *ZRG.* xxxv 170.

3. In directing a trial before recoverers the praetor was acting not on the old civil jurisdiction, but on his executive power (*imperium*, Gai. iv 105). This accords with the predominant character of Recoverers as being employed where a foreigner is a party. It is generally held that they were also eventually appointed to decide cases between Roman citizens[1]. With the meagre information which we have about the institution in general or the cases in which recoverers are said to have been appointed, it is impossible to be confident. But in no single case is it clear that the suit was between two private Roman citizens. Foreigners, tax-farmers, a municipal or other public authority appear in several cases; where, as in statutes, there is an alternative with *judices*, the case of foreigners may have been in view; where we know only of the subject-matter of the suit, the same remark applies[2]; and questions of freedom imply the appearance or possibility of non-citizenship. *Recuperatores* is the name given to Roman citizens forming the Court in proceedings in the provinces on the manumission of slaves under the *lex Aelia Sentia* (Gai. i 20; Ulp. i 13 *a*); and the same term is used in the general sense of 'Judges' by (the African) Apuleius (*de mundo* cap. 35). The facts seem to point

[1] Wlassak (*Röm. Pr. Gesetz* ii 74) relies on Cicero's speeches *pro Tullio* and *pro Caecina* (so also Madvig *Verf.* ii 256; cf. Sell *Recuperatio* pp. 412 sqq.) and on Gai. iv 105, 109 to prove this. The fragmentary nature of *pro Tullio* makes it difficult to assert anything: Caecina's citizenship (as I have said) is a question in his case. Gaius seems to me to prove nothing, but rather to suggest the contrary to what Wlassak supposes. (I take *interveniente, etc.* in Gaius as properly qualifying only *quae sub uno judice acc.*)

[2] *E.g.* in Gai. iv 46 Latin freedmen may be in contemplation.

to *recuperatores* being employed only when foreigners (*i.e.* non-Romans, Gai. i 79) were concerned, or where it was anticipated they might be concerned.

F. *Arbiter.*

The great mass of cases after preparation by the praetor were directed by him to be tried by a single judge, who is usually called *judex*, but sometimes *arbiter*. The XII tables appear to have spoken of *judex arbiterve* more than once (Gell. xx 1 § 7; Fest. *s. v. reus*, p. 273). The same occurs in the notes of Probus referring to *legis actiones*, in the *lex Julia repetundarum* (D. xlviii 11 fr 7 pr); and in the *fragm. Atest.* (Bruns no. 103) we have *judicis arbitri recuperatorum datio addictio.* Cicero mocks at the lawyers for not having made up their minds whether to speak of a *judex* or *arbiter* (*Mur.* 12 § 27); and both he and they speak of an *arbiter* as a *judex* (*Off.* iii 16 § 66; cf. 17 § 70; Gai. iv 163; Paul i 18). It is clear that *judex* was the more general term, and that *arbiter* was a special kind of *judex.* In Plautus *arbiter* is used both in the early sense of a witness (*Capt.* 211; *Poen.* 663, *etc.*; so also Cic. *Off.* iii 31 § 112; Liv. vii 5 § 4, both doubtless from some early historian) and of a judge formal or friendly; *e.g. Rud.* 1004 *In istunc hodie non feres, nisi das sequestrum aut arbitrum, quoius haec res arbitratu fiat; etc.*

Cicero (in *Rosc. Com.* 4 §§ 10—13, quoted below, p. 361) contrasts a legal *arbiter* with a *judex* at some length. With a *judex* you are bound to your exact claim; you get all or nothing: with an *arbiter* you have a larger consideration of the matter and obtain what is fairer (*aequius melius*) on the whole[1]. In

[1] So Seneca *Benef.* iii 7 § 5 *Ideo melior videtur condicio causae bonae si ad judicem quam si ad arbitrum mittitur, quia illum formula includit et certos quos non excedat terminos ponit, hujus libera et nullis adstricta vinculis religio, et detrahere aliquid potest et adicere et sententiam suam, non prout lex aut justitia suadet, sed prout humanitas vel misericordia impulit, regere.* This may refer to arbitration by agreement: the fact is, an *arbiter*, whether sitting in a legal suit, or appointed by the praetor for subordinate work, or acting by agreement of the parties, was always conceived to have a duty of coming to a fair common-sense decision irrespective of particular wording or technical rules.

the same way Gaius (iv 163) describes the difference in a defendant's position in interdict procedure, if he demands an *arbiter* and does not let the matter go before a *judex*. And so in other cases where the object of a suit is not the payment of a definite sum of money or the performance of a defined duty, but the judicial settlement of a complicated matter, the judge was called *arbiter*. Thus suits for the division of an inheritance among coheirs or of property common to two or more owners, or the regulation of the boundaries of country estates, or plaints for protection against the flow of rainwater are submitted to an *arbiter* (D. x 1 fr 7; 2 fr 43; 3 fr 26; xxxix 3 fr 23 § 2; fr 24 pr; Cic. *Top.* 10 § 43). For the regulation of boundaries the XII tables required three *arbitri*, who were reduced to one by the *lex Mamilia* (Cic. *Leg.* i 21 § 55). Three *arbitri* are also mentioned in another matter in Fest. *s.v. vindiciae* (quoted below, p. 344 n. 1).

Cicero gives the name of *arbitria* to the whole class of *bonae fidei* obligations, partnership, mandate, fiduciary relation (*i.e.* deposit, pledge), purchase and sale, letting and hiring as well as to those of guardianship and dowry (*rei uxoriae*); *i.e.* wherever in fact the suit turned on conduct required by good faith and on due allowance being made for defendant's claims (*Off.* iii 17 § 70). In the Digest we occasionally find the term *arbiter* applied in such cases (*e.g.* xvii 2 fr 38 pr, 76; xxiii 4 fr 1 § 1; xlvi 3 fr 48; xlix 1 fr 28 § 2). It is used of the judge in the actions *de eo quod certo loco dari oportet* and *quod metus causa gestum est* which are the only actions to which the term *arbitraria* is applied in the Digest[1] (cf. p. 86). It is also used when special points require settlement or special inquiries have to be made; *e.g.* into the solvency of a surety (D. ii 8 fr 9; xlix 2 fr 2); the proper height for a new building (viii 2 fr 11), or breadth for a road (*ib.* 3 fr 13); the distribution of a slave's stock-in-trade among his creditors (xiv 4 fr 7 § 1); the accounts of a steward (xxxv 1 fr 50); the reckoning of the Falcidian fourth (xxxv 3 fr 1 § 6); or where perishable goods have to be sold, while rights are undetermined (xlii 5 fr 27); or damages have to be assessed

[1] But in D. xxii 1 fr 3 § 1 a general expression is used: *In his quoque judiciis quae non sunt arbitraria nec bonae fidei, etc.*

(cf. Probus who gives among other abbreviations A L A *arbitrium liti aestimandae*), *etc.*

G. *Arbiter* (*ex compromisso sumptus*)[1] was also the name usually given to a judge appointed merely by agreement of the parties without any authoritative jurisdiction[2]. The award of such an arbiter had of itself no binding force, and was no bar to a subsequent trial and legal decision of the case. To make it effective, the agreement (*compromissum*) to refer the matter or matters to such a voluntary arbitrator was confirmed by a stipulation, and usually provided a penalty (*poena, pecunia compromissa*) in case of disobedience to the decision (*si arbitri sententiae non stetur*). The penalty might be a fixed sum or *quanti ea res erit.* If no penalty was specified, an action could be brought on the stipulation for the amount of the party's interest in the due execution of the award. The agreement often contained a clause requiring the parties to act in good faith (*doli clausula*): in the absence of such clause, an action *de dolo* or a plea would be available to meet chicanery.

The arbitrator had no power beyond what was given by the agreement, which therefore had to be strictly followed, or the decision was null. If a time is named for the decision, the

[1] Cf. Cic. *Rosc. Com.* 4 § 12 *Quaero quid ita de hac pecunia compromissum feceris, arbitrum sumpseris* (see below in Essay on this speech); *Verr.* ii 27 § 66; *Flac.* 21 § 50 *Q. Naso judex sumitur; qui cum sententiam secundum Plotium se dicturum ostenderet, ab eo judice abiit* (*Hermippus*), *et quod judicium lege non erat, causam totam reliquit*, which possibly refers to such a non-judicial *arbiter*, though called *judex.* Mommsen *ZRG.* xxv 281 understands it of a trial *imperio continens* and consequently expiring with the praetor's term of office (Gai. iv 105); Hermippus lets this occur: cf. *litem mori patietur* D. xlii 8 fr 3 § 1.

[2] To arbitrations of this kind reference appears to be made in Cic. *Caecin.* 2 § 6 *Omnia judicia aut distrahendarum controversiarum aut puniendorum maleficiorum causa reperta sunt, quorum alterum levius est propterea quod...disceptatore domestico dijudicatur, alterum non honorariam operam amici sed severitatem judicis ac vim requirit. Honorariam* means 'complimentary' 'not obligatory,' cf. Cic. *Tusc. D.* 41 § 120 where Carneades is spoken of as intervening between Stoics and Peripatetics *tamquam arbiter honorarius*: so *Fat.* 41 § 120. Cf. Wlassak in Pauly *Encycl.* s.v. *arbiter*, new edit. In Cic. *Rosc. Com.* 5 § 15 *honoraria* appears to refer to appointments by the praetor. Cf. Voigt *Jus Nat.* iv p. 454.

arbiter cannot extend it (*diem proferre*). He cannot be bound down beforehand to any particular decision, he must be free to decide as he thinks right. The award must embrace and definitely decide all the questions submitted, and define any security which has to be given. He cannot delegate his power, unless so provided by the agreement. The award once given cannot be changed. If it be duly made, the parties are bound by it whether fair or unfair[1], so far at least as it contains nothing *inhonestum*. There is no appeal, unless the plea of *doli mali* allowed by Antoninus may practically give such protection. Any failure to execute or abide by the award makes the penalty due. The arbitrator cannot forbid its enforcement. Where there are two (or more) persons jointly and severally bound, or two bank partners or even two sureties who are partners, and an award forbids one to sue or be sued, suit by, or against, the other brings the penalty clause into force. So also if a party's heir sue, when the party was forbidden.

If three arbitrators are appointed, a majority can decide. If two are appointed and do not agree, the praetor will compel them to choose a third. All must be present at the award as well as the parties. Even ill-health or public business preventing a party's appearance is no bar to the penalty becoming due, but the praetor in such a case will bar the action to enforce it.

A slave could not be an *arbiter* or party to an arbitration, but any man of the age of 20 or upwards (this was in conformity with the rule in *lex Julia* for judges), was eligible as *arbiter*. If he has once accepted the appointment (*si arbitrium receperit*) duly made, the praetor will compel him to make an award, unless for such good cause as his own ill-health, insolvency of one of the litigants, defamation or contumelious treatment by them, *etc.* Compulsion would be effected by a fine or perhaps *pignoris capio*.

[1] Cf. D. xvii 2 fr 76 *Arbitrorum genera sunt duo, unum ejusmodi ut sive aequum sit sive iniquum, parere debeamus (quod observatur, cum ex compromisso ad arbitrum itum est); alterum ejusmodi ut ad boni viri arbitrium redigi debeat, etsi nominatim persona sit comprehensa cujus arbitratu fiat*: *i.e.* when any matter is referred to someone to decide, without a formal agreement and stipulation for penalty.

An end is put to an arbitration, not only by the award but by the death of a party (unless his heir was named in the agreement) or of the arbitrator; by a formal release; by a bargain or settlement (*transactio*); or by the case being brought into Court. This last would not prevent the penalty being due.

An arbitration on a criminal matter is invalid, nor will an arbitrator be compelled to give an award on a question of freedom, or *status* of freeborn or freedman, or where there is a popular action (D. iv 8 esp. fr 2, 7, 13 § 2, 15, 17 §6—fr 19, 27—31, 32 §§ 6—8, 14, 16, 21; fr 41; Cod. ii 55 fr 1; Paul v 5 *a* § 1 who applies the term *judex*).

H. *Judex.*

Judices were according to Polybius (vi 17) taken in most of the important cases from the list of Senators, who however were disabled for this function[1] by C. Gracchus. He put *equites* in their place (*lex Sempronia* B.C. 122: Vell. ii 6; Cic. *Verr.* i 13 § 38)[2]. In Cicero's speech *pro Rosc. Com.* 14 § 42 mention is made of a private suit in which an *eques* acted as *judex*, but the date of the suit is uncertain (see p. 502). In 81 B.C. Sulla as dictator restored the senate to their old position (cf. Cic. *Verr.* iii 41 § 96). In 70 B.C. L. Aurelius Cotta established a separate list from which *judices* were to be taken, composed of three *decuriae*, one of senators, one of *equites* and one of *tribuni aerarii* (Ascon. *in Corn.* p. 78 Bait., *in Pison.* p. 16; Cic. *Att.* i 16 § 4; *etc.*), who appear to have been a class of plebeians of position and property, ranking next to, or even sometimes with, the *equites* (Cic. *Cat.* iv 7 § 15; *Flac.* 2 § 4 with schol. Bob. *ad loc. etc.*[3]). It is supposed that equal numbers were taken from all three classes[4]. The list (*album judicum*) was revised by the

[1] See Madvig *Verfassung* ii pp. 218 sqq.; Mommsen *St.R.* iii 527 sqq.

[2] A consular Fimbria is spoken of as a *judex* in a case told to Cicero as a boy (Cic. *Off.* iii 19 § 77). Fimbria was consul in 104 B.C. but he may not have been a senator at the time of the trial, and he may have been privately appointed.

[3] See Madvig *Verfassung* i 182 sqq.; Mommsen *St.R.* iii p. 192.

[4] Cf. Sen. *Ben.* iii 7 § 7 *De quibusdam et imperitus judex demittere tabellam potest:...ubi vero id de quo sola sapientia decernit in controversiam*

praetors, probably every year (Cic. *Clu.* 43 § 121). Julius Caesar removed the *tribuni aerarii* (Suet. *Jul.* 41), but according to the same writer Augustus found four *decuriae* and added another for cases of small importance (*Aug.* 32), of which the elder Pliny (xxxiii § 30) gives a confused account. Caligula added a fifth *decuria* in order to prevent the judges being overworked (*Calig.* 16). The normal number in each *decuria* was 1000 (Plin. l. c.). It is not clear whether the choice of a *judex* in civil matters was limited to the *album*; but for *legitima judicia* the judge must be a Roman citizen. For some suits, even in Rome, foreigners were appointed, presumably only in suits where foreigners were parties (Gai. iv 105)[1].

The qualifying age was reduced by Augustus from 35, which had been the minimum, to 30 (Suet. *Aug.* 32; see Mommsen *St.R.* iii pp. 534, 537), but according to D. iv 8 fr 41 to the age of 20; and in practice the age of 18 appears to have been held sufficient (D. xlii 1 fr 57). Mutes, deaf, madmen and *impuberes* were disqualified. So also were women, and of course slaves. The position of judge being a public office, a *filius familias* is no less capable than a *paterfamilias*, and in a private suit a father may be judge in his son's case, and a son in his father's (D. v 1 fr 12, 77, 78).

CHAPTER II.

TIME AND PLACE OF LEGAL BUSINESS.

A. 1. Not every day in the year was good for law business. On the *dies nefasti* the praetor was not permitted to use the technical words which were necessary for his regular functions, *do, dico, addico*: on other days law matters were transacted either throughout the day or some part of it. According to Mommsen's computation (*Corp. I.L.* 1 Pt. 1 p. 296, ed. 2) 108

incidit, non potest sumi ad haec judex ex turba senatorum quem census in album et equestris hereditas misit.

[1] Cf. Wlassak *Pr. G.* ii pp. 196, 209, *etc.*

days in the ante-Julian calendar were *nefasti*, partly of a solemn, partly of a cheerful character; 45 were marked as *fasti*; 11 were partly *fasti*; and 191 were days on which both law business and also public *comitia* could be held. In the Julian calendar 55 days were *fasti*. The result is that 247 (or 257) days in the year would be open for law business either wholly or partially, provided they were not required for the public assemblies (Varr. *LL.* vi 29—32; Macrob. i 16 § 14) or for holidays (*feriae*) and public games[1]. These latter, so far as they fell on these days, have to be deducted, and the number of legal days comes down to less than 200, including however those which might be occupied by *comitia*. Extraordinary feasts and games sometimes reduced this number. Augustus added more than thirty days to the legal year (Suet. *Aug.* 32). M. Antoninus increased the total number of days to 230 (Hist. Aug. *Ant.* 10), and while forbidding any compulsory summons at the times of harvest and vintage, unless a thing was perishing or a right of suit would otherwise be lost, or in case of serious delicts, provided for a number of matters being dealt with by the praetors on holidays, such as the appointment, admonishment, or excuse of guardians and caretakers; orders for alimony of children, parents, and patrons; grants of possession on behalf of legatees, fideicommissaries, or a *venter*, or on the ground of possible damage from buildings, securing a trust-freedom, *etc.* (D. ii 12 fr 23).

The sittings of the Courts were at one time divided into a summer and winter season; Claudius joined them. The sittings were called *rerum actus* (Suet. *Aug.* 32; *Claud.* 23; *Ner.* 17; Plin. *Ep.* ix 25)[2].

2. The legal Roman day was reckoned from midnight to midnight (D. ii 12 fr 8; Gell. iii 2); but the ordinary usage

[1] Cf. Cic. *Verr.* Act i 10 § 31.

[2] So Gai. ii 279 *cum res aguntur*: an adjournment or vacation was *res prolatae* (Plaut. *Capt.* 78; 80; Cic. *Mur.* § 28), *rerum prolatio* (Cic. *Att.* vii 12 § 2); the return of the session, *res redeuntes* (Plaut. *Capt.* 86; Cic. *Sest.* 62 § 129). Madvig (*Verf.* ii 240) quotes also Sen. *Rhet. Contr.* vii praef. § 7 *centumviri rebus jam ultimis properabant* 'were in a hurry at the end of the session'; Sen. *Ben.* v 17 § 4 *res proximae* 'the last session.'

was to reckon only the period of light, so that an hour (one-twelfth) varied from $1\frac{1}{4}$ modern hours at midsummer to $\frac{3}{4}$ hour at midwinter. The usual time for law business seems to have been from the second to the tenth hour. So at least for opening wills (Paul iv 6 § 2). The second hour is named in Cic. *Quint.* 6 § 25; Hor. *Sat.* ii 6 35; Ascon. *Mil.* p. 42; the third or fourth hour in Hor. *Sat.* i 9 35; and in Martial: *Exercet raucos tertia causidicos* (iv 8 2), and *raucae vadimonia quartae* (viii 67 3). Judgment against an absent party was not usual till the tenth hour (Cic. *Verr.* ii 17 § 41). Augustus is said sometimes to have continued sitting till nightfall (Suet. *Aug.* 33). The charter for the colony of Ossuna (*lex Urson.* cap. 102) directs both the duovir (corresponding to the praetor at Rome) and the judge not to sit before the first (? or second? see the bronze) hour nor after the eleventh, unless the case was one which that law required to be concluded in the day. (See Marquardt *Privatleben* p. 246 sqq.)

In the XII tables the direction was for both parties to appear and plead their case before midday, and not till after midday was the judge to assign the suit to the victor, being present (*post meridiem presenti stlitem addicito*). Sunset was to be the final time (Gell. xvii 2 § 10).

B. Trials before public officers whether *judices* or *arbitri* or *recuperatores* were usually held in the *forum, i.e.* in the old *forum* or those built by Julius and Augustus (Suet. *Oct.* 29), or in the *basilicae* adjoining, or in smaller rooms *auditoria* (Tac. *Orat.* 39). The judge sat on a raised platform (*tribunal*), others assisting on benches (*subsellia*) beside him. The parties and their advocates on benches on the level ground (Suet. *Ner.* 17; Madvig *Verfassung* ii p. 241). For the praetor see above, p. 313.

CHAPTER III.

DISQUALIFICATIONS FOR SUING.

A. It was not everybody who was allowed by the praetor to conduct a case before him. Some classes of persons were prohibited absolutely; others were allowed to appear for themselves but not for others: a third class were allowed to appear for themselves and also for near relatives, but only for those. The prohibition was absolute and could not be waived by consent of opponent. The technical term for making or opposing an application to the praetor was *postulare*[1] (D. iii 1 fr 1 §§ 1, 2; fr 7). The three classes (*ordines*) of persons *qui prohibentur postulare* were these:

i. Prohibited absolutely

Children under 17 years of age complete: and persons completely deaf.

If an advocate was required for them, the praetor assigned one (D. fr 1 §§ 3, 4).

ii. Prohibited from acting on behalf of others

Women; but if there was no one else, they were sometimes permitted to act for parents or near relatives (D. iii 3 fr 41; xl 12 fr 3 § 2);

blind persons; and

a few of those who were commonly called *infames* (viz. those numbered below 4, 9, 11 and 14) (D. fr 1 §§ 5, 6).

iii. Prohibited from acting on behalf of others, except of relatives, viz. parents, patrons, patrons' children or parents, their own children, brother, sister, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, step-father, step-mother, step-son, step-daughter; and if they have been duly appointed by the parent or majority of guardians or the magistrate to be guardian or caretaker, then they may act for a ward, a madman

[1] Cf. Cic. *Verr.* iii 67 § 155 where one of Verres' favourites speaking to another says *Te postulante omnes vincere solent.*

or an idiot, deaf, dumb, spendthrifts, youths under 25 years of age, and wholly infirm persons (D. fr 1 § 11—fr 5).

The persons in this third class were

(*a*) all that were so prohibited by any general statute, plebiscite, senate's decree, or edict or decree of the Emperor.

(*b*) all *infames* or (as Gaius calls them) *ignominiosi*[1]; unless their disgrace was cancelled (*in integrum restituti*). No such name was given in the Edict: it was the usual short description of the classes contained in the praetor's list (Gai. iv 182). The list appears to have been something as follows[2]:

(1) Persons condemned of having committed theft or having bargained to avoid condemnation for theft. To theft, Gaius and the Digest add, robbery by violence, and insult (*injuriarum*): the Digest adds also *dolo malo et fraude* and limits the whole to condemnation *suo nomine*;

(2) or who have been condemned as trustee (*fiduciae*) or partner or guardian or mandator or for insult or *dolo malo*.

(The Digest puts *injuriarum* and *doli mali* in the preceding clause, omits *fiduciae*, adds *depositi*, and limits the whole to 'condemnation in a direct, not in a counter action': Gaius gives both *fiduciae* and *depositi*, but omits *doli mali*;)

(3) or have been condemned under, or for contravention of, the *lex Plaetoria*;

[1] The usual word in the lawyers is *infamia* (cf. D. iii 2 rubr.; Cod. ii 11); Gaius uses *ignominia*, also of insolvents whose estate has been sold (ii 154), for which Cicero uses *infamia* (*Quinct.* 14 § 46) as well as *ignominia* (*ib.* 40 § 64), both in a general (not technical) sense, as he does frequently. In *Quinct.* § 49 *aut ignominia affectus aut judicio turpi convictus* he appears to contrast ignominy with the result of the cases named by Gaius iv 182 (but cf. *Rabir. perd.* 5 § 16), as he does when applying it to the censor's mark in *Clu.* 42 § 119, which he denies to be judicial: *Quodsi illud judicium putaretur, ut ceteri turpi judicio damnati in perpetuum omni honore ac dignitate privantur, sic hominibus ignominia notatis neque ad honorem aditus neque in curiam reditus esset. Nunc, etc.*; *RP.* iv 6. For the history of *infamia* see Greenidge's '*Infamia* in Roman Law.'

[2] I take it from the list given in the *lex Julia municipalis* 110—123 of those disqualified for the municipal council. A very similar but shorter list is in D. iii 2 fr 1. The Digest omits altogether nos. 3, 5, 6, 7, 8 and 13. Cf. also Frag. Atest. *ap.* Bruns[6] p. 103.

(4) or have hired themselves out to fight in the arena[1];

(5) or have taken an oath in court denying a debt[2];

(6) or have sworn their own solvency[3] when they have reported to their sureties or creditors that they cannot pay their debts in full or have bargained not to do so;

(7) or for whom sureties have had to pay;

(8) or whose estate has been seized and advertised under the praetor's edict, unless they were wards or absent *bona fide* on the public service;

(9) or have been condemned in a public trial at Rome, resulting in banishment from Italy, and have not been reinstated;

(10) or have been condemned in a public trial[4] in their own borough or other community;

[1] The Digest says 'fight with beasts,' cf. *Collat.* iv 3.

[2] The text of the *lex Julia* here is *queive in jure abjuraverit, bonamve copiam juravit juraverit quei sponsoribus creditoribusve sueis renuntiavit renuntiaverit se soldum solvere non posse, etc. Abjurare* is 'to swear off,' *i.e.* to deny a loan (cf. Plaut. *Curc.* 496; *Pers.* 478 *ne quis mihi in jure abjurassit*; *Rud.* 14; Sall. *Cat.* 25; cf. Serv. on Verg. viii 263; Cic. *Att.* i 8; so *abnegare* is used of denying a deposit Sen. *Ben.* iv 26; and in English 'repudiate' of refusing to pay a debt). Mommsen's supplement of *bonam copiam* before it is quite wrong (as I see Karlowa *RG.* ii 598 also holds).

[3] To make such an oath of solvency a grave offence it must be false, as in the preceding clause (*quei—abjuraverit*), and therefore I connect it with the following sentence (*quei sponsoribus, etc.*). So also Huschke *Nexum* p. 137. Mommsen adds *ve* to the *quei* before *sponsoribus*, which can be right only if *bon. cop. jur.* was in itself a discreditable proceeding.

[4] Public trials are defined by Macer (in D. xlviii 1 fr 1) as those which are under statutes, viz. *lex Cornelia* on assassins and poisoners, and another on forged wills (cf. D. xlviii 10 fr 16); *lex Pompeia* on parricide; *leges Juliae* on treason, adultery, peculation, private or public violence, canvassing, extortion, corn-supply. We may add the *lex Fabia* on kidnapping (D. xlviii 15). The Digest in the corresponding passage (*de postulando* iii 1 fr 1 § 6) has simply *capitali crimine damnatus* which comes to the same thing, capital charges being those where the punishment was death or interdiction from fire and water (*i.e.* not relegation). Charges which involve only a fine or some punishment to the person are not capital (D. xlviii 1 fr 2). If we trust Cicero's rhetoric (*Quinct.* 2 § 8; 31 § 95) *capitis causa* would have a far wider meaning, cf. D. L 16 fr 103. See Savigny *Syst.* § 81; Mommsen *St.R.* i 469 note 2; *Strafrecht* pp. 994, 995.

(11) or have been judged in a public trial to have brought an accusation or done anything calumniously or in prevarication[1];

(12) or when with the army, have had their rank taken away from them for disgraceful conduct, or have been ordered by the general to leave the army for disgraceful conduct;

(13) or have taken money or any other reward for bringing in (*referundum*) the head of a Roman citizen;

(14) or have traded with their own body (*qui corpore quaestum fecit:* Digest has *qui corpore suo muliebria passus est*);

(15) or have been training-masters or stage-players[2] (*qui lanistaturam artemve ludicram fecit*);

(16) or shall be pandars.

To these the Digest (iii 2 fr 1) adds (probably due to the *lex Julia et Papia Poppaea*):

(17) or have knowing that their son-in-law was dead given in marriage a daughter in their power before she has for the due time mourned her husband; or have knowingly married such a woman, unless by order of their family superior; or have permitted a son in their power to marry such a woman;

(18) or have on their own account, unless by order of the family superior, or on account of either son or daughter in their power, had two betrothments or two marriages established at the same time.

B. Some persons who were *infames* were also prohibited from appointing *cognitores* or *procuratores*[3]. There appears to have

[1] *Calumniari est falsa crimina intendere; praevaricari vera crimina abscondere* (D. xlviii 16 fr 1 § 1).

[2] It is noticeable that throughout the speech *pro Q. Rosc. Com.* there is no allusion to any disgrace attaching to defendant as a stage player: quite the contrary, *e.g.* § 17 *Ita dignissimus est scaena propter artificium ut dignissimus sit curia propter abstinentiam.* Livy refers to some disgrace: *Hoc genus ludorum ab Oscis acceptum tenuit juventus nec ab histrionibus pollui passa est: eo institutum manet ut actores Atellanarum nec tribu moveantur et stipendia tanquam expertes artis ludicrae faciant* (vii 2 § 12, cf. Val. M. ii 4 § 4). See Pernice *Labeo* i p. 242 sq.

[3] Savigny points out that a prohibition *ne dent cognitorem* (*procuratoremve*) *neve dentur* would prevent (until Ant. Pius allowed a *utilis*

been a separate list, (part of which is preserved in the Vatican Fragments §§ 320—323)[1], which adds the women themselves who have married before the due time of mourning has expired either for their husband, or parents (both male and female), or children. But Ulpian (*ap.* Dig. iii 2 fr 23) expressly denies the penalty of *infamia* to neglect of mourning for parents, children or other relatives.

The period of mourning is stated to be a year (of ten months) for parents, and for children more than ten years old; as many months of mourning as years of life for children from ten to three years old[2]; slight mourning for a child of one or two years, and none for children less than one year old (Vat. i 1). For a husband the period was ten months, for near relations eight months.

Mourning was abstention from dinner parties, ornaments, purple, and white dress (Paul i 21 § 13, 14). An heir's family was put into mourning (*funesta facta*) from the death of testator (D. xlv 3 fr 28 § 4).

C. Special disqualification of gaming-house keepers.

Here may be mentioned a peculiar declaration in the Edict, that no action would be granted against anyone who beat, or injured any keeper of a dicing house, or stole anything from his house when dicing was going on. Pomponius thought that this last provision referred to the action for theft only, but Ulpian held that the language of the Edict was so general as to imply a refusal of a vindication or condiction or action *ad exhibendum* also (D. xi 5 fr 1).

The senate forbade any games for money, except in manly exercises such as throwing spears or pikes, running, leaping,

actio) surrender of actions by or to *infames* (*Syst.* vol. ii § 82). Who were prevented from appointing representatives is not at all clear. Such a disability is referred to in Quintil. iv 4 § 6; vii 1 § 20; Gai. iv 124; Vat. 322; D. iii 3 fr 43 § 1; Just. iv 13 § 11. Keller (*CP.* n. 640) rightly points out that the fact of Q. Roscius appointing his partner a *cognitor* (*Rosc. Com.* 11 § 32) shews that the list could not be identical with the praetor's third class of disqualified persons. See also Karlowa *ZRG.* ix 223.

[1] The text is not clear. See Savigny *Syst.* ii, *Beilage* vii § 8.

[2] Paul i 21 § 13 gives a different account, but it rests only on a MS. now lost. See Savigny l.c. p. 553.

wrestling, boxing. Money gained contrary to the prohibition could be recovered by a *condictio, ib.* fr 2 § 1. Slaves were allowed to play for anything put on the table at a feast (fr 2 § 1—§ 4).

CHAPTER IV.

PLACE AND TIME FOR SUING.

A. Where suit should be brought.

The rule of Roman law was that a person must be sued where he had his home[1], and if he does not duly defend himself, his estate is liable to be seized under the praetor's order.

Home (or domicile) is the place which a man has made the seat of his household property and fortunes, where he means to abide if nothing call him away, and any departure from which is foreign travel. *Singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit decessurus si nihil avocet, unde cum profectus est peregrinari videtur, quo si rediit peregrinari jam destitit* (Cod. x 40 fr 7 § 1, cf. D. L 16 fr 203). For business purposes any shop, office, or warehouse is a sufficient establishment to make one liable to the local jurisdiction (D. v 1 fr 19 § 2).

If for business purposes or the administration of a ward's affairs he has established himself elsewhere, he is liable to be sued there also for any obligation there contracted or arising, or if he has contracted for payment or performance elsewhere, he may be sued in the place so named. An action *in rem* usually had to be brought like a personal action at defendant's domicile (Vat. 326 by Diocletian), but for a legacy had to be brought where the thing was. So an heir sued on a trust for an inheritance, may require the action to be brought where the greater part of the inheritance is. Plaint of an unduteous will was

[1] So Cicero said of Sicilians that it was their fixed right *ne quis extra suum forum vadimonium promittere cogatur* (*Verr.* iii 15 § 38).

brought where the heirs named therein had domicile (D. v 1, fr 19, 20, 38, 50; tit. 2 fr 29 § 4).

An heir is liable to be sued on his predecessor's obligation in the place where it arose; or if the suit has been already begun, then in the place accepted by his predecessor, whatever his own domicile may be (D. v 1 fr 19 pr; 34). And one who himself sues (except for a tort) in a place not his domicile, cannot refuse to be sued there (fr 2 § 5; 22).

Persons who are called away from their homes on public business, as legates or to give evidence, or to act as judges, and have suits brought against them for pressing obligations in the place of their temporary abode for obligations contracted at home, may demand to have the suit brought at their home (*jus revocandi domum*). If required they must give their personal security for appearance at the trial on a day fixed by the praetor (fr 2 § 3, 6; fr 24, *etc.*; cf. *Frag. Atest.* 17).

If a person is summoned by the praetor out of another's jurisdiction, he must appear and submit his objections to the jurisdiction. It is for the praetor to decide upon the limits of his jurisdiction: and this rule applies to legates claiming their privilege (D. v 1 fr 5).

Consent of the parties can give jurisdiction to any duly appointed judge (fr 1).

B. When suit should be brought.

As regards the time within which a suit must be brought, a distinction was made between suits resting on a statute or senate's decree, *i.e.* all suits belonging to the civil law proper, and those which were granted by the praetor on his own authority: *i.e.* (to use Gaius' language on another occasion) between those which *ipso jure competunt* and those which *a praetore dantur* (iv 112). Suits of the former class could be brought at any time after the cause arising; the latter as a rule only within one year. But there were exceptions where the action aimed at restitution (*quae rei persecutionem habet*) and not at mere penalty. And specially possessors of a deceased's estate and other persons in an heir's place were put on the footing of statutable heirs, and thus enabled to bring

their analogous (*utiles*) actions, and to be liable to suits more than a year after cause of suit arisen. And the same applied to the Publician action. Nor did the praetor put any limit to the time within which he granted an action for theft manifest, that action being really a milder substitute for the action given by the XII tables, which carried capital punishment (Gai. iv 110, 111; D. xliv 7 fr 35 pr).

When it is said that an action must be brought within *annus utilis*, 365 days must be reckoned without counting any day on which plaintiff's ignorance of his right, or physical hindrance, or non-sitting of the court prevents action. *Tempus utile* in this sense is opposed to *tempus continuum* (D. xxxviii 15 fr 2 pr; xliv 3 fr 1).

The time at which an action is held to be actually brought is joinder of issue (chap. xii): for the time within which it must be brought to judgment see same chapter.

CHAPTER V.

PROCEDURE *IN JURE*.

A. Summons.

The first step in legal process was to summon the defendant to appear in court (*in jus vocare*), *i.e.* before the praetor, to hear plaintiff's ground of action[1]. It is plaintiff's business to make the summons. He may summon him in any public place, at the door of his house or in the streets, at the baths or theatre, but cannot go into his house for the purpose, still less can he take him forcibly from his house. If defendant is visible from outside, or allows access, plaintiff may summon him (D. ii 4 fr 18—21). If on being summoned he does not obey, the XII tables directed evidence of the fact to be procured

[1] Cf. Plaut. *Pers.* 745 Sa. *Age ambula in jus, leno.* Do. *Quid me in jus vocas?* Sa. *Illic apud praetorem dicam; sed ego in jus voco.* Do. *Nonne antestaris?* Sa. *Tuan ego causa, carnufex, quoiquam mortali libero auris atteram? Poen.* 1233.

by the plaintiff's touching the ear of some bystander and requesting him to bear witness to his having uttered the summons. If defendant tried to shirk or refused to go, plaintiff was authorised to lay hand on him and take him. If he was old or ill, plaintiff had to provide a beast to ride or a carriage[1] (Fest. *s.v. Struere*, p. 310; Porph. ad Hor. *Sat.* i 9 76; Gell. xx 1 § 25). Defendant had when duly summoned only three courses open to avoid extreme measures: he had either to go into court, or to settle with plaintiff, or to furnish someone to answer for him. Such a substitute was called *vindex*. A defendant who adopted none of these courses was liable to a penalty under the praetor's edict, enforced by an action *in factum* (Gai. iv 46, 183; D. ii 4 fr 22 § 1). This penalty appears to be a substitute for the old fashion of compulsory taking into court; but, though we find no instance of the latter in Cicero[2], its continued existence is shewn by Horace's narrative of the bore, by the action named in Gaius (iv 46) and the Digest (ii 7) against anyone who forcibly rescued a defendant after summons, and by other reference (D. ii 8 fr 5 § 1). In practice no doubt private arrangements often obviated any such peremptory proceedings, at least in ordinary civil cases. Where a defendant kept out of the way to avoid summons, and no one appeared to defend him, the plaintiff could obtain an order from the praetor to take possession of his estate (D. ii 4 fr 19).

We have no information of the precise position and functions

[1] The words as restored were (see Bruns p. 17): *Si in jus vocat, ni it, antestamino: igitur em capito. Si calvitur pedemve struit, manum endo jacito. Si morbus aevitasve vitium escit, jumentum dato. Si nolet, arceram ne sternito.* I agree with others (*e.g.* Demelius *ZRG.* xv p. 9; Lenel *ib.* p. 49) that *manum endo jacito* does not import the procedure under the *legis actio* (see chap. xv). *Arceram ne sternito* makes it unnecessary for plaintiff to provide floorcloths or cushions.

[2] So Bethmann-Hollweg *CP.* ii 199. Obedience to a summons occurs, *e.g.* in Cic. *Quinct.* 19 § 61 *Vadari vis, promittit; in jus vocas, sequitur; judicium postulat, non recusat.* Cf. *Verr.* ii 76 § 187 and iv 66 § 148. In Plautus we have forcible dragging: *Rud.* 860 PL. *Age ambula in jus.* LA. *Quid ego deliqui?* PL. *In jure causam dicito: hic verbum sat est, sequere.* LA. *Obsecro te, subveni, mi Charmides; rapior obtorto collo: Poen.* 1232 *Moramini: in jus vos voco, nisi honestiust prehendi.*

of the *vindex*[1]. It seems probable that he merely undertook to produce defendant at some future time as the praetor might direct. If he failed to do so, he may have been liable to personal arrest and imprisonment; or to an action by plaintiff for the full amount of his claim. On satisfying this he would no doubt have a peremptory action against the original defendant. Against defendant who had given a *vindex* and kept out of the way, plaintiff had still the remedy of an order to take possession (D. ii 8 fr 2 § 5—fr 4; xlii 4 fr 2; Lenel *ZRG.* xv p. 43 sqq.).

Certain persons were not open to summons without the praetor's permission. Such were a lawful parent, grandparent, *etc.*, an adoptive parent during the adoption, a merely natural parent (*e.g.* a freedman whose child was born in slavery, or the mother of an illegitimate child), a patron or patroness, or the children or parents of a patron or patroness. This respect is due to them even if they are only guardians of the person really sued, but not if the patron is a ward and the suit is therefore against his guardians, or if plaintiff is suing on behalf of a ward. *Capitis deminutio* at least of a minor character does not affect for this purpose the relation of patron and freeman. A slave manumitted by a town or other corporation is not prevented from suing the individuals. The praetor will grant permission to sue, where the suit is not one involving disgrace or insult, or where the patron has abused his rights (D. ii 4 fr 4 §§ 1—4, 10 §§ 2, 4, 12, fr 16; Gai. iv 183). A like prohibition was in force against summoning young girls (*impuberes*) in the power of a parent, or madmen, or infants. And the like protection was extended to a consul or other magistrate with the *imperium*; a priest while performing sacred rites, a judge while sitting in court, a suitor before the praetor; one who is already bound to appear in court or in some fixed place for the purpose of a suit; one who is marrying or being married; one who cannot on religious grounds leave a place; one engaged in a funeral of his family

[1] We cannot assume identical functions with those of the *vindex* in execution. The Digest does not retain the name, but substitutes *fidejussor judicio sistendi causa*, a phrase all the more awkward because the first appearance was before the praetor. But the distinction between *in jure* and *in judicio* had passed away in Justinian's time.

or performing rites to the dead, or escorting a corpse; or being under review on a state horse (D. ii 4 fr 2—4 pr, 22 pr). The penalty for violation of the edict in this matter was 5000 sesterces (50 *aurei* in Digest *ib.* fr 12, 24). Gaius gives the formula for an action before *recuperatores* against a freedman for suing his patron (iv 46).

If suit were brought against parents, patrons, or patrons' children, children or others in plaintiff's power, or wife or daughter-in-law, any *vindex* was held to be sufficient. In other suits only a *locuples vindex*, i.e. one of adequate financial means could be accepted. If a clearly sufficient *vindex* was tendered and refused, both defendant and *vindex* had an action *injuriarum* against plaintiff who had thus insulted them (D. ii 8 fr 5 § 1).

B. *Vadimonium*[1].

If defendant appeared and the matter was not finished in one day, he had to make a *vadimonium*, *i.e.* to promise under penalty appearance on a named day. The edict provided for

[1] In Cicero *vadari* is used of requiring an adversary to promise appearance in court on a certain day, *e.g. Quinct.* 6 § 23 *Ait se jam neque vadari amplius neque vadimonium promittere; si quid agere secum velit Quinctius, non recusare. Hic hominem in praesentia non vadatur: ita sine vadimonio disceditur. Cum ceteris quae habebat vadimonia differt*; *ib.* 19 § 61; *Verr.* iii 34 § 78; Plaut. *Pers.* 289; Liv. iii 13 § 8; Ovid *Rem.* 665. To keep such an appointment is *ad vadimonium venire*, *vadimonium obire* (Cic. *Quinct.* 16 § 52; 17 § 54); not to keep it *vadimonium deserere* (*ib.* 18 § 56). Bail for appearance was *vas*; to give bail, *vadem dare* (cf. Hor. *Sat.* i 1 11 *Ille datis vadibus rure extractus in urbem*); to accept bail, *vadem accipere* Cic. *Ep. Brut.* i 18 § 2. *Vas* is principally used in criminal cases, *e.g.* Cic. *Off.* iii 10 § 45; Sall. *Jug.* 35 § 9; Liv. iii 13 *Appellati tribuni in vincula conici vetant; sisti reum pecuniamque ni sistatur populo promitti placere pronuntiant...Senatui vades dari placuit...Tot vadibus accusator vadatus est reum. Hic primus vades publico dedit. Vadatus* is used passively in Pl. *Bac.* 180: but probably not in Hor. *Sat.* i 9 36 *respondere vadato debebat* 'he ought to reply, *i.e.* to appear in court to one who had made him promise.' Mommsen (in Bekker and Müller's *Jahrbuch* vi 390) inclines to take *vadato* as ablative (cf. *auspicato, etc.*) 'after bail had been given.'

Other expressions for appearance (as in Liv. l.c.) are used in Gaius and the Digest, viz. *sistere reum* (of the bail) 'to produce defendant'; *sistere*

different cases, defendant sometimes giving a promise only (*vadimonium purum*), sometimes a promise supported by sureties, in other cases a promise on oath. Or again the appearance was secured by the appointment of Recoverers, who would at once if he failed to appear (*si non steterit*) condemn him in the amount of the sum named (Gai. iv 184, 185; D. ii 8 rubric). The amount of the *vadimonium* was usually fixed by the plaintiff on oath, who swears also to his own good faith (*non calumniae causa se postulare*). It is however limited by two *maxima*: it must not exceed either half the value or 100000 sesterces. Suits on a judgment or on money paid down by a sponsor (cf. Gai. iii 127) have the *vadimonium* unrestricted at the full value (Gai. iv 186).

The promise was in the form of answer to stipulation[1] and the action for the penalty was *ex stipulatu*. A surety for this, as for other praetorian stipulations, had to be substantial (*locuples*), and his sufficiency might if necessary be determined (subject to appeal) by reference to an arbitrator appointed by the praetor. A woman or soldier or minor under 25 years or slave is not a good surety (D. ii 8, fr 8 §§ 1, 2, fr 9, 10). Where the suit is of a nature to bring double or triple, *etc.* damages, the sureties are liable for the multiple (*ib.* fr 3).

Persons who could not be summoned without the praetor's consent (see above, p. 335) were also freed from the necessity of making a *vadimonium*, unless the praetor allow it (Gai. iv 187).

Persons in the country, where the suit was beyond the

vadimonium (Nep. *Att.* 9 § 4), *sisti* (of the defendant) 'to be produced,' 'to appear'; for which also *se sistere* (cf. Plaut. *Curc.* 163) and *stare* perf. *stetisse* are found. All the editors of Cic. *Quinct.* have been strangely misled by Gell. ii 14 where it is said that in Cato *quid si vadimonium capite obvoluto stitisses* the text should not be altered to *stetisses*. Of course not; *stare, stetisse* is intransitive and stands by itself as in all MSS. of Cic. *Quinct.* 6 § 25 *Testificatur P. Quinctium non stetisse et stetisse se*; but *vadimonium* would require the transitive *sistere, stitisse*. See full discussion in my *Introd.* Justin. p. ccxxvii. This is a remarkable instance of the way in which editors follow one another without thought, where the matter is at all technical.

[1] The stipulation was of course reduced to writing, cf. Cic. *Q. Fr.* ii 13 (quoted below, p. 347 *n.* 2); Ovid *Am.* i 12. 23 *Aptius hae capiant vadimonia garrula cerae.*

competence of the local jurisdiction, had to give a *vadimonium* to appear in Rome (*vadimonium Romam facere* (*lex Rubr.* 21)). For this purpose (and probably for other cases) the time for appearance was so fixed as to allow one day for every twenty miles of distance (D. ii 11 fr 1).

Non-appearance was excused (by grant of a plea) in case of serious illness (*morbus sonticus*) or age, or tempest, or swollen rivers impeding the journey (provided the defendant started in reasonable time); or absence *bona fide* on public business, or detention by a magistrate, or a family funeral, or capture by the enemy. In such cases and where defendant has been capitally condemned the sureties were not liable. In other cases, if appearance was made a few days after the day appointed, and plaintiff was not damnified, a plea might be admitted (D. ii 11 fr 2, 4 pr—§ 3, fr 6, 8).

Promise for another's appearance is not duly kept, if when he appears he is not in the same legal position as he was, *e.g.* if he has got some new privilege. But economic considerations did not affect the question, *e.g.* if he had incurred additional debt or had lost money. When a slave was to be produced in a noxal suit, the *vadimonium* required that he should be *in eadem causa, i.e.* not have been sold to someone more powerful or less accessible to suit than the former owner. Noxal surrender made in the interval on the ground of wrongs previously committed does not affect his position. *Noxa caput sequitur,* and therefore he remains liable for any subsequent injuries. If he have been manumitted, he becomes answerable, as a freeman, *i.e.* answerable in body for a criminal offence, and pecuniarily in full for a civil wrong (D. ii 9 fr 1, 2, 5; tit. 11 fr 11).

What was the consequence of plaintiff's not appearing we do not know, but the charter of Ossuna cap. 95 deprives him of all right to pursue the case further, unless he was prevented by ill-health, a *vadimonium,* a *judicium,* a sacrifice, a funeral in his family, or a feast in honour of the dead (*feriae denicales*): which in fact appear to be standing excuses (cf. Gell. xvi 4 § 4). The charter is supposed by Bruns and Mommsen to be dealing with criminal prosecutions.

C. The parties, often attended by their advocates (Cic. *Or.* i 37 § 168), being before the praetor, the real contention began. It consisted of two parts: (1) the arrangement for the trial, *i.e.* the ascertainment of the plaintiff's claim and of the nature of the defendant's reply, and the appointment of a judge to try the contention; (2) the trial before the judge so appointed. The first was the proceeding *in jure*, *i.e.* before the praetor or proconsul, *etc.*; the second was the proceeding *in judicio* before a *judex* or *recuperatores*, *etc.*

The proceedings before the praetor were in early times characterised by a series of formal declarations and symbolical actions of the parties, which were supposed to rest on the statute of the XII tables, and the procedure was hence called *legis actio*. The same name was also given to other procedures introduced by subsequent statutes.

CHAPTER VI.

PROCEDURE *PER LEGIS ACTIONES*[1].

Procedure by statute (*lege agebatur*) was, according to Gaius, in five different ways. Three of these were preparations for the trial of the contention: the fourth was the mode of enforcing

[1] It has been suggested that the proper notion of *agere*, *actio* in these legal proceedings was legal exercise of his right by plaintiff, and that the determination of questions as to his right was not the object of the proceeding, but arose incidentally on the resistance of defendant. This is seen in the *pignoris capio* and *manus injectio*. Cf. Demelius *Confessio* p. 40 sqq.

Lege agere is used by Cicero of vindications of land (*Or.* i 10 § 42, and perhaps *Mur.* 12 § 26); of suits for inheritance (*Or.* i 36 § 167; 38 § 175; *Verr.* ii 1. 45 § 115); of suits in Sicily (*Div. in Caecil.* 5 § 19; *Verr.* ii 2 16 § 39; *Caecin.* 33 § 97) without precise reference. Some may be referred to the technical *legis actio*, but it may be better to take them all in the general sense of 'according to the statute' whether the XII tables or other (see Bekker *ZRG.* v p. 343). So *lege agito* 'bring a suit'; Plaut. *Aul.* 458; *Mil.* 453; Ter. *Phorm.* 984. In Liv. xxvi 15 § 9 *lictorem lege agere jussit* is 'bade him proceed by law,' *i.e.* execute the prisoner.

execution of a judgment given or deemed to have been given, and will be more appropriately explained later on. The fifth was not properly judicial procedure, but a kind of self-help, classed with the others on account of the requirement of particular words (see p. 115). We know little about any of these statutable proceedings, and that little mainly from Gaius.

A. *Sacramento agere.* This was originally the only procedure and was applied, where no other form had been directed by special statute (Gai. iv 13), both to actions *in rem* and actions *in personam.* It was so called from a *sacramentum, i.e.* a stake of money deposited by each party on the justice of his claim or defence, which may have at one time gone to the priest, but in Gaius' time went to the public treasury. The mutilation of Gaius' MS. has deprived us of most of his description of procedure in a personal action[1], but has left us that in a real action.

Where a moveable object, whether slave, animal, or thing, was in dispute, it was brought into court. If this was impossible or inconvenient, as for instance in the case of a ship or column, a bit was broken off; in the case of a house, perhaps a tile was brought; in the case of land a clod[2]; if a flock or herd

[1] Valerius Probus § 4 gives explanations of certain abbreviations by initial letters for common forms in *legis actiones.* Among these appear three sentences, very probably relating to the *act. sacramenti in personam*: '*Aio te mihi dare oportere*'; '*Quando negas, te sacramento quingenario provoco*'; '*Quando neque ais neque negas*' (*Jus Antejust.* ii p. 144).

[2] Cicero in a witty passage in his speech *pro Murena* 12 § 26 ridicules the forms used in a suit for ownership of land. Plaintiff says 'The farm 'which is in the territory (*ager*) which is called Sabine, that I say is mine 'by the law of the Quirites. Thereon I call thee from court to join hand' (*Inde ibi ego te ex jure manum consertum voco*). Defendant: 'Whereon thou hast called me from court to join hand, thereon I in retort call thee.' Praetor: 'Each party having their witnesses (*superstites*) present, I declare (point?) that road: go the road. Return the road.' This shews the retention of old forms which were originally used at a time when the parties, with (or, later, without) the praetor, went to the land in dispute to identify it and there *in re atque in loco praesenti apud praetorem* both at the same time laid their hands on it (so Gell. xx 10 § 7 quoting the XII tables *si qui in jure manum conserunt*), or perhaps engaged in a symbolical struggle. A later stage, in which the parties took a clod from the place, and on it, as

was in dispute, one sheep or goat, or even some hair from an animal, was produced as a symbol of the object. The plaintiff then with a rod (*festuca*) in his hand laid hold of the thing or symbol, put the rod on it, and said, 'This man (or this thing) I 'assert to be mine by the law of the Quirites according to its 'character. As I have said, see you there, I have put my rod '(*vindicta*) upon it[1].' The rod was in lieu of a spear (*hasta*)[2], the sign of legally recognized ownership, as if the man or thing had been taken in war. If the claim was for the ownership of the thing, no qualifying words would be necessary; where the ownership was subject to a qualification, or where the claim was for the usufruct or use only, or for the ownership *minus* the usufruct, or for a servitude, or for a slave who was *statu liber*, or for an inheritance, or for a free person who was under power

upon a symbol of the land, made their claim in court, is given by Gaius in our text, and also by Gellius. He quotes Enn. *Ann.* viii *Non ex jure manum consertum sed mage ferro rem repetunt* (cf. Cic. *Mur.* 14 § 30; *Fam.* vii 13 § 2). In Cic. *Or.* i 10 § 41 both interdict and ownership suit are alluded to. *Id nisi in tuo regno essemus non tulissem multisque praeessem* ('captained' see Wilkins edit. *ad loc.*) *qui aut interdicto tecum contenderent aut te ex jure manum consertum vocarent, quod in alienas possessiones tam temere irruisses. Agerent enim tecum lege Pythagorei...ceterique in jure sua physici vindicarent...quibuscum tibi justo sacramento contendere non liceret.*

Journeys of the parties accompanied by friends to the spot are spoken of in Cic. *Caecin.* 7 § 20 *placuit constituere quo die in rem praesentem veniretur; Off.* i 10 § 32 *Si constitueris cuipiam te advocatum in rem praesentem esse venturum; Orat.* i 58 § 250.

[1] The words are *Hunc ego hominem ex jure Quiritium meum esse aio secundum suam causam. Sicut dixi ecce tibi vindictam imposui.* Some connect *sicut dixi* with what precedes. So Ihering *Geist* iii 1 p. 102 (4th ed.). For *secundum suam causam* cf. D. xli 7 fr 2 pr; x 2 fr 12 § 2; Karlowa *Röm. CP.* pp. 71, 72. Muirhead (*Hist.* § 34 n. 7) suggests that it is not part of the declaration, but a parenthetical instruction to the speaker to describe what he means by *meum esse.* But would *suam* be used in such a case?

[2] Cf. Cic. *Off.* ii 8 § 27 *Sulla ausus est dicere hasta posita, cum bona in foro venderet et bonorum virorum et locupletium et certe civium, 'praedam se suam vendere'; Phil.* ii 26 § 64; 40 § 103; *etc.* The spear was set up in the forum when the censors put out public contracts (Liv. xxviii 18 § 11; xxxix 44 § 8). It was in fact the traditional sign of a State auction (cf. Liv. ii 14 §§ 1—4).

