THE INSTITUTES OF GAIUS

Part II
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OXFORD
AT THE CLARENDON PRESS

Oxford University Press, Amen House, London E.C.4

GLASGOW NEW YORK TORONTO MELBOURNE WELLINGTON
BOMBAY CALCUTTA MADRAS KARACHI LAHORE DACCA
CAPE TOWN SALISBURY NAIROBI IBADAN ACCRA
KUALA LUMPUR HONG KONG

FIRST PUBLISHED 1953
REPRINTED LITHOGRAPHICALLY AT THE
UNIVERSITY PRESS, OXFORD
FROM CORRECTED SHEETS OF THE FIRST EDITION
1963

PRINTED IN GREAT BRITAIN

PREFACE

THE main purpose of this work is to help students to read Gaius with profit. It assumes that the reader has the text of Gaius open before him so that it is unnecessary to repeat many things that are in the text. It also assumes that Justinian's *Institutes* lie ready to hand; but though developments of the law after Gaius have not been entirely neglected, no attempt is made to provide a systematic conspectus of Roman legal history. This would be out of place in a commentary on Gaius and is no longer needed, as it was when Poste published his valuable work, even by students who read only English: they have now excellent manuals at their command.

Nunc transeamus ad obligationes. I offer sincere thanks to Professor Jolowicz for having kindly checked a number of references; also to the publisher's readers for having corrected mistakes that were not always typographical. For the rest my obligations are to previous writers. Special debts of which I was conscious have been acknowledged in the footnotes, but there must be some of which I was unconscious. I apologize for any oversights, but in an elementary work I regard the copious citation of literature as a fault.

The acknowledgement of general debts would have amounted to an autobiography. Many of those who have taught me most have passed away, but there is one happily still with us, Professor Salvatore Riccobono, to whom I am glad to have this opportunity of expressing my deep gratitude. For over fifty years his profound scholarship and rare breadth and humanity of view have been an inspiration to all Romanists, and for most of that time his unflagging friendship and kindly interest have been of inestimable value to me personally. Long may he continue *proferre de thesauro suo noua et uetera* in subtle combination.

F. de Z.

OXFORD
July 1952

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ABBREVIATIONS USED

I. MANUSCRIPTS

F = the Antinoite fragments published in 1933, *PSI* xi, 1182, and re-edited in *BIDR* 1935, 571, by V. Arangio-Ruiz.

O = the Oxyrhynchus fragments published in 1927, *P. Oxy.* xvii, 2103, by A. S. Hunt.

V = the Veronese Palimpsest, as reported in G. Studemund's *Apographum* (1874) and *Supplementa* (1884).

II. BOOKS AND PERIODICALS

Arangio-Ruiz, *Ist.* = V. Arangio-Ruiz, *Istituzioni di Diritto Romano*, ed. 4, 1937.

Arangio-Ruiz, *Actions* = V. Arangio-Ruiz, *Cours de droit romain* (*Les Actions*), Naples 1935.

Atti, Bologna = *Atti del Congresso Internazionale di Diritto Romano 1933* (the Bologna sessions, 2 vols.) (Pavia 1934–5).

Atti, Roma = *Atti* as above (the Rome sessions, 2 vols.) (Pavia, 1934–5).

Atti, Verona = *Atti del Congresso Internazionale di Diritto Romano*, Verona 1948 (Milan, 1951).

Beitr. = *Beiträge.*

BIDR = *Bullettino del Istituto di Diritto Romano.*

Bruns = C. Bruns, *Fontes Iuris Romani Antiqui*, ed. 7, O. Gradenwitz, 1909.

Buckland = W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, ed. 2, 1932.

Buckland, *Main Inst.* = W. W. Buckland, *The Main Institutions of Roman Private Law*, 1931.

Buckland and McNair = W. W. Buckland and A. D. McNair, *Roman Law and Common Law*, 1936.

CAH = *Cambridge Ancient History.*

Camb. L. J. = *Cambridge Law Journal.*

Corbett = P. E. Corbett, *The Roman Law of Marriage*, 1930.

Edictum = O. Lenel, *Das Edictum Perpetuum*, ed. 3, 1927.

Ét. = *Études.*

Festschr. = *Festschrift.*

Fontes = S. Riccobono, J. Baviera, C. Ferrini, J. Furlani, V. Arangio-Ruiz, *Fontes Iuris Romani Anteiustiniani*, ed. 2, 1940–3.

Girard = P. F. Girard, *Manuel élémentaire de droit romain*, ed. 8, F. Senn, 1929.

Girard, *Mél.* = P. F. Girard, *Mélanges de droit romain*, 1912, 1923.

Iura = *Iura — Rivista Internazionale di Diritto Romano e Antico*, 1950– .

Jolowicz = H. F. Jolowicz, *Historical Introduction to the Study of Roman Law*, 1932.

JRS = *Journal of Roman Studies.*

Kipp, *Quellen* = Th. Kipp, *Geschichte der Quellen des römischen Rechts*, ed. 4, 1919.
Kniep, *Gaius* = F. Kniep, *Der Rechtsgelehrte Gaius*, 1910.
Krüger, *Quellen* = P. Krüger, *Geschichte der Quellen und Litteratur des römischen Rechts*, ed. 2, 1912.
Kunkel = W. Kunkel, *Römisches Privatrecht*, 1935.
L. = *Lex.*
LQR = *Law Quarterly Review.*
Mél. = *Mélanges* (e.g. dédiés à G. Cornil).
Mitteis, *RPR* = L. Mitteis, *Römisches Privatrecht bis auf die Zeit Diokletians*, vol. 1, 1908.
Mommsen, *DPR* = Th. Mommsen, *Le Droit public romain* (P. F. Girard's translation of Mommsen's *Staatsrecht*), 7 vols., 1889–96.
Mommsen, *Jur. Schr.* = Th. Mommsen, *Gesammelte Schriften*, 1. Abteilung: Juristische Schriften, 3 vols. 1905–7.
Monier = R. Monier, *Manuel élémentaire de droit romain*, vol. i, ed. 5, 1945, vol. ii, ed. 2, 1940.
NRH = *Nouvelle Revue historique de droit français et étranger.*
Pal. = O. Lenel, *Palingenesia Iuris Civilis*, 1889.
PW = Pauly–Wissowa–Kroll, *Realenzyklopädie der klassischen Altertumswissenschaft*, 1894– .
RDA = *Revue internationale des droits de l'antiquité.*
RH = *Revue historique de droit français et étranger* (*NRH* continued 1922–).
SC. = *Senatusconsultum.*
Schulz = F. Schulz, *History of Roman Legal Science*, 1946.
Scr. = *Scritti.*
Seminar = *Seminar*, Annual extraordinary number of the *Jurist* (Washington).
Siber = *Römisches Recht in Grundzügen für die Vorlesung*, 1925, 1928.
St. = *Studi in onore di* (e.g. *Bonfante*, *Riccobono*).
SZ = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.*
Textes = P. F. Girard, *Textes de droit romain*, ed. 5, 1923.
Tijdschr. = *Tijdschrift voor Rechtsgeschiedenis — Revue d'histoire du droit.*
Wenger, *ZPR* = L. Wenger, *Institutionen des römischen Zivilprozessrechts*, 1925.
Wlassak, *RPG* = M. Wlassak, *Römische Prozessgesetze*, 1888, 1891.
Zulueta, *Sale* = F. de Zulueta, *The Roman Law of Sale*, 1945.

III. LEGAL TEXTS

C. = *Codex Iustinianus.*
C.T. = *Codex Theodosianus.*
Coll. = *Mosaicarum et Romanarum Legum Collatio.*
D. = *Iustiniani Digesta.*
Epit. = *Gai Institutionum Epitome.*
F. V. = *Fragmenta Vaticana.*
Inst. = *Iustiniani Institutiones.*
Nou. = *Iustiniani Nouellae.*

Paul *Sent.* = *Pauli Sententiae.*
P. Giss. = *Griechische Papyri im Museum zu Giessen.*
P. Oxy. = *The Oxyrhynchus Papyri.*
P. Ryl. = *The Rylands Papyri.*
PSI = Pubblicazioni della Società Italiana per la ricerca dei papiri, etc.
Theoph. = Institutionum Graeca Paraphrasis (ed. Ferrini).
Ulp. (alone) = *Ulpiani Liber singularis Regularum*, now commonly referred to as *Epitome Ulpiani.*
Val. Prob. = *M. Valerii Probi de notis iuris fragmenta.*
The names of the best-known jurists have been abbreviated:
e.g. Iulianus—Iul., Modestinus—Mod., Papinianus—Pap., Pomponius —Pomp., Ulpianus—Ulp.
Non-legal texts are referred to in the accustomed manner; e.g. Gell. = *Auli Gellii Noctes Atticae.*

INTRODUCTION[1]

Gaius' lifetime. Nothing is known of Gaius' life and personality but what can be gleaned from his works. Since he was in full activity as a writer under Antoninus Pius (A.D. 138–61), he must have been born at latest pretty early in Hadrian's reign (117–38); he speaks of an event in that reign as having occurred *nostra aetate.*[2] His work *Ad SC. Orphitianum* (178) may of course have been written under Commodus (180–92).[3]

Gaius' works. He is represented in the *Digest* by 519 extracts, 14 of them from the *Institutes* (more correctly *Institutiones*).[4] They are from 18 works, but the Florentine *Index* lists only 13, from one of which there is no extract. The *libri ex Q. Mucio* referred to in 1, 188 are neither indexed nor excerpted; they must have disappeared. Also neither indexed nor excerpted are the *proprii commentarii* on *bonorum possessio* and on succession to *liberti* referred to in 3, 33 and 3, 54; these, however, may not have been separate works, but portions respectively of one or other of Gaius' edictal commentaries and of his *Ad L. Iuliam et Papiam Poppaeam.*

Gaius' works, which include a number of monographs that need not be mentioned here, extend to every branch of private law. His lost *libri ex Q. Mucio*, to judge by the remains of a similar work by his slightly older contemporary Pomponius,[5] gave a comprehensive survey of the civil law. His *Ad edictum prouinciale* did the same for the edictal law.[6] The fact that the uniform Edict for all the provinces settled under Hadrian did not differ substantially from the urban Edict[7] enabled the compilers of the *Digest* to make considerable use of this work.[8]

[1] Cf. Kübler, *Gaius*, in *PW* 7, 494, mostly followed here, citations from offprint; Krüger, *Quellen* 201; *Textes* 220; the prefaces to the Krüger–Studemund and Huschke–Seckel–Kübler editions; Schulz generally (see his index).

[2] *D.* 34, 5, 7.

[3] *D.* 38, 17, 9: *Idem* (Gaius) *libro singulari ad SC. Orphitianum.* Since no such work is attributed to him by the *Index* of the Florentine *Digest*, a mistake in this inscription is conceivable, but it ought not to be assumed. Cf. Mommsen, *Jur. Schr.* 2, 38 n. 34; Kübler, *Gaius*, pp. 2–3 of offprint.

[4] *Pal.* 404–17. Grupe, *SZ* 1895, 300.

[5] Schulz 94–96. 204.

[6] He also wrote *Ad ed. praetoris urbani*; the compilers could find only 10 books of it. Schulz 191 suggests that these may not have been fragments of a once complete commentary, but a collection of commentaries on 10 edictal titles.

[7] Below, p. 19.

[8] *Pal.* 53–388.

From 1, 188 it is apparent that the *libri ex Q. Mucio* and at least one of the edictal commentaries (*edicti interpretatio*) were written before the *Institutes*.

Gaius produced other educational works besides the *Institutes* with which we are primarily concerned. He wrote, or was supposed to have written, an enlargement of the *Institutes* in 7 books *Rerum cottidianarum siue aureorum*[1] and 3 books (or 1) *Regularum*,[2] to which a single book *De casibus* was a sort of appendix. His 6 books *Ad L. duodecim tabularum*[3] are the only known work on this subject later than Labeo's. This is in keeping with the exceptional interest in legal history which he shows in the *Institutes*. He justifies it in a preface to the work which the *Digest* fortunately preserves.[4]

Posthumous fame. Gaius is not mentioned by any classical writer.[5] His fame beyond a limited circle was posthumous and, so far as we can judge, came gradually. It was to an already established reputation that the *Law of Citations* of A.D. 426 gave official confirmation by endowing all Gaius' writings with an authority equal to that of the works of Papinian, Paul, Ulpian, and Modestinus.[6] But though the fact of the growth of Gaius' popularity during the centuries before the *Law of Citations* is certain, the traces of it are few and scattered.

Fragments of two manuscripts of his *Institutes*, one of the third (O) and the other of the fourth century (F), have been found in Egypt. The *Institutes* are the primary source of the *liber singularis regularum* attributed to Ulpian, but now thought to have been composed about the year 300.[7] In the collection of extracts from classical jurists found in the *Collatio legum Mosaicarum et Romanarum* and believed to have been originally made about the beginning of the fourth century[8] there is one extract (16, 2) from the *Institutes*. From the end of the fourth century onwards Gaius is cited or used by the grammarian Seruius and other lay writers, but here we have to reckon with the influence of the *Law of Citations*. By this time, and probably earlier, the *Institutes*[9] were a prescribed introductory textbook in the Eastern law schools. The miserable commentary or lectures on the *Institutes*

[1] Schulz 167.
[2] *Ibid.* 174.
[3] Pal. 418–45.
[4] *D.* 1, 2, 1. Cf. Schulz 187.
[5] That *Gaius noster* in Pomp. *D.* 45, 3, 39 is a Tribonianism seems to be agreed. The *Gaius* cited by Iauol. *D.* 46, 3, 78 and Iul. *D.* 24, 3, 59 is probably C. Cassius Longinus.
[6] *C.T.* 1, 4, 3: *ita ut Gaium quae Paulum, Vlpianum et ceteros comitetur auctoritas lectionesque ex omni eius corpore recitentur.*
[7] Schulz 180 ff.
[8] *Ibid.* 311 ff.; *Symbolae van Oven* 313.
[9] In some form: *Const. Omnem* § 1. Cf. Schulz 275. 279.

known as the *Autun Gaius* are probably the work of an anonymous teacher at Autun in the fifth century.[1] It may be taken as showing the same for the Western schools, but this might be due to the *Law of Citations*. Similarly the fact that the *Epitome Gaii* is appended to the *Lex Romana Visigothorum* or *Breviary of Alaric* (A.D. 506) is not in itself evidence of the diffusion of Gaius' *Institutes* in Gaul earlier than the *Law of Citations*, but the *Epitome* is thought to be a Visigothic adaptation of an existing post-classical epitome which might be earlier.[2] The end of the fifth century or the beginning of the sixth is judged to be the date of the Veronese MS. (V), copied presumptively at Verona. From this scattered and fragmentary evidence no very definite conclusions can be drawn, except perhaps that it was the popularity of Gaius' *Institutes* in the schools that was the chief factor in establishing a reputation which the *Law of Citations* sealed with official approval.

Justinian calls our author *Gaius noster*.[3] This has been understood[4] as claiming him for Byzantium, but probably means merely 'the old friend of our student days'. Justinian based his own *Institutes* on Gaius'. Theophilus' Greek paraphrase of Justinian's *Institutes* shows clear signs that its author used a pre-Justinian Greek paraphrase of Gaius.[5]

Who and what was Gaius?[6] This posthumous advance to the highest authority made by a writer known only by his *praenomen* and never cited or mentioned by his contemporaries makes one thing quite certain: Gaius did not belong to the select circle of metropolitan jurists recognized as authoritative in their lifetime.[7] No *responsa* of his are known. If he practised as a lawyer it must have been outside Rome or only in a modest way. Primarily he was a writer and, to judge from his works, a teacher.

He was certainly a Roman citizen: for him Roman law is 'our law'[8] and Latin, of which he is a master, 'our speech'.[9] His references in the *Institutes* to the authorities of the Sabinian school as *praeceptores nostri* leave little doubt that he had studied at Rome. On the other

[1] *Ibid.* 301.
[2] *Ibid.* 302.
[3] *Const. Imperatoriam* § 6; *Inst.* 4, 18, 5; *Const. Omnem* § 1.
[4] By Kniep, *Gaius* § 5.
[5] Schulz 305–6. 343.
[6] Cf. Mommsen, *Gaius ein Provinzialjurist* (1859), reprinted with valuable additional notes by Kübler in Mommsen, *Jur. Schr.* 2, 26–38.
[7] On them in this period cf. Schulz 102 ff.
[8] 1, 55; 3, 163; 4, 37.
[9] *D.* 50, 16, 233, 2; 236 pr.

hand, various indications seem to connect him with the Greek East. Denomination by simple *praenomen* is not a Roman but a Greek practice.[1] He is familiar with Greek and even with Greek technical law terms,[2] and shows a certain interest in Greek and Eastern peregrine law.[3] His examples of cities possessing the *ius Italicum* are Troas, Berytus, and Dyrrachium, all of them Eastern.[4] And he is the only jurist known to have written a commentary on the provincial Edict.

On these grounds it is generally accepted as probable that Gaius came to study at Rome from a Roman colony in the Greek East, Troas perhaps, since he may have put his home town first *pietatis causa*.[5] But where, having completed his Roman studies, he wrote and taught can only be conjectured. If the Edict of his *libri ad ed. prouinciale* was that of a particular province, as Mommsen[6] strongly maintained it must have been, that province must have been one governed by a *proconsul*, since the work usually refers to the governor as *proconsul*.[7] In the East at this time the only reasonably possible proconsular province is Asia.[8] The inference naturally drawn by Mommsen long ago was that Gaius when he wrote on the provincial Edict was a law-teacher in that province, probably at Troas. But Mommsen's view as to the Edict commented on, which is essential to his argument, is not accepted by all modern authorities. It is held that Gaius may have commented on the general form of provincial Edict recently settled by Saluius Iulianus; this he might have done at Rome for the benefit of students there preparing for civil service in the provinces.[9]

Nevertheless Mommsen's view is still a tempting possibility accepted by many. What inclines others to reject it is the strong local Roman atmosphere that pervades Gaius' works.[10] The impression made by the *Institutes* is certainly that they were written primarily for Rome.[11]

[1] Mommsen, *Jur. Schr.* 2, 27–28. But see Kunkel, *Herkunft etc. der röm. Juristen* (Weimar 1952).

[2] 3, 141. *D.* 19, 2, 25, 6. 50, 16, 30; 233, 2; 236.

[3] 1, 55. 193; 3, 96. 134. Cf. *D.* 10, 1, 13. 47, 22, 4.

[4] *D.* 50, 15, 7. Cf. Ulp. *e.t.* 1.

[5] Mommsen, *Jur. Schr.* 2, 35. [6] *Ibid.* 2, 19 n. 40.

[7] Its occasional mentions of *praetor* may easily be due to corruption or interpolation: Schulz 192 nn. 2–4. Our *Institutes* commonly speak of provincial governors as *praesides prouinciarum*, but *proconsul legatusue* (*Caesaris*) occurs in 1, 101–2 and *proconsul* alone in 1, 20 and 4, 139.

[8] Mommsen, *Jur Schr.* 2, 34. But Kniep, *Gaius* 11–16, argues for Bithynia, which he contends was still a senatorial province under Antoninus Pius.

[9] *Edictum* p. 5; Kübler, *Gaius*, *P.W.*, p. 2 of offprint.

[10] For details cf. Huschke's *Praefatio*, Seckel–Kübler p. xvi, or Kübler, *Gaius*, *PW*, *l.c.* To give a single example, would a jurist writing in Asia give as an illustration of a condition: *si nauis ex Asia uenerit*?

[11] Cf. Lenel, *Holtzendorffs Enzyklopädie* 1, 364 n. 5; Wlassak, *RPG* 2, 224 n. 10.

But this Romanism can be explained away as being due to Gaius' schooling and the books he used and perhaps also as expressing the resolute patriotism of a colonial, more Roman than the Romans. The truth is that the evidence is insufficient for anything but conjectures; it is an assumption even that Gaius wrote and taught only in one place. The proper verdict is *non liquet*.

Date of the Institutes. The work was written about A.D. 161, at the end of Antoninus Pius' reign or soon after. The fact that in earlier references to him (1, 53. 74. 102; 2, 120. 126. 151a) this Emperor is *imperator Antoninus*, but in the one later reference (2, 195) *diuus Pius Antoninus*, has led to the conclusion that Book 2 was in course of composition, or (better) of being copied for publication, at the time of his death (March 161). But though Hadrian is constantly *diuus*, the epithet is omitted in two places (1, 47; 2, 57), and though Trajan is *diuus* in 3, 72, he is plain Trajan in 1, 34. Evidently we have to reckon with the possibility of aberrations of either the writer or copyists. Again, the end of 2, 195 (*diuus Pius Ant.*) is held by some to be a later addition.[1] Thus the argument, though not negligible, is far from conclusive. A better argument is that constitutions of the next Emperor, M. Aurelius, are not cited where one would expect them to be if they existed.[2] These omissions do not exclude the possibility that the *Institutes* were written after 161 but before the constitutions had been issued or had come to Gaius' knowledge,[3] but all things considered a date about 161 is a fairly safe conclusion.

Modern recovery of the text. In 1816 Niebuhr discovered that the underneath writing of a palimpsest *codex* at Verona was a fifth–sixth-century copy of Gaius' *Institutes*. The work of deciphering took many years; virtual finality was reached only by Studemund's *Apographum* (1874) and *Supplementa* (1884). The photographic reproduction (Leipzig 1909) has yielded no further results. Huschke estimated that owing to the loss of three folios and the illegibility of many passages about one-tenth of the text was still wanting, but that this could be reduced to about one-thirteenth by recourse to other sources—the *Collatio*, the Visigothic *Epitome*, Justinian's *Institutes* and *Digest*, and stray quotations in grammarians and lexicographers. Since Huschke's estimate a small piece of new text has been obtained from the Oxyrhynchite fragments (O: 4, 72 a) and two highly important

[1] Schulz 164 n. 1. 347.

[2] His constitution on *cretio* (Ulp. 22, 34) is not mentioned in 2, 177 nor that on *compensatio* (*Inst.* 4, 6, 30) in 4, 61 *sq.* Also there is no hint of his reform of *cura minorum* (*Vita Marci* 10, 11) in 1, 197, but there our text is defective.

[3] He admits imperfect information as to legislation in 1, 32b and 2, 221.

pieces from the Antinoite fragments (F: 3, 154 a. b; 4, 17 a. b.). The *Autun Gaius* (1898) had contributed practically nothing.

Authenticity of our text. Our text depends mainly on V, which is of the late fifth or early sixth century. Comparison of its text with that of the copy or copies (many must have been available) used for Justinian's *Institutes* and *Digest* and with the third- and fourth-century fragments (O and F) discloses only one serious variant: F has given us a clearly authentic passage (3, 154 a. b.) omitted by V. We incline to think that the omission was accidental, but if, as others hold, it was intentional, V may have omitted other passages. Again, the text of Gaius used, it is thought about the year 300, for the *Epitome* known as Ulpian's *Regulae*, seems to have been very like our own.[1] The area of comparison is not extensive, but the evidence we have gives no support to the idea that our text was drastically altered in post-classical times. It warrants a reasonable certainty that we possess the text substantially as it left Gaius' hands. Thus the unique importance of Gaius' *Institutes* as being the only classical work that has reached us almost complete has been confirmed by the recent discoveries.

No doubt the text has been corrupted in places by the intrusion of glosses. Some are certain,[2] others more or less probable. But the careless copying into the text of a short explanatory or amending phrase or of a note of emphasis[3] is a different thing from the rewriting or expansion of one passage after another which it is a modern propensity to claim to have detected. Schulz has justly observed that the total result of this is that hardly anything of our text is allowed to be genuine.[4] Our own strong impression is that our text is so homogeneous and sustained in character that, apart from *minutiae*, it must be the work of a single author, who can only be Gaius. To attempt to give the very numerous modern suggestions of post-Gaian alterations the full consideration that the learning and acumen with which they are advanced would require is beyond the scope of a work such as the present. Both in our edition (Part I) and in this commentary they have therefore been almost entirely ignored.

Schulz's own suggestion[5] is essentially conservative. It is that our

[1] Shown by Schulz, *Die Epitome Ulpiani* (1926) 12 f., though cf. Lenel, *SZ* 1927, 415–16.

[2] e.g. 1, 53; 3, 113. 126; 2, 160. 249; 3, 56. 146. 196; 4, 112. Cf. Studemund, *Apographum* p. xx.

[3] e.g. *regula* in 1, 53; 3, 113. 126.

[4] Schulz 162.

[5] *Ibid.* 164.

text was substantially fixed by a second edition made in the third century; it is thus at any rate classical. But if this hypothetical edition made, as he thinks, no considerable changes, on what evidence does the existence of the edition rest? And why, in particular, did it not incorporate certain obviously relevant changes of law made after 161?[1]

Criticism of the Institutes. The general verdict on Gaius' works as a whole is that, though an admirable expositor, he was not a jurist of the highest order.[2] But to a work such as the *Institutes*, which as its title announces is a textbook for beginners, exhaustiveness, up-to-date literature, penetrating analysis of difficulties, and original solutions are not necessary; they may even, if carried at all far, be detrimental. The essential qualities are good plain writing, clear arrangement, and a sense of proportion. The *Institutes* are not perfect, but their immense and lasting success would have been impossible did they not possess these qualities to an eminent degree.

Style. In spite of a few barbarisms, for instance *quod* instead of the accusative and infinitive (1, 188; 2, 78), and of the graecisms to be expected in a Graeco-Roman age,[3] Gaius' Latin is of a very high order and in the best tradition. At times he can be a trifle verbose; now and then he repeats himself.[4] But a good teacher avoids the obscurity of brevity and is not shy of repetitions.

Arrangement. The threefold division of the work (1, 8) is much more than a great advance on the order of the *Libri Iuris Ciuilis* of Q. Mucius and Massurius Sabinus;[5] it is an outstanding and permanent contribution to systematic jurisprudence. Gaius may not have originated it, but this is not shown by his announcing it without explanation: as understood by him it needed none.[6] The work is carefully subdivided; occasionally topics are introduced out of the professed order,[7] but never, except perhaps in 4, 69–114, so as to put the reader in doubt as to the thread of the discourse. Rightly enough Gaius was ready at times to prefer convenience to rigid system.

The subdivisions are not beyond criticism. Those of Book 1, clear and logical as they are, fail to do justice to some important

[1] Above, p. 5 n. 2. Schulz 164 n. 2 notes this as significant, but passes over the more obvious possible significance. However, his view only involves that our text may contain a little third-century matter.

[2] Krüger, *Quellen* 204–5; Kipp, *Quellen* 129.

[3] Cf. Seckel–Kübler, *Praefat.* p. iv; Mommsen, *Jur. Schr.* 2, 33 n. 18.

[4] Krüger, *Quellen* 209 n. 55 cites: 1, 22 = 3, 56; 1, 156 = 3, 10; 2, 34–37 = 3, 85–87; 2, 86–88. 90–91 = 3, 163–166; 3, 180–181 = 4, 106–108. But only the third parallel is at all remarkable. Cf. below, p. 65.

[5] So far as known: Schulz 95. 157–8.

[6] Below, p. 23.

[7] Krüger, *Quellen* 209 n. 54 instances: 1, 96. 119–22. 158–63; 4, 91–95.

distinctions. In Books 2–3 acquisition *per uniuersitatem* would have come better after obligations; at least so we think, but this is a minor matter. Really faulty arrangement is found only in the first part of Book 2. This was put straight in the *Res cottidianae*, an interesting case of self-criticism if, as seems probable, Gaius was the author of the relevant passages.[1] Justinian (*Inst.* 2, 1–9) had only to follow suit, but by his time the problem had been simplified by the disappearance of *mancipatio* and *in iure cessio*.

Proportion. Without a nice sense of proportion Gaius could not in so short a work have given us a living sketch, and not merely a skeleton outline, of the private law. Of course, from our point of view he never says too much and constantly too little. To be fair we must put ourselves in the place of a third–fifth-century law-student at the beginning of his course. It does occur to one that he, like our own students, may have got a little tired of *erroris causae probatio*, *exheredatio*, succession to *liberti*, or the details of interdictal procedure, and that his professor probably found the invaluable excursus on the *legis actiones* more interesting than he did. But it is Gaius' omissions that come home to us, and it is for them that he has been most severely criticized. We will review the most important summarily, bearing in mind that the secular popularity of the *Institutes* in the law schools is proof that on the whole they must have handled the delicate question of what to leave out with sound judgment.

1. We are not told how people got married. The reason for this is that their status was not affected. A woman might pass *in manum matrimonii causa*, but a status of *feme covert* did not exist. But even from the point of view of status an act (or facts, if one likes) which produced such important consequences on the status of the offspring deserved the short paragraph that would have sufficed (cf. *Inst.* 1, 10 pr.).

2. *Dos* is mentioned only incidentally.[2] This omission may have been justifiable. At any rate, the professors who compiled Justinian's *Institutes* appear to have thought so.

3. *Longi temporis praescriptio* is not mentioned (2, 46; contrast 2, 31). But probably it did not yet exist as a general provincial institution, the matter being left to the *lex loci*.[3]

4. The omissions of the *SCa. Vellaeanum* and *Macedonianum* seem defensible.

[1] *Pal.* 490–7.
[2] 1, 178. 180; 2, 63; 3, 93a. 125; 4, 44. 62. 151. Contrast Ulp. 6.
[3] Below, pp. 70–71.

5. The treatment of obligations, greatly though we are indebted to it, must be admitted to be defective. Only civil obligations *ex contractu* and *ex delicto* are considered; the obligations, civil as well as praetorian, which later were classed by the *Res cottidianae* (Gaius *D.* 44, 7, 1 pr.) as *ex uariis causarum figuris* and by *Inst.* 3, 13, 2 as *quasi ex contractu* and *delicto*, are passed over. The adoption of the current unsatisfactory classification of contracts as real, verbal, literal, and consensual[1] seems to be chiefly responsible for the omission of *depositum* and *commodatum*; the *Res cott.* (Gaius *D.* 44, 7, 1, 3–6) were to class these two contracts along with *pignus* as real, by the side of *mutuum*, an expedient canonized by *Inst.* 3, 14.[2] Extinction of obligations is confined to civil modes of extinguishing contractual obligations; praetorian extinction by *pactum* does appear in the account of *exceptiones*, but the civil extinction of delictual obligations by *pactum* is hardly mentioned (4, 182). These defects will be considered in the course of our work. In general they are due to the immaturity of Roman jurisprudence in systematization, a matter in which Gaius was a pioneer. The antiquated conception and faulty treatment of obligations are thought by some to have resulted from too close a following of some older work. As to this there is no need to indulge in unverifiable hypotheses. It is sufficient to conjecture that Gaius was following an established academic tradition, presumably that of the Sabinian school; precisely how it reached him, whether orally or through some textbook, it is impossible to say.

Further criticisms. Gaius is said to be wanting in historical insight.[3] By modern standards this is a true bill, as one sees from 1, 144; 3, 193. 216. But among the classical jurists he stands alone in his appreciation of the value of legal history.[4] Without him we should know very little of Roman legal history.

In his treatment of disputed points he is said to be superficial and to show a lack of independence. Usually he simply contrasts the Sabinian and Proculian views, leaving us to presume, rightly or wrongly, that he was a faithful Sabinian.[5] Less often he records that a point is controversial without even citing rival authorities.[6] At least twice he announces further consideration, which, however, is not

[1] Pernice, *SZ* 1888, 220–6.