(*adjecta causa* D. vi 1 fr 1 § 2), the character of the claim (*secundum suam causam*) would be briefly stated (or possibly only hinted at by these very words), the symbol itself being very far from telling its own tale. The defendant made a like claim accompanied by a like gesture. The praetor then intervened and directed both parties to let go (*mittite ambo hominem*). They let go. Plaintiff proceeds 'I demand whether thou sayest on what title thou hast claimed by rod.' Defendant answers 'I have done right so, as I have laid rod thereon. Plaintiff, 'Whereas thou hast wrongly claimed by rod, I challenge thee 'with a stake of 500 of bronze (*D aeris sacramento*).' Defendant said in similar way, 'and I thee.' Something further then followed (the MS. fails) as in a personal action, and then the praetor declared the *vindiciae* in favour of one of the parties: that is, as Gaius tells us, he made one of the parties *ad interim* possessor of the thing, and bade him give his opponent sureties for the suit and the rod-claims (*praedes litis et vindiciarum*[1]), *i.e.* for the due delivery, if he lost the case, of the thing itself and profits accruing in the meantime. The praetor further required from both parties other sureties for the amount of the stake, forfeitable by the loser to the public, the stake being 500 asses, if the claim was for a thing worth 1000 asses or more, 50 asses, if of less value. If the suit was whether a person was slave or free, the stake was only 50 asses, however valuable he might be, for freedom was not estimable in money (D. L 17 fr 106),

[1] Festus, p. 376, following Cincius, explains *vindiciae* to be the things taken from the land into court. I doubt this. Serv. Sulpicius (*apud* Fest.) seems to have taken it as I do. Gaius translates *litis et vind.* by *rei et fructuum.*

As regards *lis=res* Cicero ridicules the lawyers for not having made up their minds whether the term (in some proceedings—probably this) should be *lis* or *res* (*Mur.* 12 § 27), cf. Varr. *LL.* vii 93 *Quibus res erat in controversia, ea vocabatur lis; ideo in actionibus videmus dici 'quam rem sive me litem dicere oportet.'* The more usual meaning of *lis* (old form *stlis*) is 'suit,' *e.g.* D. L 16 fr 36. So in *Decemviri stlitibus judicandis, litis contestatio, etc.* In Cicero it is distinguished from *judicium, Verr.* iii 10, 26 *Traducere homines ad insolitam litem atque judicium; ib.* 13 § 32 *Persequi lite atque judicio*, and means perhaps the process before the praetor, or the older process of *legis actio.* Cf. *Orat.* ii 24 § 99; *ad Heren.* iv 23 § 33; Wlassak *PG.* ii p. 12.

and it was important that no claim of personal freedom might be hindered by the largeness of the stake. These amounts were all fixed by the XII tables (Gai. iv 13—17).

The second stage of the proceedings ensued. What was the practice before the *lex Pinaria* we do not know[1], but by that law an interval of 30 days was allowed before the appointment of a judge. On the judge being accepted, the parties gave notice (*denuntiabant*, to one another?) to appear before him on the next day. When they appeared, they first gave a summary or heads of their claim or defence (*causae conjectio*[2]), and afterwards pleaded their case in full (Gai. iv 15 of an action *in personam*).

No doubt witnesses were heard, but we know no more than is above given.

Three fragments of information which Gaius gives us elsewhere respecting the statutable procedure may be noticed here.

(*a*) In iv 108, after speaking of the plea of matter decided and brought to issue, Gaius remarks that in the days of the *legis actiones* there was no such use of pleas as there was in his time. Although his remark may refer only to that particular plea, it may be asked generally, how did defendant who had just objections to plaintiff's suit get them duly regarded? The answer which is given by most is that defendant urged them before the praetor himself so as to get him to refuse the *legis actio* altogether. If the facts required to be ascertained, he would direct a preliminary inquiry by means of a wager.

Possibly also the power of bringing a subsequent action for reimbursement would be some safeguard against exorbitant or unjust demands. The *lex Cincia* and *lex Plaetoria*, it has been suggested, might well be enforced by this latter means[3]. Other matters may have been dealt with by the judge himself, who was probably not in those days bound to so precise an issue as he was under the formulary system, where consequently a worthy plea could not be left out of the instructions, if right was to be done.

[1] '*Statim*' in Krüger's text of Gai. iv 15 is conjectural.

[2] MS. has *collectio quasi causae suae in breve coactio.*

[3] Cf. Ihering *Geist* § 52; Karlowa *CP.* § 46.

(*b*) What form judgment took is much disputed. In iv 48 Gaius[1] apparently contrasts the formulary system with that of the *legis actiones*, in that the former had the decision always directed to damages, whereas in the latter the judge condemned defendant in the thing itself. This may however have been sometimes preceded by an interlocutory pronouncement, *ejus qui petit* (plaintiff's) or *a quo petitur* (defendant's) *sacramentum justum esse.* Indeed in actions respecting personal liberty this was very probably the form of the decision itself (Cic. *Caec.* 33 § 97; *Dom.* 22 § 78). Where the thing in dispute was not producible, or pecuniary damages on any ground required to be awarded, the judge would probably proceed at once to settle them.

The fragment of the XII tables *post meridiem praesenti litem addicito* (Gell. xvii 2 § 10) agrees with Gaius' expression.

(*c*) Gaius (iv 108) tells us that in the days of procedure by statute, a matter once made the subject of a process could not again become so[2]; and that this was as of course (*ipso jure*). Compare *exceptio rei judicatae, etc.* below.

[1] Gaius' words are *Et si corpus aliquod petamus veluti fundum hominem vestem argentum judex non ipsam rem condemnat eum cum quo actum est, sicut olim fieri solebat; aestimata re pecuniam eum condemnat.* Most editors insert *sed* before *aestimata.* Some however have connected *sicut—solebat* with what follows, and thus make the same course to be taken under the process by statute as under the process by formulas. Böcking conjectures *sed ut* for *sicut.* It seems improbable that Gaius should have mentioned the old system at all, unless it was different from the modern. Keller supposes that this condemnation *in rem ipsam* was followed by an *arbitrium litis aestimandae*, and refers to this Fest. *s.v. vindiciae: in XII* (*tabulis*) '*si vindiciam falsam tulit si velit is* (*practor*) *arbitros tres dato, eorum arbitrio* (*reus*) *fructus duplione damnum decidito*' (*CP.* p. 74). There is no evidence for Keller's view. Cf. Stintzing *Leg. Act.* pp. 32, 34; Cogliolo notes to Padelletti p. 337.

[2] Cf. Ter. *Phorm.* 403 *Tu magistratus adi, judicium de eadem causa iterum ut reddant tibi, quandoquidem solus regnas et soli licet hic de eadem causa bis judicium apiscier; ib.* 419 '*Actum*' *aiunt* '*ne agas*'; Donat. ad Ter. *Ad.* 232 *Actum agam: proverbium*, i.e. *nihil agam: quod enim in jure semel judicatum fuerit, rescindi et iterum agi non potest;* Quintil. *Inst.* vii 6 § 4 *Solet et illud quaeri, quo referatur quod scriptum est;* '*bis de eadem re ne sit actio*'; *id est, hoc* '*bis*' *ad actorem an ad actionem: haec ex jure obscuro.*

B. The second *legis actio* mentioned by Gaius was called *per judicis postulationem*. His account is lost and we know nothing of it. It seems probable that it was used for the authoritative settlement of disputes which were too complicated to admit of a simple issue. Such might be the *judicia fam. ercisc.* and *com. div.* or the action *pro socio* or *rei uxoriae* or *tutelae*. Or it is conceivable that it was applied when defendant admitted liability, and the question was only what should be the damages. Some think[1] it was an alternative course open to the parties in any suit (cf. Cic. *Rosc. Com.* 4). Some connect with this procedure the challenge we often read of in Plautus and others 'to take a judge' (see chap. viii H).

The form of application is apparently given by Val. Probus § 4: *Te praetor judicem arbitrumve postulo uti des.*

C. The *legis actio per condictionem* derived its name from the notice (*condictio* = *denuntiatio*) given by plaintiff to defendant to appear on the thirtieth day (from the notice) to take a judge. Its introduction was due to a *lex Silia*, and under that law it applied only to suits for money certain. A *lex Calpurnia*[2] afterwards extended it to suits for anything certain (*de omni certa re*). Gaius says it was much questioned why this mode of procedure was wanted at all, for a claim *quod dari oportet* could be brought either by sacrament or by application for a judge (Gai. iv 17*a*—20), *i.e.* by one or other of those modes, possibly some by one and some by the other; certainly a choice in all cases is not implied (cf. *ib.* 13).

The commencement of Gaius' account has been lost from the MS. The notice in 30 days is the same as that given by the *lex Pinaria* in the sacramental procedure. Considering the class of cases to which this procedure was applicable, it is reasonable to conjecture that the motive for its introduction was to shorten the proceedings in matters (money loans) where

[1] So Schmidt *ZRG.* xiv 153; Wlassak *PG.* i 105. Against Wach-Keller *CP.* p. 78; Ihering *Scherz* 205. Karlowa (*RG.* ii 576) thinks this was the mode of enforcing *pecunia certa credita*.

[2] Mommsen identifies this law with the *lex repetundarum* of B.C. 149 (*Strafrecht* p. 708).

no long investigation was required and stringency was usual. This might be effected by substituting for the solemn ceremonial before the praetor a simple notice, possibly an extra-judicial[1] notice, given along with the summons, to appear in court that day month. Very likely some specification of the claim might have to be given at the time: and possibly the penal wager, which was part of the procedure for loans of money, was then made by the parties (Gai. iv 171; see above, p. 71; cf. Maine, *Early Hist. of Inst.* Lect. IX. p. 257).

CHAPTER VII.

PROCEDURE *PER FORMULAS*, *i.e.* by issues stated by the praetor.

1. All these procedures by statute came into odium, according to Gaius, from their excessive strictness which made any mistake fatal. The ceremonial words followed the precise terms of the statute, and this appears to have been especially the case with any action founded on the XII tables. Gaius mentions one instance: the XII tables gave an action against one who cut down trees (*de arboribus succisis*); a man had his vines cut down and in stating his plaint named vines and not trees. He lost his case. The law spoke of trees: how was a judge to say that vines were trees? If plaintiff complained of something else than the law gave an action for, he must take the consequence and go without the remedy[2] (Gai. iv 11).

[1] Demelius (*Krit. Viert.* viii 508) and Wach-Keller's *CP.* p. 86 ed. 5 state some objections to this view. In reply to the latter see Voigt *Vadimonium* p. 328.

[2] The doubt was not without real foundation. Vines were in some parts of Italy regularly trained to elms or planes or other trees (*arbores*); *arbustum* was the term for such a plantation, which required more years to grow than a plant like a vine. Hence it seems to me likely enough that the XII tables referred to the destruction of the permanent support (and also olives, *etc.*) and not to that of the easily growing but fruitful plant. Cato distinguishes them; *arbores facito uti bene maritae sint vitesque uti*

There appears to be in Gaius' remarks a lack of distinction between *actio* in the sense of legal procedure generally and *actio* as a ground for judicial protection in a particular class of circumstances. But it seems clear that the procedure or procedures by statute lacked flexibility, and were encumbered with antiquated formalities of an unpractical character and only half understood. The growth of Rome and its commerce increased its intercourse with other cities and nations, and promoted the transaction of business on a more simple and intelligible plan. The institution of a praetor for suits among and with foreigners brought new methods in its train, and the bold judicial legislation of the city praetor modified and extended the old law, and no doubt required the accompaniment of a reformed procedure. This reform was eventually effected by a *lex Aebutia* and two *leges Juliae*[1], which established a system of pleading conducted not by gesture and oral ritual, but by words specially adapted to the particular suit (*per concepta*[2] *verba id est per formulas*). The old procedure was abolished except for suits which were to come before the Hundredmen, and in cases of damage apprehended from ruinous buildings (*damni infecti*[3]).

satis multae adserantur (*RR.* 32); so also Varro; *ex arboribus in arbores traductis vitibus vinea fit* (*RR.* i 8 § 4). Pliny includes vines among trees in a general sense; *Vites jure apud priscos magnitudine quoque inter arbores numerabantur* (*HN.* xiv 9). For the action *de arboribus succisis* see p. 194.

[1] Wlassak in a very careful and elaborate investigation has made it probable that the *lex Aebutia* introduced the formulary process for all kinds of actions, but concurrently only with the procedure by statute (*Proc. Gesetz.* i p. 104); and that one *lex Julia* (of Augustus) abolished the *legis actiones* except in the two cases mentioned in the text. Both *Aebutia* and *Julia* dealt only with the proceedings before the *Praetor urbanus*. A second *lex Julia*, he suggests, made the same reform for Roman communities outside Rome, and limited the competence of municipal magistrates (*ib.* p. 191 foll.).

[2] For this use of *concipere* 'to draft,' see Cic. *Ep. Q. Fr.* ii 13 § 3 *Negat Trebatius quemquam fuisse* (*i.e.* in his camp in Gaul) *qui vadimonium concipere posset* 'who could draw a bail-bond': Liv. vii 5 § 5 *in quae ipse concepisset verba jurare*; Plaut. *Pseud.* 1077; Cic. *Off.* iii 29 § 108; Gai. iv 119, 131; *etc.*

[3] Wlassak makes the excellent suggestion that the *legis actio damni infecti* contained an extra-judicial notice (as in *operis novi nuntiatio*) to the

Of these the former was alone important. No use was made of the second, as the praetor's edict provided a remedy by way of stipulated guaranty which proved more convenient than the old proceeding (Gai. iv 11, 30, 31; Gell. xvi 13 § 8). After the *lex Aebutia* therefore the procedure by statute was in fact confined to cases intended for the Centumviral Court.

We do not know the date[1] of these laws, though the *leges Juliae* were probably passed by Augustus. Nor do we know their respective shares in the reform, nor how far the change which was thus stamped with authority had been gradually developed in practice. Our knowledge of the formular procedure is derived mainly from Gaius, but in essentials it existed in Cicero's time, who speaks of it as in use in Sicily. The principle of the procedure was that the praetor should settle beforehand all such questions of law arising in a suit as did not depend on the facts, should define how far equities should be recognised which were beyond the old or ordinary law, and should leave to the judge the decision on the facts and on the application of the law as known, or as now laid down by the praetor, to the result of the facts[2]. The plaintiff's claim and

owner of the dangerous building which imposed on him a liability, and that this part of the *leg. act.* was not of a nature to be superseded by a *formula*, but was superseded by the praetor's directing a stipulation (*Pr. G.* i 269 sqq.).

[1] The latest inquiry into the date of the *lex Aebutia*, that by P. F. Girard (*ZRG.* xxvii 49, see also *Manuel* p. 36), puts the *lex Aebutia* between 605 and 628 U.C. (149—126 B.C.). The *leges Juliae* he puts probably in the year 17 A.D. (*Manuel* p. 49).

[2] The distinction between proceedings *in jure* and *in judicio* is clearly seen in Cic. *Inv.* ii 11 § 57 *Et praetoris exceptionibus multae excluduntur actiones, et ita jus civile habemus constitutum ut causā cadat is qui non quemadmodum oportet egerit. Quare in jure plerumque translationes* (cf. p. 352) *versantur. Ibi enim et exceptiones postulantur et agendi potestas datur et omnis conceptio privatorum judiciorum constituitur. In ipsis autem judiciis rarius incidunt. Part. Or.* 28 § 99 *Etiam ante judicium de constituendo ipso judicio solet esse contentio, cum aut sitne actio illi qui agit aut jamne sit aut num jam esse desierit aut illāne lege hisne verbis sit actio, quaeritur. Quae etiamsi, antequam res in judicium venit, aut concertata aut dijudicata aut confecta non sunt, tamen in ipsis judiciis permagnum saepe habent pondus, cum ita dicitur: 'plus petisti'; 'sero*

the defendant's answer (if not a simple negative), so far as they were admitted by the praetor for trial, were embodied in one formula, framed on lines set forth in the Edict, but adapted to the particular contentions. This question or complex of questions was the issue which the judge had to try. The praetor *judicia dat* 'gives trials,' or 'grants issues for trial[1]'; the *judex judicat* 'tries and decides the issues' (Cic. *Verr.* II 2. 12 § 30).

2. The course followed in framing the issue is nowhere expressly described. Presumably the plaintiff selected among the *formulae* set forth on the praetor's *album* that which best suited him[2], and informed the defendant of it (*edebat*), *i.e.* either

petisti'; '*non fuit tua petitio*'; '*non a me*'; '*non hac lege*'; '*non his verbis*'; '*non hoc judicio*' (*i.e.* you have claimed too much; you are behind time with your suit; it is not for you to sue; nor am I the party to be sued; your case is not under this statute, nor within the words of this formula, nor in a trial like this). Again *ib.* § 100 *De constituendis actionibus, de capiendis subeundisve judiciis, de excipienda iniquitate actionis, de comparanda aequitate, quod ea fere generis ejus sunt ut, quamquam in ipsum judicium saepe delabuntur, tamen ante judicium tractanda videantur, paulum ea separo a judiciis tempore magis agendi quam dissimilitudine generis.*

[1] *Judicium* 'the declaration of law' includes the whole issue tried before the *judex* or *recuperatores* as authorized by the praetor and accepted by the parties. 'Trial' or 'issue' are the more precise, but 'suit' or 'process' are also sometimes convenient translations. When Wlassak (*e.g. Litiscontestation* p. 14) contends for its not only denoting the whole trial (*Gericht*) but also being technical for the *Schriftformel*, distinguishing this from the issue 'das von den Parteien vereinbarte Processprogramm' (*Proc. Gesetze* ii p. 60, cf. i p. 76 sq.), I cannot follow him, though willing to admit that the tablet containing the issue may often have been spoken of by the word properly denoting only the contents. That it means 'issue' and is often used where *formula* might be used, is clear. See also B. Kübler's examination of Ciceronian usage in *ZRG.* xxix 137 sqq.; xxvii 80; and Lenel *ib.* xxviii 374 sqq. *Formula* generally denotes such model or blank forms for issues as were set out in the praetor's *album*, but also the form filled up to give the issue for a particular trial, *e.g.* Gai. iv 57. Gradenwitz says the latter use is not found in laws and republican writers (*ZRG.* xxii 190).

Wlassak notes that where Cicero uses *judicium* the Digest often puts *actio*; this is strikingly shewn by comparing Cic. *Tull.* §§ 7—10, 38—43 with D. xlvii 8 fr 2, esp. §§ 13—25 (*Proc. Ges.* i p. 80).

[2] Cf. Cic. *Rosc. Com.* 8 § 24 *Sunt jura, sunt formulae de omnibus rebus*

read it to him (*dictare judicium* D. xlv 1 fr 112 pr), or shewed it him, or gave him a copy of it (cf. D. ii 13 fr 1 § 1; xxvi 8 fr 1, 15; xliv 4 fr 4 § 19). Sometimes, *e.g.* where there was a doubt as to the ground on which defendant maintained possession, plaintiff proposed two *formulae,* declaring at the same time that he intended only to use one (D. xliii 3 fr 1 § 4). If defendant made no objection and the case was of an ordinary type, the praetor would allow it. But there might often be circumstances which seemed to one party or the other to demand some addition or modification in order to get an issue which both could accept; and upon these proposals the praetor would have to decide (Cod. ii 1 fr 3; Cic. *Tull.* 16 § 38). It was not for the praetor to dictate[1] to the plaintiff what action he should bring, nor to the defendant in what way he should meet it: each party was presumed to know the law and facts of the case and the probable consequences of his proceeding. But the praetor was free to refuse a trial altogether[2] (see lexica *s. v. denegare*), or to refuse the particular issue demanded, if the circumstances made it unfair or inapplicable[3]. On the other hand if plaintiff shewed the praetor that no ordinary form would meet his case, but that he had *prima facie* been wronged in a way calling for legal redress, the praetor could direct an issue in such a special form as would enable right to be done[4]. So if defendant shewed that the issue insisted on by the plaintiff was too absolute and gave no opening for his answer, the praetor would make corresponding exceptions or requirements, and grant a trial to the plaintiff only if he accepted them as part of the issue. Some

constitutae, ne quis aut in genere injuriae aut ratione actionis errare possit. Expressae sunt enim ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicae a praetore formulae, ad quas privata lis accommodatur. Quae cum ita sint, cur non arbitrum pro socio adegeris Q. Roscium, quaero. Formulam non noras? Notissima erat. Judicio gravi experiri nolebas? Quid ita?

[1] This is clearly laid down by Cicero *pro Caecina* 3 § 3.

[2] Cf. Cic. *Flac.* 21 § 49 *M. Gratidius legatus ad quem est aditum, actionem se daturum negavit: re judicata stari ostendit placere.*

[3] *E.g.* the actions *quod metus causa*, and *de dolo* were granted only if there was no other adequate legal remedy (D. iv 2 fr 14 § 2; 3 fr 1 §§ 4—7 pr).

[4] *E.g.* by an *actio in factum.*

pleas if granted by the praetor would be clearly fatal to plaintiff's case: others would not. The plaintiff was free to avail himself of this issue or to proceed no further with his suit. If he chose to take the issue as settled by the praetor, defendant had either to accept it and go to trial, or to admit the justice of the claim and either make an arrangement with plaintiff or be condemned without more ado.

3. The issue was directed to a particular person or persons, as judge or recoverers, named in the formula. Apparently the plaintiff proposed the name of someone duly qualified (*ferre judicem*, Cic. *Rosc. Com.* 15 § 45; *Orat.* ii 70 § 285), who if accepted by the defendant (*accipere judicem*) would be nominated. Plaintiff was then said *sumere judicem* (Cic. *Rosc. Com.* 14 § 42; *Quinct.* 9 § 32; D. x 2 fr 52 § 2); or *arbitrum* (D. x 2 fr 47). But defendant might refuse (*recusare, reicere*) the person proposed, and might be compelled to support his refusal by an oath (*ejurare*) that he believed him to be unfair (*iniquus*, Cic. *Verr.* iii 60 § 137; *Or.* ii 70 § 285; *Fin.* ii 35 § 119). Fresh proposals would be made until an agreement was arrived at. Even in a matter of a small sum of money, says Cicero, no one was appointed judge who was not agreed upon by the parties (*Clu.* 43 § 120). Pertinacious refusal to accept all judges proposed would doubtless be treated by the praetor as failure in due defence[1], and defendant might probably be condemned without trial, or possession of his estate be given to plaintiff (cf. *lex Rubr.* 21, 22). A rescript of Hadrian (where the parties disagreed) disapproves of the appointment of a judge whom one party requested by name (D. v 1 fr 47).

As the function of judging was a public duty, the person named in the formula could only obtain excuse for grave reasons (D. v 1 fr 78; cf. fr 39; Suet. *Oct.* 32; *lex Ursonn.* 95); or as a matter of privilege, either under the *lex Papia Poppaea* (*Vat.* 197, 198), or otherwise, cf. Plin. *Ep. Traj.* 58 (66).

In the appointment of recoverers[2] it was perhaps usual to

[1] Cf. Cic. *Verr.* iii 60 § 140 where Verres similarly condemns a plaintiff who asked for recoverers taken from the regular assize list and declined to accept Verres' nominees from his own suite.

[2] This was the mode followed in Sicily: *Quid praetor* (Verres)*? Jubet recuperatores reicere; decurias scribamus. Quas decurias? De cohorte mea*

take by lot a number of names out of a list of duly qualified persons, and then for each party to have the right of challenging (*rejiciendo*) a certain number (*Ed. Venafr. sub finem*, Bruns no. 73).

In all cases whether of single judges or of recoverers the actual appointment (*datio, addictio*) was made by the praetor, who might however, and would in some cases, either by general rule or perhaps on the application of the parties, send the matter before the *centumviri* or *decemviri*. Any change of party or representative or judge required the approval of the praetor, who would then alter the *judicium* according. This was *transferre judicium* (D. iii 3 fr 17; v 1 fr 46, 57).

4. The general functions of the praetor in these matters, especially when the contest resulted in a trial, are often mentioned in the laws preserved in inscriptions, the phrases being very similar. *Magistratus ita jus deicito, judicia dato, judicareque jubeto, cogito*, 'the magistrate (*i.e.* praetor, governor of province, *etc.*) shall declare the law, shall grant trials, and bid and compel men to judge the case' (*lex Rubr.* 20); *de ea re juris dictio, judici* (=*judicii*) *judicis recuperatorum datio esto* (*lex agrar.* 35); *juris dictio judicis arbitri recuperatorum datio addictio, etc.* (Frag. Atest. 15 *ap.* Bruns no. 17). The expressions remind one of the three words which the praetor could not utter on an unholy day (Varr. *LL.* vi fr 4 § 30)[1]. But those probably related to his functions under the old statutable actions, perhaps thus, *do judicem, dico vindicias, addico judicatum* (*i.e.* to his creditor), or *addico rem* in surrender in court, *etc.*

All orders made by the praetor could be revoked by him (D. xlii 1 fr 14), and a *judicium* is dissolved by a prohibition of the praetor or of one who had greater authority (*e.g.* consul, D. v 1 fr 58). But neither praetor nor judex could rescind a judgment (*sententia*) once given by him (D. xlii 1 fr 42, 45). All magistrates (not however town *duoviri*) had power to enforce

reicies, inquit (Cic. *Verr.* iii 11 § 28), cf. *Flac.* 4 § 11. In Plin. *Pan.* 36 we have (perhaps referring to *recuperatores*) *sors et urna fisco judicem adsignat; licet reicere, licet exclamare, 'hunc nolo,' 'illum volo.'*

[1] Cf. Ovid *Fast.* i 47 *Ille* (*dies*) *nefastus erit, per quem tria verba silentur; fastus erit, per quem lege licebit agi.*

obedience to their orders by directing an issue for damages *quanti ea res est* (D. ii 3).

Special preparatory or alternative proceedings by means of wagers, orders for giving security, and tenders of an oath might form part of the business before the praetor. In some cases interrogatories were allowed. The appointment of representatives to conduct the suit was included in the issue. These matters together with certain checks on litigation will best be treated after the pleadings have been discussed. Gaius' fourth book is almost our only source of direct information on the pleadings.

When the emperor referred a litigant to the praetor or proconsul, *etc.* (*eum qui provinciae praeest adire potes*) it was for the magistrate to decide whether he would deal with (*cognoscere*) the matter himself or appoint a judge (D. i 18 fr 8).

5. A check upon the praetor's or other magistrate's possibly arbitrary decisions was provided by the edict declaring that if he laid down any new law (*si quid novi juris statuerit*) against a litigant, he and the litigant who demanded and obtained it in his favour must submit to its application against themselves in any suit which either might subsequently be engaged in, if his opponent in such future suit, whoever he might be, demanded it. The heir of the litigant favoured by the decision has to submit to its application also; but it cannot be used by a surety of the litigant. If the magistrate was a son under power, the father, sued on his son's behalf, is not liable to this principle (D. ii 2). The magistrate so applying it, if attacked, could plead *praeterquam si contra eum fecerit qui ipse eorum quid fecisset* (fr 4).

CHAPTER VIII.

PLEADINGS, OR PARTS AND KINDS OF *FORMULAE*.

A. General form.

1. The instructions on an issue for trial contained normally three parts. The first part was a brief statement of the matter giving rise to the suit, and was called *demonstratio*: the second set forth the plaintiff's claim (*intentio*): the third (*condemnatio*) instructed the judge to condemn the plaintiff in so much damages or to acquit him, as he might find to be right on the issue raised.

Thus to take the case of suit on a stipulation for a definite sum of money the issue would be framed thus:

M. Titius[1] *judex esto. Quod A. Agerius de N. Negidio x milia stipulatus est.* (*Demonstratio.*)

Si paret N. Negidium A. Agerio x milia dare oportere. (*Intentio.*)

M. Titi[2], *N. Negidium A. Agerio x milia condemna; si non paret absolve.* (*Condemnatio.*)

2. All these parts were subject to alteration according to the nature of the suit. Thus in a suit *ex vendito* against the buyer of a slave for the purchase money, the demonstration would state the fact of the sale, and the claim might be for the agreed amount: *e.g.*

M. Titius judex esto. Quod A. Agerius hominem Stichum N. Negidio vendidit, si paret N. Negidium A. Agerio L milia dare oportere, etc. But as the claim might in this, as in other *bonae fidei* suits, carry with it further rights for interest, *etc.* due to the delay of the purchaser, or might be subject to equities or counterclaims on behalf of the purchaser, a more general form of the *intentio* was adopted, *quidquid paret N. Negidium A. Agerio dare facere oportere.*

[1] Perhaps *M. Titi*, the vocative; but in Cic. *Verr.* ii 2, 12 § 31 we have *L. Octavius judex esto.*

[2] Gaius has *judex* in the formula, for which I presume the name of the particular judge selected would appear in the issue as actually sent for trial.

Where the suit was *in rem* to recover one's own slave or other thing in the possession of another, there was often no need of any demonstration and the claim would be put forward at once, *i.e., M. Titius judex esto. Si paret hominem Stichum quo de agitur ex jure Quiritium A. Agerii esse.* The condemnation clause would contain not a definite sum of money, but leave the valuation to the judge, *e.g. quanti Stichus est, tantam pecuniam, M. Titi, N. Negidium A. Agerio condemna; si non paret absolve* (Gai. iv 40, 41, 43).

Where again the suit is one for division of property held in common, whether between coheirs by the suit *familiae erciscundae,* or between partners or tenants in common by the suit *communi dividundo,* or between neighbours by the suit *finium regundorum,* the issue would briefly describe the circumstances and matter in question, and then instruct the judge by an adjudication clause to adjudge such part as might seem to him right to this or that litigant, *e.g. quantum adjudicari oportet, M. Titi, A. Agerio, M. Seio adjudicato,* and finally subjoin the general instruction in some such words as *quicquid ob eam rem alterum alteri praestare oportet, ejus M. Titi alterum alteri condemna, etc.*[1] (Gai. iv 42).

3. The condemnation in every issue 'sounded in damages,' *i.e.* it directed not, as under the former system, specific restoration of a thing or specific performance of a neglected duty, but the payment of money (Gai. iv 48: see above, p. 344 n. 1). The judge valued the thing or estimated the loss which had arisen from the neglect, and condemned the defendant in that amount. But specific restoration or performance might practically be obtained by the insertion of such words in the issue as *nisi restituet,* or *neque (si) ea res A. Agerio restituetur,* or by the action of the judge (Gai. iv 48; Cic. *Verr.* II 2, 12 § 31; and below, p. 411). Similarly in a noxal action the condemnation was couched in the alternative, *e.g. aut x milia sestertiûm solvere aut Stichum noxae dedere* (Gai. iv 75; Paul i 15 § 1): but in the

[1] Puchta (*Inst.* I § 167) and Lenel add *si non paret absolve* (*EP.* pp. 164, 165). No doubt if there were more than two co-holders and a payment was imposed on one for equality of distribution, the others might require an acquittal (cf. D. x 2 fr 27), but these words seem incongruous.

action *judicati* founded on this condemnation, plaintiff claims the 10000 sesterces, and defendant will be condemned to that, but has a statutable right to free himself by noxal surrender (D. xlii 1 fr 6 § 1).

The damages stated in the condemnation-clause may be either a certain or an uncertain amount. There are two cases of an uncertain amount: the damages may be put at the value of the thing or of the interest of the plaintiff, whatever that may be (1) without limit: or (2) with a superior limit. It is uncertain without limit (for instance) in a vindication or suit for production: *quanti ea res erit, tantam pecuniam, judex, N. Negidium A. Agerio condemna: si non paret, absolvito.* It is uncertain, but with a maximum limit (*cum taxatione*) when *dum taxat* appears in the formula, *e.g. N. Negidium A. Agerio dum taxat sestertiûm x milia condemna; si non paret absolve* (Gai. iv 49—51) or *dum taxat de peculio et quod in rem ejus* (*i.e. patris*) *versum est* (D. v. 1 fr 57)[1].

It may be noted here that the words *quanti ea res erit* (or *est*) sometimes denote the actual value of the thing, *verum pretium rei, vera rei aestimatio* (D. l 16 fr 179, 193: xlvii 2 fr 50 pr) more frequently were extended, or sometimes confined, by the lawyers to the plaintiff's interest, *utilitas, quanti actori interest, quod interest* (D. vi 1 68; xliii 16 fr 6; 17 fr 3 § 11; xlvi 5 fr 11; cf x 4 fr 9 § 8; Just. iv 3 § 10)[2].

4. One important difference in the frame of the issue was determined by the nature of the action, as founded on the civil law, or as granted by the praetor to meet the particular circumstances. In the former case the issue was shaped for law (*formula in jus concepta*); in the latter case it was shaped for

[1] In the case of *Tullius* v. *Fabium* the issue contained a limit. Cicero says *Judicium vestrum est, recuperatores. Quantae pecuniae paret dolo malo familiae P. Fabi vi hominibus armatis coactisve damnum datum esse M. Tullio. Ejus rei taxationem nos fecimus: aestimatio vestra est: judicium datum est in quadruplum, i.e.* the recoverers would if they found for the plaintiff fix the amount of damages at some figure not exceeding plaintiff's estimate (*taxatio*). Whatever the amount so fixed, defendant would be in this case condemned for fourfold that amount (Cic. *Tull.* 3 § 7).

[2] See Savigny *Syst.* v. *Beil.* xii; F. Mommsen *Beitr.* ii § 6; Demelius *Exhibitionspflicht* p. 10.

fact (*in factum concepta*). A formula 'shaped for law' was an issue directing a judge to inquire whether the facts that should be proved shewed a right known to the civil law, *e.g.* that a thing is ours by the law of the Quirites, or that this or that thing or sum of money should be given us, or that some damage caused to us by defendant, either as thief (*pro fure*) or as committing a wrong within the Aquilian statute (*damnum injuria*), ought to be settled for (*decidi oportere*), or the like. The amount might by the pleading be left to the judge to determine (*quidquid dare facere oportet*) or be claimed by the plaintiff definitely: that did not affect the general character of the issue, which, presuming the judge to know what was required for Quiritian ownership, and what the civil law recognised as a personal obligation from contract or from tort, gave him the task of deciding whether the plaintiff proved his ownership or contract, or established his case for compensation for neglected duty.

On the other hand a formula 'shaped for fact' limited the judge to the task of ascertaining whether the facts were really as stated in the formula hypothetically: the praetor had already determined that these facts entitled the plaintiff to redress: if therefore the facts were found to be as alleged, the judge had nothing more to do (at least at this stage) than to find for the plaintiff and condemn the defendant in an amount which would redress the wrong.

Usually one only of these two kinds of issue would be so often required for a particular class of action as to make it worth while for the praetor to publish the types of issue on his *album*. But for some reason or other in the cases of deposit and loan (*commodatum*) the edict contained both types, and these may therefore be suitably used in illustration. The *formula in jus concepta* for deposit is given by Gaius thus:

Judex esto: Quod A. Agerius apud N. Negidium mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem N. Negidium A. Agerio dare facere oportet ex fide bona[1], *ejus*

[1] Cf. Cic. *Top.* 17 § 66 *in omnibus his judiciis in quibus 'ex fide bona' est additum.*

iudex N. Negidium A. Agerio condemnato N. R.[1]*: si non paret absolvito.*

The *formula in factum concepta* is given as follows:

Judex esto. Si paret A. Agerium apud N. Negidium mensam argenteam deposuisse eamque dolo malo N. Negidii A. Agerio reddítam non esse, quanti ea res erit, tantam pecuniam judex N. Negidium A. Agerio condemnato: si non paret absolvito (Gai. iv 45—47: cf. 60).

The *formula in jus concepta* just mentions the general nature of the suit and then leaves free hand to the judge to determine what the equity of the case demands, the suit being *bonae fidei*. There might be claims of the plaintiff for non-return of the table or for delay in returning it, or for damage done to it, or for its having been carried off and left in a distant place, and there might be counter-claims for expenses in recovering it from robbers or repairing damage from inevitable accidents, *etc.* The judge might direct the immediate return and ascertain the balance on claims, or might direct plaintiff on receiving the value to transfer his actions to defendant, *etc.*

The *formula in factum concepta* makes it necessary for plaintiff to prove the fact of the deposit of a table, of its being silver, of its non-return, and of this non-return being due to the fraudulent (*i.e.* wrongful) conduct of defendant: if these facts are severally proved, the judge has simply to allow plaintiff to fix on oath the value of the table (D. xvi 3 fr 1 § 26), or if plaintiff does not do so, to fix the value himself and order defendant to pay the value. One may conjecture that when the facts were clear and there was no complication of counter-claims, a plaintiff might prefer this form of action to one which left more openings for chicanery and delay.

Gaius gives another instance of an action *in factum concepta* where a freedman has summoned his patron into court contrary to the edict (see p. 335) and the patron therefore sues him

[1] Supposed by some to be for *nisi restituat*, but there is no authority for such an explanation, and no other example of *nisi restituat* in the formula of an action of *dare oportere*. See Keller *Institutiones* p. 115.

for damages[1]: *L. Titius, C. Seius, M. Flavius recuperatores sunto. Si paret M. Albium Sexti filium Quirina (patronum) a M. Albio liberto suo contra edictum C. Burrieni praetoris in jus vocatum esse, L. Titi, C. Sei, M. Flavi, M. Albium libertum M. Albio Sexti filio Quirina x milia condemnate: si non paret, absolvite.* The same title of the edict (*de in jus vocando*) was filled with *formulae* of this class *e.g.* in actions against one who being summoned into court neither came nor furnished a *vindex* in his stead, or one who had forcibly carried off a person who was under summons to court; these and many others (*innumerabiles*) being cases where the praetor held that the fact once established was sufficient to constitute a claim for redress (Gai. iv 46).

5. There are some cases in which the formula contains neither demonstration nor condemnation, but only the claim or rather the point in dispute (*intentio*). Gaius gives as instances certain preliminary questions (*praejudicia*), 'whether a person is a freedman' (cf. D. xl 14 fr 6), 'how large a dowry is,' *etc.* No formula ever contained only a *demonstratio* or an *adjudicatio* or a *condemnatio*: they would have no point by themselves; the *intentio* is essential (Gai. iv 44). In the *formulae in factum conceptae* the demonstration is absorbed into the claim (cf. *ib.* 60).

B. Error in plaintiff's statement.

The importance of an error in the plaintiff's statement of claim is different according to the part of the formula in which it occurs.

1. In the clause containing the claim (*intentio*) a misstatement is fatal to the plaintiff, if in excess of his right. *Causā cadit* 'he falls from his case,' *i.e.* loses his suit (*rem perdit*)[2].

[1] I have filled up Gaius' blank form with conjectural names (cf. Cic. *Quinct.* § 24).

[2] A case in point (but *lege agendo*) is mentioned by Cicero (*Orat.* i 36 §§ 166, 167). Hypsaeus acting for a ward against his guardian urged the praetor to allow him to make his claim for more than the XII tables permitted (see vol. I p. 111) in which case he would have lost his case (*causā caderet*). Octavius for the defendant was equally stupid; he vigorously

And the praetor rarely quashed the proceedings (*in integrum restituere*), unless plaintiff was under twenty-five years of age. If he were older, it must be shewn that there was much to excuse the error (Gai. iv 53 mutilated, cf. Just. iv 6 § 3). Excess of claim (*plus petere*) might be in several ways; viz. in the thing itself, in point of time, in point of place and in the particular character (*re, tempore, loco, causa* Gaius; *loco, summa, tempore, qualitate* Paul i 10). There is excess in the thing if a man sue for 20,000 when only 10,000 is owed him, or when with an issue framed *in factum* a man states a deposit of more things than was true (Gai. iv 60), or when a part owner or co-heir sues for the whole or for a larger share than belongs to him, or when a man claims (*vindicat*) the right of raising his house without specifying any limit of height, although he has only a right of raising to a certain height (Vat. 53). There is excess in point of time, when one sues for what is not yet due; or when one who has a temporary usufruct claims it, without adding the period (Vat. 52). Excess in point of place is when what is promised to be paid in a certain place is sued for in another place, without mention of the place agreed on, as if a man has stipulated for something to be given him at Ephesus, and then at Rome sues for it to be given him without any qualification. The rates for money and the price of commodities vary in different places and hence the claim may by the change of place become more irksome. There is excess in the particular character (*causa*) of the claim, if a man sues for a thing without giving an option between that and something else in conformity with the stipulation. So if a man has promised purple generally, and you sue him for Tyrian purple; or has promised a slave generally, and you sue him expressly for a particular slave. Nor does it matter whether the thing sued for is cheaper than what was promised or not: the excess lies in taking away defendant's option, for although the claim may be for what is really less, yet it may sometimes be easier for defendant to give the other, and thus an excess of claim is the result.

urged that this should not be permitted, thereby missing his opportunity of getting a certain acquittal for his client in a suit which involved infamy to the person condemned.

And therefore in suing on a stipulation, the claim should be expressed in the precise terms of the stipulation (Gai. iv 53; cf. Just. iv 6 § 33).

If the claim is, as defined above, uncertain[1], *i.e.* if the formula runs *Quidquid N. Negidium A. Agerio dare facere oportet*, there can be no excess of claim. And the same applies when (as is however rarely allowed) an undefined part of a thing is claimed in an action *in rem, e.g. quantam partem paret in eo fundo de quo agitur A. Agerii esse* (Gai. iv 54).

If one claim less than is really due, his claim is good so far, but he cannot sue for the balance within the same praetorship, as the defendant could defeat him with the plea *litis dividuae, i.e.* that he has split his claim (Gai. iv 56, 122, see below).

If the plaintiff errs by substituting one thing for another, so that he claim the slave Eros when he ought to have claimed Stichus; or if he based his claim on a will (*ex testamento dare sibi oportere*) when the thing was due on a stipulation; or if an attorney or agent claims that a thing ought to be given *to him* (instead of to the person whom he represents); in all these cases the plaintiff's action goes for nothing, and he is not prevented from suing afresh on his real claim rightly stated (Gai. iv 55).

2. If in the condemnatory clause plaintiff puts a larger sum than he ought, he only so far injures himself that he enables the defendant to get the proceedings quashed (*in integrum restituta*) on the ground of the formula which he has accepted being unfair. If plaintiff puts a less sum than he ought, the balance is lost, for the claim puts the whole matter

[1] Cicero dwells on the difference between a suit for something certain and for something uncertain, calling the former a *judicium*, the latter an *arbitrium*. (*Rosc. Com.* 4 § 10) *Pecunia tibi debebatur certa, quae nunc petitur per judicem. Hic tu, si amplius* HS *nummo petisti quam tibi debitum est, causam perdidisti, propterea quod aliud est judicium, aliud est arbitrium. Judicium est pecuniae certae, arbitrium incertae: ad judicium hoc modo venimus, ut totam litem aut obtineamus aut amittamus; ad arbitrium hoc animo adimus, ut neque nihil neque tantum quantum postulavimus consequamur. Ei rei verba formulae testimonio sunt. Quid est in judicio? Derectum, asperum, simplex: si paret* HS IↃↃↃ *dari; hic nisi planum facit* HS IↃↃↃ *ad libellam sic deberi, causam perdit. Quid est in arbitrio? Mite moderatum, 'Quantum aequius et melius sit dari'*

in issue, and the judge cannot give sentence for a larger amount than is named in the condemnation. Nor will the praetor assist the plaintiff by quashing the proceedings, unless he is under 25 years of age, for in the case of minors the mistake of a plaintiff meets with as much indulgence as that of a defendant (Gai. iv 57).

3. A mistake, whether by excess or defect, in the demonstration, does no harm, the rule being *falsa demonstratio rem non perimit.* Plaintiff's real claim is not put in issue at all (*nihil in judicium deducitur*) and the proceedings go for nothing. According to some lawyers (says Gaius), including Labeo, a demonstration is not bad which states less than the real claim, so that one who has bought two slaves Stichus and Eros, can take a formula commencing 'Whereas I have bought from you the slave Eros,' and can afterwards sue for Stichus, for it is true that having bought the two, he has also bought each one. But if he has bought only one, and sets forth that he has bought two, the demonstration is false. And the same applies in suits for loan (*commodati*) and deposit. Other writers again hold that in some cases a demonstration setting forth more than is true occasions a loss of the suit altogether, these cases being actions of deposit and all others wherein condemnation was followed by infamy. For instance, one who sets forth a deposit of two or more things when he has only deposited one, or who, bringing an action for insulting conduct in consequence of a blow on his cheek with a fist, alleges a blow on another part of his body also. Gaius apparently agrees that this is so in an action for deposit where the formula was *in factum concepta* because there the demonstration is merged in the claim and the judgment made to depend on the finding of the facts; but with a formula *in jus concepta* the two are quite separate, and a misstatement does no harm, because the claim is only for what is found to be right (*quicquid ob eam rem illum illi dare facere oportet:* Gai. iv 58—60 mutilated at end).

Where the claim set forth is true in itself, but is on certain grounds of law not fully recoverable, because for instance the defendant as father or master is responsible only to the extent of the son's or slave's *peculium* and that is inadequate to the

claim, or because the relation of plaintiff and defendant prevents the claim being pressed to the full (cf. p. 416), the apparent excess of demonstration or of claim or of condemnation does not injure the plaintiff's suit: the judge makes the necessary reduction (Just. iv 6 §§ 36—38: Gaius' text is lost but cf. iv 134).

C. Set off (*Compensatio*).

Other circumstances may make a practical reduction of the plaintiff's demand. In all *bonae fidei* actions, and, since M. Aurelius, in strict actions also, the judge could set off against the claim of plaintiff a debt in reference to the same matter due from him to the defendant. But this was not explicitly stated in the formula and will be better dealt with later on. 1. There are however two cases in which 'set off' or an analogous deduction found place in the formula. A banker suing his customer for money due, must set off all sums due to him; in short he can sue for the balance only. Thus if he owes Titius 10,000 sesterces and Titius owes him 20,000, the claim must be made in this fashion; 'if it appears that Titius ought to pay plaintiff '10,000 more than he himself owes to Titius, then condemn 'Titius in that amount.' 'Set off' can only be between debts actually due and of the same kind, *e.g.* money against money, wheat against wheat, wine against wine; and some lawyers held that they must be of the same quality as well as of the same kind. Account is taken of the set off in the clause containing the claim (*intentio*), so that if the banker sue for a sesterce more than the balance, he loses his case and therefore the debt is gone.

2. The purchaser of a bankrupt estate (*bonorum emptor*) is in somewhat the like position. He must sue with a deduction: *i.e.* he can sue a debtor to the estate only for what remains due, after deducting what he owes to the defendant on the defaulter's account. But the deduction is not confined to what is actually due; a debt due on a future day has also to be deducted. Nor is it necessary that the debt should be of the same kind of thing: from a money demand must be deducted the value of any corn or wine due. Account is taken in the condemnation clause, so that the rule which attends the

banker's set off does not hang over the purchaser of bankrupt estate: though his claim is for a defined amount, the condemnation clause is uncertain: *quanti id erit, deducto quod actor debet, etc.* (Gai. iv 61—68; Paul ii 5 § 3).

D. Pleas (*Exceptiones*).

1. The praetor in settling the issue is not concerned only with the plaintiff's claim, but has to regard and embody in the formula any special answer in law or equity which the defendant may put forward, and which is not regarded by the praetor as sufficient in itself or sufficiently evident to justify him in refusing the action altogether. The formula, being the instructions to the judge that he is to condemn or not, according as he finds the facts and law to support the plaintiff's or defendant's case, must embrace the salient points on which the defendant bases his refusal, as well as the plaintiff's allegation of right. Thus it may be that the plaintiff has strict law on his side, but that it would be inequitable for defendant to be condemned. Suppose for instance that I have stipulated that you should repay me so much money which I am going to count over to you as a loan and yet have never done so, you are still bound by your promise to pay it me—that is clear law; but, the equity of the case being against me, you are allowed a plea of fraud (*doli mali*), and, if this be proved, the judge will acquit you from my suit. Or suppose that I have made a bargain with you not to sue you upon your debt, the bargain does not cancel the obligation to pay in strict law, but if I sue notwithstanding, the praetor will allow you the plea of 'bargain agreed' (*pacti conventi exceptio*) and thus defeat my action. Other pleas are such as arise when an oath has been tendered and defendant has sworn that he does not owe the money, or that the land sought is his own; or when a man has been compelled by fear or induced by fraud to mancipate to another some property. If he is then sued, the plea of oath or intimidation or fraud will be fatal to plaintiff. Or if a man has knowingly bought land with disputed title (*fundum litigiosum*) from one who is not possessor, and then sues the person possessing for it,

a plea of the fact puts the suitor out of court (Gai. iv 115—117; Just. iv 13 § 4; see below, p. 406).

2. Some pleas were in constant use, and were set out in the edict as standing pleas: others were granted specially by the praetor after full hearing (*causa cognita*). All rested either on statute or what is equivalent to statute, or on the praetor's jurisdiction. They were inserted in the formula in a shape which expressed the contrary of the defendant's contention[1], being in fact conditions on which the judge was not to find for the plaintiff; or, in other words, only if the fact alleged by defendant was found not to be true, was the judge to condemn the defendant. Thus, taking the first case mentioned above, the formula would run thus: *si paret N. Negidium A. Agerio x milia sestertium dare oportere*[2], *si in ea re nihil dolo malo A. Agerii factum est neque fit, judex, N. Negidium A. Agerio x milia sestertium condemna; si paret absolve.* So the plea of 'bargain agreed' would be in the form *si inter A. A. et N. N. non convenit ne ea pecunia peteretur*, and only if the judge finds there has been no fraud or no such bargain is he to condemn the defendant (Gai. iv 118).

3. Pleas are called either peremptory or dilatory. The former are those which are always in force and cannot be avoided, the latter are good only for a time. Peremptory pleas are such as intimidation, fraud, violation of a statute or senate's decree, matter already decided or brought to issue (*rei judicatae vel in judicium deductae*)[3], bargain never to sue. Dilatory pleas

[1] The words used in *formulae* for introducing a plea are *quod non, quod nec...nec* (Cic. *Fam.* vii 13; *Tull.* 19 § 44; *lex Agrar.* 18; D. xliii 24 fr 7 § 3; *etc.*); *qua de re non* (*lex Rubr.* 19); *extra quam* (Cic. *Inv.* ii 20 § 59); *extra quam si* (D. xliii 12 fr 1 § 16); *si non* (Gai. iv 119, 126); *neque*, after *si paret* (C. *Verr.* ii 12 § 31). *Nisi* appears to have been avoided, perhaps because of its use in offering the alternative of restitution (*nisi restituat*, see p. 411). *Nisi*, as well as *ni*, *si*, is common in wagers. See Keller *CP.* § 34; Schmidt *Interd.* p. 108; and on wagers the references below, p. 374 n. 1.

[2] In actions for *certa credita pecunia* the ground of debt was not stated. Lenel *EP.* p. 187; infra, p. 497.

[3] Most writers treat this as two pleas. Lenel shews that Gaius gives it apparently as one, and points out possible risks which would be avoided by the combination. It is referred to (not quoted) in Cic. *Orat.* i 37 § 168 *ne*

are such as 'bargain not to sue within (say) five years': after that time has expired, suit could be brought. So the pleas of 'split suit' (*litis dividuae*) and 'remaining matter' (*rei residuae*) are only temporary bars: the former is when a plaintiff has already sued for part of a debt and sues for remainder within the same praetorship; the latter is when a plaintiff, who has several actions with the same defendant, has sued on some and put off others with a view to getting different judges, and then sues on these remaining matters within the same praetorship: in both cases plaintiff is put out of court by the plea. Whenever there is a dilatory plea applicable, plaintiff's right course is to defer suit until the next praetorship or whatever the period may be, and thus avoid the plea; otherwise if he persists in suing, the matter having been brought to issue and destroyed by the plea, his claim is gone. If defendant omits to use a dilatory plea which he might use, it is, says Gaius, a question whether he can get the proceedings quashed: if he omits by mistake to use a peremptory plea, he can get them quashed so far as to admit of the addition of the plea (Gai. iv 120—123; 125).

Other dilatory pleas are concerned with the persons appearing as parties, such as cognitorial (or procuratorial D. xliv 1 fr 2 § 4 fr 3) pleas. If plaintiff sue by attorney (*cognitor*), when he is disabled by the edict from appointing one, or has appointed one who is disabled from acting as such (see chap. iii A, B), he is liable, if he proceeds, to have this pleaded against him and thus lose his claim. His right course, on the insertion of this plea being demanded by his opponent, is to appear in person in the former case, and in the second case either to appear in person or to appoint a duly qualified attorney. In one of these ways he can avoid the plea. Concealment of the disqualification is fatal (Gai. iv 124).

exceptione excluderetur quod ea res in judicium antea venisset (*EP.* p. 404). Observe too that *rei* is not repeated before *in judicium*, as would be natural in giving the name of a separate plea. (Eisele in *Abhandl. d. röm. C. P.* argues against Lenel, but considering how little we know of the *legis actio* procedure and how little we can trust conjectural restorations, I am surprised at the stress laid by him on them, *e.g.* pp. 20, 26. He has a further article on the subject in *ZRG.* xxxiv.)

A defendant is not limited to a single plea; and is not held by the use of a plea to admit the claim of plaintiff to be good in itself (D. xliv fr 5, 8, 9).

E. Replications, *etc.* Plaintiff will sometimes have a good answer to defendant's plea, and this also will consequently be inserted in the formula. It is called a *replicatio*[1]. For instance it may be quite true that I bargained not to sue you for a debt, but a subsequent bargain between us may have been made, which restored me my liberty. The formula should therefore contain not only the plea of bargain made not to sue (*si non convenerit, ne eam pecuniam peterem*), but also a replication subjoined *si non postea convenit ut mihi eam pecuniam petere liceret.* So a banker may have conducted an auction and given notice that payment must be made before delivery. If he sues a purchaser for the money and the purchaser pleads non-delivery of the goods bought, the plea will run *si ei res quam emerit tradita est*; the plea being as usual contradictory to the defendant's contention, *i.e.* in this case in the affirmative because defendant denies delivery. To this the replication will be appended *aut si praedictum est ne aliter emptori res traderetur quam si pretium emptor solverit.* A rejoinder to a replication may perhaps be required on the part of the defendant: this is called a *duplicatio.* Again this may lead to surrejoinder (*triplicatio*) from the plaintiff; and it is possible that the controversy may require further additions (Gai. iv 126—129; cf. D. iii 3 fr 48).

The replication is sometimes regarded as the second stage in the pleading, the exception being the first: the reply to plaintiff is then *triplicatio.* Thus if a caretaker who ought by a decree of the praetor to have given security has sold and conveyed some thing belonging to the madman and the madman's heir brings a vindication against the purchaser, he will plead (*exceptio*) that it was sold to him. The madman's heir can reply (*replicatio*) that the caretaker was bound to give security for his due administration, and that the purchaser can proceed against him, and will not therefore be damnified by giving up

[1] *I.e.* the 'undoing, because the leaf folded is folded back again,' *Quia per eam replicatur atque resolvitur vis exceptionis* (Gaius).

the thing illegally sold to the madman's heir. To this the purchaser can perhaps retort (*triplicatio*) that the purchase money has been applied to defray debts of the madman and that therefore the madman's heir, holding an estate which has been benefited by the act of the caretaker in raising money, is acting fraudulently in redemanding the thing sold. This pleading would be expressed: *si non curator rem de qua agitur vendiderit* (exceptio), *aut si satisdatione interposita secundum decretum vendiderit* (replicatio) *neque in ea re dolo malo Titii* (*i.e. heredis*) *quidquam factum est* (triplicatio). Cf. D. xxvii 10 fr 7 § 1; Keller *CP.* § 37; Savigny *Syst.* v p. 193. So in Vat. 259 the reply to a plea of the *lex Cincia* is called *duplicatio* (= *replicatio*).

F. Praescriptions.

1. Praescriptions[1] are limitations prefixed to the formula for the protection of plaintiff. It often happens that several claims may arise from the same obligation, part due now, part only at a future time. Thus if a person has stipulated for a certain sum of money to be paid him every year or every month, at the end of some years or months certain amounts will be due, others under the same obligation not due, and we may desire to collect what is due without impairing the obligation of future payments. Plaintiff therefore must put at the head of the issue words to limit his suit: *e.g. Ea res agatur cujus rei dies fuit*[2]. Otherwise if he sue with the regular *formula* for an uncertain amount, *quidquid paret N. Negidium A. Agerio dare facere oportere*, he puts the whole obligation in issue[3], and yet cannot get judgment for more than is actually due: and thus will lose future payments altogether.

2. Similarly if a man sue on a purchase (*ex empto*), so many matters may be the subject of this suit, that it is necessary to

[1] Cf. Cic. *Fin.* ii 1 § 3 *Omnis oratio praescribere primum debet, ut quibusdam in formulis, 'Ea res agatur,' ut inter quos disseritur conveniat quid sit id de quo disseratur.*

[2] Cicero speaks of it as an old and much used plea (*exceptio*), and says it was a plea framed on behalf of plaintiffs (*Orat.* i 37 § 168). See above, p. 179.

[3] In issues for trial *oportet* includes *oportebit* (D. xlv 1 fr 76 § 1). Cf. p. 53.

use a praescription, lest in suing on one point he may be precluded from afterwards suing on others, as occasion may arise[1]; *e.g.* if he wish to obtain mancipation of the land purchased, he should prefix *Ea res agatur de fundo mancipando,* which will prevent the whole obligation coming to issue and therefore leave it open for him afterwards to sue for delivery of vacant possession, or on a covenant for quiet enjoyment, or the like (Gai. iv 130—132). Again if a slave or other person under power has stipulated for something, and an action is necessary to enforce it, the master or father appears in the formula claiming that defendant is bound to give something to him, and yet plaintiff has himself made and can prove no such stipulation or reason for the *dare oportere.* A clause is therefore prefixed stating that he is suing on a stipulation made by his slave or son (Gai. iv 134 much mutilated, 135).

3. Where an uncertain stipulation has been made and the promiser is supported by a *sponsor* or *fidejussor*, and suit is brought only for what is due, the necessary limitation is inserted in the demonstration itself[2], in the case of suit against the principal debtor; but in the case of suit against a surety this limitation is added to the praescription which is required for shewing the character of his obligation. Thus the formula for suit against principal will be *Quod A. Agerius de L. Titio*

[1] Two passages have led to a general opinion that several claims arising from the same subject were sometimes made in one action, each with a limiting praescription: Cic. *Fin.* v 29 § 88 *Ut in actionibus praescribi solet 'de eadem re, alio modo'; Fam.* xiii 27 (addressed to Servius) *ut vos soletis in formulis, sic ego in epistolis, 'de eadem re alio modo';* cf. D. xliv 2 fr 14. Modern jurists have difficulty in finding the right occasion for such a praescription. Cf. Savigny *Syst.* vi p. 425, 6; Salpius *Novation* p. 184, *etc.* I am inclined to think that Cicero has in mind not the *formula* itself, but books of precedents, so that *in actionibus, in formulis* mean 'in the case of actions' or 'in your lists of actions or formulae,' *praescribere* being used in the general sense of 'make a heading' (cf. *Fin.* ii 1 § 3) and not in the technical sense of plea or limitation. Since writing this I notice B. Kübler (*ZRG.* xxix 148) has put forth the same view, and compares Cic. *Orat.* i 57 § 245 *ad Hostilianas te actiones contulisses*; Varr. *RR.* ii 5 § 11 *qui Manili actiones sequuntur; ib.* 5 § 11 *ut in Manili actionibus sunt perscripta.*

[2] *Loco demonstrationis,* cf. Gai. iv 68 *quo loco.* It can hardly mean 'instead of' as the praescription is given as only part of the demonstration.

incertum stipulatus est, cujus rei dies fuit, quidquid ob eam rem L. Titium A. Agerio dare facere oportet, tantam pecuniam, etc.

Against a *sponsor*, as follows: *Ea res agatur, quod A. Agerius de L. Titio incertum stipulatus est, quo nomine N. Negidius sponsor est, cujus rei dies fuit.* [1](*Quod A. Agerius de N. Negidio incertum stipulatus est, quidquid ob eam rem N. Negidium A. Agerio dare facere oportet, tantam, etc.*)

Against a *fidejussor* (who may have been surety for a verbal or non-verbal obligation of his principal) the frame is different: *Ea res agatur, quod N. Negidius pro L. Titio incertum fide sua esse jussit, cujus rei dies fuit.* [1](*Quod A. Agerius de N. Negidio incertum stipulatus est, quidquid ob eam rem N. Negidium A. Agerio dare facere oportet, tantam, etc.*) (Gai. iv 136, 137).

4. Gaius mentions that though in his time all praescriptions were on behalf of the plaintiff, there was a time (*olim*) when some were inserted also on behalf of the defendant[2], and instances the case of a disputed inheritance, where a defendant

[1] The parts added in brackets are not given by Gaius, who simply says *deinde formula subicitur.* Keller subjoined *quidquid paret ob eam rem N. Negidium dare facere oportere, etc.*, without any demonstration (*CP.* p. 198). Lenel agrees (*EP.* p. 119). Karlowa objects that, when a *praescriptio* is put first with *ea res agatur*, there should be a demonstration. So far I am inclined to agree, but not when he (*RG.* ii 737 n.) makes the demonstration to contain not the name of the surety, but that of the principal debtor. I think the surety should be sued on his own stipulation, not on that of his principal, especially as sometimes he was obliged for a less sum than the principal (Gai. iii 126). It was important to have a praescription in order to make the accessory nature of this stipulation clear and enable surety to use pleas open to his principal. Karlowa's reason, that it was intended to prevent the consumption of the action against the principal debtor and thus to leave it open to the creditor to cede this to the surety (D. xlvi 1 fr 36, *etc.*), seems to me to tell against his bringing the principal debtor into the demonstration. (Of course in the *intentio* it would be fatal.)

If there were several sureties, would this fact appear in the formula, *e.g.* after *sponsor* add *cum duobus aliis* or *dumtaxat ex tertia parte?*

[2] Quintilian (*Inst.* vii 5 §§ 2, 3) uses *praescriptio* in this way. *Aut intentio aut praescriptio habet controversiam...cum ex praescriptione lis pendet, de ipsa re quaeri non est necesse. Ignominioso patri praescribit filius; de eo solo judicatio est, an liceat (i.e. patri agere)?* So *praescribere* in D. xlix 1 fr 3 § 1; 4 fr 1 § 10. Compare the case in D. xxvi 7 fr 37 § 2.

might fear that a decision in a suit for a particular thing, apparently belonging to the inheritance, might be held to involve a decision on the claim to the inheritance as a whole. He could then have a praescription, *ea res agatur, si in ea re praejudicium hereditati non fiat* (cf. D. v 1 fr 54). In Gaius' time this danger was met by a plea (iv 133; after which section begins a long gap in our MS. of Gaius). See below, p. 393.

G. Fictions.

1. Besides the enumeration of facts (mentioned above, A 4) the praetor had other means of framing *formulae* to give redress in cases not within the civil law. One of these was by fictitious assumptions. The judge was instructed by the formula to act on certain assumptions, which if true would put the case on the lines of the ordinary civil law. Thus the praetor could not make a man heir, but the same considerations which made the edict set forth a succession to deceased's estates different from that of the old law, made him grant to these 'possessors of the estate' analogous rights of suit to those which the statutable heir would have. They could not use the regular expressions which an heir would use; they could not say that the property of the deceased was theirs, or that debtors ought to give them (*dare oportere*) this or that thing, owed to the deceased, except by a fiction. The formula therefore was modified in this way: *M. Seius judex esto. Si A. Agerius L. Titio heres esset; tum si eum fundum de quo agitur ex jure Quiritium ejus esse oporteret, M. Sei, N. Negidium A. Agerio x milia sestertium condemna; si non oporteret absolve.* 'M. Seius shall be judge. If A. A. 'had been heir to L. Titius, and if then the farm in question 'ought to belong to him in accordance with the law of the 'Quirites,' *etc.* A like fiction would be made in case of an action for debt (*dare oportere*). Similarly if a man on the ground of purchase or other lawful cause had had delivery of something, but had not had time to gain the ownership by usucapion, and had lost possession, the praetor granted him an action (*Publiciana* vol. I p. 443) against any unlawful possessor, similar to a regular vindication, but based on the

fiction that he had possessed it for the full time requisite; *si quem hominem A. Agerius emit et is ei traditus est anno possedisset, tum si eum hominem de quo agitur ex jure Quiritium ejus esse oporteret, etc.* 'Assume that the slave in question, which 'A. Agerius bought and which was delivered to him, had been possessed by him for a year, then, if it should have been his by 'the law of the Q.,' *etc.* Again it is sometimes just that a foreigner should be enabled to sue or be sued in cases where a Roman citizen would be able and liable by the civil law, *e.g.* for theft, aiding or counselling theft, or Aquilian damage: Roman citizenship is attributed to him for the purpose of the action, and the judge is directed to condemn or acquit on that hypothesis. So also the difficulty arising from the old Roman law that *capitis deminutio* destroyed all contractual obligations of the person, as in the case of a woman who was copurchased, or a man who was arrogated, was met by the praetor's allowing any creditor, who would thus be deprived of his rights, to bring his action against them and allege that they were bound to give him his demand (*sibi dare eum eamve oportere*). For this purpose the formula contained the fictitious assumption that they had not suffered *capitis deminutionem.* (Gai. iv 34, 36—38, in some parts mutilated.)

2. So the *formulae* for 'apprehended damage' (*damni infecti*) given by the *lex Rubria* (cap. 20) for the inhabitants of Cisalpine Gaul are framed so as to make one who had failed to give due promise or security responsible just 'as if he had given it' (Bruns no. 16). The same is found in the praetor's edict on the subject (D. xxxix 2 fr 7 pr).

In the formula given to a tax farmer, a kind of fiction is introduced: the condemnation is to be made for the amount which defendant would have had in old times to pay to redeem his pledge, if a pledge had been taken (Gai. iv 32)[1].

3. The '*bonorum emptor*' 'purchaser of a bankrupt estate' required actions for recovering the debts *etc.* due and belonging to it. His case was met in two ways. There was an *actio*

[1] Gaius' appended remark that '*nulla formula ad condictionis fictionem exprimitur*' probably only means that no occasion was found under the formulary procedure for a fictitious assumption of a 30 days' notice, *etc.*

Serviana (introduced by Serv. Sulpicius?) which was based on the fiction that the man instead of being bankrupt was dead, and the purchaser was the heir. Another way was the invention of P. Rutilius, the praetor to whom the whole law for the sale of bankrupts' estates was attributed. On this method the claim (*intentio*) ran in the name of the bankrupt; but the condemnation was couched in favour of the purchaser of the estate, viz. that the judge should condemn the defendant to pay plaintiff damages if the thing claimed was the bankrupt's, or to pay plaintiff whatever defendant was shewn to be indebted to the bankrupt (Gai. iv 35). The purchaser was in fact treated as procurator for the bankrupt.

4. A similar mode of drafting the formula to that of Rutilius was adopted whenever a suit was conducted on behalf of another (*alieno nomine*) *e.g.* by attorney, agent, guardian, or caretaker (*cognitor*, *procurator*, *tutor*, *curator*). The formula contains the name of the principal in the claim (*intentio*), and the representative's name appears in the condemnation clause. Thus if P. Mevius be plaintiff, and L. Titius be acting for him, these two clauses will run thus in a personal action: 'If it 'appears that N. Negidius ought to give P. Mevius 10000 ses-'terces, judge, condemn N. Negidius to pay to L. Titius 10000 'sesterces: if it does not so appear, acquit him.' If defendant is represented by another, defendant's name will similarly be put in the claim and the representative's name in the condemnation clause. In an action *in rem*, where plaintiff is represented by attorney, *etc.* the form will run: 'if it appears that 'the thing in question is P. Mevius' by the law of the Quirites, 'condemn N. Negidius to pay to L. Titius, *etc.*[1]' Where defendant is represented by attorney, *etc.*, the condemnation clause will be altered in the same way, but defendant's name is not given in the claim, any more than it would be if he defended in person (Gai. iv 86, 87).

5. A similar frame will be adopted when a principal is

[1] Where the representative was a *cognitor* and consequently the principal was responsible, perhaps his description was added in the formula, *e.g. Lucio Titio, P. Maevi cognitori*, and the same for *tutor* and *curator*.

made responsible by the praetor for his skipper or his manager (*exercitoria, institoria actio*), the claim having the name of the subordinate as the person who made the contract, the condemnation clause having that of the principal (D. xiv 1 fr 1 § 24).

H. *Sponsiones*[1] 'judicial wagers.'

One of the methods used by the praetor to expedite a suit was to direct an issue on a particular question, whether the main question between the parties or one ancillary or preparatory to it. The parties under his instruction made a wager (*sponsio*), by single or double stipulation, with one another for a nominal sum on the truth either of the plaintiff's claim or assertion or on some counter-assertion of the defendant's. Thus a wager, that the thing in question was the plaintiff's, was one of two methods for pursuing an action *in rem*. The terms of the wager are given us by Gaius (iv 93) *Si homo quo de agitur ex jure Quiritium meus est, sestertios xxv nummos dare spondes?* The formula or issue for trial would be a claim for the payment of the 25 sesterces; and plaintiff would win only if he proved his ownership of the slave named in the wager. Cicero (*Verr.* iii 57 § 132) refers to the same method for claiming an inheritance. A wager could be used in the procedure under any interdict[2], and was always used where the interdict was prohibitory, as in the interdicts *uti possidetis* and *utrubi* for trying who is the lawful possessor (Gai iv 141). Cicero's speech for Caecina was

[1] *Sponsio.* Schmidt (*Interd. Verfahren* p. 244) raises the question whether these wagers were necessarily in the form *spondesne? spondeo* and answers in the negative, because, if so, foreigners would be excluded. He refers to D. L 16 fr 7.

See a collection of passages containing wagers in Bekker *Actionen* i 249 sq. In one which he quotes (Val. M. vi 5 § 4) *sponsio* is I think used for a surety's bond. On the grammatical form of wagers, when reported, see my Lat. Gr. §§ 1752, 1753.

[2] The wager mentioned by Cicero in Silius' case *Si bonorum Turpiliae possessionem Q. Caepio praetor ex edicto suo mihi dedit* (*Fam.* vii 21) appears to belong to the interdict *quorum bonorum* (vol. I p. 239). It would raise the issue whether a grant of possession of Turpilia's estate *secundum tabulas testamenti* had been duly made. There appears to have been a question whether Turpilia had a right to make a will at all (without the authority of her guardians?). See vol. I p. 101.

made on the trial of a wager on an interdict *de vi armata* (8 § 23). His speech *pro Quinctio* was made on the trial of a wager on defendant's denial of plaintiff's allegation (8 § 30; 9 § 32). Similar, but not strictly judicial, cases are in Liv. xxxix 43 § 5 where Cato the Censor, removing a consular from the senate for an act of atrocious cruelty offered him the chance of making a wager on the fact in order to prove his innocence: and in Val. M. vi 1 § 10 where a delinquent asks to have a trial on a wager to prove a fact which would mitigate his admitted guilt[1].

Where a wager was thus merely ancillary or preparatory to the main issue, it was called *sponsio praejudicialis*[2]. The wager was one-sided, only the one party stipulating, and the amount of the wager was not exacted. If defendant won, he could await any further action on the part of the plaintiff. If plaintiff won, he would still have to take some further step to get satisfaction of his claim on the main issue; but of this we know only what Gaius tells us in relation to interdicts (see below, p. 445). Sometimes security for this would be taken before trial of the wager (Gai. iv 94, 165).

Other wagers were called *poenales* because they were used to check litigation by imposing additional penalties on the defeated party. Their earliest form was the *sacramentum* of the *legis actio* (Gai. iv 13, 14); and they were used for this purpose

[1] Some such defensive wagers appear to be intended in Plaut. *Men.* 592.

[2] The plaintiff was said *sponsione provocare* (Gai. iv 95; 165, cf. 166) *lacessere* (Cic. *Verr.* iii 57 § 132), but the more usual phrase, applicable to both parties, was *sponsionem facere, e.g.* Cic. *Quinct.* 8 §§ 30, 31; 9 § 32; *Caecin.* 16 § 45; *Fam.* vii 21; Liv. xl 46 § 14; Val. M. vi 1 § 10, *etc.* According to Huschke (*Anal.* p. 146) followed by Jordan (*ad Caecin.* 31 § 91) if plaintiff won, he was said *sponsione vincere* (Gai. iv 165; Cic. *Quinct.* 27 § 84); if defendant won, he was said *sponsionem vincere* 'overcome the wager' (Cic. *Tull.* 9 § 30; *Caecin.* 31 § 91). Huschke therefore in *Caecin.* 32 § 92 alters the MS. reading *sponsione* into the accusative. The passage in *ad Heren.* iv 23 *ipse grandi sponsione victus est* proves nothing. I doubt the distinction and think the expressions are like our 'win a wager' and 'win in a wager,' the accusative being cognate. So in the fragm. of Cic. *Tull.* quoted by Victorinus p. 209 Halm we have *vici unam rem* and *vici alteram*: in *Rosc. Com.* 18 § 53 *quod vicisset judicio ferres tuum* 'what he had won'; *Verr.* ii 1 53 § 139 *judicium me uno dependente vicit.* In Liv. xxxix 43 § 5 we have *sponsione defenderet sese.*

in certain actions under the formulary system, viz. for a loan of money certain and for money 'appointed to be paid' (*certa credita pec.* and *constituta pec.*: Gai. iv 191; cf. Cic. *Rosc. Com.* 4 § 10); and also in interdict procedure (Gai. iv 166, 167). A *sponsio* is mentioned as a customary part of procedure in *Lex Rubr.* 21, 22[1].

(In the English Chancery Courts, when a trial of fact by a jury was desirable, the practice formerly prevailed to feign a wager which the parties were bound to admit, and direct it to be tried in a Court of Common Law. Such an issue is now either sent for trial in a direct form without any wager being feigned, or is tried in the Court itself (Stephen's *Comm.* iii p. 661 12th ed.).)

CHAPTER IX.

REPRESENTATION AND SECURITY.

A. Representation of parties.

1. Under the system of action by statute (*legis actiones*) representation of the parties was allowed only in a few cases (Gai. iv 82; cf. D. L 17 fr 123 pr). In Justinian's *Institutes* (iv 10

[1] Other instances of wagers are mentioned in the classical writers, which might no doubt, like any other verbal contract by stipulation, be the subject of a trial, but which are neither directed by the magistrate nor form part of legal procedure. Such was a bet between the consul and praetor as to which deserved the credit of having led the fleet to victory over the Carthaginians (Val. M. ii 8 § 2), or that which two men in succession publicly offered to make, and one made, that Verres was partner with a tax-farmer in his contract for the Sicilian tithes (Cic. *Verr.* iii 57 § 132; 58 § 135). In another case Verres retaliated for similar freedom of speech by compelling the speaker to make a wager; he had him so severely beaten that he died in consequence (*Verr.* v 54 § 141). Other cases are Piso's offer to Cicero, who had said he had entered the city by the Caelimontan gate, to bet that it was by the Esquiline gate (Cic. *Pis.* 23 § 55); or the bet made by Lutatius and brought to trial 'that he was a good man' (*quod vir bonus esset*, cf. Gell. xiv 2 § 26); or several which

pr) we are told that such cases were suits on behalf of the people, or for one claiming his freedom, or on behalf of a ward (*pro populo, pro libertate, pro tutela*). The first probably includes as well actions to assert a public right of road, as actions on behalf of a municipality or for extortion against a provincial governor. One suing *pro populo* could not appoint an agent; the person sued could (D. xlvii 23 fr 5). The agent in claiming freedom was a *vindex*. A guardian would appear for a ward, and a curator for a minor or a lunatic. Where there was no guardian ready to defend a ward and there were pressing claims against him, as heir or otherwise, the praetor would call on relatives or friends or freedmen to appear for him, and only if no one could be got to undertake the task would he allow creditors to take possession of the estate (D. xlii 4 fr 5). A *lex Hostilia* allowed a representative to bring an action for theft on behalf of one who was in the enemy's hands, or who was absent on public business, or who was their ward (Just. l.c.). Some concession appears also to have been made for persons over 60 years of age, or who were disabled by sickness or infirmity (*ad Heren.* ii 14). But both *cognitores* and *procuratores* are found in Cicero. Women were not qualified (D. L 17 fr 2).

2. Gaius mentions no restrictions on the use of representatives, but distinguishes between a *cognitor* and a *procurator*. A cognitor is appointed for a particular suit or cause of suit (*in litem*) in a set form of words in the presence of the opponent. Gaius gives two forms[1], the first apparently for a suit actually in court and ready for joinder of issue. Thus in an action *in rem* plaintiff would say 'Whereas I am suing thee for a farm' (no doubt naming it) 'I give to thee L. Titius as (my) attorney' (*Quod ego a te fundum peto, in eam rem L. Titium cognitorem do*): defendant, if appointing such an attorney, would say

appear elsewhere. Cf. Plaut. *Pseud.* 1077 (where however the bet is one-sided, *i.e.* a mere single stipulation).

The expression *ferre judicem alicui* is used in Livy iii 24, 56; cf. Plaut. *Rud.* 1380 and 713 of similar challenges to have issues tried; and *da pignus* is common in Plautus for bets of all kinds (*e.g. Epid.* 699; *Pers.* 186; *Poen.* 1242, *etc.*).

[1] See Wlassak *Gesch. der Cognitur* pp. 23, 26, *etc.*, D. xlvi 8 fr 15.

'Because[1] thou art suing me for (such and such) a farm, for that 'matter I give thee P. Mevius as (my) attorney.' The other form is apparently intended where the case has not yet come into court, or at least not yet reached the stage of trial. Thus in a personal action plaintiff says, 'Whereas I mean to sue thee '(*tecum agere volo*), for that matter I give L. Titius as (my) 'attorney.' Defendant says 'Because thou meanest to sue me, for that matter I give P. Mevius as (my) attorney.' The words are not so strictly framed as are the phrases in the *legis actiones*, and they admit of addition or omission: and even Greek words might be used. It is immaterial whether the cognitor be present or absent at the nomination, but, if he be absent, he becomes cognitor only if he is informed and accepts the duty. His appointment must however be absolute: an appointment under condition, whether express or implied, is invalid. He is put in his principal's place, with the opponent's full knowledge, and, if acting for plaintiff, binds his principal so that no second action for the same matter can be brought by the principal, any more than if he had conducted the suit himself (Gai. iv 82, 83, 97, 98; Vat. 318, 319, 329). If he act for defendant and has assented to the appointment and to the principal's giving security for him *judicatum solvi*, he will be compelled by the praetor to accept trial, except for grave reason, *e.g.* if he has received an accession of dignity, or is going to be absent on public business, or has an inheritance fallen to him, or is in bad health, or going on a necessary journey, or has a capital quarrel with the principal (D. iii 3 fr 8 § 3—fr 15). Until joinder of issue the principal (or his heir) is free to change his cognitor for another or act himself, but after joinder of issue he must show the praetor good cause for so doing, *e.g.* besides such reasons as above, that the cognitor is in captivity or imprisoned or in exile or hiding or engaged in a public or private suit or has become connected with his adversary by marriage or has become his heir or is too old. And the like applies if he is

[1] In both cases Plaintiff uses '*quod*,' Defendant '*quia*.' Any reason of substance is not apparent. Gradenwitz suggests that it is a matter of euphony, so as not to have, either hiatus (*quia-ego*) or such a combination of dentals as *quod tu* (*ZRG.* xxix 130).

cognitor for plaintiff (fr 16—25)[1]. On the way in which the formula was made to fix a representative with responsibility see above, p. 373.

3. A procurator (or agent) is on a different footing. He may be agent for the principal's business generally or for a certain department of his affairs or he may be appointed to act for a particular suit[2]. His relation to his principal is a contract of mandate, which may be made by words orally or by writing or message without any set form, and even without the knowledge or presence of the other party to the suit. The mandate is often not shewn at first but only in the course of the suit: and is liable to expire by the death of either mandator or mandatee or by revocation. Such an agent does not bind his principal, who is therefore not disabled from suing again on the same matter; the opponent must therefore protect himself against the agent's want of authority by requiring security for his principal's approval (*de rato*). Indeed some lawyers, says Gaius, were of opinion that no mandate was necessary, if the agent undertook the business in good faith and gave security. Children, parents, brothers, relatives by marriage, freedmen, may certainly sue for their relative without a mandate, provided they are not shewn to be acting against their relative's will (Gai. iv 84; Vat. 333; D. iii 3 fr 42 § 2; fr 35 pr, 40 § 4; cf. xlvi 7 fr 3 § 3). A procurator accounts to his principal for what he gets and can claim reimbursements for expenses rightfully incurred (fr 46 §§ 4, 5).

If a procurator brought an action for another person or made an application to the praetor for an interdict or for a praetorian stipulation, the edict required that he should also

[1] I have followed Lenel in considering these passages to relate originally to *cognitores*.

[2] Cf. Cic. *Caecin.* 20 § 57 *De liberis* ('freemen') *quisquis est, procuratoris nomine appellatur* (*i.e.* in the interdict *de vi*); *non quo omnes sint aut appellentur procuratores qui negotii nostri aliquid gerant....Non alia ratio juris est, utrum me tuus procurator dejecerit is qui legitime procurator dicitur, omnium rerum ejus, qui in Italia non sit absitve reipublicae causa, quasi quidam paene dominus, hoc est, alieni juris vicarius, an tuus colonus aut vicinus aut cliens aut libertus aut quivis qui illam vim dejectionemve tuo rogatu fecerit.*

accept trial in actions brought by others against such principal, should duly conduct the defence, and should give adequate security. And not only must he defend him in regular actions and interdicts but in praetorian stipulations and interrogatories, being bound to answer what his principal would be bound to answer. The like responsibility was incurred by relatives who sued on behalf of others though not requiring a mandate. But no such responsibility was incurred by undertaking the defence of another (fr 33 §§ 3, 4; 35 pr §§ 2, 3; 39 pr; Vat. 330).

4. The great distinction between a cognitor and a procurator is that the judgment in the suit is enforced in the former case by and against the principal and his heir[1], whereas a procurator has the control of the suit, is responsible on an adverse judgment, and if successful has a right to sue upon the judgment[2]. But if a cognitor is acting for his own interest (*in rem suam*), being another's representative only in form, as often occurs in the cession of actions, he is in the same position as a procurator as regards the judgment, but has no obligation to account to, and no claim against, the nominal principal (any more than a procurator *in rem suam*). On the other hand if a procurator was appointed by his principal present in person and thus is free from all suspicion of being a mere volunteer or the holder of an insufficient or expiring mandate, he is treated as a cognitor, so as if acting for the plaintiff not to be required to give security, though if acting for defendant he was still bound to give security (see below, p. 382). The praetor will however after due inquiry allow the principal to sue and be sued on the judgment. The principal need not be present in court or even in the forum: it is enough if he is in the city. The ordinary

[1] Cf. Cic. *Rosc. Com.* 18 § 53 *Qui per se litem contestatur sibi soli petit, alteri nemo potest nisi qui cognitor est factus. Cognitor si fuisset tuus, quod vicisset judicio, ferres tuum.*

[2] The passages in the Digest which appear to put a procurator into a different position (D. iii 3 fr 28; tit. 4 fr 6 § 3; xlii 1 fr 4 pr; xlvi 3 fr 86) are probably to be explained (see Lenel's *Palingenesia*) by supposing Tribonian to have put *procurator* for *cognitor*. But there was, no doubt, in the latter part of the Antonine times a tendency to give a *utilis actio* to one (*e.g.* a principal) who was directly concerned though not technically entitled.

procurator is spoken of as *procurator absentis*, in contrast to such a *procurator praesentis* (Vat. 317, 331—333; Paul i 2 § 4).

The rules respecting compelling cognitors to accept trial and changing cognitors apply also to procurators.

5. A woman can appoint a procurator without the authority of her guardian; a girl cannot. If parents are too ill or old to sue and there is no one else, the praetor will sometimes allow a woman to sue for them (Vat. 326, 327; D. iii 3 fr 41). Deaf and dumb persons are not prevented from appointing procurators (fr 43 pr). Sons and daughters under power can appoint procurators to sue, if the case be one (*e.g. injuriarum*) in which they can bring an action themselves. Slaves cannot appoint procurators to sue, except when they are engaged in a trial of their *status* (fr 8 pr, 33 pr, § 1; see Book 1 chap. v). Soldiers cannot be procurators while in service (fr 8 § 2).

A list is given in the edict of persons disqualified from appointing or being appointed cognitors or procurators (see chap. ii B). Anyone disqualified and yet suing would be met by a plea to that effect (*exceptio cognitoria, procuratoria*, fr 57 § 1, Vat. 323).

B. Security to be given by suitors.

1. If plaintiff sue either in his own name or by attorney (*cognitor*) neither he nor his attorney is required to give security, whether the suit be *in rem* or *in personam*. Defendant of a suit *in rem* always has to give security, so that, if he is defeated, and does not either restore the thing in his possession or pay the adjudged damages, plaintiff may have the power of suing his sureties as well as himself. If the action be *in personam* and an attorney accepts trial on account of a principal the principal must give security; for it is a general rule that no one is an adequate defendant of another's concern without security being given (Gai. iv 88—90, 96, 97, 100, 101). If however the principal accepts issue on a personal suit in his own name, he is still liable to give security in certain cases, specified by the praetor, on the ground partly of the nature of the action (*a, b, c*), and partly of defendant's own character (*d, e, f*). Thus he must give security, if the action be (*a*) on a judgment,

or (*b*) on money paid down by a sponsor (vol. II p. 184), or (*c*) on a woman's conduct (*de moribus mulieris* vol. I p. 157), or (*d*) if defendant have run through his property (*si decoxerit*[1]), or (*e*) had his goods seized and advertised by his creditors, or (*f*) be an heir held by the praetor to be suspect (Gai. iv 102).

2. Where an agent (*procurator*) is employed, he himself, not his principal, has to give security: viz. if plaintiff, *ratam rem dominum habiturum*; if defendant[2], either *judicatum solvi* or (if the proceeding was by wager) *pro praede litis vindiciarum.* Guardians and caretakers are as a rule in the same position, but, when they are plaintiffs, are sometimes excused (Gai. iv 91, 98—101; cf. D. xxvi 7 fr 23[3]). A procurator for defence whose appointment is recorded in court (*apud acta constitutus*) is still, by a constitution of Severus, compelled to give security *judicatum solvi* (Vat. 317). Where a procurator demands security for payment of legacies, or against anticipated damage from a building, or for double value in case of eviction, he can be called upon to give security for his principal's ratification, such securities as these being in fact preventive substitutes for suits (D. xlvi 8 fr 20; iii 3 fr 40 § 1); and by agreement this stipulation is often used when a procurator sells or lets, *etc.* (xlvi 8 fr 10).

3. Security (*satisdatio*) in all these cases means not pledges or deposit of money, but promise given in reply to stipulation and supported by like promises made by sureties (D. xlvi 5 fr 1 § 5; fr 7). These (as well as other) stipulations were required by the praetor and set out in his edict and hence called *praetoriae.*

[1] *Decoquere* did not necessarily, though it did usually, imply moral delinquency. Cf. Cic. *Phil.* ii 18 § 44 *Lege Roscia decoctoribus certus locus constitutus, quamvis quis fortunae vitio non suo decoxerit.*

[2] In Cic. *Verr.* ii 24 § 60 the practice of requiring security from defendants on others' account is recognized: *Amici, si quis quid peteret, judicio se passuros, judicatum solvi satis daturos esse dicebant.* (On *judicio pati* see p. 459 n. 5.). In Cic. *Quinct.* 7 § 28 a procurator protests against having to give security, unless his principal if present would have to give it. But the circumstances there were peculiar; see below, pp. 460, 477.

[3] D. xxvi 7 fr 23 (unless altered by Tribonian, cf. Gradenwitz *Interpol.* p. 100) shews that the ordinary practice in Ulpian's time was not to require security *ratam rem pupillum habiturum*, seeing that the guardian's suit commits his ward (*rem in judicium deducit*).

They were not subject to alteration by the parties without the praetor's approval (D. xlv 1 fr 5 pr; 52 pr; xlvi 5 fr 1 § 10). On due cause being shewn (*causa cognita*) the principal was held entitled to sue on any praetorian stipulation made on his behalf by his procurator (D. xlvi 5 fr 5).

Their contents appear to have been as follows:

4. *Ratam rem dominum habiturum, i.e.* that the procurator's action shall be held as the action of the principal. There were usually as it appears three clauses: (*a*) *amplius non peti*[1], or more fully, *amplius non petiturum eum cujus de ea re actio petitio persecutio sit*: (*b*) *ratam rem dominum habiturum* or more fully *ratum habituros omnes ad quos ea res pertinebit*; (*c*) *de dolo i.e. dolum malum abesse afuturumque esse* (D. xlvi 8 fr 14, 22, § 7, 23, *etc.*, cf. Lenel *EP.* § 289). The guaranty was therefore both negative, that no further action of any kind should be brought in the matter by anyone entitled to do so[2], and positive, that his principal, or generally, that all concerned, would ratify his suit. If the principal only were named when the intention was to include also his heir and others concerned (which term did not include creditors, D. iii 3 fr 39 § 2), the last clause would come in to justify the stipulator in suing, if necessary, on account of their action (xlvi 8 fr 22 § 7). There is no forfeit under the stipulation, if an action is brought by someone who is not a properly appointed procurator or otherwise not concerned (fr 23). Nor if the principal appealed from a decision given against the procurator; for that is in the natural course of the

[1] For *peti* see p. 402.

[2] This would apply *e.g.* where a stipulator left several heirs (D. xlv 1 fr 4 § 1); or where an Aquilian action is brought by a farmer which might also be brought by his landlord (ix 2 fr 27 § 14). Cicero refers to this clause in *Brut.* 5 §§ 17, 18 *Ego a te hujus voluntarius procurator petam. 'At vero' inquam 'tibi ego non solvam, nisi prius a te cavero amplius eo nomine neminem, cujus petitio sit, petiturum'; Att.* i 8; *Fam.* xiii 28 *a* § 2 *Rogo ut, si quid satis dandum erit 'amplius eo nomine non peti,' cures ut satisdetur fide mea.* The absence of such a stipulation is used as an argument in Cic. *Rosc. Com.* 12 § 35.

The clause for approval by the principal might be used separately, where (as mentioned above) an agent has sold or let property or otherwise acted for an absentee (D. xlvi 8 fr 10, 11). Cf. Lenel *EP.* § 289.

suit, and implies a ratification of the plaintiff's action. Nor, unless express words are added to the stipulation, is there a forfeit, if the suit was on behalf of a minor and the minor obtained a quash of the proceedings (fr 3, 5).

The ratification ought to be made within a reasonable time after any payment or other satisfaction made to the procurator. If the principal in any way fails to recognise the settlement, *e.g.* by setting off the original debt, the (former) debtor can sue on this stipulation (fr 12 §§ 2, 3). So also if the principal sue a surety or partner in the obligation or anyone whom he could not have sued if the ratification had been duly made (fr 1, 14). If the principal leave several heirs, and one ratify and another do not, the stipulation is good for a partial forfeit, and so also if the principal himself partially ratify (fr 17, 18). The liability under the stipulation is not affected, whether the procurator have obtained payment which was due or not due, or whether he has got it without bringing suit or by the decision in a suit, though it might be argued that, when a judge had found due what was not due, there was nothing for the principal to ratify and no interest for the unfortunate defendant in having a ratification. When defendant would have a condiction for undue payment to the procurator, the stipulation supersedes it: if the principal ratifies the procurator's action, the stipulation fails and the condiction will be against the principal (fr 22 §§ 1—3). Action could be brought on the stipulation more than once—whenever in fact the stipulator is put to expense and loss by the principal's not ratifying the procurator's action: he is not bound to wait till the whole loss is ascertained (fr 18).

The measure of damages on the stipulation is the interest of the stipulator in due ratification; *in quantum mea interfuit, id est, quantum mihi abest quantumque lucrari potui* (fr 13, 19). The words in the stipulation would be *quanti ea res erit* (D. xlvi 5 fr 2 § 2).

5. *Judicatum solvi, i.e.* for payment of the judgment. Here also were three clauses *de re judicata, de re defendenda, de dolo malo.* The second clause was necessary because judgment might be staved off or prevented by defendant's or his representative's shirking or failing to appear. In fact the stipu-

lation was intended to guaranty both an honest defence (*boni viri arbitratu*), such as might not prevent the attainment of a judgment, and the due performance of the judgment when obtained (D. v 1 fr 63). No one could be sued on the stipulation on both clauses, but of two sureties or two heirs to the promiser one might incur a forfeiture on one clause and one on the other (D. xlvi 7 fr 6, 21). If a release was given or other settlement made on the principal clause (*de re jud.*), the others fell with it (D. xlvi 4 fr 20). Any one surety could undertake the defence to the action on the stipulation. If there were more than one surety or more than one heir, the plaintiff could demand that one agent should act for all. Sureties sued on the stipulation should require security that their principal should be acquitted in the original suit, else they could not claim against him on the mandate, for their payment would not have freed him (xlvi 7 fr 5 §§ 1, 7, fr 14 § 1). The stipulation failed if the action which it guarantied was brought before a different judge, or was itself of a different kind from that contemplated, or if it was brought by one not duly authorised (fr 3 pr, 7). It is not necessary for the promiser or his sureties themselves to undertake the defence: the clause for due defence is satisfied if an outsider undertake it, provided he give proper security or be accepted by plaintiff even without security (fr 3 § 9, 5 § 3). If a slave object of the original suit dies after joinder of issue, the sureties are not freed, for it is important to have judgment in order to preserve the action against eviction and the fruits (fr 11). The measure of damages in this stipulation is the amount of the judgment (fr 9). If a suit is transferred from a defender to his principal, the defender's sureties and pledges are no longer bound (D. xx 6 fr 1 § 2).

6. *Pro praede litis vindiciarum* was the form of security required when an action *in rem* was tried by means of a wager. The wager took the place of the *sacramentum* in the old *legis actio*, and this security took the place of the sureties there given. But as the amount of the wager was only nominal, security to be effectual had to be given not for that amount (as in *judicatum solvi*) but for the restitution of the thing in dispute and the mesne profits or its equivalent in money. In other

respects probably this form of security resembled that of *judicatum solvi* (Gai. iv 91—94; cf. 16).

In all these guaranties breach of the *doli clausula* gave rise, like the other clauses, to an action on the stipulation, not to the special *doli actio* (D. xliv 4 fr 4 § 16; cf. iv 8 fr 31).

CHAPTER X.

CHECKS ON LITIGATION.

A. General.

Both plaintiff and defendant were subjected to various risks, if found to have brought or defended a suit unjustifiably.

Plaintiff may be met at the outset by a challenge of his good faith. Defendant may either call upon him to take his oath that he is suing in good faith (*non calumniae causa se agere*): or he may call for a trial of his good faith (*calumniae judicium*), the penalty to plaintiff being one-tenth of the amount of his suit. But plaintiff is not condemned unless shewn to be bringing the suit without reasonable ground and merely in order to harass his opponent, hoping to win by a blunder or partiality of the judge and not on the merits: for *calumnia* like *furtum* lies in the evil intent. One who calumniously claims another's slave as a freeman is liable to a fine of one-third instead of one-tenth.

In certain cases defendant can have instead of one of the above-named two courses a counter trial (*contrarium judicium*) with penalty attached. Three cases are named: viz. if one is sued for insulting conduct (*injuriarum*); if a woman, who has been sent into possession of an estate on account of her unborn child (*ventris nomine*), is charged with having *dolo malo* transferred the possession to another: if one is sued for refusing to admit into possession a person who has the praetor's order for entering. The penalty in the first case is one-tenth: in the other two one-fifth, and plaintiff (in the direct suit, now

defendant in the *contr. jud.*) is liable to the penalty notwithstanding his having believed in the justice of his charge.

Where plaintiff has the right of challenging defendant to a penal wager (see below) defendant has sometimes the right to challenge back (*restipulari* Gai. iv 13). The penalty in these counter-wagers was consequent on defeat of the plaintiff, irrespectively of his belief in the justice of his suit.

These several checks were alternative: one only could be adopted (Gai. iv 174—181).

Defendant is liable to a penal wager in the sacramental procedure; in interdicts; and in an action on loan of money certain (*pecunia certa credita*) and money appointed to be paid (*constituta pecunia*), for one-third and one-half the value respectively in the two last named cases. Women and wards are not liable to the risk of a wager. In some other suits a defendant, who does not admit the claim, is liable to pay, if he lose the case, twice the value (*lis crescit infitiando in duplum* (see Book v chap. v)). These cases are for money due on a judgment, money paid down by a sponsor, damages under the *lex Aquilia*, and legacies left in the damnatory form. And an agreement for settling these cases is invalid (*pacto decidi non potest*). In cases of theft the damages are not increased by non-admission, but are from the first laid at four times the value for theft manifest, at thrice the value for theft non-manifest, or *corruptum* or *oblatum*. And there are, says Gaius, other cases of this kind (Gai. iv 171, 173; Paul i 19).

If none of these checks are applicable, the praetor permits plaintiff to call upon defendant to swear that it is in good faith that he disputes the claim (*non calumniae causa infitias ire*). Neither heirs, nor persons in heirs' place (*i.e.* possessors of the estate), nor women, nor wards are exempted from this: parents and patrons are (Gai. iv 172; D. xii 2 fr 34 § 4).

Besides these checks may be mentioned also the disgrace and consequent personal disqualification which was attached to condemnation in certain actions (see p. 327).

Where a suit was found by the judge to have been brought without due consideration (*temere*), he may condemn the plaintiff to pay costs and travelling expenses of defendant (D. v 1 fr 79 pr).

B. *Exceptio rei judicatae.*

A further and most important check on litigation is found in the rule that a matter once brought to trial should not be tried again, except of course by way of appeal. In one important class of cases a renewal of the claim was stopped before trial; in the rest, defendant was entitled to plead the fact of previous judgment or trial, and, this if established, was fatal to plaintiff's case (see pp. 403, 404). The discussion on this matter is in the Digest connected with this plea, which is there called *exceptio rei judicatae* (D. xliv 2) but by Gaius *exceptio rei judicatae vel in judicium deductae* (iv 106). See p. 365. The matter of the plea may also take the shape of a rejoinder (*replicatio* D. xliv 2 fr 9 § 1; 24).

The general principle was that one suit and one decision was enough for any single dispute; *singulis controversiis singulas actiones unumque judicati finem sufficere* (D. xliv 2 fr 6)[1]: and consequently whenever the same question is brought into court again between the same parties, although by a different form of suit[2], defendant has a right to be freed on shewing that the matter has been already decided or is actually before the court in another proceeding. *Exceptio obstat quotiens inter easdem personas eadem quaestio revocatur vel alio genere judicii* (Jul. *ap.* fr 7 § 4).

1. What is *eadem quaestio*? Substantial identity is required, not a precise identity of the particular quality or quantity of the land or other article claimed or of the amount of demand. The farm may have had a natural accession since the former trial; it still remains the same farm. A flock of sheep may be larger or smaller than it was, but the flock as a whole is the same. My former claim may have been to raise my house ten feet higher, notwithstanding any inconvenience to my neighbour; my present suit may be to raise it twenty

[1] See Terence and Quintilian quoted above, p. 344.

[2] Cicero speaks of a suit for freedom being the only suit in which *res judicata* was not a good plea: *Si decemviri* (*i.e. stlitibus judicandis*) *sacramentum in libertatem injustum judicassent, tamen quotiescunque vellet quis, hoc in genere solo rem judicatam referri posse voluerunt* (*Dom.* 29 § 78; cf. *Caecin.* 38 § 97).

feet, or ten feet higher than I claimed before: a decision against my former claim is fatal to my present contention (fr 14 pr, 26). And generally the greater includes the less, and a whole includes any part, so that one who has already sued for a farm cannot afterwards sue for a part of it, whether a fractional part or a particular field: one who has sued (and been defeated) for an inheritance cannot afterwards sue for a slave belonging to the inheritance or for a debt due to it; and *vice versa*, one who has sued for two things cannot afterwards sue for one of them. But this does not apply when my building materials have been used in your house or my planks in your ship. I can claim them (when separated), though defeated on a claim for the house or the ship. A claim for fruits or the offspring of slaves is not barred[1] by a decision on a claim for the land or for the mother, unless indeed they have already been included in the damages on the former trial (fr 3, 7). A legatee of all the deceased's silver, who supposed only the silver tables to have been left him and claimed only for their value, is not debarred from claiming the rest, for neither litigants nor judge could have supposed the whole to have been included in the suit: nor would a suit for all the silver preclude a suit for the wearing apparel, if that also were found later to have been bequeathed by codicils (fr 20, 21). A suit for interest does not bar a suit for the principal, nor a suit for interest now due bar a suit for future interest (fr 23): a suit for *iter* is no bar to a suit for *actus* (fr 11 § 6).

The question of pledge is distinct from that of ownership, and therefore a pledge-creditor without notice (although deriving his title from the debtor) is not affected by the decision in a suit for the ownership between the debtor and another, if the pledge was given before the suit: the ownership might have changed hands subject to the pledge (fr 11 § 10, fr 29 § 1). Nor is the assertion of a prior pledge barred by the success of a creditor in establishing a later pledge in a suit against the owner, who was not aware of his having himself also the right of a prior pledge made to his grandfather (fr 30 § 1).

[1] Many read *noceat* (fr 7) instead of *non noceat*. See *e.g.* Savigny *Syst.* vi p. 508, Windscheid *Pand.* § 130 n. 16.

In suits *in rem* a previous adverse decision is no bar to a fresh suit, if a new title be acquired in the meantime. But a mistake as to the ground of title does not prevent the effect of the decision. *Adquisitum postea dominium aliam causam facit, mutata autem opinio petitoris non facit.* Whether my title is legacy or purchase, if it exist at the time of suit it is brought to issue[1] and I am bound by the decision. But I can sue again if I subsequently obtain a fresh title and state it (*causa adjecta*) in my repeated suit (fr 11 §§ 1—5; 14 § 2; cf. fr 19). Nor is there any bar, if the former suit was decided, not on the ground of my want of title but of defendant's not being in possession and not having dishonestly lost the possession. My right to sue the possessor, whether the former defendant or not, remains unaffected by the previous decision (fr 9 pr, 17, 18). Between two claimants of an inheritance, each in possession of part of the estate, a suit is decisive if it be in favour of plaintiff and establish his ownership, thereby disproving defendant's ownership: but if it was in favour of defendant, his right is not thereby established but only plaintiff's right disproved. Still even if such plaintiff be really the true owner and afterwards happen to become possessor, he cannot resist a suit for recovery urged by the former defendant, who has thus got a decision in his favour which he can use to rebut his opponent's proof of ownership (fr 15, 24, 30). Fresh evidence gives no claim for renewal of a suit on the titles previously put forward or existing (fr 27, cf. xlii 1 fr 35).

A partial usufructuary who has been defeated in a suit for the whole is not debarred from claiming it, when the remainder has naturally accrued to him (D. xliv 2 fr 14 § 1, cf. vii 1 fr 33 § 1): nor is an unsuccessful suit for a usufruct a bar to a renewal of the suit after acquisition of the ownership, an independent usufruct being a different thing from a usufruct consequent upon the ownership (D. xliv 2 fr 21 § 3).

2. For the plea of *res judicata* to be available the parties

[1] I am inclined to take *non expressa causa* in fr 14 § 2 of the general character of *in rem actiones*, not of a power to avoid the inclusion of all grounds by expressing a particular one. Cf. Cogliolo *Cosa giudicata* p. 273; Windscheid *Pand.* § 130 note 6.

must be the same as in the former suit. *Res inter alios judicata nullum aliis praejudicium facit* (fr 1). Success in an action *in rem* does not give defendant any title against others than the plaintiff (fr 15). Action on a deposit brought against one heir of the depositary is no bar to an action against his coheirs; nor if one coheir brings a suit is the decision against him any bar to suits by other coheirs (fr 22, 29 pr). If, legacies and freedoms being left by the same will, a legatee sues and the will is alleged to be broken or invalid or not duly made, claims for freedom are not barred by a decision against the legatee; so if one coheir only is ousted by a plaint of unduteous will, or if one such plaint, out of several by different persons, succeeds, freedoms left by the will are not upset, but the judge will arrange for the victor to be compensated (fr 1, 29).

The benefit as well as the burden of a decision passes to one (*e.g.* a purchaser) who derives his title from the suitor; but a suit by a third party, whether successful or not against the purchaser, gives no right to the use of this plea in a suit between the third party and the vendor (fr 4, 9 § 2, 10, 11 §§ 3, 9, fr 28). A pledge-creditor allowing his debtor to conduct a suit concerning the ownership of the pledged property, a husband allowing his wife's or her father's suit concerning the ownership of what has been given him in dowry, a possessor allowing his vendor to defend his title, is bound by the result of the suit (D. xlii 1 fr 63). The decision in a suit by myself or by my procurator (on mandate) or guardian or caretaker against either the defendant himself or one who undertakes his defence is good against any future suit between us. For such persons are held to bring the matter to an issue (*rem in judicium deducunt*). And a suit against a son under power is a bar to a suit for the same matter against his father (D. xliv 2 fr 11 §§ 8, 9). A decision for the principal debtor may be pleaded by a surety (fr 21 § 4). On the other hand a decision against a suit by an unauthorized agent does not bind the principal unless he ratify the proceeding, and accordingly the same agent on receiving the principal's mandate to sue can renew the suit (fr 25 § 2).

3. The plea of 'matter decided' is available though the second suit be different from the first: *de eadem re agere*

videtur et qui non eadem actione agat. A plaintiff who has commenced an action for mandate cannot sue also for 'business done' or bring a condiction on the same matter. Nor, if he has failed in a suit for an inheritance, can he bring a suit for *fam. ercisc.* or *com. div.* relating to the same estate. But the decision on an interdict is no bar to a vindication, for the one relates to possession, the other to ownership. And a plaintiff defeated in a vindication is not barred from bringing a condiction, because the claim is wholly different (fr 5,14 § 3, 18,31).

4. In special cases a right to this plea either was not created or could be defeated, as where the judge in the former suit refrained from deciding the particular question which forms the subject of the second suit (D. iii 5 fr 7 § 2; xvi 2 fr 7 § 1; xlii 1 fr 15 § 4; see above on *in rem actiones*), or where, though the plea was founded, the circumstances were such as to justify its being rebutted by an allegation of fraud (D. xxvi 7 fr 46 § 5; Cod. iii 1 fr 2), or the documents on which the decision was made proved to be forged (D. xliv 1 fr 11); or where an action had been brought under an important misconception (D. xiv 3 fr 13 pr; xv 1 fr 30 § 4; xliv 2 fr 11 pr, but *contra* D. ix 4 fr 4 § 3; and cf. xxxviii 2 fr 12 § 3); or of course where minority justified a restoration to the former position (Cod. ii 26 fr 1). Where in an action *de peculio* full satisfaction had not been obtained, and the *peculium* was afterwards increased, a fresh action might be brought for the deficit (D. xv 1 fr 30 § 4).

On the rule in concurrent actions see below.

5. In order to make a decision *res judicata* it must be given by persons with full executive authority and jurisdiction (*qui imperium potestatemque habent*) or by persons appointed under the authority of such to judge between the parties, or (within the pecuniary limits assigned to them) by the municipal magistrates, or by judges obtained out of the regular course from the emperor. An arbitrator appointed by mere agreement between the parties does not give a binding decision; *rem judicatam non facit* (Paul v 5 *a* 1).

The decision must be within the jurisdiction of the judge[1];

[1] A judgment outside the sphere of the judge's competence is declared by Cicero to be no judgment. *Frustra judices solent cum sententiam*

and it must be given in the presence of the parties (Paul v 5 *a* 5).

It was not necessary that the bench should be composed of the same judges throughout the hearing (D. v 1 fr 76)[1].

C. A suit for a smaller matter was not allowed to be pressed if its decision involved the decision of a larger matter in dispute between the parties. Thus the claimant of an inheritance is not allowed first to sue for some object belonging to the inheritance: the claimant of a farm cannot first bring a condiction for its fruits; or first sue for an accessory right of road through another farm belonging to defendant; or bring an action for partition (*com. div.*) before he had established his joint ownership. At one time defendant applied in such cases for a praescription to the formula, *e.g. si in ea re praejudicium hereditati non fiat:* but afterwards the objection took the form of a plea, *e.g. quod praejudicium hereditati* (or *praedio*) *non fiat* (Gai. iv 133; D. v 1 fr 54; xliv 1 fr 16, 18; cf. iv 1 fr 4). The claimant of joint heirship, if actually possessing a part of the inheritance, is however allowed to sue *fam. ercisc.*, and the judge in that trial will decide also his claim to be heir (D. x 2 fr 1 § 1). A claim for civil redress was not barred by the matter being also criminal (D. xlvii 8 fr 2 § 1; xlix 1 fr 4, *etc.*)[2].

pronuntiant, addere 'si quid mei judicii est.' Si enim non fuit eorum judicii, nihilo magis, hoc non addito, illud est judicatum (*Fin.* ii 12 § 36).

[1] This extract is from Alfenus and contains a curious misapplication of philosophy and analogy in defence of what seems a dangerous proposition requiring much careful guarding.

[2] So also apparently in Cicero's time (*Inv.* ii 20 § 59) where a case is supposed of armed men going to commit an act of violence, and being met by other armed men. A Roman knight in the struggle has a hand cut off by one of them and sues him *injuriarum.* Defendant applies to the praetor to grant him the plea, *extra quam in reum capitis praejudicium fiat.* Plaintiff objects and asks for a *judicium purum*, *i.e.* without such a plea. Defendant argues that no question which must arise on a crime tried under the law of cut-throats (*inter sicarios*) should be tried in a suit before Recoverers. Plaintiff replies that the wrong is so great that it should be tried on the first opportunity.

CHAPTER XI.

A. Oaths.

An oath by one of the parties to a suit was sometimes the means of ascertaining a disputed point as between the parties, and thus abridging further proceedings. Such an oath might be (1) voluntary *i.e.* taken or declined at the will of the party; or (2) necessary *i.e.* not to be declined without serious risk; or (3) judicial *i.e.* suggested by the judge to assist in forming his mind. The Digest (xii 2) treats them all together with but slight distinction, but it appears probable that this assimilation is largely due to Justinian[1].

1. A voluntary oath is taken by the free consent of the parties either out of court or in the course of the proceedings before praetor or judge. But to be effectual it must not be volunteered, but taken on a precise tender made by the opponent, who by this tender (*deferre*) offers to accept the other's oath as decisive of the particular question. It is allowable in all kinds of suits and on any question. But in most cases it appears as a final settlement or compromise of the whole issue. Plaintiff for instance suing on a loan tenders to defendant an oath (*defert jusjurandum* or *condicionem jurisjurandi*) *i.e.* challenges him to swear that he does not owe the money (*se dare non oportere*). If defendant takes the oath the issue between the parties is established as sworn; defendant is thereupon not liable, and can plead this oath in any future suit between him and the plaintiff which raises this precise issue. Or, it may be, defendant when sued on the loan challenges the plaintiff in the same way to swear to the justice of his claim. If plaintiff accepts the oath and swears defendant is thereupon liable just

[1] The Antonine jurists treated of oaths in comments on two parts of the edict, viz. on procedure and on the section *de rebus creditis* (Lenel *Ed.* § 54; 95 § 3). Demelius has, partly on this ground, partly on rational considerations, endeavoured to detect the old law under Justinian's alterations (*Schiedseid* &c. 1887). See also Gradenwitz's review *ZRG.* xxi 269.

as if he had fought out the case and judgment had gone against him. And in case of any dispute on the point, plaintiff is entitled to have an action, not on the main issue, which is now held to be decided, but on the simple issue whether such an oath was duly taken. In fact the oath ranks as a judgment for and against the parties. Plaintiff with such an oath in his favour can proceed to execution. Defendant in the like case is as free as if he had paid the claim, sureties and pledges are freed also, and if money has been paid, it can be recovered. Co-stipulators and co-promisers are all bound by the tender or oath of one.

It is immaterial what the terms of the oath are, provided the object or form of adjuration does not belong to an illicit religion, but it must be taken (*datum, praestitum*) in the terms tendered (*delatum*), just as exactness is required in the answer to a stipulation. It may be offered or taken by a ward with his guardian's authority, by a procurator with adequate powers, or by a son or slave in matters relating to his *peculium*, if he have the management of it. Even on his master's concerns, a slave taking an oath tendered obtains a plea for his master. Still more a son. If a minor has been cheated into taking it, or a fraud on creditors has been thereby committed, a replication as to the circumstances under which it was taken will be allowed on defendant's pleading the oath. Any contention as to the truth of the matter sworn to was not encouraged by the praetor. In suits where non-admission (*infitiatio*) doubles the damage, if the case be established by an oath, only single damages can be recovered (D. xii 2 fr 1—9; fr 17 § 3—fr 21; fr 23, 24, 27, 28, 30 pr; xliv 1 fr 15; Quintil. *Inst.* v 6).