[2] Below, p. 150.

[3] Kübler, *Gaius*, *PW* 7, offprint pp. 6–7.

[4] Schulz 134–5. 187.

[5] 1, 196; 2, 15. 37. 79. 123. 195. 200. 216 *sq.* 231. 244; 3, 87. 98. 103. 133. 141. 161. 167a. 168. 178 *sq.*; 4, 78. 79. 114. Cf. *Pal.* ii, col. 216.

[6] 1, 129. 184; 2, 90, 94, 95; 3, 119. 122. 143–5. 189; 4, 125.

forthcoming.[1] Such is the charge-sheet. The only defence is that within the limits of a beginners' textbook it was not possible to go deeply into the numerous matters of controversy.

Gaius' literature. The Sabinian and Proculian schools. A last criticism is that Gaius' literature is not up to date. Most of his citations contrast the views of *praeceptores nostri* and *diuersae scholae auctores*,[2] the former being the authorities of the Sabinian *secta* or *schola*, the latter those of the Proculian. Our sole direct informant, Pomponius,[3] tells us that the Sabinian school was founded by C. Ateius Capito and the Proculian by M. Antistius Labeo, jurists who flourished under Augustus and Tiberius, and that among the succeeding heads of the Sabinian school were Massurius Sabinus, Cassius, Caelius Sabinus, Iauolenus, and Julian, and of the Proculian school Nerva *pater*, Proculus, Pegasus, Celsus *pater*, Celsus *filius*, and Neratius.[4] Naturally Pomponius could have gone no farther, but probably the rivalry of the schools, though presented as living by Gaius, ended about the time of Hadrian. They seem to have been schools in the literal sense,[5] not simply schools of thought; for though Pomponius contrasts the intellectual tempers of the two founders, no one has been able to reduce the differences of view to any principle. The termination of the rivalry may have been due to the overriding authority of Julian, to Hadrian's measures of centralization, or to one or both schools having ceased to exist. At any rate, the great jurists of the Severan dynasty—Papinian, Paul, and Ulpian—cannot be assigned to either school.[6]

The jurists of Gaius' copious citations range from Q. Mucius (consul 95 B.C.) to his own older contemporary Julian,[7] but jurists of the middle half of the first century of our era predominate, the most frequently cited being Labeo, Nerua, Proculus, Massurius Sabinus, and Cassius. The only citations of jurists of the second century are one of Iauolenus (3, 70), two of Julian (2, 218. 280), and one of Sextus (Pomponius or Africanus: 2, 218). The feud between Celsus and Julian is probably the explanation of the total neglect of the former, but it is hard to explain how a Sabinian writing at the end of Anto-

[1] 2, 121; 3, 116. Perhaps also 3, 179. 202. It may be added that in 1, 32b and 2, 221 he shows slackness in verifying legislative sources, but we do not know what facilities he disposed of.

[2] References above, p. 9 n. 5.

[3] *D.* 1, 2, 2, 47 *sq.*

[4] We have omitted some lesser names. Cf. Krüger, *Quellen* 163.

[5] Cf. Gell. (*ob.* A.D. 175) 13, 13, 1.

[6] Cf. Buckland 25–27; Schulz 119–23.

[7] Cf. the *Index Nominum* at the end of Krüger's edition.

ninus Pius' reign could have cited Iauolenus and Julian so seldom. It is not as if Gaius was ignorant of the legislation of the second century. The inference that his citations were at second hand in the sense that he was not personally familiar with the works of the writers whom he names would be preposterous, but they may have been at second hand in the sense that he judged it wise not to overload a popular work with citations other than those expected by academic tradition. The convenient modern compromise of a simple text with learned footnotes was not available.

Conclusion. The various criticisms of the *Institutes* which we have felt bound to record are, it should be remembered, the product of many years of minute scrutiny by experts, a test from which hardly any law-book would come out unscathed. They are valuable from the learned point of view, but for the most part do not touch the suitability of the work for the purpose for which it was written. Gaius was subject to the limitations of his period and doubtless made mistakes of his own. Nevertheless after nearly 1,800 years the advice to beginners in Roman law is still: 'read Gaius'.

BOOK I

§ 1. Ius Gentium and Ius Naturale

It is possible that the beginning of this section has not been completely restored. Taken as it stands it tacitly identifies *ius gentium* with *ius naturale*: it is the law common to all mankind as being the product of reason—common human reason or the divine reason ordering the world. In spite of the curious distinction drawn in *Inst.* 1, 2 pr., we find the same identification in *Inst.* 1, 2, 11 and elsewhere (e.g. *Inst.* 2, 1, 11).

Ius gentium and ius ciuile. The distinction drawn by Gaius between these two terms may seem clear enough, but the later passages, in which he partly fulfils his promise to apply it in detail, show that *ius gentium* bears two distinct, though closely allied, meanings. Such propositions as that by the *ius gentium* children inherit the status of their mothers (§§ 78. 82), or that all forms of the verbal contract except *sponsio* are open to non-Romans, being *iuris gentium* (3, 93), are statements of actual law, but the propositions that, for example, *dominica potestas* is *iuris gentium* (1, 52), or that *tutela* and *cura* occur in peregrine law (§§ 189. 197), are just pieces of superficial comparative jurisprudence: as much could be said of many legal institutions (e.g. manumission: *Inst.* 1, 5 pr.), namely, that something of the sort exists in every system. This distinction between the practical and the speculative meanings of *ius gentium* must be borne in mind.

The practical meaning is of special importance. Roman law, like other ancient laws, began with the principle of personality of law: the law of a State applied only to its own citizens. It was a momentous innovation when Roman jurisprudence adopted the idea of a *ius gentium*. This originated when, about 200 B.C., Rome began to grow into an empire and therefore to require a common law for all its subjects regardless of their *ciuitas*, especially a common commercial law. The need was met not by framing an international code of commerce, but simply by treating as universally applicable such Roman institutions as seemed suitable. The tests were non-technicality and conformity with the common sense and practice of the Mediterranean world. Thus the Roman *ius gentium* in the practical sense came to consist in part of quite old native law (e.g. *traditio*, *stipulatio* except *sponsio*, *mutuum*), and in part of more recent Roman customary law (e.g. the consensual contracts). No doubt in the formation of this later custo-

mary law international mercantile practice played a part.[1] No doubt too the acceptance and propagation of the idea of *ius gentium* was assisted by the fact that it harmonized with Hellenistic speculation. It was natural to identify the contrast between *ius ciuile* and *ius gentium* with the current philosophical and rhetorical contrast between positive law (δίκαιον νομικόν) resting on the ordinance of the State (γεγραμμένον) and therefore peculiar to it (ἴδιον), and natural law (δίκαιον φυσικόν) existing without enactment (ἄγραφον) and everywhere (κοινόν). But the hall-mark of the institutions of the *ius gentium* is unmistakably Roman: *emptio uenditio*, for example, is anything but Hellenistic.

The promise made at the end of the section to distinguish institutions as *iuris ciuilis* and *iuris gentium* in the course of the work is not fully kept. It is observed as far as the end of the first part of book 2, but apparently forgotten afterwards. That the whole law of inheritance and of actions was *iuris ciuilis* hardly needed to be stated. Under the law of obligations it is duly observed that the verbal contract in the form of *sponsio* (3, 93) and on the whole the literal contract by *expensilatio* (3, 132) were *iuris ciuilis*, but that this was exceptional in the law of contracts, the other forms of verbal contract and the real and consensual contracts being *iuris gentium*, deserved express mention. That the law of delicts was *iuris ciuilis* we learn only incidentally later (4, 37).

§§ 2–7. The Sources of Roman Law

§ 2. A comparison of the list of sources given here with that given by Papinian a generation later is instructive. It runs (*D.* 1, 1, 7): *Ius ciuile est quod legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium uenit.* 1. *Ius praetorium est quod praetores introduxerunt adiuuandi uel supplendi uel corrigendi iuris ciuilis gratia propter utilitatem publicam. quod et honorarium dicitur ad honorem praetorum sic nominatum.*

The differences from our § 2 are mainly that *ius ciuile* and *ius praetorium* are distinguished[2] and that the creative power of jurisprudence is described as *auctoritas prudentium* instead of *responsa prudentium*.[3] Otherwise the two lists agree; the sources of enacted law are the same in both, and both omit custom as a source. The omission is surprising, for though one may regard Justinian's homage to custom as lip-service,[4] the view that custom was a source of law was old and general,

[1] Below, pp. 146–7, 252–3.
[2] Cf. below, on § 6.
[3] Cf. below, on § 7.
[4] *Inst.* 1, 2, 3. 9–11.

being found in Cicero and in various classical jurists.[1] Probably it is omitted because Gaius and Papinian did not regard it as a source of law distinct from jurisprudence, but made it depend on being accepted by jurisprudence as *ius ciuile quod sine scripto in sola prudentium interpretatione consistit*.[2] Such a view would not lack modern support.

§ 3. *Leges* and *plebiscita* are the statutes of the Republican period. They were the enactments of the constitutional assemblies of the *populus* and the *plebs*, those of the *populus* being the *comitia curiata*, *centuriata*, and *tributa*, that of the *plebs* the *concilium plebis*. In each the members were organized and voted in groups, respectively *curiae* (meaning unknown), *centuriae* (probably military; traditionally attributed to the penultimate king Seruius Tullius), and *tribus* (originally districts), the last being also the units in the *concilium plebis*. These assemblies could be convened only by an appropriate magistrate and were confined to accepting or rejecting his proposal (*rogatio*, *lex rogata*); they had no power of amendment or even debate.[3]

Comitia curiata. The enactments of the *comitia curiata* were *leges*, but this assembly is not likely to have legislated in the modern sense at any period. Legislation, when it began, fell to the other assemblies, which had by then come into existence. In the historical period the *comitia curiata* were a formal survival, preserved for particular purposes on religious grounds. In private law two institutions depended on a *lex curiata* proposed by the *pontifex maximus*, namely *adrogatio* (1, 99) and the earliest *testamentum* (2, 101), both of which involved sacral law.

Comitia and concilium plebis. We need not trouble with the distinction between the *comitia centuriata* and *tributa*, but that between these *comitia* and the *concilium plebis* was important so long as the conflict between patricians and plebeians was a living issue. The patricians claimed that they were not bound by plebiscites because (or if?) these lacked their *auctoritas*. Exactly what is meant by *auctoritas* here is an abstruse and disputed question.[4] The objection was finally overruled by a *L. Hortensia*,[5] after which, though *lex* and *plebiscitum* remained technically distinct, the term *lex* was currently applied indiscriminately. Most of the later Republican '*leges*' on pri-

[1] *D.* 1, 3, 32 *sq.*

[2] Pomp. *D.* 1, 2, 2, 12.

[3] For details see Jolowicz 16 ff.

[4] It cannot refer to the fact that the patricians, numerically insignificant, had no vote in the *concilium plebis*, but must refer to some formal act. Cf. Mommsen, *DPR* 6, 1, 174 ff. 7, 236 ff.; Jolowicz 30; Beseler, *Beitr.* 4, 109 and *SZ* 1924, 359.

[5] 286–9 B.C.: Mommsen, *DPR* 6, 1, 178. But there had been previous legislation on the matter.

vate law seem to have been plebiscites, e.g. the *L. Aquilia* (3, 210 *sq.*). But there was always the important difference that the convener of *comitia* was a *magistratus populi Romani*, but of the *concilium plebis* a tribune.[1]

Out of policy Augustus kept up this Republican form of legislation, but it was dropped by Tiberius, and the *leges* passed under Claudius in the middle and by Nerva at the end of the first century were but antiquarian revivals.[2]

§ 4. Senatusconsulta. Legislation by senatusconsult was a transition form, which provided a semi-republican cloak for imperial legislation at the beginning of the Empire. Under the Republic the Senate, though claiming considerable powers of interfering with legislation, could not itself legislate. In the first century of the Empire the regular form of legislation came to be senatusconsult proposed or approved by the Emperor, but though under Tiberius the power to elect the magistrates was formally transferred from the popular assemblies to the Senate, there was no similar formal transfer of legislative power. At least in private law recourse was had at first to the Senate's old basic right to give authoritative advice to the magistrates, i.e. in this sphere to the judicial magistrates. Hence the senatusconsults of the earliest Empire did not make *ius ciuile* directly, but took the form of advising the magistrate by his Edict (§ 6) to make *ius honorarium*.[3] A senatusconsult backed by the Emperor was necessarily obeyed by the magistrate, and in course of time, after a doubt (*quamuis fuerit quaesitum*), the senatusconsult itself came to be accepted as a direct source of civil law (*legis uicem optinet*). The earliest senatusconsult which certainly made civil law is the *SC. Tertullianum* in the reign of Hadrian,[4] when also the power of the magistrates to alter their traditional Edicts was abolished. But as a form of legislation the senatusconsult did not endure much longer. At the end of the second century we find the jurists quoting the introductory *oratio principis* instead of the senatusconsult itself; a little later the formality of a senatusconsult was dropped, and the *oratio principis* became merged in the imperial *edictum*.

§ 5. Constitutiones principum. Ulpian (*Inst.* 1, 2, 6)[5] says much the same as Gaius: imperial constitutions have the force of *lex* in virtue of the *lex* investing the Emperor with *imperium*. Here *imperium*

[1] Cf. *Inst.* 1, 2, 4.
[2] On the terms *ius* and *lex* cf. Mitteis *RPR* 30 ff.
[3] Cf., for example, 2, 253, on the *SC. Trebellianum* of the reign of Nero.
[4] Some hold that there were earlier cases, e.g. the *SC. Neronianum* (2, 197–8).
[5] Fuller version *D.* 1, 4, 1. On authenticity cf. Mommsen, *DPR* 5, 152, 2.

designates the totality of the powers conferred on him and the *lex* referred to must be the so-called *lex de imperio*, i.e. the ratification by the *populus* of the senatusconsult which invested an incoming Emperor with the traditional accumulation of powers. If the imperial constitution was to be regarded as legally continuous with that of the Republic the Emperor's power to legislate could be derived from no other source, and though such a power was not, it seems, among those expressly conferred by the *lex de imperio*, those that were granted were so extensive that power to legislate was an inevitable practical consequence. Gaius says that this power had never been doubted; there may have been silent doubts, but at least as early as Hadrian juristic doctrine had accommodated itself to the patent fact.[1] The forms in which the Emperor was considered to legislate throw some light on the development.

Edicta. A magistrate's Edict (cf. § 6) expired with his office, was limited to his sphere of competence, and could normally make new law only as *ius honorarium*. But the Emperor's Edicts, according to what seems the better view, did not expire automatically at his death, his competence was practically unlimited, and there is no sign of his Edicts ever having created only *ius honorarium*, except, of course, intentionally (e.g. 2, 120). There were important imperial Edicts during the first century,[2] but overt legislation, at least on private law, was in that period regularly enacted by *lex* or senatusconsult. In later times imperial Edict was the natural form of legislation.

Decreta here mean the Emperor's judicial decisions.[3] They constituted, of course, authoritative interpretations of the existing law, but the Emperor's freedom to go outside strict law and give effect to equity sometimes conferred on them a legislative character.

Epistulae. *Rescripta*, to use the more comprehensive term covering both *epistulae* and *subscriptiones*, were imperial answers to applications made by officials and public bodies (*consultatio*, *relatio*) or by private persons (*libellus*); to the former the answer was by separate document (*epistula*), to the latter by a note at the foot of the *libellus* (*subscriptio*).[4] In a lawsuit the judge or one of the parties might solicit the Emperor's advice on a point of law; the answering rescript would be binding in the actual case provided that the facts had been truly represented to the Emperor. Naturally enough it would also establish

[1] Implied in Julian's Edict. Cf. Pomp. *D.* 1, 2, 2, 11. 12; Gaius here; Pap. *D.* 1, 1, 7 pr. Ulp. *D.* 1, 4, 1.

[2] e.g. the Cyrenean Edicts of Augustus: *Fontes* 1, 403.

[3] Wider meaning in Pap. *D.* 1, 1, 7, quoted above, p. 13.

[4] Wilcken, *Hermes* 1920, 1.

a precedent for similar cases, though as to this difficulties arose in later times.[1]

This practice of occasional rescripts was converted by Hadrian into a regular system. The earlier Emperors had followed the Roman custom of taking the advice of a *consilium* of friends when making an important decision. Hadrian gave the imperial *consilium* an official character and placed leading jurists on it. Petitions raising legal points would naturally be referred to the legal members of the *consilium*, so that Hadrian's rescript-system may be regarded as something like a centralization of the authority of jurisprudence (§ 7). Up to Diocletian the rescripts (they form the majority of the constitutions that have reached us) should be reckoned as part of Roman juristic law.

Mandata[2] were essentially administrative instructions issued by the Emperor both to his own direct subordinates and to the so-called Republican magistrates; these tended to be consolidated into a code of official conduct. Though not classed as constitutions by our texts they deserve mention, because they did at times make new law: an example is Trajan's mandate[3] establishing the full validity of the military will (2, 109).

§ 6. Edicta magistratuum. The magistrates mentioned are those who under the early Empire had superior jurisdiction in private law. For their history the reader must look elsewhere. They had a Roman magistrate's right to issue Edicts with such effect as their competence might confer, limited therefore not only by the powers and local sphere of their office, but also by its duration (one year in the case of the home magistrates). Very little is known about the Edict of the *praetor peregrinus* beyond that his office was created in 241 B.C. with jurisdiction at Rome over cases to which a *peregrinus* was a party, and not really much is known about the Edicts of the governors who had plenary jurisdiction in their provinces. The reason of our ignorance is that by the time of Justinian, from whose *Digest* most of our information as to the Edicts of the *praetor urbanus* and the aediles comes, the *peregrinus* had disappeared and the differences between the law of Italy and the provinces had been obliterated. On the other hand, we know a great deal about the Edicts of the urban praetor and the aediles in their final shape.[4] It is of the urban Edict, to which the aedilician may be regarded as a sort of appendix, that we shall mainly speak.

[1] Cf. *Inst.* 1, 2, 6. *C.* 1, 14, 12 (A.D. 529). Kipp, *Quellen* 80–81; De Visscher, *Nouvelles Ét.* 353.

[2] Not mentioned by Gaius. Finkelstein, *Tijdschr.* 1934, 150.

[3] *Inst.* 2, 11, 1; Ulp. *D.* 29, 1, 1 pr.

[4] O. Lenel, *Das Edictum Perpetuum*, ed. 3, Leipzig 1927—practically final.

The urban Edict. The *praetor urbanus* might issue an Edict at any time, but *the* Edict was a comprehensive announcement, invariably made by a praetor on entering office, of his intentions in regard to the exercise of his powers during his year of office. By a natural tendency, exhibited also by our own Equity, this Edict gradually became stabilized, each praetor taking over substantially the Edict of his predecessor. During the last two centuries of the Republic, which were the great creative period, some at least of the praetors must have innovated very boldly, but by the end of the Republic, though the praetor's discretion remained legally unfettered, the Edict had become sufficiently fixed to make it worth while for a jurist to write a commentary on it. The advent of the Empire brought no legal change in the praetor's powers, but in fact he lost initiative and refrained from making alterations in the Edict except on the authority of a senatus-consult inspired by the Emperor. In the end, by order of Hadrian about A.D. 130, the jurist Salvius Iulianus revised the Edict, and from the form settled by him future praetors were forbidden to depart. The annual issue of the Edict thus became a formality and it was dropped in the third century. It is Julian's stereotyped Edict that we find in force when Gaius wrote and that has been reconstructed in modern times.

The importance of the Edict evidently depended on the praetor's powers. What these were under the early system of procedure, that of *legis actiones* (4, 11 *sq.*), is an obscure and controversial question. The powers regulated by the Edict of our period were bound up with the formulary procedure introduced about 150 B.C. and later generalized (4, 11. 30). Under this, to speak summarily, the praetor had complete control of legal remedies, in particular of the *formula*, i.e. the instructions to the trial-authority (*iudex* &c.) as to the conditions under which condemnation or absolution of the defendant must be pronounced. Even if this control had been confined to the application of the civil law, it would have involved an immense power over its development; but it went much farther. The praetor could issue a *formula* stating conditions of condemnation which were not, or were only doubtfully, causes of action at civil law (*actiones praetoriae*, *utiles*, *ficticiae*, *in factum*), or a *formula* stating a civil cause of action, but incorporating further conditions which constituted no defence at civil law (*exceptiones*). Details of these and other wide powers, such as that of issuing interdicts, will be found in Book 4.

The result was that, though the praetor was the custodian of the civil law (*uiua uox iuris ciuilis*: Marcian *D.* 1, 1, 8), he could and did

set the civil law aside or go outside it. But he did not do this by direct enactment. He said not *familiam habeto* but *bonorum possessionem dabo* (3, 32), not *dupli poena esto* but *in duplum actionem dabo*; he did not declare that *stipulationes* affected by fraud should be voidable, but offered an *exceptio doli* against the actions enforcing them. This indirect form of legislation resulted in a contrast resembling that between Common Law and Equity in our own system. The civil law survived technically unaltered and, but for the praetor's intervention, effective, and at the same time the praetor's overriding interventions gradually crystallized into a body of law, *ius praetorium*, practically as stable as the civil law.

We must, however, beware of identifying edictal law and *ius praetorium*. The *amplissimum ius* of the Edict comprised much civil law, some of which at least must have originated there.[1] This is perhaps why Gaius, unlike Papinian, does not at this point even mention the highly important distinction between *ius ciuile* and *ius praetorium*, though he abstains from the phrase *legis uicem optinet*. The omission of the distinction is nevertheless a serious defect.

We must also beware of regarding the Edict as the personal creation of the successive praetors, though individual praetors may have made great contributions. The praetor held office only for a year and was not selected for his legal qualifications. Quite obviously the Edict is a legal masterpiece which can have been produced only by the *prudentes*. Formally it was the praetor's work, but in fact it provided the jurists with an instrument of extraordinary potency and delicacy, by means of which they were enabled to improve and expand the law with a freedom which no conception, however liberal, of their natural function of interpretation could have justified. Had not the *ius praetorium* been, broadly speaking, the collective work of jurisprudence, the praetor's powers might well have been found intolerable: they appear to have been legally unlimited.[2]

The other Edicts. Julian's work of recension seems to have extended also to the aedilician, peregrine, and provincial Edicts. Our knowledge of the provincial Edicts is scanty, but by Julian's time there was probably in effect only one *ius honorarium*, though expressed by various Edicts. Certain matters would pertain specially to this or that Edict: we should expect to find the special provisions affecting provincial land (2. 7 &c.) in the provincial Edicts, and the peculiarities

[1] Buckland, *Tulane L.R.* 1939, 163.

[2] A *L. Cornelia* of 67 B.C. is reported as having enacted: *ut praetores ex edictis suis perpetuis ius dicerent*: Asconius *in Cornelianam*, Bruns 2, 69.

of a province would be dealt with in the Edict of its own governor. But it has been shown[1] that, so far as citizens were concerned, the various Edicts were in all probability identical, being reproductions of the urban Edict. As we learn here, the aedilician Edict, important in the law of sale, was not issued in the provinces of Caesar (2, 7. 21), but its provisions were probably applied everywhere. The old view, that the formulary procedure was used only in the people's provinces, has been exploded by Wlassak.[2] There is no trace of any such a distinction between the two kinds of province in either our § 6 or 4, 109.

§ 7. Responsa prudentium. In proper republican and classical usage the term *responsa pr.* means the answers of authoritative jurists to concrete problems laid before them by magistrates, *iudices*, or private persons in the course of practice: that and nothing else. Under the Republic the authority of a *responsum* depended on the personal standing of its giver before the public opinion of an aristocratic and conservative city-State. In every age there were a few men whose *responsa* were by social convention taken as practically decisive in the case for which they were given. *Responsa* were thus the earliest and most striking form of expression of juristic opinion, being the point of contact between legal science and ordinary life, but as the science of law developed they ceased to be the only form. From the later years of the Republic and still more under the Empire the opinion of the learned might be obtained from scientific literature, of which collections of *responsa* were only one form. The practice of *responsa* continued substantially unchanged during the first two centuries of the Empire, but, as one would expect, there was some imperial interference or regulation. The exact nature of this is, however, owing to the deplorable state of our only source, very doubtful.[3] The republican jurists had given their *responsa* with aristocratic informality; Pomponius appears to say that Augustus ordered them to be given in writing under seal and also instituted a practice of granting to certain jurists a *ius respondendi ex auctoritate principis*. In some form this practice was continued by Tiberius[4] and seems to have existed at least as late as Hadrian. On this evidence, such as it is, one would expect to find that possession of the *ius publice respondendi* was a chief, if not the sole, criterion of the authority of a jurist. But this expectation is contradicted by the evidence of the remains of classical jurisprudence.

[1] Buckland, *RH* 1934, 80.

[2] *Zum röm. Provinzialprozessrecht* 4 ff.

[3] Pomp. *D.* 1, 2, 2, 48 *sq.* Cf. De Visscher, *RH* 1936, 615. 634; Schulz 112. 347.

[4] De Visscher, *l.c.*, distinguishes between the occasional action of Augustus and a system established by Tiberius.

Whatever additional weight the *ius respondendi* may have given to the *responsum* of its possessor in the decision of the case for which it was given, the authority of a jurist as a contributor to the *communis opinio prudentium* seems still to have depended on his personal standing before informed opinion.[1] No doubt from the time of Vespasian it would have been impossible for a jurist to attain to great personal authority without enjoying imperial favour, which one supposes would include a grant of the *ius publice respondendi*. But except perhaps in the present passage[2] the privilege is never mentioned as constituting a claim to special authority in the development of juristic law, and nowhere is the authority of a jurist questioned on the ground that he did not possess it.

Interpretation of § 7.[3] The explanation here given by Gaius of the last of the sources in the list of § 2 is not an explanation of *responsa* in the only known classical sense, but makes the term cover all forms of expression of juristic opinion, including literature, in short jurisprudence in general. We cannot be quite certain that this loose usage was not already current in the schools, but outside the present passage no example of it survives from before late in the fourth century.[4] On our evidence as it stands we cannot acquit Gaius of having misused a technical term. It is chiefly this that has made § 7 a *crux interpretum*.

The most recent solution, and the simplest, is that § 7 was not written by Gaius, but is spurious or at least corrupt and reflects the ideas of the fourth or fifth century.[5] But we can accept this view only if no other is tolerable. The Latin of § 7 is impeccable, it shows none of the usual signs of later work, its style and rhythm are in complete harmony with what precedes. Furthermore, it is practically certain that the text used by the compilers of *Inst.* 1, 2, 8 was the same as that of our Veronese palimpsest, and to attribute a common, *ex hypothesi* late, corruption to manuscripts so widely separated is a quite unwarrantable assumption. Moreover, *responsis* in § 2 would remain to be accounted for.

The compilers of *Inst.* 1, 2, 8 understood our passage to refer to the

[1] Cf. Schulz 124 &c.

[2] *quibus permissum est iura condere*: § 7, on one interpretation.

[3] Krüger 120. 124; Wlassak, *Die klass. Prozessformel* (1924) 41. 44; Wenger, *Praetor u. Formal* (1925) 105, 108; Solazzi, *St. Riccobono* 1 (1931) 95; Buckland 25; Pringsheim, *JRS* 1934, 146; Wieacker, *Freiburg. Rechtsgeschichtl. Abh.* 5 (1935), 44 &c.; De Visscher, *RH* 1936, 615. 634; Schulz 112. 347; Zulueta, *Tulane LR.* 22 (1947), 173.

[4] Wieacker, *o.c.* 48 ff. 53 ff.

[5] Buckland 25; Schulz 112; detailed argument in Solazzi and Wieacker *ll.cc.*

working of the *ius respondendi*. After *permissum est* a sixth-century reader would automatically supply *ab imperatore*.[1] When, over a century ago, our text was rediscovered, interpretation at first followed the same line. But difficulties soon appeared: *sententiae et opiniones* was too wide, permission *iura condere* went far beyond what could have been included in a grant of *ius publice respondendi*, and it was impossible to construct a conceivable functioning of the *ius resp.* on the basis of Hadrian's rescript. In the end the general opinion[2] came to be that Gaius had confused the duty of a *iudex* to decide a case before him in accordance with the *responsum*, given *ad hoc*, by an imperially authorized jurist with the law-making power inherent in jurisprudence, the *communis opinio* of the learned. This is a tenable view, for Gaius has unquestionably blundered. But we venture to think that his error was not so gross as this.

What has not been sufficiently attended to is that § 7, though it attributes an erroneous meaning to *responsa pr.*, gives a fair elementary account of the source of law known to Cicero (*Top.* 5, 28), Pomponius (*D.* 1, 2, 2, 12), and Papinian (*D.* 1, 1, 7)[3] as *auctoritas* or *interpretatio prudentium*. It was a source that clamoured for mention and one that Gaius would have been the last to overlook. It is submitted that he did not overlook it. The trouble is that he labelled it *responsa pr.* This was forced on him by § 2. Our conjecture is that the list there is traditional, dating from the time when the general authority of law was not properly distinguished from the binding effect of decisions in the cases for which they were given.[4] Gaius' real mistake was not to have corrected the old list.

On this view the teaching of § 7, though put under an erroneous rubric, is simply that the *communis opinio* of the learned is as good a source of law as statute and that contributions to it are not limited to any one form of expression; they must, however, come from authorized persons (*quibus permissum est iura condere*) and in order to be binding must be unanimous; if they differ, a *iudex* is free to use his own judgment.

Quibus permissum est. Coming under the heading *responsa pr.* these words inevitably raise the question whether they do not refer to the *ius resp.* But we must not overlook what is said to be permitted, which is nothing less than *iura condere*, the very phrase applied by Gaius

[1] But Theoph. 1, 2, 9 did not forget the Republic.

[2] Voiced by Krüger, *l.c.*

[3] Above, p. 13.

[4] Thus Cic. *Top.* 5, 28 puts *res iudicatae* among the sources alongside with *auctoritas prudentium*.

to the law-making power of early republican jurisprudence (4, 30). No one thinks that such a power could have been included in a grant of *ius resp.* to an individual jurist. It is a power inherent in jurisprudence, but to account for it would have been impossible in a short elementary work. Gaius ignores the difficulty. If pressed he would probably have appealed to general consent (cf. 3, 82). But if he had definitely meant imperial permission, he had only to add the words *ab imperatore*, and the precision of the preceding sections makes it practically certain that he would have added them. He could not do so without denying the authority not only of the republican jurists but also, in all probability, of Labeo and possibly some other jurists of the first century of the Empire.

Hadrian's rescript. To the natural question, what, then, if the learned disagree? the rough common-sense answer is given that in that case one must judge for oneself. It is a crude answer, as a short answer to beginners was bound to be, but not a decadent answer; it belongs to a different world from that of the mechanical solution by counting heads enjoined by the *Law of Citations*.[1] In support of his answer Gaius was able to cite a rescript of Hadrian. Many believe this to have regulated the working of the *ius resp.* or to have been an important declaration of imperial policy regarding the authority of the jurists. It may equally well have been a summary dismissal of the scruples of an over-meticulous *iudex*.