2. In a few suits only (as appears probable; Justinian has no restriction), plaintiff has the right of tendering before the praetor an oath to defendant on the justice of his claim, and defendant cannot put aside the tender. *Solvere aut jurare cogam* are the words preserved to us from the praetor's edict: defendant must either pay the demand or swear that he does not owe it. He can however require that plaintiff should first take the oath of good faith (*de calumnia*): from which oath however parents and patrons are exempted; and he may, instead

of taking the oath demanded by plaintiff, retort the challenge. In that case plaintiff must either at once swear to the justice of his claim or be non-suited, *i.e.* the praetor will refuse him a trial. Nor can he call upon defendant to take an oath of good faith, for by his original challenge he has shewn that he trusts defendant's honesty. If, when the party challenged is ready to take the oath offered, his opponent waives it (*remittit*), the effect is as if the oath had been taken. Paul (if the text be uncorrupted[1]) allows either party to tender an oath, with a prior claim to the plaintiff if both are desirous to tender (D. xii 2 fr 34; Paul ii 1 §§ 1—4).

The suits in which this compulsory oath was allowed appear to be *de certa credita pecunia* (D. xii 2 fr 14) and probably also the *condictio triticaria* (cf. fr 34 pr); *de pecunia constituta* (fr 14, 36); *de operis* (fr 34 pr); *rerum amotarum* (fr 16; xxv 2 fr 11); in noxal actions on the question of the slave's being in defendant's power (ix 4 fr 21 § 2); *de injuriis* under the *lex Cornelia* (xlvii 10 fr 5 § 8); and *furti* (xxv 2 fr 12; cf. xlvii 2 fr 52 § 27).

3. Judicial oaths are taken, not by agreement of the parties or at the challenge of one of them, but at the suggestion of the judge who seeks thus to inform his mind on a doubtful point, and proposes an oath to one of the parties with the promise naturally implied of deciding in his favour if he take it[2] (*solent saepe judices in dubiis causis exacto jurejurando secundum eum judicare qui juraverit*). In such a case imperial constitutions allowed a further hearing, if new documents (*nova instrumenta*) were discovered (D. xii 2 fr 31). Probably to judicial oaths refers the statement by Paul (v 32) that an appeal is allowable only at the time when the oath was tendered and not when it was actually taken.

A special occasion of judicial oaths was when, after an interlocutory decision with which defendant did not comply, the judge allowed the plaintiff to assess the damages himself on

[1] He speaks also generally '*in pecuniariis causis*' which is a phrase meaning civil, as opposed to criminal, cases. *Ad pecunias* in D. fr 34 pr refers to the *actio creditae pecuniae*.

[2] An interesting case is given by the elder Seneca (*Contr.* vii *Praef.* § 7).

oath. This was called *in litem jurare* (D. xii 3; and see below, p. 415).

B. Admission (*confessio in jure*).

The decision of the judge, after trial had, ascertains the justice or injustice of the plaintiff's claim, and, if the claim be found to be just, defendant is then in the position of one bound to satisfy the plaintiff. If there be an appeal and the judgment appealed from is confirmed, the case is ripe for execution. But trial is required only when defendant denies the justice of the claim. If he admits it, no trial is necessary, and defendant is in the same position as one against whom final judgment is past. The XII tables put admission and judgment on the same level (see p. 423), and as a general phrase *confessus pro judicato est* is clearly true. Defendant, as Paul puts it, has passed judgment against himself (D. xlii 2 fr 1). As such it is accepted by the law as final, and, after the ordinary interval allowed to condemned defendants, may be enforced by distress under Ant. Pius' rescript (Paul v 5 *a* §§ 2—4).

An admission is good, whether oral or written or given in any other way *e.g.* by gesture, but it must be given in the presence of the opponent or at any rate of his procurator, guardian or caretaker. Such representatives are not competent to make admissions. A ward requires the authority of his guardian; and a minor can get his admission quashed (Paul *ib.*; D. xlii 2 fr 6 §§ 3—6).

Where the claim is for money certain, and an admission of debt is made by defendant, no further proceedings are necessary, but after the usual interval execution can ensue. But where the claim is for something uncertain, an admission can only prepare the way for a judgment, but cannot supersede it. A defendant against a claim under the *lex Aquilia* can admit that he killed or wounded a slave, but his obligation to compensate the owner is not thereby established. The question of *jure an injuria* remains for the judge to decide; and even if *injuria* be admitted, the amount of damages has to be determined. One who has admitted obligation should be pressed to agree to an amount of damages. So, if a person admits that he owes

plaintiff a certain thing, the amount of the damages is still open to question. In such cases the admission of the fact only can at most lead only to an interlocutory finding (*pronuntiatio*) on the part of the magistrate; and the trial will then proceed; the admission will be stated in the formula, and the fact admitted be withdrawn from any dispute before the judge. This appears to be the meaning of Marcus Aurelius' declaration, that the praetor is to accept, as if decided after trial, every fact admitted by defendant[1], *praetorem debere omne omnino quod quis confessus est pro judicato habere* (D. xlii 2 fr 6 § 2). In an action *ad rem*, if defendant admits that the farm claimed is plaintiff's, plaintiff is thereby established as owner (at least as against defendant) as fully as if the judge had so pronounced (*ib.*).

An admission made in error, if an error of fact, does not bind, and consequently forms no hindrance to a *condictio indebiti* (Demelius p. 226 sq.). But an admission, in a suit under the *lex Aquilia*, of having killed a slave is good against defendant whether *he* actually killed him or not, provided only the slave was killed. An admission of owing a particular slave is likewise good, even if the slave was already dead or died during the trial: but if there was no such slave, or generally if it is even doubtful whether the thing admitted to be due ever existed, the admission is not good. On the other hand an heir, admitting that he owes a legacy certain, is bound by his admission, even if the thing never existed or has ceased to exist: he has to pay its value (D. *ib.* fr 2—5, 8; cf. xi 1 fr 20 pr). But an heir admitting that he owes something on trust, is not necessarily to be condemned to payment, if it turn out that, from some cause unknown to him, nothing is really due (xlii 2 fr 7). His admission is only an admission of the existence of such a trust in the will (Demelius *Conf.* p. 211).

Advocacy of another's claim does not preclude the advocate, on subsequent knowledge of the thing's being his own, from claiming it for himself (D. vi 1 fr 54).

Along with judgment and admission was placed in the *lex*

[1] Demelius (*Confessio* pp. 194—204) criticises the passage and regards it as partly interpolated.

Rubria (*capp.* 21, 22), and doubtless in the edict also, failure in due defence, leading in the case of a loan of money (*certa credita pecunia*) to personal arrest and in other cases to seizure and possession of the defendant's estate. A defendant who does not admit the debt or obligation charged and yet will not join in the necessary steps to secure a trial and decision, was treated as contumacious, and subjected to like execution (cf. Demelius *Conf.* pp. 127 foll., 159, 160; Lenel *EP.* p. 329).

C. *Interrogationes in jure*[1].

In some cases where the course to be taken by a plaintiff would necessarily be different according to the position taken up by defendant, plaintiff was allowed to ascertain this definitively by a question to defendant by or before the praetor. The most usual case was that of a creditor against the estate of a deceased. If an heir has entered on the inheritance, the creditor can sue for his debt: if there be no heir, he can apply to the praetor for possession of deceased's estate. He is allowed therefore to ask the supposed heir whether he is so; if he says he is, whether really heir or not, he has as it were contracted with plaintiff to accept the responsibility. If he denies that he is heir, he will not be allowed to obstruct plaintiff's application for possession of the estate. If defendant has answered under a mistake, and a subsequent will be discovered, or the will under which he was heir be upset in any other way, the praetor will grant him relief (D. xi 1 fr 4; 9 § 1; 11 §§ 8—12). Silence or indistinct answering are held equivalent to denial (fr 11 §§ 4, 7). But due time for deliberation is granted if asked *bona fide*; and if defendant's claim is contested by another, Hadrian directed that he should not be compelled to answer, and thereby either prejudge his own case or assume a responsibility which he might be deprived of the means of meeting (fr 5, 6). Defendant might also be asked his age, apparently because if under twenty-five the creditor might be exposed afterwards to have his victory cancelled (fr 11 pr). Where there is a trust, defendant might be asked whether the estate had been accordingly restored to him (fr 9 § 7).

[1] See Demelius *Confessio* §§ 18—26.

Another important question for a creditor of deceased for an amount certain, was what was defendant's share of the inheritance: else plaintiff might run the risk of an excessive claim (*plus petendi*, fr 1 pr). If defendant reply that he is universal heir, or heir to a larger extent than is true, he is still bound by his answer. If he reply less than is true, or give no reply, plaintiff can sue him, and he is liable for the whole debt (fr 11 §§ 1—5). Whether further questions could be put, such as concerning the nature of his title to the inheritance, whether in his own right or in that of persons in his power, was a matter for the praetor to decide according to circumstances (fr 9 § 6).

Again, one who is suing under the *lex Aquilia* or other noxal action will have to take a different course, according as the slave's master or child's father is ready to defend him or at once to surrender him or is not disposed to do anything. It is the owner or superior who is liable. Plaintiff was allowed to ask defendant whether he had the slave or child in his power[1]. And according to the answers to this question plaintiff's course would be clear (D. ii 9 fr 2 § 1; xi 1 fr 5). An answer admitting ownership of another's slave is good against the answerer, and, if he be sued noxally, the real owner is freed (D. xi 1 fr 20 pr, 28). But if, instead of being another's slave, it is a freeman, defendant is not bound by his answer, any more than he is if he declares one to be his son whose age makes the relationship impossible. For a confession to be accepted by the law must be consistent with the law and with nature (fr 13 pr, 14 § 1). In an action for *pauperies*, the question as to ownership is allowed (fr 7).

In two other cases questions of this binding character could be put. When possible damage was threatened by a neighbouring building, plaintiff might ask the supposed owner whether he was owner and, if a co-owner, what was his share, so that he might compel him to give the usual security (fr 10). Similarly the question whether and to what extent a defendant possessed, *i.e.* owned[2], a farm was allowed, but probably only in

[1] See Lenel *EP.* pp. xiii, 127; Demelius *Conf.* p. 310. The special meaning of *potestas* given in ix 4 fr 21 § 3 is at most only part of the meaning.

[2] See Demelius *Conf.* § 25.

the case of an action *aquae pluviae arcendae* and the like, whereas in the case of *damni infecti* the object of the suit was in effect a restoration of the old state of things (fr 20 § 1; cf. xxxix 3 fr 11 § 3).

In all these cases the gist of the question allowed to be put to defendant is not the ascertainment of a fact, but the willingness of the defendant to accept liability (cf. fr 4 pr), instead of leaving the plaintiff to the remedy of applying to the praetor to be put into possession of the inheritance or slave or animal or land concerned. The actions in which the interrogatories were put were called *interrogatoriae*, and the fact of the question having been put was named in the formula, and the claim was based on it[1]. Some questions apparently were put without leading to actions, but the answer might, if calculated to deceive, justify an action for fraud (D. xxvii 6 fr 12).

Where one was asked whether he maintained that his guardian's heirs were in debt to him and he answered no, it was held that he could not afterwards withdraw his statement, and the heirs were freed, whether the answer was in consequence of a compromise having been made or was to be taken as expressing a gift (D. xxxix 5 fr 29 § 1).

CHAPTER XII.

JOINDER OF ISSUE.

1. The settlement by the praetor of the instructions for trial, containing the appointment of a judge (or recoverers) with the issue to be tried, and its acceptance by the parties, formed the conclusion of the proceedings before the praetor, and were preparatory to the real trial of the suit. It is only now that the plaintiff's claim against the defendant is definitely

[1] Interrogatory actions ceased with the abolition of procedure *per formulas*, and the answers to questions became available only in evidence. See D. xi 1 fr 1 § 1; which fragment and fr 21 in their present form are doubtless due to Justinian.

ascertained and allowed, and the suit effectively begun. Till now he could withdraw altogether, and defendant could satisfy him without legal process. This is the time *cum petitur* in the full sense (cf. *e.g.* D. xii 1 fr 22; xxii 1 fr 2; xlvi 8 fr 15; *etc.*). In early days it is said the parties called on the bystanders to witness the acceptance of the issue by crying *testes estote* (Fest. p. 38) and hence *litis contestatio* (joinder of issue) was the name of this step in the procedure. However that may be, the name is suitable enough for a 'joint declaration of the suit.' The same was denoted (from defendant's act) *judicium acceptum* (cf. *e.g.* D. iii 3 fr 15): also *lis inchoata* (Vat. 263; *Consult.* vi 8 § 9); *res in judicium deducta* (Gai. iii 181; D. xxvi 7 fr 22, 23). The exact form of this final act before the praetor is not known. It may have consisted, as Wlassak contends with some probability, in the plaintiff's handing to the defendant a written copy of the issue made by the praetor's official and defendant's taking it[1]: or the plaintiff may have merely shewn him the issue as settled by the praetor, or read it out to him (*dictare e.g.* D. ix 4 fr 22 § 4; xlv 1 fr 112 pr), and the defendant may have declared orally his acceptance of it (cf. D. ii 13 fr 1 pr, § 1)[2].

[1] H. Erman (*ZRG.* xxx 334, cf. xxxii 270) suggests that the formula was written and sent to the judge sealed up and that this gives an explanation of a difficult passage in Hor. *Sat.* ii 1. 86. Horace is professing to consult the lawyer Trebatius in reference to the charges made against him for satirising persons. Treb. says *si mala condiderit in quem quis carmina jus est judiciumque.* Horace replies *Esto, si quis mala; sed bona si quis judice condiderit laudatus Caesare? si quis opprobriis dignum latraverit, integer ipse?* Treb. replies: *Solventur risu tabulae, tu missus abibis.* Suppose a suit for *injuriarum* with an issue, *Quod Q. Horatius Flaccus mala carmina condidit, etc.* On the tablets containing the formula (cf. *tabulas cautionis* D. xxvi 10 fr 5; *tabulas chirographi* D. xxxii fr 59) being 'opened,' the court bursts into laughter and dismisses the case. *Solventur* may also be taken as 'dissolved,' 'discharged'; cf. Cic. *Or.* ii 58 § 236; Quintil. v 10 § 67. The expression *jus judiciumque* makes a civil action most likely: in Hor. *Ep.* ii 1. 153 criminal procedure under the *lex Cornelia* seems to be meant: cf. Gai. iii 220; D. xlvii 10 fr 5 § 9, 15 § 27; criminal procedure was more advantageous when the person libelled was not named, *ib.* fr 6. Horace's justification *si quis opprobriis, etc.* finds support in *ib.* fr 18 pr. Trampedach (*ZRG.* xxxi 143) suggests the translation 'the libellous writings will be set free (acquitted) amidst laughter.'

[2] Cf. Wlassak *Litiscont.* p. 53 n.; Bekker *ZRG.* xxviii 181; Lenel *ib.* 380.

Issues for trial (*judicia*) were either statutable (*legitima, quae legitimo jure consistunt*) or imperial (*imperio continentia*[1], *quae imperio continentur*). The former were such as rested or were supposed to rest on the ancient constitutional authority of the XII tables[2] or the like; the latter are attached to the executive power of the praetor and controlled by it.

2. *Legitima judicia* are described by Gaius as those accepted in Rome or within a mile of it, between parties who were all Roman citizens, and to be tried by a single judge, also a Roman citizen. In other words they were issues in conformity with the law of Roman citizens and tried by the regular courts. With them joinder of issue works as of course (*ipso jure*) in transforming the original cause of action into a new obligation. The old lawyers said *ante litem contestatam dare debitorem oportet, post litem contestatam condemnari oportet, post condemnationem judicatum facere oportet.* Joinder of issue is a kind of contract under authority (cf. D. XV 1 fr 3 § 11; V 1 fr 61), and effects a novation in some sort[3] of the previously existing obligation, so far as is necessary to obtain a practical result. The original tie between plaintiff and defendant is loosed: it is only in the form now given to it that plaintiff can prosecute his claim against this defendant on this matter: defendant is no longer subject to an undefined possibility of suit, but is under a definite obligation to abide judgment on a precise issue (Gai. iii 180, 181).

The consequence is that, whatever be the result of the trial, plaintiff is as of course disabled from suing defendant again on the matter. But this is true only when the issue is so framed as to put the whole claim before the judge and nothing but this claim; that is, when he is directed to determine the duty of the defendant towards the plaintiff in respect of a particular

[1] Cf. *aedificia urbi continentia* in *lex Quinct.* Bruns no. 22 ed. 6.

[2] According to Wlassak *legitimum* refers to the *lex Aebutia* which authorised trials of written issues (*Pr. Gesetz.* i p. 29, 37 n., *etc.*, ii p. 83, 363, *etc.*). But see above (vol. 1 p. 95) on the use of *legitimus.*

[3] Gaius' treatment distinguishes *novatio* from *litis contestatio* (iii 176—180). Only one passage is found in the classical Jurists or Digest in which *novatio* is applied to joinder of issue (Vat. 263), cf. Salkowski *Novation* pp. 118, 119. Justinian so applies it in Cod. vii 54 fr 3 § 2.

matter according to the law of the citizens (*si legitimo judicio in personam actum sit ea formula, quae juris civilis habet intentionem*[1]). If the issue is one of fact, not of law (see Gai. iv 45—47), the truth of the facts as alleged, not the plaintiff's right, is before the judge, and a different statement of the facts might give a different result; defendant's conduct may have given the plaintiff a good legal claim, which has not been heard at all. Or again the issue may be general (*in rem*), and not particular to this defendant only, *e.g.* that a certain farm is the plaintiff's: if his claim is good, it concerns not only the defendant, but all the world, and is therefore too large a question to be disposed of by this contest, which strictly speaking only decides whether defendant is bound to recognize the claim.

Thus statutable trials *in rem*, and also those *in personam* with a *formula in factum concepta*, leave an opening for a fresh trial. But as the reasons for this are technical, and defendant may have a real grievance if a fresh trial be allowed, the praetor granted in these cases a plea of 'matter already brought to trial or decided' (see p. 388) which gave practical security against a rehearing of the same matter. The plaintiff was not stopped from proceeding to trial, but would lose his case if it were really a repetition of what had been already brought before a court (Gai. iii 180, 181; iv 107; cf D. L 17 fr 112).

Judicia legitima have some other peculiarities. Only in trials so conducted could a usufruct be established in suits for peti-

[1] There are three important classes of actions about which it is not clear whether they can be said for this purpose to have *juris civilis intentio*. These are (1) actions where the formula has a fiction; (2) where the condemnation clause has a different person from the clause of intention, as where a cognitor or procurator sues; and (3), with a similar frame to the last, actions against the principal on a shipmaster's or shopkeeper's contracts, or against a father or master on a son's or slave's contracts. Pokrowsky (*ZRG.* xxix p. 80 sq.) in an excellently written paper maintains that in all these cases the Digest does not allow, or at least does not require, *ipso jure* consumption, and consequently that they all belong to the large class of actions with a *formula in factum concepta*, which is not to be limited to the ordinary *actiones in factum*. H. Erman (*ZRG.* xxxii 261) in an elaborate criticism rejects Pokrowsky's theory, but he rests too much on historical hypotheses to carry conviction to my mind. Pokrowsky has replied in *ZRG.* xxxiii p. 99 sqq.

tioning an inheritance or dividing common property (Vat. 47 *a*). A woman could not proceed in a statutable trial without the authority of her guardian, just as she could do no other civil business (Ulp. xi 27). And if a paterfamilias or a woman was engaged in such a suit, when adopted or coempted respectively, the suits did not pass to the adopter or copurchaser but perished entirely (Gai. iii 83: text not certain).

The *lex Julia judiciaria* made all such issues (*judicia legitima*) to lapse if not brought to judgment within one year and six months (from joinder of issue? Gai. iv 104).

3. Imperial *judicia* were all such as had not the three characteristics named above, viz. Rome for place, Roman citizens for parties, and a single Roman judge. Consequently they included:

(*a*) Trials in the provinces or more than a mile from Rome, even though they rested on the *lex Aquilia* or *Ollinia*[1] or *Furia* or any other *lex*, whether the parties or judges were Roman citizens or foreigners:

(*b*) Trials before recoverers, even though held in Rome:

(*c*) Trials before a single judge, if one of the parties or the judge was a foreigner.

But the mere fact that the authority for granting the action was the praetor's edict did not in any way prevent the trial being statutable, if it was at Rome, between Roman citizens, and before a single judge, who also was a Roman citizen.

In no imperial trials had joinder of issue a necessary action in destroying the claim and thus preventing a second trial: the previous trial or judgment had to be pleaded. The character of the trial as dependent on the praetor's authority was thus maintained throughout.

On the same principle trials thus granted expired, if not brought to judgment within the praetor's year of office (Gai. iv 103—109).

4. Joinder of issue (in both classes of trials) has certain other effects:

(*a*) All actions run against heirs, even if, as for torts, they did not run against them at first; and an action for

[1] This *lex* is not otherwise known. For *lex Furia* see p. 30.

insulting conduct (*injuriarum*) can now be continued against heirs (D. xliv 7 fr 26, 59; xlvii 10 fr 13 pr; L 17 fr 87).

(*b*) An action which could only be brought before plaintiff's death or within a certain time from the ground of complaint is now beyond risk from these causes (D. L 17 fr 139; xii 2 fr 9 § 3). But this has nothing to do with the periods stated above for the completion of a suit. Nor is a person over 25 years of age who has once desisted from the suit, helped by the fact that issue was joined within the proper time, *i.e.* one year after 25 years of age (D. iv 4 fr 20 § 1).

(*c*) Defendant, if condemned, is answerable as from this date for whatever fruits, offspring, interest, *etc.* the plaintiff could have had, if he had then been put into possession of what he claimed (or of what was awarded). The subsequent loss of his right by usucapion, or the loss by fault of defendant of the object of suit, or of the means of satisfying the plaintiff (*i.e.* by surrender of a noxal slave) do not as a rule remove his liability (D. v 3 fr 40; vi 1 fr 15—18, 20; ix 4 fr 21 § 2; xii 1 fr 31 pr; xxii 1 fr 2).

(*d*) In strict suits the value of the thing is taken as at this time, whereas in *bonae fidei* suits it is taken as at date of judgment (D. xiii 6 fr 3 § 2).

(*e*) From this time the object of suit becomes *res litigiosa*. As such it was not alienable or pledgable voluntarily, and the acquirer would be met by a fatal plea, at least if he bought from one not in possession. Apparently alienations by the plaintiff were meant, for the defendant if he has parted with possession is in any case answerable for the value (D. x 2 fr 13; xx 3 fr 1 § 2; Gai. iv 117 *a*; Cod. iii 37 fr 1 § 1). An edict of Augustus inflicted a penalty of 50 sesterces to be paid to the fisc (*Frag. de jure fisci* § 8 mutilated; cf. D. xlix 14 fr 1 pr). The rule appears to have originally related only to suits for Italic land, but was extended to moveables (D. xx l. c. *Fragm. fisc.* l. c.). The XII tables forbad the consecration of anything in dispute under a penalty of double value; and this rule remained in the Digest (xliv 6 fr 3). See Cod. Theod. iv 5 fr 1 and Vangerow *Pand.* i 256, Lenel *EP.* p. 107.

CHAPTER XIII.

PROCEEDINGS *IN JUDICIO.*

A. The judge (or recoverers) named in the formula settled by the praetor (or proconsul, *etc.* in the provinces) was, if not present, informed of it, probably by the praetor, who might also fix the place and limit of time within which the trial should be held (cf. D. ii 1 fr 13; v 1 fr 2 § 2; fr 59 *lex Urson.* 95; Wlassak *P. G.* ii 56). Otherwise the judge would name a day[1]. The hearing was open to the public. The judge was sometimes accompanied by assessors chosen by himself, who formed his *consilium*[2]. In Cicero's speech for *Quinctius* (cf. 7 § 54) the judge C. Aquilius, able lawyer as he was, still had three assessors, men of dignified position. The different parts of a judge's duty are named in an old statute, *ad id judicium adesse, verba audeire, in consilium eire, judicare* (*lex Acilia repetundarum,* § 71).

The parties whether appearing in person or by attorney or agent had, at least in important cases, their cause pleaded by orators (*oratores, advocati, patroni*), who in early times acted gratuitously, looking to fame and influence as their reward, but in imperial times received fees (see vol. 1 p. 526). They were assisted by lawyers[2]. We hear of limitations of time for the advocates' speeches in criminal cases, *e.g.* three hours for each by Pompey's law on occasion of Milo's case 52 B.C. (Cic. *Brut.* 94 § 324; Ascon. *Milon.* § 25), of statutable (*legitimae*) hours in Cicero's impeachment of Verres (Act. ii 1, 9 § 25). Pliny complains of restrictions of time, apparently made at the discretion of the judge (*Ep.* i 20 §§ 10, 11; iv 9 § 9), six hours for accuser, nine for

[1] Cf. Cic. *Flac.* 24 § 57 *forum plenum judiciorum, plenum magistratuum.*

[2] Cf. Cic. *Top.* 17 § 65 *Privata enim judicia maximarum quidem rerum in jurisconsultorum mihi videntur esse prudentia* ('to rest on their skill'), *nam et adsunt jurisconsulti multum, et adhibentur in consilia, et patronis diligentibus ad eorum prudentiam confugientibus hastas ministrant.*

accused (vi 2 §§ 6, 7): and Cicero refers in a private suit to the natural pressure to get a case finished in the day (*Tull.* 3 § 6). Each party's advocate spoke once only, but sometimes several advocates were heard (Cic. *Quinct.* 26 § 80), and on adjourned consideration sometimes the same, sometimes different advocates spoke (*ib.* 1 § 3; *Caecin.* 2 § 6). The conclusion sometimes took the shape of a sharp short discussion and questioning of the opposing advocate, presumably to put in relief some decisive point. This was called *altercatio* (Quintil. vi 4).

B. Evidence was produced and commented on by the advocate during his speech. The witnesses appeared voluntarily; but sometimes (in criminal cases) on summons from the magistrate (*quibus denuntiatur* Quintil. v 7 § 9) or through the prosecutor (Cic. *Verr.* ii 1 19 § 51; *Flacc.* 6 § 14). The compulsory witnesses were limited to ten in some semicriminal cases (*lex Mam.* 55; *Ed. Venafr.* 68; cf. Val. Prob. 5); in the borough of Ossuna to 20 (*lex Urson.* 95). Ten witnesses only are commented on by Cicero in the speech *pro Caecin.* (10 § 28).

Witnesses gave their evidence on oath (Cic. *Rosc. Com.* 15 § 45). Declarations made in the presence of witnesses, written, and sealed up[1] were sometimes produced (Cic. *Rosc. Com.* 14 § 43; Quintil. v 7); as also notices given in the presence of witnesses (*testato e.g.* D. xlv 1 fr 122 pr and § 3): and documents of various kinds (*tabulae, codices, instrumenta*), especially copies of accounts in bankers' books. Bankers were compellable to allow a customer to have inspection and a copy made of his own account (D. ii 13 fr 4, 10).

The evidence of slaves was taken by torture, and taken only in default of other (D. xxii 5 fr 7). Paul appears to limit its use

[1] In Cic. *pro Flacco* we have several instances of sealed up documents produced in evidence on a trial against a provincial governor; a resolution in his favour from the town of Acmon, sealed with special Asiatic chalk much used by the publicans (16 § 37); some evidence against him, denounced as false by Cicero, sealed with wax (*ib.*); a decision in an arbitration suit (36 § 89); record of trials which ought by law to have been sealed by the judges in public and brought to the praetor in three days, but which had been kept back for thirty days, presumably forged (9 § 21).

in private suits to cases of guardianship and inheritance, where the judge of guardianship or the *centumviri* find no other evidence of the assets of the deceased or the connexion with the family (*de rebus hereditariis vel de fide generis* Paul v 15 §6; 16 § 2).

An oath sometimes supplied the place of evidence, but if it is to have full weight, it must not be volunteered but tendered, either by the opposite party (which was the usual case), out of court or before the praetor, or be invited by the judge in order to satisfy his own mind (see p. 394).

The burden of proof falls, as a general rule, on the party making an assertion (*ei incumbit probatio qui dicit, non qui negat* D. xxii 3 fr 2). Hence it falls usually on the plaintiff, but pleas must be proved by defendant. So anyone imputing disability to his opponent, *e.g.* that he could not be, or appoint, a procurator, must prove it, and so must one who, having promised to appear before the judge, alleges detention on public business, fraud of his opponent, ill-health or tempest (*ib.* fr 19, cf. fr 5; xliv 1 fr 1).

On points of law[1] it was the practice at one time for the parties to get and produce opinions from jurisconsults who in Augustus' time and after were specially selected and licensed. They either wrote their opinions directly to the judge or declared them in the presence of witnesses who wrote them and produced them in court. Hadrian made them binding on the judge if they were unanimous (Gai. i 7; D. i 2 fr 2 § 49). In the provinces the governors were consulted by the judges on matters of law, but left them to themselves on matters of fact (D. v 1 fr 79 § 1).

[1] An advocate was not necessarily a trained lawyer: if any special point of law had to be argued, his clients would consult lawyers and furnish him with their opinions, or he would himself consult them. See Cic. *Orat.* i 15 § 56; 58 §§ 249, 250, *etc.*; *Top.* 17 § 65. The special functions of the lawyer as distinguished from the orator are satirically described by one of Cicero's interlocutors. *Ita est tibi iurisconsultus ipse per se nihil nisi leguleius quidam cautus et acutus, praeco actionum, cantor formularum, auceps syllabarum* (*Orat.* i 55 § 236) 'You make the lawyer 'merely by himself to be only a cautious and sharp statutemonger, who 'announces his suits like a public crier, repeats his *formulae* by rote, and 'lays snares to catch only the letter of the law.'

C. The judge was left to act as he thought right in the conduct of the case subject to the instructions contained in the formula given by the praetor (or governor) and to the general law. He was not bound to exercise his full powers (D. v 1 fr 40 pr).

He formed his own judgment on the evidence. In several rescripts Hadrian dealt with this question and directed the judge not to give exclusive credence to one kind of proof. 'Sometimes the number, sometimes the dignity and authority 'of the witnesses carried most weight; oral evidence was much 'more important than affidavits (*testimonia*); the manner of the 'witnesses should be noted, whether they told a simple tale and 'answered naturally at the moment, or gave uniform evidence 'carefully prepared.' As to affidavits Hadrian declined to admit them in criminal matters, when hearing cases himself. The judge was to give credence or not *ex animi sui sententia* (D. xxii 5 fr 3 §§ 1—4). He might after hearing the case, instead of pronouncing judgment, endeavour to bring the parties to an agreement on terms; he might intervene in the conduct of the case and put questions and suggest points not adverted to by the litigants: he might make use in forming his opinion of any knowledge which he personally happened to have on disputed facts[1]. But the propriety of such action on the part of the judge seems to have been much discussed (Gell. xiv 2 §§ 14—19). He might allow adjournments (*diem diffindi*), for which in Cicero's time the phrase appears to have been '*Amplius pronuntiare*' 'to declare for further hearing' (Cic. *Brut.* 22 § 86; *Verr.* ii 1 9 § 26; 29 § 74).

D. On preliminary and collateral points he would give interlocutory findings preparatory to the final formal judgment. Some instances may be given:

[1] Demelius however thinks the two following rules, though not actually found, must be regarded as in force among the Romans. (1) The judge cannot in giving judgment pay regard to any facts which are not maintained by the parties. (2) All facts maintained by one and admitted by the other he must take as a basis for his decision without inquiring into their material truth. In short he must not be actively inquisitorial (*Confessio* p. 365).

1. In actions *in rem* the condemnation is for the value of the thing and mesne profits, deducting necessary expenses (D. v 3 fr 38), but may be averted by due restitution. If therefore the judge finds (*pronuntiat*) for the plaintiff, he will call upon defendant to restore, and, only if defendant refuses to obey the judge's direction, will he give judgment for damages[1]. The formula contains such words as *nisi restituet*, and thus invites the judge's action (Cic. *Verr.* ii 2 cap. 12 § 31; cf. Gai. iv 114). In the mortgagee's action (*Serviana*), if the mortgage is only conditional and the mortgagee sue before the condition takes effect, the judge will not require the possessor to give up the thing, but to give a bond for delivery when the condition exists, if the money is not by that time repaid (D. xx 1 fr 13 § 5). In the ancillary personal action *ad exhibendum*, if production is made, there will be no condemnation, except for the consequences of delay (cf. D. x 4 fr 9 § 8; Just. iv 17 § 3).

2. In *bonae fidei* actions, the settlement being largely dependent on the discretion (*arbitrium, arbitratus*[2]) of the judge, he may direct various duties to be performed, and security to be given (D. v 1 fr 41), *e.g.* in an action *commodati* he may simply require defendant to surrender his actions against a third party and pay costs (D. xiii 6 fr 5 § 12). In a redhibitory action by the purchaser, the judge must ascertain whether vendor is prepared to restore everything he has received as price, and, if not, the condemnation will be double instead of single (D. xxi 1 fr 45; see p. 153); *etc.*

3. In actions on torts committed by slaves defendant can avoid condemnation by surrendering the slave (*e.g.* D. iv 3 fr 9 § 4), but, if he did not, the condemnation would still contain

[1] In D. vi 1 fr 57 Alfenus tells of a case where two suits by different persons were brought before different judges at the same time for a farm. He advises that whichever judge decided first should, if he found for the plaintiff, order restitution, only if plaintiff gave security against the other's claim.

[2] Actions in which such a discretion is exercisable by the judge are called by Justinian *arbitrariae* (*Inst.* iv 6 § 31). The Antonine jurists appear to have confined the term to the *actio de eo quod certo loco dari oportet* (which see) and perhaps to *quod metus causa gestum*, but this is by Gradenwitz held to be interpolated (*Interpol.* p. 99).

the alternative of damages or surrender (D. xlii 1 fr 6 § 1; cf. Just. iv 17 § 1, and see above, p. 355).

In an action for fraud or intimidation, restitution may, if the judge think fit, avert damages (D. iv 3 fr 18 pr; cf. the case of publicans xxxix 4 fr 5 pr).

4. Where defendant has got a plea of fraud admitted in order to recover expenses (beyond necessary expenses) to which he has been put for the benefit of others' property, considerable discretion is left to the judge in dealing with the matter: that is, if defendant had by mistake bought with a bad title and had built or planted, the judge may require plaintiff to repay the cost, or at least the additional value thus given to the land: or, if plaintiff is a poor man and would thus be deprived of the home and grave of his ancestors, he may permit defendant to remove his improvements so far as it can be done without injury to the place, or reduce the demand on the plaintiff to the value of what is thus removable (D. vi 1 fr 38; v 3 fr 38; xliv 4 fr 14).

5. The judge may require, as the condition on which he would condemn the defendant, the surrender by plaintiff of the actions which he has against others, *e.g.* where a surety is sued and pays he can get the creditor's actions against the principal debtor or other sureties (D. xlvi 1 fr 13, 17, 36); or, if the creditor has also a pledge, he can get this transferred to him (Cod. viii 40 fr 2; D. xx 5 fr 2). In actions on loan and deposit, where the defendant is condemned for fraudulent loss of the thing, it was the practice for the owner to cede his actions to defendant (D. xlii 1 fr 12). See also D. xlvii 2 fr 81 §§ 5, 7.

6. Where there are concurrent actions, the judge can arrange that plaintiff release the others before condemnation be passed on the one in process; *e.g.* where a guardian is sued *tutelae*, but liable also to an action on stipulation (D. xlvi 2 fr 9 pr); or where a thief is sued by a vindication but is also liable to *condictio furtiva* (D. xlvii 2 fr 9 § 1). (If the damages would be larger in the second action, the praetor in settling the issue will arrange for the defendant's being liable in that only for the excess, D. xlvii 7 fr 1; 2 fr 89; xliv 7 fr 34 pr, fr 41 § 1.) If the duty of the judge would not of itself secure such

results, a plea of fraud would enable it to be done (D. iv 9 fr 3 § 5).

7. In an action *de peculio* the judge inquires whether any part of the debt incurred has been really for the master's or father's service, and gives judgment for that (*de in rem verso*), before he inquires into the amount of the *peculium* (Just. iv 7 § 4*b*).

8. Further, in all *bonae fidei* suits it was the duty of the judge to look at both sides of the matter and determine the reciprocal obligations of the parties. He allowed for any expenses properly incurred by defendant or counterclaims of any kind in reference to the particular subject of suit. In partnership actions he could even set off (*compensare*) the negligence of one against negligence of the other or against a gain made by the other from the common property (D. xvi 2 fr 10 pr). From this general position of the parties and the judge, a further step was taken, and a defendant was permitted to set off against the sum found to be due from him to the plaintiff the amount of any money due from plaintiff to him. The judge was free to permit it or not: there was nothing in the formula to bind him; but it was held to be more consonant with the requirements of good faith, that a man who was called on to pay should pay over only the balance of what he was entitled to receive, or if amounts were equal, should not have to pay at all (Gai. iv 61—63). A rescript of M. Aurelius admitted compensation in strict suits also, by allowing defendant a plea of fraud for this purpose (Just. iv 6 § 30). And it was admissible in a suit on tort or a noxal suit (D. xvi 2 fr 10 § 2). It had long been usual in bankers' suits (above, p. 363).

The conditions of set-off were that the debt should be of the same kind, money against money, corn against corn, *etc.*[1]; that it should be actually due, whether in suit, or already a judgment debt, or not even recoverable at all by suit (a natural debt only), but it should not be one which plaintiff can destroy by a plea (D. xvi 2 fr 6, 7 pr, 8, 14, 16 § 1). Money debts were held (by a constitution of Alexander Severus) to

[1] This is named in the case of bankers in Gai. iv 66, and appears probable for other cases of compensation.

cancel one another from the date of the counterbalance[1], and interest not to be due on the amount set off, even if one debt bore interest and the other did not, or the rates of interest were different (Cod. iv 31 fr 4; cf. D. fr 11, 12, which refers to a constitution of Sept. Severus). A surety could set off a debt due to his principal or to himself; a person sued by a guardian could not set off, against a debt due to the ward, a debt due from the guardian on his own account (fr 4, 23). A son under power could set off a debt due to his father, but had to guaranty that his father would ratify (fr 9 § 1). A creditor is not bound to accept a set-off of what he owes to a third party, even though this last consents (fr 18 § 1). If the judge rejected the set-off on the ground that there was no such debt, any suit for that debt could be met by a plea of 'matter decided'; but if he simply rejected it as not suitable or as involving controversy or for any other reason, defendant was not precluded from suing for it (fr 7 § 1; iii 5 fr 7 § 2).

E. Whether the judgment should be condemnation or acquittal, when defendant, after joinder of issue but before judgment, had satisfied the plaintiff, as required by the judge, was a matter on which the two schools of lawyers held different opinions. Sabinus and Cassius held that all kinds of trials admitted of acquittal in such a case (*omnia judicia absolutoria esse*), on the ground that defendant was now no longer liable (cf. D. xxxix 4 fr 5 pr). The opposite school appear to have held (Gaius is mutilated) the same as regards suits *in rem*, because condemnation was expressly made contingent on non-restoration (*nisi restituet, condemna*): and as regards *bonae fidei* trials, because the judge is free; but that in strict suits the condemnation depended on the position at the joinder of issue, and defendant, if in the wrong then, could not escape condemnation (Gai. iv 114).

[1] On the much disputed meaning of *ipso jure* as applied to set-off see different opinions in Windscheid *Pand.* § 349 n. 10. Dernburg (*Pand. Oblig.* § 62) and others take it to mean that since M. Aurelius' rescript it is a matter of right, and not in the discretion of the judge; cf. Paul D. xvi 2 fr 21. The expression is more probably due to Justinian; cf. *Inst.* iv 6 § 30.

F. Suit can be brought only for what is now due and unconditionally due. The judge must accordingly decide absolutely, and the condemnation in damages must be for a fixed sum (Gai. iv 51; D. v 1 fr 35). Where there was no limit, he could fix the sum as high as he pleased; where there was a maximum (*taxatio*), he must not exceed it, but may name a less sum; where the amount is fixed in the formula, he must neither exceed nor reduce it[1]. If he thus exceeded his instructions, although by mistake, he was said *litem suam facere*[2] 'to treat the suit as his own' (Gai. iv 52); as he did, when he gave a judgment not in conformity with the statute (*in fraudem legis*) from corrupt motives (favour, enmity, bribery[3]). The judge was liable to an action *in factum*, the damages to be fixed by the judge in that trial. If he was a *filius familias*, his father was liable only to the extent of his *peculium*: the heir of a judge was not liable (D. v 1 fr 15, 16; L 13 fr 6).

If the judge finds interest due as well as the principal, he must not simply add to his judgment the words 'and interest,' but should ascertain the amount (D. xlii 1 fr 59 § 2).

G. The judge had in many suits a potent means of compelling defendant's obedience to his findings by allowing the plaintiff to fix on oath the amount of the damages for defendant's failure to restore or give guaranty as required. The judge may, if he think fit, put a maximum, and may, but only for very strong reasons, not adopt the amount sworn. This mode of fixing the damages is resorted to principally

[1] Cf. Sen. *Clem.* ii 7 § 3 *Clementia liberum arbitrium habet: non sub formula sed ex aequo et bono judicat: et absolvere illi licet, et quanti vult taxare litem.*

[2] Cicero *Or.* ii 305 uses the expression metaphorically. *Quid si, cum pro altero dicas, litem tuam facias, aut laesus efferare iracundia, causam relinquas?* So Gellius (x 1 § 5) contented himself in reply to a question with quoting Varro, for *adversus eum qui doctus esse dicebatur, litem meam facere absens nolui.* The orator G. Titius (2nd cent. B.C.) speaks as if a late appearance or non-appearance in court made a judge liable; *inde ad comitium eunt ne litem suam faciant* (*ap.* Macrob. *Sat.* iii 16 § 16).

[3] A constitution of Caracalla decided that money given in any suit either to the judge or the adversary should cause plaintiff to lose his suit (Cod. vii 49 fr 1; D. iii 6 fr 1 § 3).

where there is fraud or obstinacy on the defendant's part: if there be only negligence attributable, the judge makes the estimate himself (D. xii 2 fr 2, 4 §§ 3, 4, fr 5 §§ 1—3; v 1 fr 64). 'Swearing to the claim' (*jurare in litem*)[1] was not used in strict actions, unless there was something making the value very uncertain, *e.g.* if a slave who was promised had died. Nor would it be used in a suit on the deposit of a known sum of money, unless, by the failure to restore, some special damage had been caused. But it was in use in suits *in rem, ad exhibendum, rerum amotarum* and *bonae fidei* (*ib.* fr 3, 5 pr § 4; xxv 2 fr 8 § 1), and in the interdict *quod vi aut clam* (D. xliii 24 fr 15 § 9).

This oath is good only if tendered by the judge. A ward cannot be compelled to swear, nor can guardians or caretakers; but a youth (*adulescens*) and guardians and caretakers are permitted to swear if they are willing to incur the risk. This was settled by the Antonines (*ib.* fr 4). No one could take this oath who had not joined issue in his own name (fr 7).

H. Apart from the merits of the case a reduction of damages was made in favour of a defendant standing in such a relation to the plaintiff as was held to give a claim to consideration. Such a defendant is a partner, a parent, a patron and a patron's children and parents, a husband, and, on other grounds, a soldier who has been in active service. These are to be condemned only *in id quod facere possunt, i.e.* not beyond their actual means of payment, without taking any account of what they may owe to others, the principle in this as in some other matters (see pp. 240, 255) being 'first come first served' (*occupantis melior condicio est* D. xlii 1 fr 16—fr 19 pr; xxiv 3 fr 54). In the case of a husband this limitation was originally granted only on the wife's action for repayment of the dowry, but allowed by Antoninus Pius in other suits by the wife; and the lawyers

[1] Cicero in *Rosc. Com.* i § 11 (which was a strict suit) alludes to *in litem jurare* as if applicable, and as if at that point of the trial it could take place: *Essene quemquam tanta audacia praeditum qui, quod nomen referre in tabulas timeat, id petere audeat, quod in codicem injuratus referre nolit, id jurare in litem non dubitet?* This however is probably only rhetorical.

were inclined to apply it by analogy to suits by the husband against the wife (xlii 1 fr 20). The limitation was further extended, so as to require the means of actual subsistence to be left to such a defendant (*ne egeat* D. L 17 fr 173). The limitation could not be claimed by the heirs or sureties of such a person (D. xlii 1 fr 24, 25). The time for estimating the means of defendant is the time of judgment (D. xxiv 3 fr 15 pr).

A like limitation is granted to the husband's father if he be sued on a promise of dowry, while the marriage still subsists (fr 21, 22 pr), and to anyone accepting the defence of any of the above-named persons whose means are insufficient (fr 23; xvii 2 fr 63 § 1).

A like limitation is allowed to a son emancipated or disinherited, *etc.* (see p. 244), if sued on his contracts made while he was in his father's power (D. xiv 5 fr 2; xxvi 7 fr 37 § 2; xlii 1 fr 49); and (by a rescript of Ant. Pius) to a donor sued upon his promise: in which last case other debts (not being voluntary gifts) were deducted to ascertain *quod facere potest* (D. xxxix 5 fr 12; xlii 1 fr 19 § 2). An intended donor, if delegated by the donee to a creditor, is liable to him in full (D. xlii 1 fr 41 pr).

A partner (and perhaps others) could be sued for the residue of his debt, if he subsequently acquired means, and this was secured by his own guaranty (D. xvii 2 fr 63).

If the limit has by inadvertence not been regarded in the original action, the omission can be remedied by a plea of fraud in the action on the judgment (D. xxiv 3 fr 17 § 2; xlii 1 fr 41 § 2).

J. When the cause had been fully heard it was the judge's duty *ire in consilium, i.e.* to consider his judgment with his assessors and pronounce sentence accordingly (*de consilii sententia*). And something of the kind would take place before any important pronouncement on preparatory points. He was not however bound by their opinion: he might adopt it or not as his own honest opinion inclined, and in case of complete perplexity he could declare on his oath 'the matter is not clear to me' (*non liquet*) and thereby the trial was put an end to, the

judge was free, and the plaintiff must if he chose begin again (Gell. xiv 2 § 25; cf. D. xlii 1 fr 36)[1]. There was no particular form for the final judgment. It was delivered orally in the presence of all the parties (or their representatives), and apparently not accompanied by a statement of reasons. A decision given in the absence of some of the parties binds only those who were present; and does not make the matter *res judicata*, unless the absent party has been summoned by the judge by three letters or notices (*edicta*) or, if the judge see cause, by one peremptory notice in lieu of all, or by a thrice repeated notice (*denuntiatio*) given by his opponent. If he does not then appear before the judge named in the notices, he may be pronounced contumacious and judgment given against him, which then will not be subject to any appeal or revocation (Paul v 5*a* §§ 5, 6; D. xlii 1 fr 53). A bad fever or other serious disease (*morbus sonticus*) was an adequate excuse, and the proceedings were adjourned (*ib.* fr 60).

A decision once given by the judge could not be altered by him: he was *functus officio* (*ib.* fr 55). If the parties agreed

[1] Aulus Gellius (l.c.) naïvely describes his own experience when first put on the list of *judices* by the praetor. He got books in both languages (Greek and Latin) on the duty of a judge, but found they did not meet his practical difficulties. In one case plaintiff sued for money paid down, but had no evidence either oral or documentary. Defendant demanded an acquittal for himself and the condemnation of his opponent for *calumnia*. Gellius' assessors unhesitatingly recommended acquittal, but Gellius was not satisfied, because plaintiff was a man of honour and proved integrity, and defendant was a rogue and oft-convicted liar. He adjourned the case and consulted a philosophic friend who referred him to a speech of Cato (*pro L. Turio contra Cn. Gellium*) which recommended, when there was no evidence and the parties were equal in point of character, judgment to be given for defendant, but if one was of a better character than the other, judgment to follow superiority in character. Gellius however thought this too bold a course and contented himself with a *non liquet*.

Seneca *Ep.* 65 § 15 imagines his friends impatient of the length of his discussion and saying to him: *Aut fer sententiam aut, quod facilius in ejusmodi rebus est, nega tibi liquere et nos reverti jube.* So in a reproach by Cicero: *Quid dicam nisi id, venisse eum in consilium publicae quaestionis et in eo consilio, cum causam non audisset et potestas esset ampliandi, dixisse sibi liquere; cum de incognita re judicare voluisset, maluisse condemnare quam absolvere* (*Caecin.* 10 § 29).

upon the judgment to be given, it was quite in order that the judge should adopt it (*ib.* fr 26).

When there was a plurality of judges, all ought to be present to give the decision. The majority decides. If an equal number were for different opinions on a question of freedom, the opinion in favour of freedom prevailed by a constitution of Ant. Pius: in other cases, civil as well as criminal, the defendant had the benefit of the doubt. In plaint of an unduteous will, the will would be upheld unless the testator was clearly shewn to have acted with partiality. If the judges differed in the amount to which they condemned defendant, the smallest amount was taken. If two of three judges appeared and one was absent, no decision could be given, but if he was present, neither his opposition to their opinion (if agreed), nor his declaration on oath of his inability to make up his mind (*sibi non liquere*), prevented their decision being good (D. xlii 1 fr 36—39; xl 1 fr 24; v 2 fr 10).

CHAPTER XIV.

APPEALS.

A. 1. Appeals were allowed not only from the final judgment, but sometimes from interlocutory decisions, *e.g.* when in a civil matter the judge required examination of a slave by torture, or when on an application by minors for reinstatement an interlocutory decision was given on their age (D. xlix 5 fr 2; iv 4 fr 39). Notice of the intended appeal had to be given, either in court at the time by simply saying *Appello*, or by application for a dimissory letter to the judge in appeal, such application to be made in writing (*libelli appellatorii*) within a period of two or three days from the judgment, two days, if the appellant was acting in his own case, three days, if as procurator or guardian, *etc.* he was acting in another's case. Any days in which the judge was not accessible did not count. If the appellant was absent, the time ran from his getting

knowledge of the decision (D. xlix 5 fr 2, 5 § 4; tit. 4 fr 1 §§ 11, 12, 15).

Five days were allowed for obtaining the dimissory letters: if, notwithstanding repeated application, he could not get them, he must protest. These letters were to state the fact of the appeal and the names of the appellant, of the parties to the case, and of the judge (D. *ib.* 6 § 2; Paul v 34). The applicant had within five days (or longer if he lived at a distance) to give a bond forfeiting in case of non-success a penalty, which in civil cases was one-third of the damages to which he was condemned. One good surety (or more) was to be given unless the money was deposited or something of equivalent value. The bond ought to fix the amount of the penalty, so that it could be sued for in case of forfeiture. If the possessor appeals, in the case of land he has to deposit the mesne profits, or, in the case of houses or slaves or ships, the rents or wages or passage moneys (Paul v 33, 36; cf. D. ii 8 fr 15).

A time for prosecuting the appeal was also fixed. Any failure to proceed within the times stated, involved defeat by a praescription (*i.e.* plea to that effect), and loss of the penalty of the bond (Paul v 34 § 2).

If the judge from whom the appeal is made refuse to receive the notice of it, appeal may be made on the refusal (D. xlix 5 fr 5).

2. The appeal judge was usually the person who appointed the judge who had given the decision. If he had been appointed by a deputy of the regular magistrate, the appeal lay to the magistrate himself. An appeal, made to a judge inferior in rank to the judge appealed from, is lost: if to a superior judge but not the right one, the appellant will be sent before the proper one. An appeal might (according to a rescript of Ant. Pius) be taken even from a judgment given in pursuance of a rescript of the emperor, if it could be shewn that the facts had been wrongly stated (D. xlix 1 fr 1; tit. 3 fr 1).

3. No one could appeal from a decision in a suit to which he was not a party, unless he was directly interested in the decision, *e.g.* as a coheir or a legatee or one entitled to freedom under the will which was assailed. If a procurator does not

appeal, his principal can; so also if vendor and purchaser acquiesce in an eviction, the guarantor of both can appeal, or a surety on behalf of his principal (D. *ib.* 1 fr 4 § 2—fr 5 § 2).

4. An appeal in civil cases may be conducted by an agent, unless it concerns a man's freedom. The decision could be appealed from as a whole, without specifying any particular part; but if the decision of one case embraced two different matters, *e.g.* principal of a loan and interest, appeal on one only implies acquiescence in the other. At least in Diocletián's time and probably always before, an appeal was a rehearing of the matter, and new facts and witnesses could be adduced (Paul v 35 § 1; D. *ib.* fr 13 pr, fr 17 pr; tit. 5 fr 1; Cod. vii 62 § 6).

5. Success in appeal benefited those concerned in the same case even if they had not appealed. Defeat made the appellant liable for fourfold the other party's cost in the appeal (D. xlix 1 fr 10 § 4; Paul v 37).

During an appeal, whether allowed or refused by the judge, all proceedings on the judgment are suspended (D. xlix 5 fr 6, 7).

B. 1. For some obvious matters an appeal was not necessary: mistakes could be corrected in the proceedings on the judgment (*actio judicati*). A sentence given when the defendant was dead, either at the time of the appointment of the judge or at the time of sentence, was invalid (D. xlix 8 fr 3). So also when defendant had been professedly summoned by peremptory edict, which in fact had neither been proposed nor come to his knowledge (*ib.* fr 1 § 3); or when the judge had declared that there were no such rights as were plainly given by imperial constitutions (*ib.* § 2); or had directed something to be done which was physically impossible (*ib.* fr 3); or had made a mere mistake in arithmetic (*ib.* fr 1 § 1; Paul v 5*a* § 11). On such points probably a replication could be made if a plaintiff was met by a plea of 'matter decided.'

2. Where fraud, intimidation, minority, absence in the public service could be proved, proceedings for reinstatement (*in integrum restitutio*) would supply effectively the place of an appeal (see pp. 226, 228, 259, 262).

C. Another proceeding is coupled with appeal in some passages of Paul under the name of *in duplum revocare*. All

that we are told is that it was not applicable by a defendant to his own confession; nor (any more than an appeal) to a sentence passed against him as contumacious, nor in reference to a matter which had been decided, 'as long ago as ten years if the 'parties were present[1], twenty years if absent, and had not been 'stirred since' (Paul v 5 *a* §§ 6 *a*—8; cf. Cod. Greg. *ap.* Krüger *Jus antejustin.* iii p. 261)[2].

[1] *I.e.* domiciled in the same town, cf. Cod. vii 33 § 1.

[2] This proceeding is generally identified with one referred to in Cic. *Flac.* 21 § 49. Hermippus, as surety for Heraclides, both citizens of Temnos (in the province of Asia), had to pay a sum borrowed by Heraclides. He sued Heraclides, got judgment, and took defendant in execution, but settled with him by taking some slaves in payment. Heraclides waited for a new governor, and, on Q. Cicero succeeding, applied to him and complained that the Recoverers in Hermippus' suit had been intimidated by the governor at the time (Flaccus) into condemning him. Q. Cicero decreed *ut, si judicatum negaret, in duplum iret; si metu coactos diceret, haberet eosdem recuperatores, i.e.* that if he challenged the judgment as illegal and therefore no judgment, he should 'proceed for the double' (see below), and, if the special ground of his plaint was that the judgment was due to intimidation, the case should come before the same men as Recoverers, who could then give free expression to their convictions. Bethmann-Hollweg supposes that Heraclides would bring a *condictio* to recover the amount of the condemnation under a penalty of twice the amount, if he failed in his suit (*CP.* ii 726: so also Eisele *Abhandl.* p. 163). This mode of proceeding would be applicable only when a judgment had been obeyed, and therefore the opportunity of raising the point of 'no judgment' in the *actio judicati* was past. Eisele considers the proceeding mentioned by Paul to belong not to the formular procedure but to the extraordinary cognition, *ib.* p. 188. The whole matter is obscure and much debated: see references in the above.