§ 8. Division of the Subject

Taught by *Inst.* 1, 1, 4 (from Ulpian) we expect, but are not given, a preliminary division of law into public and private, with an announcement that the latter is to be our subject (perhaps faintly implied by *ius quo utimur*). Again, the threefold division of private law upon which the structure of the work depends is simply stated; its meaning is left to be discovered as we proceed: *soluitur ambulando*.[2] *Persona* was a word with a future, but to Gaius it meant simply 'human being'. The meanings of *res* and of *actiones* will be discussed in due course.[3] One may say with substantial truth that the *Law of Persons* (rest of Book 1) is the law of status, that of *Things* (Books 2 and 3) the law of the patrimony, and that of *Actions* (Book 4) the law of remedies. But we must not expect the systematic treatment of a modern work; this

[1] *C.T.* 1, 4, 3, of A.D. 426. Cf. Buckland 33; Schulz 282 &c.
[2] Nowhere better discussed than by Buckland 56 ff. 180 ff. 604 ff.
[3] Below, pp. 55 and 221.

would have required a maturer analytical jurisprudence than the Romans possessed.

The Law of Persons. Book 1 introduces us to the main categories of status affecting Roman citizens, but the treatment has defects as well as merits. Thus the status of citizenship is taken for granted, even its acquisition and loss being mentioned only incidentally to other matters. Of the other status Gaius usually gives a short characterization, but not even an outline of the capacities and incapacities resulting from them; such information as he gives on these matters has largely to be gleaned from the later books. His chief preoccupation in Book 1 is with the acquisition and loss of the various status. This makes his failure to deal systematically with the sources of slavery astonishing: contrast *Inst.* 1, 3, 3. These deficiencies are due to the lack of a conscious theory of legal personality; some of them are made good by Justinian's *Institutes*, but the progress in systematic jurisprudence achieved in nearly four centuries is not impressive.

§§ 9–11. Classification of Persons—Free and Slaves—Freeborn and Freed

§ 9. The general nature of slavery is explained (§§ 52–54) under a second classification of persons as either *sui* or *alieni iuris* (§§ 48 *sq.*), but as we have said, no proper account is given of the sources of slavery.

§§ 10–11. Thus we have to wait till § 82 to learn who, positively, is *ingenuus*. The distinction between *ingenui* and *libertini* as drawn here leaves it uncertain whether a man born free, subsequently reduced to *iusta seruitus*, and then manumitted was *ingenuus* or *libertinus*. *Inst.* 1, 4, 1 tells us that he was *ingenuus*. Of course, the case was rare.

§§ 11–47. Freedmen. Manumission

By Gaius' time the civil law of manumission, which was simple, had been complicated by praetorian intervention and legislation. His account of the subject suffers from his manner of approach, but we must remember that a whole page of his text (§§ 21–22) is illegible.

Manumission

(*a*) **The civil law.** A master, who in early times was necessarily *dominus ex iure Quiritium*,[1] could manumit his slave by one of three methods: *uindicta*, *censu*, or *testamento*, with the uniform effect of

[1] Below, p. 66.

making the slave a *ciuis Romanus libertus*. His power to manumit was unrestricted by general law, but State control was obviously possible over manumission *uindicta* and *censu*, and also over manumission *testamento* so long as wills were made by an act of the *comitia curiata*, the earliest form of will (2, 101).

Manumission *censu* consisted in the slave's name being entered by the censors in their five-yearly list of citizens. This was done on the application of the slave with his master's authority.[1] Ulpian speaks of this method as obsolete; in all probability it was so already in Gaius' time, in spite of §§ 17. 44. 138. 140, since the *census* itself had been abandoned under the Empire.

Manumission *testamento*, i.e. by the master's will, in practice the most important form, need not be discussed as yet.[2] There is evidence that it existed as early as the *Twelve Tables* and that even then it was no novelty.[3]

On the ceremonial formalities of manumission *uindicta* even in historical times our evidence is incomplete,[4] but in Gaius' time it was virtually a pronouncement of the slave's liberty made by a competent magistrate at any time or place (§ 20) on the master's request. This form survived in the law of Justinian (*Inst.* 1, 5, 2). It is generally, but not universally, held to have originated like *in iure cessio* (2, 24) as a collusive lawsuit.[5]

(*b*) **The praetor.** By the end of the Republic two cases had arisen in which a slave on being manumitted became not *liber*, still less *ciuis*, but *in libertate tuitione praetoris*. This meant that though still a slave at civil law he was in *de facto* liberty, being protected by the praetor during his lifetime from any assertion of his master's civil law rights. His position is well illustrated by the fact that on his death his property belonged to his master as being the *peculium* of a slave (3, 56).[6]

(i) One of the two cases was due to the development of praetorian or bonitary ownership.[7] A slave might now have a bonitary owner, to whom the praetor secured all the substantial rights of an owner, and a Quiritary or civil law owner, whom the praetor deprived of all effective rights and left with the bare technical title, the *nudum ius Quiritium*

[1] Ulp. 1, 8: *Censu manumittebantur olim qui lustrali censu iussu dominorum inter ciues Romanos censum profitebantur*. Cf. Daube, *JRS* 1946, 60.

[2] 2, 153. 186–7. 267. [3] Ulp. 2, 4.

[4] Texts: Roby, *Roman Private Law* 1, 26 n. 1.

[5] Lévy-Bruhl, *Quelques problèmes du très ancien droit romain* (1934) 56; Buckland, *Festschr. Koschaker* 1, 17; Daube, *JRS* 1946, 57.

[6] Below, p. 131.

[7] Explained below, p. 66. Cf. 1, 17. 35. 54; 2, 40. 88; 3, 166.

of which he had no power to deprive him. The only manumission of a slave in this position that the praetor allowed to have practical effect was one performed by his bonitary owner. This made the slave *de facto* free, because the praetor would not allow the bonitary owner to go back on the manumission and continued to paralyse the civil rights of the Quiritary owner. The slave was thus *in libertate* but not *liber*: only manumission by his Quiritary owner could make him that.

(ii) The three old forms of manumission were cumbrous and expensive (5 per cent. tax). The praetor could not give civil effect to other forms, but he could, and did, give the effect above described (*in libertate esse*) to new customary forms. It has been shown[1] that in classical times he recognized only two such forms, namely grants of freedom declared by letter (*per epistulam*) or before witnesses (*inter amicos*). Other customary forms grew up later, for instance *conuiuii adhibitio*, i.e. inviting the slave to sit at table with the free guests.[2]

(*c*) **Legislation.** Three statutes of the beginning of the Empire are mentioned.

L. Iunia. Its exact date in uncertain. *Inst.* 1, 5, 3 calls it *Iunia Norbana*, which suggests A.D. 19, but a date before the *L. Aelia Sentia* (A.D. 4) is at least as probable (§§ 17–18) and to assume this simplifies treatment.[3] This *lex* conferred on the two above-mentioned classes of persons who were *in libertate tuitione praetoris* a civil law status, that of Latins, but with considerable restrictions: hence their name of *Latini Iuniani* (§ 22; 3, 56).

L. Fufia Caninia (2 B.C.). This is sufficiently explained by the text (§§ 42–46).

L. Aelia Sentia (A.D. 4). Four of its provisions[4] are mentioned here. (i) If a slave was manumitted below the age of 30, he was not to become a *ciuis*, but only a Junian Latin, unless the manumission was performed *uindicta* after proof of a proper motive before a *consilium* (§§ 16. 18 *sq.*) or unless it was *testamento* for the purpose of providing an insolvent master with a *heres* (§ 21).[5] (ii) Manumission by a master under 20 was made absolutely void unless it was performed *uindicta* after proof before a *consilium* as in the previous case (§§ 38 *sq.*). This applied equally to civil and praetorian methods of manumission (§ 41). (iii) Manumissions in fraud of creditors or a patron (successoral rights) were also to be void (§ 37; 2, 154; *Inst.* 1, 6, 1). (iv) Criminous

[1] Wlassak, *SZ* 1905, 367; Buckland, *RH* 1908, 234. [2] *Epit.* 1, 1, 2.

[3] Last, *CAH* x, 888, conjectures 17 B.C. Cf. Arangio-Ruiz, in *Augustus* (Acc. Lincei 1938) 45–7 (offprint).

[4] Full account: *Acta Diui Augusti* (R. Acad. Ital. 1945) 1, 205.

[5] Cf. 2, 153–5.

slaves (§ 13) if manumitted were to have only the status of *peregrini dediticii*.

Tria genera libertinorum (§ 12). From all this there emerge three classes of freedmen.

(i) The *ciuis Romanus libertus* had under the Republic been under some political inferiorities and had been excluded from marriage with *ingenui*. Under the Empire the political disabilities ceased to matter, and by a *L. Iulia* of 18 B.C. a *libertus* was allowed to marry any one except a person of senatorial rank. The serious difference that remained between a *ciuis libertus* and an *ingenuus* was the tie binding the *libertus* to his former master, his patron. This tie was transmitted to the patron's male descendants, but not to the descendants of the *libertus*. Legal results of this relation will be mentioned in connexion with *tutela* (§ 165), a special form of the verbal contract (3, 96), succession to *liberti* (3, 39 *sq.*) and procedure (4, 46 &c.).

(ii) *Latini Iuniani*. The privileges enjoyed by members of the cities of the Latin League until it was dissolved in 338 B.C. still existed under the Empire for citizens of Latin colonies in the provinces (§ 96) in a somewhat less beneficial form, whence the contrast *Latini ueteres* and *coloniarii*. In private law *Latini col.* had the *ius commercii*, but not the *ius conubii*. Their lack of *conubium* meant that their marriages even with Roman citizens were not *iustae nuptiae* (§ 55), their possession of *commercium* that they were capable of the forms of conveyance and contract regarded as peculiar to *ciues* and even of making, taking under, and witnessing a Roman will. The general position of the new Latins created by the *L. Iunia*, the *Latini Iuniani*, was the same during their lifetime, except that the *L. Iunia* forbade them to make or to take (directly) under a Roman will (1, 23. 24; 2, 275). But their freedom under the *L. Iunia*, like their *de facto* liberty previously under the Edict, expired at their death.[1] Hence property left by them was treated as the *peculium* of a slave (3, 58 *sq.*). The status of their children would depend on that of the mother.

(iii) *Dediticii*.[2] The *L. Aelia Sentia* placed criminous slaves on manumission *dediticiorum numero*, i.e. confined them to the status possessed by members of communities that had surrendered to Rome, but whose constitutions had never been recognized by her. Freedmen of this class, as being *peregrini*, had access to all institutions of the *ius gentium*, but as not being members of any *ciuitas* had no power to

[1] *Inst.* 3, 7, 4: *licet ut liberi uitam suam peragebant, attamen ipso ultimo spiritu simul animam atque libertatem amittebant.*

[2] §§ 13–15. Cf. A. H. M. Jones, *JRS* 1936, 223.

make or take under any kind of will.[1] Succession to their property on their death depended on the form under which they had been manumitted (3, 74–76). No avenue to citizenship was open to them, and if they took up residence within the hundredth milestone of Rome, they fell back into permanent slavery. They and their class seem to have been expressly excluded by Caracalla from his grant of citizenship to all free men in 212.[2]

Promotion of Junian Latins to ciuitas. The disabilities of Junian Latins account for the attention paid (§§ 28 *sq.*) to the various ways in which they could become *ciues*, but of these only *anniculi probatio* (§§ 29 *sq.*) and *iteratio* (§ 35) possess juristic interest. *Ann. probatio* is a creation of the *L. Aelia Sentia. Iteratio* means repetition of manumission, and this time free from the impediment that had prevented the slave from becoming *ciuis* by the first manumission.

§§ 48–51. Classification of Persons as sui or alieni iuris

We have finished with the first classification of persons (§§ 9–11) and pass to a second which will occupy us till § 141. The subheads *in potestate manu mancipioue* are not exhaustive. They omit not only the obsolete *nexi*[3] and the not generally important *auctorati* (3, 199) and *redempti*,[4] but also the more important *iudicati*. These last are mentioned elsewhere (3, 78. 189. 199; 4, 21), but only incidentally and insufficiently.

§§ 52–54. Dominica Potestas

Gaius does not define slavery,[5] but is content to mention the two aspects of *dominica potestas*, absolute power over the slave's person and absorption of his economic capacity. The slave was an article of property, a *res corporalis* (2, 13), but inevitably his manhood was recognized. The classical enactments (§ 53) protecting him from outrageous ill treatment may, indeed, be compared with legislation against cruelty to animals. More decisive are his capacity to be manumitted and, in spite of his incapacity to marry, a certain recognition of his

[1] Ulp. 20, 14: . . . *quoniam nec quasi ciuis Romanus testari potest, cum sit peregrinus, nec quasi peregrinus, quoniam nullius certae ciuitatis ciuis est, ut secundum leges ciuitatis suae testetur.*

[2] Ulp. *D.* 1, 5, 17. *P. Giss.* I 40: *Fontes* 1, 445. Enormous literature: cf. Jones, *l.c.*; Momigliano, *JRS* 1941, 163.

[3] Below, p. 143.

[4] Girard 142.

[5] Buckland 61 ff.

natural relationships (§ 19; cf. *Inst.* 1, 10, 10. 3, 6, 10). Even the harsh principle: *quodcumque per seruum adquiritur, id domino adquiritur* (2, 86 *sq.*; 3, 163 *sq.*), is an admission of his manhood and so is his capacity to incur a *naturalis obligatio* himself (3, 119a) and to impose contractual obligation on his master (4, 69 *sq.*).

§ **54.** This is one of the important passages on the distinction between Quiritary and bonitary ownership, which we have already had to mention.[1] We must still defer its fuller consideration.[2]

§ 55. Patria Potestas

Gaius' main concern is with the sources of *patria potestas*. The chief source is birth *ex iustis nuptiis*. This stated (§ 55), we are led to consider *iustae nuptiae* (§§ 56–64) and thereafter the cases in which children are brought under *p. pot.* by events after birth, a disquisition which digresses into the general question of the status of children at birth (§§ 65–96). At length we come to the second great source, adoption (§§ 97–107). The termination of *patria potestas* is dealt with along with that of the other forms of subjection (§§ 124 *sq.*).

Patria potestas. In public law the position of sons and daughters (*liberi*) had always been very different from that of slaves, and even in private law there had always been the immense difference that the death of the *paterfamilias* (*pf.*) rendered the *liberi* independent. But during his lifetime there was in private law little or no difference simply because inside the family the sole law was the will of the *pf.* Gradually the law penetrated into the family and differentiated various classes of dependants. Some traces of the original lack of differentiation survive in our text. In the ceremony of adoption (§ 134) we find the form of an ordinary action to recover property applied to *liberi*. An *actio furti* in respect of *liberi* was still a possibility (3, 199). A *pf.* could still convey his son by *mancipatio*, though only *in mancipii causam* (1, 117; 4, 79) and not as of old *trans Tiberim* (out of the State) into slavery.

But in Gaius' time the father's powers over the persons of *liberi* (originally unlimited, though tempered by the family council and the censor) had been brought under legal control.[3] His complete absorption of their economic productivity had, however, as yet been little impaired. The same principles still applied as in the case of a slave (2, 86 *sq.*; 3, 163 *sq.*), except in respect of a son's acquisitions as a soldier

[1] Above, pp. 25–26.
[2] Below, p. 66.
[3] Buckland 102.

(*peculium castrense*).[1] A son's powers of imposing obligations on his father were likewise the same as a slave's (4, 69 *sq.*), but as a free man he could impose civil and not merely natural obligations on himself.

In contrast to *dominica potestas* which is *iuris gentium* (§ 52) Gaius points out that *patria pot.* is *iuris ciuilis, ius proprium ciuium Romanorum* (§ 55). He can find hardly any parallel to it in peregrine laws. Its greatest peculiarity was its duration. It lasted until the *pf.* died or abdicated by emancipating or giving in adoption, whatever might be the age or dignity (but § 130) attained by the child. This peculiarity remained to the end; the incidents of *pat. pot.* were, as we have said, gradually attenuated, but its duration was never reduced.

§§ 56–64. Iustae Nuptiae

Gaius' concern is with *iustae nuptiae* as a source of *pat. pot.* and therefore primarily with marriages in which the husband was a Roman, since a non-Roman father could not have *pat. pot.* (§ 55). The only requisite of *iustae nuptiae* that he deals with is *conubium.* Other requisites were that the parties should be of marriageable age and that they and their *patresfam.*, if any, should consent (*Inst.* 1, 10 pr.).

Conubium. Besides *ciues* only privileged *peregrini* (not in general *Latini*) had the *ius conubii.* Only marriage between persons having the *ius con.* was *iustae nuptiae*, and necessarily such. If both parties were *ciues* the children were Romans and in the husband's *potestas*, and the result was the same if the husband was a Roman and the wife a privileged *peregrina.* But if a *peregrinus* having *conubium* married a *Romana*, the children followed his civic status and were under the family law of his *ciuitas.*[2]

But *conubium* covers more than general capacity for *iustae nuptiae*; parties might possess that and yet not have *conubium inter se.* Till the *L. Canuleia* of 445 B.C. patricians and plebeians had not *conubium* with each other, and till the beginning of the Empire freeborn and freed could not intermarry. Another bar was consanguinity, that is, kinship up to a certain degree traced through females as well as through males (*cognatio* as opposed to *agnatio*). The originally wide ambit of this impediment had been much reduced by the time of Gaius. What he says (§§ 59 *sq.*) comes to this, that an ascendant could not marry a descendant and that collaterals could not intermarry if either of them was only one degree removed from the common ancestor. Thus an aunt

[1] Mentioned in 2, 106 and probably in 2, 111.

[2] Hadrian enacted that this should be so even if he had not *conubium*: § 77.

could not marry her nephew nor an uncle his niece; but the precedent of Claudius and Agrippina had produced the exception that one might marry one's brother's daughter (§ 62). Adoptive kinship was an impediment in the direct line even after it had been destroyed by *capitis deminutio* (§§ 158 *sq.*), but between collaterals it ceased to be an impediment when it had been so destroyed. Thus one could never marry one's adoptive daughter, but after his or her emancipation one's son could do so (§§ 59–61). Affinity, i.e. relationship resulting from marriage, seems originally to have been no legal impediment,[1] but in Gaius' time it was a bar in the direct line, so that one could not marry one's parent-in-law or one's step-parent (§ 63), but could, for example, marry one's former wife's sister or former husband's brother or, if both parents were different, one's stepbrother or sister.

Age. This was ultimately fixed at 14 for boys and 12 for girls (*Inst.* 1, 10 pr.; 22 pr.), but according to the Sabinians marriageable age for a male depended on his physical development (1, 196).

Consent. Parties *alieni iuris* needed not only to consent themselves but also to have the consent of their *patresfam.* However, from the beginning of the Empire the consent of the *paterfam.* could be dispensed with by public authority if it was unreasonably withheld or rendered impossible by circumstances, such as the madness of the *pf.*

Nuptias non concubitus sed consensus facit (Ulp. *D.* 35, 1, 15)[2] is a maxim famous in subsequent history, but in its context seems to mean no more than that consummation was not essential for marriage. Consent certainly was the main essential, but did it suffice by itself? The law required no formality, but it is generally held[3] that the consent must have been acted on; the ordinary practice was to lead the wife to the husband's house (*uxorem ducere*).[4] At any rate, if a man and woman lived together, marriage was purely a question of their intention (*affectus maritalis*), and this would be presumed except where the parties were of very unequal rank. But usually there would be direct evidence.[5]

This formlessness of marriage harmonizes with the fact that it did not change the status of the husband or wife, and this no doubt is

[1] Cic. *p. Cluent.* 5, 14 &c.

[2] Corbett, *Roman Law of Marriage*, 90 ff.

[3] But see now Volterra, *La conception du mariage d'après les juristes romains*, Padua 1940.

[4] Pomp. *D.* 23, 2, 5; Girard 167 n. 6.

[5] *Tabulae nuptiales* seem to have been customary, but only one fragment has as yet been discovered: *Fontes* 3, no. 17, with literature, especially Wenger, *Sb. Ak. Wien* 219, 1, 1941. There would also usually have been previous *sponsalia*, *festiuitas nuptiarum*, and *dos*.

why Gaius does not treat of the results of marriage as such apart from *manus* (§§ 108 *sq.*). The only result to which he attends is that which in Roman eyes was the chief object of *iustae nuptiae*, namely the procreation of children who should be in *patria potestate*. There were, however, other results, especially the possibility of *dos*,[1] the omission of which by Gaius[2] may perhaps be considered a serious defect.[3]

§§ 65–66. Patria Potestas over One's Offspring arising after Birth

Children not born in one's *potestas* might be brought under it by (i) *anniculi probatio* under the *L. Aelia Sentia* (§§ 29. 30. 66); (ii) *erroris causae probatio* (§§ 67–75. 87); (iii) imperial grant of *ciuitas* to a non-Roman father, provided that this was accompanied by express concession of *potestas* over children already born or conceived (§§ 55. 93. 94); (iv) *ius Latii* (§§ 95–6).

§§ 67–75. Erroris causae probatio

Mistakes as to one's own status or that of the person one was marrying were easily made and might be disastrous. A senatusconsult[4] of unknown date gave relief in cases mentioned by our text on condition that the mistake (presumably a reasonable one) was proved and a child had been born. In general one of the parties must have been a *ciuis*, and the relief consisted in giving *ciuitas* to the other party and the child, and *potestas* over the child to the father; but of course a *dediticius* could not be given either *ciuitas* or *potestas* (§ 68 *fin.*). Where the effect of the mistake was to prevent a marriage from complying with the *L. Aelia Sentia* and thus opening the way to *anniculi probatio*, the child had to be one year old; in this case neither party need have been a *ciuis*, but one of them must have been a Latin. There are some lacunae and other difficulties in these sections; in § 71 Huschke's correction is tempting.[5]

§§ 76–96. Status of Children at Birth

We pass on to a general discussion of this wider subject. The basic principles were[6] that the children of *iustae nuptiae* inherited their father's status at the time of conception (rule of the *ius ciuile*) and that

[1] Below, p. 38.
[2] Contrast Ulp. 6.
[3] Above, p. 8.
[4] Admirably summarized by Buckland 96.
[5] See notes to text, Part I, p. 22.
[6] Cf. Ulp. 5, 8–10.

children of any other union inherited that of their mother at the time of birth (rule of the *ius gentium*).[1] But the *L. Minicia* (date unknown) departed from principle by providing that where one parent was a Roman and the other a peregrine not enjoying *conubium*, the child of their marriage should be a peregrine. Our text, however, is defective (§ 78). Obviously the law was superfluous where *Romanus* married an unprivileged *peregrina* and was only required where *Romana* married an unprivileged *peregrinus*.

We pass (§§ 79–81) to mixed marriages of Latins. Gaius seems to have held (§ 79) that the Latins of his day were not *peregrini* within the meaning of the *L. Minicia* and that therefore the child of *Latinus* and *Romana* would be born a *ciuis*. Against this it had been ingeniously objected that the *L. Aelia Sentia* created *conubium* between parties marrying in compliance with it and that consequently in such a case the child of *Latinus* and *Romana* took the status of its father. But the objection was overruled by Hadrian (§ 80). The same Emperor further laid down that the offspring of Latins and peregrines should inherit their mother's status, as, indeed, would result from the *ius gentium* (§ 81).

The digression which follows (§§ 82 *sq.*) on the inheritance of the status of *libertas* to some extent makes good the meagre treatment of *seruitus* (§§ 9. 52). If one parent was a slave and the other free, there could be no marriage at all. The rule of the *ius gentium* applied: the child was born free or a slave according as its mother was free or a slave at the moment of its birth. Some exceptions are mentioned,[2] notably that under the *SC. Claudianum*, which also provides one of the rare cases of enslavement of a *ciuis* (§§ 91. 160; *Inst.* 3, 12, 1). It is pointed out incidentally (§ 87) that the Roman son of a Roman father would be in *potestas* only if he derived his citizenship from his father; he might acquire it through his mother, e.g. if she became a *ciuis* while pregnant (§§ 88–92. 94). This brings up the point that an imperial grant of *ciuitas* to a father and his children did not give him *potestas* over his existing children unless that, too, was expressly granted (§§ 93–94). The digression ends with a note on the *ius Latii* (§§ 95–96).

§§ 97–107. Adoption

Adoption in the wide sense covers *adrogatio*, i.e. the adoption of a person *sui iuris*, as well as adoption in the narrower sense, i.e. that of a person already in *pat. pot.*

Adoption proper. By a complicated ceremony, described later in

[1] §§ 76. 89. [2] §§ 83–86.

connexion with emancipation (§ 134), a person in *pat. pot.* was transferred into another *pat. pot.* He left behind him in the old *pat. pot.* any child he might have had, and he could have no property to bring with him. In the new agnatic family[1] which he thus entered he was precisely as if he had been born there; his former agnates were still his cognates, but this materially did not signify much (3, 31; *Inst.* 3, 1, 14).

Adrogation. Here the person adopted (*adrogatus*) exchanged the status of *paterfam.* for that of *filiusfam.* He brought with him into the adrogator's *potestas*, as grandchildren, &c., those who had been in his own *potestas*, and his entire fortune passed by universal succession to the adrogator (3, 83; 4, 38. 80). Like the earliest will (2, 101) adrogation was effected by a *lex curiata*, a vote of the *comitia curiata* sitting probably under the presidency of the *pontifex maximus*. The voting became a mere formality, but the terms of the resolution put to the *comitia* indicate the gravity of the act.[2] Moreover, there was a preliminary inquiry by the pontiffs into its desirability.[3] A woman could not be adrogated because she could not be present at the *comitia curiata* (1, 101), nor an *impubes*, because such a surrender of a ward into another's *ius* exceeded a tutor's powers; Antoninus Pius, however, allowed adrogation of *impuberes* subject to very special safeguards (§ 102; *Inst.* 1, 11, 3), and when imperial rescript became the form of adrogation (Diocletian), there was no longer any obstacle to the adrogation of women.

Of course women could not adopt in either form, because they could not acquire *patria potestas*; adoption by women, introduced by Diocletian (*Inst.* 1, 11, 10), is not adoption in the Roman sense.

§§ 108–115b. Manus

Apart from its abusive applications, of which below, *manus* was a variety of domestic power exercisable only over wives. A wife *in manu* was *filiae loco*, in the position of a daughter, and the general effects on the status of a woman produced by her passing into *manus* were, if she had been *sui iuris*, as far as might be those of an adrogation, and if she had been *alieni iuris*, those of an adoption. Entry into *manus* took place in three ways.

1. **Confarreatio** (§ 112)[4] is more interesting from the point of view

[1] Below, p. 46.

[2] Gell. 5, 19: *Velitis iubeatis uti L. Valerius L. Titio tam iure legeque filius siet quam si ex eo patre matreque familias eius natus esset, utique ei uitae necisque in eum potestas siet, uti patri endo filio est.*

[3] Gell. *l.c.* Cf. Cic. *de domo* 13, 34 *sq.*

[4] Warde Fowler, *JRS* 1916, 185; Corbett, 71.

of religious than of legal history. Some further details of the ceremony are recoverable from other sources, but not the *solemnia uerba* mentioned in § 112. It had in the past created full *manus*, but after legislation under Augustus and Tiberius it ceased to affect the wife's civil position and transferred her to her husband's family only *quod ad sacra* (§ 136). With this reduced effect it seems to have lasted till the end of paganism, being kept alive for the recruitment of the higher priesthoods (§ 112). Indeed, it is unlikely ever to have been much used outside sacerdotal circles. The difficulties of divorce by *diffarreatio*[1] contributed to its unpopularity.

2. **Coemptio** was an adaptation of *mancipatio*, the ancient conveyance on sale, to the purpose of marriage (§ 113). Ordinary mancipation of free persons produced the status of *mancipii causa* (§§ 116 *sq.*), but the (unknown) *formula* used in *coemptio* showed the difference from an ordinary *mancipatio* (§ 123). The various ceremonial practices that we hear of[2] seem to have been customary preliminaries, not essentials. Servius the grammarian and Isidore[3] appear to have believed that the wife bought the husband as well as the husband the wife, and our § 113 is amended by Huschke in this sense.[4] But a buying of the man is so inconsistent with the subordinate position resulting for the woman that this idea is generally thought to be a late and false inference from the prefix *co-*. On the other hand, the bride, though subjected to sale, was not treated as a mere chattel. If *sui iuris* she sold herself *tutore auctore*, if a *filiafam.* she still played a principal part, if we may believe Paul,[5] and, as we have said, the *formula* used was not that of an ordinary mancipation (§ 123).

Coemptio fiduciaria (§§ 114 *sq.*). Before proceeding to *usus* we had better dispose of the application of *coemptio* to non-matrimonial purposes. A woman *sui iuris* made a *coemptio tutore auctore* with some man of her choice, the non-matrimonial purpose being indicated presumably by an accompanying *pactum fiduciae*. In spite of the *fiducia*, if the *coemptionator* was her husband, she became *filiae loco* to him, with *filiae iura* (§§ 115b. 118; 2, 139; 3, 14). If he was not her husband, she did not become *filiae loco* to him, but he had nevertheless the power

[1] Festus *s.v.*: Bruns 2, 7; Lindsay 65.

[2] Thus mutual interrogations: Ulp. *ap.* Boeth. *ad top.* 3, 14 (Bruns 2, 73–74; *Textes* 493), and the *formula* '*ubi tu Gaius ego Gaia*': Plut. *Q.R.* 30; Cic. *p. Mur.* 12, 27.

[3] Bruns 2. 76. 81.

[4] Part I p. 34 n. 6.

[5] *Coll.* 4, 2, 3: *filia quae patre auctore, cum in potestate esset, uiro in manum conuenerit.*

to take the next step (§ 118). This was that the *coemptionator* mancipated her (§§ 118 *sq.*) to another man of her choice and thus caused the latter to hold her *in mancipio*. The holder then manumitted her *uindicta*, with the intended result that she became *sui iuris* once more and he her *tutor fiduciarius* (§ 166a). Another reason for a woman to go through this complicated ceremony had been the rule, abolished by Hadrian, that unless she did so she was incapable of making a will (§ 115a; 2, 112).[1] A third reason, which is mentioned by Cicero[2] but not by Gaius, was that *coemptio* enabled a woman to get rid of *sacra* (family cult) with which she was burdened.[3]

3. **Usus.** As Girard puts it, *usus* is to *coemptio* as *usucapio* to *mancipatio*. A man's wife came under his *manus* by living with him for a year, just as a slave came under his *dominium* by being possessed by him for a year. But the *Twelve Tables* allowed her to avoid *usus* by absenting herself for three consecutive nights (*trinoctium*) in each year (§ 111).

Disappearance of manus. By the time of Gaius *usus*, which still existed in Cicero's time, had ceased to operate, *confarreatio* had been shorn of its civil effects, and *coemptio*, though spoken of by Gaius in the present tense, seems to have become at least rare. One may say that before the end of the classical period the free consensual marriage described above (§§ 56–64) had displaced dependent marriage with *manus* altogether. But the victory of the free marriage was not complete: it had derived from dependent marriage the feature of *patria potestas* over the children.

Manus and marriage: early history. We must dismiss the natural idea that *manus*-marriage was the sole original form of Roman marriage. Comparative law[4] shows that all over the world dependent marriage of the type involved by sale-marriage (*coemptio*) goes with a patriarchal organization of the family. Marriage is subsumed under ownership, but rather because of the lack of differentiation of concepts in primitive law than of a brutal parification of the wife to a slave. But coexistent with sale-marriage are found other forms of marriage, some at least of which result in free marriage. These latter forms Roman jurisprudence, by a feat of abstraction of which it alone was capable, brought under the single concept of consensual mar-

[1] Below, p. 91.