All seem to agree in one point, viz. that *in duplum* (*ire* or *revocare*) refers to the risk of defendant, who in this as in other cases of opposing a judgment, was liable to double damages (Gai. iv 171). Probably he was; but it is difficult to see how, as a matter of language, *in duplum ire, etc.* can refer to a penalty on failure instead of the gain on success. The object or direct result or extent of the action of the verb is the invariable meaning of *in duplum, in quadruplum* (*e.g.* with *judicium dabo* Ed. *ap.* D. xvi 3 fr 1 § 1; *agentis* Gai. iv 9; *damnatur* D. iv 6 fr 9; *etc.*), cf. *in creditum ire* of plaintiff (D. xii 1 fr 2 § 1; xvi 1 fr 19 § 5); *actio in ipsum et in solidum et in duplum et in perpetuum datur* (D. xvi 3 fr 18); cf. Just. iv 6 § 21, *etc.* I believe *plaintiff sued for double damages* on the ground that defendant had enforced a judgment which was no judgment.

CHAPTER XV.

EXECUTION.

The execution of a judgment was not a matter for the judge (at least before the time of Antoninus Pius), but for the successful party. The judgment ascertained his right. But plaintiff had to sue on the judgment for execution. This could be done at any time and both by heirs and against heirs (D. xlii 1 fr 6 § 3). The defendant (if there was no appeal taken) would usually conform, but the law put great pressure to induce him to do so. Only fragments of the details are known to us. In early days imprisonment or worse was the fate of an obstinate judgment debtor: towards the end of the Republic (probably), the seizure and distribution of the debtor's property, if it was not made over voluntarily, could be obtained by application to the praetor.

Where a defendant was condemned on several suits, the earlier condemnation gave no priority in suing execution (D. xlii 1 fr 61).

A. Attachment of the person.

1. When the *legis actiones* were in use, one of them was a form of execution. It was authorized by the XII tables. The words given us are *Aeris confessi rebusque jure judicatis*[1] *triginta dies justi sunto. Post deinde manus injectio esto, in jus ducito. Ni judicatum facit aut quis endo eo in jure vindicit, secum ducito, vincito aut nervo aut compedibus: quindecim pondo ne minore aut si volet majore*[2] *vincito. Si volet, suo vivito. Ni suo vivit, qui eum vinctum habebit libras farris endo dies dato* (Sex. Caecilius *ap.* Gell. xx 1 45). 'Thirty days shall be lawful 'for those who have admitted a debt of money or in the case of 'matters lawfully judged. Thereafter shall be a "laying hand

[1] These first words are no doubt corrupt in some way: the difference of case is enough to shew that.

[2] Some reverse *minore* and *majore* (by conjecture). But cf. Liv. xxxii 26 § 18 (*Jussum*) *captivi ne minus decem pondo compedibus vincti essent* (quoted by Hertz *Gell.* xx 1 § 45).

"on"; plaintiff shall take defendant into court. If he does not 'the judgment, and no one in court makes opposing claim in his 'case, plaintiff shall take him off, fasten him either in a block 'or with fetters; he shall fasten him with a weight of 15 pounds, 'not less: if he chooses, with more. If defendant will, he 'shall live on his own[1]. If he does not live on his own, he that 'shall have him fastened shall give him pounds of corn per day[2].' Sex. Caecilius proceeds to say that this state lasted for sixty days, during which debtor had the opportunity of coming to terms with his creditor; and on three consecutive market days debtor was led forth into the comitium to the praetor, and announcement was made of the amount of the judgment debt. On the third market day he paid with his person (*capite poenas dabat*), or was sold into foreign parts beyond the Tiber. If there were more creditors than one, the XII tables said, *tertiis nundinis partis secanto: si plus minusve secuerunt, se fraude esto* (*ib.* § 50). The meaning of these words has been much disputed: Caecilius took them literally of the creditors being entitled to cut up the debtor himself, and having no need to be particular as to the precise correspondence of each man's share of the body with his share of the total debts[3]. So also Quintilian (*Inst.* iii 6 § 84) and Dio Cassius (*Fragm.* 17 § 8), but Quintilian says that such a proceeding was repudiated by custom (cf. Tertull. *Apol.* 4); and the others deny that any instance was known of its ever being done. Similar savagery

[1] Cf. D. xlii 1 fr 34.

[2] On the duty of feeding see S. Ambros. l.c. (p. 431).

[3] Some writers have taken the words in the more humane sense of division of the estate and not the person of the debtor. If so, they may be understood to free the creditors from liability, if they sold and divided more than would cover the debts, or from loss of the remainder of their claim, if the first sale did not realize enough. Münderloh (*ZRG.* xii 202) takes the words to mean that whether the proceeds were more or less than the debts the creditors must be content. H. Nettleship says *secare partes* is not Latin for 'to cut into pieces' and suggests that *secare* is another form of *sequi* and means to claim their shares in the debtor's property (Essays p. 374). Schulin proposes *secunto* with like root and meaning (*RG.* p. 535). I see no objection in point of language to taking *secare partes* as 'to cut (off their) shares' whether in the body or in the property.

is recorded of other nations, and one cannot deny that the early Roman laws may have had it, and that it may have been retained by the *decemviri*, in order to compel the debtor to submit his property and the services of himself and family to the creditor's disposition. It could hardly have been a bit of grim inexorable logic. Be that as it may, we hear nothing of it in our legal authorities, and whatever else may have been done by the *lex Poetelia* (326? or 313? B.C.), we may conclude that it was then abolished if it ever existed. In ordinary language the sale or *sectio* of the person is sometimes spoken of in Cicero's time where the property alone is really meant[1] (see p. 435 n. 2; so in English 'A. B. is sold up').

2. Gaius (iv 21) gives the following account of *manus injectio*. The plaintiff laid hold of some part of defendant's body and said, 'Whereas thou hast been judged or condemned to me 'for 10000 sesterces, seeing thou hast not paid, therefor I lay 'hand on thee for the judgment of 10000 sesterces (*Quod tu 'mihi judicatus sive damnatus*[2] *es sestertium x milia, quandoc 'non solvisti, ob eam rem ego tibi sestertium x milium judicati*[3] *'manum inicio*).' The judgment debtor was not allowed to throw off the plaintiff's hand, and act by statute (*lege agere*) for himself, but would offer (*dabat*) some champion (*vindex*[4]) who,

[1] Something analogous is seen in the language used where the division of (the burden of) stipulations among the heirs of the stipulator or of the promiser is spoken of: *Cum species stipulamur necesse est inter dominos et inter heredes ita dividi stipulationem ut partes corporum cuique debeantur* (MS. *debebuntur*) D. xlv 1 fr 54 pr, *i.e.* each heir of the stipulator will have a right to (the conveyance of) a share in the slave or other chattel.

[2] Krüger and others take *sive dam.* as Gaius' words, not part of the formula.

[3] Sc. *nomine* or *causa*.

[4] *Vindex* appears to be from *vim dicere* 'to assert force, *i.e.* to declare a counter claim': hence *vindicare* of claiming a thing as one's own; *vindiciae* 'claims'; *vindicta* the rod used as a symbol of force (cf. vol. I 26, II 341). Livy uses these terms frequently in his account of Appius' treatment of Verginia: *M. Claudio negotium dedit, ut virginem in servitutem assereret neque cederet secundum libertatem postulantibus vindicias* (iii 44 § 5). *Me vindicantem sponsam in libertatem vita citius deseret quam fides* (45 § 11). *Postero die vindex injuriae praesto erat* (46 § 6), cf. 56 §§ 4–6; 57 §§ 4, 5. In *lex Ossun. init.* we have *vim facere* in close connexion and contrast with *vindex* (p. 426).

as the practice was, acted for him: if he got no champion he was led off home by plaintiff and fastened up. The charter of the colony of Ossuna in Spain (44 B.C.) adds a little to our information: we may presume that it followed the Roman practice. 'If anyone shall be bidden to lay hand on[1], the 'hand-laying shall be as for a judgment, and it shall be 'lawful for him to do it without risk to himself. A champion '(*vindex*) shall be substantial (*locuples*)[2] in the opinion of the 'commissioner or chief law-officer. If he shall get no champion 'and shall not do the judgment, plaintiff shall lead him off. 'He shall keep him bound in accordance with the civil law. 'If anyone shall use force therein (*i.e.* attempt a rescue?)[3] and 'is convicted thereof, he shall be condemned in the double, and 'to colonists of that colony in the sum of 20000 sesterces: any-'one who will may sue for it and the commissioner or chief 'law-officer shall have the exaction and the judging' (cap. 61).

Sex. Caecilius (Gellius' authority) tells us of a fact not mentioned in the above accounts, viz. that in default of payment, the debtors after being summoned before the praetor were by him assigned to the persons to whom they had been judged (*nisi dissolverant ad praetorem vocabantur et ab eo quibus erant judicati addicebantur*, Gell. xx 1 § 44).

In Livy's sixth book we have frequent mention of persons being judged for money debts, assigned, and led off by private creditors into confinement (see Essay on *nexum*, above p. 297).

3. The result of the above may be briefly stated thus. *Manus injectio* in itself is simply 'bodily arrest[4].' It is used

[1] The bronze does not give the circumstances for this *manus injectio*.

[2] Cf. Cic. *Top.* 2 § 10 *Cum lex assiduo vindicem assiduum esse jubet, locupletem jubet locupleti. Assiduus* is 'settled' from *adsidēre* (not *ab asse dando*, as suggested by a writer in Gell. xvi 10 § 16). See Mommsen *Staatsr.* iii p. 237 n. The XII tables are said to have *Assiduo vindex assiduus esto: proletario jam civi cui quis volet vindex esto* (Gell. *ib.* § 5).

[3] *Si quis in eo vim faciet, ast ejus vincitur.* See Exner *ZRG.* xiii pp. 395—397. Girard objects that the penalty for such a robbery (cf. Gai. iii 199) would be not double but quadruple, and refers the words to the interference of the *vindex* (*Textes* p. 84). But the position of the sentence is against this view. See also p. 325 n. 4.

[4] It is used by Livy of Claudius' assertion of his claim to Verginia as

of a master reasserting his right over a slave, sometimes for the slave's benefit, in consequence of a breach of condition of sale (Vat. 6; D. xviii 7 fr 9; xl 1 fr 20 § 2). It was used in the XII tables of plaintiff's seizure of a defendant who declined to obey a summons into court (see above, p. 334). As the act of a creditor in execution of a judgment, it was accompanied by the formal words given by Gaius. The debtor against whom judgment had passed, by this formal act of the creditor lost his power as a free citizen of acting for himself in court[1], and had, in the course of a month, either to pay his debt, or to find someone to act for him and undertake or guaranty his liability. At the expiration of the month he had to appear before the praetor; if no payment had been made and no one appeared for him, the praetor *addixit i.e.* bade the creditor take him off to his own house[2]. Perhaps in Cicero's and later

a slave (iii 44 § 6) and of Manlius' interference with a creditor's leading his debtor into confinement (vi 14 § 3). There is an allusion apparently to the judicial (criminal) *manum inicere* in Plaut. *Pers.* 70 where a parasite proposes *ubi quadruplator quempiam injexit manum, tantidem illa illi rursus iniciat manum, ut aequa parte prodeant ad tres viros.*

[1] Cf. Unger *ZRG.* vii 196 foll., 203: 'It was an old Roman principle 'that the object of a suit could not also be a party. One in slavery could 'not assert his own claim to be a freeman but, until Justinian's law (Cod. 'vii 17), required an *adsertor*; and a suit whether a person was in one's 'power was conducted by the alleged father not the son himself (D. xliii 30 'fr 3 § 3). The suit in the case of the *vindex* of a judgment debtor would be 'immediately over the person of the debtor, indirectly over the existence of 'the judgment debt.'

[2] The regular phrase for committing a debtor to his creditor's prison was *Duci jubere* 'bid him to be taken off,' *e.g.* Cic. *Verr.* ii 2 26 § 63; *Cum judicatum non faceret, addictus Hermippo et ab hoc ductus est* (*Flac.* 20 § 48; also § 45), *Apud Novium quidam, judicatum duci videns percontatus ita: quanti addictus? 'Mille nummum': Nihil addo, ducas licet* (Cic. *Orat.* ii 63 § 255), where the joke lies in the use by the play-writer Novius of *addictus* both of a slave knocked down at a price by an auctioneer, and of the fate of a judgment debtor.

Some refer *addicere* and *duci jubere* to different occasions, cf. Karlowa *CP.* § 19; Wlassak *PG.* i 96. On *addicere* see my Comm. on *de Usufructu* p. 184. *Duci jussu praetoris* is used of a creditor's taking off slaves in default of noxal transfer (D. ix 4 fr 26 § 6; fr 28). It is constant in Livy of persons being ordered to prison on criminal charges (iii 49 § 2; 56 § 4, *etc.*).

times the personal confinement took place only in the case of utterly insolvent debtors, and there was no repetition of the appearance before the praetor and of the proclamation of the debt. A champion surety (*vindex*) who paid the debt had a right to the like stringent process to recover his money from the debtor (*actio depensi*). Anyone who endeavoured to rescue the debtor by force, when led off or imprisoned by his creditor, was condemned not only in twice the amount of the debt but in a fine besides. If however the *vindex* instead of paying the creditor appeared in court and disputed the judgment, he was himself responsible for the issue, and if the decision (whether by the praetor himself or by a judge appointed by him to try the case) was against the *vindex*, he would, I presume, be condemned in damages to twice the amount of the debt. The debtor would be then liable to the *vindex* only[1].

The debtor in his creditor's shackles is, in Livy's account of early Roman history, spoken of as in slavery, and Quintilian (*Inst.* vii 3 § 26) mentions as a question for discussion in the schools of rhetoric *an addictus, quem lex servire donec solverit jubet, servus sit*, but gives decisive arguments for the negative. The truth is, his legal rights were in suspense but not destroyed. No Roman could be slave of another Roman within Roman territory[2]. The judgment debtor retained his full name and tribe as any other free person: he was held under the authority of the law[3], not as a mere chattel at the caprice and disposal of his master: whether the creditor consented or not, he recovered his liberty on full discharge of his debt, and then did not, like an emancipated slave, become a *libertinus*, but remained *ingenuus* (if he had been so before). Whether he was held as a

[1] Unger (*ZRG.* vii 203) holds that the debtor, not the *vindex*, would be liable for the double.

[2] Otherwise in Gaul. *Plerique* (*de plebe*) *cum aut aere alieno aut magnitudine tributorum aut injuria potentiorum premuntur, sese in servitutem dicant nobilibus*, (*quibus*) *in hos eadem omnia sunt jura, quae dominis in servos* (Caes. *B. G.* vi 13 § 2). See Mommsen in *Festgabe für Beseler*, p. 266.

[3] A *judicatus* could be stolen but so could other free persons (Gai. iii 199; D. xlvii 2 fr 38). A free man in bodily confinement was not technically possessed (D. xli 2 fr 23 § 2).

mere pledge or was legally compellable[1] to work for his creditor is not said: he may have been willing to do so, in order to pay off his debt or to keep down interest (if that continued to run), or to obtain better treatment. Practically he would have little choice in the matter. The original purpose of the treatment was no doubt to put pressure on him, so as to induce him to give up his property and the services of his family and self for the discharge of his debts.

4. Execution on the person was allowed by the XII tables in the case of one who admitted a money debt (cf. *confessi debitores pro judicatis habentur* Paul v 50 § 2) as well as in that of a judgment. In the *lex Rubria* (42—35 B.C.) the local magistrates (in Cisalpine Gaul) can allow it (*duci jubeto*), in the case of a loan certain of coined money[2] (see p. 309) not exceeding 15000 sesterces (£120 to £150), provided defendant has admitted the debt, but not paid it or satisfied his creditor; or has given no answer at all on the matter, or has not made due defence, or after lawful trial has been condemned (cap. 21). This was no doubt following the practice at Rome but limiting the jurisdiction to small amounts. In any other case except that of loan certain as above, the praetor at Rome is to grant execution, whether by arrest or by possession and sale of defendant's estate, the occasion for one of these remedies rather than the other being not determined in the law so far as we have it (cap. 22). Nor do we know when the remedy by *manus injectio* was to be applied under the charter of Ossuna; the clause is only half preserved.

5. But it was not only in execution of a judgment that 'laying hand on' was allowed. Statutable authority was required for subjecting a debtor to such a stringent and summary

[1] The words in Quintilian's *lex servire jubet* prove nothing in a rhetorical thesis. To another question *An is, quem dum addicta est mater peperit, servus sit natus* he gives no answer (*Inst.* iii 6 § 25). See Savigny *Verm. Schr.* ii 446 sq.

[2] Demelius (*Confess.* p. 140) supposes that this procedure was applicable to all admissions of debts of money certain, not merely of loans as Savigny (*Verm. Schr.* ii 431, *etc.*) takes it. A large meaning was given to *credita pecunia* in the interpretation of the *lex Cornelia* respecting sureties, and Gaius' words may be taken as more general (Gai. iii 124).

process. Such authority was given (evidently in early times) in certain cases named by Gaius (iv 22—25). The first is the *lex Publilia* which granted it against the debtor who had not repaid his surety (*sponsor*) within six months. Then the *lex Furia* against any creditor who had exacted more than his fair share from one of several co-sureties; besides several others in many cases. The plaintiff, after naming the subject of his suit, accompanied the arrest with the words 'on that account I lay hand on thee as upon one judged (*pro judicato*),' and in consequence the defendant was not allowed to throw off the hand and plead his own case (*pro se agere*). By the *lex Vallia* however this incapacity was removed from all persons subjected to personal arrest, except judgment debtors and those who had not repaid their surety (*depensi*). The attachment of the person however remained: and it was allowed also in many other cases, distinguished from the above by the words *pro judicato* being omitted from the formal words. Thus it was allowed by the *lex Furia testamentaria* against anyone, not within the exceptions of the statute, who had taken by will or *mortis causa* more than 1000 (MS. has 100) asses; and by the *lex Marcia* against moneylenders in order to enforce repayment of interest which they had exacted[1]. Gaius notes that by a mistake the draftsman of the *lex Furia testamentaria* had inserted the words *pro judicato* in the form of words given, though the statute had not directed the treatment as of a judgment debtor. In this latter class of cases the fatal words were not used in making the arrest and the debtor was under no incapacity to maintain his own cause.

6. By Gaius' time arrest in private causes had ceased at least in this form of *manus injectio* along with the other *legis actiones*. But a reminiscence of the old stringency survived in

[1] If the moneylender had exacted (*i.e.* by process), not merely received, interest it would be double of the amount in consequence of the debtor's contesting the judgment. If the moneylender in his turn contested the suit for recovery under the *lex Marcia*, he would have to pay twice this, *i.e.* fourfold the original amount. Karlowa (*CP.* p. 197) points out that this might explain Cato's language (*RR.* 1) *Majores nostri ita in legibus posiverunt furem dupli condemnari, feneratorem quadrupli.*

the requirement that in suits *judicati* or *depensi* defendant should give security for payment of the judgment (*judicatum solvi*) (Gai. iv 22—25).

Attachment of the person still remained[1], as we see from Caecilius' words: *addici nunc et vinciri multos videmus* (Gell. xx 1 § 51); from such expressions as *vel in publica vel in privata vincula ductus* (D. iv 6 fr 23 pr); from the grant of an action against those who prevented food and bedding being brought in to one judged (D. xlii 1 fr 34) and other allusions (*e.g.* Gai. iii 199 *si judicatus subreptus est*; Cod. vii 71 fr 1). It is not likely that they are mere relics of old times: but they may be instances of imprisonment for contempt of court or for special misdemeanours (cf. Paul v 26 § 2).

7. The compatibility of a supposed abolition of imprisonment for debt with its evident continuance long afterwards is well illustrated by English experience. In 1869 the Debtors'

[1] In Greek countries, especially in Egypt before and after the Empire was established, execution on the person was found, but it may have been always, as it certainly was sometimes, illegal. Papyri shew it was sometimes included in the acknowledgment of debt, and an edict (Bruns no. 69) of Tib. Alexander praefect of Egypt (68 A.D.) speaks of persons being thrown into prison nominally for debts due to the fisc, really for private debts. (This may, as Revillout and Mitteis suggest, be due to the fact that a fine to the State was sometimes made part of the penalty for non-payment of a private debt. Or may it be that the fisc-collectors were engaged to collect private debts?)

In the 4th century St Ambrose speaks of it as a fact in vivid language. *Vidi ego pauperem duci, dum cogeretur solvere quod non habebat; trahi ad carcerem, quia vinum deerat ad mensam potentis, deducere in auctionem filios suos ut ad tempus poenam differre posset* (*de Nabuth.* p. 724, ed. Ballerini): and in speaking of arrests of corpses he alludes no doubt to treatment of the living also: *Quotiens vidi teneri defunctos pro pignore et negari tumulum dum faenus exposcitur. Quibus ego acquievi libenter ut suum constringerent debitorem ut electo eo fidejussor evaderet. Hae sunt feneratoribus leges. Dixi itaque: tenete reum vestrum, et, ne possit elabi, domum ducite; claudite in cubiculo vestro....Peccatorum reos post mortem carcer emittit, vos clauditis. Nunc vero capite minutus est, vehementioribus tamen nexibus alligate, ne vincula vestra non sentiat durus et rigidus debitor et qui jam non noverit erubescere. Unum sane est quod non timere possitis, quia poscere non novit alimenta* (*de Tobia* 10). See Mitteis' *Reichsrecht, etc.* p. 445 foll.

Act (32 and 33 Vict. cap. 62) was passed, and the general impression of the public (who had not read the Act) seemed to be that imprisonment for debt (except for fraud) was gone. The Act did abolish in general terms arrest or imprisonment for default of payment of money[1]: but preserved it (with the maximum limit of one year) in certain cases of which the principal were when the money required was a penalty by law, and when it was an amount recoverable summarily by Justices *e.g.* for police offences. And it authorized any court to commit, for six weeks or less, any debtor who has been ordered to pay and has had means to pay since the order. Debtors suspected of fleeing from justice and fraudulent debtors are of course also excepted. "Yet according to the latest returns 8375 persons "were committed to prison in one year and these were not "exceptional figures. Some County Court Judges make orders "for committal freely, and they fill the local prisons with debtors "technically guilty of contempt of court[2]. Others rarely send "anyone to prison. Yet debtors who have incurred debt on "a large scale, apply to the Bankruptcy Court and are not sent "to prison unless guilty of grave fraud." (*Times*, 7 June, 1897, abridged.) I suspect some such description would not be unsuitable if applied to Rome after the Poetelian statute, though execution by seizure and sale of defendant's property had legally and usually superseded personal detention for non-payment in private actions.

B. Attachment of the property.

1. The ordinary mode of executing a judgment in Gaius' time when the debtor was unwilling or unable to pay was by seizure and sale of the whole estate of the debtor. Seizure of the estate (*missio in possessionem*)[3] was ordered by the praetor in several cases in order to secure it for rightful claimants, *e.g.* for legatees or claimants under a trust when the heir did not give proper security (D. xxxvi 4); for a pregnant woman

[1] Compare the humorous account of something analogous in Scotch law in Scott's *Antiquary* ch. xxxix.

[2] *Quod jus dicenti non obtemperaverint* (Paul v 26 § 2).

[3] Equal in modern English law to 'a receiving order.'

whose child would have a prior claim to a vacant inheritance (D. xxxvii 9); for a ward who is without proper guardians to defend him against a suit (D. xlii 4 fr 3—5); for one *bona fide* absent on state service or captured by the enemy (*ib.* fr 6 §§ 1, 2); and in cases of *damni infecti* (D. xxxix 2 fr 7 pr), *etc.*

This seizure and possession does not lead to usucapion[1]; and has nothing to do with the *bonorum possessio* granted to a praetorian heir. It has for its object the protection of the estate and is of a temporary and provisional character, giving way eventually either to a definitive transference to the rightful claimant or to sale for the satisfaction of creditors (D. xlii 4 fr 12). The praetor protected those sent into possession by an interdict against disturbers (D. xliii 4).

Possession, with sale in immediate prospect (*possideri vendique*), was the Roman term for proceedings in bankruptcy against debtors deceased, or avoiding creditors, or failing to satisfy a judgment. The last is the case particularly in view now. A reasonable time, fixed partly by the XII tables, partly by the praetor's edict, was allowed to enable the debtor to find the money. If this time elapsed without payment or the creditor's being otherwise satisfied, application was made to the praetor, and he directed the petitioning creditor to take possession of the estate of the debtor. The order was apparently almost a matter of course, not one granted only after inquiry by the praetor (cf. Keller *Semestr.* p. 79 sqq.).

2. As a rule, only those debts which are absolute and actually due justify such an application by a creditor. A debt due from a *peculium* is good for this purpose, until it is ascertained that there is nothing in the *peculium.* A conditional creditor may in some cases be sent into possession *rei servandae causa*, but for bankruptcy proceedings a creditor must be one

[1] As it was not a question of exclusive possession to secure usucapion there was no necessity to turn out the owner. Cicero gives the words of the edict in his time: *Qui ex edicto meo in possessionem venerint, eos ita videtur in possessione esse oportere; quod ibidem recte custodire poterunt id ibidem custodiant; quod non poterunt, id auferre atque abducere licebit. Dominum invitum detrudere non placet* (*Quint.* 27 § 84. Cf. D. xxxix 2 fr 15 §§ 20, 23).

entitled to press for a sale (D. xlii 4 fr 6 pr; fr 14 § 2; xv 1 fr 50 pr; cf. xlii 4 fr 7 § 14)[1]. The creditor sent into possession was not regarded as an officer of the court: he was acting on his own and other creditors' behalf as a volunteer and could leave possession when he chose. But while there he was competent and was bound to manage properly, to let or sell the fruits, to let out the services of slaves or beasts, to feed the household, repair the buildings, and, if that be the best course, to defend the slaves against noxal suits. He was not responsible for mere fault (as is a creditor in possession of a pledge) but for fraud in a wide sense, and is liable to an action *in factum*. On the other hand he could recover his expenses. The persons entitled to sue him or be sued by him are the creditors or their caretaker, or, if the matter does not proceed to a sale, the debtor himself (D. xlii 5 fr 8 §§ 1—4; fr 9).

From the time of Labeo at least, other creditors were entitled to join in the possession, and to continue even if the petitioning creditor has got payment and retired. If several creditors in possession did not agree who should manage and make an inventory, *etc.* the praetor decided. For the conduct of a suit a *curator* ought to be appointed with the consent of the majority of the creditors, either from among themselves or not. When an estate was large and scattered, several caretakers would be appointed, and any persons deputed by them to conduct suits gave or took security in the name, not of the estate-owner, but of the appointing caretaker. Any actions to be brought against them might be brought *in solidum* against any one of them at the creditor's option. Such caretakers would also conduct the sale (D. xlii 5 fr 8 § 4; 14, 15 pr; tit. 7 fr 2, 3).

After possession had lasted for thirty days, further proceedings could be taken with a view to a sale[2]. The thirty days gave

[1] See Dernburg *Emt. bonor.* p. 97 sq.

[2] This was a matter which formed part of a provincial governor's edict: cf. Cic. *Att.* vi 1 § 15 *Edicendum putavi...de hereditatum possessionibus, de bonis possidendis vendendis, magistris faciendis, quae ex edicto et postulari et fieri solent.* The procedure is referred to impressively by Cicero *Quint.* 15 § 50 *Cujus bona ex edicto possidentur, hujus omnis fama et existimatio cum bonis simul possidetur; de quo libelli in celeberrimis locis proponuntur,*

an opportunity for the debtor or his friends or representatives to settle the affair or to apply to the praetor with suitable objections, and the creditors would then be better able to estimate the financial position of the estate. The creditors then met, and one of their number was elected to arrange the sale and settle its conditions. He was called *magister*. Sometimes it was a *curator* appointed by the praetor. The sale, apparently by auction, followed in ten days. Where it was a deceased's estate that was sold, the times were half those named (*i.e.* 15 and 5 days)[1], there not being in that case the same cause for indulgent consideration as there was when the debtor was alive; for the sale was followed by infamy. A necessary heir (*i.e.* a slave) was not liable to have any property of his own sold, which he had acquired independently of the inheritance after the testator's death (Gai. iii 79; ii 154, 155; *lex Agrar. i.e.* Bruns no. 11 § 56).

3. The estate (*bona*) was sold[2] as a whole (*per universitatem*). It is not definitely stated whether the biddings were for the assets only and the purchase money then distributed

huic ne perire quidem tacite obscureque conceditur; cui magistri fiunt et domini constituuntur ('for whom masters are appointed and put as owners of his property') *qui qua lege et qua conditione pereat pronuntient, de quo homine praeconis vox praedicat et pretium conficit, huic acerbissimum vivo videntique funus ducitur.*

The *magister* is also referred to in Cic. *Att.* i 1 § 3.

[1] All these figures are doubtful owing to the state of Gaius' MS.

[2] The *bonorum emptio* of private bankrupts must be distinguished from the purchase of goods or estates confiscated by the State, whether taken in war or from citizens condemned for crime. This was usually sold as a whole by the quaestors. The purchaser was called *sector* (*sectores vocantur qui publice bona mercantur* Gai. iv 146) apparently because he sold it in detail ('cut it up'). *Sector* is frequent in Cic. *Rosc. Com.* (§§ 80, 88, 94, *etc.* cf. § 21). The term *sectio* was often applied to the mass of property itself, *e.g.* Cic. *Inv.* 45 § 85 *Ex hostibus equus est captus, cujus praedae sectio non veniit; Phil.* ii 26 § 64 *Hasta posita pro aede Jovis Statoris, bona Cn. Pompei voci acerbissimae subjecta praeconis. Exspectantibus omnibus quisnam ad illud scelus sectionis auderet accedere, inventus est nemo praeter Antonium qui Pompei sector...esse auderet;* Caes. *B. G.* ii 33 *Sectionem ejus oppidi universam Caesar vendidit.* The purchaser became owner *ex jure Quiritium* (Varr. *RR.* ii 10 § 4). Prisoners taken in war were generally sold separately by the quaestors.

rateably to the creditors, the surplus, if any, being given to the debtor, or were directed primarily to the liabilities, and the person who offered to pay the largest percentage of the debts was declared purchaser. The latter course is generally assumed to have been taken, and where the estate was known or supposed to be insolvent, was no doubt the most convenient[1]. If the creditors were not paid in full, after-acquired property was liable to be taken and sold for the benefit of the creditors (Gai. ii 155; D. xlii 3 fr 7)[2]. Otherwise the debtor was not liable[3] after the sale to any suit, or able to bring any suit, on matters preceding the sale (*ex ante gesto* D. xlii 7 fr 4; 8 fr 25 § 7). Among bidders preference is given to the largest creditor, then to other creditors, and then to relatives (D. xlii 5 fr 16).

The purchaser (*bonorum emptor*) acquired the equitable ownership of the things constituting the estate, without further conveyance, but needed usucapion to perfect his legal title. The praetor protected his position by granting him an interdict (sometimes called *possessorium* Gai. iv 145) against disturbers, and actions (*utiles*), framed on the analogy of the successor to a deceased's estate (*bonorum possessor*), to enable him to collect debts due to the estate. He could be sued by creditors in a like way (Gai. iii 80, 81; iv 35). If a debtor to the estate was also creditor, the *bonorum emptor* had in suing to deduct accordingly (see chap. viii C 2). As regards goods pledged, he stood in the shoes of the debtor and could claim only for the surplus (cf. Cod. vii 72 fr 6)[4].

4. In payment of debts, some were privileged and entitled to payment in full before ordinary debts were regarded. Of these the first in rank were the fisc (including anything due

[1] It is implied in Milo's goods being sold *semuncia* (Ascon. *in Milon.* p. 159 Hot. = 48 Kiessling). Cf. *pro portione venire* in Gai. ii 155.

[2] In the case of *publicatio bonorum* the fisc did not take after-acquired property, unless the owner was deported (D. xvii 1 fr 22 § 5; Cod. ix 49 fr 2).

[3] But see Lenel *EP.* p. 347.

[4] The interposition of an *emptor bonorum* between debtor and creditors was given up along with the formulary procedure (Just. iii 12).

to Caesar and Augusta), and funeral expenses of the debtor himself (if deceased) or of anyone for whose funeral he was liable (Paul i 21 § 15; v 12 § 10; D. xlix 14 fr 6; xlii 5 fr 17 pr). Next came a woman's claim for her dowry by the *rei uxoriae judicium*, and some other cases where there was no legal marriage and consequently no right to that action (Cod. viii 17 fr 12 §§ 1, 5; D. xxiv 3 fr 22 § 13; xlii 5 fr 17 § 1); debts due to a ward by one who, not being a guardian, acted as his guardian or did business for him; debts due by their caretakers to spendthrifts, deaf, mutes, or idiots; debts due on loans for the repair of buildings (this was by a constitution of Marcus Aurelius); or for building or buying or fitting ships (D. xlii 5 fr 19 § 1—fr 23, 24 § 1; 34). Among these there is no preference, date of debt not being regarded. The privilege of the fisc is only for its own proper debts, not for debts of an estate which has fallen to it; and claims for penalties come after creditors (D. xlix 14 fr 6 pr; fr 17). Anyone who has supplied money to pay a privileged debtor stands in his place (D. xlii 5 fr 24 § 3; tit. 3 fr 2). Those who have deposited money with a banker at interest rank with other creditors, but if it was a mere deposit and the actual money is found, the depositor can claim it before all privileges (D. xvi 3 fr 7 § 2; xlii 5 fr 24 § 2).

5. If a debtor dies and his heir is, or is thought to be, insolvent, the creditors of the debtor can obtain separation of the two estates so that those who trusted the deceased may not be swamped by the creditors of one whom they never trusted. The separation is not granted at the request of the heir's creditors, who cannot prevent their debtor from incurring fresh debts by acceptance of another's inheritance any more than in any other way. Such a separation is not granted more than five years after the acceptance of the inheritance, nor if the estates have been inextricably confused (which can hardly take place with landed property), nor if the debtor has sold the inheritance, nor if the applying creditors have accepted the heir as their debtor (*heredis personam secuti*) by novating their debts with him or taking interest or pledges or sureties from him. Nor can they, after obtaining separation and finding the

result unsatisfactory, go back upon it, and claim for the residue of their debts upon the heir's estate. On the other hand, if the debtor's estate prove more than sufficient for its own creditors, the heir's creditors can, if not fully satisfied, come upon what is left (D. xlii 6 fr 1 §§ 1, 2, 10, 12, 15, 17; fr 5, 22). Legatees could however claim before the heir's creditors (fr 6 pr).

So if a debtor become heir to his surety, the surety's creditor (or creditors) can obtain separation of the two estates, notwithstanding that in strict law the surety's obligation is extinguished by merger. If the surety's estate is not sufficient to satisfy the creditor, he can still claim with the other creditors of the principal debtor's own estate, which was primarily responsible (*ib.* fr 3 pr, § 1).

6. The persons liable to a sale of their estates at the instance of their creditors were (see Gai. iii 78):

(*a*) Judgment-debtors. With these may be classed those who admitted (without discharging) the debt; and those who had taken no steps to meet the suit (D. xlii 2 fr 1; and *lex Rubr.* 21).

(*b*) Persons hiding from their creditors[1] without anyone to defend them in their absence. The hiding must be intentional in order to avoid their creditors; not merely momentary or occasional but persistent; the debtor may be abroad or in Rome, but dodging behind a column is enough to make latitation; it need not be against all creditors, but, in order to justify the application, it must be latitation against the applicant (D. xlii 4 fr 7 §§ 1—8, § 13 *ad fin.*; tit. 5 fr 36).

(*c*) Madmen and spendthrifts, who are not in the eye of the law properly hiding, may yet, if their debts be urgent, have their estates sold, the surplus being reserved for them (*ib.* §§ 10—12).

(*d*) Persons in exile, if not defended against their creditors (D. xlii 4 fr 13; Cic. *Quinct.* 19 § 60, see pp. 465, 470).

(*e*) Persons who under the *lex Julia* have voluntarily surrendered their estates to their creditors[2]. This might be

[1] Cf. Cic. *Verr.* ii 24 § 59 *Insimulant hominem fraudandi causa discessisse; postulant ut bona possidere jubeat* (*Verres*). On this matter see Cic. *pro Quinctio* and below, pp. 472, 480.

[2] Compare in English law, 'file petition in bankruptcy.'

done in court, or informally by letter or message, and must be preceded or accompanied by distinct acknowledgment of debt or by confession in court or by condemnation. The debtor does not lose the ownership of his goods until the sale, and can up till then recall his surrender and defend himself against actions. If his assets are not sufficient to pay his debts in full, his after-acquired property, if considerable, will be held liable, but only with the limit of *in quod facere potest* (D. xlii 2 fr 3—9). A debtor so surrendering his estate did not become infamous by its sale; and he was not liable to personal imprisonment (Cod. ii 11 fr 11; vii 71 fr 1).

(*f*) Deceased persons, when it is certain that there is no heir or possessor of the estate or other lawful successor who will defend deceased against creditors (Gai. iii 78; Cic. *Quinct.* 19 § 60; cf. D. xlii 5 fr 4 *sub fine*).

7. If possession and sale are obtained by fraud or by one who is not a creditor, they are null (D. xlii 4 fr 7 § 3; tit. 5 fr 12). A rescript of M. Aurelius directed complainants of non-legal sale to have the question tried by a *praejudicium* and not appeal to the emperor (*ib.* 5 fr 30; cf. Cic. *Quinct.* 8 § 30).

The seizure and sale of a debtor's estate rested on the *imperium*, *i.e.* executive authority of the praetor or provincial governor; and was beyond the power of municipal magistrates (*lex Rubr.* 21, 22; D. ii 1 fr 4; L 1 fr 26). It is said to have been introduced by a praetor, P. Rutilius (Gai. iv 35), who is generally supposed to have been the consul of 105 B.C. But some such arrangement may have existed before. A *bonorum emptor* is mentioned in the *lex Agrar.* 56 (B.C. 111).

8. In the case of an inheritance an heir, before entering, sometimes bargained with the creditors to accept a percentage of their debts as a due discharge. Such a bargain was good according to a rescript of M. Aurelius, only if made after a meeting of the creditors and a resolution passed by the majority. A majority for this purpose meant a majority not in number but in amount of debt; if that were equal, then a majority in number was required: and again if that was equal, then the praetor accepted the opinion of the more distinguished. If several persons were joint creditors for the same debt,

they were reckoned as one. Absent creditors, at least since M. Aurelius' rescript, if privileged, or possessing special claims by mortgage or mandate, were not bound by the decision. Such a bargain may be made by a *suus heres* or a necessary heir though a slave, if it be made before any actual meddling with the inheritance (D. ii 14 fr 7 § 17—fr 10 pr; xvii 1 fr 58 § 1; xl 4 fr 54 § 1).

C. 1. The system of possessing and selling a debtor's whole estate, however suitable when he was really insolvent, was a cumbrous mode of enforcing a judgment against a solvent but obstinate defendant. Antoninus Pius took apparently a new step in directing the magistrates of the Roman people to execute the sentences of the judges or arbitrators appointed by them. In the provinces the Governors were empowered by a rescript of Caracalla to execute the judgments given in Rome as well as those of provincial judges. The magistrate was to direct *pignora capi et distrahi*, in fact to levy a distress of so much of the debtor's property as might be sufficient to meet the judgment, or admitted debt. By preference moveables and animals were to be first taken: in default of these, land; then rights and lastly investments (*nomina*) if admitted to be due to debtor. Moneys in the hands of bankers or others, in the name of the debtor, or intended for him, was also taken. Two months was allowed to elapse before sale, which was conducted under the magistrate's authority, not left to the creditor.

If no purchaser were found, the pledges thus taken might be made over (*addici*) to the creditor in full satisfaction of the debt. If any of the things were in pledge previously, the surplus value only could be applied. If sales yielded more than was required to meet the judgment, the surplus was to be handed over to the debtor. If the ownership of something taken was disputed, the magistrate was to decide the question: if he was not satisfied, the seizure was to be dropt without prejudice to the question of title (D. xlii 1 fr 15, 31; Cod. viii 22; Paul v 5*a* § 4). This mode of execution seems to be an adaptation of the old magisterial *pignoris capio* (see p. 115). Any creditor on a written instrument (*chirographarius*), without

any mortgage, forcibly seizing property of defendant was liable criminally under the *lex Julia* (Paul v 26 § 4).

2. Specific performance, *e.g.* by restoration of land or thing, was not, so far as we know, enforced in Antonine times, but the defendant had often the option (see p. 411). Such directions for transfer of possession *manu militari, i.e.* 'by actual force,' as are found *e.g.* in D. vi 1 fr 68 are probably due to Justinian[1]. Where the defendant in a suit for land or an inheritance did not appear, and had no defender, Celsus recommends the course of simply directing plaintiff to take possession of the object of suit rather than seizing the whole estate: this was directed by Ant. Pius in case of an inheritance, but the practice was not general (D. xlii 4 fr 7 §§ 16—19).

CHAPTER XVI.

INTERDICTS AND THEIR PROCEDURE.

A. Interdicts formed a special kind of legal process used principally in questions relating to possession or quasi-possession[2], *i.e.* they were used to protect persons in the enjoyment of what was or appeared to be their property or of rights over others' property. They were also applied to prevent invasion by private persons of the enjoyment of property or rights belonging to the public. In form they were directions or prohibitions from the praetor, being called *decreta* when they directed something to be done, *interdicta* when they forbad it, the latter term however being also commonly used of the whole class. A main division of them was into prohibitory, exhibitory and restitutory.

1. Prohibitory interdicts were such as protected consecrated ground: *e.g. in loco sacro facere inve eum immittere quid veto* 'I forbid doing or putting anything in a consecrated

[1] See Gradenwitz *Interp.* p. 14.

[2] *Quasi possessio* is the exercise of rights such as usufruct, predial servitudes, *etc.*; cf. D. iv 6 fr 23 § 2; viii 5 fr 10.

place' (cf. vol. I p. 412): or the interdicts which frequently prepared matters for an *actio in rem* (cf. vol. I p. 460): *Uti nunc possidetis eas aedes quibus de agitur nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis vim fieri veto* (D. xliii 17 fr 1 pr) 'I forbid force to be used to prevent your 'possessing that house, as you now possess it, neither by force 'nor stealth nor request, the one from the other.' Or the like interdict for moveables, *Utrubi hic homo quo de agitur majore parte hujusce anno fuit, nec vi nec clam nec precario ab altero possessus fuit, quominus is eum ducat, vim fieri veto* (D. xliii 31: cf. Lenel *EP.* p. 392) 'I forbid force to be used to prevent that 'one of you with whom the slave in question has been for the 'greater part of the year, *etc.* from leading him off.'

2. Exhibitory interdicts were such as ordered the production of a person under our power who is detained by another, *Qui quaeve in potestate L. Titii est si is eave apud te est, dolove malo tuo factum est quo minus apud te esset, ita eum eamve exhibeas* (D. xliii 30). 'You are to produce him or her who is under 'L. Titius' power, if he or she is with you or by your fraud has 'been made not to be so.' See vol. I p. 63.

3. Restitutory interdicts are such as order the restitution of what has been wrongfully withdrawn from one's possession, as that commonly called *de vi*: viz. *Unde in hoc anno tu illum vi dejecisti aut familia tua dejecit, cum ille possideret quod nec vi nec clam nec precario a te possideret, eo illum restituas* (so Lenel *EP.* p. 373: cf. D. xliii 16 fr 1 pr and below, p. 521). 'You 'are to restore so and so to the place whence you or your house-'hold have forcibly turned him off, though he was in possession 'without having gained it from you by force or stealth or 'request.' (Gai. iv 139, 140.) See vol. I p. 462.

4. All exhibitory and restitutory interdicts are simple, *i.e.* one party is plaintiff, the other is defendant: plaintiff is he who applies for protection or restitution, defendant is he who is called upon to produce or restore.

Prohibitory interdicts are often simple like these, but sometimes are double, *i.e.* both litigants are in the same position, equally plaintiffs and defendants, the interdict being addressed to both as in the case quoted above of *uti possidetis*. The

procedure in prohibitory interdicts is always by a wager (Gai. iv 141, 156—160; Ulp. *Inst.* in *Jus Antejust.* ii p. 159).

B. The issue of the interdict was only the first step in the procedure. Gaius tells us nothing of the procedure on application, whether or not the defendant was summoned and the application made in his presence or at least when he had had an opportunity of being present. If relevant facts were stated to the praetor and there was nothing unusual in the application, the interdict was issued, probably as a matter of course, at the risk of the applicant. There was no proper *causae cognitio* at this stage of the proceedings.

Suppose an interdict granted to order restitution of an evicted person, or production of a freedman from whom the patron desired to require promised services (*operas indicere*). The operative words are *restituas* or *exhibeas*, a definite order to the defendant to do a certain thing. If the defendant intimated his willingness to do it, the litigation would at once come to an end, or at any rate be suspended till further difficulties arose. But if he shewed fight, he had his choice of two courses[1], either to have the matter referred to arbitration or to enter into a wager on the justice of his case. The choice must however be exercised before he leaves the praetor's court. If he chooses arbitration, he accepts what is called the arbitration formula (*f. arbitraria*), and if the judge on hearing the case in his discretion orders him to restore or produce, defendant does what is bid, and is acquitted without incurring any penalty. Nor, if the judge find no restoration or production due, is plaintiff exposed to any penalty, unless he is met with a trial of good faith (*calumniae judicium*), which involves a penalty of one-tenth the value. Proculus maintained that a defendant, who requested an arbiter, had no right to call upon plaintiff to undergo a trial of good faith, because he had by such a request admitted some obligation to restore or produce (as the case might be). But the practice was the other way, and, as Gaius says, rightly, the request for an arbiter not being an admission

[1] Cf. Cic. *Tull.* 23 § 53 *Tecto illo disturbato si hodie postulem quod vi aut clam factum sit* ('if I should ask the praetor for the interdict *quod vi aut clam*') *tu aut per arbitrum restituas aut sponsione condemneris necesse est.*

of the plaintiff's case, but merely a modest way of meeting the suit (Gai. iv 161—164).

If defendant, on the interdict being granted, leaves the court without making the request for an arbitration, plaintiff challenges him to a wager (*sponsio*) that he has, contrary to the praetor's edict, failed to restore or to produce. Defendant counter-stipulates, *i.e.* demands that plaintiff should pay him a like amount, if plaintiff turns out to be wrong. Plaintiff serves defendant with the formula of the wager, and defendant replies with the formula embodying the counter-stipulation. Plaintiff demands a trial of the wager as to the fact of violation or not of the praetor's edict, and a further trial, if the wager is decided in his favour and defendant does not obey, to ascertain the damages. Gaius' MS. here becomes illegible. No doubt a judge would be appointed to try the issues raised by the wagers and according to his judgment of the facts to condemn the one party and acquit the other, the amount stated in the wager being payable by the defeated party in addition (if the defendant be found wrong) to the damages in default of restoration (or production).

C. The state of the MS. prevents our knowing the initial steps in the case of a double interdict, like the *uti possidetis*. Here the operative words do not enjoin any positive act; they are, as in all prohibitory interdicts, simply negative: *Vim fieri veto quominus etc.*, an injunction not forcibly to encroach upon a person's liberty or rights. If the use of a road or a stream is in question, probably no further steps might be taken until some fresh act of encroachment or hindrance were done. But if defendant meant to challenge plaintiff's right, there seems no reason for postponing the trial. If the interdict is resorted to, as *uti possidetis* often was, merely to determine the relative position of the parties preparatory to a suit respecting the ownership, the applicant at least, if not both parties, would desire to proceed to trial at once. If the parties agree in this desire, it may be (as some think) that to give a clear foundation for the subsequent proceedings a formal encroachment was actually made by both parties (as the interdict was double) or was agreed to be taken to be made. The act of force or

presumed force would be justified if on trial the doer were found to have been the rightful possessor, and would be the technical ground for loss of his wager in the case of the one not found to be rightful possessor. What steps were adopted, if one of the parties wished to avoid or delay trial, will be better considered after the general procedure has been stated.

The first step is to settle which of the two shall be possessor during the trial of the interdict. This is done by the parties bidding against each other for the interim profits (*fructus licitando*): the highest bidder is placed (*constituitur*) in possession, but has to covenant by a stipulation, that if the decision is against him he will pay the amount of his bidding to his adversary as a fine for his attempt to occupy another's property. Each party now challenges the other to a wager, maintaining that force had been used to him contrary to the praetor's edict: each counter-stipulates (*restipulatur*) against the other. There are thus two wagers, each with its counter-stipulation; possibly they were sometimes consolidated. The matter then comes before a judge, who, in order to determine which has won his wager, tries this issue, viz. which of the two parties, during the time at which the interdict was given, possessed the land or house in question without having obtained it from his opponent by force or stealth or request. Suppose the judge after examination to decide this issue in my favour: he condemns my opponent to pay me the amounts of my wager and counter-stipulation, and acquits me from any obligation to him on his wager and counter-stipulation. Further, suppose my opponent to have won in the bidding and consequently to be holding the interim possession: he is now proved to be there without good title, and consequently has to pay me in addition the amount of his bidding for the profits, to give up to me possession of the land or house, and further to pay all the profits he has meanwhile taken, *i.e.* since the issue of the interdict (D. xliii 1 fr 4; cf. tit. 16 fr 1 § 40). On the other hand if I am unsuccessful in proving that the possession rightfully belongs to me, as I was also unsuccessful in the contest for interim possession, I have only to pay the amounts of the wager and counter-stipulation (Gai. iv 166—168).

The sums payable by the defeated party are recoverable by the judge's decision on the wagers or stipulations. But the possession and mesne profits, if not surrendered, are recovered by what was called a Cascellian or consequent trial (*secutorio judicio*). And a similar trial, but called *fructuarium*, could be resorted to for recovering the amount of the possessor's bidding, if the party defeated in the contest for interim possession prefers that course to making a stipulation for it. The plaintiff is entitled to security for the payment of the judgment (*judicatum solvi* Gai. iv 169).

All this presumes the two parties, after the interdict is granted, to be willing to further the procedure in order to get a decision of their dispute. But it may happen that one of the parties shews himself reluctant to do so and declines to take the requisite steps consequent on the interdict (*cetera ex interdicto facere*). He may decline to use force (see below), he may decline to bid for the profits, or when successful to give security for the amount of his bidding, or he may decline to make wagers or to accept trial of the wagers when made. In any of these cases the praetor provides a remedy by issuing a secondary interdict requiring the person who thus blocks the course to a decision, if possessor, to restore possession to his opponent; if not possessor, to refrain from forcibly disturbing his opponent's possession. Whatever be the real merits of his case, he is treated as one who practically concedes the ground to his opponent[1] (Gai. iv 170). The suit is therefore closed and judgment at once pronounced.

D. The account given in the last paragraph follows closely Gaius' text as given by Studemund, but the mutilation of the MS. leaves many things either uncertain or without answers to natural questions. Whether the *moribus deductio* spoken of by Cicero is connected with this interdict, whether *vim faciat* in § 170 is identical with *vis ex conventu* in Cicero, whether *vis* has the same force in *vim faciat* as it has in *vim fieri veto*, whether real or conventional force is intended, are questions much discussed. See Keller *ZGR.* xi 325 foll.; Karlowa *RG.* ii 325;

[1] Cf. *lex Rubr.* 21, 22 *si se sponsione judicioque uti oportebit non defendet, etc.*

Kappeyne van de Coppello *Abhandl.* p. 115 foll.; A. Exner *ZRG.* viii 167 foll.; and the latest (and very voluminous) writer Ubbelohde (in Glück's *Pand.* Pt. i § 1836 Nos. 39—45; Pt. ii § 1850 p. 387), who give other references. With Cicero I deal elsewhere (p. 515). I assume that *vim fieri* and *vim facere* have like meaning: nor do I see that much depends on the distinction between real and conventional force, except that the latter might take place in court and the former probably requires action on the spot: otherwise conventional force is merely force regulated by agreement or by court rules, but so that the legal consequences of real force shall follow[1]. It is to be taken as real force. It is action against the other's will. Nor indeed need force be active in order to be real. But I am inclined to think that much of the discussion and difficulty is due to a slight corruption of the text of Gaius (iv 170), a text which Studemund[2] does not give as certain but only as fairly probable. Gaius says, speaking of the secondary interdicts, *vis et potestas haec est ut qui cetera ex interdicto non faciat veluti qui vim non faciat aut fructus non liceatur aut qui fructus licitationis satis non det aut si sponsiones non faciat sponsionumve judicia non accipiat, sive possideat, restituat adversario possessionem, sive non possideat, vim illi possidenti ne faciat.* I believe we should read *qui vim faciat* for *qui vim non faciat.* First, nothing could be more likely than the insertion of *non* by a copyist in order to assimilate this clause to the four following clauses, each of which has *non,* and thus apparently make it conform to *cetera ex int. non faciat.* But, secondly, the interdict runs *vim fieri veto,* and it is not the non-use but the use of force which is not in pursuance of the interdict. Thirdly, it seems to me most improbable that the praetor should follow up an interdict forbidding force by an injunction to use force, and that the non-use of force should be the ground of the further injunction to one of the parties not to use force (*vim illi pos. ne faciat*). Fourthly, if such had been the course of the procedure, Gaius would not have mentioned so strange a requirement in this simple manner without explanation (of which I

[1] Karlowa *RG.* ii 326 seems to ignore this.

[2] See the Apograph.

see no sign in the fragments at the end of § 170). Fifthly, I see no necessity for acts of force, agreed or not, in order to found the subsequent proceedings. Some forcible act or contentious declaration must have already founded the proceedings, and the issue of the interdict only declares the law, as shewn in the edict, and initiates the procedure for the determination of the right. Either party can withdraw: by persistence in his contention if ultimately proved to be in the wrong, he offends against the edict[1] from the moment that the interdict is issued, and the natural course of business is at once to make the biddings for the interim possession, to challenge each other and go to trial, cf. § 141 *Nec, cum quid praetor jusserit fieri aut fieri prohibuerit, statim peractum est negotium, sed ad judicem recuperatoresve itur et ibi editis formulis quaeritur an aliquid adversus praetoris edictum factum sit, etc.* Sixthly, nothing can be more suitable than that any act of force during the procedure for peaceable determination of the parties' rights should at once bring about the condemnation of the offender. Hence *qui vim faciat* is appropriate, if not necessary.

A wrong insertion or omission of a negative is not lightly to be assumed, but is by no means uncommon[2]. I am only surprised not to have seen this suggestion made by others. But its acceptance would cut short a great deal of learned conjectural controversy.

[1] The phrase throughout is (*contra*) *edictum* not *interdictum*, cf. §§ 141, 165, 166; Cic. *Caecin.* 16 § 45; D. xxxix 1 fr 5 § 4, fr 22; xliii 8 fr 7; L 17 fr 102. (Schmidt interprets *edictum* as not referring to the *Ed. Perpetuum* but to any order of the praetor (*Interdictverf.* p. 241 sqq.).)

[2] *E.g.* it is inserted by the editors in Gai. iv 98 and 117: it is evidently to be struck out in D. viii 6 fr 7. It is omitted in the Florentine MS. in D. xliv 4 fr 2 § 1; but inserted by the corrector and modern editors. It appears in *Collat.* ii 4 § 1 *in hac nec mihi videri* where the Digest (ix 2 fr 27 § 17) rightly omits *nec.* Many other instances occur in the Digest. In Vat. 154 *non* is omitted, and is found in 223 of the same matter.