[2] *p. Mur.* 12, 27.

[3] Exactly how this abusive process worked is uncertain: Girard 166 n. 4; Buckland 119.

[4] We are following Koschaker, *Die Eheformen bei den Indogermanen* (1937); analytical review *LQR* 1938, 120.

riage, of marriage as such, distinct from lordship or ownership. Marriage so conceived respected the personality of the woman; it was the progressive type of marriage; the future belonged to it. But it must not be forgotten that its very freedom opened the door to grave abuses.

Free marriage then is as ancient as dependent. It was not a product of primitive liberalism, but rested on a very simple material basis. If the wife stays in her own family and home, the husband, a tolerated stranger, will not readily acquire lordship over her and her children.[1] But where husband and wife set up a separate household, the common result will be the conversion of free into dependent marriage and the acquisition by the husband of paternal power over the children. Roman *usus* is an excellent illustration. It shows that from very early times a woman might be married without being *in manu*, but that if she settled with her husband she would come under his *manus*, unless she took steps to avoid doing so. The *trinoctii absentia* of the *Twelve Tables* involves an unequivocal recognition of marriage without *manus*. The natural consequence of the wife's freedom, that her children belonged to her or her family, may have been accepted at Rome in very early times. But the patriarchal family was what suited the Roman temperament and the tradition of the dominant classes, and somehow, before our records begin, it was established that whether the wife was free or *in manu* her children were born into the *potestas* of their father. Thus the free consensual marriage of classical Roman law was not unadulterated free marriage. If it had been, it would have defeated what to a Roman was the primary purpose of marriage.

Excursus. Two branches of marriage law are hardly mentioned by Gaius, namely, termination of marriage and *dos*. They are too important to be entirely passed over by us.

Termination of marriage. Marriage was terminated by death, but a widow might not remarry within the ordinary period of gestation (10 months—*tempus lugendi*). Since a slave could not be married, it was also terminated by the enslavement of either party and in the case of enslavement by enemy capture it was not revived by *postliminium*, a renewed *consensus* being necessary.[2] Again, if either party lost *ciuitas*, the *nuptiae* would at least cease to be *iustae*.[3] Furthermore, if

[1] Cf. E. B. Tylor, *Nineteenth Century* 40 (1896), 81.

[2] *Postliminum*: below p. 41. Pomp. *D.* 49, 15, 14, 1: *Non ut pater filium ita uxorem maritus iure postliminii recipit; sed consensu redintegratur matrimonium.* Cf. Corbett, 212. Marriage in itself is thus treated as a pure *res facti*, but *manus*, which had become a distinct feature (§ 137 a), may have been revived.

[3] *Inst.* 1, 10 pr. Corbett 104.

by either party being adopted there arose between them a relationship inconsistent with their being married, their marriage was ended.[1]

Divorce.[2] It may be presumed that a *manus*-marriage could originally be broken in the lifetime of the parties only by ending the *manus*, in other words by an act of the holder of *manus—diffarreatio* or ordinary emancipation (§§ 136–7 a) according to the case. But in the time of Gaius *manus* was one thing and marriage another, so that a woman *in manu matrimonii causa* was as free as one married without *manus* to terminate her marriage by mere repudiation and thus to put herself in a position to insist on the *manus* being dissolved by her emancipation (§ 137 a).

This of course was due to the influence of the free marriage, which was dissoluble not only by mutual consent but by unilateral repudiation. The analogy of the contract of *societas* is obvious (3, 151); its propriety is more than doubtful. Such, however, was the developed Roman law. There were customary forms of repudiation; it might be declared orally; commonly there was a document which was delivered to the other party by a freedman. But no formality was legally necessary till the *L. Iulia de adulteriis* (18–16 B.C.) made divorce, or perhaps only unilateral repudiation, invalid unless declared in the presence of seven citizens of full age.[3]

After divorce the parties were not only free to remarry but had to do so if they wished to avoid the disabilities imposed on celibacy by Augustus' caducary laws.[4] The only restraints on complete freedom of divorce were that for causeless *repudium* or for giving cause for *repudium* a party might suffer in respect of the *dos*, the wife by deductions from its restoration to her in full, the husband by the loss of *retentiones*.[5] The question of the custody of the children simply did not arise: they remained as a matter of course in the *potestas* of the husband, whatever had been his conduct. Thus the essential framework of the Roman family survived the impact of free and easy divorce; a less rigid family system might have succumbed to it.

Dos.[6] There ought to be some contribution, according to circumstances, from the wife's side to the expenses of the common household. A problem is thus raised to which the earliest Roman law gave no satisfactory answer. *Dos*, as we know it, is the answer of later law; it

[1] *Inst.* 1, 10, 2 *fin.*, so-called *incestus superueniens*.
[2] Corbett 218 ff.; Levy, *Der Hergang der röm. Ehescheidung*, 1925.
[3] Disputed by Levy, *o.c.*, but cf. Corbett 228 ff.; Buckland 117 n. 5.
[4] Ulp. 14.
[5] See immediately below.
[6] Corbett, 147; Buckland 107.

was first devised by practitioners for their clients and then, by a familiar development, passed into the general law.

In *manus*-marriage, if the wife had previously been *sui iuris*, her entire fortune became by operation of law the absolute property of her husband or his *paterfam.* (3, 82–84); if she had previously been *alieni iuris*, she could have no fortune, but such provision as her *paterfam.* chose to make for her necessarily vested in her husband, since whilst *in manu* she could own nothing herself. Marriage without *manus* went to the other extreme: by the fact of marriage the husband obtained no right whatever over his wife's present or future property. Both systems were open to obvious criticism. We do not know what devices may have been resorted to in early times, but fairly late in the Republic, when divorce appeared[1] and became increasingly common, the expedient adopted by practice was to vest the wife's contribution in the husband subject to an obligation imposed on him by contract (*stipulatio*) to restore it to the wife or its giver in certain events, in general on the termination of the marriage. The obligation at first depended on express contract and was enforceable by the ordinary action (*actio ex stipulatu*). When in course of time the obligation came to be implied by law (*actio rei uxoriae*),[2] *dos* thereby became a distinct institution. *Dos* derived from the wife's *paterfam.* was termed *profecticia*, from any other person *aduenticia*. It might be constituted by promise as well as by conveyance to the husband: *dos aut datur aut dicitur aut promittitur*.[3]

The law in Gaius' day or shortly after[4] was, stated briefly, as follows. The husband was owner of the *dos*, but though during the marriage he had the right to manage it and enjoy its income, he was bound to manage as a *bonus paterfam.*, and his power, as owner, to alienate or mortgage dotal land had been restricted or abolished.[5] If the marriage was ended by the husband's death or by divorce, the *dos* had to be given up to the wife; if it was ended by the wife's death, the husband kept the *dos*, except that *dos profecticia* had to be restored to the *paterfam.* if he was alive. But where the husband had to give up the *dos* he might have the right to make certain deductions from it—*retentio propter liberos*, *propter mores mulieris* (wife's misconduct), *propter impensas*, and so forth. Thus his ownership was of a special kind and the wife's interest was inadequately expressed in terms of

[1] Gell. 4, 3, 2.
[2] 4, 62. Cf. Cic. *de off.* 3, 15, 61.
[3] Ulp. 6, 1. On *dicitur* cf. 3, 95a.
[4] Ulp. 6.
[5] 2, 63; *Inst.* 2, 8 pr. *L. Iulia de adulteriis*, 18–16 B.C.

personal obligations of the husband. When much later the wife, besides being a preferred creditor against her husband's general estate, was given a *uindicatio* of the dotal property, it could be claimed that the husband's ownership was *legum subtilitas* and that *iure naturali* the wife was owner.[1]

In conclusion we must mention that by a rule of fairly early customary law gifts between husband and wife were void. But increasing exceptions made the rule of moderate practical effect. It is not referred to in either Gaius' or Justinian's *Institutes*.[2]

§§ 116–23. Mancipii Causa

Persons *in patria pot.* or *in manu* could be mancipated by their *paterfam.* to another person. *Mancipatio* was an ancient method of transferring property, e.g. slaves, originally by way of sale. The ceremony is described here (§§ 119 *sq.*), but we reserve discussion of it for the law of property (2, 14 a). Free persons by being mancipated were reduced to bondage, not slavery; their *capitis deminutio* was *minima*, not *maxima* (§ 162); their marriages remained *iustae nuptiae* (§ 135). But in relation to the person to whom they had been mancipated they were *seruorum loco*, and their subjection, unless ended by manumission, *uindicta*, *censu*, or *testamento* (to which in their case the *Ll. Aelia Sentia* and *Fufia Caninia* did not apply: §§ 138–9), was lifelong. In matters of property and contract their position was that of a slave or, more exactly, that of a person *in manu* (2, 86; 3, 104. 163). A legacy left to a person *in mancipio* by his holder like one left to a slave by his master, was valid only if he was freed by the will (§ 123) and if freed and appointed *heres* he was, like a slave, *heres necessarius* except that he had the *potestas abstinendi* of a *suus heres* (2, 160). He could, however, though not in all cases (see § 140), be manumitted *censu* even against the will of his holder. The holder, if he treated him contumeliously, was, we read (§ 141), liable *iniuriarum*, criminally, it is presumed, since a civil *actio iniuriarum* (3, 220) brought by a dependant against his *paterfam.* is hardly conceivable.

In the time of Gaius this status was created with substantial effect by noxal surrender (§ 140 *fin.*), i.e. when a *paterfam.* preferred to surrender his son rather than pay the money-penalty incurred by his son's delict (4, 75 *sq.*). Noxal surrender of females had long died out, if it ever existed. A little after Gaius we are told[3] that a surrendered

[1] *C.* 5, 12, 30 (A.D. 529); earlier Tryph. *D.* 23, 3, 75.
[2] Cf. Buckland 111–12; Corbett 114 ff.
[3] Papinian *Coll.* 2, 3.

son could demand liberation when he had worked off the penalty.[1] But in general the status was created for purely technical reasons incidentally to the processes of emancipation and adoption (§§ 115. 132. 134).[2] It is, however, clear that at one time mancipation of sons had been practised for the purpose of economic exploitation. This must be the original significance of the rule of the *Twelve Tables* (§ 132), that if a son was sold by his father three times he should be freed from *patria pot.* The rule also shows that a son who had been mancipated would fall back into *patria pot.* if manumitted and that till the rule was made the process could be repeated without limit.

§§ 124–31. Termination of Patria Potestas

We pass to the termination of *potestas*, *manus*, and *mancipium* (§§ 124–41), and first to that of *potestas.* The termination of *dominica pot.* by manumission is dismissed as having already been dealt with (§ 126).

Patria potestas ended with the life of its holder, but, as Gaius (§ 127) points out, not all who had been subject to it became *sui iuris*; those who did were the deceased's *sui heredes* (2, 156; 3, 2). It was also ended by either its holder or the subject losing *ciuitas* (§§ 55. 128) or *libertas* (§ 129).

Loss of ciuitas. *Aquae et ignis interdictio*, given as the example of loss of *ciuitas* without loss of *libertas* (*cap. dem. media*: § 161), is represented by our text (§ 128) as a punishment ordained by Sullan legislation (82–79 B.C.). This is inexact.[3] By a tolerant practice which existed before as well as after Sulla citizens charged with capital offences were allowed to escape conviction or, if convicted, the death-penalty by retiring voluntarily into exile; if they took this course they were banished from Italy by *aquae et ignis interd.*, a sort of outlawry. With this practice Sulla did not interfere,[4] so that in his legislation the death-penalty came in effect to mean *aq. et ign. interd.*, virtually banishment with loss of civic rights. Thus either Gaius is expressing merely the practical results of the *Ll. Corneliae* or else the words *ob aliquod maleficium ex lege Cornelia* are gloss.[5] Not till the very end of the Republic does exile figure as an express statutory penalty. Under

[1] Justinian abolished noxal surrender of free persons: *Inst.* 4, 8, 7.

[2] Below, p. 42.

[3] Levy, *Die röm. Kapitalstrafe*, Heidelberg 1931.

[4] Cic. *p. Caec.* 34, 100.

[5] So Levy, *o.c.* 37–38, accepted by Kübler. Krüger had already suspected *ex lege Cornelia*.

the Empire we find *deportatio in insulam* with loss of *ciuitas* (*Inst.* 1, 16, 2); moreover, the death-penalty was revived.

An obsolete case of *cap. dem. media* is mentioned in § 131, namely, that of a citizen son enrolling himself with his father's leave as a citizen of a newly founded Latin colony.

Loss of liberty (*cap. dem. maxima*). This is exemplified by *captiuitas* (§ 129; cf. § 160). The Romans, recognizing capture in war as a source of slavery *iure gentium* (*Inst.* 1, 3, 4), admitted that in theory a captured Roman became a slave. But this was circumvented if he returned from captivity by the doctrine of *postliminium*,[1] or, if he died in captivity, by the fiction that he had died at the moment of capture (*fictio legis Corneliae*: *Inst.* 2, 12, 5). To have admitted that he had died a slave would have rendered his will, though made before capture, void and would have left him without a successor *ab intestato*.

Liberation from *pat. pot.* by becoming *flamen Dialis* or a Vestal Virgin (§ 130) involved no *cap. dem.*[2]

§§ 132–5a. Termination of Patria Potestas: Emancipation and Adoption

Emancipation and giving in adoption, both voluntary acts of the *paterfam.*, are brought together here because both had the negative effect of ending *pat. pot.* Their positive effects were of course quite distinct. Hence the ceremonies of the two acts are identical up to the point at which the *pat. pot.* was destroyed and after that different.

The termination of *pat. pot.* was effected in both cases by an abusive application of the rule of the *Twelve Tables* (§ 132 &c.) that if a father sold his son three times, the son was to be free of his father. As we have said, the rule was probably intended to limit the economic exploitation of sons, but, granted that mancipation for a nominal sum was allowed to count as sale, it provided a safe statutory method of deliberately destroying *pat. pot.* Moreover, the rule was interpreted as implying that a single sale would produce the same effect in the case of any subject of *pat. pot.* other than a son (daughter, grandchildren, &c.). We have seen an application of this in *coemptio fiduciaria* (§ 115). The ceremony of destruction was therefore as follows. The *paterfam.* mancipated the descendant to a friend with the result that the person mancipated was in *mancipii causa* to the friend (§ 117). This ended *pat. pot.* over any descendant except a son, for whom three sales were

[1] § 187; *Inst.* 1, 12, 5. 2, 1, 17. Buckland 67. Cf. De Visscher, *Festschr. Koschaker* 1, 367; Amirante, *Captivitas e Postliminium*, Naples 1950.

[2] Cf. 3, 114; Gell. 1, 12, 9.

necessary. A son therefore was manumitted by his holder *uindicta* after the first mancipation and fell back into *pat. pot.* He was then mancipated and manumitted a second time, with the same result. A third mancipation ended the *pat. pot.* for good, as did the first in the case of other descendants. In both cases the person mancipated was left *in mancipio* to the friend.

We come to the positive sides. The ultimate effect aimed at by emancipation was to make the descendant *sui iuris*. For this all that was strictly necessary was a manumission *uindicta* by the holder *in mancipio*, the third of a son, the first of any one else. But it was generally desired that the act of definitive manumission should be performed by the father himself, so that he should secure, as *parens manumissor*, rights of succession and *tutela* similar to a patron's,[1] Accordingly the descendant was first mancipated back to the father who, holding him now *in mancipio*, manumitted him *uindicta.*

The positive effect intended by adoption was the creation of *pat. pot.* for a new holder, the adopting father. This was done by a fictitious *uindicatio* (§ 134) in which the plaintiff was the adopter and the defendant the present holder *in mancipio.* The latter, if, as was more correct, there had been a previous remancipation, would be the natural father.

The status of an adopted person has already been briefly described above (§§ 97–107). He was provided with a new civil agnatic family, whereas an *emancipatus* was not. An *emancipatus* was *sui iuris*, but had no agnates and no civil rights of succession even to his father. However, he preserved his *cognatio*, and this became increasingly important; in particular the Edict put him *iure praetorio* in practically the same position in regard to succession to his father as he would have been in *iure ciuili* had he not been emancipated.[2] He could have no relatives to succeed him *ab intestato* except *sui heredes*, but, as we have said, rights to succession and *tutela* similar to those of a patron would result to his father if the emancipation had been in the best form.

Neither emancipation nor adoption affected the status of any one but the person to whom the process was applied. Thus a son left his children behind him in the old *pat. pot.* and his wife, if *in manu*, still in the *manus* of his father; equally a grandson emancipated or given in adoption was cut off from his father. Any child conceived to a son

[1] § 132a, defective: see note to text, Part I p. 42.

[2] *Bonorum possessio contra tabulas, 2,* 135; *ab intestato* 3, 26. The same for a descendant given in adoption but emancipated from it before the death of his natural father: 3, 31; *Inst.* 3, 1, 14.

after his emancipation or adoption would be in his or his adopter's *pat. pot.*, even if he had left his wife *in manu* of his natural father, but as regards the position of a child conceived during the course of the protracted ceremonies there was some controversy (§ 135).

§§ 136–7a. Termination of Patria Potestas by giving in Manum. Termination of Manus

If a *paterfam.* gave his daughter &c. *in manum* whether *matrimonii* or *fiduciae causa*, his *pat. pot.* terminated, except that by comparatively late legislation[1] the *manus* created by *confarreatio* did not affect her civil but only her sacral status (§ 136). Passing from *pat. pot.* into *manus* did not, like the tortuous process of being adopted, involve incidental subjection to *mancipii causa*, but nevertheless the woman was *capite minuta* (§ 162). Emancipation from *manus* took the same form as emancipation of a daughter from *pat. pot.* (§§ 115. 137). If the *manus* was *fiduciae causa*, the woman had a right to be emancipated. If it was *matrimonii causa*, she had such a right no more than a daughter, natural or adoptive, but she could acquire it by merely renouncing her marriage (§ 137 a); here the influence of the free marriage is plain.

§§ 138–41. Termination of Mancipii Causa

These sections have already been dealt with in connexion with §§ 116–23.

§§ 142–3. Tutela and Curatio

Persons *sui iuris*, i.e. not *in potestate manu mancipioue*, might not have capacity to perform legal acts. Normal incapacity, due to age or sex, was supplemented by *tutela*, abnormal, due to madness or prodigality, by *curatio*; but in classical law *curatio* was used to raise the protected age to 25. We have the account of *tutela* almost complete (§§ 144–96), but only a small fragment of the account of *curatio* (§§ 197–8).

We begin with *tutela*. Originally this was part of the family system; it was a protection not only of the ward, but also of his or her presumptive heirs or more exactly of the family. Later it came to be regarded simply as a protection for the ward and a burden on the tutor (*Inst.* 1, 25). In classical law the original character of the institution appears most clearly in the *legitima tutela mulierum*.

[1] Above, on §§ 108 *sq.*

The order of topics is (1) who are *tutores* (§§ 144–88), (2) comparison of *impuberum* and *mulierum tutela* (§§ 188–93), (3) termination of *tutela* (§§ 194–6).

§§ 144–54. Tutores Testamentarii

Since the need of a tutor ordinarily arose when a person became *sui iuris* owing to the death of a *paterfam.*, *tutores test.* are taken first. By his will a *paterfam.* could appoint a tutor to any one, including a *postumus* (§ 147), whom his death caused to need one. Boys *sui iuris* required one up to puberty (§ 144; puberty § 196), females *sui iuris*, married or single, up to any age (§ 144), except that Vestal Virgins were exempted from *tutela* by the *Twelve Tables* and women with the *ius liberorum* (three children in the case of an *ingenua*, four in that of a *liberta*) by the *L. Iulia* (18 B.C.) and the *L. Papia Poppaea* (A.D. 9) (§§ 145. 194; 3, 44). The correct words of appointment are given (§ 149; cf. 2, 231. 234. 289). The appointment might be made subject to the happening of a condition or from a future date (§ 186). Any definite male *ciuis* above puberty, even a *seruus testamento manumissus* or even a Latin, but not a Junian Latin (§ 23), could be appointed. The appointment took effect only if the will did (§ 186; *Inst.* 1, 15, 2). A *tutor test.* was exempted from having to give security for proper administration of the *tutela* (§ 200).

Tutores optiui. Wives freed from *manus* by his death were among those to whom a *paterfam.* could appoint tutors by his will. Moreover, to them only (not to daughters and granddaughters) he could leave the right to choose their own tutors (§§ 150–3). The end of § 150 has been supposed to be a gloss because in principle a tutor, so long as he was tutor, ought to be *in omnes res*.[1] But the principle is not very ancient and this may be an exception. Also § 153 shows that the practical effect of an *optio plena* would be that a woman could appoint a tutor for a single transaction and then supersede him.

§§ 155–66. Tutores Legitimi. Capitis Deminutio

1. In default of a *tutor test.* the *tutela* went by the *Twelve Tables* to the ward's nearest agnate or agnates (§§ 155. 164) or failing them to his or her *gens* (passage missing between §§ 164 and 165; cf. 3, 17), i.e. to the ward's presumptive heir or heirs. But in Gaius' day the

[1] Solazzi, *Aegyptus* 2, 177.

rights of the *gens* were obsolete (3, 17),[1] and the *legitima tutela* of agnates over women had been abolished by a *L. Claudia* (A.D. 41–54: §§ 157. 171).

2. A *libertus* or *liberta* could have no agnates, but from the fact that in the matter of succession the *Twelve Tables* put their patrons in the place of agnates it was inferred that *tutela* (*legitima*) was intended to go to them likewise. The rights of a patron passed to his male descendants (§ 165; 3, 45. 58).

3. As we have seen (§§ 132–5 a), emancipation in the best form secured to the *parens manumissor* quasi-patronal rights of succession and *tutela*. Whether or not § 166 is rightly supplied from *Inst.* 1, 18,[2] it is clear that the *tutela* of a *parens manumissor* was at any rate treated as if *legitima* (§§ 172. 175. 192; 2, 122); that of his male descendants, however, unlike that of a patron's male descendants, was only *fiduciaria* (§ 175).

Thus in classical law there were three kinds of *tutores legitimi*: the nearest agnate or agnates (but not over women), the patron or his male descendants, and the *parens manumissor* but not his male descendants.

The term *agnati* explained in § 156 (cf. 3, 10) should cause no difficulty since our own surname system is agnatic. Agnates are primarily persons descended from a common male ancestor exclusively through males; but we must remember to include persons brought into the agnatic circle by adoption or by subjection to *manus*, and to exclude persons put outside it by *capitis deminutio*. For *cap. dem.* destroyed *agnatio* or civil kinship (§§ 158. 163. 195 b; 3, 21. 51. 153 &c.).

Thus *cap. dem.* comes up for parenthetical explanation (§§ 159–63). So far as *cap. dem. maxima* and *minor* or *media* are concerned there is no difficulty. Paul *D.* 4, 5, 11: *tria sunt quae habemus, libertatem, ciuitatem, familiam. igitur cum omnia haec amittimus, hoc est libertatem et ciuitatem et familiam, maximam esse capitis deminutionem: cum uero amittimus ciuitatem, libertatem retinemus, mediam esse capitis deminutionem: cum et libertas et ciuitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat.* Thus to Paul *cap. dem. minima* is *familiae mutatio*, whereas to Gaius it is *status commutatio* (§ 162), a thing that happens to those who are adopted or who enter *manus* or are mancipated or are manumitted from *mancipium*. Hence Gaius concludes that a person given in adoption or emancipated

[1] There is a trace of them at the beginning of our era in the *Laudatio Turiae* 20: Bruns 1, 323; *Textes* 818; *Fontes* 3, 269.

[2] Cf. Part I p. 54 n. 2.

undergoes as many *cap. deminutiones* as there are incidental mancipations and manumissions. Paul would not have dissented (*D.* 4, 5, 3), but in the passage quoted, by treating these composite acts as unitary and judging them by their ultimate effects he is able to improve the dogmatic scheme of *cap. deminutiones*; even Gaius' is far from primitive.[1]

§§ 166a. Tutores Fiduciarii

If in an emancipation (§§ 132 *sq.*) there was no remancipation to the father, but the definitive act of manumission was performed by the third party holding *in mancipio*, the latter was tutor if a tutor was required, but *tutor fiduciarius*. He was also the *heres ab intestato* of the emancipated person at civil law, but was in this matter postponed by the praetor to certain near relatives.[2] *Tutela fiduciaria* was the intended outcome of *coemptio fiduciaria* (§ 115); other cases of it must have been rare. As we have just mentioned, the male descendants of a *parens manumissor* also were classed as *tutores fid.*

§ 167. Tutela of Junian Latins

This section tells its own story, though the motive for the provision of the *L. Iunia* is not apparent. The passage would have been better placed immediately after § 165. The disorder may be connected with the omission of § 166, if that section was indeed mistakenly omitted.

§§ 168–72. Tutores Cessicii

Legitimi tutores of a woman had power to make an *in iure cessio* (2, 24) of their *tutela* to another person, who thereby became *tut. cessicius*. If he died before the *legitimus*, the *tutela* reverted to the *legitimus*; if the *legitimus* died first or underwent a *capitis deminutio*, the *tutela* of the *cessicius* was extinguished, as that of the *legitimus* would have been. The *tutela* of a *pupillus* could not be thus ceded (§ 168), and Gaius points out (§ 171) that by the *L. Claudia* the *legitima tut.* of agnates over women no longer existed. He seems inclined to accept the view that the right of *cessio* was not enjoyed by fiduciary tutors (§ 172).

[1] Buckland 134 ff.; Desserteaux, *Études . . . sur la c.d.* (1909–28), with reviews by Michon in (*N*)*RH* 1909. 1919. 1927. 1928; Also H. Krüger, *SZ* 1929, 541.

[2] *Bonorum possessio unde decem personae*: *Inst.* 3, 9, 3. Below, p. 126 n.5.

§§ 173–88. Tutors appointed by Magistrates

There might easily be no testamentary tutor—no *testamentum* or no effective *testamentum* (*heres* not accepting), no appointment of tutor by the will or appointment depending on *condicio* or *dies* (§ 186). And there might be no *legitimus tutor*—e.g. no agnates, no *liberti patroni* (§ 195 b), a female patron (§ 195). Again, an existing tutor was out of office so long as he was a prisoner of war (§ 187). In default of a tutor one was appointed by public authority, at home by the praetor and the majority of the tribunes under a *L. Atilia* (before 186 B.C.) and in the provinces by the governors under a *L. Iulia et Titia* (end of the Republic; perhaps two *leges*). In an older case, namely that of the incapacity of a tutor to give *auctoritas* in a *legis actio* between himself and his ward, the praetor appointed (§ 184).[1]

The appointing authority was changed from time to time (*Inst.* 1, 20, 3), but this is of no interest to us. What is interesting is that appointment by the State indicates that the protection of the helpless had come to be regarded as a *munus publicum* (*Inst.* 1, 25 pr.). The praetor had no inherent jurisdiction in the matter; the one case in which he appointed without statutory authorization (§ 184) arose in his special province of litigation.

Further examples of appointment by the magistrate under statute appear in §§ 173–83. The senatusconsult or senatusconsults mentioned (in one case the *L. Iulia* of 18 B.C.: § 178) authorized the urban praetor or provincial governor in certain cases, on application being made to him, to replace the existing tutor of a woman by another. One of the cases is important in the history of *tutela mulierum*: a woman, if her tutor was absent (liberally construed: § 173), could have him replaced, except if he was *legitimus tutor* (*patronus*, *patroni liberi*, *parens manumissor*), and even he if his absence or his incapacity to give *auctoritas* (owing to his being *impubes* or *furiosus*) was preventing the transaction of some urgent business, in which case the replacement was only for the purpose of the business in hand.

In § 182 there is passing reference to the crimen *suspecti tutoris* and *excusatio*, fuller treatment of which will be found in *Inst.* 1, 25 and 26.

The controversy (§ 188) as to the proper classification of the various kinds of *tutela*, if it was as futile as it seems, indicates that the newly acquired instrument of Greek dialectic was not without its dangers

[1] By custom, according to Ulp. 11, 24. Cf. *Inst.* 1, 21, 3.

for Roman jurisprudence. But it enabled Q. Mucius (consul 95 B.C.: § 188) to write the first systematic work on the *ius ciuile*.[1]

§§ 189–93. Tutela Impuberum. Tutela Mulierum

Gaius' broad contrast between *tutela impuberum* (including girls up to 12) and *tut. mulierum* amounts to this, that while *tut. impub.* accords with natural reason and universal practice (§ 189), *tut. mul.*, though pretty general in one form or another, cannot in its Roman form be justified on rational grounds (§§ 190. 193).

1. **Tutela impuberum.** Without *tutoris auctoritas* a pupil could not alter his position for the worse. He could not alienate any kind of property (2, 80. 82) nor incur contractual obligation (3, 107). This was so, however favourable on the whole the transaction might be. He was fully capable of acquisition (2, 83), but in practice this cannot have been of much use to him. If he received payment of a debt, the money became his (2, 84), but the debtor was not released at civil law, though he might have an equitable defence. If he received a payment by mistake of a supposed debt, it was a question whether he could be made to repay (3, 91).

His tutor was the responsible administrator of his patrimony and accountable to him in a *iudicium tutelae* (§ 191; *bonae fidei*: 4, 62). The tutor might have to give security for proper administration (§§ 199–200). By a process known as *crimen suspecti tutoris* (*Twelve Tables*: *Inst.* 1, 26) he could be suspended and eventually removed from office. As to his methods of administration we distinguish, with Ulpian (11, 25), *auctoritatis interpositio* and *negotiorum gestio*.

Auctoritas. The pupil did the act and the defect in his capacity was made good by *auct. interpositio*. This was a spoken unconditional adhesion to the act given by the tutor in person at the moment of the act. It was more than a mere *consensus*, which could have been signified by letter or messenger. On the other hand, formal words were certainly not necessary in classical law, and there is said to be no evidence of their necessity in earlier ages.[2] The characteristic feature of *auctoritatis interpositio* was that it did not render the tutor a party to the transaction. The act and its direct consequences appertained to the pupil. The tutor incurred no responsibility to the other party, though by giving *auctoritas* improperly he incurred liability to the pupil.

[1] Pomp. *D.* 1, 2, 2, 41. Schulz 94.

[2] *Auctorne fis? Fio* has been suggested, but cf. Buckland, *Festschr. Koschaker* 1, 23.

Negotiorum gestio. The mechanism of *auctoritas* could not be employed if the pupil was too young to do an intelligent act,[1] and in any case it might be inconvenient. For the acquisition of rights a slave of the pupil was a perfect instrument, but for other purposes the tutor had to act himself. His capacity to represent his pupil was limited. He could validly alienate the pupil's property by *traditio*, but not by *mancipatio*.[2] He could not contract as his pupil's agent; any contract made by him was his own; on it he alone could sue and be sued, the pupil being a stranger. Of course as between tutor and pupil any benefits from the contract were claimable by the pupil and the tutor had a right to indemnity from him in respect of expenses and liabilities properly incurred in his administration. This clumsy situation was circumvented before the end of the classical period by praetorian devices (*actiones utiles*, *exceptiones*) which produced at the termination of the *tutela* a virtual transfer of rights against and liabilities to third parties from the tutor to the pupil.