CHAPTER XVII.

PROCEDURE *EXTRA ORDINEM*.

There were cases in which for some reasons the praetor or provincial Governor did not send the parties before a judge or recoverers, but himself heard and decided the matter. Where personal or ethical or social considerations entered largely into the question, and the strict rights of the parties or the pecuniary importance were relatively small, the praetor reserved the case for himself. Such was compelling a guardian to act (D. xxvi 7 fr 1 pr); claims for support (*alimenta*) brought by parents and children or patrons and freedmen against each other (D. xxv 3 fr 5), and the approval of compromises of legacies or *mortis causa* gifts for this purpose (D. ii 15 fr 8); grant of access to tombs belonging to the applicants (D. xi 7 fr 12 pr); claims for remuneration of physicians, advocates, teachers, scribes, notaries, accountants. But philosophers and law-professors were deemed to have too lofty a work for their payment to be subject of ordinary legal claim: a fee (*honor* or *honorarium*) was allowed (D. L 13 fr 1). Trusts (*fidei commissa*) were at first dealt with in this way (cf. Just. ii 23 § 1; Ulp. xxv 12). Semicriminal cases are in the same position, *e.g.* where one who had commenced a suit for some one's freedom threw up the case unfinished (Paul v 1 § 5). Cases thus decided by the praetor were often called *cognitiones*, because the case was heard (*causa cognita*) by himself (cf. D. i 18 fr 8, 9).

Spendthrifts were interdicted from the management of their property by the praetor[1]. The words used in such a case are given us by Paul (iii 4 *a* § 7) *Quando tibi bona paterna avitaque*

[1] Cf. Cic. *Sen.* 7 § 22 *Sophocles a filiis in judicium vocatus est, ut, quemadmodum nostro more male rem gerentibus patribus bonis interdici solet, sic illum quasi desipientem a re familiari removerent judices.*

nequitia tua disperdis liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdico.

This procedure (without *judex*), which in the times with which I am concerned was only of special and occasional use, was gradually extended, until, probably under Diocletian, it became the regular mode for all trials, and the formulary procedure with a *judex* was discontinued.

APPENDIX TO VOL. II.

Essays on the matters of law in Cicero's speeches

A. pro P. Quinctio
B. pro Q. Roscio (comoedo)
C. pro M. Tullio
D. pro A. Caecina

Errat vehementius, si quis in orationibus nostris, quas in judicio habuimus, auctoritates nostras consignatas se habere arbitratur. Omnes enim illae causarum ac temporum sunt, non hominum ipsorum aut patronorum (Cic. *Cluent.* 50 § 139).

Cicero might now say:

'Modern critics seem sometimes to regard my speeches as 'professorial lectures or as counsel's formal opinions, and treat 'the statements and arguments in them as expositions of estab- 'lished law, and a measure of my knowledge of it. I venture 'to remind them that an advocate has to deal, as best he may, 'with the particular case in the circumstances of the time. 'I am not freely uttering either my own opinions or those 'of my client: my speeches do not treat of law or politics 'disengaged from personal interests and particular occasions.'

Mea autem ratio haec esse in dicendo solet, ut boni quod habeam id amplectar, exornem, exaggerem, ibi commorer, ibi habitem, ibi haeream, a malo autem vitioque causae ita recedam non ut me defugere adpareat sed ut totum bono illo ornando et augendo dissimulatum obruatur....Illud mihi pro meo jure sumo, ut molesto aut difficili argumento aut loco non nunquam omnino nihil respondeam. Confiteor me, si quae premat res vehementius, ita cedere solere, ut non modo non abjecto sed ne rejecto quidem scuto fugere videar, sed adhibere quandam in dicendo speciem atque pompam et pugnae similem fugam; consistere vero in meo praesidio sic, ut non fugiendi hostis sed capiendi loci causa cessisse videar (Cic. *Orat.* ii 72 §§ 292, 294).

(This is put into the mouth of the orator Antonius, but may well be applied to Cicero himself.)

APPENDIX.

A. Cicero *pro Quinctio*[1].

This speech was delivered in the year 673 U.C. = 81 B.C. when Sulla was dictator and Cicero twenty-five years of age (Gell. xv 28). The question really raised is the due execution of an order of the praetor arising out of a partnership dispute. Recent political disturbances are several times alluded to, Cicero's client having as alleged been assisted previously by the influence of the party opposed to Sulla, and his opponent having influential friends in Sulla's party.

The speech is not quite wholly preserved, and apparently one part of Cicero's argument is lost, but the substance is given in the summary at the close of the speech, and some small fragments of it are found in a late writer on Rhetoric, Julius Severianus § 15 (Halm's *Rhet. Script.*, p. 362), which have been in Baiter's and other recent editions inserted in § 85.

The facts, as given by Cicero, were as follows:

C. Quinctius, brother of Cicero's client P. Quinctius, had a considerable grazing farm (*pecuaria res*, § 12) in Gaul, apparently near Narbo Martius[2] (now Narbonne), well cultivated and profitable. He took into partnership in his Gallic business a friend, Sex. Naevius, by trade an auctioneer, but at the time or afterwards connected with the family by marrying a first cousin of Quinctius (§ 16). Cicero speaks in very disparaging terms both of Naevius' contribution to the partnership resources

[1] The principal essay on this speech is one of the three in Keller's admirable *Semestria* (1842). See also Frei *Der Rechtstreit zwischen Q. und N.* (1852); Bethmann-Hollweg *Röm. Civ. Proc.* ii 783 sqq. (1865); Oetling *Abhandlung* (Oldenburg Progr. 1882); B. Kübler *ZRG.* xxvii p. 54 (1893). Comments on the speech are also given by De Caqueray *Passages de droit privé dans les œuvres de Cicéron* (1857); Gasquy *Cicéron Jurisconsulte* (1887); E. Costa *Le orazioni di diritto privato di M. Tullio Cicerone* (1899); Greenidge *Legal Procedure of Cicero's Time* App. I (1901).

[2] Cf. § 15. On Narbo see Cic. *Font.* § 13. The farm of Quinctius and Naevius was in the country of the *Sebagini* (§ 80), who are not known.

(§ 12) and of his character. He had some ability—at least as a buffoon; he was a man of some polish—for an auctioneer; but he was greedy, and evidently thought the duty of a partner was to study his separate interests (§§ 11—13). The partnership lasted several years, C. Quinctius having occasional doubts of Naevius' honesty, and not being able always to get a satisfactory account of his proceedings, but there was no rupture. At a time when both partners were in Gaul, C. Quinctius died suddenly, leaving a will in which he made P. Quinctius his heir (§ 14).

P. Quinctius, not long after, went to Gaul and for about a year or more[1] lived in intimacy with Naevius, often discussing the partnership business and property in Gaul. Naevius, as Cicero says, never hinted at anything being due to him from the partnership or from Quinctius on any private account. Probably accounts were periodically taken of the expenses and profits of the business, the balance was divided, and there were no outstanding claims on this head. Cicero speaks as if Publius succeeded his brother in the partnership as well as in his private property. In strict law the partnership came to an end on the death of a partner (D. xvii 2 fr 40, 59, *etc.*), and all that remained would be to take final accounts and divide the property (*ib.* fr 34, 65 § 9). We hear nothing of any fresh contract being entered into with the brother; but Publius, being sole heir to Caius, would easily glide into partnership with Naevius (*ib.* fr 37). Repeated allusion is made to their being partners (cf. §§ 23, 25—28, 48, 52—54, 74); and though the term *socius* could be used of one who was only tenant in common (cf. § 52), Cicero uses it here mainly in the sense of one standing in a relation voluntarily formed by contract, and in virtue of which he was entitled to expect, and bound to perform, mutual friendly services.

P. Quinctius as heir to his brother had to discharge some debts at Rome, and in order to raise money for this purpose, gave notice of sale by auction at Narbo of some property in Gaul which was not held in partnership. Naevius dissuades him from this course, telling him that it was a bad time to sell, and that he himself had plenty of money at Rome, which he

[1] *Annum fere* § 15; *anno et sex mensibus* § 40.

would readily put at the disposal of his partner and kinsman. Quinctius accepts the offer, gives up his proposed sale, and returns to Rome, whither Naevius also proceeds at the same time (§§ 15, 16).

Among other debts of his brother's, one at least was pressing, due originally to P. Scapula and now to Scapula's children. The amount of the debt was ascertained from the documents, but the amount now to be paid was something different. *Propter aerariam rationem non satis erat in tabulis inspexisse quantum deberetur, nisi ad Castoris quaesisses quantum solveretur* (§ 17). Castor's temple in the forum was the centre of the money-changers' and bankers' shops, and of the official testing and stamping of weights[1]. The present was a time of great disturbance in the money world from two special causes[2], in addition to the civil wars. The first was the currency: the second the *lex Valeria*. M. Drusus, in 663 U.C. = 91 B.C. by a law authorized the mint to issue one plated *denarius* in every seven. The confusion caused was great: no one knew whether his money was good or bad. At length the praetors and tribunes during Cinna's rule, probably in 670 U.C. = 84 B.C., resolved on the replacement of the plated denars by silver. M. Marius Gratidianus stole a march on his colleagues, and at once announced the resolution from the *rostra*, gaining thereby credit with the people for its authorship (Cic. *Off.* iii 20 § 80; Plin. *HN.* xxxiii 132, xxxiv 27). The denar was the ordinary coin used for payments, though the sesterce (one-fourth of the denar) was used for reckoning, as being the silver representative of the old *as* (Marquardt ii p. 16 sqq.). This state of the currency has been taken to be the meaning of the words *propter aerariam rationem*. Niebuhr (*Rhein. Mus. für Philolog.* for 1827, i 224) objected on two grounds: first that for this meaning *argentaria*, not *aeraria ratio*, would be the proper term; and secondly that the

[1] See *Corp. Inscr. Lat.* v 8119, 4 and others referred to by B. Kübler l.c. pp. 77, 78.

[2] The reduction of the coined *as* to one half of its former weight by the *lex Papiria* in 665 U.C. = 89 B.C. had no important effect, as it was only token money (Marquardt ii p. 18).

difficulty of determining the number of denars to be paid (*quid ad denarium solveretur*) could not have been great or of a nature to require the services of a jurist like Aquilius. He explains the words by a reference to the *lex Valeria* proposed by L. Valerius Flaccus successor to Cinna in the consulate 668 U.C. = 86 B.C., which reduced all debts to one-fourth of their amount (*creditoribus quadrantem solvi jusserat*, Vell. ii 23), or, as Manlius is made by Sallust (*Catil.* 33) to express it, *propter magnitudinem aeris alieni argentum aere solutum est.* Cicero in the fragmentary commencement of the speech *pro Fonteio* apparently speaks of all debts being paid on this ratio for some time, presumably until Sulla abrogated the law. Mommsen takes the same view (*Röm. Münzw.* p. 383). *Aeraria ratio* would thus be in fact the substitution in the reckoning of a bronze *quadrans* for a silver sesterce (a sesterce, representing the *as*, being a regular symbol for a whole). Mommsen puts it as the substitution in calculation of the reduced *as* ($= \frac{1}{16}$ denar) for the libral *as* which was represented by the silver sesterce ($= \frac{1}{4}$ denar). The difficulty in calculation spoken of by Cicero, would arise, as Niebuhr supposes, from the law applying only to debts at the date of the enactment, and not to any interest accruing since or to any new debts, so that the account between the Scapulae and Quinctius would not be all on the same footing.

The notion that the difficulty arose in the exchange of foreign coins is found in several expositors, but there seems no way for foreign money to come in. Narbo was a Roman colony and had Roman money; and Naevius was expected to provide the money at Rome. The debt was contracted at Rome as likely as anywhere else. Besides Aquilius was hardly an expert in money-changing.

In these circumstances the great lawyer C. Aquilius, who was a friend[1] of the Scapulas, was called in by both parties to decide how many *denarii* should be paid to settle the debt (*quid ad denarium solveretur, i.e.* what debt should be discharged

[1] Kübler (l.c. p. 78) refers to Plin. *HN.* vii 183 *Obiit P. Quinctius Scapula cum apud Aquilium Gallum cenaret.*

for each denar). He does so: the amount neither of debt nor of denars is given us. But the whole arrangement was made with the knowledge and approval of Naevius, who frequently repeated his promise to find the money for Quinctius, whenever he asked him. Quinctius accordingly had no hesitation in making a binding engagement[1] with the Scapulae to pay them on some near fixed day, and applies to Naevius to find him the money. Naevius thinking that now he had Quinctius on the hip and could make his own terms, replies, that before he provides a penny, he must have a complete settlement of all partnership matters and accounts, and know that there will be no dispute with Quinctius about them in future. Quinctius replies that that matter can wait, but the money is wanted at once, and reminds Naevius of his promises, but in vain. Quinctius being bound to keep his word under a penalty of an additional 50 per cent. (Gai. iv 171) was in a fix. He gets the Scapulae to allow him a few days and sends at once to Gaul to carry out the sale of which he had given notice before. The time was unfavourable, and he was not present, so that the sale was a bad one; and he settles with the Scapulae on worse terms than he had previously arranged. The other creditors of his brother's estate do not appear to have pressed him, and he was now free to turn his attention to the partnership affairs (§§ 17—20).

He at once takes the initiative and formally calls upon Naevius (*appellat ultro Naevium*, § 20) to get the matters arranged with the least trouble. Naevius appoints a friend M. Trebellius as his representative: Quinctius appoints Sex. Alfenus, a connexion of both parties, who indeed had been brought up at Naevius' house, to act for him. Naevius was too exacting: a friendly arrangement could not be made, and the business had to come before the courts. Several appointments for appearance in court were made and adjourned. Eventually Naevius appeared, but said he had sold by auction in Gaul what he thought fit, and had taken care to satisfy

[1] *Constituit Scapulis se daturum*, *i.e.* he promised payment of a definite ascertained amount on a certain day (see p. 86; D. xiii 5).

fully his claims on the partnership[1]: he had therefore no cause either to summon Quinctius to any more appearances or to accept any summons from him: but of course if Quinctius chose to bring any suit against him, he had no objection. Quinctius, thinking he had better revisit Gaul and see how matters stood there, took no formal step. The parties separate without any appointment for appearance in court being made (*sine vadimonio disceditur*, § 23).

Quinctius stays about 30 days in Rome; puts off such court engagements as he had with his other creditors, and starts on his journey on 27 January in the year 671 U.C. = 83 B.C. (*ante diem IV Kal. Febr. Scipione et Norbano coss.*)[2], with L. Albius as his companion (§ 24). He arrives in Gaul, but we hear nothing of what he did or found on his arrival, except that a few days afterwards, on the day before the intercalary Kalends, *i.e.* 23 Feb., the slaves belonging to the partners eject him from the mountain pastures and farm lands of the estate (§ 28). Quinctius applied to C. Flaccus, who was *imperator* in the province at the time, and Flaccus made some strong orders denouncing this eviction, but what they were is not told us. They were apparently produced in court (§ 29). If they were interdicts *de vi, etc.* such as are mentioned in the speeches for Tullius and Caecina one would have expected to hear more of the results.

Cicero gives the distance from Rome as 700 Roman miles (equal to 643 English statute miles)[3]. If a traveller did 50 miles (Roman) a day the journey would take (apart from stoppages) 14 days[4]. Possibly however Quinctius might go by sea from *Vada Volaterrana*, where was a roadstead with good

[1] Presumably this refers only to advances he had made or expenses incurred or profits accrued: the land and slaves of the partnership remained common to N. and Q. (§ 28).

[2] In § 57 he is said to have started *prid. Kal. Febr.* The editors usually alter in § 24 iv to ii but this is a very unusual way of marking *pridie*.

[3] The distance by railway from the modern Narbonne appears to be kilom. 1160=725 Engl. statute miles. But the situation of the farm is uncertain and may well have been nearer than Narbonne.

[4] 40—50 miles a day is assumed by Friedländer as the usual rate of travelling in a hired carriage (*Sittengeschichte* ii 19 ed. 5).

anchorage for coasting vessels. At this place (according to the Antonine Itinerary p. 139 ed. Parthey) 186 or 189 m. p. on the *Via Aurelia* from Rome (now about 280 kilometres by rail) it happened that he saw L. Publicius, an intimate friend of Naevius, who was bringing him some slaves from Gaul for sale. Publicius reports to Naevius where he had met Quinctius. Naevius at once, as Cicero implies, saw his opportunity. He sends messages to his friends to meet him at the *tabula Sextia*[1] at the second hour of the day following. His friends come in good numbers. Naevius[2] calls upon them to bear witness to the fact that he has appeared and that Quinctius has not appeared[3]. A big[4] formal affidavit is drawn, and Naevius' friends of rank seal it up. They then separate. Naevius applies to the praetor on the 20th February (*ante diem V Kalendas intercalares* § 79) to allow him to proceed against Quinctius as a defaulter. The praetor Burrienus accordingly issues the usual order for him to take possession of the estate of Quinctius in accordance with the edict (*ut ex edicto bona possidere liceat*). Naevius proceeds to put it into force. He has notices affixed to Quinctius' house, and endeavours to lay hold of a slave. Alfenus at once contests these proceedings, pulls down the notices, carries off the slave, and formally notifies Naevius that he is Quinctius' agent (*procurator*), and that, if Naevius will assail in this cruel manner the civic life and fortunes of his friend, patron, and kinsman, and not await as was reasonable Quinctius' return, he (Alfenus) asks no favour but is ready to defend Quinctius at law (*judicio defendere*[5] § 27) and accept

[1] *Tabula* is often used for an auction notice, *Caecin.* § 16 *adest ad tabulam*; *Att.* xii 40 § 4; xiii 33 § 4. What 'Sextius' board' was we do not know. It was apparently near the praetor's court.

[2] In § 53 Naevius is supposed to say *Horae duae fuerunt: Quinctius ad vadimonium non venit.* It would appear that the appointment is presumed to have been for daybreak, and hence Naevius allows two hours and invites his friends to come *hora secunda* to certify Quinctius' failure.

[3] *Stetisse* (not *stitisse*) is right. See p. 337; and *Introd. Just.* p. ccxxvii.

[4] I am inclined to agree with Oetling p. 13 in retaining the old reading *maximae* (not *maxime*).

[5] *Judicio defendere, judicio pati* are used as opposites of *judicio agere.* See Müller *Adn. Crit.* on § 63; Mommsen *apud* Cic. Orell.[2] i p. 454.

issue on any suit Naevius may choose to bring. The attachment of the estate in Gaul was apparently more successful. It must have been done on instructions given by Naevius previously, either by a special messenger despatched when he heard of Quinctius' journey or even perhaps in anticipation of it[1]. Kübler (p. 69) suggests that Naevius probably acted in the belief that Quinctius was going to secure to himself the Gaulish estate.

Naevius persists, as Cicero expresses it, in aiming at the head of Quinctius, and in reply to Alfenus' declaration that he is Quinctius' agent, formally applies (*postulat*) for Alfenus to give the security (*i.e.* sureties) usually given by an agent, *judicatum solvi, i.e.* for due defence of Quinctius and payment of the judgment if the decision should be against him (see p. 384). Alfenus urged that it was not fair for an agent to give security, where the principal in person was not required to do so. The praetor threatened to make an order in Naevius' favour[2], when Alfenus appealed to the tribunes, one of whom, M. Brutus, said that he would interpose his veto upon the praetor's order if some arrangement were not made between Naevius and Alfenus (§ 65). Accordingly further proceedings were stayed until Quinctius could return. Alfenus promises to produce Quinctius in court (*P. Quinctium sisti promittit* § 29) on the 13th September (671 U.C. = 83 B.C.).

Quinctius returns and appears. Naevius takes no formal step for eighteen months (probably owing to the civil war in the neighbourhood of Rome and to Sulla's proscription[3]), but

[1] In § 82 '*post dies* XXX' is found and is not easy to reconcile with other dates. Mommsen (*apud* Orelli[2]) says it is a gloss. Baiter may be right in referring it to the time between Naevius' despatch of a messenger and the day of his application. Hartmann (*Contumacial-Verf.* p. 33) refers *postulaturus eras* (§ 82) to the final application for sale. (See above, p. 434.)

[2] Probably, that unless Alfenus gave the regular security he would protect Naevius' possession of Quinctius' estate, and authorise his proceeding to a sale (cf. D. xliii 4).

[3] In 672 U.C. were the fights of Sulla and Marius the younger at Signia and Praeneste, then the fight between Sulla and Carbo at Clusium, and on 1 Nov. 672 U.C. the battle at the Colline gate, which was soon followed by Sulla's dictatorship and proscription in 673 U.C.

makes illusory proposals (*condicionibus hunc quoad potest, producit*). At last he applies to the praetor Cn. Dolabella to order Quinctius to give him security for payment of the judgment (*judicatum solvi*), on the ground that Quinctius is a person whose goods have been possessed for thirty days in accordance with the praetor's edict. Quinctius made no objection to giving security, if the allegation were true, but objected to conceding the truth of the allegation by giving security on that ground. Whereupon Dolabella intimated his intention to direct an issue to try the fact[1]. Quinctius was to make a wager with Cn. Naevius, that is, to stipulate for a nominal sum to be paid by Naevius, if his goods had not been possessed for thirty days in accordance with the edict of P. Burrienus the praetor. Naevius having made this promise, Quinctius would have to bring a suit for this nominal penalty and naturally have to prove his case. Quinctius and his friends objected strongly to the proposed order, as unnecessarily risking Quinctius' civic reputation. If he failed to prove that Naevius had not been in possession as alleged, he was a ruined and disgraced man; and by such a form of issue Quinctius would have to speak first and to make out the negative, instead of Naevius, who was the real plaintiff, having to make out the affirmative. Why not have the real rights of the two parties tried in action (*pro socio?*) on the main question, and then, if desired, both parties might give security *judicatum solvi?* (In a partnership suit with counterclaims this would be a natural course.) Dolabella however adhered to his view: he probably thought that he owed it to his predecessor Burrienus and to the continuity of judicial action not to put aside his order, and treat the whole dispute between Quinctius and Naevius as *res integra*: he must regard that order as *prima facie* valid, and conduct matters on that assumption, till it was shewn either that the order was not right or that it had not been duly carried into effect. If this issue were decided in Quinctius' favour, the proceedings taken in default failed, Quinctius' goods had not been legally in alien possession for thirty days, and the partnership dispute could be gone into.

[1] A similar course was adopted in a case named in D. xlii 5 fr 30.

If the decision went against Quinctius, then he must submit to the consequences of not having duly met Naevius' claim by appearance in court. As regards the form of issue, Dolabella, I suppose, would say that, on an issue of that kind it could not much matter which party spoke first, but that there were two reasons for putting Quinctius in this position; first, because an order had been made against him and Naevius was in possession, partial or complete, regular or irregular; and secondly, because it was a simpler course, if Quinctius were right, to shew a flaw or flaws in Naevius' position and conduct, than for Naevius to go through the whole proceedings bit by bit and shew their legality. If Quinctius declined to accept this issue, Dolabella said he should grant Naevius' application and order Quinctius to give the required security. Quinctius' advocates continuing to protest, Dolabella had them sent out of court (§ 31). Cicero sarcastically observes on Dolabella's conduct that noblemen attain a height in wrong-doing as well as in right-doing which humbler persons cannot reach[1].

Quinctius came reluctantly to the conclusion that it was better to accept the issue and trust to getting an impartial judge to try it. He took[2] C. Aquilius as judge (who chose as assessors L. Lucilius, P. Quinctilius, and M. Marcellus §§ 5, 34), and then sued Naevius on the wager. M. Junius pleaded Quinctius' cause several times (§ 3). Why the case was not decided, we are not told: it is hinted that Junius spoke at too great a length[3] (§ 34). However when the case came on again, Junius was absent on public business (*nova legatione impeditus* § 3), and young Cicero had to take it up on short notice (§§ 3, 4). Hortensius made an application for Aquilius to come before the praetor on the preceding day to be made to fix a limit of time for Cicero's speech[4]. The praetor according to Cicero

[1] This Dolabella was governor of Cilicia in 80 and 79 B.C. with Verres as legate and was convicted of extortion by M. Aem. Scaurus 78 B.C. See Cic. *Verr.* ii 1 38 §§ 96, 97 (Zumpt's *Röm. Crim. Proc.* p. 484).

[2] *I.e.* he proposed Aquilius, and Naevius accepted. See above, p. 351.

[3] Similarly Cicero complains in *pro Tull.* § 6 of his opponent spinning out his speech.

[4] Pliny says (*Ep.* vi 2 § 7) *Equidem quotiens judico, quod vel saepius*

would have been ready enough to do what Hortensius asked, but Aquilius objected to any such interference with his duty and functions as *judex*, and no order was made. Cicero declares that brevity is best suited to his powers and inclination and therefore he will give no cause for delay, but will at once lay down three propositions conclusive of his case, and keep himself strictly to them (§ 35).

The three propositions which Cicero undertakes to prove are:

1. There was no ground for Naevius' applying to the praetor for any order to take possession of Quinctius' estate.
2. Naevius could not have possessed the estate in accordance with the edict.
3. Naevius did not possess the estate.

In short Cicero contests the justice of Naevius' application, the legality of the order and its execution, and lastly whether Naevius' possession, such as it was, amounted to good possession in law.

1. The first proposition is made by Cicero the text for an animated and vituperative discussion of Naevius' conduct, partly no doubt in order to create such a prejudice against Naevius as might facilitate the acceptance of Cicero's proofs of the second and third propositions. Cicero proceeds to establish his first proposition by arguing (*a*) that Naevius' conduct was wholly inconsistent with the existence of any such debt. Naevius puts the debt as a large one owed by C. Quinctius on certain specific matters. C. Quinctius dies; his brother the defendant is heir and comes to him in Gaul. Naevius never mentioned such a debt, though P. Quinctius was more than a year with him in Gaul, and on a change of debtor it would have been natural to do so: there was nothing to prevent him: he saw Quinctius continually; justice was administered in Gaul, and the courts in Rome were open also[1]; and Naevius was not of a character to waive a claim or to have any reluctance to press it (§§ 37—41). Further even now Naevius shrinks from

facio quam dico, quantum quis plurimum postulat aquae do. He evidently gave to others what he wished for himself.

[1] *In provincia jus dicebatur, et Romae judicia fiebant* (§ 41).

getting the money question tried, and prefers to force on another issue which may ruin Quinctius (§§ 43—47).

(*b*) Cicero next argues that even granting that Naevius had a well-founded claim against Quinctius, that was no reason for taking such an extreme step. Suppose Quinctius had failed to keep an appointment to appear, he was a kinsman, a partner, a friend in constant intercourse: was it reasonable to take advantage of the first slip, and resort to an act, which would have been justified only when the wrong was clear, when there was no chance of getting a trial, and when the defendant had broken his engagement over and over again? (§§ 48—53). Quinctius had a house in Rome: his wife and children were there: was there any justification for Naevius' asking the praetor to treat him as one who shirked a trial instead of seeing his friends, inquiring for his agent, or giving formal notice at his house? (§ 54).

(*c*) Finally on this head Cicero disputes altogether that the appointment for appearance which Naevius alleged Quinctius had failed to keep, had ever been made. Quinctius, as soon as he got back to Rome, asked Naevius to give him the date when the appointment was made. Naevius immediately answered 'on the nones (5th) of February.' Quinctius looks in his diary and finds that he had left Rome for Gaul on the last day of January[1] (*prid. Kal. Feb.*) and consequently was absent from Rome on the 5th February and could not have made the appointment. Albius was his fellow traveller: several friends saw them off. There is (says Cicero) therefore plenty of evidence for the date of Quinctius' departure, such as will effectually rebut any evidence which can be given by Naevius' ally[2], who is alleged to have joined in the stipulation for the appointment (§ 58).

Naevius, says Cicero, is a man of influence, especially among those who are dominant in Rome at this time. Quinctius is a plain, quiet man, in his sixtieth year, of old-fashioned habits and

[1] *I.e.* the 29th. In § 24 the 27th is named as the day. The MSS. are wrong no doubt in one or other place.

[2] The object of having an *adstipulator* may have been to act in case of Naevius' absence (cf. Gai. iii 110, 111, and above, p. 28).

sombre and reserved character, no lounger in the forum[1] or *Campus Martius*, unused to society, devoted to those old notions of thrift and duty which have in modern times become blurred and forgotten; but he has a good case, and he relies on the judge to save his reputation and fortunes from the cruelty and greed of Naevius (§§ 59, 99).

Cicero having thus made an appeal to the sympathies of the court, and shewn that Naevius had no ground for his application to the praetor (the issue of the rule if applied for was almost a matter of course: cf. pp. 349, 350), and that his action was precipitate, unnecessary, and cruel, because in fact nothing was due to him, no appointment had been made, and consequently no desertion had taken place, proceeds to his second proposition.

2. Could Naevius have possessed the estate of Quinctius in accordance with the edict? What are the terms of the edict? It lays down several cases in which the praetor promises to order possession to be taken of a defendant's estate. The first is, if a man fraudulently keeps out of the way (*latitarit*). That does not apply to Quinctius, who went away on business and left an agent to act for him. The two next cases named by the praetor have also clearly no application, 'one who is dead without an heir,' and 'one who has gone into exile.' But it is said Quinctius comes within the words of the edict 'absent without due defence[2].' When then was Quinctius absent without defence? He was absent no doubt when Naevius applied to the praetor for an order to take possession of the estate, for no one could imagine that such an application would be made. Nor indeed was it important for anyone to attend, for the praetor's order would not be absolute, but for something to be done in accordance with his edict. (That is to say, the praetor gave the order on *ex parte* information, and in case of dispute the whole matter would have to be gone into, and in some shape compensation be made, if the order was not justified and

[1] *Ad solarium* is taken to mean 'at a sundial' near the Rostra in the forum (Censorin. 24 § 7) where people gathered for talk. Cf. *ad Heren.* iv 10 § 14.

[2] On the text here see below, p. 471.

damage had been done.) The first opportunity that there really was for his agent to defend Quinctius, was when Naevius proceeded to put up notices of seizure on his property. Alfenus at once interfered and tore down the notices, and on Naevius attempting to seize in the streets a slave belonging to Quinctius took the man away by force, and had him taken back to Quinctius' house. Further Naevius asserts his claim of debt, Alfenus denies it; Naevius demands a formal promise to appear, Alfenus gives it; Naevius summons him into court, Alfenus obeys the summons; Naevius applies for a trial, Alfenus does not refuse it. Nor was Alfenus a man of straw or needy hack. He was a Roman knight of good means, managing well his own business, and, what is more, he was the very man whom Naevius always left as his agent whenever he went into Gaul. Can Naevius pretend that Quinctius was not duly defended in his absence? (§§ 61, 62).

To all this Naevius replied that Alfenus declined to give him security, and, when the praetor was going to make an order to that effect, appealed to the tribunes as previously mentioned. This is where, as Cicero supposes, Naevius finds Quinctius liable under the praetor's edict. 'A man who is 'absent and whose agent does not submit to a suit or defend 'him against it in a regular trial but appeals to the tribunes, is 'a man who is absent undefended.' The practical answer to Naevius is that the order of the praetor for Alfenus to give security was either not actually made (*decernebat praetor* § 63), or if made (cf. § 65 *decreto praetoris oportuisse parere*) was rendered ineffective by the threatened interposition of the tribune M. Brutus. Alfenus made an affidavit, supported by others, in Naevius' presence, that he claimed on the ground of their relationship, that Naevius should not press serious measures against Quinctius in his absence; and further that if Naevius persisted, he himself was ready to accept process on any issue proposed by Naevius and to defend Quinctius against Naevius' claim of debt. A new start was made by the arrangement to await Quinctius' return and by his due appearance in court (§ 67). Naevius and his counsel may grumble as much as they like about Alfenus' influence with the dominant powers at

that time: the real issue is not affected. Quinctius was defended, and defended by means of the law and of the lawful magistrate (§ 68).

Be that as it may, the question now at issue is whether Naevius has possessed in accordance with the edict, that is to say, whether the directions of the edict have been followed. Now (*a*) the edict requires all the sureties[1] and creditors of the defendant to meet, and the estate when possessed to be sold. Neither of these things took place. Yet there were other creditors who were entitled to take part, who however, so far from enforcing their claims, are here to assist the defendant. True, some witnesses are said to be ready to speak of other acts of *laches* or fraud on the part of Quinctius: it will be seen what they have to say. They will be wise to remember that the only way to gain or maintain credit is to support the truth (§ 75).

(*b*) It is clear from Naevius' own conduct that he did not consider effective possession had been taken of Quinctius' estate. For if it had, Quinctius was ruined in reputation and position. Yet when the estate of Alfenus was confiscated and sold by Sulla as dictator, Naevius bought it and gave the name of Quinctius as his partner in the matter—a course quite inconsistent with Naevius' present contention.

(*c*) The dates[2] shew that the edict was not followed. For the application was made to the praetor on the fifth day before the intercalary Kalends, *i.e.* on Feb. 20; and Quinctius was ejected from the Gaulish farm on the day before the Kalends, *i.e.* Feb. 23. The ejectment was therefore on the second or third day after the praetor's order. It is impossible for the

[1] *Ceteri sponsores et creditores.* The *sponsores* would be sureties who had not yet been made to pay but were liable to do so. If they had paid they would be creditors, though they may perhaps have been treated as a distinct class. They had a more summary remedy usually. See Gai. iv 22. The same expression in like connexion occurs in Cic. *Phil.* vi 4 § 11.

[2] The dates are as follows: Q. leaves Rome, Jan. 27 or 29; is at *Vada*, *cir.* Feb. 4; is at Narbonne, *cir.* Feb. 18 (?); is ejected, Feb. 23. Publicius sees Q. at *Vada* and reports to Naevius. As he was taking slaves, we do not know how long his journey required. He reports to Naevius after Feb. 8 (?); N. meets his friends, Feb. 10—20; applies to praetor, Feb. 20.

distance of 700 (Roman) miles to be covered in that time[1]. Consequently Naevius must have presumed some time before on the order being made. In a matter which concerned the very life and fortunes of another, Naevius must have boldly assumed, when he sent his messenger to Gaul, that he would persist in his purpose, that he would be alive and well and able to come before the praetor to make this application, that the praetor would be well and in court, that he would consent to make the order, and that no one would make a valid defence, give such security as might be required, accept an issue for trial, and thus prevent any decree being made for possession of Quinctius' estate as a defaulter (§§ 78—82, 88).

(*d*) Finally the praetor's edict expressly directs that in taking possession of the estate the owner should not be himself ejected against his will. This provision applies even in the case of an absconding and undefended debtor. Yet Naevius actually ejects Quinctius, who did not abscond and who was defended by a regular agent (§§ 84, 85).

It may be remarked on this part of Cicero's argument that on the first point counter evidence was to be produced, and Cicero does not attempt to deal with it in detail. Perhaps he really did not know what evidence Hortensius had. But he distinctly asserts that whatever may have been the case before, now all the creditors are on Quinctius' side (§§ 76, 88). The second point again is very briefly treated, and we know nothing of the circumstances of Sulla's putting Alfenus to death and the confiscation of his property. It was probably a mere ordinary incident in that reign of terror. Very likely Naevius and Quinctius combined to buy the estate of their old friend. Such action on the part of friends was, I expect, frequent in cases of public sales (see vol. I p. 482). The third point, which Roscius suggested, raises the question, whether an act was legitimate for which the instructions were given without authority at the time. Similarly on the fourth point the question is whether an expulsion of the owner himself, though contrary to edict, made the seizure bad in law.

[1] This point is said by Cicero to have been suggested to him by Roscius the actor, whose sister was Quinctius' wife.

3. The last of the three heads into which Cicero divided his defence has been lost in the MSS. But the purport is given in Cicero's summary at the end (§§ 89, 90) and accords with Severian's brief extracts. It was that due possession had not in fact been taken, because Naevius had not possessed all, but only a part of, Quinctius' estate. There were a house and slaves in Rome, there were some slaves on the Narbonne pasture and there were some farms in Gaul, belonging to Quinctius separately from Naevius, which had escaped his hands (§ 90). He had not possessed the estate (*bona*), he had only seized one piece of land. In other words Cicero maintains that Quinctius must win on the wager, because even if Naevius had ground for his hostile proceedings, even if he had in other respects followed the directions of the edict, his possession was not in fact such a possession as was intended in the edict: consequently he had not possessed (§§ 85—89).

It is clear from the language frequently used that the lawless and terrible state of Rome under Marius and Sulla had its effect even on this private suit. Probably it accounts for much of the delay which occurred; possibly it afforded occasion to Naevius and to Quinctius to take advantage of each other in a way which would not have been practicable in quiet times. Alfenus is charged with using extra-judicial means through his influence with Brutus in order to set aside or suspend the praetor's decree. He was a strong partisan and fell in Sulla's proscription with his party and for them. Naevius was quite as strong a partisan, with more craft and greater influence: he deserted his party in order to be on the winning side; and just as he is alleged to have got his first advantage from Burrienus by political influence, so he is now, says Cicero, availing himself of the triumph of Sulla's party to secure his victory over Quinctius (§§ 68—70). One cannot but admire young Cicero's courage in taking up the case and pleading it with such vigour against orators like Philippus and Hortensius and members of Sulla's faction, while Sulla was dictator[1]. But genius gives impulse and confidence; and

[1] The speech *pro Sex. Roscio* of Ameria is a still greater proof of Cicero's boldness.

genius alone could have excited the enthusiasm and won the favour which have preserved to us so many of Cicero's speeches and writings, when all the other oratory and almost all the prose writings of the Republic, except his, have been allowed to perish.

As I have said above, it does not seem to me unreasonable for the issue to have been directed by Dolabella in the form given, much as Cicero protests against it. I assume that this form really throws open the whole matter, and that Cicero is justified in discussing the validity of the praetor's first decree for taking possession as well as the subsequent proceedings[1]. The summary with which Cicero concludes his argument (§§ 85—90) is clear, precise, and effective, but, as orator, Cicero cannot leave the matter without a last appeal to the equity and compassion of the judge and his assessors. Such an appeal was a regular part of a speech (cf. Cic. *Inv.* i 55 § 106) and would be expected by any court. We should think it natural, if addressed to a popular body like an assembly of the people or even to an ordinary jury. Addressed to a lawyer like Aquilius and to his dignified and competent assessors, it may seem out of place and rather an indication that the purely legal argument was felt to be weak. But besides the general fact, on which Cicero often dwells in his *de Oratore*, that judges are men as well as lawyers, and consequently accessible to feelings of pity, we cannot assume that the separation of strict law from looser considerations of fair dealing was as complete in the time of Cicero as it may have been in later days. By Ulpian's time they had both come to be fully recognised by the courts, and assigned to their respective provinces. But the very stiffness and rigour of the early Roman forms and procedure must have continually excited a desire for larger consideration. Moreover the wholesale slaughters and confiscations, which Rome had seen in the last few years, must have had their effect in weakening the hold which pure law would have on the minds of Roman citizens. *Inter arma silent leges.* It is difficult for anyone not bound in parchment to lay great stress on technical require-

[1] Cf. D. xlii 1 fr 14 *Quod jussit vetuitve praetor contrario imperio tollere et remittere licet.*

ments, when life, liberty, and property are dealt with every day without reference to any law, at the caprice of a dominant party or of the captain of an army. If Habeas Corpus were suspended in fact, and the King's Writ ceased to run, it would be somewhat difficult even in these days for an English advocate before a fair and competent bench to lay almost exclusive stress on defects in procedure, and to argue that the court should still look to precedent or should still be guided solely by the words of a statute or a rule, if the conduct of the parties would otherwise justify a different conclusion.

We have only Cicero's eloquent speech for Quinctius: we have not Hortensius' pleading on the other side, nor the statements or affidavits of witnesses; we really do not know the merits of the two parties' conduct. Nor have we even a copy of the praetor's edict, as it was either in Cicero's or indeed at any time. But dealing with the law as best one can, I proceed first to speak of the text of § 60, which raises an important question, and then to remark on the leading points, without inferring, as some writers seem inclined to do, from the excellence of the rhetoric the badness of the cause.

Most editions contain after *solum verterit* (§ 60) some such words as *Dici id non potest. Qui absens judicio defensus non fuerit. Ne id quidem.* They are not found in any existing MS. and were first inserted, professedly on MS. authority (not an unusual way with the older editors, when introducing a mere conjecture) by Hotoman. Lambin professed also to have MS. authority for his insertion of *Dici hoc de P. Quinctio non potest. Qui absens judicio defensus non fuerit.* The variation in these supplements is not great, but it is enough to strengthen the suspicion that neither editor had manuscript authority. At the same time it must be admitted the words seem to suit the context and at first sight to be justified by *reliquum est ut eum nemo judicio defenderit* (§ 87). Short negations very similar (*ne id quidem, dici non potest*) are found in *pro Tullio* § 48, and in other speeches of Cicero[1].

[1] *E.g. Verr.* ii 43 § 106; iv 65 § 146 *Ne id quidem*; *ib.* iii 88 § 205 *ne id quidem dicet*; i 46 § 118 *non enim hoc potest hoc loco dici*; *Caecin.* 25 § 72 *illud enim potest dici, etc. hoc non potest*; *etc.*

Mommsen in an early review (dated Nov. 1843) of Keller's *Semestria* (published in *Zeitschrift für Alterth.* p. 1084 for Dec. 1845) rejected these supplements and proposed to read and punctuate thus: *Quo tempore? Existimas oportuisse, Naevi, absentem Quinctium defendi. At quo modo?* This seems to me not Ciceronian. *Quo tempore* would be a strange answer to the suggested application of the clause about exiles: the subsequent argument is not introduced by any particle or other suitable words: and the second question (*quo modo?*) is answered by reference not to manner but to time. I agree with B. Kübler in rejecting Mommsen's solution and in believing with him and others that there is some omission in the MS.

The supplements mentioned above however involve the insertion in this part of the Edict of a separate independent clause, *Qui absens judicio defensus non fuerit*, and accordingly most editors insert it here in Cicero's speech. Keller (*Sem.* p. 45), Bethmann-Hollweg (ii 560), Hartmann (*Contumacial-Verfahren* p. 24), Karlowa (*Beiträge* p. 133), Lenel (*EP.* p. 333), and Costa (pp. 13, 14), all approve (cf. Kübler *l.c.* p. 63). The contrary is maintained by Mommsen (*l.c.*), Dernburg (*Emt. bon.* p. 66), Bachhofen (*ap.* Karlowa), Oetling (p. 6), and apparently by Rudorff (Pucht. *Inst.* § 179 n. *bb*). The extracts from the edict given in the Digest do not contain such a clause.

The evidence for such an addition to the edict is very weak (see it stated in Karlowa pp. 133—139). The most important is Gai. iii 78, *Bona autem veneunt aut vivorum aut mortuorum: vivorum veluti eorum qui fraudationis causa latitant nec absentes defenduntur.* Karlowa persuades himself that the words admit of those *qui absentes defenduntur* being a different class from those *qui latitant.* I cannot agree; and I feel confident that Gaius is here shortly stating by *nec abs. def.*[1] the effect or the words of such a conditional clause (omitted by Cicero after *latitarit* § 60) as we find in the fragment of the edict given in

[1] *Absens* is somewhat superfluous, but, I think, formed with *def.* a kind of technical phrase, cf. D. iv 6 fr 1 § 1; 21 §§ 1, 2; 28 § 6; xlii 4 fr 2 § 2. In our speech Cicero often uses it, §§ 60, 61 (*bis*), 62, 65, 68 (*bis*), 74; as well as a phrase of like meaning, *judicio defendere*, §§ 62, 63, 68, 84, 87.

D. xlii 4 fr 7 § 1, *Qui fraudationis causa latitabit, si boni viri arbitratu non defendetur, ejus bona possideri vendique jubebo.* Ulpian's treatment of this fragment seems to me altogether inconsistent with the supposition, that this section of the edict contained in his time a distinct clause for undefended absentees[1] (see *ib.* §§ 9—12). And in our speech Cicero similarly connects undefended absence with fraudulent hiding (§§ 74, 75, 84, 85). Nor is the way in which the words *reliquum est, etc.* (§ 87) are appended to a positive denial of liability under the edict really such as one would expect, if a separate coordinate clause of the edict and not an appended condition were referred to.

Moreover I do not believe that mere undefended absence[2] could have been placed by the edict or by the law generally on the same footing as fraudulent keeping out of the way[3]. Only when there is fraudulent purpose does absence become penally blamable. But when an absentee however innocent has no adequate representative, a creditor may be unable to get satisfaction; and if a summons has been served, and agreement for appearance in court has been come to, a creditor has a well-founded right that undefended absence shall not for ever bar his suit or expose the property on which he relies to dissipation. The praetor therefore granted possession of the debtor's estate, but it was possession for safe keeping only. *In bona ejus qui vadimoni* (Dig. *judicio sistendi*) *causa fidejussorem dedit, si neque potestatem sui faciet neque defendetur, iri jubebo*[4] (D. xlii 4 fr 2 pr). This included both the fraudulent and the innocent absentee (*ib.* §§ 2, 3). It is *possideri*, not

[1] *Absens* is either *qui non est eo loci ubi petitur* (*i.e.* Rome) or *qui in jure non est* (D. L 16 fr 199; xxxix 2 fr 4 § 5).

[2] Cf. Hartmann *Contum.* §§ 8—12.

[3] The Digest is express on this point (iv 6 fr 21 § 2) *Eorum qui non defenduntur si quidem latitent, Praetor ex edicto pollicetur in bona (eorum) mittere, ut si res exegerit etiam distrahantur, si vero non latitent, licet non defendantur, in bona tantum mitti.* Karlowa and, following him, Lenel (*Paling.* ii p. 480) declare these words to be an addition of Tribonian's. I don't believe this as regards the substance. Some expressions may be due to Tribonian's abridgment.

[4] This originally referred to *in jus vocatio.* See Lenel *EP.* p. 58 and above, p. 334, but this principle applies after *vadimonium* also. The precise shape of the edict in Cicero's time is of course uncertain.

possideri vendique that is spoken of here (compare *ib.* fr 7 §§ 1, 2). The creditor was entitled to have the possession secured. Subsequent events might explain the absence, or shew that it should be treated as fraudulent latitation. No doubt a further application to the praetor would have to be made before steps were taken for a sale (cf. *ib.* fr 6 § 1, 7 § 11). If latitation or other sufficient cause[1] were found to exist, a sale would be ordered. Meantime the appearance of the defendant or of an adequate representative would put an end to the creditor's occupation, but security must be given, at least if the defendant does not appear in person (D. *ib.* fr 5 pr; tit. 5 fr 33 § 1).

Such seems to have been the position in the case of Quinctius. Some considerable time had elapsed since Naevius first got the order for possession. Had Alfenus not interfered, Naevius would probably (after thirty days?) have applied again to the praetor to order a sale on the ground that Quinctius was fraudulently keeping out of the way. Alfenus' energetic action prevented this.

I suppose that there is some part of Cicero's speech lost after the words *solum verterit* in § 60. He probably returned to the mention of latitation and took up the conditional clause (*si absens non defendetur*[2] or the like) to shew that no part of this head of the edict had any application to Quinctius. 'He 'wasn't hiding, he wasn't undefended in his absence. Hiding 'is much more than non-appearance: it is shirking appearance, 'it is fraudulent avoidance of your adversary, it is *turpis occul-* '*tatio sui*[3]. And even hiding is not enough without the 'additional fact of want of due defence. Where is there any 'basis for applying this to Quinctius? *Quo tempore existimas* '*oportuisse, etc.*' I do not pretend to suggest the words of any precise supplement, but I have put into Latin (see note 4 below) my conception of what would suit Cicero's argument.

[1] Cf. D. xlii 5 fr 5.

[2] In this suggestion I have been anticipated by B. Kübler (p. 64).

[3] Ulpian D. xlii 4 fr 7 § 4 attributes to Cicero a definition of *latitare* as *turpis occultatio sui.* It is not found in Cicero's works, and may very possibly have been given in our speech at this point.

[4] Suppose for instance Naevius interrupted him or is imagined by Cicero to interrupt him. Something of this kind might have been said:

The leading points in Cicero's defence which seem to require special notice are:

1. Had Quinctius failed to keep an appointment or appearance?

2. Was Alfenus' defence of Quinctius good without his giving security *judicatum solvi*?

3. Was Alfenus' application to the tribunes an illegal disobedience to the praetor's orders?

4. Under this decree was the concurrence of the other creditors necessary? and had it been obtained and the sale proceeded with?

5. Was it necessary for effective seizure, that all the property of the defendant, whatever and wherever it was, should be seized?

6. Must such seizure be made, as it were, with the praetor's warrant in hand?

7. Was the personal eviction of Quinctius a fatal flaw to a good execution of the order?

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1. The first point is one of fact, on which I expect Quinctius was in the right. There may have been misunderstanding or there may have been fraudulent assumption on the part of Naevius. Keller (p. 175) supposes that Naevius made a slip of memory when he named the Nones of February (§ 57),

'*At absens fuit, at non defensus est. Quid est aliud latitare nisi copiam 'sui non facere nec absentem defendi?' Primum, Naevi, velim consideres non hoc solum exegisse praetorem ut quis latitasse convinceretur, sed ut cum latitasse videretur tum idem etiam non esset defensus. Non latitavit Quinctius, sed etiamsi latitasset nihil contra edictum committebat qui absens defendebatur. Deinde aliud est, mehercule, latitare quam copiam sui non facere. Qui latitat, timet et vitat adversarium, decipere ac fraudare cupit; non modo occultat se sed turpiter occultat. Quae res a Quinctio alienissima fuit. Non evitabat te, neque cur evitare vellet ulla causa erat; sed cum velle te illum morari negavisses, in Galliam rei suae curandae causa profectus est, Romae procuratorem reliquit qui tibi praesto esse semper posset. Quo tempore, etc.*

and that Cicero ought to have shewn that no appointment was made on any other day. How? surely that was for Naevius to prove; and if Naevius had really made it on some other day and said so, Cicero could not have avoided dealing with it. It does not seem likely that Quinctius should have deliberately gone to Gaul only a few days after he had made a formal appointment with Naevius, and yet it is not likely that the praetor made his order without some evidence of the appointment. But Naevius could no doubt get some affidavit of this concocted, and it might easily pass muster when no one was present on the other side to contest it.

It was the risk of such proceedings taking place, that made it usual for Romans with business affairs to have a competent agent to represent them in their absence, and led to legal recognition of the action of persons who without any commission conducted business for absentees (*negotiorum gestio*). In a case like that before us the risk was modified by the praetor's order being only what we should call a rule *nisi*, an order issued on *prima facie* evidence, and subject to be cancelled or altered on sufficient cause shewn[1]. It was good, as Cicero remarks, only if the edict had been fully observed (§ 60 *nec quemquam, etc.*). The praetor in fact would say to Naevius, 'You may take your rule, but if your statements and affidavits 'are not true, you will be liable to Quinctius for the damage you 'may cause him' (cf. § 83 *corrigeres haec scilicet tu postea*). Indeed if Naevius falsely alleged a debt, he was liable to a suit *injuriarum* in having taken possession of Quinctius' estate (Gai. iii 220). The possibility of rescission of the sale is stated in D. xlii 4 fr 7 § 3; cf. tit. 5 fr 30; tit. 1 fr 51. If however an appointment had been made and not kept and no defence put in, the order for possession was regular, however harsh.

2. There is no doubt that in the time of Gaius and later a procurator for the defendant was bound to give the security *judicatum solvi*. *Ab ejus parte cum quo agitur, siquidem alieno nomine aliquis interveniat, omni modo satisdari debet, quia nemo alienae rei sine satisdatione defensor idoneus intelligitur. Sed*

[1] So Keller *Semestr.* p. 79 sq.; Gai. iv 141 is also in point.

siquidem cum cognitore agatur, dominus satisdare jubetur, si vero cum procuratore, ipse procurator (Gai. iv 101). *Defendere est id facere, quod dominus in litem faceret et cavere idonee. Nec debebit durior conditio procuratoris fieri quam est domini praeterquam in satisdando.* (D. iii 3 fr 35 § 3 Ulp.; cf. *ib.* fr 46 § 2; 51 § 2—fr 53; xlii 4 fr 5 § 3; tit. 5 fr 33 § 1; xlvi 7 fr 10; Vat. 317, 333.) It is of course possible that the rule may not have been fixed and universal in Cicero's time, especially in the case of one who was a standing agent[1] for Quinctius' affairs and not merely appointed for a particular suit: and yet this is unlikely in the case of a rule, which though not resting on legislation was founded on clear principle: and Keller points to Cic. *Verr.* ii 24 § 60 as some evidence of its general recognition. Modern expositors are pretty well agreed that the rule did exist, and consequently that Alfenus' position was completely untenable. If so, how are we to account for its being taken? There are some considerations which seem to me to have been overlooked or at least not sufficiently regarded.

It is nowhere said that Alfenus definitely declined to give security. He said it was not fair (*aequum*: cf. Oetling p. 9) that a procurator should give security when his principal, if he had been present, would have been under no obligation to do so and appealed to the tribunes. The tenses are noticeable[2]. *Postulabam,* says Naevius, *ut satis daret. Injuria postulabas* (replies Cicero); *ita videbare; recusabat Alfenus.* Naevius replies, *Ita, verum praetor decernebat.* Says Cicero, *Tribuni igitur appellabantur* (§ 63). Again *Bruti erat* (*Alfenus*) *familiaris; itaque is intercedebat,* says Naevius; to which Cicero replies, *Tu contra Burrieni, qui injuriam decernebat* (§ 69). The imperfect is not the tense for positive final acts. What is thus described is rather a series of negotiations and proposals; perhaps threats and alternative proposals. Cicero admits that, if the tribunes had declined to interfere and the praetor had

[1] Cf. Cic. *Caecin.* 20 § 57. This suggestion is made by several writers and carefully dealt with by Keller p. 117 sqq.

[2] Comp. Cic. *Verr.* iii 22 § 55; 28 § 69. In neither of these cases, as I understand, did Verres actually send the matter to trial.

made the order, Alfenus would have had (*oportuisse*) to give security (§ 65).

Alfenus' contention was first, that the whole matter should rest until Quinctius' return: secondly, that if Naevius was determined to push things to extremities, well, he must bring his suit, and he (Alfenus) would accept process (§§ 27, 66), but in that case he ought not to be called on to give security simply as procurator. His reasons, I imagine, would be founded on the special circumstances of the case. It was not a case of a claim being pressed for the first time against an absent defendant, but of some suit to be brought against one whose estate had been already, as Naevius professed, seized. Alfenus had offered to accept any issue proposed by his opponent (§ 63); but such issue would obviously have reference to the partnership matter, no other being alluded to, and was in all probability the same as that on which Naevius asserted he had given Quinctius notice of trial, and then alleging default, had applied to the praetor Burrienus for an order for possession. What more security did he want than the possession of the whole of the defendant's estate[1] (to which alone Alfenus could look for reimbursement)? It was unreasonable to require sureties for the execution of the judgment, when he had already as it were executed it himself. Usually when sureties were given, possession of the estate would be given up (D. xlii 5 fr 33). If Naevius had offered to withdraw from possession, possibly Alfenus would have consented to give sureties, and been glad of such a solution of the difficulty. No hint is given of any such course. I cannot help thinking that in the circumstances the objections of Alfenus had reasonable ground. Moreover he was not a mere outsider meddling with another's concerns without call to do so. He was a man of character and substance well known to Naevius, who could not doubt his legitimate connexion with Quinctius, when he had already been appointed to act for the latter in trying to get a friendly settlement (§ 21). One would however like to know why the praetor did not do of his own motion what was done

[1] Cf. the language in § 98 *Cum illum* (*Naevium*) *in suis paternis bonis dominari videret.*

afterwards through the appeal to the tribunes, viz. adjourn the proceedings till Quinctius' return, and fix an early day. It looks as if Dolabella had either formed a very unfavourable opinion of Quinctius' conduct, or were far from impartial.

3. Alfenus' application to the tribunes seems to us at first sight at variance with the proper conduct of judicial procedure. But the tribunicial power of veto was not limited. The order of the praetor was a magistrate's order, just as any order of a consul in public affairs, and was liable to the interference of the tribunes, who in fact were created for the very purpose of checking the improper exercise of public authority. Alfenus claimed to be acting *more et instituto, per eum magistratum qui auxilii causa constitutus est*[1] (§ 63). Nor was his action without parallel. In the speech *pro Tullio* an appeal is made to the tribunes to alter the issue directed by the praetor (*Tull.* §§ 38, 39). The allowance of pleas by the tribunes is playfully alluded to in Cic. *Acad.* ii 30 § 97 ed. Reid *Tribunum aliquem censeo adeant: a me istam exceptionem numquam impetrabunt.* Pliny the younger in *Epist.* i 23 gives as one reason for his not acting as advocate when he was tribune, that he was liable to be appealed to by plaintiffs and defendants (Mommsen *Staatsr.* i 264; Cic. *in Vatin.* § 33; Ascon. *in orat. in toga cand.* p. 111). It can hardly however have been common for the tribunes thus to interfere on interlocutory judicial questions[2]. On this point probably Hortensius did not dispute the right of the defendant to appeal, and did not maintain that defendant was bound to accept without appeal any issue offered[3], but

[1] I am inclined to agree with most of the earlier editors in thinking that something has been lost in the MSS. just before this. See Kübler p. 68 against Keller p. 244.

[2] A courteous reviewer of this Essay (*Athenæum*, 7 June 1902) disagrees from this opinion; he emphasizes the fact that two of our four private speeches of Cicero contain instances of this interference, and refers to Tac. *An.* xiii 28 and Juv. vii 228 in proof of the tribunes' activity in judicial matters. But Tacitus tells us only of the senate's forbidding the tribunes from usurping the functions of the praetors and consuls by summoning defendants *ex Italia, i.e.* from outside Rome. And Juvenal refers only to tribunes being appealed to in matter of school fees. See Mommsen *Staatsr.* ii p. 298.

[3] Müller is wrong in bracketing these words (§ 64). They are the natural alternative to an appeal.

urged that an appeal to the tribunes on a matter of ordinary routine and settled practice could only be for the sake of delay (§ 65 *ad fin.*), and constituted a breach of a defendant's duty *judicio defendere* (§ 63); and he further pointed out that the tribunes though appealed to did not interpose their *veto*. Alfenus therefore had not complied with the praetor's uncancelled direction to give security, whether made into a formal order or not. To this Cicero replies, that the appeal to the tribunes was perfectly constitutional, and was practically successful in producing through Brutus' threat a stay of proceedings, until Quinctius could himself appear. So far there seems to be no doubt, but Cicero I think goes too far in asserting that the original position was thus restored; that Quinctius' goods were not to be regarded as under notice or in alien possession; that time could not run against him, and that there could be now no talk of a thirty days' possession (*Fit rebus integris neque proscriptis neque possessis bonis, ut Alfenus promittat Naevio sisti Quinctium* § 67). I take the effect to have been simply a suspension of proceedings[1]. On the fresh hearing of the case the praetor would be able to put matters right, and rescind or confirm or amend his previous order.

4. If we may assume that in this respect the rules for the possession and sale of an estate given by Gaius were the same in essentials as those in the praetor's edict in Cicero's time, it is clear that such an order as Naevius obtained was one of which he had only the carriage and in which others were interested besides him. If the estate is that of a living person, the praetor directs the effects to be possessed and advertised (*proscribi, i.e.* by notices affixed) for thirty days continuously: after that a meeting of creditors to be held, one of them appointed to conduct the sale (called *magister*), and the sale to take place only after a further period[2] (Gai. iii 79, above p. 434). This accords very well with Cicero's language in § 50 *de quo libelli in celeberrimis locis proponuntur,...cui magistri*

[1] Both Keller doubtfully (pp. 162—168) and Frei decidedly (p. 134) go further, and think the appointment made between the parties at Brutus' instance might well be regarded as a waiver of any claim based on the want of due defence of Quinctius.

[2] The times are uncertain. See Stud. and Krüg.'s edit. of Gaius.

fiunt et domini constituuntur (*i.e.* for whom masters are appointed and made owners of the property); *qui, qua lege et qua condicione pereat, pronuntient, de quo homine praeconis vox praedicat et pretium conficit*[1] (declares the bids and fixes the price), *huic acerbissimum vivo videntique funus ducitur*[2]. In the Digest we find Paul laying down the rule that one creditor obtaining an order for possession opens the door for all; the grant by the praetor is one free from limitation to particular persons (*in rem permissum videri* D. xlii 5 fr 12 pr), and Labeo's opinion is referred to as authority. This language makes one think that it was not a generally admitted rule in Labeo's, *i.e.* Augustus' time; and if so, we can hardly think that in Cicero's time it was beyond doubt. But probably the question was whether some further application to the praetor should not be required before the custody of the goods should be open to others. Clearly the other creditors' interests had to be consulted when the whole estate of a debtor was seized, unless indeed the principle of *occupantis melior condicio est* was applied at that time. So that, as far as we know, Naevius' proceeding, not in first taking possession but subsequently, was incomplete and perhaps irregular. The appeal to the tribunes however interrupted the course of events; it may have taken place before the thirty days had expired. Anyhow no hint is given of any formal meeting of the creditors, still less of any sale of Quinctius' effects. Naevius would probably say that he had been interrupted by Alfenus' interference or by the state of political affairs.

5. On the fifth point I think Cicero is mixing up two different things. His argument is good against one who is trying to get possession with a view to become owner by usucapion. An inheritance (which is not merely a collection of separate bits of property, but an ideal whole) could in olden times be acquired by usucapion, and for this purpose no doubt

[1] The *magister* only directed the terms of sale and perhaps presided. The actual bids were collected and repeated by a *praeco*.

[2] Cf. D. xvii 2 fr 65 § 12 *Publicatione distrahi societatem diximus, quod videtur spectare ad universorum bonorum publicationem si socii bona publicentur: nam cum in ejus locum alius succedat, pro mortuo habetur.*

an extensive control over the whole estate, or rather over all the different bodily components of the estate would be necessary (Gai. ii 54). But some reasonable interpretation would be put even then (cf. D. xli 2 fr 3 § 1). And the position of the purchaser of the goods of an insolvent or fugitive was much the same (cf. Gai. iii 80, 81, and iv 35). The position of Naevius was quite different. He was sent into possession *rei servandae causa*, to hold and preserve the estate until further order. He was, as the Antonine jurists sometimes distinguish, to be in possession (*in possessione esse*) but not to possess (*possidere*)[1]; *i.e.* he had no proper possession in the technical sense (cf. D. xli 2 fr 3 § 23; xliii 17 fr 3 § 8); he could not by occupation however long continued acquire the ownership; and the doctrines of the Roman lawyers on the technical sense of possession, as inchoate or presumptive ownership, do not apply. Proper notices would doubtless have to be affixed to the main items of the estate, to the house in Rome and to the lands in Gaul or elsewhere, and proper means would have to be taken to secure that the goods were not carried off and the slaves did not run away. But all that was required was honest care and maintenance of the goods (see § 84, and cf. D. xlii 5 fr 8 § 2; fr 9 § 5). Naevius was answerable for this by an action on the case (*ib.* fr 9 pr), and, if he were interfered with, the praetor would protect him with a like action (cf. D. xlii 4 fr 14 pr; xliii 4 fr 1 sqq.). So that on Cicero's third head as a technical point, I think the argument does not come to much. But practically there seems to be a good deal. The circumstances of this taking possession were not those of an insolvent debtor, hiding from, or seeking to defraud, his creditors. The possession was disputed by Alfenus on Quinctius' behalf from the first; the actual occupation of Quinctius' property by Naevius was ridiculously incomplete; no other creditor was with Naevius; the regular procedure and preliminaries for a sale

[1] The language of the edict was *possideri et proscribi* (Gai. iii 79): *bona possidere* in *Quinct.* 6 § 25; cf. 19 § 60; but it also has *in possessione esse* 27 § 84; cf. D. xlii 4 fr 2 pr; 5 § 2; 7 § 1; tit. 5 fr 9 pr. The two expressions are sharply distinguished in the edict on *damnum infectum* (xxxix 2 fr 7 pr).

had not been followed; there was really no fair ground for saying that the edict applied and that Quinctius could be regarded as a defaulting and undefended absentee. One wonders what were the facts of possession during the eighteen months after Quinctius' return from Gaul (§ 30).

It is noticeable that in the passage of Paul above referred to (D. xli 2 fr 3 § 23) we are told that Q. Mucius actually counted such an occupation (*rei servandae causa*) among the kinds (*genera*) of possession. Paul characterises Mucius' view as *ineptissimum*. But Mucius very possibly was merely making a formal enumeration of *genera possessionis*, based on the use of the word *possessio*, and may have afterwards distinguished some classes of possession as leading to usucapion and others as not doing so (cf. Pernice *Lab.* II² p. 427). Whether the difference of his treatment from Paul's was formal or substantial, Cicero may have been led by his classification and the actual use of *possidere* in the edict into making this point.

6. On the hasty seizure of the Gallic land Cicero's language is noticeable. He says such a thing was unheard of, it was wicked, but he hardly commits himself to the assertion that the possession was bad in law. The point was apparently a new one. It was certainly a great risk for Naevius to run, but as he actually got the praetor's order, and got it before the eviction in Gaul took place, can it be said that in this respect he did not *possidere ex edicto*[1]? I do not think so. How was the praetor, in a matter in which it was important to make the time as short as possible, to fix precisely a time for the communication of his orders to different parts of the Roman world? Nor was there any requirement or practice, so far as we know, of producing a warrant from the praetor or an attested declaration of the issue of the order when

[1] Compare Ulpian's words in another matter: *Totiens ei sua praesumptio proficit quotiens concurrit cum veritate* (D. xxix 2 fr 30 § 4; cf. xxxiv 5 fr 15). A stipulation between persons at Rome for money to be paid on the same day at Carthage was held by some lawyers to be not invalid, if previous arrangements had been made in view of this stipulation (D. xlv 1 fr 141 § 4).

it was put into execution. But such precipitate action on Naevius' part would be taken into account by the praetor in any judgment he might have to form on the merits of the two parties' conduct; and if Naevius was not justified in his action, he was, as said above, liable to a suit *injuriarum* (Gai. iii 220; cf. D. xlvii fr 10 fr 13 § 3; fr 15 § 31).

7. As to the eviction of Quinctius personally the words of the edict given by Cicero are *Dominum invitum detrudere non placet*[1]. The praetor does not say *non licebit* in correspondence with the preceding directions. Still *placet* is a usual word for expressing decisions both of the senate and of others[2]. Much might depend on the conduct of the owner at the time. If he acquiesced in the bailiff's presence and control, there would be nothing gained by turning him out. The occupation for this purpose would be valid and complete, notwithstanding his presence. But if he resisted, asserted his rights, and attempted to exercise control over the property or remove it from the place or from the control of the bailiffs, the praetor I expect would not object to his being put out. In our case it must be remembered the pasture and farm were common property of Naevius and Quinctius (*de saltu agroque communi a servis communibus vi detruditur* § 28; cf. §§ 79, 85), and any damage thereby suffered by Quinctius would be taken into account in an action *pro socio* or *com. div.* (D. x 3 fr 3), and the interdicts *de vi* and *uti possidetis* might also apply. Some injunction was probably the purport of the orders issued by C. Flaccus *imperator* to whom Quinctius appealed (§ 28). I assume that Naevius was not ejecting Quinctius in order to assert (irrespective of the insolvency proceedings) a claim to the exclusive property, for then the interdicts would clearly apply. But if Naevius proved

[1] So in the case of *damni infecti* D. xxxix 2 fr 15 § 20 *Si quis in possessionem missus nondum possidere jussus sit, an dominus decedere possessione debeat, videamus. Et ait Labeo non decedere, sicuti nec cum creditores vel legatarii mittuntur: id quod est verius*; § 23 *Ubi autem quis possidere jussus est, dominus dejiciendus erit possessione* (see *Introd. Just.* p. 56, above vol. I p. 513). Similarly one in possession *legatorum serv. causa, expellendi heredem jus non habet* (D. xxxvi 4 fr 5 pr).

[2] Keller treats this too lightly (*Sem.* p. 187).

that the slaves ejected Quinctius only in order to insure for the benefit of the creditors the control of the Gallic pasture and farm so far as Quinctius' share was concerned, then I think Cicero's argument on this head would go for nothing.

Cicero says that Quinctius was ejected by the slaves owned in common by him and Naevius. According to the law in the Digest, if a common slave remained in possession, Quinctius would retain possession through him (D. xli 2 fr 40 pr).

On the whole, if an opinion is justifiable on such one-sided and imperfect information, I am inclined to think Quinctius would win the wager, on the ground of his not having been a defaulter in the sense of the edict and having had till now no reasonable opportunity of meeting Naevius' claims on the merits. The appeal to the tribunes was justified by the result: it was plainly equitable that the whole case should be discussed in Quinctius' presence. But on some of the other points, the proceedings of Naevius might probably be found technically defensible. What answer Naevius might have had on the merits, what light he could have thrown on Quinctius' conduct as justifying his imputation of fraudulent absence, we are wholly ignorant.

B. Cicero *pro Roscio Comoedo*[1].

This speech has come down to us in a mutilated condition. Something considerable apparently has been lost both at the commencement and at the end. The speech, as we have it, contains no distribution of the matter, so that we are unable to form any trustworthy opinion as to how much has been lost, though we have no doubt lost more than a rhetorical introduction and a rhetorical peroration. We begin and end in the midst of an argument.

In these circumstances it is more than usually difficult to construct a tenable account of the case. The difficulty is increased by the frequent mention of different sums of money intimately connected with its very substance, whereon however the MSS. maintain no consistent story. I shall adhere closely to the amounts and figures given in Orelli's second edition, without professing any confidence in their correctness, but thinking this to be a safer course than to make conjectural alterations in accordance with some particular theory.

The date of this speech is uncertain. Some contend for the year 77 or 76 B.C., some for 68, others for 66. See below, p. 502.

In the first part of the speech as we have it (§§ 1—15) Cicero deals with the conditions required by the special form of action adopted by the plaintiff. In the second part (§§ 16—56) he goes into the merits of the case in order to vindicate the character and justify the conduct of the defendant, Roscius, for

[1] The most important discussion of this case is by Jul. Baron in *ZRG.* xiv 166 sqq. (1880) republished with slight alterations in *Die Condictionen* § 11 (1881). See also Bethmann-Hollweg *Röm. Civilprozesz* ii 804 sqq. (1865); P. Krüger (giving Keller's view) *ZRG.* vii 237 (1868); Ruhstrat *ZRG.* xvi 34 sqq. An earlier book is an edition by C. A. Schmidt (1839); and there is an essay by Puchta (1832) in *Rhein. Mus.* v 316=*Kleine Schriften* p. 272. Comments will be found also in the books of De Caqueray, Gasquy, Costa, and Greenidge cited above.

whom he is pleading. The facts of the case are mainly to be found in this second part, especially in § 27 foll. Saturius was advocate for the plaintiff (§§ 22, 51). Of him we know nothing. C. Piso was judge.

C. Fannius Chaerea, plaintiff, had bought a slave of the name of Panurgus ('Rascal'), and agreed with Roscius, the great actor, to train him for the stage, and to be partner with him in the slave and his earnings (§ 27)[1]. As nothing is said on the point, they would no doubt have equal shares. Cicero puts the value of the slave untrained at a maximum of 4000 sesterces, and the additional value produced by Roscius' training at 100,000 sesterces. Nor was it merely training. The knowledge that he was Roscius' pupil secured him the favour of all those who were admirers of Roscius. He began a successful career, which however was brought to an end through his being killed by Q. Flavius of Tarquinii. The partners brought an action (*damni injuria* sc. *dati*) under the Aquilian statute against Flavius for damages, which would be reckoned at the greatest value the slave had in the preceding year (§ 32; Gai. iii 210), and this amount would be doubled, if the claim were contested (Gai. iv 171). Roscius appointed his partner, Fannius, as his attorney (*cognitor*) to conduct the case for him. Issue was joined, but before judgment Roscius came to an agreement with the defendant Flavius, and accepted some land as the price of withdrawing his claim. What was the value of the land at that time we are not informed. The land-market was greatly depressed, probably on account either of the social war or of the civil war between Marius and Sulla (the time is uncertain). The farm was not cultivated and there was no homestead. By the time this speech was made, a homestead had been erected and the farm well cultivated. Fannius declared it was worth, according to most editors, 100,000 sesterces, according to Mommsen 600,000[2]. At any rate it seems clear that Roscius, as things turned out, had made a good settlement. The question

[1] Some cases more or less resembling this are discussed in D. xix 5 fr 13 § 1.

[2] Hermes xx p. 317 reading ɔɔɔIↃↃↃ = 600,000 (500,000 + 100,000) sesterces.

was however disputed, whether he had settled for his own share only or for both partners (§ 34). Fannius maintained the latter; Cicero declares that the former was the fact, and was the only hypothesis consistent with all the proceedings. This took place fifteen years[1] before the present speech (§ 36).

What further happened at the time or indeed for some years afterwards, we do not know. The state of tumult in Italy, and especially in Rome and the neighbourhood, may very likely account for much delay. The next thing of which we hear are some legal proceedings about three years before the present speech. Fannius appears to have brought a claim against Roscius for the same sum[2] of money that he claims now, and, though professing to rely on his books to support the claim for a sum certain, consented to go to arbitration, either under an order from the praetor or more probably by agreement. C. Piso was arbitrator, apparently at the proposal of Fannius (§§ 12, 26). We know nothing more of Fannius' suit on this occasion, than that it was not an action *pro socio* (§ 25), nor do we know any of the proceedings except the result. The matter was arranged. According to Cicero, Piso requested Roscius, in consideration of Fannius' exertions as his attorney, and his trouble in attending the trial, to pay him 100,000 sesterces[3], on condition that Fannius bound himself to give Roscius one half of anything Fannius might recover from Flavius (§ 38). Fannius' advocate appears to have put the matter as a bargain[4] which Roscius

[1] Some editors alter xv to iv; but this would scarcely agree with *re vetere* (§ 38) and *decisionem veterem* contrasted with *repromissionem recentem* (*i.e.* three years ago) in §§ 39, 41.

[2] *De hac pecunia, de his ipsis HS* IↃↃↃ (§ 12). It was the same amount, being half of the value of the land received from Flavius, but not the same claim which he makes now and which is for the second instalment of the amount promised by R. under the compromise.

[3] Cicero denies that there was any formal stipulation binding Roscius: on the other hand Roscius did stipulate that Fannius should give him half of his expected gain. This last is the *restipulatio* and *repromissio* in § 37 where the words of the latter are given and inaccurately called *restipulatio*. (Müller with other editors conjectures 15,000 for 100,000 sesterces.)

[4] In § 25 *cur non nominas?* is unintelligible to me and probably corrupt, as the text is two lines before. A little higher I think *non* in

entered into in order to prevent an adverse decision of the case. The two modes of viewing the matter are quite compatible with one another, if allowance be made for advocates' language. But Cicero describes the arrangement as one which was welcome to Fannius[1]. He came unasked to Roscius' house; he gave him the undertaking requested; he begged Roscius to pardon him for having been so precipitate, and to inform the judge of the acceptance of the proposal, and he promised not to appear again, as he had no further claim on the partnership. Roscius gave notice to the judge accordingly, and Piso acquitted him (§ 26).

It is the arrangement so made for settlement of the partners' disputes which is sought to be enforced by Fannius in the suit in which Cicero makes this speech. Incidental mention occurs of a first payment having been made by Roscius, and of a second payment being due (§ 51). We do not know when payment was expected or why Roscius did not pay. But in the course of his argument Cicero states that Fannius had gone on with his suit against Flavius and had recovered from him 100,000 sesterces (§ 41). According to the arrangement, Roscius was to have half of whatever Fannius obtained, and as Fannius appears now to be claiming 50,000 sesterces as the second and final instalment from Roscius, we may conjecture that Fannius' success was so soon after the arrangement with Roscius, that the latter practically set one against the other and declined to pay Fannius a sum equal to that which Fannius was also to pay him. True, the fact of Fannius' having recovered these damages from Flavius is denied by Fannius' advocate (§ 41). Flavius was dead, and Cicero offers as proof a statement made by Cluvius who was judge in the case, in the hearing of two senators whose declaration is read in court. This was a usual

proprium non erat judicium is right, though only Müller retains it. Cicero says, 'In this case it was not for an *arbiter* to give a strict verdict any more than for a *judex* to regard all the equities.'

[1] If the figures are right, Fannius had got in cash or promise everything, and Roscius was left with nothing. Roscius is represented in § 23 as not eager for money; perhaps also the land was becoming more valuable.

mode of taking evidence when the witness for some reason was unable to attend in person (cf. Quintil. v 7 § 1; *Dial. de Orat.* 36 fin.). Cluvius apparently made this statement in ordinary conversation with his friends and of course was not sworn, but Cicero argues that he was a man of integrity, selected as judge by Fannius along with Flavius, and therefore entitled to credit, with no motive for making a misstatement, and not likely to tell a lie to please Roscius, even if Roscius, whose high character was well known and was inconsistent with such an action, had used any blandishments for the purpose (§§ 42—51).

The arrangement which closed the arbitration three years before is difficult to understand. If Roscius had handed over the whole of the money suggested by Piso at once, it would have been natural for Fannius to give a binding promise (*repromissio*) to Roscius while Roscius made no such binding promise to Fannius. He did very possibly pay half at once, and both parties may have expected Fannius' suit against Flavius to follow shortly and to render further payment unnecessary. At any rate Cicero challenges any evidence of such a stipulation by Fannius, and promise by Roscius, and in fact asserts that there was none (§§ 13, 14). On the other hand he argues for some time against Fannius' assertion that he has a book entry to establish his claim. A properly made book entry would have answered Fannius' purpose as well as a stipulation, though why this method of putting Roscius under a strict obligation should have been adopted is not clear. As however Roscius' promise was absolute, a book entry was possible. Fannius' promise being practically conditional on success in his suit against Flavius, did not admit of book entry (§ 37; cf. Vat. 33b). On the evidence of such a book entry against Roscius something will be said later on.

Apart from any strictly technical repulse of this action for want of legal ground, Cicero proceeds to shew that there is no claim on the merits. Roscius settled the lawsuit against Flavius only so far as his own share in the dead Panurgus was concerned. He left Fannius' claim untouched, and Fannius had as a matter of fact got full compensation in his turn from Flavius. Fannius contended that whatever Roscius got ought

by partnership law to be divided between the partners. With Cicero's argument against this contention the speech is broken off. But the substance of it appears to be given.

First, Cicero argues, each partner, like each coheir, is master as regards his own share, and no one can sue for more than his share, unless duly appointed attorney (*cognitor*) for another (§§ 52, 53, 55). Secondly, Fannius was appointed by Roscius to be his attorney in the first suit against Flavius, which fact shewed that Fannius could otherwise have acted only for himself (§ 54). Thirdly, if Roscius had not settled only for himself, Flavius would have justly demanded that Roscius should give the usual security against any further claim in the matter of Panurgus (*amplius neminem petiturum*, § 35: see p. 383) Flavius was fully aware of Fannius being partner in Panurgus, as issue had been joined in the suit between them (§ 35). Fourthly, the agreement, for Roscius to have a moiety of anything Fannius might recover in the second suit from Flavius, shewed that without such agreement one partner had no right to share in the gains of the other, if he dealt with his own share only (§ 56). Lastly, the successful prosecution of his suit by Fannius shewed that Roscius had in fact left Fannius' share and claim untouched (§ 55).

It is plain that the conduct of Roscius in making a separate settlement with Flavius is at the bottom of the present dispute. Had he the right so to act? and is Cicero's comparison of the position of a coheir justifiable? Both Baron and Bethmann-Hollweg deny the latter, and are, to say the least, not satisfied on the former head. Baron however clears Roscius on the ground that the partnership was dissolved by the death of Panurgus, and that no new partnership for obtaining compensation had been formed (l.c. pp. 127, 150). Bethmann-Hollweg points out that an heir lies under no obligation to his fellow heirs, and is master of his share of the inheritance without regard to others, while a partner has to look to what good faith and mutual regard may require (*CP.* ii. pp. 825–6).

I do not think there can be any doubt that Cicero, not only as Baron admits (p. 149), calls Roscius and Fannius partners

but also treats them throughout the speech as being partners, both while Panurgus was alive and after his death. It is true that *socii* is a term applied in Roman law to persons who by a will or other cause are tenants in common of the same thing, as well as to persons who have voluntarily entered into partnership relations (Cic. *Quinct.* 16 § 52, 24 § 76 contrasting *voluntaria societas* with *hereditaria societas*; D. x 3 fr 4 § 3; 6 § 12; 8 §§ 3, 4, *etc.*). But it does not seem necessary to restrict Cicero's meaning in some parts of the speech, whereas generally *socii* means partners entitled to and governed by the action *pro socio*. Baron's discussion appears to me to be somewhat affected by two mistakes. First he brings into the case the rule of the XII tables that *nomina ipso jure divisa sunt*[1] and hence infers that a partnership in a debt is inconceivable, and only a partnership in collecting a debt is possible (l.c. p. 149). But the XII tables are speaking only of inheritance, and no doubt the action *fam. ercisc.* did not, usually at least, regard debts (D. x 2 fr 2 § 5; fr 25 § 1); one pound of money owed is as good as another pound, and there is no need for a judge to make a division. But the action *pro socio* did regard debts as well as other forms of property (*actio pro socio nominum rationem habet*, D. xvii 2 fr 43). Strictly speaking, though *prima facie* each is entitled to his share of debts as of other property, the actual division of a particular debt is not a necessary consequence of the respective shares in the partnership: the debts are merely items in the general account between them. And further the partnership formed between Roscius and Fannius was a partnership in Panurgus and not merely in his professional career; and it therefore covered not only the produce of his earnings when alive, but the substituted produce arising from the mode of his death. The *actio pro socio* was certainly required to deal with the doings and negligences, the gains and expenses of partners on the subject-matter of their agreement, and was not put out of

[1] Baron elsewhere also gives an unrestricted application to this rule, *e.g. Institut.* § 117, 3; *Pand.* §§ 244, 245 (pp. 447, 448, ed. 9). Cf. Savigny *Oblig.* § 31.

court immediately on the death of a slave who was the object of the partnership (cf. D. ix 4 fr 10 arg.). That would, I think, be pressing such words as we find in D. xvii 2 fr 63 § 10 and fr 65 § 10 beyond their meaning. Such cases as the sinking of a ship by act of God, or the natural death of a slave, or the collapse of an *insula* might be in point and justify the partnership being considered at an end. The case of Panurgus is different: there was a continuing joint interest, *finis negotio non positus est* (fr 65 § 10 above). Certainly Cicero[1] presumes that an *actio pro socio* was or had been possible in our case (see § 25), and though not a jurisconsult he knew, I expect, a great deal more law than Baron credits him with, and I should readily take his word if he spoke as lawyer, not as advocate. I admit however that we cannot rely on an advocate's looking to law only or stating it impartially.

Baron's second mistake is in supposing, very naturally, the words *in societate dissoluta*, § 38, to contain an assertion by Cicero that the partnership was already dissolved at the time of the settlement proposed by Piso in the arbitration suit. But, if the passage be read carefully, it will be seen that these words are only part of an *argumentum ad hominem*. 'If,' says Cicero, 'what you say is right, that Roscius settled 'with Flavius for the whole of the partnership claim on account 'of the death of Panurgus, how could you expect to get any-'thing from Flavius? why should Roscius make a restipulation 'for what he had long ago actually got paid? What was Flavius 'to give you when he had already paid to Roscius all he owed? 'The matter of Panurgus' death was twelve years old (*in re 'tam vetere*), the business for which the partnership existed 'was now concluded (*in negotio jam confecto*), the partnership 'was consequently dissolved (*in societate dissoluta*): there could 'remain only the division between Roscius and Fannius of the 'land which Flavius, as plaintiff contended, had conveyed to 'Roscius for the joint account.' But Cicero denies that this

[1] I am glad to see Alf. Pernice (*ZRG.* xvi p. 99; cf. *Labeo* iii 224) differs from Baron, and thinks that Cicero simply neglects the "'fine legal "distinction' between continuance of the partnership and continuance of "the partnership action." Ruhstrat *ZRG.* xvi p. 47 agrees with Baron.

was the true account of the matter, and denies that the partnership was wound up before the arbitration suit (cf. § 25, *etc.*).

As regards Bethmann-Hollweg's strictures, I doubt whether Cicero has pressed the analogy between partner and heir too far, considering the particular point in dispute. There are important differences between their positions, but there are also important resemblances. An heir has a claim only to the division of the assets and fruits and expenses thereon according to the shares of the coheirs: a partner has this and in addition is responsible for his acts and negligences so far as the interests of his partners are touched and for sharing anything which has come to him on partnership account (D. xvii 2 fr 74; fr 67 § 1). But it is true as regards both that they can bring actions separately or together against outsiders, and if they obtain each his own share only, a partner cannot claim for this to be divided any more than an heir can. As regards outsiders the partnership was *nil*: outsiders were not bound by any mutual engagements between persons who made themselves partners; and a suit by partners against outsiders is a suit by each of the partners for his share (D. ix 2 fr 19, 20, 27 § 2), and only, if duly authorised, can one partner sue for his fellows or alienate their property or claims as well as his own. *Nemo ex sociis plus parte sua potest alienare* (D. xvii 2 fr 68 pr): and fr 62 *pro socio* (xvii 2) seems expressly in point: *meae dumtaxat partis pretia perceperam, neque interesse utrum per se partes vendidissem an communiter cum eo qui reliquas partes ad se pervenire diceret. Alioquin eventurum ut etiam si duo socii rem vendiderint unus quisque (ejus) quod ad se pervenerit partem alteri societatis judicio praestare debeat, etc.* Whether other circumstances existed to give a countervailing claim to the other partners is a matter which could only be properly entertained in an *actio pro socio* (cf. D. *ib.* 63 § 9).

Some expressions at the end of 9 § 26 and beginning of 10 § 27 should here be noticed. Plaintiff talks of 'fraud and theft'; 'Roscius had made a bargain to avoid condemnation.' Why, asks Cicero, should Roscius have been afraid of being condemned? The answer given is *Res erat*

manifesta: furtum erat apertum. To which Cicero pertinently replies *Cujus rei furtum factum erat?* What was the chattel he stole? Plaintiff replies with a detailed history of the partnership, but we hear no more of the 'theft': what appears to be intended is Roscius' having, as plaintiff contended, settled the whole of the partnership claims and kept the proceeds to himself. Cicero fully admits *Roscium, si quid communi nomine tetigit, praestare debere societati* (12 § 35). But for theft we require physical handling of a moveable corporal object. The damages were not paid in cash but by conveyance of a farm (12 § 33). Roscius' entry on the farm was no act of theft, for *fundi furtum non fit.* But if he took any produce from the farm beyond what was his own share, he would no doubt be chargeable with theft, provided that the farm was not his own but common to him and plaintiff, and that he took the produce with the intention of appropriating it to himself (D. xxii 1 fr 25 pr; xlvii 2 fr 25). And the action *furti* could be brought against a partner as well as the action *pro socio* (D. xvii 2 fr 45, 51 pr). It does not appear that plaintiff had as yet sued Roscius for theft, and the bargain made under Piso's advice would presumably bar it for the future. (Baron (p. 127) treats the charge of theft to be merely rhetorical vituperation of Roscius' conduct and not meant literally. Bethmann-Hollweg (p. 819) thinks it possible the *condictio* now brought by plaintiff was a *condictio furtiva*: for which view there seems to be no ground.)

If indeed it could be shewn that Roscius had purposely concealed his settlement from Fannius, or had obtained some unfair advantage over him, Fannius might reasonably have called him to account (see the general reasoning in D. xvii 2 fr 65 §§ 3—6). Ruhstrat (*ZRG.* xvi 44) supposes Flavius to have made proposals for a settlement to Fannius which Fannius rejected, on account of the land being in his opinion an inadequate compensation. It seems to me more likely that Fannius had in those stormy times been compelled to leave Rome for a period or was otherwise inaccessible to Roscius. But no such suggestions are made by Cicero, and with only this torso of

Cicero's speech left us it is useless to make conjectures. However that be, unfair separate action was a matter for an *actio pro socio,* and the present suit is certainly not that. Cicero expressly reproaches Fannius for not having brought such an action (§ 25). And this reproach appears to make it impossible to suppose that the *arbitrium* which took place three years before could have been the regular *arbitrium pro socio.* It must have been, as Baron contends[1], an informal arbitration agreed on by the parties (*ex compromisso* § 12). Nor is the fact (mentioned by Cicero) that the decision of the arbitrator was given in the absence of Fannius any objection to this view. In both kinds of arbitration the rule was that the parties should be present at the decision (cf. D. iv 8 fr 27 § 4, *etc.*; Paul v 50 § 5). In our case the absence was agreed on by the parties, and there could be little risk of objection to the arbitrator's proceeding (cf. Cod. vii 43 fr 1, 2). Had it been a formal *arbitrium pro socio,* it could not have been brought a second time, nor could a *condictio* be brought either (D. xii 2 fr 28 § 4; Pernice *Labeo* iii 225), and therefore on this ground also Cicero's reproach would have been pointless.

The present action is undoubtedly a *condictio certae pecuniae* (cf. Gai. iv 19), and it is accompanied by a wager for a third part of the damages (*Pecunia petita est certa; cum tertia parte sponsio facta est* § 14). This characteristic identifies it with the *actio pecuniae certae creditae* (described by Gaius iv 13; 171). And we know from Gaius also (iii 124) that *pecunia credita* at least in the *lex Cornelia* (and probably in other matters) was taken by the lawyers to include not only money lent, but all money which was the subject of unconditional obligation. The formula would be: *Si paret Q. Roscium C. Fannio* IↃↃↃ *HS dare oportere, Gai Piso, Q. Roscium C. Fannio quinquaginta milia sestertium condemna: si non paret, absolve.*

The amount claimed, if the MSS. are right, was 50,000 sesterces, and is said to be the same amount about which the

[1] One of Baron's arguments is based on *repromittive* in § 12. This is the conjectural reading of Orelli's first edit. The MSS. have *repromittique.*

friendly arbitration had already taken place (§ 12). That arbitration (as already mentioned p. 488) was settled by Piso's requesting Roscius to pay Fannius 100,000 sesterces, of which he actually paid one half. It looks as if we had to allocate that half to remuneration for Fannius' trouble and regard the other 50,000 as Fannius' share of what Roscius received, though why Roscius should have nothing left for himself is a problem. I don't trust the figures.

This being a *strictum judicium* would not admit of Roscius' pleading his claim against Fannius as a set off to Fannius' claim against him (Just. iv 6 § 30: Gaius iv 61 is mutilated).

Two points still await discussion: (1) the ground for action alleged by Fannius; and (2) the relation of the second part of the speech (§ 15 to end) to the first part.

(1) It appears that the formula stated only the amount due, and not the ground of obligation. It was an action for ascertained debt, and the proof of the amount of the debt and of the mode of contraction would lie together in a nutshell. There were, as Cicero says, only three grounds on which a definite sum of money could be claimed (*i.e. inter vivos*, legacy being out of the question): viz., money paid down, money promised by formal stipulation, money debited in the ledger[1]. Proof of any one of these was sufficient without discussion of the transactions which led to it. *Plus petere*, 'excessive claim,' was of course fatal, and the addition of the wager made the consequences of failure more serious (§ 10). But there were advantages in the form of action (see p. 71).

If Cicero could shew that none of the three grounds, on which this form of action rested, existed in this case, he had a complete technical answer to the action. According to him Fannius admits that he never paid down the money; he produces no evidence whatever of any stipulation (§ 13); he relies on an alleged book entry in his *adversaria* (§ 5). The *adversaria* were something in the nature of a day-book or waste-book, loose papers on which entries were made as the business was done day by day. From these the ledger would be posted up monthly or thereabouts (§ 8). It is obvious that

[1] Compare the language of the Baetic inscription given on p. 101.

such tablets might contain much that was of slight or temporary importance, and might more easily admit insertions or additions at a later time, than would a ledger with its regular order and definite headings. The custom of accepting book entries as a ground of obligation evidently sprang from regular commercial business duly recorded in a book intended for the owner's own permanent use and reference. If the entry of an agreed amount of money debited against another is found only in the loose sheets of a day-book and not in the ledger, it would naturally be supposed to be a note for temporary purposes, and not intended (unless eventually entered in the ledger) to be set up as a legitimate obligation (§§ 6, 7). We have only Cicero's argument on the matter, but reason seems to be with him. Such a ground for not entering in the ledger as that suggested by Fannius[1], viz. that Roscius did not wish the matter to be known, is hardly worth discussing. If true, it amounts probably to a statement that no legal obligation was intended and only a friendly understanding took place (§ 9).

Another essay contains a full explanation of *litterarum obligatio*. Baron seems to have no definite conception of it (see also his *Institutionen* i § 119)[2]. That Fannius could have maintained his book-entry against Roscius to have been in the books of Perperna and Saturius seems to me incredible as contrary to the usage of merchants and the nature of the contract. What was the reason for demanding production of the *tabulae* of Perperna, who was on the bench in this case (§ 22) and of Saturius, who was Fannius' advocate, I do not attempt to guess. No hint is given what the *tabulae* contained.

(2) The second part of the speech is according to Cicero intended not to defend Roscius from the technical suit (that was sufficiently done by Cicero's shewing that no ground for the action had been proved by Fannius) but to vindicate the

[1] Kappeyne van de Coppello (*Abhandl.* p. 214) takes *rogatus eras ne referrem* (§ 9) as a positive statement that Roscius was unwilling that this should be entered in the *codex* and thus become an obligatory debt. It seems to me to be merely an allegation of Fannius.

[2] I have dealt with some of the passages quoted by Baron and others on this matter at the end of the essay on *litt. oblig.*

character of Roscius from foul aspersions of fraud. In fact Cicero demurs to the action: admitting all that Fannius says to be true, he declares no cause of action had been made good: no money paid down, no stipulation, no valid book entry. But Cicero is not content that a client like Roscius should lie under the smallest suspicion of breach of faith, or that a judge like Piso should think unfavourably of his client, even though he decided for him, or that such assessors as were present on the bench[1] should hear only a bare technical defence. He volunteers to shew that Roscius is open to no charge whatever; that all suits which could be brought against him, whether strict or wide, whether statutable or praetorian, nay that all charges *in foro domestico* before a tribunal judging of good conduct and morality only are alike capable of complete defence and refutation, as much as if they were all legally involved in the present issue. And accordingly he proceeds to discuss the whole dispute and set forth its history, so as to make clear that Roscius' conduct throughout had been legal, honest, and honourable (§ 15).

Baron takes these last words *perinde ac si in hanc formulam omnia judicia legitima, omnia arbitria honoraria, omnia officia domestica conclusa et comprehensa sint* as referring to the abstract character of the *condictio certi*. According to him the basis of claim was not declared before the praetor and was not stated in the issue for trial, and any basis of obligation might on the trial be put forward by the plaintiff. 'Fannius alleged 'two such bases *pecunia credita* formed by literal contract, and 'partnership. He had entered into a *sponsio*, and if he proved 'his book entry he won his wager, if he did not prove it, he 'had the other string to rely upon, and consequently Cicero 'was bound to address himself to the obligation of partnership, 'as he does in the second part of the speech.'

The much discussed passage in the Digest xii 1 fr 9 pr[2] *Certi condictio competit ex omni causa, etc.* Baron (l.c. pp. 131—135, 145) takes to mean that, besides any special action,

[1] So rightly Schmidt *ad loc.*, comparing Cic. *Quinct.* § 5 *Quos tibi advocasti.*

[2] On its probable interpolation see Pernice *ZRG.* xxvi 252.

and concurrently therewith, a plaintiff might always bring a *condictio certi*, and that the requisite certainty might be obtained, if necessary, by an estimate made at plaintiff's risk. In the present case Fannius on the ground of partnership could only claim half the land which Roscius had got from Flavius, and consequently had to make an assessment of its value; which he put at 100,000 sesterces. But Baron admits that no such right of getting certainty by independent estimate is ever mentioned in these cases, except in the Basilica, *e.g.* ii 596 f.; and it is generally considered a post-Justinian practice. Secondly, if such were the practice in Cicero's time, would he not in some way have alluded to it in this speech, particularly in §§ 32, 33? It is I think quite inconsistent with Cicero's language in §§ 13, 14. Thirdly, I do not agree, any more than do most lawyers[1], with Baron's interpretation of fr 9 *de reb. cred.* even supposing that we have there Ulpian's words and not Tribonian's. I take the law simply to mean that any business which gives rise to one person's being bound formally to make over to another (*dare oportere*) a liquidated amount of money or a clearly ascertained thing may form a basis for *condictio certi*. Had a slave, instead of land, been delivered to Roscius, when he ought by a definite obligation to have been delivered to Fannius, and had died, a *condictio certi* would have been allowable under the law as laid down in the Digest—quite a different case from ours. The certainty must either be found in the business itself or arise from a stipulation, *etc.* made in relation to it.

I am inclined to think Cicero to have been right in saying that the issue raised by this action depended on one of the three grounds of obligation being shewn, and that in Roscius'

[1] See for instance Karlowa *RG.* ii p. 764; Pernice *Labeo* iii p. 228; Kappeyne van de Coppello *Abhandl.* p. 220. Bekker vigorously rejects the possibility of Baron's view (*ZRG.* xvii 49 sqq.; see also his *Actionen* i 136). Keller takes a similar view of this fragment to Baron's, provided the obligation was originally one for payment of money, but he holds this to be one of the latest developments of the Jurists and therefore long after Cicero (*Civ. Pro.* p. 440, n. 107). Cogliolo (Padelletti p. 330 i) accepts Baron's view. But see Girard *Manuel* p. 599 ed. 2.

case it depended on the validity of book entry in *adversaria*. If Fannius' contention were negatived, the judge ought to pronounce in Roscius' favour. But Cicero was too good an advocate to be content with arguing a dry point of law. If Fannius was substantially in the right, though mistaken in bringing this action or unfortunate in his proof, the judge might hesitate to condemn him, and a *non-liquet* might leave Roscius still exposed to suit and still under an imputation of sharp practice or dishonesty. Piso had been concerned with the case before; but would be none the worse for having his half recollection refreshed and perhaps recoloured. Besides a Roman *judex* was not a jurisconsult called to decide an abstract question, but one sworn to do justice on a particular issue between man and man, and however strict the issue might be, he would more readily form his opinion and deliver his decision, if he thought the merits as well as the law were against Fannius[1]. Cicero's treatment was calculated to secure this without throwing any legitimate doubt on his contention that the law was on Roscius' side.

We do not know what were really the respective merits of Roscius and Fannius' conduct or what was Piso's decision. Cicero's speech has at any rate had the effect of surrounding Roscius' name with eulogies which posterity will be slow to believe are due only to the boldness of the advocate or to the popular appreciation of defendant's qualities as an actor.

P.S. R. v. Mayr in a recent book (*Die Condictio, etc.* 1900) holds[2] that the arbitration mentioned in §§ 12, 26 was an *arbitrium pro socio*, and that the latter part of Cicero's speech is intended to shew that under a different *formula* Fannius is raising again a matter already decided and thereby entitling Roscius to an *exceptio rei judicatae*. Even if the former proceeding was a non-judicial arbitration, he would be entitled to an *exceptio pacti* (D. iv 8 fr 13 § 2), so that the character of the arbitration is not of great moment (Mayr p. 60). He

[1] See the passage from Quintilian quoted below, p. 530.

[2] Throughout his discussion Mayr calls the speech *pro Q. Roscio Comoeda* (sic !) *oratio*.

conjectures some (impossible) supplements in § 25, which would clearly express Cicero's object to be the establishment of such a plea. Against Bethmann-Hollweg's objection (*Röm. C. P.* ii 809) that *quantum aequius meliusve* § 85 does not suit an arbitration enforced by a *stipulatio poenae* (see above, p. 320) the answer seems ready that all arbitrations are based on the desire to get a free and equitable adjustment of the dispute, and the stipulation comes into play only on this adjustment being disobeyed. Another objection (with which Mayr agrees, pp. 59, 60), that an arrangement putting an end to the arbitration is incompatible with an acquittal by the judge (§ 26), is I think as readily answered by the simple supposition that an acquittal by the judge was part of the terms of the arrangement, or that the language is only a loose description of the result.

Prof. Morris H. Morgan (in *Harvard Studies*, vol. XII (1901), which he has kindly sent me) discusses the date of this speech, and makes out a good case for the year 66 B.C. This date accords with the depression in the land market, at the time of Roscius' settlement with Flavius, being due to Sulla's confiscations (§§ 33, 37); and the judgeship of the *eques* Cluvius would then fall after B.C. 70, when the *equites* were no longer disqualified (see above, p. 322). And a date approaching the close of Roscius' career (he died *cir.* 62 B.C.) best suits the language of § 23. There is however a difficulty in the language of § 44 (*mea adulescentia*), which is hardly met by referring, as Bethmann-Hollweg does, to the words *defendi rempublicam adulescens* in *Philipp.* ii § 118. An old man looking back on himself at 42 may naturally call himself young 20 years ago, but Cicero after a dozen years of brilliant advocacy and holding the praetorship would hardly speak of his then age of 40 as *adulescentia.*

On the other hand if the depression is referred to the Social or Marsic War (B.C. 91—88), this speech would fall in B.C. 76—73; and consequently the judgeship of Cluvius, two or three years before, would fall during the period when *equites* were disqualified. Some writers try to overcome the difficulties of the earlier date by altering XV in § 13; see above, p. 488 n. 1.

C. Cicero *pro M. Tullio*[1].

This speech is supposed to have been delivered 682 or 683 U.C. = 72 or 73 A.C. As far as we can make out the story (in the present state of the MS. which is really only a series of fragments) the facts appear to be as follows. M. Tullius, the plaintiff, had in the district of Thurii an estate, which he had inherited from his father. It was adjacent to an estate formerly belonging to M. Claudius, a senator, who had bought it in good condition at a high price, and recently sold it to P. Fabius the defendant. Fabius had made money in some way while serving under the consul in Macedonia and Asia, and now gave Claudius half as much again, though the homesteads had been burnt and the land was waste. He became dissatisfied with his purchase and advertised it for sale. Apparently Fabius had bought it in partnership with Acerronius, and now persuaded him to buy the whole. In this district and conveniently close to Fabius' land there was a plot of 200 jugera, called the Populian Century which had been in the possession of Tullius' father, and still belonged to Tullius. Fabius seems to have included this in the quantity of land advertised for sale, and, in the absence both of Tullius and of Tullius' agent and farm bailiff, pointed out the bounds of the estate to Acerronius, but did not deliver him due (*vacuam*) possession of the Populian Century. Tullius had written to his agent and bailiff on the matter, and we may conjecture that Fabius was prevented by Tullius' slaves from doing so. Fabius now brings to his estate a number of bold and strong men and arms them. They go

[1] This speech has been edited with notes and essays by P. E. Huschke in I. G. Huschke's *Analect. Litteraria*, 1826 and by F. L. Keller in his *Semestria* vol. i. Explanations are given also in the works of De Caqueray, Gasquy, Costa, and Greenidge cited above. The speech itself was a long one: cf. Tac. *Dial.* 20 *Quis de exceptione et formula perpetietur illa immensa volumina quae pro M. Tullio aut Aulo Caecina legimus?*

about armed and brawl in the neighbourhood; amongst other things kill two slaves of Q. Catius Aemilianus, and keep the farms and roads in a state of constant warfare. Soon after Tullius comes to his Thurine estate. While he is there, Fabius walking about his (or Acerronius') estate sees a building in the Populian Century, and a slave of Tullius named Philinus there. 'What's your business on my land?' says Fabius. The slave said his master was at the homestead, and referred Fabius to him. Fabius takes Acerronius with him, comes to Tullius, and formally proposes, in order that the ownership of the land might be determined, either to eject Tullius or be ejected by him. Tullius says he will eject Fabius and will, as usual in such cases, make a formal engagement to attend trial at Rome. Fabius accepts and they soon part. But the next night just before daybreak, a numerous band of Fabius' slaves come to the building in the Populian Century, break in by force, attack the slaves of Tullius who were few and unprepared, kill them nearly all, and damage the roof and homestead. Of the slaves (who were valuable) one, Philinus, escapes though severely wounded and tells Tullius, who sends for his friends to advise him.

Tullius applies to the praetor Metellus, who directs an issue under the edict first proposed by M. Lucullus five years before for damage done by armed bands[1]. The pith of the issue is given in these words: *Quantae pecuniae paret dolo malo familiae P. Fabii vi hominibus armatis coactisve damnum datum esse M. Tullio.* The damages were laid by Tullius at a sum not told us, but which would form the maximum in the praetor's *formula*; and the penalty was to be fourfold the amount at which the 'Recoverers' who were to try the issue should assess the damage. L. Quinctius (*vir primarius*, as Cicero calls him, § 1) was advocate for Fabius.

Fabius fought hard before the praetor to get him to insert the word *injuria* in the formula (before *datum*?) and even appealed, but without success, to the tribunes of the *plebs* against the praetor's refusal. (A similar appeal is mentioned

[1] See above, p. 216.

in the speech *pro Quinctio* § 63.) He now complained of the praetor's unfairness in refusing to insert the word (§ 38).

Fabius admitted (1) that Tullius had suffered damage and that men had been killed, (2) that this was done by his slaves, (3) that it was done by force and by men armed for the purpose; but denied that it was done wrongfully (*dolo malo* §§ 24, 25, 31). Evidently his contention was that these acts were only in self-defence against the conduct and assaults of Tullius' slaves. He asserted that the land, on which the building was erected, was his (Fabius') land, and further alleged various charges or suspicious facts against Tullius' slaves; viz. that one of Fabius' slaves, who had been seen in company with Tullius' slaves, had disappeared; that a cottage of his had been set fire to by Tullius' slaves; and that Fabius was in fear of an attack from them. Cicero denies the allegations of fact, and adds that even if true neither they nor Fabius' fears were any adequate ground for such a murderous attack (§§ 54, 55).

Cicero's main argument is to establish that the admitted facts were sufficient to insure condemnation. He argued that the whole intention of the edict was to put down violence by armed slaves, without inquiry whether there was any justification for their conduct.

1. This is shewn by the refusal of the praetor to insert *injuriā* in the formula. The object of obtaining the insertion was to enable the question of justification to be argued. The praetor, according to Cicero, said that there could be no justification for armed violence carried on by a band of slaves. For ordinary violence the *lex Aquilia* gave adequate remedy, and allowed a plea of justification to be raised: damage under that statute must be *injuria datum, i.e.* wrongfully caused: but under Lucullus' edict the case was different. Brigand-like violence by slaves must be suppressed: to get a prompt decision the court was to be not a single judge but *recuperatores*: the charge was laid not against specified individuals but against the whole band: the penalty was to be fourfold, not twofold, the damage; and *injuria* was left out (cf. §§ 10, 11, 38—42). (Cicero compares the two interdicts *de vi* (§ 44), and *de vi*

hominibus armatis to point out how much more severe the law was when armed men were brought to the decision of a legal question; but the MS. is mutilated (§ 46) and the general argument can be better dealt with in the speech *pro Caecina*.)

It is not difficult to imagine what Quinctius' answer was to this. He no doubt urged that the reason why the praetor refused to insert *injuria* in the formula, was because *dolo malo*, which was in the formula, included it: and that why he pressed the insertion of *injuria* was in order to remove all chance of cavil on Tullius' part, not because *dolo malo* did not fully permit him to plead a justification for the violence under the actual circumstances.

2. Cicero accordingly deals at length with the meaning and purpose of *dolo malo* in this formula. It was, as he contended, an addition in favour of the plaintiff, and not in favour of the defendant. It made a conviction possible where a *familia* had contrived and prepared the attack, but had not themselves borne a hand in it. It made a person liable, if it was done *consilio et opera ejus*, as well as if he had done it in person[1]. *Vis* does not include *dolus malus*: but *dolus malus* includes *vis*[2]. Every part of this proceeding was characterised by *dolus malus*, both their forming the plan, their taking arms, their selecting time and place, their breaking into the building, their killing the slaves, their pulling down the roof. And how then can it be said that the assault as a whole was not done *dolo malo*, when those words are strictly applicable to every incident separately? (§§ 26—34).

3. Quinctius here took a technical objection. He insisted that *dolus malus* cannot properly be applied to a *familia* (§ 35). Presumably his reason was that *dolus malus* implies a mind, and that a *familia* as a whole has no mind (like the old argu-

[1] Cf. D. xlvii 2 fr 50 §§ 1—3.

[2] Compare Ulpian in D. xlvii 8 fr 2 § 8 *Qui vim facit dolo malo fecit, non tamen qui dolo malo facit utique et vi facit. Ita dolus habet in se vim, et sine vi siquid callide admissum est aeque continebitur. ib.* § 2 *Dolo malo facere potest non tantum is qui rapit sed et qui praecedente consilio ad hoc ipsum homines colligit armatos ut damnum det bonave rapiat.* (But the edict there is somewhat wider than in our speech.)

ment that a corporation has no conscience[1]). To this Cicero replies that the argument would prove not merely that Fabius should be acquitted, but that no conviction against a *familia* was possible, and the edict would thus be reduced to an absurdity. What more he said the mutilation of the MS. prevents our knowing. But it may be supposed that he argued that though sometimes an expression like *familia* referred to the body of slaves as a whole, yet on other occasions it was merely a short phrase for the individuals, one or more, who composed it. Thus Ulpian says on this edict (D. xlvii 8 fr 2 § 14) *Haec actio familiae nomine competit, non imposita necessitate ostendendi qui sunt ex familia homines qui rapuerunt vel etiam damnum dederunt. Familiae autem appellatio servos continet, hoc est eos qui in ministerio sunt, etiamsi liberi esse proponantur vel alieni bona fide nobis servientes.* And again D. L 16 fr 195 § 3 (quoted by Huschke p. 151) *servitutium* (*servitium* conj. Mommsen) *solemus appellare familias, ut in edicto praetoris ostendimus sub titulo 'de furtis' ubi praetor loquitur de familia publicanorum. Sed ibi non omnes servi sed corpus quoddam servorum demonstratur huius rei causa paratum, hoc est, vectigalis causa, alia autem parte edicti omnes servi continentur, ut 'de hominibus coactis' et 'vi bonorum raptorum'; item, etc.*

4. Such a construction of the edict and formula as Cicero puts forward was based[2], Quinctius appears to have argued, on an exaggerated respect for human life, which is not in harmony with other legislation. The laws of the XII tables sanctions killing a thief at night, and, if the thief defend himself, even in the daytime. Another law allows the killing of one who has struck a tribune to go unpunished (§ 47). These laws shew that the mere fact of killing is not enough to ensure condemnation: the further question must be considered, whether the killing was justified (§ 49). Cicero replies that it was

[1] Cf. D. iv 3 fr 15 *An in municipes de dolo detur actio dubitatur. Et puto ex suo quidem dolo non posse dari, quid enim municipes dolo facere possunt?* xli 2 fr 1 § 22 *Municipes per se nihil possidere possunt quia universi consentire non possunt.*

[2] Keller (p. 643) rightly refers to Cicero's own language in the *Pro Milone* §§ 7—11 as expressing what Quinctius probably said.

necessary to secure the life of the tribunes, if magistrates were to be expected to do their duty of protecting the citizens: and that the restriction on killing a thief by day was a proof of the reluctance of the laws to sanction men's taking the law into their own hands. Even accidental injury met with no indulgence from the XII tables (§§ 49—51). Later on (some pages having been lost) Cicero appears to have contrasted Quinctius' arguments for impunity with the law on forcible or stealthy acts. Even if Fabius owned the land in dispute on which Tullius had erected the building, he could not pull it down without the knowledge or against the opposition of Tullius who claims it as his own. Fabius would come under the interdict *quod vi aut clam*, and be liable to compensate Tullius for the injury done to his building[1]. Can it be said that the law will justify the killing of the men who were in the building? (§ 53).