2. **Tutela mulierum.** Here there is no question of *gestio* by the tutor: a woman *sui iuris* conducted her own affairs (§ 190). Still, if she was *in tutela* she needed *tutoris auctoritas* for certain acts. These included the alienation of *res mancipi*, civil *negotia* generally, and the incurring of contractual obligation,[3] but not the alienation of *res nec mancipi*. Clearly we have here an historical survival, no longer resting on any principle. A good illustration is that though a woman could release her debtor by receiving actual payment, she could not do so by *acceptilatio* (fictitious receipt: 2, 85; 3, 171) without *auctoritas*. Moreover, the requirement of *auctoritas* was merely a matter of necessary form (*dicis causa*: § 190) and no protection to the woman, since by giving or withholding it the tutor incurred no responsibility, there being no *iudicium tutelae* (§ 191). Thus, except where he was *legitimus tutor*, the praetor might compel him to give *auctoritas* (§ 190 *fin.*), or might uphold a will void at civil law because made by the woman without *auctoritas* (*bonorum possessio secundum tabulas*: 2, 121–2). Again, a woman could readily change any except a *legit. tutor* for one more complaisant, either by *coemptio fiduciaria* (§ 115) or by obtaining a praetorian appointment on the slightest excuse of absence (§ 173). In contrast, *legit. tutores* of a woman (after the *L. Claudia* only patron, patron's sons, *parens manumissor*) were compellable to give *auctoritas*

[1] A question of fact in Gaius' day, liberally treated, however (3, 109); in later law the seventh birthday.

[2] It is doubtful if *pupilli seruus* could mancipate: Buckland, *LQR* 1918, 372. Shortly after Gaius restrictions began to be placed by statute on the tutor's discretion to alienate.

[3] 3, 109. Ulp. 11, 27 is fuller.

only exceptionally (§ 192) and were not in general removable for absence (§§ 174 *sq.*). The *legitima tutela* thus exhibits *mul. tut.* in its original state. *Tutores legit.* could prevent the woman from reducing her estate by alienating her *res mancipi* or incurring debt. They were her *heredes ab intestato*, and a will made by her without their *auctoritas* was void at civil law (3, 43) and was not validated by the praetor (2, 122). Gaius (§ 192) rests their exceptional position on the ground of their own interest, and this or something like it was clearly the original purpose of *tutela*: it was part of the early system of family property.

§§ 194–6. Release from Tutela

If the ward passed out of the existing *tutela* in consequence of his undergoing *cap. dem. minima*, he either became and remained *alieni iuris* or received a new tutor. Similarly, if the existing *tutela* was ended by the tutor's death or *cap. dem. maxima* or *media* (or in the case of *tutela legitima* even *minima*: *Inst.* 1, 22, 4) or by the arrival of a condition or *dies* by which a testator had limited his appointment, and so on, the ward simply got a new tutor. Termination of *tutela* in this sense is mentioned only incidentally in this passage (§§ 195 *sq.*). The intended subject is termination by the ward attaining full capacity.

A male was released from *tutela* by reaching puberty (§§ 145. 196), a female by acquiring the *ius liberorum* (§ 194),[1] that is, if she was *ingenua* by having three children, and if she was *libertina* four if she was *in legit. patroni liberorumue eius tutela* or three if she was in any other kind of *tutela* (§ 194).

But how could a *libertina* be in any but *legitima tutela* (§§ 195 *sq.*)? In various ways. If her patron was a woman, she was given an Atilian or Julio-Titian tutor (§ 195).[2] If with the *auctoritas* of her *legit. tutor* she made a *coemptio fiduciaria*, she would acquire a *tutor fid.* (§§ 115. 195 a).[3] If her patron died leaving no agnatic male descendants, the *legit. tutela* did not pass to his collateral agnates; unless there had been a joint patron, to whom the *legit. tutela* survived in entirety (3, 58 *sq.*), the magistrate had to appoint (§ 195 c). The same happened if her patron or his successor in the *legit. tutela* underwent a *cap. deminutio minima*; this could only occur by his being adrogated, so that all his agnatic descendants would have passed with him into the new family.

[1] Also by becoming a Vestal Virgin: § 145.
[2] Above, p. 48.
[3] Above, p. 36.

Once again, unless there had been a joint patron, there was a vacancy to be filled by the magistrate (§ 195 b).[1]

§§ 197–8. Curatio

The illegible page of our palimpsest between §§ 196 and 197 contained something more, probably not much, about *tutela*,[2] but must have been mostly occupied with *curatio*. Only the end of that topic now survives in our §§ 197–8.[3] It may be assumed that Ulpian preserves the Gaian order—*cura furiosi*, *prodigi*, *minoris*. The first two are at least as old as the *Twelve Tables*; the third is a later development. Other cases of *curatio* also grew up later; the curator became a general emergency man, whereas in Gaius' day a temporary tutor was sometimes resorted to.[4]

Cura furiosi. Cura prodigi. The *Twelve Tables*[5] placed both a *furiosus* (not a merely *insanus*) and a *prodigus* under the *cura* of his agnates or *gens* (*curator legitimus*), but did not empower a *paterfam.* to appoint a curator by his will. Originally the pronouncement of madness or prodigality may have come from the family or the *gens*. In both cases the *lex* had to be supplemented by praetorian appointment. This was inevitable if there happened to be no *legitimus curator*, but even where there was one, praetorian appointment was not excluded, and this seems to have become normal in later times. In appointing, the praetor would defer to a *paterfam.*'s testamentary indication of desire.

A *furiosus*, except in lucid intervals (*Inst.* 2, 12, 1), was regarded as naturally incapable of any legal act, even one of pure acquisition (3, 106), because like an *infans* he had no *intellectus*. The *Twelve Tables* gave his curator (i.e. *legitimus*) wide powers of administration (2, 64),[6] but a curator appointed by the praetor did not enjoy these statutory powers and could administer only in the same indirect way (*negotiorum gestio*) as a tutor acting otherwise than through the mechanism of *auctoritas*.[7] There could be no question of the acts of a *furiosus*

[1] Buckland 159–60 says that the *tutela* would pass to the adrogator. But he gives no authority and § 195b seems conclusive. Cf. the extinction of *operarum obligatio*: 3, 83.

[2] The evidence is scanty. The end of Ulp. 11 is missing, *Epit.* 1, 7 says nothing and *Inst.* 1, 22 is not a safe guide.

[3] Cf. Ulp. 12; *Epit.* 1, 8; *Inst.* 1, 23.

[4] Buckland 172–3. Contrast e.g. § 184 with *Inst.* 1, 21, 3.

[5] 5, 7: *Textes* 14; Bruns 1. 23; *Fontes* 1, 39.

[6] Their extent is disputed. Cf. Wlassak, *Stud. z. altröm. Erb- u. Vermächtnisrecht* (1933) 6 f.

[7] Above, p. 50.

being validated by *consensus curatoris*, because he was incapable of any act.

Cura prodigi.[1] The *cura legitima* of the *Twelve Tables* was only for one who was squandering property that had come to him by intestate succession, but in later times intestate succession was very rare and this limitation was not observed. A *prodigus* was not naturally incapable. By what process under the *Twelve Tables* a man was made legally *prodigus* is doubtful. In historical times the regular method was a praetorian decree placing him under an *interdictio* from *commercium* which deprived him of capacity to do any legal act making his position worse; nor, since he could not mancipate, could he make a will.[2] Having *intellectus* he remained capable of acts of pure acquisition. Whether other acts done by him were simply void or could be validated by his curator's *consensus* is uncertain.

In both these cases the action for bringing the curator to account was *negotiorum gestorum*.

Cura minoris. In any but a very simple society the ages of 14 and 12 at which a boy came out of *tutela* and a girl's *tutela* changed its character were too low. In the final Roman law (*Inst.* 1, 23–26) young persons *sui iuris* were under curators from the end of the *tutela* till the age of 25. It was not compulsory to have a curator, but for a minor of any fortune it was practically inevitable. If a minor had a curator, any act done by him without his curator's *consensus* was void. He might administer his affairs himself, obtaining *consensus* when necessary, or the curator could administer under the system of *negotiorum gestio* already described.[3] Thus in the final law *cura minoris* was assimilated to *tutela impuberis*, except that the *consensus curatoris* unlike *auctoritatis interpositio* was not a formal act, that the curator was always appointed by a magistrate, and that the action for account was *negotiorum gestorum*. The appointing magistrates, the system of *satisdationes* (§§ 199–200), and the restrictions on alienation by the guardian were the same in both cases. In appointing a curator the magistrate would be likely to defer to the choice indicated by the *paterfam.*'s will.

The development of this institution had been a long process. Lacking Gaius' evidence[4] we cannot be sure how far it had gone in his day. But its general course is pretty clear. The origin of *cura minorum*

[1] Paul. *Sent.* 3, 4a, 7; Ulp. 12, 3; *Inst.* 1, 23, 3.
[2] 2. 103; Ulp. 20, 13.
[3] Above, p. 50.
[4] At §§ 196–7 a page of his text is illegible.

was the danger of dealing with minors created by a *L. Plaetoria* (or *Laetoria*) of about 200 B.C. and by the praetorian system of *restitutio in integrum minorum* which is found fully developed by the end of the Republic. This danger, in addition to the penalties for fraud imposed by the *L. Plaetoria*, was that a transaction concluded with a minor was very liable to be rendered ineffective if it turned out to his disadvantage. This was not so if the loss was one that might have been suffered by anyone in the ordinary course of business, but it might be difficult to show that a loss falling on a minor was due to bad luck and not to youthful inexperience. This difficulty would hardly exist, however, if in concluding the transaction the minor had had the approval of a person of mature judgment, and it was for this reason that curators seem first to have been appointed. Thus originally a curator's *consensus* provided an element of fact in the determination of the question of voidability. It was not till after the end of the classical period that an act of a minor who had a curator was void if done without *consensus*.[1] Persons obliged to deal with minors, e.g. a tutor giving up office or one paying a debt to a minor, naturally came to have a right to insist on the minor having a curator, and the minor himself would find it impossible to obtain any sort of credit unless he had one. It is presumed that curators were at first appointed for particular transactions, but by the time of Gaius' *Institutes* it is probable that the appointment of permanent curators had become well established in practice.

A little later M. Aurelius (A.D. 161–80) made permanent *curatio minorum* into a normal institution. The authority for this statement is not good, but there is no reason to doubt it.[2]

§§ 199–200. Satisdatio of Tutors and Curators

With the exception of testamentary tutors and tutors or curators appointed by a higher magistrate tutors and curators were compelled to give a formal promise, with sureties, guaranteeing the conservation of their ward's estate. A magistrate taking insufficient security was liable for the deficiency (*actio subsidiaria*).[3]

[1] Mod. *D.* 45, 1, 101. Girard 254 n. 4.

[2] *Vita Marci* 10 *fin.*: *de curatoribus uero, cum ante non nisi ex lege Laetoria uel propter lasciuiam uel propter dementiam darentur, ita statuit, ut omnes adulti curatores acciperent non redditis causis.* Cf. Ulp. 12, 4.

[3] *Inst.* 1, 24.

BOOK II

Books 2 and 3 deal with *ius quod ad res pertinet*. The term *res* has a great variety of meanings; here, as the contents of the two books show, it denotes all rights having a pecuniary value, therefore not *libertas* or *ciuitas* or *patria pot.*, but ownership and other rights over material things and claims against persons estimable in money. In short, the *ius rerum* is the law of the patrimony. The treatment is from the point of view of the acquisition of *res*.

§§ 1–14a. Classifications of Res

Gaius (§ 1) begins by classifying *res*, meaning here material objects, as being within or outside the patrimony. *Extra patrimonium* expresses the legal impossibility of a thing having a private owner. We go on at once to the classification *res diuini* and *humani iuris*.

Res diuini iuris (§§ 3–9). Ownership of *res sacrae* (temples, altars, their equipment) and of *res religiosae* (ground in which a corpse had been legally buried with the consent of the landowner and of any other person having an interest: *Inst.* 2, 1, 9) was attributed to the gods, and *res sanctae* (§ 8) were regarded as being under their special protection. Private ownership of these things was legally impossible (§ 9).

A *res* became *sacra* by an act of State (§ 5), but in provinces there were temples and shrines consecrated by custom or by non-Roman authority;[1] these were treated as *res sacrae* (§ 7 a). Similarly, according to the generally accepted view (§ 7), land in the provinces could not become *religiosum* but only *pro religioso*, because the *dominium* of *solum prouinciale* (non-Italic land) was vested in the State, i.e. in the *populus Romanus* or the Emperor according as the province was administered under the old Republican system (so-called senatorial provinces: *praedia stipendiaria*) or by the Emperor (*praedia tributaria*: § 21). The antiquity of this doctrine of State ownership is doubtful,[2] but it is clear that private ownership of provincial lands was at no time regarded as being *dominium* in the Roman sense (*ex iure Quiritium*): they could neither be mancipated (§§ 14a. 21. 27) nor ceded *in iure* (§ 31) nor be acquired by *usucapio* (§ 46). Naturally provincial

[1] For that matter also in Italy, whence Mommsen's suspicion of *in prouinciis* in § 7a.

[2] A. H. M. Jones, *JRS* 1941, 26.

landowners enjoyed legal protection, but the Romans seem to have been at a loss for a special term by which to denote their interest. Their ordinary designation is *possessores*; a medieval jurist might have described them as having *dominium utile*. The description in § 7, *possessio uel*, or *et*, *ususfructus*, seems to be borrowed from the *formula* propounded in the provincial Edict[1] for the recovery of provincial land. Of course *possessio* and *ususfructus* must not be understood in their ordinary senses.

Res humani iuris (§§ 9–11). Here *Inst.* 2, 1, 1 *sq.* or some modern elaboration will be found more profitable. Gaius' treatment is jejune in the extreme. All he does is to divide *res humani iuris* into *publicae* and *priuatae*. He fails to mention the interesting category of *res communes*[2] and with regard to *res publicae* the distinction that had already been drawn by Celsus and Pomponius[3] between *res pub.* that could pass into private ownership (*in pecunia populi*) and those, such as public roads and open spaces, theatres and *stadia*, which owing to their permanent appropriation to public uses could not so pass. The one interesting point occurs in § 11: *res publicae* are said, like *res diuini iuris* § (9) to be *nullius in bonis* because they belong to the *uniuersitas*. This implies that Gaius did not regard a corporation as a person. *Res publicae* in the proper sense were the property of the *populus Romanus*, but the mention of *uniuersitas* suggests that the property of other corporate bodies such as municipalities is also in mind.

Res priuatae were things susceptible of private ownership, being neither *diuini iuris* nor *publicae*, though in fact they might be ownerless (*nullius* in another sense: § 9).

Dismissing *res extra patrimonium* we next classify *res* as either *corporales* or *incorporales* (§§ 12–14). The objection is obvious that *res* in the sense of things are all corporeal and in that of rights incorporeal; but it is equally obvious that Gaius is identifying the right of ownership with the corporeal thing owned, so that the contrast is really between ownership and all other rights. Except that none of them are susceptible of *traditio* or of being possessed (§§ 28. 38), the rights named in § 14 make a decidedly heterogeneous group. Servitudes go more naturally with ownership than with obligations and they are in fact treated along with it (§§ 14. 28–33). They resemble ownership in the important point of being recoverable by *actio in rem* (4, 3). A later passage (3, 83) seems to imply that *obligationes* are not *res incorporales*.

[1] *Edictum* s. 71.
[2] *Inst.* 2, 1, 1. 4. Cf. Gaius *D.* 1, 8, 5.
[3] *D.* 18, 1, 6 pr.

This must be a blunder, due perhaps to a survival of an older terminology which did not class *obligationes* as *res*. Gaius' own classification is clear. *Obligationes quoquo modo contractae* (§ 14, repeated § 38)[1] must be taken as covering delictual as well as contractual obligations, though the expression is unsuitable. The inclusion of *hereditas* among *res incorporales* (§ 14) is evidence that as early as Gaius it was regarded as an abstract entity and not merely as an aggregate of rights.[2]

§§ 14a–27. Res Mancipi. Conveyance of Res Corporales

The last classification of *res* is as *mancipi* and *nec mancipi*. This is a conveyancing distinction and introduces the subject of conveyance of *res corporales* in general.

The classical Roman conveyances were *mancipatio*, *in iure cessio*, and *traditio*, the two former being *iuris ciuilis* and so available only to persons having the *ius commercii*, the third *iuris gentium* (§ 65). *Res mancipi* were properly conveyed by *mancipatio* or by *in iure cessio* (§ 25). Other things (*res nec mancipi*) could, if *corporales*, be conveyed by *traditio* (§§ 19. 25); they could not be mancipated, but, with the exception of provincial lands to which special considerations applied (§ 31), they could be conveyed also by *in iure cessio*, though this is hardly worth mentioning.[3]

A. *Mancipatio*

Res mancipi (§§ 14*a*–17; 1, 120) were slaves, beasts of draught and burden (i.e. oxen, horses, mules, asses), Italic lands (including buildings) and rustic (but not urban) praedial servitudes over such lands (§§ 17. 29). These were the most important possessions of the primitive Roman farmer—reason enough for requiring their alienation to be by solemn form, especially if it was by his ownership of such things that a citizen was classed in the Servian census. But there may have been another reason. Many high authorities[4] believe that the distinction between *res mancipi* and *nec mancipi* corresponds to that between *familia* and *pecunia*, an old classification of property of which faint traces (e.g. 2, 104) survive. The theory is that *familia*, being family property, could be alienated only in solemn form, whereas *pecunia*, being the personal property of the *paterfam.*, could

[1] Cf. De Visscher, *RH* 1928, 354.

[2] Buckland, *Yale L. J.* 1924, 360; Bortolucci, *BIDR* 1934, 153.

[3] Ulp. 19, 9.

[4] For modern views cf. Cornil, *RH* 1937, 555; *Festschr. Koschaker* 1, 404. ; De Visscher, *Nouv. Ét.* 141, 179, 193.

be alienated by formless delivery. Though no memory of the identity of the two distinctions survives, this view is attractive. But it is open to the serious objection that the constituents of *familia* and *pecunia*, so far as they can be inferred, were not the same as *res mancipi* and *nec mancipi* respectively. *Familia* seems to have consisted of the household and the household property; this would include slaves, but not land apart from the homestead (*heredium*). *Pecunia* seems to cover all cattle except the plough-ox. It may be replied that the *heredium* was at first the only land in private ownership and that in any case *mancipatio* looks as if it had been originally devised for movables. With regard to cattle, the Proculian view (§ 15) as to the moment when they became *mancipi* harmonizes with other evidence that cattle were *pecunia* till they were put into the *familia* by being taken out of the herd, broken in, and appropriated to the working of the farm.[1] The inclusion of rustic praedial servitudes among *res mancipi* causes no difficulty, since in primitive times the original four, *iter uia actus aquaeductus*, would be thought of as physical.[2]

Mancipatio. To the account of the ceremony in 1, 119[3] we need only add that *iura in re*, such as a usufruct (§ 35), or a right of way or light in favour of land retained by the alienor, might be deducted[4] and that the price seems to have been stated, or if there was no price a nominal one (*sestertio nummo uno*).[5] It is characteristically Roman that it is the alienee who plays the active part; the inference is even justified that there was no need for the alienor to do more than acquiesce.[6] The alienee could be represented by a son or slave (3, 167), the alienor by a son or possibly by a slave.[7] It should be noted that land could be mancipated from a distance.[8]

History of the ceremony. In Gaius' time the weighing was fictitious, a pure formality, but it had not always been so. Until the fourth century the medium of exchange was uncoined bronze, so that its weighing was a natural essential (1, 122). All cash sales must have been *per aes et libram*, but for the sale of the things known to us as *res mancipi* the presence of a *libripens* and five witnesses was required, probably

[1] Cf. Cato, *De agri cult.* 138.

[2] Buckland 262–3.

[3] Cf. 1, 121; 2, 104; 3, 167. 174. Kunkel, *PW* art. *Mancipatio.*

[4] Paul *F.V.* 50: . . . *emptus mihi esto* (MS. *est*) *pretio, deducto usu fructu* . . .

[5] Paul *F.V.* 50. Examples: *Textes* 829 *sq.*; Bruns 1, 335 *sq.*; *Fontes*, 3, 295 *sq.*

[6] De Visscher, *Nouv. Ét.* 141, though regarding the alienor's *auctoritas* or warranty of title as the very core of *mancipatio*, concludes nevertheless (p. 169) for merely tacit ratification by him.

[7] Buckland, *LQR* 1918, 372.

[8] 1, 121. Ulp. 19, 6.

by statute, and the employment of a certain *formula* and ritual, perhaps by custom. Thus when counting coin took the place of weighing metal, the weighing disappeared from all sales except those in which it was encrusted in formalities prescribed by law, i.e. sales of *res mancipi*. The weighing of Gaius' day is thus a survival of what before coinage was introduced had been a natural essential of any sale. The one symbolic act in the ceremony, the striking of the balance with the *aes*, has been compared to making a coin ring on the counter, but as metal held in the hand does not ring, the fall of an auctioneer's hammer is perhaps a better parallel.

This formalizing of the weighing had, however, begun long before it was completed by the introduction of coinage. By a development which must be early[1] it became accepted that even if the price was nominal and its weighing and payment consequently fictitious, mancipation transferred ownership. In this way *mancipatio* was transformed from a sale for cash into an abstract conveyance, i.e. into machinery that could be used for transferring property on any occasion, e.g. sale on credit, donation, and constitution of a *dos*.

The *formula* spoken by the alienee (1, 119) is an enigma. Its first clause appears to state an untruth, its second to confess the untruth. The two clauses taken together may indeed be interpreted as an emphatic declaration of the result that the speaker desired immediately to bring about, but even so the second clause should have come first. The simplest of various explanations is that one or other clause, presumably the second, is an addition to the original *formula*, made for a particular purpose. This may have been to emphasize the fact of payment of the price. The *Twelve Tables* gave an action against a seller by mancipation for double the price if he failed to defend the buyer from eviction from the thing sold during the period of *usucapio* (§§ 42 *sq.*).[2] It is possible that the *Twelve Tables* also made the passing of property conditional on the price having been paid.[3]

Application and effects of mancipation. The uses of mancipation in family law have already been dealt with; we are concerned here with mancipation as a conveyance. In the time of Gaius it was the proper method of transferring civil law ownership (*dominium ex iure Quiritium*) in *res mancipi* (§§ 22. 41) and a method of creating rustic praedial servitudes[4] over Italic land (§ 29). The occasion of its employment did

[1] Girard 310 makes it the intended result of the rule generally ascribed to the *Twelve Tables: cum nexum faciet mancipiumque, uti lingua nuncupassit ita ius esto.*

[2] So-called *actio auctoritatis*. Cf. Zulueta, *Roman Law of Sale* 43; De Visscher, *Nouv. Ét.* 171.

[3] Zulueta, *o.c.* 37.

[4] Below, p. 62.

not need to be sale; it might be donation, constitution of a *dos*, satisfaction of an obligation, and so forth. If it was sale, the mancipation had the further effect of giving rise, if the buyer was evicted within the period of *usucapio*, to an *actio auctoritatis* for double the price;[1] also, if in a sale of land by mancipation the extent of the land was overstated, there would be an *actio de modo agri* for double the proportion of the price attributable to the shortage.[2] There could, as we have said, be deduction of *iura in re* in favour of the alienor (§ 33), but the conveyance had to be immediate and absolute; an express *dies* or *condicio* made it void.[3] The mancipation might be *fiduciae causa* (§ 59), but the *pactum fiduciae* was not incorporated in the mancipation.

B. *In iure cessio*

Though dissented from by some[4] the common opinion that *in iure cessio* was in origin a collusive *uindicatio* seems pretty certain in view of the general similarity of its form (§ 24) to that of a primitive *actio in rem* (4, 16–17) and of the rule that the alienee could not be a person *alieni iuris* (§ 96; contrast 3, 167).[5]

Application and effects. *In iure cessio* like *mancipatio* was *iuris ciuilis* and had no application to provincial lands (§ 31). Being in the form of an *actio in rem* it could not be used for the creation or transfer of obligations (§ 38). Subject to these limitations its scope was wide. In the conveyance of *dominium ex iure Quiritium* it was a possible alternative to mancipation of *res mancipi* or *traditio* of *res n.m.*, though hardly a practical one (§ 25). Its chief importance lay in its being the sole civil means of creating, directly (i.e. not by deduction) and *inter uiuos*, *iura in re* less than ownership, except that rustic praedial servitudes were also mancipable. Details will be given below (§§ 28–33). As in mancipation no *condicio* or *dies* might be expressed,[6] but *iura in re* in favour of the alienor could be deducted when ownership was being conveyed, and there might be an accompanying *pactum fiduciae* (§ 59).

Further uses of *in iure cessio* were to transfer a *tutela* (1, 168–72) or an *hereditas* (§§ 34–36; 3, 85–87) in certain cases. Moreover, manumission *uindicta* (1, 20) and the final act in an adoption (1, 134) seem to be acts of essentially the same character.

[1] See p. 59 n. 2.
[2] Paul 2, 17, 1–4.
[3] Pap. *F.V.* 329. *D.* 50, 17, 77.
[4] e.g. Lévy-Bruhl, *Quelques problèmes du très ancien dr. rom.* (1934) 114.
[5] Cf. Buckland 233–4; Mitteis, *RPR* 276.
[6] See, however, Paul *F.V.* 48.

C. *Traditio*

Traditio or delivery (§§ 19–21) was a natural mode of acquisition (§ 65), obviously applicable only to *res corporales* (§ 28), of which in later law it became the universal mode of conveyance. In classical law *peregrini* could acquire by it such ownership as they were capable of; between persons having the *ius commercii* it transferred Quiritary ownership of *res nec mancipi* (§ 19), but only bonitary of *res mancipi* (§ 41). Provincial land was reckoned as *nec mancipi* for this purpose, but of course there was here no question of Quiritary ownership.[1]

Traditio meant just delivery, but for *traditio* to be a conveyance something more was required. Delivery by way of loan for use (*commodatum*) gave the receiver only natural possession (detention), delivery by way of pledge (*pignus*) gave him full possession, but still not ownership; and so on. To transfer ownership *traditio* had to be on account of some transaction involving such a transfer; sale and donation are Gaius' examples, others would be *mutui datio* (3, 90), *solutio*, and constitution of *dos*. Thus *traditio* as a conveyance demanded besides delivery a *iusta causa transferendi dominii*.

The requisite of delivery consisted in the transfer of immediate physical control, a matter to be judged by common sense and depending largely on social conditions. The subject is better studied in connexion with *Inst.* 2, 1, 40 *sq.*

Causa is more difficult.[2] The final result of classical jurisprudence was that this second requisite was satisfied if there was intention on the side of the *tradens* to transfer ownership and on the side of the *accipiens* to receive it. Of this reciprocal intention *causa*, i.e. some transaction between the parties involving the transfer of ownership and forming the motive of the delivery, would be the ordinary test and natural evidence. But there are cases of putative *causa*, in which the *causa* fails—e.g. one party intends sale and the other gift—and yet because both intend conveyance ownership is transferred. Of all this there is naturally no discussion in Gaius' elementary work.[3]

Gaius' complete silence (§§ 19–21) as to the rule attributed by *Inst.* 2, 1, 41 to the *Twelve Tables*, that where the *causa traditionis* was sale, the *traditio* did not transfer ownership to the buyer until the price had been paid or some security had been given for it, or unless credit

[1] Cf. above on § 7.

[2] The modern literature is enormous. Cf. e.g. Buckland 228; Girard 318.

[3] The expression of *Inst.* 2, 1, 40—*uoluntas domini uolentis rem suam in alium transferre*—is attributed to Gaius by *D.* 41, 1, 9, 3. Interpolation is possible.

had been allowed to the buyer, raises a problem. That the *Twelve Tables* should have made any such rule for *traditio*, or at any rate for *traditio* and not for *mancipatio*, has long seemed extremely doubtful. However that may be, if the rule was in force for *traditio* in Gaius' day, his silence is astonishing. It constitutes the best argument for a modern view that the rule is not classical, but is due to Justinian. But perhaps a safer explanation is that the final exception of cases where credit had been allowed made the rule of too little practical consequence for mention of it to be required.[1]

§§ 28–33. Res Incorporales: Rights in rem less than Ownership

These sections deal with the creation of *iura praediorum* (praedial servitudes, servitudes properly so called) and usufruct. Regarded as a group, these rights resemble ownership (*res corporales*) in being *in rem* (4, 3) and obligations in being incorporeal (§ 14). They have the common quality of being rights over another's property (*res aliena*), and there is similarity in the methods of their creation. But from most points of view praedial servitudes are very different from usufruct and the other so-called personal servitudes.

1. *Praedial Servitudes*

These rights, which correspond to the easements and profits of English law, were conceived of as rights of one owner's land (so-called *praedium dominans*) over another's neighbouring land (*praedium seruiens*). The catalogue of them in § 14[2] may not be complete, and one must admit the possibility of additions being made to it by jurisprudence. But it is a closed list in the sense that parties could not invent new servitudes at will. In their classification as *iura praediorum urbanorum et rusticorum* the genitive is possessive, so that the adjectives refer to the character of the *praedium dominans*. At first sight this would seem to imply that a servitude would be urban or rustic according as the dominant *praedium* was urban (i.e. built on) or not. But this is incorrect. A given type of servitude was always either urban or rustic. This leads to the rather lame conclusion that each type was classed as urban or rustic according to the usual character of the dominant *praedium* in its case.

Creation of praedial servitudes. An owner of Italic land could impose either kind of praedial servitude on it in favour of neighbour-

[1] Cf. Zulueta, *Sale* 37–38. [2] As restored.

ing land belonging to another owner by means of *in iure cessio*; if the servitude was rustic, he could equally use *mancipatio* (§§ 17. 29). Or again, if he was mancipating his land or ceding it *in iure*, he could deduct a servitude over it in favour of neighbouring land retained by him. But neither *mancipatio* nor *in iure cessio* could create, whether directly or by deduction, servitudes over provincial land; there recourse was had to *pacta et stipulationes* (§ 31), i.e. to agreement reinforced by a formal contract, to which the provincial Edict, anomalously, gave an effect *in rem*. When *mancipatio* and *in iure cessio* became obsolete, this method was adopted for Italic land also (*Inst.* 2, 3, 4).

Servitudes could also be created by will, and they could arise from long enjoyment. The latter must have been a common case. A *L. Scribonia* of uncertain date[1] abolished such *usucapio* of servitudes as there had been,[2] but virtual acquisition by long user continued, because immemorial user was proof of title and it became settled that enjoyment for 10 years *inter praesentes* rising to 20 *inter absentes*[3] was *prima facie* proof. The enjoyment must have been *nec ui nec clam nec precario*, that is not by force or clandestinely as against the other party or by his licence,[4] but there was no need of the *bona fides* or *iustus titulus* which we shall find to have been necessary for acquisition of ownership by long possession.

Transfer and extinction of praedial servitudes. When a *praedium seruiens* passed to a new owner, the burden of the servitude remained on it. The benefit of a servitude passed with the ownership of the *praedium dominans*; it could not be transferred in any other way. It could indeed be ceded *in iure* (contrary pact in the provinces) to the owner of the *praedium seruiens* (§ 30), but this is extinction rather than transfer. A servitude was also extinguished by the ownership of both *praedia* becoming vested in one person (*nulli res sua seruit*), or by nonuse in the case of rustic servitudes and positive interruption (*usucapio libertatis*) in the case of urban for 2 years in Italy, 10–20 in the provinces.

2. *Personal Servitudes*

Like Gaius we shall confine ourselves to usufruct, which is only one, though far the most important, of a number of *iura in re aliena* (*Inst.* 2, 4; 5) now commonly designated as personal servitudes. The justification of this convenient, though not very happy term (perhaps

[1] Paul *D.* 41, 3, 4, 28 (29).
[2] Perhaps only of the most primitive rustic servitudes.
[3] See below, p. 70, on *longi temporis praescriptio*.
[4] Cf. 4, 150.

due to Justinian), is that the rights in question were as inseparable from the person entitled to them as were praedial servitudes from the *praedium dominans*.

Usufruct (§§ 30–33) was the right to use and enjoy another's thing and to become the owner of its fruits by taking them (*perceptio: Inst.* 2, 1, 36), provided that the substantial character of the thing remained unaltered (*Inst.* 2, 4 pr.). It was normally for the life of the usufructuary and in no case for longer; if created for a term, it might end in his lifetime, but could not outlast it. It was therefore limited in scope: the thing must come back unimpaired at the end of the usufruct to its owner, who meanwhile had ownership stripped of enjoyment (*nuda proprietas*).

Comparison with our own tenancy for life suggests itself, but the differences are important. Apart from the difference of conception —a *ius in re aliena* as opposed to limited ownership—usufruct was not confined to land, but might be over any *res corporales* except *res quae usu consumuntur*, i.e. things to use which is to consume them.[1] A further difference is that a usufructuary was not merely under the negative duty of not exceeding his rights; if he did that, he committed a delict against the nude proprietor like any third party.[2] He was also under the positive duties of dealing with the thing as a *bonus paterfamilias*[3] and of restoring it to the owner at the end of the usufruct. These duties, which greatly exceed an obligation not to commit waste, were secured[4] by a stipulation (*cautio fructuaria*) which the praetor would compel a usufructuary to give, with sureties, to the owner.

Gaius gives no formal account of usufruct here, but some points occur incidentally elsewhere. The usufructuary's tenure of the thing was not *possessio* (§ 93); the usufructuary of a female slave did not become owner of her offspring as he did of the young of animals (§ 50); the usufructuary of a slave not only had the right to use the slave and hire him out, but was also entitled to any property or rights acquired by the slave in connexion with his, the usufructuary's, business (*ex re fructuarii*) or by hiring himself out (*ex operis serui*).[5] But the slave's acquisitions outside these *duae causae* went to the owner of the *nuda proprietas*.

Creation of usufruct. Usufruct could be created by will, either by direct gift to a legatee or by deduction from a legacy so as to operate in favour of the *heres*. *Inter uiuos* it could be created directly by *in iure*

[1] *Inst.* 2, 4, 2: quasi-usufruct.
[2] Cf. § 50.
[3] Cf. *Inst.* 2, 1, 38.
[4] Possibly this is their origin.
[5] 2, 91; 3, 165. Below, p. 81.

cessio of the right or indirectly by deducting the usufruct from the *mancipatio* or *in iure cessio* of the thing. These methods were applicable to *res mobiles* even in the provinces, but were inapplicable to provincial land, so that pact and stipulation had to be used (§§ 31–32).

Transfer of usufruct. Except that it could be ceded *in iure* to the owner of the *nuda proprietas* (extinction rather than transfer: § 30), usufruct was not transferable. It did not pass by universal succession to the adrogator of a usufructuary, being one of the rights which were extinguished by *capitis deminutio* even *minima* (3, 83; contrast *Inst.* 2, 4, 3 *init.*). But a usufructuary could let the enjoyment of his rights to another and take the rent (*fructus ciuiles*).

Extinction of usufruct. As already stated, usufruct ended on the usufructuary's death or *capitis deminutio*; also, if granted for a term, by the expiry of the term. It was merged in the *proprietas* if it was surrendered to the owner or if the usufructuary acquired the *proprietas*. It was lost if the thing was substantially altered, or by nonuse of the right for the period of *usucapio*, i.e. two years if the thing was *immobilis*, one if it was *mobilis*. The termination of the usufruct meant in all cases that the owner of the *nuda proprietas* recovered his full rights.[1]

§§ 34–37. Res Incorporales: Hereditas

§ 34 comes naturally at this point, as completing the treatment of *in iure cessio* and because *hereditas* has been mentioned as a *res incorporalis* (§ 14). But the developments of §§ 35–37 are out of place, being unintelligible to one unacquainted with the law of inheritance. Their substance is repeated, with little change of phraseology, in 3, 85–87, and if Gaius wrote both passages, he ought to have struck out the earlier.[2] We defer the subject till we reach the later.

§§ 38–39. Res Incorporales: Obligations

Of the *res incorporales* mentioned in § 14 there remain only obligations. To them none of the modes of alienation previously mentioned were applicable. Properly they were not transferable at all, but two devices are described by which the economic results of an assignment could be obtained.

[1] Cf. *Inst.* 2, 4, 3–4.

[2] Assuming, with others, that one or other passage is spurious, Solazzi, *Per il XIV centenario delle Pandette* (Pavia 1934) 349, '*Glosse a Gaio*', gives good grounds for rejecting the present passage.

(*a*) Novation (§ 38)[1] extinguished the existing obligation (3, 176–9), but placed the debtor under a new obligation having the same content to a new creditor. The result was entirely adequate, but it could be produced only with the debtor's co-operation and only by using the form of *stipulatio*, which might be inconvenient. That *transscriptio a persona in personam* (3, 130)[2] is not suggested as an alternative form is an indication that it had gone out of use.

(*b*) It was simpler (§ 39) for the assignor to empower the assignee to sue the debtor as his *cognitor* (4, 83) or *procurator* (4, 84), but for his own (the assignee's) benefit (*in rem suam*). There were, however, imperfections in this device, which were only gradually remedied later.[3] Thus the mandate to sue could be revoked by the assignor, lapsed by the death of either assignor or assignee, and did not deprive the debtor of his power to discharge the obligation by paying the assignor, who remained his sole legal creditor.

§§ 40–41. Bonitary Ownership

It is noted here as a peculiarity that had been developed by Roman law that there could be double ownership of a thing, in the sense that one person (*Q*) could have the civil law title and another (*B*) the effective rights: *Q* was said to have *nudum ius Quiritium* and *B in bonis habere*,[4] phrases which express the fact that *Q*'s title was a bare technicality and that *B* had the entire beneficial interest. This was the result of praetorian intervention, the occasions of which were various.[5] In the present passage the only illustration given is *traditio* (*ex iusta causa* of course) of a *res mancipi* by *Q* to *B* (cf. §§ 26. 204); elsewhere (3, 80) we are told of bonitary ownership arising from *bonorum possessio* and *bonorum emptio*. The point of the present passage is that bonitary ownership was transformed into Quiritary by usucapion, the mode of acquiring ownership next to be discussed (§§ 42 *sq.*).

This duplication of ownership has an obvious parallel in the English separation of legal and equitable ownership, but it functioned quite differently. *Q* was in no sense a trustee for *B*; speaking broadly the praetor simply annihilated his rights and gave to *B* the essential rights of an owner. Let us suppose, for the sake of brevity, that *Q* has sold and delivered, but not mancipated, a slave to *B*. *B*, if in posses-

[1] Below, p. 192. [2] Below, p. 164.

[3] Buckland 520. 554.

[4] The term 'bonitary' now generally used was coined from this phrase by the Byzantine jurists; 'praetorian' would have served equally well.

[5] About a dozen are known: cf. Buckland 195; Bonfante, *Corso di dir. rom.* 2, 317.

sion, has, of course, the protection of the interdicts and will, if he continues in possession, become full Quiritary owner. But this was not the only nor even the characteristic feature of bonitary ownership; as much might be claimed for any *bona fide* possession (§ 43). *B* was more than a *bona fide* possessor who could be evicted by the *uindicatio* of the real owner. If *Q*, pending usucapion, brought his *uindicatio* against *B*, claiming, as with perfect truth he could, *hominem suum esse ex iure Quiritium*, the praetor enabled *B* to defeat him by an *exceptio rei uenditae et traditae*.[1] Again, if *B* had somehow lost possession, he could recover the slave from *Q* or anyone else by means of the praetorian *actio Publiciana*, the *formula* of which (4, 36) instructed the *iudex* to assume that the plaintiff had possessed for the usucapion period, an assumption which, since *B* satisfied the other requirements of usucapion (*bona fides*, *iustus titulus*), amounted to a fiction of usucapion.[2]

The terms of the *Publiciana* (4, 36) cover any plaintiff to whom a thing, whether *mancipi* or not, had been delivered on account of a sale (presumed to have been the original case, afterwards extended to other *iustae causae*); they cover not only a bonitary owner, but a *bona fide* purchaser *a non domino*, who likewise needed only continued possession in order to become full owner by usucapion (§ 43). This indeed is the very reason why the *Publiciana* survives in the law of Justinian, after the abolition of the distinction between Quiritary and bonitary ownership.[3] But of course the action was not intended to enable any and every *bona fide* possessor to recover the thing from its real owner. Brought by a purchaser *a non domino* against the true *dominus* it could be defeated by the plea of good title (*exceptio iusti dominii*). But since this plea would equally have defeated the *Publiciana* brought by a bonitary owner, it was granted only after consideration by the praetor (*causa cognita*), or, if granted because the case was doubtful, it could itself be defeated by a further plea (*replicatio*: 4, 126) substantially to the same effect as the *exc. rei uenditae et traditae*.[4]

The bonitary owner had practically all the benefits of ownership. This can be illustrated from our texts in the case of bonitary ownership of a slave. The slave was in *B*'s *potestas*, not *Q*'s (1, 54). He

[1] *Exceptiones* 4, 115 *sq.* This *exceptio* ran (*Edictum* § 276): *si non Aulus Agerius fundum quo de agitur Numerio Negidio uendidit et tradidit.*

[2] Different technical devices were employed in the *formulae* offered to a *bonorum possessor* or *bonorum emptor*, but the practical effects were the same: 4, 34–35.

[3] Cf. *Inst.* 4, 6, 4. In fact we have no direct evidence of the employment of the *Publiciana* by bonitary owners, though it is virtually certain.

[4] Cf. Buckland, *Elementary Principles* 66–75, or Jolowicz 273–6.

acquired for *B* on every account and not merely, as for a *bona fide* possessor or a usufructuary, *ex duabus causis* (§§ 88. 91; 3, 164. 166).[1] No more than a *seruus alienus* could he acquire for *Q*, even if he took in his name (3, 166). But there was a certain survival of *Q*'s rights and a consequent deduction from *B*'s. Only manumission by *Q* could make him a *ciuis Romanus libertus*; manumission by *B* made him only a *Latinus Iunianus* (1, 17, 35); indeed testamentary manumission by *B* except in the form of *fideicommissum* was void (§ 267). Moreover, if the slave having been made a *Latinus* by *B*'s manumission required a tutor, the office went to *Q*, though the patronal rights of succession to him were reserved to *B* (1, 35. 167). A general inferiority of bonitary ownership, virtually obsolete in Gaius' day, had been that by certain forms of legacy a testator could leave only what he owned *ex iure Quiritium* (§§ 196. 222).

§§ 42–51. Usucapio

The *Twelve Tables*[2] made possession (described as *usus*) of a *fundus* for two years and of *ceterae res*[3] for one year give the possessor ownership. *Fundus* was interpreted as covering buildings,[4] and when the distinction between *res corporales* and *incorporales* had emerged (§ 54) and the usucapion of servitudes had been abolished,[5] *ceterae res* became equivalent to *res mobiles* (§ 42). The *Twelve Tables* prohibited usucapion of stolen things, and this prohibition was in some way confirmed or amended by a *L. Atinia* of about 150 B.C. This *lex* is not mentioned in § 45, but is found in the paraphrase given by *Inst.* 2, 6, 2; the omission here may be due to an accident in copying. A *res* ceased to be *furtiua* when it had returned to its owner; the *L. Atinia* laid down that this should be considered to have happened when he had had the power to reclaim it.[6] The *Twelve Tables* further forbade usucapion of *res mancipi* of a woman *in agnatorum tutela* (§ 47; obsolete since Claudius: 1, 157. 171).

As to later prohibitions[7] we need only mention that a *L. Plautia* (?77 B.C.) and a *L. Iulia* of Caesar or Augustus[8] forbade usucapion of

[1] Below, p. 81.
[2] 6, 3: *Textes* 15; Bruns 1, 25; *Fontes* 1, 44.
[3] § 54. Cic. *top.* 4, 23.
[4] § 42. Cic. *top.* 4, 23.
[5] Above, p. 63.
[6] Paul *D.* 41, 3, 4, 6. 50, 16, 215. *Lex Atinia*: *Textes* 32; Bruns 1, 47; *Fontes* 1, 81. On the quotation from it given by Gell. 17, 7, 1 cf. De Visscher, *RH* 1937, 581; Huvelin, *Furtum* 1, 270 *sq.*
[7] Buckland 249.
[8] Girard 332 n. 1.

things seized by violence (§ 45). It is perhaps owing to a textual corruption that § 49 wrongly attributes this to the *Twelve Tables*.

The operation of the prohibitions in regard to *res furtiuae* and *ui possessae* cannot be better explained than by the text (§§ 49–51).

Such is the statutory basis of the law of usucapion. The rest is jurisprudence. Being *iuris ciuilis* this mode of acquisition was open only to persons having the *ius commercii*. Naturally it did not apply to *res extra patrimonium* (§ 48) nor, since they could not be possessed (§ 28), to *res incorporales* including, in the developed law, servitudes, nor, since there could not be *dominium ex iure Quiritium* over them, to provincial lands (§ 46).

Requisites of usucapion. It is not easy to formulate these in terms strictly applicable to all cases of usucapion. Gaius contemplates two cases, that of a *res mancipi* imperfectly conveyed by *traditio* (§ 41) and that of *bona fide* acquisition *a non domino* (§ 43). Let us start from the latter as being that chiefly in mind in §§ 45 *sq.*

Possession, not merely detention (§ 93), must have been acquired. The acquisition must have been through some transaction that would ordinarily have made the acquirer owner. This is generally called in connexion with usucapion *iustus titulus*; it comes to much the same as *iusta causa* in connexion with *traditio*.[1] Furthermore, the acquirer must at the moment of getting possession (§ 43) have believed *bona fide* that he was acquiring ownership. The possession must continue without interruption for the statutory period, but the *bona fides* need not.[2] We thus arrive at three requisites: sufficient possession, *iustus titulus*, and initial *bona fides*.

Bona fides and iustus titulus. In the case we are considering the alienee at the moment of *traditio*[3] *bona fide* but mistakenly believed that the alienor either was owner and capable of alienating or at least was authorized to alienate. The mistake must have been reasonable and one of fact, not of law.[4] It could not be reasonable unless supported by some *iustus titulus*, and for usucapion putative *causa*[5] did not suffice: *error falsae causae usucapionem non parit* (*Inst.* 2, 6, 11).[6] Without *iustus titulus*, *bona fides* would be unreasonable: the holding

[1] Above, p. 61.

[2] There are, however, grounds for thinking that in the classical period *bona fides* had to continue throughout where the acquisition had been gratuitous.

[3] In sale we have to add: 'and at that of contracting'.

[4] e.g. that a *pupillus* alienating was of full age, but not that a *pupillus* had capacity to alienate.

[5] Above, p. 61.

[6] See, however, Buckland 246.

of a tenant, borrower, depositary, and so on could not be allowed to count, however sincerely he might have come to believe he was owner. *Iustus titulus* was thus practically the more important of the two requisites. It had to be proved; if it was proved, *bona fides* was presumed and might be difficult or impossible to disprove. The requirement of *bona fides* perhaps originated from the prohibition of the usucapion of *res furtiuae*; that of *iustus titulus* would follow inevitably.[1]

If we apply these requisites to the other case, the ripening of bonitary into Quiritary ownership, we shall find that *bona fides* at least must be differently formulated. The acquirer of a *res mancipi* by *traditio* makes no mistake: he knows or ought to know that he is not getting a Quiritary title. His *bona fides* consists in believing that he is getting an equitable title which the praetor will protect. The state of mind of a *bonorum possessor* or *b. emptor* (3, 80) is similar. As to *iustus titulus*, the *traditio* of the *res mancipi* is assumed to be supported by *iusta causa*; the *iustus titulus* of the *b. possessor* or *emptor* is simply praetorian authorization.

Interruption of possession. If possession was interrupted before the period was complete, the period had to begin afresh if possession was recovered, and again with initial *bona fides*. It was not, however, interrupted by the mere fact of the usucapient's death; his *heres* could complete the period, counting not only the deceased's period of possession, but also the period during which the thing remained undisturbed in the *hereditas* before he (the *heres*) had accepted, and since his was not a new possession, but a continuation, his own *bona* or *mala fides* was immaterial; what mattered was the initial *bona fides* of the deceased (*Inst.* 2, 6, 12). But sale or other alienation by the usucapient involved the end of the old and the beginning of a new possession, and it was not till late in the classical period that the alienee was allowed[2] to add the possession of his predecessor in title to his own; since two distinct possessions were thus added together, both must have begun *bona fide*.[3]

Longi temporis praescriptio. Gaius does not tell us what provision the law made for the acquisition of provincial lands by long possession (§ 46). In view of § 31 this is surprising, but probably in his day there was no general system, the matter being left to the parti-

[1] There is plenty of literature, e.g. Collinet, *Mél. Fournier* 71.

[2] By a constitution of about A.D. 200: *Inst.* 2, 6, 13. Probably only a buyer but later extended to other alienees.

[3] Contrast *accessio temporis* under the interdict *Utrubi*: 4, 151.

cular law of each province. It is from an accidentally preserved rescript of A.D. 199[1] that we get our first direct information as to *longi temporis praescriptio*, which, modified and renamed *l. t. possessio*, became under Justinian the general system for all lands, Italic as well as provincial (*Inst.* 2, 6 pr.). The period of possession was 10 years *inter praesentes*, 20 *inter absentes*, i.e. a minimum of 10 years rising to a maximum of 20 for periods of absence of the owner from the district or province. Another difference from usucapion was that whereas usucapion made the usucapient owner, *l.t.p.* seems at first to have been only a defence. Its history before Justinian is obscure. The requirement of *iustus titulus* existed from the first; that of *bona fides* is thought by some to have developed later; ultimately it was given the positive effect of creating ownership.

Another gap was that usucapion was not available to *peregrini*. There is evidence from Egypt[2] that at the beginning of the third century *l.t.p.* applied to movables as well as immovables, an application that can have been of use only to *peregrini* (soon to disappear), since even in a province a *ciuis* could acquire a movable in the much shorter period of usucapion.

§§ 52–61. Anomalous Usucapio

We have here three cases in which one could acquire by usucapion in spite of being aware of one's lack of title.

1. **Usucapio pro herede** (§§ 52–58; 3, 201). This archaic institution was still in nominal existence in Gaius' time, though it had been rendered ineffective by a *SC.* of Hadrian (§ 57). Placed here, in the setting of the mature law of usucapion, it looks highly anomalous, but its proper setting is the primitive law of inheritance, of which it is a fossilized survival. The beginner will do well to return to the topic after making acquaintance with the law of inheritance.

The opportunity for *u.p.h.* arose when a man died leaving no *heres necessarius* or *suus et necessarius*.[3] Thereupon, until his *heres extraneus* accepted the position of *heres* (§§ 161–2. 164 *sq.*), the *hereditas* was vacant (*iacens*) and its contents, the *res hereditariae*, were ownerless. Hence to appropriate them was not *furtum*, and since the *Twelve Tables* required no more for usucapion than that the *res* should not be

[1] *Textes* 201. 906; Bruns 1, 260. 418; *Fontes* 1, 438. 440.

[2] *P. Strassb.* 22: see references in last note. Cf. Kreller, *Aegyptus* 13, 268.

[3] Though both § 58 and 3, 201 speak of *heres nec.* simply, the term can, and here must, cover the *suus et necessarius*: cf. § 37 with 3, 87.

furtiua and the rules of *u.p.h.* were settled before jurisprudence had added the requirements of *bona fides* and *iustus titulus*, the taker could become owner by usucapion.

Thus far *u.p.h.* is easily explained, but it went further. Even after the *extraneus heres* had accepted the *hereditas*, *u.p.h.* remained possible in respect of the *res hereditariae* of which he had not yet taken possession (§ 52; 3, 201); though, in historical times at least, they had become his property, it was still no *furtum* to appropriate them. Yet the mere existence of a *heres necessarius* made any *u.p.h.* impossible, and there is no ground for holding that besides being *ipso iure* owner he was *ipso iure* possessor of the *res hered.* Thus this difference between the two classes of *heredes* cannot be accounted for by the suggestion[1] that for *furtum* there must be violation of possession.

We think that the best solution is that the effects of becoming *heres* by *aditio* were originally less than those of being *heres necessarius* and than they later became.[2] *Aditio* seems at first to have been thought of quite materially and to have had no effect on the ownership of anything that the *heres* had not reduced to possession. The conception of *aditio* as a gesture signifying acceptance of the *hereditas* as a whole and conferring ownership of all its contents came later.

We believe that the key to the problem of *u.p.h.* is to be found in the explanation of *pro herede possidere* given in 4, 144, which is very different from that implied by the epithet *improba* in § 55. It is said to mean possession by one believing, rightly or wrongly, that he is *heres*. In the absence of *sui heredes* the law did not make any one *heres*, but merely declared who had the best right to enter on and take over the deceased's estate. Thus the *Twelve Tables* (5, 4) have *agnatus proximus familiam habeto*, not *heres esto*. If a man claiming to have the best right entered into possession and held *pro herede* for a year, time had been given for the assertion of any better claim and there were now good reasons of public policy (§ 55)[3] for fixing him with the title and responsibilities of a *heres*. It is certain that *usucapio hereditatis* did at one time exist; it is given as the explanation of *u.p.h.* of land being completed in one year (§ 54). It would also explain why this *usucapio* was called *pro herede* and why even in Gaius' day a true *heres* proceeded against a usucapient *pro herede* by *hereditatis petitio*, not by ordinary *uindicatio* (§ 57).[4]

[1] Made by Scaeuola, Ulp. *D.* 47, 4, 1, 15; cf. Celsus, Ulp. *D.* 47, 2, 43, 10, but improbable. Cf. Buckland, *LQR* 1927, 338–9, but also Solazzi, *BIDR* 39 (2), 8.

[2] Compare the difference as to *in iure cessio hereditatis*: § 37; 3, 87.

[3] Cf. Cic. *de leg.* 2, 19, 47 *sq.*

[4] Cf. H. Krüger, *SZ* 1934, 80.

The institution was virtually obsolete in Gaius' day, since a *SC.* under Hadrian had provided that the *heres* might get the usucapion set aside (§ 57).

2. Usureceptio ex fiducia (§§ 59–60). It has been mentioned[1] that *mancipatio* and *in iure cessio*, but not apparently *traditio*, might be accompanied by an agreement known as *fiducia* (enforceable: 4, 62. 182). *Fiducia cum amico* was a conveyance to a friend with a trust for reconveyance. It might have various purposes, for example that of making good the lack of a law of agency;[2] Gaius, however, only mentions that of safe keeping. *Fiducia cum creditore* resembled the English mortgage; it was a giving of security for debt by making the creditor owner. It remained in use throughout the classical period, but in the law of Justinian it has given way to *pignus* and *hypotheca*. In *f. cum amico* reconveyance would be due on demand, in *f. cum creditore* on satisfaction of the debt. But delicacy in the one case and timidity in the other, or slackness in either, might prevent insistence on the formality of a reversing *mancipatio* or *in iure cessio*. However, if the original owner recovered possession, his title was made good by *usucapio*, here called *usureceptio*, in spite of his knowing that the thing belonged to another (§ 59). This is readily intelligible since except in one case he would as a matter of equity be on a par with a bonitary owner. The less intelligible case is that in *f. cum creditore*, even if the debt had not been satisfied, usucapion was allowed provided that possession had not been recovered by licence or hire from the creditor. Presumably it was thought that security of which the creditor was careless was likely to be superfluous.

Our text (§ 59) says that in this case also usucapion of land was completed in a year. Gaius offers no explanation for this and none has been found. The Veronese text is thus suspect. We ought perhaps to follow Kübler in accepting Beseler's emendation, which makes the normal period of two years hold here.[3]

3. Usureceptio ex praediatura (§ 61). Speculators in forfeited securities are not popular, though they often have substantial consolations, since a selling creditor is chiefly concerned to cover himself. Only thus can we explain why, when the State sold security given to it, the law complaisantly allowed the debtor to recover ownership of anything he managed to keep by usucapion of the normal periods, without *bona fides* or *iustus titulus*.

[1] Above, p. 60.
[2] Rabel, *Atti, Roma*, 1, 240–1.
[3] Cf. Part I p. 80 n. 2.

§§ 62–64. Restrictions on Alienation. Alienation by non-owners

Modern opinion is against the transposition of these sections (adopted by Krüger and others before him) to after § 79, in order to produce correspondence with *Inst.* 2, 8. Justinian's combination of the subject of the present sections with that of §§ 80 *sq.* and his placing of them were inevitable after his rearrangement of topics in *Inst.* 2, 1, but in Gaius the natural place for the subject of power to alienate is the present, after modes of alienation with their supplement usucapion, and before the modes of involuntary acquisition (§§ 66–79). Systematically §§ 80–85 ought to come between §§ 64 and 65, but that is not sufficient reason for correcting the manuscript.

Power to alienate. The tacitly assumed general principle is that an owner can alienate and a non-owner cannot.

Restraints on owners (§ 63). The only illustration given is the restriction of the husband's powers over dotal land by the *L. Iulia.*[1] The total incapacity of *furiosi* and *prodigi* has already been mentioned,[2] as has the partial incapacity of persons *in tutela*, which recurs at §§ 80–85. These are restrictions imposed by law; restrictions created by private act hardly existed. An owner could not[3] deprive himself of his power to alienate, though he might contract not to use it and by breaking his contract become liable in damages. Thus in *fiducia cum creditore* a creditor who had agreed not to sell the mortgaged property could give good title to a buyer.[4]

Alienation by non-owners (§ 64). The powers of a *curator furiosi* have already been discussed along with those of other guardians.[5] What Gaius said here about the powers of a *procurator* (a general agent or factotum)[6] is, owing to the state of the text, conjectural. No person outside a man's *potestas* could be empowered to alienate his property by *mancipatio* or *in iure cessio*; on the other hand, any person holding a thing on behalf of another (4, 153) could, whether with or without authority, give a third party possession of the thing by *traditio*. But could he, even if authorized by his principal, give him ownership—bonitary ownership, if the thing was a *res mancipi*? The answer depends on a rather fine distinction to which attention has

[1] Cf. *Inst.* 2, 8 pr. On the husband's ownership, above p. 39.

[2] Above, p. 52.

[3] Apart from quite exceptional cases: Buckland 188–9.

[4] From a certain date and to an extent that varied from time to time a testator could by means of a *fideicommissum* impose restrictions on his successors, but this subject lies outside our scope. Cf. Buckland 361 ff.; *Equity in Roman Law*, pp. 83 ff.

[5] Above, pp. 49 ff. 52.

[6] See below on § 95.

been drawn only in fairly recent years.[1] The agent's *traditio* would produce a transfer of ownership provided that his act was merely ministerial. If, for example, his principal has agreed to sell the thing to a third party, his act in obeying an order to hand over is no more than the act of a *nuntius* who delivers a letter and cannot be construed as the exercise of a power of alienation. Such a construction would be proper only if the agent had had some degree of independence in the formation of the contract of sale or other *iusta causa transferendi dominii*. Now it is more than doubtful whether in the time of Gaius an agent having for example a discretionary mandate to sell a specific thing possessed the power to alienate it even by *traditio*. On the other hand, it seems that by then a *procurator* had become recognized as competent, in virtue of his general commission, to alienate his principal's property, by *traditio* of course, not by a formal conveyance. It must be because a *procurator*'s powers were exceptional that they are specially mentioned in our present unfortunately defective passage.

There is also mention of a creditor's power to sell his *pignus*, i.e. to sell a thing of which, by way of security, his debtor had given him possession without, as in *fiducia cum creditore* (§§ 59–60), ownership. In this matter there seems to have been a development, and it is not clear how far it had gone in Gaius' day. At first, in all probability, *pignus* did not give the creditor a power of sale by implication, but only by express agreement. An implied power, in the absence of contrary agreement, is affirmed by Ulpian (*D.* 13, 7, 4), but the natural inference from our present text is that in Gaius' day the power still had to be expressly granted.[2]

§§ 65–79. Natural Modes of Acquiring Ownership

Since these modes are much better studied in connexion with *Inst.* 2, 1, 12 *sq.*, we shall try to be brief.

Traditio is treated as having been disposed of (§ 65).

Occupatio (§§ 66–69). The two points are the thing and the taking. The occupable things mentioned are *ferae bestiae* and *res hostiles*. The former in their wild state are *res nullius* and the owner of the land on which they are has no special title; *feritas* is a question of the species, not the individual animal. *Res hostiles* are not defined. Ordinary booty and conquered lands went to the State; what is meant is

[1] By Buckland 277 and *Main Inst.* 166–7. 169–70, and more fully in '*Per liberam personam*', *Bull. Acad. de Belgique* 1939, 188–210.

[2] Cf. *Inst.* 2, 8, 1: *ab initio contractus.*

enemy property on Roman soil at the outbreak of war and property captured in a private raid on a people not allied to Rome. One may say that these *res hostiles* are *nullius* because their owners are outside the law, but the law of the stronger is older than any theory (4, 16 *fin.*). Besides these two classes of *res nullius* which are mentioned there are the sea-shore and the sea-bed so far as they can be effectively occupied, the inanimate products of the sea (*Inst.* 2, 1, 18), islands arising in the sea (*Inst.* 2, 1, 22), and *res derelictae* (*Inst.* 2, 1, 47). (2) Gaius does not raise the question of what constitutes sufficient taking and barely touches upon that of the retention of control on which retention of ownership depends (*Inst.* 2, 1, 12 *sq.*). The general principles are that the taking must be effective[1] and, as to retention, that in the case of escaping wild animals their recapture must be reasonably probable. In practice much would depend on local and trade custom[2] and, where Roman *occupatio* has been received by another system, on the general law of that system.[3]

Accessio. Under this heading it is customary to group the various cases in which the ownership of a thing was altered by its having been physically united to another thing. This occurred as the result of two principles: that ownership of things attached to land merged in that of the land, and that ownership of a movable thing forming a physical unity was necessarily single; there might be several owners of the whole, but there could not be distinct owners of different parts. So far as the immediate ownership of things attached to land is concerned there is no difficulty: they went with the land. There remains only the question whether the previous owner of a thing thus merged in another's land had the right to demand that it be severed, in which case his ownership would revive, or a right to compensation. The effect of the junction of two movable things belonging to different owners, on the other hand, varied according to the case. It might be settled by previous agreement. Otherwise, if one of the things was a principal thing, the ownership of the subordinate thing, which had ceased to exist as an object of separate ownership, was merged in that of the principal. If neither thing was principal, there was joint ownership of the new whole in proportion to the values contributed. But in neither case were these effects necessarily permanent. If separation was possible, a previous owner of a merged thing could demand that it be separated; if separation was impossible the former owner

[1] Proculus *D.* 41, 1, 55.
[2] Holmes, *Common Law*, Lecture, 6, 217.
[3] Cf. E. J. Cohn, *LQR* 1939, 289, on *Kearry* v. *Pattinson*, [1939] 1 K.B. 471.

of a merged minor thing could demand compensation; where joint ownership had resulted, there was the ordinary right to partition. We will pursue the subject of the junction of movables no further, since it is not mentioned by Gaius and its treatment even in *Inst.* 2, 1, 26–28 is unsatisfactory.