Keller has set out what he takes to be Quinctius' view of the facts in a speech for the defence well devised and in some parts eloquent. Quinctius is made to claim that the Populian Century was his property, that Tullius had endeavoured to seize it, and had erected a house to protect his slaves, that he kept there a band of ruffians who spread terror through the neighbourhood, and that Fabius, hearing of an intended fresh expedition of these brigands, determined to prevent it by destroying the building and crushing the resisting slaves, but took nothing away, and was then ready to have the legal ownership determined by law.

I am myself disposed to connect Fabius' assault with the arrangement made for a formal ejection. Fabius had given Tullius the choice whether he would be plaintiff or defendant. Tullius chose the position of defendant: he was possessor at the time and proposed to continue. Fabius would come with his friends to the spot and demand possession: Tullius would eject him with sufficient show of force to enable Fabius to assert that he had been *vi dejectus*, and then apply for an interdict to have the title to possession duly tried. It would appear as if Fabius repented of his offer of the option to Tullius, and thought it would be wise to get possession himself.

[1] Cf. D. xliii 24 fr 1 § 2.

Knowing that Tullius's slaves were in occupation, he collects his own followers, and on the day after the arrangement had been made, before daybreak, makes for the building, and meeting with resistance was led on into a fight. He would say that he intended nothing more than a quiet and conventional seizure (*vis quotidiana*)[1] and had brought a superior force with him in order to prevent any imprudent resistance; that Tullius' slaves however met him with violence, and in self-defence his followers killed them and damaged the building. Then he would say the law was on his side: *arma armis repellere* was allowable if done *non ex intervallo sed ex continenti* (see Ulpian's language on the Interdict *de vi* D. xliii 16 fr 3 § 9)[2].

The disregard of the arrangement which had been come to with Tullius, the deliberate use of arms (cf. *Caecin.* § 45), and the bloody result would I think be fatal to Fabius' cause, even if the terms of the issue admitted (contrary to Cicero's argument) of a justification being attempted. With *dolo malo* in the formula I do not see how a justification could be excluded on the words. At the same time Fabius' persistence in his claim for the insertion of *injuria* and his charge of unfairness against the praetor for his refusal (§ 38) certainly strengthen Cicero's position. The analogy of the interdicts and probable object of Lucullus in first framing the edict make one incline to think that in the main Cicero's argument is right.

[1] See *Caecin.* 32 § 92 and below, p. 514.

[2] In Cicero's letter to Trebatius (*Fam.* vii 14) he jokes the lawyer on his position with Caesar's army in Gaul: *Tantum metuo ne artificium tuum tibi parum prosit; nam, ut audio, istic 'non ex jure manum consertum sed magis ferro rem repetunt'; et tu soles ad vim faciundam adhiberi: neque est quod illam exceptionem in interdicto pertimescas 'quo tu prior vi hominibus armatis non veneris'; scio enim te non esse procacem in lacessendo.* I am only afraid that your professional craft is of little good to you, for I am told where you are (to quote Ennius) 'men link not hand in lawful course, but use the sword their right to enforce': and *you* are habitually called in to use violence! Nor need you much fear that plea in the interdict 'Provided that thou hast not been the first to come with 'violence and armed men; for I know that you are not very forward in 'attack.' For *manum consertum* cf. Cic. *Mur.* 12 § 26; Gell. xx 10 § 7. (Some interpreters take *soles ad v. fac. adhib.* to refer to Trebatius' usual work in advising on conventional struggles. See below, p. 514.)

D. Cicero *pro Caecina*[1].

This very brilliant speech has many points of resemblance with that *pro Tullio*, but fortunately is preserved in much better condition. We seem to have the whole with the exception of one not very large or important part of the argument. It is supposed to have been delivered in 685 U.C. = 69 B.C.

The case had been argued before Recoverers (*recuperatores*) twice already without any decision having been come to, a fact which Cicero chooses to attribute rather to the reluctance of the Recoverers to pass so severe a condemnation of Aebutius' character and conduct than to any doubt of the right verdict (§§ 6—10). Condemnation in an Interdict proceeding was not however followed by technical infamy (D. xliii 16 fr 13).

M. Fulcinius of the town of Tarquinii in Etruria had married a lady of the same place named Caesennia and was a banker at Rome. They had one son. The dowry of his wife had been paid to him in money and he invested it in some land in the Tarquinian district[2]. Soon after he gives up his bank and buys some farms adjoining this land of his wife's. He dies leaving by will his son as heir, but bequeathing a life interest (usufruct) in all his estate to his wife in common with their son. The young man soon dies, leaving P. Caesennius as his

[1] The leading treatment of this speech is by Keller *Semestr.* 273 sq. (1842). See also C. A. Jordan's edition (1848); Bethmann-Hollweg's essay in *Röm. Civilprocesz* ii 827 sqq. (1868) and various writers on Interdicts, *e.g.* Karlowa *RG.* ii 325 (who gives many references); Savigny *Besitz* § 40; Kappeyne van de Coppello *Abhandl.* p. 129 sqq.; Ubbelohde *Glück's Pand.* § 1863 *a*; and more fully §§ 1848, 1848 *a* (pub. 1896). Comments are also found in De Caqueray, Gasquy, Costa, and Greenidge's works already cited.

[2] This is spoken of as a sale by Fulcinius to his wife at a time when cash was difficult to obtain. He had the cash representing his wife's dowry employed in his business and treated it as payment for the land. Cf. D. xxiii 4 fr 21.

heir, a legacy to his wife of a large amount of money, and one to his mother of a larger share[1] of his property. In order to satisfy these legacies the young man's estate is put up for sale by auction, not as a whole but in detail. It occurs both to Caesennia and to her friends that it would be a good thing for her to buy the land (*i.e.* the reversion after her usufruct of the land) formerly her husband's, which adjoined her own land (*i.e.* the dowry land) with some of the money which was coming to her under her son's will. She had been in the habit of employing in business matters a man named Sex. Aebutius, in no way related to her, but one of whose business ability she had a high opinion. Aebutius accordingly is commissioned to attend the sale. He does so and bids for this land: it is knocked down to him, and he is debited in the banker's[2] books for the purchase money and afterwards credited for its payment, Caesennia having found the money. Caesennia took possession of the land and let it: soon after she married A. Caecĭna[3], and four years after the purchase, died. By her will she made her husband A. Caecĭna heir to $11\frac{1}{2}$ shares out of 12, and of the remaining half-twelfth gives two-thirds to M. Fulcinius a freedman of her first husband, and one-third to Aebutius, who was thus

[1] This interpretation is preferable to 'the greater part,' both on other grounds and because no reference is made to the *lex Voconia* which otherwise might be a question in the case. See Jordan *ad loc.*

[2] *Argentarius.* A banker was usually the responsible person in an auction. A *praeco* called out the bids. Cf. Gai. iv 126 *a*.

[3] The family of Caecina was called on the Etruscan tombs at Volaterrae *Ceicnas*, and hence it has been supposed the vowel *i* was short (Caecĭna) as *Lekne* is supposed to be for Licĭnius. Prof. A. S. Wilkins points out that *musni* at Cortona seems to be for *Musōnius* (cf. Deecke's Müller i 488) and *meknate* of Perusia for *Maecēnatem*. If so, the elision in Etruscan of the vowel *i* in Caecina is no argument for its penultima being short. But the river (and railway station) *Cecina* (near *Vada Volaterranorum*) is pronounced with penult short in modern Italian. (So in Dante *Inferno* xiii 9.) 'There are in Italian words for a boy and girl '*cecino* and *cecina* which in living Tuscan are pronounced with accent 'on penult; but *Cecina* as name of a town, of a river and as an old Roman 'name are pronounced with accent on antepenult' (L. Barboni in *Antologia ricreativa* p. 490 Livorno 1895). On the whole I am inclined to think that the name Caecina had a short penult.

heir to one seventy-second part of the lady's estate (§§ 10—17). He soon began to make himself disagreeable. Caecina was a Volaterran: and the people of Volaterrae had taken arms against Sulla who had passed a law which reduced their civic position to that of the people of Ariminum (§ 102). Aebutius declared that this disqualified Caecina from being heir. Caecina was not frightened, but on Aebutius' claiming a larger part of Caesennia's property than he was entitled to applied to the court to appoint an arbitrator for division of Caesennia's estate among the coheirs[1]. A few days afterwards (*illis paucis diebus*) Aebutius gives him formal notice in the forum at Rome that the land which he had bid for at the sale of the younger Fulcinius's property, was not part of Caesennia's estate, but was Aebutius' own: 'He had bought it for himself.' 'What! 'that land which without dispute Caesennia held as long as she 'lived, do you assert to be yours?' says, or is supposed to say, Caecina. 'True,' Aebutius replies, 'but Caesennia occupied it by virtue of the usufruct which her first husband left her.' Caesennia being dead, the usufruct ceased, and Aebutius claimed to have bought the land (*i.e.* the ownership subject to the usufruct) for himself (§§ 18, 19).

Caecina consults his friends on this new contention of Aebutius, and determines at once to try his right to the ownership of the farm. As a usual preliminary for this purpose he makes an appointment with Aebutius to go to the spot on a certain day and there be formally turned off the land by Aebutius. Accordingly Caecina and his friends go to a place named Axia[2], not far from the land in question. They are informed that Aebutius has collected and armed a large number of persons, both free and slave. Aebutius comes himself to Axia and notifies Caecina that he has got armed men, and that if Caecina comes on to the land, he will never leave it. Caecina and his friends, disbelieving Aebutius' threats, determine to make the attempt. They find men placed at every approach, not merely to the land in dispute, but also to the adjacent farm

[1] I agree with Keller in reading *iste* for *ipse*.

[2] Identified probably with Castel d'Asso about 6 miles west of Viterbo (Bunbury in *Dict. Geog.* s.v.).

which was Caesennia's dowry. Caecina being driven off from there by armed men tries another approach. The disputed land on this side was bounded by a straight row of olive trees. As Caecina was approaching them, Aebutius met him with all his forces, summoned one of his slaves named Antiochus to him, and in a loud voice ordered him to cut down anyone who entered the row of olives. Caecina saw the armed men and heard the order, but still went nearer, and was just passing within the boundary made by the olives, when Antiochus armed, as well as others, made a rush: Caecina retreated, and his friends and advocates in fear betook themselves to flight with him (§§ 20—22). These being the facts, the praetor, P. Dolabella issued his injunction, in the ordinary way *de vi hominibus armatis* without any qualifying clause (*sine ulla exceptione*), simply directing Aebutius 'to restore whence he had ejected.' Aebutius replied that he had restored. A wager was made raising the issue, and Recoverers were appointed to try it (§ 23). This is a short statement of the facts, as told with much humour and skill by Cicero.

Aebutius' contention that Caecina was disqualified for being heir to Caesennia, because he was a Volaterran, is dealt with by Cicero at the end of the speech, and may be well deferred for the present. Caecina's application for an arbiter to divide Caesennia's estate was a direct defiance of Aebutius. The *judicium familiae erciscundae* was a suit founded on the XII tables, and lay only between heirs or others entitled to a deceased's estate. If a man's being heir was disputed, and he was not in possession of his part of the estate, he could be repelled, until he had proved his title to the inheritance. Caecina was no doubt in possession of most of Caesennia's estate, and the question, whether he was heir or not, was one cognisable by the judge in the case. Under the circumstances it was the proper suit to bring, and Caecina thus challenged a decision on his alleged disqualification (Gai. ii 219; D. x 2 fr 1, 36, 43). Had Aebutius accepted the challenge, it is possible that he would thereby have admitted Caecina to be coheir (Keller *Sem.* p. 283 sqq.; Vangerow *Pand.* § 514. 4 and others on D. x 2 fr 37). Anyhow, instead of doing so, he raised

a different question, and meeting Caecina in the forum formally gave him notice, that he claimed as his own the farm which had fallen to his bidding at the sale of the younger Fulcinius' estate; 'he had bought it for himself.' Caecina of course disputed the claim, but the issue, whether a particular piece of land was parcel of the inheritance or the private property of one of the coheirs, was not determinable in a suit for dividing the inheritance (D. x 2 fr 25 § 7, 45 pr; xliv 1 fr 18). Caecina had therefore to face a suit in respect to the ownership of this particular farm. If Caecina were possessor, Aebutius would have to vindicate it as his own, and be put to the proof of his title. If Aebutius were possessor, Caecina would bring his suit as heir to eleven and a half twelfths of it (D. v 4 fr 1 § 1) and would have the burden of proving Caesennia's ownership and his own inheritance. Meantime the suit for division of her estate must either be postponed, or, if it proceeded as regards other items about which there appears to have been no dispute, the ultimate division of this farm, if proved to be part of Caesennia's estate, would be effected in default of agreement by a suit *communi dividundo* (D. v 4 fr 7; x 2 fr 20 § 4)[1].

It was important therefore to settle who was possessor. In Gaius' time (iv 148; D. vi 1 fr 24) a suit for the ownership of land was often preceded by a judicial inquiry into the possession, and this was done by the interdict *uti possidetis*. The proceedings so far as known to us are described above (Book VI chap. xvi C). It is a question what if any relation this procedure had to what we find in Cicero's time, as shewn in this speech and in that *pro Tullio*. In Gaius (iv 170) we read (if the text be right, Book VI chap. xvi D) of *vim facere* apparently as a formal method of bringing the matter to a legal issue, but it is *after* the grant of the interdict, and there is no allusion to any private arrangement between the litigants. In our speech the dispute is frequently spoken of as one relating to possession

[1] See Keller p. 359 sqq.; Ubbelohde *Glück's Pand.* § 1848 *a* p. 176.

Keller suggests a possible additional difficulty for Caecina, if the suit was brought at Tarquinii, and thus might expire with the expiration of the magistrate's *imperium* (Gai. iv 105).

(*e.g.* §§ 2, 32, 35, 41, *etc.*); and to facilitate a judicial process conventional force was to be used (*vim moribus*[1] *facere* § 2; *ex conventu vim fieri* § 22; *ut vis ac deductio moribus fieret* § 32). But this was to be done by agreement between Caecina and Aebutius, apparently *before* any application to the praetor.

Keller (in an excellently written essay in *ZRG.* xi p. 322 foll.; see also *Semestria* p. 369 sqq.) holds that the *deductio quae moribus fit* served to introduce the suit for ownership *per sponsionem*, where there was no dispute about the possession, and that the interdict *uti possidetis* was used when there was such a dispute (cf. D. xliii 17 fr 1 § 3). Karlowa (*Beiträge* p. 27; *RG.* ii 325) holds that the *deductio* introduced the interdict *uti possidetis*. Ubbelohde (to take the latest writer) holds that it was simply to establish the actual fact of possession, so that without any discussion over the right of possession, the *actio sacramento in rem* (not the *actio per sponsionem*) might proceed, and the praetor might at once require securities from the actual possessor so fixed (*Glück's Pand.* § 1852, v p. 639 sqq.). Here, as in many other cases, I think that we have not information enough to enable us to come to any decided opinion. The *deductio* could not be identical with the *vim facere*, which is found in the present text of Gaius; but there was clearly a common practice in disputes about ownership of land to prepare for the trial by having an agreed eviction peacefully carried out. Where the dispute was between occupants of contiguous tenements, such a course might be almost necessary to enable each formally to ascertain the limits of his adversary's claim and define his own (see Exner *ZRG.* xxi 190). Force (*vis*) is a term which varies in meaning. Marcus Aurelius was indignant at a creditor who had seized something belonging to his debtor and pleaded *vim nullam feci.* The Emperor replied *Tu vim putas esse solum si homines vulnerentur? vis est et tunc quotiens quis id quod deberi sibi putat non per judicem reposcit* (D. iv 2 fr 13 = xlviii 7 fr 7). In the interdict *de vi* we are told that it relates

[1] For this use of *moribus* cf. Ulp. xi 24; D. xxvii 10 fr 1, *etc.*; and for definition of *mores* D. i 3 fr 32 pr § 1; xvi 1 fr 1 § 1.

only to brutal force (*ad solam atrocem*[1] *vim pertinet hoc interdictum*, D. xliii 16 fr 1 § 3); but slight force if seriously intended may practically be brutal violence (Cic. *Caecin.* 14—16, §§ 41—47). In the interdict *quod vi aut clam*, force is any act done in defiance of a prohibition by the possessor (D. xliii 24 fr 1 § 5; cf. L 17 fr 73 § 2). In our speech what was contemplated by *vis ac deductio moribus* was for Caecina with a few friends as witnesses to come to the farm at an agreed time, to assert in some way his right to remain there as possessor, and for Aebutius, with sufficient force but without any real struggle or violence, to conduct him off the land. It was part of the arrangement that the evictor should formally promise to appear in court to answer the suit of the person evicted (see Cic. *Tull.* § 20; and above, p. 504).

This pacific course for bringing about a settlement of Caecina's and Aebutius' rival claims was rudely interrupted by the conduct of Aebutius on the eventful day. What was his motive? The notion, that Aebutius suspected Caecina of the intention of forcing an entry and holding the land, seems to be negatived by the fact declared by Aebutius' witnesses (if we so far trust Cicero's analysis, §§ 24—30), that Caecina had but few persons with him. But that the suspicion was unfounded is no proof that it was not entertained by Aebutius, who might point to Caecina's persistence in attempting an entry instead of contenting himself (as others sometimes did[2], cf. § 45) with a formal declaration of the presence of armed men. At any rate, on some ground or other, Aebutius saw his advantage in preventing Caecina's putting a foot inside the boundary of the disputed farm. If the farm was of some size, a number of people would be necessary to secure this object; and the arms and threats may have been for deterrent purposes only. We are not told by Cicero of anyone being hurt. Terror was sufficient to accomplish Aebutius' object.

Whether Aebutius or Caecina had in any legal or proper

[1] *Atrox* implies desire or at least readiness to wound: 'in deadly earnest,' 'seriously meant,' cf. Cic. *Orat.* ii 200; and our speech § 9.

[2] This practice is differently explained by various writers. Compare also Cic. *Inv.* ii 20 § 59.

sense possession of this farm, is not clear, but will be discussed at a later period of Cicero's speech. For the present the situation was this: Aebutius was in actual physical possession of the farm, and Caecina was not. He had attempted to enter, and had fled on a clear and threatening demonstration of armed force. He applied to the praetor and obtained as a matter of ordinary routine the issue of an interdict in peremptory language directing Aebutius 'to put him back whence he had thrown him off.' The words of the interdict would be these: *Unde tu, Sexte Aebuti, aut familia aut procurator tuus A. Caecinam vi hominibus coactis armatisve dejecisti, eo restituas* (cf. §§ 55, 59). Aebutius appears not to have urged the insertion of any plea (*e.g.* that Caecina had first used armed force, cf. Cic. *Fam.* vii 13 § 2, quoted p. 58)[1], but met the interdict directly with the technical answer 'that he had put Caecina back.' The order, being based on an alleged state of facts, was really conditional on the facts being found to be as alleged. The meaning of Aebutius' joinder of issue was that he was not in default. He had restored Caecina, so far as the praetor could be taken to have really ordered it. He would not have ordered it had he been rightly informed, and Aebutius had therefore obeyed the praetor in not restoring Caecina, where the praetor never intended him to be restored. An exact issue being thus joined, a wager is entered into, pledging the parties to their respective assertions; and the case goes at once to trial on this wager.

That the case was one admitting of much doubt is a natural inference from the fact of the Recoverers having twice heard the case and been unable to come to a decision. We do not know their number: unanimity was not apparently required (cf. D. xlii 1 fr 36). Yet the difficulty does not seem to lie in the facts. There is no dispute, so far as we can gather from Cicero, that an agreement for customary formal eviction was come to, that Aebutius had collected a number of armed men and had them at his call, that they were there to prevent Caecina's entering on the farm, that Aebutius threatened Caecina's life if he entered, that Caecina none the less

[1] The fact that Dolabella issued the interdict *sine ulla exceptione* does not at all imply that the interdict did not admit of one.

attempted it twice, and called upon Aebutius to carry out the customary ejectment (§ 27), and that he gave way and retired, only when in some danger of his life (see §§ 32, 33). What then was the defence set up by Aebutius' advocate Piso? It was as follows:

1. Caecina has not been dejected but rejected[1]. He could not be turned off a place when he was never on it. Aebutius did not evict him, he prevented him from entering (§§ 31—40; 49; 64 sqq.).

2. No force (*vis*) was used to Caecina. No one was slain, no one was wounded. Caecina and his friends took fright and fled before entering the place (§§ 41—63).

3. No one could be dejected who did not possess at the time. Caecina was not possessor (§§ 90—94).

4. Caecina was not owner and had no right to the possession. This argument seems to be hinted at in the conclusion (§ 104).

5. Caecina was under disability as a Volaterran in consequence of Sulla's law reducing the status of the people of Volaterrae[2] (§ 95 sqq.). From this Piso seems to have argued, that he had no right to the interdict or to a legal wager. His right to take as heir under Caesennia's will is not strictly relevant to this trial, but may, as Keller thinks, have been at the bottom of Piso's objection. If not heir, Caecina was the merest outsider.

But though these appear to be the arguments resulting from an examination of Cicero's references to the defence, and can be dealt with separately, they were probably combined in Piso's actual speech. He may have said: 'This interdict is not 'one to which Caecina has the smallest right. He is a Vola- 'terran, and wholly disqualified from enjoying the rights of 'Roman citizens. The interdict is concerned with recovery of 'possession. Caecina was neither possessor of the estate in

[1] I accept Keller's correction of *rejeci* for *ejeci* in §§ 38 and 84, and *rejectus* for *ejectus* in § 66. See his *Sem.* p. 393 foll.

[2] Volaterrae resisted a siege by Sulla for two years and then capitulated (Strab. v 6 p. 223; *Corp. Ins. Lat.* xi p. 325).

'question, nor was he owner so as to have a right to the posses-
'sion. He was not even in actual occupation, rightly or wrongly,
'either for himself or for others: he was a mere outsider trying
'to force his way on to my property. I had a sufficient force to
'prevent him, and I made a serious demonstration, which caused
'him to run away before he put a foot on my ground. Neither
'he nor any one of his party was hurt. If Caecina is entitled
'by this interdict to be put into possession of my farm, then
'any loafers or ruffians from Gaul or Greece may collect in
'force and trespass on my land, just because they choose to call
'it theirs, and I shall have no right to arm my servants for
'their own defence while turning or keeping off intruders. Let
'him bring his suit for the ownership: I will not assist him to a
'trial, but stand on my rights.'

Cicero treats the fifth point with care: the fourth hardly at all, unless something material has been lost in the middle of § 95. The third includes a question of law and a question of fact. The latter is treated very summarily (in §§ 94, 95), the question of law is argued in §§ 90—93. The great bulk of his argument on the whole case is expended on the first and second points. And here the case which Cicero puts is that of a man who has left his house for a time and on returning is prevented from entering by armed force (§ 34). On such a supposition we may well believe an interdict framed like this was as effectual against exclusion as against expulsion, and against a threatening display of force as against physical pressure, and against the use of arms whether they drew blood or not. Ulpian agrees, and very possibly he or his authorities had Cicero's speech in recollection when they wrote on this interdict: *Si quis de agro suo vel de domo processisset nemine suorum relicto, mox revertens prohibitus sit ingredi vel ipsum praedium, vel si quis eum in medio itinere detinuerit, et ipse possederit, vi dejectus videtur, ademisti enim ei possessionem, quam animo retinebat etsi non corpore* (D. xliii 16 fr 1 § 24). *Qui armati venerunt, etsi armis non sunt usi ad deiciendum sed dejecerunt, armata vis facta esse videtur; sufficit enim terror armorum, ut videantur armis dejecisse* (*ib.* fr 3 § 5). *Si, cum dominus veniret in possessionem, armati eum prohibuerunt, qui invaserant possessionem, videri*

eum armis dejectum (*ib.* § 8). So far as the first two allegations are concerned, Cicero's argument, at once close and broad, logical and eloquent, was doubtless convincing if anyone required convincing on the case put.

Unfortunately for Caecina the case put was not his. The farm in question was not his home: it is doubtful whether it was his in any sense; it is even doubtful whether he ever put a foot on it except perhaps in doing his wife's business during her life. Cicero glides somewhat quickly over this part of the argument (§§ 90—93) but meets such an objection by saying that though Caecina was possessor, possession was not required for this interdict: whether Caecina was or was not possessor was therefore wholly irrelevant: possession was required in order to bring the interdict *de vi*; it was not required in order to bring the interdict *de vi hominibus armatis*.

Possession is quite different from ownership[1]. A man may own without possessing, though he might have a right to the possession: he may possess without being owner: and under Roman law possession, as such, if honest, was entitled to protection, and the ordinary form of protection was by interdict. For our purpose, possession[2] may be defined as occupation either by yourself or someone for you with the intention to hold as of right for yourself. Occupation as tenant or depositary was occupation for another, and did not as a rule entitle the tenant or depositary himself to the interdicts (D. xliii 16 fr 1 § 10): occupation as usufructuary did, though the frame of the interdict *de vi* was modified to suit the usufructuary's position.

The interdicts *de vi* and *de vi armata* are treated together (under these names) in the Digest and no express mention of possession is made in the extract from the praetor's edict there given; but we are told by Ulpian that possession was

[1] Ulpian's expression is strong: *Nihil commune habet proprietas cum possessione* (D. xli 2 fr 12 § 1).

[2] *Possidere* is used for occupation generally as well as for technical possession. Thus it is used in the edict of a seizure and occupation *rei servandae causa*. Cf. Gai. iii 79; D. xlii 4; xliii 4; and the Essay on *pro Quinctio* (above, p. 482).

required, and the only difference between the requirements, in this respect, of the two interdicts, is that in the former the possession must be free from force, stealth or request as against the opponent, but that faulty possession will do in the case of the latter (D. xlii 16 fr 14, 15). It is noticeable however that the requirement of possession is in the Digest deduced from, or at any rate specially connected with, the word *deici*. *Deicitur is qui possidet sive civiliter sive naturaliter possidet, nam et naturalis possessio ad hoc interdictum pertinet* (*ib.* fr 1 § 9). *Interdictum hoc nulli competit nisi ei qui tunc cum deiceretur possidebat; nec alius deici visus est quam qui possidet. Eum qui neque animo neque corpore possidebat, ingredi autem et incipere possidere prohibeatur, non videri dejectum verius est: deicitur enim qui amittit possessionem, non qui non accipitur* (*ib.* § 26). One might fancy this last passage was written in recollection of Piso's defence[1] in our case. Gaius (ii 155) treats the interdict *de vi armata* as only a modification of the other by the omission of the requirement that the possession should not be faulty, and says not a word of any other view.

Cicero on the contrary rests his case in this respect mainly on the difference of language between the interdict *de vi* and that *de vi hominibus armatis*. He says the former contained the words *cum ego possiderem*, the latter did not (§ 91). In the speech *pro Tullio* he gives the words of the former interdict as '*cum ille possideret*,' and in addition (*et hoc amplius*) *quod nec vi nec clam nec precario possideret*. Savigny (*Besitz* § 40 p. 426) holding that possession was necessary for both interdicts[2] suggests that Cicero has here made one clause into two, and that the interdict *de vi* really ran thus '*cum ille nec vi nec clam nec precario ab illo possideret*,' so that *cum possideret* was there only to support the three grounds of exception and, as these

[1] *Exoritur hic illa defensio eum deici posse qui tum possideat, qui non possideat nullo modo posse; itaque, si ego sim a tuis aedibus dejectus, restitui non oportere, si ipse sis, oportere* (*Caecin.* § 90).

[2] Most recent writers differ from Savigny. See Keller *Semestr.* pp. 427-8. I understand Lenel to consider that possession was necessary in the case of both interdicts, being expressed in the one (*de vi*) and deduced from *deici* in the other (*EP.* p. 372).

dropped out in the interdict *de vi armata*, the words *cum possideret* dropped out also. Keller thinks that Cicero's language is too clear and positive to be doubted: and that the frame of the interdict which Cicero appears to give and which Savigny alters is confirmed by the *lex Agraria* (Anno 643 U.C. Bruns[6] no. 11), where the affirmation of possession is a separate clause from the negation of faulty possession (§ 18): *si quis...ex possessione vi ejectus est quod ejus is quei ejectus est possederit, quod neque vi neque clam neque precario possederit, ab eo quei eum ex possessione vi ejecerit.* He holds therefore that possession was not required in the interdict *de vi armata* in Cicero's time, but admits that the generality of the interdict obviously needed some limitation, and suggests that Piso's argument was probably one of many arguments to get the courts to require some kind of occupation as necessary for this interdict; until at length, by Ulpian's time, possession was required for this as well as for the more ordinary interdict. Meantime the frame of the interdict had been so far modified, as to make no mention of possession, *deici* being understood to imply it (*Semestria*, pp. 301, 378—389). Cicero's argument (§ 86 sqq.) that *deici* and *unde* might be used as well of a place *a quo* as of a place *ex quo*, is admitted by Keller to be probably correct (*ib.* p. 422).

The most recent writer on this matter, Ubbelohde (l.c. p. 170 sqq.), holds that juristic possession was not in the general opinion necessary in Cicero's time for this interdict; else how could Cicero have addressed this argument to the judges[1]? but that there must have been required some kind of relation between the applicant for the interdict and the land, though it is difficult to say what; and hence the hesitation of the Recoverers was well grounded.

It is not easy at first to resist the force of Cicero's pleading in this matter; and it is clear that so far as the words went, there was some such difference between the two interdicts as Cicero points out. Keller pours scorn on anyone who, looking at the care with which the language of the interdicts was settled, thinks that the insertion of the words *cum ille possi-*

[1] But Piso's argument has to be considered as well as Cicero's.

deret in one and their omission in the other could be compatible with possession being a condition of both interdicts (*Semestr.* pp. 301, 339). But is the alternative offered to us by Keller easier to accept? A theory which supposes an irrational form of interdict, and an unproved series of attempts to make it rational, with the result that in Gaius and Ulpian's time we have a frame of interdict not containing these distinctive words[1] but with *deici* rationally interpreted, so as to carry the very meaning which Cicero and Keller suppose to be impossible here, may seem to justify scorn, as much as the belief that the wording of the interdict might have been in some respects verbose and ambiguous, so as to lend itself to the ingenious perversion of an advocate. Anyhow I venture to differ in this matter from Keller (much as I respect his authority), and I rest my opinion not only on the rational character of praetorian action but also on examination of the words themselves. First take the passage from the Agrarian law. The introductory words *ex possessione vi ejectus est* require an addition to shew that the ejection was from land occupied by *him*, not by someone else. That is why we have the clause *quod ejus*[2] *is qui ejectus est possederit*, 'so far as the land was possessed by the evicted person and possessed neither, *etc.*' This clause could not have been intended to lay stress on the bare fact of possession, when the eviction had been already described as *ex possessione*. Now take the interdict *de vi*, which according to Cicero ran thus: *unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi dejecisti, cum ille possideret quod nec vi nec clam nec precario possideret, eo restituas* (*Tull.* 19 § 44; *Caecin.* 8 § 23; 19 § 55; 31 § 91). I cannot persuade myself that *cum ille possideret* was meant to be taken by itself, as a bald requirement

[1] *I.e.* according to Keller (p. 313); but I think Lenel (*EP.* p. 372, especially note 3) is right in supposing these words to have been in the edict for the interdict *de vi* in Ulpian's time and omitted only by Justinian.

[2] On this use of *quod ejus* compare the *lex Agrar.* 5, 16, 24, 33, *etc.*; Cic. *Top.* 17 § 66 *quod ejus melius aequius*; and the aedile's edict in D. xxi 1 fr 1 § 1. See my Lat. Gr. § 1297. H. Jordan (*Beiträge* p. 336) gives a full account.

of possession, without an object, without any description of the kind of possession, or any other natural and significant addition to the predicate[1]. By itself what would it add to the implication inherent in *dejecisti*? How could he have been dejected, if he had not been in possession of any sort? The real cause of this particular frame of the interdict was this. The drafter had three things to embrace, viz. (1) to make it as general as possible, hence *unde*, not *ex quo fundo*, *etc.*; (2) to identify the time of dejection with the time of possession[2], hence *cum...possideret*; (3) to shew that that from which he was dejected was held in lawful possession. The clause with *quod* would not follow *unde* very well, and the time-clause thus forms a convenient link. 'Although his 'possession at the time was one which was neither forcible 'nor stealthy nor by request' (literally 'whereas he was possess-'ing what neither by force nor stealth nor prayer-wise was he 'possessing'). Then when the interdict *de vi armata* came to be framed, the omission of flawless possession carried away with it of course the link '*cum...possideret*[3],' leaving the fact of some sort of possession involved in the word *dejecisti*. Cicero adroitly in the interest of his client seized on the apparent difference between the wording of the two interdicts, and gave an independence and an importance to the clause which it was never intended to have. His argument had no doubt some effect on the minds of the Recoverers, as it has had on modern critics.

Further, there is no trace (I admit our information is meagre) of any change in the fundamental conditions of the interdict *de vi armata* having taken place between Cicero's time and that of Gaius or Ulpian; and in Gaius and Ulpian's

[1] *E.g.* in the interdict *uti possidetis* the *uti* gives the required point to *possidetis*. N.B. The repetition of *possidere* is seen in the formula of *uti possidetis* (D. xliii 17 fr 1 pr) and in this agrarian law, as well as in our interdict.

[2] Cf. Ulpian D. xliii 16 fr 1 § 23 *Interdictum hoc nulli competit nisi ei qui tunc cum deiceretur possidebat.*

[3] My view resembles Savigny's, but was taken without any recollection of his suggestion. It is always a pleasure to agree with or follow that admirable lawyer and writer.

times possession, civil or at least natural, was no doubt required. Nor is there any sense, as it seems to me, in supposing the praetors to have ever conceived, still less to have 'carefully drafted,' an interdict which should be as useful for a tramp as for a lawful, or at any rate for a settled, occupier. It is one thing to check and punish armed brigandage or armed violence of any kind: it is quite a different thing to enact such a fantastic remedy as putting (*or* restoring!) into possession any casual intruders who have been threatened with a pike or sword by the farmer or his servants on a lonely holding. Armed violence was punishable as crime under the *lex Julia* (D. xlviii 6 fr 3 § 6; Just. iv 15 § 6) and probably before: it was punishable with heavy damages under the *lex Aquilia*, or on a charge of *injuriarum* or *vi bonorum raptorum* (see *Tull.* 17, 18; *Caecin.* 12 § 35). But to say that an actual occupant, if he used arms against a mere intruder, who without any tittle of right tried to force his way into the other's land, should be bound to give him up the possession, is not at all in harmony with the good sense and practical character either of Roman legislation or of the praetor's action.

I hold with Ulpian and Piso (§ 91) that no one could be dejected who had not some kind of possession, and that this, though not set out as a distinct condition in the interdict, was implied in the very nature of the case. And it must be a possession at the time in some sense of the place or thing really in dispute (the usual *qua de agitur* is implied). Cicero himself lays no stress on the argument suggested to him by a lawyer (§§ 78, 80) that at any rate Caecina ought to be restored somewhere, if not to the farm itself. Yet if there is to be no kind of possession required, and the whole gist of the interdict is to impose a punishment for armed violence, such an interpretation seems to me bearable: 'If you turn a person off by armed violence, you shall put him back wherever it was.' But I agree with Cicero (§ 85) in thinking this was not the real meaning of the interdict. Interdicts are in fact steps or remedies for obtaining, protecting and regaining possession (Gai. iv 143 sqq.): this particular interdict is for regaining lost possession; the nature of possession may possibly vary

with different interdicts, and the sufficiency of the possession asserted is a fit subject for argument; whether a *bona fide* purchaser or a usufructuary or an heir or the occupant, without title, of a vacant farm, or the holder by an illegal gift, or a tenant by agreement or on sufferance has the right for himself to this particular form of legal remedy, may be an arguable question; but a mere outsider, attempting a trespass, refusing to retire, and threatening violence, can hardly under any circumstances have a claim to be put into possession by the praetor's edict.

Cicero declares that in his argument on this matter he is defending the common interest of all: it does not concern Caecina, for Caecina had possession, and that, he says, may be shewn in a few words, although in truth it is irrelevant to the question of the interdict. He gives four arguments to prove Caecina's possession. (1) He had possession as heir through Caesennia's tenant, (2) he had personally taken possession, (3) Aebutius had recognised his position in this respect, (4) his conduct in arranging for a *moribus deductio* shews it.

(1) It was admitted that Caesennia possessed on account of the 'usufruct left her by her husband's will. Caesennia 'let the farm to a tenant. The same tenant on the same hiring 'was in the farm when she died. Can it be doubted that if 'Caesennia possessed when her tenant was in her farm, on her 'death her heir possessed by the same right?'

This is a close translation of Cicero's words, but at first sight it appears full of fallacies as an argument. It is incorrect, at least according to the post-Augustan lawyers[1], to speak of a usufructuary's possessing. He has not the necessary *animus* to hold as of right permanently, and has only a *quasi-possessio* (Gai. ii 94; iv 139; D. iv 6 fr 23 § 2; x fr 5 § 1; *naturaliter possidet* D. xli 2 fr 12; *neque usus fructus neque usus possidetur sed magis tenetur* D. xliv 3 fr 1 § 8). He occupies because occupation is the obvious and proper means of exercising his right in the thing: but this exercise of his right is quite

[1] Keller argues not improbably that this was a later subtlety and that in Cicero's time a usufructuary might have been held to possess (p. 345 sqq.).

compatible with another's having the technical possession (D. xli 2 fr 52). So that Aebutius might have been possessor all the while notwithstanding Caesennia's usufruct, and two persons (not being joint owners) could not be technically possessors of the same thing at the same time. Secondly, there is no inheritance of a usufruct. If Caesennia had only the usufruct of the farm, it died with her. No doubt her occupation as usufructuary would have entitled her to protection by this or an analogous interdict in Cicero's days. In Ulpian's time there was a special interdict for usufructuaries *qui fundo vel aedificiis uti frui prohibiti sunt* (D. xliii 16 fr 3 § 15; Vat. 90, 91). But this right was no more transmissible to her heir than the usufruct itself was; and the lease died with her right, if Caesennia held as usufructuary only. Thirdly, there is no inheritance in possession at all. It must be acquired *corpore* as well as *animo*. Paul's language in D. xli 2 fr 30 § 5 is an express negative to Cicero's confident question. *Quod per colonum possideo, heres meus, nisi ipse nactus possessionem, non poterit possidere: retinere enim animo possessionem possumus, apisci non possumus.* So also Javolen: *Cum heredes instituti sumus, adita hereditate omnia quidem jura ad nos transeunt, possessio tamen nisi naturaliter comprehensa ad nos non pertinet* (*ib.* fr 23 pr); and Ulpian D. xlvii 4 fr 1 § 15; cf. Gai. iv 153. I see no reason to doubt this being good law in Cicero's time, as applied to such a possession as led to usucapion; and Keller (*Semestr.* p. 351) points out that the doctrine of *pro herede usucapio* (Gai. ii 52), certainly an old doctrine, implies this state of the law.

It is impossible to suppose Cicero ignorant or unobservant of the general character of usufruct or of the law of usucapion. He would I think have replied (1) that the distinction between the possession of an owner and the possession (whatever it be called) of a usufructuary was not relevant to the question, for if possession was required at all, the possession of a usufructuary was sufficient for this interdict (cf. D. xliii 16 fr 1 § 9); (2) that he referred to the usufruct, only because possession so far was admitted by the other side, but that his own contention was that Caesennia had had the usufruct, but that it was now merged in the ownership, and her tenant held the possession

after her death for the heirs to her ownership[1]; and (3) that the requirement of personal acquisition of possession by the heir applied only to the civil possession, which led to usucapion[2]; whereas Caecina succeeded to Caesennia's position as lessor of this farm as well as to her other obligations; and Aebutius' violent conduct was not merely an obstruction to Caecina's taking or exercising personal possession, but in effect an ejection of Caecina from the possession held for him by his tenant (D. xliii 16 fr 1 § 22; *e.g.* cf. this speech 13 § 37). Cicero's position thus appears tenable, or at least plausible.

Aebutius might be expected to retort that there were no rights at all in this farm belonging to Caesennia or her heirs after her death. He himself was owner and in possession all along[3], notwithstanding the usufruct being out in Caesennia. The lease was put an end to by the extinction of the usufruct on her death, and the tenant was responsible to him for any fruits after that time; any obligation created by the lease was personal to Caesennia's heirs and did not affect the land.

(2) Cicero's second argument brings Caecina into direct touch with the land. He says that Caecina when going round the farms came into this farm and received accounts from the tenant (§ 94). We are not told when this took place, but the presumption is that it was after Caesennia's death. Savigny (*Besitz* § 40 p. 425 note) suggests that this was only a visit to take the account of what was due to Caesennia's estate. But Cicero puts it forward as more than that. If Caecina without opposition came into the farm, took the accounts, and continued the tenant in the holding, he would presumably thereby have

[1] Where possession is acquired by an heir he can count as part of his possession for the purpose of usucapion the period from the death of testator to his own entry into possession (D. xli 3 fr 31 § 5; fr 44 § 3).

[2] Cf. D. xliii 16 fr 1 § 26 *Eum, qui neque animo neque corpore possidebat, ingredi autem et incipere possidere prohibeatur, non videri dejectum verius est, i.e.* there were disputes on the question, it was not settled law even in Ulpian's time. If so, Cicero might well have maintained either argument.

[3] If Aebutius took possession at first in the name of Caesennia, he could not afterwards by mere change of intention convert his possession as her agent into rightful possession for himself (cf. D. xli 2 fr 3 §§ 18, 19; fr 42 § 1).

taken possession. No mention is made of any interference by Aebutius at the time. It is noticeable that the tenant was not among Aebutius' witnesses; indeed no further reference at all is made to him. He may have been dead, he may now have left the farm, he may have been got at by Aebutius; we know nothing.

(3) Cicero next questions Aebutius how, if Caecina was not possessor, he came to give him notice (*denuntiare*) about this particular farm, rather than others which he possessed; if, adds Cicero, he had any. A notice, Cicero implies, is given to a possessor, *e.g.* D. xli 4 fr 13; and so in the case of *damni infecti* (D. xxxix 2 fr 4 § 5), or *quod vi aut clam* (D. xliv 24 fr 1 § 7). But the answer to Cicero is obvious. Notices are very common for all kinds of purposes (*e.g.* Cic. *Quint.* § 27; § 54; *Rosc. Com.* § 26; D. xiv 3 fr 17 § 4; iv 4 fr 47 pr; xxi 2 fr 55 § 1, *etc.*)[1]. Aebutius might easily know or guess that Caecina regarded this farm as part of Caesennia's estate; and seeing that a suit for the division of the estate was begun, it was natural for Aebutius to give a warning to Caecina, that the suit must be conducted without reference to this farm, and that any attempt to exercise rights over the farm would be disputed as a trespass.

(4) Cicero's last argument is imperfectly given in the MS., but appears to be that Caecina's wish to be formally evicted, expressed after consulting his legal advisers, was evidence of his possession. 'If not in possession, how could he ask to be evicted?' Cicero seems to say. One would have thought from the similar case in the *pro Tullio* (8 § 20) that a possessor would claim to evict the claimant, and that Caecina by his consent to be evicted really yielded the point, at least for the time, to Aebutius. But the *deductio moribus* is too little known to permit inferences. Possibly Cicero only meant that, if there had been any doubt on the fact of possession, Caecina would not have challenged a decision on that point[2] but brought his action for the ownership at once.

[1] See Keller *Sem.* p. 355; Kipp *Litis-denuntiation* § 26.

[2] To the expected result of such a trial on the possession I refer the

It must be admitted that Cicero's hurried argument for Caecina's possession is not such as to convince one of his having a clear case. Nor have we a particle of evidence of any rightful possession by Aebutius either.

I pass now to the fourth head of Piso's defence, which so far as our text goes is only touched in a line by Cicero, in the summary at the end of the speech: *multo minus quaeri A. Caecinae fundus sit necne, me tamen id ipsum docuisse fundum esse Caecinae* (§ 104). If the interdict required possession, it was strictly speaking of no avail to allege or prove ownership; but it was natural, especially for Cicero, who denied this requirement, to shew that Caecina had a *bona fide* interest of the strongest kind in claiming the use and protection of the interdict[1]. It was not an intruder and trespasser, but the owner of the land, who had been subjected to this unprovoked attack by Aebutius, and if Aebutius honestly disputed his ownership, why did he not let the question come in the ordinary way to trial?

As regards Caecina's claim, there is a minor difficulty in the fact that Caecina was not the universal heir of Caesennia (though very nearly so) and till the estate was divided, either by agreement or by judicial action, Caecina could not be sole owner of this farm or of any particular portion of the estate. There might no doubt have been an agreement with the freedman M. Fulcinius: there was clearly none with Aebutius, and the suit *fam. ercisc.* had been stopped by Aebutius' conduct. Nor is any mention made of any special bequest or gift of the farm to Caecina. However if the facts were at all what Cicero sets forth, Aebutius' claim to the ownership appears impudent,

words in i § 2 *Si facta vis esset moribus, superior in possessione retinenda non fuisset* (*Aebutius*). See below, p. 532. Bethmann-Hollweg (ii p. 236 and *Pref.* p. xiii) takes them differently.

[1] Quintilian actually recommends this course (*Inst.* vii 5 § 3) *Quotiens tamen poterimus, efficiendum est ut de re quoque judex bene sentiat: sic enim juri nostro libentius indulgebit; ut in sponsionibus quae ex interdictis fiunt, etiamsi non proprietatis est quaestio sed tantum possessionis, tamen non solum possedisse nos sed etiam nostrum possedisse docere oportebit.* Perhaps our passage was in his mind.

but might be difficult to disprove. The mere fact of the bidding at the auction being by Aebutius, and the payment of the purchase money being entered in Aebutius' name in the banker's books, is after all only *prima facie* evidence[1]. Aebutius is said to have made away with the accounts (§ 17), presumably the accounts between himself and Caesennia, whose business he often managed (§ 15); but still there should have been means of proving, whence the purchase money really came, and who took possession and acted as the proprietor of the farm. Cicero tells us *Caesennia fundum possedit locavitque*, but it is not unlikely that Aebutius acted as her agent in taking possession (cf. D. xli 1 fr 53), and thus appeared throughout as purchaser. Paul says (ii 17 § 14) *Fundus ejus esse videtur cujus nomine comparatus est, non a quo pecunia numerata est, si tamen fundus comparatori sit traditus.* The statement is reasonable: *cujus nomine* may mean whose name was given as the purchaser or (what would usually be the same) 'on whose account' it was purchased. And the doctrine is quite in accordance with recognised law (see Cod. iv 50) and good sense. If a man buys an estate with money borrowed from his banker, the banker has no claim thereby to the ownership of the estate.

Among the witnesses produced by Aebutius were P. Caesennius, *fundi auctor, i.e.* the vendor and guarantor of title of the farm, and Sex. Clodius Phormio the banker. Cicero dismisses them with scoffs: the former was weightier in body than in character (*auctoritate*, with a pun on *auctor*); the latter was as black (*niger* cf. Hor. *Sat.* i 4 85) and confident (Ter. *Phorm.* 123) as the Phormio in Terence, but neither said anything which could affect the judgment (10 § 27). These were the only witnesses who had nothing to say about the forcible eviction. It seems clear that they were there to depose to the entries of sale and payment in the banker's books being in Aebutius' name, and to the delivery of the price by him. So much Cicero admits: as to the mode of delivery of possession of the land, he says nothing (6 §§ 16, 17), and whatever view Caesennius and Clodius may have taken of the transaction, as

[1] Persons of position did not always like their names to occur in documents of sale (D. xxvi 8 fr 5 § 4).

the money was duly paid, they were not further concerned. If Aebutius played Caesennia false at the time, acted for himself and took delivery for himself, he would be legal owner (D. xli 2 fr 1 § 20; Cod. iv 50 fr 1, 8, *etc.*), but liable to Caesennia's heirs for theft of the money and to a condiction for the money. But it is more likely that he did not so act, and that this posing as the real purchaser and owner was an afterthought, when Caesennia was dead and Aebutius found so little left him by her will. Caecina's marriage with Caesennia had probably interfered with his employment by Caesennia, and now Caecina's heirship threatened to oust him altogether.

If he was neither owner nor possessor with a good title, but only possessor by stealth, his conduct in breaking the agreement and at all hazards preventing Caecina from getting legal foothold is more explicable. If the question of possession came to a decision under the interdict *uti possidetis*, he must expect to lose[1]: his chance seemed to be to interpose as much difficulty and delay as possible, and to rely on Caecina's being precluded from the interdict *de vi* by not being possessor, and from the interdict *de vi armata* by such a defence as Piso appears to have set up.

The fifth point of Piso's defence is one on which our information is only what is given us in this speech. We have not Sulla's law: and the question raised by Cicero (33 §§ 95, 96) whether there are not limitations on any and every law is a difficult constitutional question. If the people of Rome were really sovereign (and one can hardly deny it) their power to take away citizenship and freedom is clear. But there is a wide gulf between abstract power and those limits of legislation which are felt by practical statesmen, and which are so conformable to the habits of a people, that they cannot be overstepped without revolutionary action. Yet even if such limits were usual, would an ordinary tribunal be justified in refusing to recognise enactments not in conformity with them? In the absence of a written constitution, it is difficult to think so.

[1] Cf. § 2 *Si facta vis esset moribus, superior in possessione retinenda non fuisset* (*Aebutius*) and Gai. iv 150, 153; D. xli 2 fr 6 pr.

Cicero says that in a previous case when he was quite a young man and opposed as an advocate to Cotta, the most skilful orator in Rome, he succeeded in obtaining a decision from the Decemviri[1] in favour of the freedom of a woman of Arretium, and established the principle that citizenship could not be taken away, and *a fortiori* freedom could not[2]. This, too, was in Sulla's lifetime. Banishment was not recognised by the Roman law as a punishment. It was the refuge voluntarily sought by those to whom, by the prohibition of fire and water, the means of living in their own country were denied. They lost the Roman citizenship only when they were received into another state[3]. So with freedom: if a man declines to serve in the army or to be enrolled in the list of burgesses, the state directed him to be sold; but strictly this meant that by these refusals, he had himself declined to bear the burdens and maintain the *status* of a freeman (§§ 97—100).

Cicero challenges the production of any case in which freedom or citizenship had been taken away by statute or bill (*lege aut rogatione* § 100, *i.e.* taken by statute or proposed by bill to be taken). As regards Sulla's law in the case of Volaterrae it contained the usual clause declaring that the law did not apply in any matter which was not lawfully the subject of a bill, and this saving clause therefore protected the rights of citizens. Cicero adds further that all that Sulla proposed to do by that law was to reduce the people of Volaterrae to the position of the people of Ariminum: and the people of Ariminum were one of the twelve (Latin) colonies and were capable of taking inheritances from Romans[4]. Sulla's bill did not affect *nexa*[5] *atque hereditates, i.e.* the rights of mancipation and inheritance peculiar to Roman citizens (35 §§ 101, 102).

The meaning of the customary saving clause is pressed too

[1] *I.e. xviri stlitibus judicandis* (see p. 315).

[2] The same argument is found in Cic. *Dom.* § 77 sqq.

[3] Not necessarily 'acquired the citizenship of another state' according to Mommsen *Staatsrecht* iii 50. Cf. also Madvig *Verfassung* i 50, 51.

[4] Cf. Mommsen *Röm. Gesch.* i[7] p. 421; *Staatsrecht* iii[2] 624; Madvig *Verfassung* i 67.

[5] On *nexa* see my Essay on *nexum* above, p. 304.

far by Cicero[1]. It could hardly be held to take out of the law any matters forming part of its obvious intention and substance, but only to deal with collateral and unintended effects. Cicero's previous success, however, in a similar pleading on the general argument, forms a good precedent for him on this occasion. His express statement in reference to the terms of Sulla's law is, if accurate, decisive of the question.

As regards mancipation, Gaius speaks of it as peculiar to Roman citizens (Gai. i 119). Ulpian however speaks more exactly, when he says that mancipation was valid between Roman citizens and Latin colonists and Junian Latins and such foreigners as have rights of commerce granted them. In effect the power of conveyance of property in full ownership by properly Roman forms had been conceded to these other classes. But in our case inheritance was the important point. Gaius tells us that, while the *lex Junia* created a class of persons with rights in general the same as those belonging to Latin colonists, it expressly denied them the power to make a will or to take under a will or to be appointed guardians by will (Gai. i 22, 23; ii 275); and Ulpian confirms this as special to the Latins under Junius' law (xx 14; xxii 3; xi 16). There were obvious reasons for this restriction. Junian Latins were slaves emancipated by informal methods (Ulp. i 9; Gai. i 35; see vol. I p. 38), and protected in freedom by the praetor, and afterwards by Junius' statute. If they had the right of making wills and being appointed guardians, they might remove their property or that of their wards from their patron's control and reversion. And the right of taking under a will, if fully recognised, would be inconsistent with their being, as they still were in theory, slaves, whose acquisitions passed in law to their masters (Gai. iii 56). But these reasons in no way applied to the Latin colonists proper, who were freeborn citizens, voluntarily adopting another place as their residence and country.

We find it stated in other passages of Cicero, that Sulla's

[1] Mommsen (*Staatsrecht* iii p. 43 note) observes that with the help of this principle an advocate can reduce any law to nothing.

confiscation of the land of the Volaterrans and reduction of their civic status were not eventually given effect to, though Rullus and others proposed to confirm them. *Hodie non modo cives sed etiam optimi cives fruuntur nobiscum hac civitate* (*Dom.* 30 § 79). *Sullani temporis acerbitatem subterfugerunt. Cum enim tribuni plebi legem iniquissimam de eorum agris promulgavissent, facile senatui populoque Romano persuasi ut eos cives quibus fortuna pepercisset salvos esse vellent. Hanc actionem meam C. Caesar primo suo consulatu lege agraria comprobavit agrumque Volaterranum et oppidum omni periculo in perpetuum liberavit* (Cic. *Fam.* xiii 4 § 2).

On this part of the case therefore Cicero was probably successful, however fine-drawn we may think some of his arguments. Whether he won his case altogether, we do not know. The mere facts, that Cicero had the speech published, and was proud of it as a speech[1], and that he was on pleasant terms with an Aulus Caecina in the time of Caesar's dictatorship, seem to me to prove nothing to the point. There are letters to and from Aulus Caecina in Cicero's correspondence (*Fam.* vi 5—9). In 7 § 4 he speaks of himself as Cicero's *veterem clientem*, and may for aught I see be the Caecina of our speech. Recent writers treat him as the son of our defendant. Cf. Teuffel-Schwabe's *Gesch. röm. Litt.* § 199, 5; Tyrrell and Purser's edit. of Cicero's correspondence, vol. iv, p. lxxiii; Pauly-Wissowa *Realencycl.* iii 1237.

[1] Cf. *Orator* 29 § 102 *Tota mihi causa pro Caecina de verbis interdicti fuit: res involutas definiendo explicavimus, jus civile laudavimus, verba ambigua distinximus.*

I. INDEX OF WORDS AND MATTERS.

Roman figures denote volume; Arabic denote pages or (with n.) notes.

II. INDEX OF PRINCIPAL PASSAGES IN LAY WRITERS REFERRED TO.

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