Alluuio (§§ 70–72). Gaius does not carry the subject far; for further details see *Inst.* 2, 1, 20–24. In contrast with other cases of *accessio* there is no losing owner, for if what the waters add to my land is recognizably yours (so-called *auulsio*), it remains yours till its physical individuality disappears.

Inaedificatio, plantatio, satio (§§ 73–76). The one hypothesis contemplated by Gaius is that *A* has built with his own materials on *B*'s land, or planted his own slips or seeds in it. Merger of the building materials in the land takes place at once, but of the plantings only when they have taken root, though once they have done so no question can arise (as it can in the case of building materials) of a revival of *A*'s ownership upon severance from the land.

So far it made no difference whether or not *A* built or planted in the *bona fide* belief that the land was his own; but ulterior consequences have to be considered. If *A* had acted *mala fide*, that was the end of the matter; he was treated as having voluntarily abandoned ownership, and in classical law he had no claim to compensation nor to revival of his ownership of materials in the event of their being severed. If, on the other hand, *A* was *bona fide*, he could claim reimbursement of his outlay by means of an *exceptio doli* against *B*'s *uindicatio* of the land. This might be unfair to *B*, and depended on *A*'s having possession, the normal case no doubt. If *A* lost possession, it is doubtful whether classical law gave him more than the shadowy chance of a revival of his ownership of the materials if severed. The revival would be due to the fact that *B* neither owned nor even possessed the materials as such, but only the building.[1] The most practical solution of the whole problem is to give *A*, whether in possession or not, a right to detach and remove his former property on condition of not damaging the premises (*ius tollendi*). It would then be open to *B* to make a fair offer for improvements, if he desired them. This solution is applied in the law of Justinian, if not earlier, to a *mala fide* as well as a *bona fide* builder. Some movement towards it appears in nominally classical texts, which may not all be interpolated.[2]

[1] An interesting consequence of this is that even a *bona fide* purchaser of the building from *B* did not acquire the materials by usucapion.

[2] See especially Celsus *D.* 6, 1, 38. Cf. Buckland 213. Girard 356.

Our text does not deal with the other hypothesis, that *A* builds on his own land with *B*'s materials. This produces the same automatic merger of the ownership of the materials, with the possibility of its revival in the event of severance. But there are complications. *A* may be guilty of *furtum*. Moreover, *B* had a common law right to an *actio ad exhibendum* for the production of his materials, which would compel their severance with a consequent revival of his ownership; but for reasons of public policy the *Twelve Tables* confined him to a special *actio de tigno iuncto* for double damages.[1]

Scriptura, pictura (§§ 77–78). If *A* writes on *B*'s paper, the document is *B*'s; but if *A* paints on *B*'s panel, the picture is *A*'s. So Gaius informs us, though he can see no ground for the distinction. Not everyone accepted it. Paul (*D.* 6, 1, 23, 3) decides against the painter on the ground that the picture could no more exist without the panel than the script without the paper. But Justinian (*Inst.* 2, 1, 34) keeps to Gaius' rule, justifying the decision as to *pictura* on the ground, noticed by Paul, of the possible relative values of the painting and the panel; it would have been more convincing to put it that a picture may be unique.

The writer, then, loses his script and the owner his panel. The enforcement of compensation by means of an *exceptio* seems to have caused no difficulty, but this would be effective only when the loser was in possession, as would probably be the case in *scriptura*, but not in *pictura*. Gaius says that if the painter is in possession, the former owner of the panel ought to be allowed a *utilis actio*, but he works this out as a sort of *uindicatio*, which the painter, though admittedly owner, can only defend if he is not paid the *impensa picturae*. The legal and practical absurdity of this betrays an anxiety to get back to the well-established *exceptio*; it looks as if Gaius' suggested *actio utilis* rested on no authority. Such cases are of course rare, and when they occur are not likely to come into court. In later law there was an *actio in factum* for compensation wherever necessary.[2]

Specificatio (§ 79). If *A*, not working by agreement with *B*, made a new thing out of *B*'s property, the Sabinians held that the new thing was *B*'s, the Proculians that it was *A*'s. It should be noted that the Proculian doctrine applied only if a new thing was made; for *specificatio* there must be a change of the *species*.[3] With regard to other

[1] Cf. *Inst.* 2, 1, 29. Details of the action are doubtful.

[2] Paul *D.* 6, 1, 23, 5: *in omnibus his casibus, in quibus neque ad exhibendum neque in rem locum habet, in factum actio necessaria est*—probably interpolated.

[3] Illustrations *Inst.* 2, 1, 25. Buckland 215–16.

changes, however important, there was no difference of opinion. Justinian (*Inst.* 2, 1, 25) adopted a compromise which had perhaps been suggested in classical times,[1] namely that *A* acquired ownership by changing the species only if the materials were not reducible to their former state.[2] The Proculian view was pretty clearly influenced by Aristotelian philosophy, but it dealt with a practical difficulty. In classical law a plaintiff vindicating property had to describe it with some particularity; he had to name its species. If claiming unwrought gold he had merely to state its weight, if money the number of coins; but gold made into a cup would have to be described as a gold cup.[3] Thus in our case if *B* as plaintiff described the thing as he had owned it, he would be describing what no longer existed, and if he described it as it actually was, he would be describing something he had not previously owned. We are told that 'in the Year Books the question is discussed not as a question of *specificatio*, the making of a new species of thing, but on the distinctively English basis that ownership is lost when the marks of ownership are lost, i.e. when the chattel becomes unrecognizable as the same chattel'.[4] There is, however, no material difference between a chattel being made unrecognizable by work done on it and its being so much altered that it is a new kind of thing requiring to be described by a new name. As usual, Aristotle and common sense agree.

Compensation. If, owing to *specificatio* by *A*, *B* lost his property, we may assume that *B* in the less likely event of his being in possession of the *nova species* could secure compensation by raising the *exceptio doli* against *A*'s vindication; but in the event of his not being in possession his remedy by action is, as in the case of *accessio*, very doubtful, at least in classical law. All that Gaius finds to say is that if *A* had committed *furtum* he was liable to an *actio furti*, and also to a *condictio* which latter Gaius says (§ 79) lay in respect of an extinct thing against thieves and certain other possessors. The *condictio furtiua* against a thief is a matter of course, but who these other possessors are is an unanswerable question. Gaius cannot have meant that in all cases of *specificatio* there was a *condictio* (the later *condictio sine causa*), but it is a reasonable assumption that, where there was no other remedy, later law would give, as in cases of *accessio*, an *actio utilis*.[5] On the subject of compensation for *A*, supposing him to have improved *B*'s

[1] Gaius *D.* 41, 1, 7, 7.

[2] So also if A had made it partly out of his own materials; but this looks like an addition of the compilers: Buckland 216.

[3] Paul *D.* 6, 1, 6.

[4] Glanville Williams, *LQR* 1945, 293.

[5] Paul *D.* 6, 1, 23, 5, quoted above, p. 78 n. 2.

property without changing its species (irreducibly), a discreet silence is preserved, though there might easily be a hard case.

We can but draw attention to Gaius' omission of the special titles to *fructus* (*Inst.* 2, 1, 35–38) and by *thesauri inuentio* (*Inst.* 2, 1, 39).

§§ 80–85. Alienation by Persons in Tutela

These sections provide two illustrations of the respective capacities of *pupilli* and women *in tutela* which we have already outlined.[1] Without *tutoris auctoritas*, a woman *in tutela* could become creditor by a *mutuum* (3, 90–91), but a *pupillus* could not, because she was and he was not capable of passing ownership to the borrower, as was essential for *mutuum*. Thus the woman had the ordinary action on the contract, but if a *pupillus* attempted a *mutuum*, what he lent (money is supposed) remained his property and he had no contract on which he could sue. Nevertheless, if the coins were no longer traceable, there can have been no real doubt (in spite of § 82 *fin.*) but that he would have some form of personal action.

Again, payment of a debt to a woman was a discharge of the debt, since an obligation was not a *res mancipi*, though a release (*acceptilatio*: 3, 171) given by her without *tut. auct.* was ineffectual. But payment of a debt to a *pupillus* was no discharge, though he became owner of what was paid; if, however, the money was still in his pocket he would be defeated by *exceptio doli mali* if he brought action on the debt (§§ 83–85).

§§ 86–96. Acquisition of Ownership and Possession through Others

The basic principles are that a *paterfam.* inevitably acquires what his dependants acquire, but that he can acquire nothing through an *extranea persona*, i.e. a person not subject to his *ius*, but either independent or subject to someone else. The acquisition of ownership by formal acts such as mancipation done by an *extranea persona* was plainly impossible, but the acquisition of possession, being a matter of fact, is not so simple, and this affects the question of the acquisition of ownership by *traditio* and *usucapio*.

Acquisition of ownership through dependants

(i) My acquisition of an *hereditas* through a dependant will involve me in the liabilities of a *heres*; the dependant's acceptance of the *hereditas* (*aditio*) therefore needs my *iussum* (§ 87).

[1] Above, p. 49.

(ii) The bare Quiritary owner of a slave could acquire nothing through him: he was not in his *potestas* (§ 88; 1, 54; 3, 166).

(iii) A dependant could not acquire at all by *in iure cessio* since the form involved his claiming *suum esse*, which was an impossibility (§ 96); he could not, as in *mancipatio* (3, 167), assert the ownership of his *paterfam.* because in a *legis actio* representation was not allowed.

(iv) From the beginning of the Empire a *filiusfam.* had full power to dispose of his *peculium castrense* (his military outfit and any acquisitions resulting from his military service) in his lifetime and, since Hadrian, by his will (*Inst.* 2, 12 *pr.*). But though he is described as being in the position of a *paterfam.* in relation to it,[1] it was still technically *peculium*, as is shown by the fact that if he died intestate, his father kept it *iure peculii* and was not regarded as succeeding as *heres*. This may be the explanation of what seems to us, who know the subsequent development of the son's separate property, Gaius' strange silence here as to the soldier son's proprietary privileges.

(v) Co-owners of a slave shared his acquisitions in proportion to their shares in him. If an acquisition could not go to one of them, the shares of the others were proportionately increased (*ius accrescendi*). The subject is not mentioned here. We shall return to it at 3, 167.

(vi) The rights (*usus* and *fructus*) of the usufructuary[2] of a slave comprised acquisition of anything that the slave acquired *ex operis suis* or *ex re fructuarii* (§ 91). *Ex operis* covered only what the slave earned by hiring himself out,[3] *ex re* all acquisitions made in connexion with the usufructuary's affairs. Every other acquisition went to the nude proprietor; the stock examples are *hereditas*, *legatum*, and *donatio*.[4] In this matter of acquisitions the *bona fide* possessor of another's slave or of a free man was treated in the same way: there was the same division of acquisitions between him and the real owner or the free man himself (§ 92).

Acquisition of possession through dependants. There was little substance in the doubts as to acquisition of possession through persons *in manu mancipioue* (§ 90) and through usufructuary slaves (§ 94), since the objection that they were not themselves possessed would apply equally to a *filiusfamilias*.[5] Apart from these cases acquisition of possession through dependants is affirmed without qualification, and acquisition through *traditio* to them is treated on the same footing

[1] Ulp. *D.* 14, 6, 2.

[2] Above, p. 64.

[3] Buckland 279 n. 2.

[4] There was a tendency to assign even these to the usufructuary if the intention had been to benefit him: Buckland 279.

[5] Paul *D.* 41, 2, 1, 8.

as acquisition through *mancipatio* (§ 87). But a slight qualification is needed. Possession could be acquired only by a conscious act. Thus one could not strictly be said to have acquired possession of a thing of which one's dependant had taken physical control until one was informed of the fact, or, on a lenient view, unless one had previously authorized the taking. But to this an important exception was admitted. It became accepted, on practical grounds, *utilitatis causa*, that any acquisition of possession made by a dependant in connexion with his *peculium* was covered by the general authorization involved in the grant of *peculium*.[1] Gaius' silence on this point is presumably due to the fact that acquisitions *ex non peculiari causa* were practically negligible.

Acquisition through extraneae personae (§ 95). It was clear law that one could not acquire ownership through *mancipatio* to or other formal act of a person not subject to one's *ius*, but in Gaius' day it had become a question whether one could acquire possession through such a person; and an affirmative answer was bound to lead to the inference that one could acquire ownership through him by *traditio*. The extent of the doubt must, however, be understood.[2] It can never have been doubted that one acquired possession at once where all that the *extranea persona* did was to carry out one's order to take over a specified thing, or that possession would be acquired by subsequent ratification of an unauthorized taking. The doubt must have been as to cases where the authorization was not specific, cases in which the transaction under which the *traditio* took place had been negotiated by the *extranea persona*. To this doubt the answer of the final law is given clearly and forcibly by *Inst.* 2, 9, 5; it amounts to a repudiation of the old principle *per extraneam personam nihil nobis adquiri posse* in respect of possession and consequentially of ownership. But in Gaius' day this new doctrine was only in course of formation. Concession to it seems to have begun with the general agent or *procurator*. By an unfortunate coincidence § 95 like § 64 is defective at the critical point. All that can be said is that in § 95 Gaius may well have written *per procuratorem*; in our view he is unlikely to have gone further.[3]

§§ 97–100. Acquisition per Uniuersitatem

Order of topics. We pass now to acquisition of things in mass before having exhausted acquisition of things one by one. The propriety

[1] Paul *D.* 41, 2, 1, 5, citing Sabinus, Cassius, and Julian.

[2] On the special position of the *procurator* see above, pp. 74–75, on § 64.

[3] Cf. Neratius (beginning of the second century) *D.* 41, 1, 13. 41, 3, 41. *C.* 7, 32, 1 (A.D. 196) and Ulp. *D.* 13, 7, 11, 6 are suspected of being interpolated. Cf. Mitteis *RPR*, 212 n. 24; Girard 294; Buckland 200.

of deferring acquisition by *legatum* is patent (§§ 97. 191), but Gaius seems not to realize that systematically there is no justification for placing universal succession before obligations; perhaps he was following a traditional order. Under acquisition *per uniuersitatem* he takes first *hereditas*, the civil law form of succession on death, with which the praetorian form, *bonorum possessio*, is inextricably interlocked. This, including the excursus on *legata* and *fideicommissa*, carries us to 3, 76. Next comes the praetorian system of bankruptcy, *bonorum emptio* (3, 77 *sq.*), then the universal succession incidental to *adrogatio* and to *coemptio* of a *sui iuris* woman (§§ 82–84), and finally a badly placed appendix on transfer of *hereditas* by *in iure cessio* (3, 85–87, a duplication of 2, 34–37).

Acquisition per uniuersitatem. The idea is quite simple; it is that of succession to the whole of a man's patrimonial position. *B* steps into *A*'s shoes; in the whole of *A*'s patrimonial relations, for *A* write *B*. This is the general idea, though we shall find that in none of the cases is the succession quite universal.

Hereditas. Since brevity obliges us to speak dogmatically, the reader is warned that hardly any view as to the early history of the Roman law of succession is uncontroversial.[1] *Hereditas* is the original and proper form of succession on death in Roman law. It was the natural expression of the continuity and solidarity of the early patriarchal family and involved the identification of the *heres* with the deceased for religious at least as much as for economic purposes. To it the universal succession of an executor or administrator with which we are familiar, though descended from Roman law, affords no real parallel, being provisional and purely economic. When a *paterfamilias* died, the family simply continued under the headship of his *suus heres* or, if there were several *sui heredes*, under their joint headship as *consortes* (3, 154a) until they divided the *hereditas* (4, 17a). The succession of *sui heredes* furnished the model for that of other kinds of *heredes*. It is doubtful how far obligations owed to or by the deceased originally descended along with his corporeal property; the obligation of keeping up the family worship (*sacra*) emphatically did descend, but it may be that purely patrimonial obligations were not at first thought of as being parts of the *hereditas*, though there is evidence that they were attached to it by the *Twelve Tables*.[2] Some hold that

[1] See generally: Maine, *Ancient Law*, chs. 6 and 7; Holmes, *Common Law*, Lecture 10; Mitteis, *RPR* 93; Bonfante, *Scritti Giurid.* 1 and *Corso* 6; Buckland 282 and *Main Inst.* 179.

[2] *XII Tabb.* 5, 9: *Textes* 15; Bruns 1, 24; *Fontes* 1, 41.

obligations were originally so strictly personal that they were extinguished by the death of the creditor or the debtor.[1] But this is a prehistorical question. In historical times it was as much a matter of course that an *hereditas* should comprise the obligations owed to and by the deceased as that it should comprise his *res corporales*; moreover the liability of the *heres* for the deceased's debts was not limited to the hereditary assets. With certain exceptions (cf. 4, 112–13) *hereditas* was in very truth a *successio in uniuersum ius*.

Nature of hereditas: hereditas iacens. As usual Gaius is primarily occupied with the question of acquisition, which in this matter reduces itself to the question who is *heres*. We can gather no more of his conception of *hereditas* than that he regarded it as a distinct right, a *ius successionis*, which was a *res incorporalis* not to be confounded with the *res corporales* which it might contain (§ 14), but nevertheless susceptible in earlier times of being acquired by *usucapio* (§ 54) and still in some cases of being ceded *in iure* (2, 34–37; 3, 85–87). Gaius would have been forced to a closer consideration if he had had occasion to treat of *hereditas iacens*, i.e. of the position that arose when a man died leaving no *suus* or *necessarius heres* and the *hereditas* lay vacant and ownerless until the *heres extraneus*, if any, accepted it.[2] The subject, which is difficult and complicated,[3] thus lies outside a commentary on the *Institutes*, but it cannot be completely ignored. During the interval between death and *aditio* the estate could not be stationary: the activities of slaves were bound to produce gains and losses for which a subject of inherence and incidence had to be found. Roman jurisprudence found it in the *hereditas* itself, a solution which modern jurisprudence would describe as a personification of the *hereditas*. There are texts which come near to saying as much, but in classical and even later times *persona* had not acquired its modern technical meaning. The expedient adopted was to regard the *hereditas iacens* as representing according to one view the *persona* of the deceased, according to another that of the *heres*. On the whole (*in plerisque*) Justinian favoured the former view (e.g. *Inst.* 3, 17 pr.).

Hereditas ex testamento and ab intestato. In our view, though there is great modern authority to the contrary, intestate succession is older than testamentary. But Gaius takes testamentary succession first, and this is the practical order, since the first thing to be ascer-

[1] Cf. Korošec, *Die Erbenhaftung nach röm. Recht*, Leipzig 1927.

[2] Cf. above, p. 71.

[3] Cf. Buckland 306 ff., with literature, to which add Bortolucci, *BIDR* 42, 150; 43, 128; Albertario, *ibid.* 42, 550.

tained when a man died was whether he had left a will. It was a cardinal point that the two kinds of succession were mutually exclusive and that one could not die partly testate and partly intestate: *neque idem ex parte testatus et ex parte intestatus decedere potest* (*Inst.* 2, 14, 5). But when it had become possible to impose a *fideicommissum* on one's intestate *heres* (§§ 270. 273), this rule was substantially overridden, though it was nominally saved by the distinction between a *testamentum* and a codicil. It follows, contrary to our ideas, that a valid will necessarily disposed of the whole *hereditas*; its one essential provision was the institution of a universal successor or *heres* (§§ 116. 229).

§§ 101–8. The Civil Law Forms of Will

Gaius' account is confirmed by Aulus Gellius (15, 27): *In libro Laelii Felicis ad Q. Mucium primo scriptum est Labeonem scribere 'calata' comitia esse quae pro conlegio pontificum habentur aut regis aut flaminum inaugurandorum causa. . . . 'Curiata' per lictorem curiatum 'calari', id est 'conuocari', . . . Isdem comitiis quae 'calata' appellari diximus et sacrorum detestatio et testamenta fieri solebant. Tria enim genera testamentorum fuisse accepimus: unum quod calatis comitiis in populi contione fieret, alterum in procinctu, cum uiri ad proelium faciendum in aciem uocabantur, tertium per familiae [e]mancipationem, cui aes et libra adhiberetur.*

There being little other direct evidence the early history of the Roman will is largely conjectural and the conjectures of the authorities differ widely. We shall state with little detail or argument the conclusions that seem to us the most probable.

A. *The Will in procinctu* (§ 101)[1]

We dispose of this first as standing outside the main development. It was a declaration made by a soldier before an impending battle. The best explanation is that the *exercitus* was taken as representing the *comitia*, but whether the declaration was made before an assembly of the whole army on the eve of battle[2] or before the soldier's neighbours in the ranks just before the joining of battle cannot be determined. In either case there would be no possibility of control being exercised by either *pontifices* or *populus*, so that the form can have amounted to no more than a witnessing and the wills can only have

[1] Cf. Gell. *l.c.*; Cic. *de nat. deor.* 2, 3, 9; Vell. Pat. 2, 5, 2; *Schol. Verron. ad Verg. Aen.* 10, 241 (Bruns 2, 77).

[2] Siber, *SZ* 1937, 248.

been very simple. There is evidence of its existence as late as 150 B.C., but Cicero speaks of it as obsolete.

B. *The Comitial Will* (§ 101)[1]

Meetings of the *comitia curiata*, under the style of *comitia calata*, were held twice a year[2] for religious business. This included adrogations[3] and the making of wills.

Form. There is no direct evidence. One view is that a *testamentum*, like an *adrogatio*, was embodied in a *lex* of the *comitia*, but there are undeniable grounds[4] for thinking that the function of the *comitia* may have been simply to witness. We prefer the first view, but the difference is not great. Witnessing by the *comitia* would carry public recognition and guarantee; on the other hand, if we assume a *lex*, it would probably become a formality, as in *adrogatio*. The important point is that in both cases there would be pontifical control. A *lex* would have to be proposed by the presiding officer, presumably the *pontifex maximus*, whose proposition the *comitia* could reject but not amend,[5] but even if the *comitia* merely witnessed, pontifical control of a solemn act affecting the *sacra* performed at the *comitia calata* can be taken for granted.

Contents. The essential and only necessary disposition of this will was *heredis institutio*, i.e. the nomination of a universal successor. If it were not for the authority of the dissenters[6] one would think the arguments for this statement to be decisive. There is the analogy of *adrogatio*. There is the fact that *hereditas* and responsibility for *sacra* were inseparable and that, unless the will affected the devolution of this responsibility, its execution would not concern the *comitia calata*. Lastly, *heredis institutio* cannot be a native product of *familiae mancipatio*; the necessity for it in the form of *testamentum* later derived from *fam. manc.*[7] must be an importation from outside. We can only conclude that the principle that *heredis institutio* was *caput et fundamentum testamenti* (§ 229) must have been laid down long previously by the

[1] Cf. Girard 849; Buckland, *LQR* 1916, 97.

[2] According to Mommsen probably on March and May 24: cf. Bruns 1, 42–43.

[3] Above, p. 34. Not mentioned by Gellius 15, 27, but presumed to have taken place at the same meeting as the renunciation by the *adrogatus* of his old *sacra* (*detestatio sacrorum*) which Gellius does mention.

[4] In spite of Girard 852 n. 3. Cf. Clark, *R. Priv. Law, Regal Period* 440. 449; Siber, *SZ* 1937, 248.

[5] Above, p. 14. Schulz 19.

[6] Notably Lenel, *Essays in Legal Hist.*, ed. Vinogradoff 1913, 120. But cf. Girard 850 n. 3; Buckland, *LQR* 1916, 97.

[7] Below, p. 88.

pontifices for the only known *testamentum*, the comitial, and that when *fam. manc.* was transformed into a genuine *testamentum* it had to conform to the settled conception of a *testamentum*.

Another principle of the classical will that must, we hold, be traced to the same source is *exheredatio*, i.e. the principle that *sui heredes* of the testator whom he was not instituting as *heredes* must be excluded from being *heredes* by (more or less) express words.[1] It is probable that the *heredes* instituted by the earliest wills were usually *sui heredes*, in which case the testator's main purpose would be to exclude other *sui heredes* either because of their incapacity or in order to avoid a possibly disastrous *morcellement* of the family estate.[2] He instituted as *heredes* the most suitable of his *sui*, but the *pontifices* showed a sound legal instinct by insisting that the disinherison of the others, who even in the testator's lifetime were in a sense *domini* (§ 157 &c.), should be express and not merely implied. This requirement, like *heredis inst.*, became firmly established and was carried over into the later form of will. Whether the history of yet another principle, *nemo pro parte testatus, pro parte intestatus moritur*, was the same is not so certain. It seems probable.

Further contents of the comitial will. Besides *heredis institutio* and any necessary exheredations a comitial will could contain nominations of tutors and manumissions,[3] but any further contents are a matter of speculation. It has been argued[4] that the effects of legacies *per uindicationem* and *per damnationem* (§§ 193 *sq.* 201 *sq.*) are such that they must have originated in the comitial will.

Early obsolescence. Our uncertainties about the comitial will are due to its having died out pretty early, exactly when cannot be said, but Cicero[5] implies that in about 150 B.C. it was obsolete.

C. *The Will per aes et libram* (§§ 102 *sq.*)

On the history of this form Gaius is practically our sole evidence. The *formulae* reported by him (§ 104) are those in use in his own day, but though they are not in their earliest state, certain developments being obvious, they bear witness to what must originally have been the essential structure of *mancipatio* applied to testamentary purposes. Gaius' own account of the evolution of the classical will amounts to little more than what could be deduced from the *formulae*. Like him we distinguish two main phases in the evolution.

[1] Below, p. 96. Cf. Schulz 19.
[2] Cf. 3, 1 *sq.*
[3] *XII Tabb.* 5, 6; 7, 12: *Textes* 14. 17; Bruns 1, 23. 28; *Fontes* 1, 39. 51.
[4] e.g. by Girard 969.
[5] *De or.* 1, 53.

First phase. Let us provisionally draw the conclusions which would follow from the application of later, but still quite early, law to our data. The *familiae emptor*, who it is important to note could not be a person in the would-be testator's *potestas*, acquired the whole estate at once. The supposedly dying man was left with nothing; to imagine deduction of usufruct in his favour would be a flagrant anachronism. If he recovered, remancipation to him would naturally be possible and may have been compellable. If he died, the *f.e.* according to Gaius *heredis locum optinebat*, but this cannot be taken literally. The *f.e.* resembled a *heres* in acquiring the whole estate and in being subject to duties of distribution, which one is at liberty to suppose to have been or to have become legally enforceable, but being already owner he could not become *heres*. The decisive question is, what happened to the *sacra*? We can only guess the answer. The deceased may have provided for them in his instructions to the *f.e.*; the *pontifices* are likely to have tied them to the assets. But in the state of our information we are bound to assume that the deceased's *sui heredes*, if he had any, were still his *heredes*; we cannot assume that they could be exheredated either expressly or impliedly by the *familiae mancipatio*.

On this showing *familiae mancipatio* began as a makeshift; it was not a *testamentum*, but a device for doing without one, the sort of device that is always resorted to when a will is impossible. But it may not have been so crude a device as the logic of later law makes it seem. Most unfortunately our text of the *f.e.*'s *formula* (§ 104) is defective, but, as we read it, it substitutes for the usual *ex iure Quiritium meum esse aio* the qualified claim *endo mandatela tua custodelaque mea esse aio*.[1] This is clearly significant, but the fact remains that the formula ends with an *emptio* and that the speaker became *emptor*. There was therefore alienation,[2] but whether the early *prudentes* thought of the *f.e.* as becoming *dominus ex iure Quiritium* as distinctly as we think of a trustee as being legal owner may well be doubted. The black and white of later jurisprudence may at times misinterpret primitive institutions.

Second phase. At an indeterminable date, after the *Twelve Tables*, *familiae mancipatio* was turned into a true will of the Roman pattern. The evolution is very curious. One might have expected the *f.e.* to develop into a *heres*; that might well have come about by custom but for the objection that the form of mancipation prevented a *suus heres* from being *f.e.* What actually happened was that the whole transaction

[1] The text, however, has to be restored. The use of *endo* is a sign of high antiquity. On *mandatela* and *custodela* cf. Weiss. *SZ* 1921, 104.

[2] Pomp. *D.* 40, 7, 29, 1.

was denatured and the mancipation reduced to an utterly empty form. The estate no longer went even momentarily to the *f.e.*, but (subject of course to *aditio* where required) vested after the testator's death, and not sooner, directly in the person designated as *heres* by the testator's *nuncupatio*. So radical a change cannot have been the slow work of custom alone. One might as well say in English legal history that uses gradually came to be considered executed. Thus the inference that there was some Roman equivalent of the *Statute of Uses* seems certain *a priori*, and it is strongly confirmed by the *f.e.*'s declaration (§ 104) that he is taking the mancipation *quo tu iure testamentum facere possis secundum legem publicam*.

The *lex* referred to is almost certainly some clause of the *Twelve Tables*, the *lex per eminentiam* of early speech (Ulp. 11, 3). Only one relevant clause is ever quoted, and we may be confident that there was no other that could be quoted. It comes to us in various versions; that given by § 224 runs: *uti legassit suae rei, ita ius esto*.[1] The precise wording need not trouble us, since the variants are as to what might be 'legated'. Modern opinion is pretty well agreed that originally this was the *pecunia*[2] or privy property of the *paterfamilias*, to the exclusion of the *familia* or family property.[3] One can understand that, when the régime of *familia* had died out and the *pf.* had become absolute owner of *familia* and *pecunia* alike, the clause could be interpreted as covering the whole estate and would be likely to be misquoted accordingly. The really crucial question is: how could the word *legare* come to be interpreted as covering *heredis institutio*?

Speculation as to what the decemvirs meant by *legare* is not a hopeful enterprise; what follows is merely tentative. It is improbable that they used the word in its sole classical technical sense of a gift charged by *testamentum* on a *heres*; if they did, the clause must have referred to the only existing *testamentum*, that made *calatis comitiis*. More probably the word bore at that date a wider sense, nearer to its primary meaning of 'appointing to a duty' or 'commissioning'. The device of a conveyance *inter uiuos* with *post mortem* instructions (*legata*?), so natural where a will is impossible, is likely to have been resorted to at a very early date, though not at first in the form of a comprehensive *mancipatio familiae* (§ 102). The decemvirs may have thought good to give direct legal effect to such *legata* so far as they

[1] *XII Tabb.* 5, 3: *uti legassit super pecunia tutelaue suae rei, ita ius esto* is the version preferred by *Textes* 14, Bruns 1, 23 and *Fontes* 1, 37, where the variants are given. Cf. however, Wlassak, *St. z. altröm. Erb- und Vermächtnisrecht* 4 n. 6. 14 ff.

[2] According to Wlassak, *l.c.*, the *res sua* as opposed to *non sua*.

[3] Cf. above, p. 57.

dealt with *pecunia*. Later, when the distinction between *familia* and *pecunia* disappeared, it became possible to understand the clause as covering the whole estate. This would enable a *pf.* to make a will in our sense, but not, unless he was allowed to include *heredis institutio* in his '*legata*', a Roman *testamentum*, not the will desired by national sentiment and sanctioned by the tradition of the comitial will. Our hypothesis obliges us to suppose the acceptance of an abusive interpretation of *legare*, a very bold interpretation, but not, we submit, inconceivable if the word had as yet no very definite technical sense. Pomponius at any rate does not blench,[1] and that Gaius (§ 224) appears more cautious may be due to the context.

Explain it as we may, this transformation of the instructions given by the would-be testator in his *nuncupatio* is a matter of historical fact. Somehow *mancipatio familiae* was turned into a true *testamentum*, in which *heredis institutio* was not only possible, but indispensable. Though it displaced the comitial will owing to its greater convenience, it was subjected to its fundamental rules.

Another notable development was that it became allowable for the testator to declare the terms of his will by referring in his *nuncupatio* to a document (*tabulae testamenti*) containing them, instead of announcing them orally (§ 104).[2] Oral announcement always remained possible (*Inst.* 2. 10, 14), but for practical purposes the *tabulae testamenti*, authenticated by the seals of the *f.e.*, the *libripens*, and the five witnesses of the mancipation, became the normal will, though it was unduly long before the formal *familiae mancipatio* and *nuncupatio* were rendered legally negligible; ultimately they disappeared.[3]

Qualification of witnesses (§§ 105–8). The rules laid down are survivals from the time when the mancipation was a reality and illustrate Roman conservatism in an extreme form. They were brought up to date in later law (*Inst.* 2, 10, 5–11).

§§ 109–11. The Military Will

By sporadic ordinances which go back to Caesar the Emperors freed the wills of soldiers from all formalities of execution (§ 114). A definite regulation by Trajan was incorporated in the standing *mandata* to provincial governors.[4] *Inst.* 2, 11 provides sufficient commentary.

[1] *D.* 50, 16, 120: *Verbis legis duodecim tabularum his 'uti legassit suae rei, ita ius esto' latissima potestas tributa uidetur et heredis instituendi et legata et libertates dandi, tutelas quoque constituendi.*

[2] Cf. Riccobono, *Atti, Roma*, 1, 340; Schulz 26.

[3] Below, p. 95.

[4] Ulp. *D.* 29, 1, 1 pr.

The privilege was not confined to exemption from the formalities of execution; there were further indulgences,[1] but our text, so far as it survives, tells us only that certain classes of persons incapable of taking under a normal will could take under a soldier's. These will be mentioned below (at §§ 114–17).

§§ 112–13. Capacity to make a Will

The loss of nearly three pages of V between our §§ 111 and 112 leaves us with only a small fragment on capacity to make a will, which, to judge by *Epit.* 2, 2, Ulp. 20, 10 *sq.*, and *Inst.* 2, 12, was Gaius' next subject. To make a Roman *testamentum* one had to have the *ius commercii*: this excluded interdicted prodigals (Ulp. 20, 13) and, in general, *peregrini*, but not Latins; the incapacity of Junian Latins was statutory. A dumb man was excluded by the fact that he could not utter the *nuncupatio*, a deaf man by his not being able to hear the *familiae emptor* (Ulp. 20, 13). The testator had to have a *patrimonium*: this *excluded* all persons *alieni iuris*, servile or free, except sons possessed of *peculium castrense* (§ 106; cf. *Inst.* 2, 12 pr.). Lack of *intellectus* disabled *furiosi* (*Inst.* 2, 12. 1; cf. 3, 106), immaturity *impuberes*, i.e. males below 14 and females below 12 (§ 113). A woman *sui iuris* above 12 could make a will with her tutor's *auctoritas*, which she could compel him to give unless he was her patron or her *parens manumissor* (§ 122). But until Hadrian abolished it (§ 112; 1, 115 a), wills of *ingenuae* other than Vestals had been subject to the further requirement that the testatrix should have previously made a *coemptio*. The motive of this, to judge by its inapplicability to freedwomen (3, 43), must have been to protect the woman's agnates: after a *coemptio* she would have none.

§§ 114–17. Heredis Institutio

After a recapitulation we pass to a further condition of initial validity, *heredis institutio*. This was the one indispensable disposition in every will: *heredis institutio uelut caput et fundamentum intellegitur totius testamenti* (§ 229). A will containing no valid institution was void; there was a total intestacy; all other dispositions in it, such as legacies, manumissions, and nominations of tutors, failed. But there was a strong sentiment against intestacy, and this explains the marked tendency, when an *institutio* was combined with a legally incompatible

[1] Buckland 361; Girard 866 n. 3.

provision, to save the *institutio* by striking out the offending provision.

The *institutus* had to be capable (passive *testamenti factio*), and that, speaking generally, at the moment both of the making of the will and of death. The following were incapable:[1] (i) *peregrini*, including of course *dediticii*, as not having the *ius commercii*, (ii) women; by the *L. Voconia* (169 B.C.) they were incapacitated from being instituted by testators classed in the *census* as having more than 100,000 *asses*, but in spite of § 274 this law was no longer in application, presumably owing to the *census* having become obsolete from the beginning of the Empire,[2] (iii) *incertae personae* (§§ 242. 287), explained below (§§ 238 *sq.*); these included *postumi*, but by the time of Gaius only *postumi alieni*, *sui* having been rendered capable by a progressive movement,[3] (iv) municipalities and other corporate bodies, apart from special privilege, perhaps because they were regarded as being *incertae personae* (Ulp. 22, 5), but they could take a *fideicommissa hereditas* and legacies, and could even be instituted by their *liberti*, (v) *serui sui* and *alieni* could be instituted, but subject to conditions to be examined later (§§ 153 *sq.*, 185 *sq.*).

The incapacities of Junian Latins and of *caelibes* and *orbi* (§§ 110–11) were of a different order. Junian Latins could be validly instituted, but were disqualified by the *L. Iunia* from becoming *heredes* if they did not become *ciues* before the time for acceptance of the *hereditas* had run out. *Caelibes* (unmarried males above 25, females above 20) were placed in a similar position by the Augustan *Ll. Iulia et Papia Poppaea* (§ 286), while *orbi* (childless married persons) could take only half of what was left to them (§ 286 a).[4]

It was essential that the *institutio* should be made *sollemni more*, in approved words (§ 117). *Exheredationes* preceding it were valid, but legacies, manumissions, and perhaps *tutoris datio* so placed were void (§§ 229–31). The placing of *fideicommissa*, which were outside the civil law, was a matter of indifference (§ 269? Ulp. 25, 8).

Conditions and terms. It was not possible to make the *hereditas* pass away from the instituted *heres* at some future date (resolutive *dies*) or in some future event (resolutive *condicio*); the *dies* or *condicio* was struck out and the *institutio* was absolute: *semel heres semper heres*. A provision suspending the taking effect of the *institutio* till a definite date (*dies certus*) was similarly treated, but suspension till the happening of a future event that might never happen (suspensive *condicio*) or

[1] Cf. Ulp. 22, 1 *sq.*
[2] Not mentioned by Ulpian.
[3] Below, p. 97.
[4] Details: Buckland 292–3.

one which must happen, but at an uncertain date (*dies incertus*), was valid. The fact that a suspensive condition was immoral, illegal, or impossible[1] did not make the *institutio* void; it was void itself.

The same tendency to save an *institutio* is observable in the application of the principle *nemo pro parte testatus, pro parte intestatus moritur.* A *heres* is one who succeeds to the whole estate if alone or to a fraction of it along with other *heredes.* But if a *heres* was instituted only to definite property (*ex certa re*), the limitation was struck out,[2] and if the fractional shares to which several *heredes* were concurrently instituted did not add up to a whole, they were treated as instituted to the whole in the proportions indicated (*Inst.* 2, 14, 5 *sq.*).

In later law the merely formal rules as to the wording and placing of *institutiones* were abolished,[3] but to the end *heredis institutio* remained essential to a *testamentum.* It should, however, be borne in mind that even in Gaius' day there could be substantial evasion by means of codicils imposing *fideicommissa* on an intestate *heres* (§ 270), and that by *fideicommissum* one could circumvent the principle *semel heres semper heres* (§ 277).

§§ 118–22. Auctoritas tutoris. Bonorum possessio secundum tabulas

Auctoritas tutoris. For the validity at civil law of the will of a woman in *tutela* the *auctoritas* of her tutor was a further essential. But since, except if she was in the *tutela legitima* of her patron or *parens manumissor*, she could compel her tutor to give *auctoritas* (1, 192; 2, 122), it was in all other cases a mere formality. The praetorian system of *bonorum possessio secundum tabulas* had by the time of Gaius ended in overriding for all wills the merely formal requirements of *mancipatio* and *nuncupatio* (§ 104), and the question is raised (but not answered: *uidebimus* § 122) whether the requirement of *auctoritas*, where it was a mere formality, was not also overridden.

Bonorum possessio. In this incidental fashion this form of universal succession (§ 98) is introduced. There is no systematic account in Gaius to be commented on, but a short general explanation seems indispensable.[4]

[1] On impossibility cf. Buckland 297.

[2] Complications Buckland 296.

[3] *C.* 6, 23, 15 (A.D. 339). *Inst.* 2, 20, 34.

[4] The full account given by Buckland 381 ff. (*Element. Principles* 198 ff.) is strongly recommended. Synopsis of views on the origin of *bonorum possessio*: Girard 845, n. 2.

As it is revealed to us, *bonorum possessio* was a provisional regulation of the position created by a death. A grant of *b.p.* was obtained by application to the praetor (*agnitio*). The Edict classed all who might have a possible right to apply in an order of preference, each class (if it existed) being given a certain time in which to apply, after which the right to apply passed on to the next class. There were three main classes: (1) those who claimed against a will on the ground that it had not exheredated them as it ought to have: *b.p. contra tabulas* (§§ 125 *sq.*); (2) the *heredes* named in a will that was *prima facie* valid: *b.p. secundum tabulas*, the subject with which we are immediately concerned (§§ 119 *sq.*); (3) those claiming by intestacy, of whom there was a series of sub-classes: *b.p. ab intestato* (3, 25 *sq.*).

Grant of b.p. not ex edicto. Since *b.p.* was granted by the praetor with little or no inquiry, it might easily be granted to one who was not entitled to it under the terms of the Edict. For practical purposes such a grant was a nullity. It was no bar to a grant being made to one really entitled, and the fact that it was not *ex edicto* was a decisive answer to the interdict and actions by which *b.p.* was sanctioned (3, 80–81; 4, 34. 144). In what follows we shall be referring to *b.p. ex edicto* only.

B.p. cum and sine re. A grant of *b.p.* enabled the grantee to get in the estate, but in itself, like a possessory interdict, left the question of title untouched. If the *b. possessor* could keep the estate, his *b.p.* was said to be *cum re*; if he could be evicted by the civil law *heres* bringing his *hereditatis petitio*, it was said to be *sine re* (§§ 148 *sq.*; 3, 35 *sq.*). Obviously he could keep it when there was no civil law *heres* or when he was himself *heres*, as he often would be: a *heres* could do without *b.p.*, but would be wise to obtain it (3, 36–7). In these cases the Edict had the effect of supplementing or assisting the civil law. But if someone else was *heres*, the *b. possessor* might or might not be able to resist eviction by him; that would depend on whether the *b.p.* in question had been armed with an equitable defence, the *exceptio doli*, against the *hereditatis petitio* of the *heres*. The chief cases in which such a conflict might arise were *b.p. contra tabulas*, *b.p. ab intestato: Unde liberi*, and *b.p. secundum tabulas*. At what date the *exceptio* came to be allowed is a separate question in each case, but the several developments have a common significance. Wherever a *b.p.* conflicting with the *hereditas* was rendered *cum re* in this manner, it ceased to be a provisional grant of administration and became an instrument of law reform. In fact *b.p.* was the chief means by which the civil law of succession was amended up to the end of the classical period.

B.p. sec. tabb. (§§ 119 *sq.*; 147 *sq.*). The gist of the Edict in its final form was: *Si tabulae testamenti non minus quam septem testium signis signatae extabunt, secundum supremas tabulas testamenti potissimum bonorum possessionem dabo.*[1] In itself this meant no more than that the praetor offered to authorize the testamentary *heres* to take action under the latest will of which there existed what we have seen was the customary evidence of a will.[2] A grant of *b.p. sec. tabb.* was no pronouncement on the validity of the will, and if the will turned out to be void, the *b.p.* would be *sine re*. In the meantime, however, there would be someone to get in the assets and to whom the deceased's creditors could look. But shortly before Gaius' *Institutes* a rescript of Antoninus Pius provided that a *b. possessor* under a will which was void at civil law owing to a formal defect in its execution should be able to defeat the *hereditatis petitio* of the civil law *heres* by *exceptio doli* (§§ 120–1. 149 a). The rescript clearly applied to a will that was void owing to lack of a valid *familiae uenditio* or *nuncupatio*, but Gaius is doubtful whether it applied to failure of a testatrix to obtain the *auctoritas* of her tutor, provided that he was not *legitimus* (§ 121).[3]

The rescript of Antoninus Pius was a very important reform, since it involved that thenceforward one could make a will by nothing more than a duly attested document, but it was a lamentably half-hearted one, since such a will would still be valid only *iure praetorio*, a merely technical inferiority no doubt, but purposeless formalities ought to be abolished. Far from being abolished *mancipatio* and *nuncupatio* remained essential to the civil validity of a will for centuries, till 439 in fact, when the *testamentum tripertitum* was created by constitution.[4] This final form of civil will added to the praetorian requirement of the seals of seven witnesses that of the *subscriptiones* of the witnesses and of the testator or of an eighth witness for him, and it was provided that the execution must be by a single uninterrupted act: *uno contextu testari oportet*. This last requirement Justinian derives from the civil law. It was implicit in the form of *mancipatio*.

[1] For greater exactitude see *Edictum* § 149. Earlier form: Cic. *in Verr.* ii, 1, 45, 117.

[2] *Tabulae* bearing the seals of seven witnesses, namely the *f. emptor*, the *libripens*, and the five witnesses of the mancipation. Above, p. 90, on § 104. Cf. § 181. The opening of wills had been formalized in connexion with the *L. Iulia uicesimaria* (A.D. 6) imposing a 5 per cent. tax on *hereditates*. Cf. Paul 4, 6; Suet. *Nero* 17; Girard 891–2 and 861; Macqueron, *R.H.* 1945, 123.

[3] Other cases: Buckland 286. 289. 395. Apparently the *b.p. sec. tabb.* mentioned in § 147 was not necessarily *cum re*.

[4] *C.* 6, 23, 21. *Inst.* 2, 10, 3.

§§ 123–43. Exheredatio

Sui heredes. A man's *sui heredes* were those of his descendants who became *sui iuris* by his death; a woman could have none. They were his sons and daughters and, provided that the person or persons intervening between them and the deceased had died or otherwise left the deceased's *patria potestas* during his lifetime, his grandchildren and further descendants through males; adoptive children and wives *in manu* were included (3, 1–8).

These persons were the first successors on intestacy and, whether they succeeded by intestacy or as *heredes* instituted by will, they had no choice but to be *heredes*: they were *necessarii* as well as *sui* (§§ 156–60). By making a will instituting as *heredes* strangers or only some of the *sui heredes* the *pf.* could exclude all or any of his *sui heredes* from his succession, but only on condition that those not instituted were declared disinherited by an appropriate clause in the will (*exheredatio*): *sui heredes* had to be either instituted or exheredated in due form, otherwise the will was more or less invalidated. The rule was purely formal: by using the correct form the testator could in most cases achieve the result he desired. It was no real protection to the *sui heredes*. It was satisfied if they were instituted *heredes* in any share, large or small, and, apart from the legislation against excessive legacies (§§ 224 *sq.*), that share might be rendered valueless. On the other hand, however great might be the benefit conferred by the will on a *suus heres* otherwise than by his institution as *heres*, the requirement of *exheredatio* applied.

This system must have originated in the very early times when the *pf.* was rather the administrator than the absolute owner of the family property, when his *sui heredes* were in a certain sense co-owners even in his lifetime, when his *testamentum* had to be approved by the *pontifices* and sanctioned by the *comitia calata*, and when *hereditas* was not a mainly economic conception. Paul's development of the explanation of the special quality of *suus heres* given by Gaius in § 157 is worth quoting. *D.* 28, 2, 11: *In suis heredibus euidentius apparet continuationem dominii eo rem perducere ut nulla uideatur hereditas fuisse, quasi olim hi domini essent, qui etiam uiuo patre quodammodo domini existimantur. . . . itaque post mortem patris non hereditatem percipere uidentur, sed magis liberam bonorum administrationem consequuntur. hac ex causa, licet non sint heredes instituti, domini sunt: nec obstat quod licet eos exheredare, quod (quos?) et occidere licet.*[1] But when, later

[1] Girard's argument for the antiquity of the principle of exheredation is over-

but still early, the *paterfam.*'s sovereignty was transmuted into absolute ownership with unlimited powers of alienation *inter uiuos* and complete freedom from control in testation, *exheredatio* became a useless survival, a pure form, which could protect *sui heredes* only accidentally, through some mistake in the will. But irrational as it was, it survived into the law of Justinian, though already in Gaius' day there had begun the evolution of the more rational principle that a testator (or a testatrix in this case) must not except for just cause leave certain near relatives less than a certain fraction of their intestate share (*legitima portio*).[1] In short, whilst *exheredatio* provides extremely interesting evidence as to the primitive system of family property, its details in developed law are an unattractive, though inescapable, subject.

The civil law. Exheredation of a son had to be *nominatim* (explained § 127; cf. 132), but that of daughters and of more remote descendants of either sex could be by a general clause (§§ 128. 132). *Praeteritio* or *omissio* (as failure to institute or to exheredate was called) of a son made the will void, and void *ab initio* according to the Sabinian doctrine (§ 123), which was adopted, so that the fact that a *filius praeteritus* predeceased the testator did not save the will. *Praeteritio* of any one else merely gave the *praeteritus* or *praeterita* a *ius accrescendi*, that is a right to share equally with any *sui* instituted and to take half against *extranei* instituted (§ 124).

Postumi. The rule of exheredation extended to *postumi*, and in a severer form: *praeteritio* of any *postumus suus*, and not merely of a *postumus filius*, rendered the will void (§§ 130–1).[2] Now *postumus* here covers any one who became a *suus* after the making of the will. Thus a *postumus* might arise in many ways: by the mere fact of being born (§ 130), by the death or other departure from the testator's *potestas* of an intervening ascendant (§ 133), by adoption or *conuentio in manum* (§§ 138–9), by return to the *patria potestas* of a person *in mancipio* (§ 141), by *erroris causae probatio* (§§ 142–3), or by imperial grant of *patria potestas*. Even if the testator had foreseen what actually came to pass, he would at one time have found it impossible to provide against it by anticipatory institution or exheredation. Unborn persons in particular could not be instituted or exheredated because they were *personae incertae*,[3] and in the case of artificial *postumi* institution of a

whelming. He explains (p. 905 n. 1) Cic. *de or.* 1, 38 as referring only to the question of the validity of an exheredation of a son *inter ceteros*.

[1] *Querela inofficiosi testamenti: Inst.* 2, 18, not mentioned by Gaius.

[2] Ulp. 22, 18. But if the *postumus* predeceased the testator, there might be *b.p. sec. tabb.*, and *cum re*: Ulp. *D.* 28, 3, 12 pr.

[3] This survived in Gaius' day only for *postumi alieni*: § 242.

person not a *suus* at the time of testation would not be institution as *suus*, while his exheredation would be meaningless (§ 140). But these difficulties were gradually overcome in most cases partly by jurisprudence and partly by legislation,[1] so that in Gaius' day it was possible to institute or exheredate in advance any person who became a *suus* after the will, except those who became such by adoption or *conuentio in manum* (§ 140) or, until a relaxation by Hadrian, by *erroris causae probatio* (§§ 142–3).

The Edict. The praetor required *nominatim* exheredation of all males, not merely of sons, but still allowed that of females to be *inter ceteros* (§ 129). What is more important, he extended the requirement of institution or exheredation to all *liberi*, by offering *b.p. contra tabb.* not only to *sui heredes* but to all *liberi praeteriti*, that is also to those who would have been *sui* but for a *capitis deminutio minima*, except, however, adoptive children who had been emancipated and natural children who had been given in adoption and were still in their adoptive family (§§ 135–7). This extension is the counterpart of the extension by *b.p. Unde liberi* of the rights of *liberi* on intestacy (3, 26), and it is important to realize its limited nature in both cases. It was not a substitution of cognation for agnation, but of natural for artificial agnation, with the proviso that subsisting artificial membership of another civil agnatic family was a bar to rights in the natural agnatic family.

Bonorum possessio contra tabulas. This was offered to anyone who, whether under the civil or the praetorian rules, was *praeteritus*. Its grant did not render the will void even *iure praetorio*; it did not produce an intestacy. It totally excluded any *extranei heredes* instituted, but left in force exheredations, pupillary substitutions (§§ 179 *sq.*), presumably appointments of tutors and certain legacies, not, however, in general manumissions.[2] The result of this total exclusion of *extranei heredes* might be that a *praeteritus* got more by *b.p. contra tabb.* than he would have got by a civil law *ius accrescendi*, but in the case of women this was disallowed by a rescript of Antoninus Pius (§§ 125–6).

This *b.p.* was introduced in all probability at least not later than the beginning of the Empire; one thinks it must have been *cum re* from

[1] For details cf. Buckland 323–4; Girard 908–9. Certain exheredations of *postumi* were sanctioned by the *L. Iunia Vellaea* (§ 134; A.D. 26?) on condition that males should be exheredated *nominatim* and that females if exheredated, as they might be, *inter ceteros*, should be left a legacy. Cf. *Inst.* 2, 13, 1, from which § 132 is restored. But there is a difficulty: Ulp. 22, 22.

[2] Buckland 326. Girard 912.

the beginning, since otherwise it would have been pointless; at any rate it was *cum re* in our period. As in the case of *Unde liberi* there was a possibility of unfairness: an *emancipatus* who applied for *b.p.* was asking to be treated on the same footing as the true *sui heredes*, but these by having stayed *in patria potestate* had remained under the rule of automatic acquisition for the *pf.*, whereas the *emancipatus* had been free to acquire for himself. Thus his request was only granted on the terms of his bringing in for division along with the paternal *hereditas* (*collatio bonorum*) the property he had so acquired, excluding of course any property which, had he remained *in potestate*, would have been *peculium castrense* and so his own.

§§ 144–51a. Invalid Wills

Gaius (§ 146) classifies invalid wills under three heads. (*a*) *Testamentum non iure factum*—will void *ab initio*. The cause might be the testator's lack of *testamenti factio* (§ 114), absence of a proper *heredis institutio* (§ 116), failure to exheredate a son *nominatim* (§ 123), or defective execution of the will (§§ 115. 119. 120–1) including lack of *auctoritas tut.* for a woman's will (§§ 118. 122). We have seen that the first three defects were irremediable, but that defective execution might not prevent *bon. poss. cum re.*[1] (*b*) *Testamentum ruptum*—originally valid will invalidated *postumi agnatione* (§§ 130 *sq.* 138 *sq.*) or by a later will (§ 144). (*c*) *Testamentum irritum factum*—will rendered ineffectual by the subsequent *cap. deminutio* of the testator (§ 145) or by the fact that no *heres* takes under it (§ 144).

Capitis deminutio of testator (§§ 145 *sq.*). By *cap. dem.* the testator passed, at least temporarily, into a status in which he could not have made a will. This invalidated his will. But in the case of *cap. dem.* produced by being captured by the enemy[2] the rule was nugatory even at civil law, because if the testator died in captivity he was reputed to have died at the moment of being captured (fiction of the *L. Cornelia*), and if he returned his captivity was ignored *iure postliminii*. The praetor went further: he granted *b.p. sec. tabb.* if the testator had had *testamenti factio* at the time both of his making the will and of his death, without regard to an intervening *cap. dem.* But in classical times this *b.p.* would be *sine re* unless the testamentary *heres* was also *heres ab intestato* or there was no civil law *heres* (§§ 148–9).

Subsequent will. The execution of a valid will annulled any

[1] Above, p. 95.

[2] Above, p. 42.

previous will, even if in the events that happened the later will proved to be inoperative owing to the *heres* named by it not accepting (§ 144).

Revocation (§§ 151–51 a). At civil law there was no way of revoking or even altering a will once made except by making a completely new will. Having once made a will a man could not return to intestacy. The fact that by destroying or defacing his *tabulae testamenti* he had shown his wish to revoke them made no difference in law (§ 151), though it might render proof of their contents difficult or impossible. But in these cases the praetor, who gave *b.p. sec. tabb.* only *si tabulae testamenti extabunt*,[1] would grant *b.p.* to the *heres ab intestato*, and this *b.p.* was *cum re* probably already in the time of Gaius (§ 151 a is conjectural), but at any rate later.[2] As we shall see, the legalization of codicils and *fideicommissa* made a revolutionary change in this matter.

§§ 147–50. These sections are highly instructive as to the working of *b.p.*, which has already been described.[3] In § 149 there appears to be a mistake. Dealing with the cases of invalidity mentioned in § 148, one of which is *testamentum irritum factum*, the text says that if the *heres* named in the invalidated will obtains *b.p.*, he can be ousted by the civil law *heres* whether the latter is such *heres ab intestato* or (we quote) *ex primo uel ex posteriore testamento*. Now a will previous to the *testamentum irritum factum* would have been finally annulled by it (§ 144), and a will subsequent to it would have annulled it at civil law and *b.p.* granted under it would not be *ex edicto*.[4] Muirhead therefore regards the words quoted as a misconceived gloss.

§ 150. A succession which no one took up as *heres* or *b. possessor* went to the public treasury under the *L. Iulia et Papia Poppaea*. Previously the law had made no provision beyond allowing *usucapio pro herede* to the first taker.[5]

§§ 152–63. 185–90. Heredes necessarii, sui et necessarii, extranei

a. **Necessarii.** A *heres necessarius* was a slave of his own whom the deceased had instituted *heres* by his will. There were two requisites: (i) the institution had to be accompanied by an express manumission (§§ 186–7); it was not till Justinian that manumission was inferred from

[1] Above, p. 95.
[2] Ulp. *D.* 38, 6, 1, 8. 44, 4, 4, 10.
[3] Above, p. 93.
[4] Not *secundum supremas tabulas*: above, p. 95.
[5] Girard 940.

institution (*Inst.* 2, 14 pr.), and (ii) the slave must have been owned by the testator *ex iure Quiritium* at the time both of making the will and of dying; otherwise the manumission would be void (§ 267).

Institution of one's own slave without an accompanying manumission was a nullity, and consequently of no effect even if the testator later manumitted the slave *inter uiuos* or alienated him (§ 187). On the other hand, a valid institution, i.e. one accompanied by manumission, held good even if the manumission was afterwards nullified by the slave being manumitted *inter uiuos* or alienated; but he was no longer *heres necessarius*: he could accept or refuse the *hereditas*, if a freedman at his own discretion, if a *seruus alienus* according to the *iussum* of his present owner (§ 188). In fact the results were the same as if he had been free or a *seruus alienus* at the time of his institution. The institution of a *seruus alienus* (of course without a manumission, which would be meaningless) was perfectly valid, provided that his owner had *testamenti factio* (§§ 185. 189–90).

b. **Sui et necessarii.** *Sui* have already been defined.[1] A *suus* was *necessarius* whether he was *heres* by will or on intestacy.

c. **Extranei.** This term covers all *heredes* testamentary or *ab intestato* other than *necessarii* and *sui et necessarii*.

The important contrast is between *extranei heredes* and the two kinds of *necessarii*. The former were not *heredes* until they assented and they were free not to do so (§ 162); the latter became *heredes* by mere operation of law, even against their will (§ 157 *fin.*). Now, to be *heres* involved full responsibility for the deceased's liabilities, without limitation to the assets of the *hereditas*. *Exceptis excipiendis* (chiefly rights such as usufruct and delictual liabilities—4, 112; cf. 113) the *patrimonium* of the deceased became the *patrimonium* of the *heres*, or rather part of it. Hence, if the *hereditas* was insolvent (*damnosa*), to be *heres* was a disaster, and equally, if the *heres* was insolvent, the deceased's creditors might be damnified. One can understand why a slave could not accept an *hereditas* without his master's authorization.

This truly universal succession, this identification of the *heres* with the deceased, had been in complete harmony with the family system of primitive times, in which it originated, when *sui heredes*, whose succession is the prototype, did not so much succeed to property as come into the free administration of what was already in a sense their own (§ 157).[2] But in Gaius' day such a conception of *hereditas* was out of

[1] Above, p. 96.
[2] Above, p. 96.

date. The unlimited liability of *heredes* ought to have been abolished, but, characteristically, there was merely piecemeal alleviation of the harder cases by the praetor.

Separatio bonorum. For the reason given in § 154, which was in thorough accord with Roman sentiment,[1] the *heres* of an insolvent would often be a slave manumitted by will and instituted as last substitute (§§ 174 *sq.*). This *heres necessarius* got his freedom, but if the estate was insolvent he got nothing else, but was on the contrary personally liable to the full extent of the deficiency of hereditary assets. On being freed he would be penniless, but any property he afterwards acquired would be liable to be sold up. However, the praetor on application would grant him *separatio bonorum*, the result of which was (§ 155) to limit his liability to what had come or might later come to him from the *hereditas*. This *separatio* was modelled on the similar *separatio* which the praetor granted on the application of creditors of an *hereditas* who feared that they would suffer by the *hereditas* being fused with the *heres*' own estate.[2]

Ius abstinendi (§§ 158–60. 163). Provided that they kept their hands off the hereditary property, *sui heredes* were allowed by the praetor to escape liability for the hereditary liabilities, with the result that the *uenditio* of the estate (3, 78 *fin.*) was in the deceased's name and not in theirs. In effect they were not committed to the hereditary liabilities unless they chose, and to that extent were assimilated to *extranei heredes*. But whereas *extranei* who did not accept were not *heredes* at all, so that a will depending on them simply failed, *sui* were *heredes* in spite of their abstaining, and a will instituting them took such partial effect as was possible. The *ius abstinendi* extended to persons *in mancipio* manumitted and instituted *heredes* by the will, though properly they were simply *necessarii* (§ 160).

Extranei heredes, on the other hand, were held to be sufficiently protected against a *damnosa hereditas* by the fact that they became *heredes* only by their own deliberate act (§ 162; §§ 164 *sq.*) of acceptance. Acceptance once given was in principle final (§ 163), so that, until Justinian introduced the *beneficium inuentarii* (*Inst.* 2, 19, 6), one accepted at one's peril.

§§ 164–73. Aditio. Cretio

An *extraneus heres* might accept (*aditio, adire hereditatem*) either by a formal declaration known as *cretio* (to be examined below) or by *pro*

[1] Cf. 1, 21; *Inst.* 1, 6, 1.

[2] Not mentioned by Gaius. Cf. Buckland 317–18. Girard 945–6.

herede gestio, that is by doing some act showing an intention to be *heres*, such as occupying the deceased's house, cultivating his land, taking charge of his slaves, selling his property.[1] A third method appears to be mentioned in § 167: *uel etiam nuda uoluntate suscipiendae hereditatis*, but *uel etiam* probably indicates not an alternative, like the preceding *aut*, but an explanation of the idea of *p. her. gest.* as depending on intention.[2] Acceptance by *nuda uoluntas* is mentioned only here and in *Inst.* 2, 19, 7.

In classical law any *heres extr.* might accept by *cretio*, but no *heres* was obliged to do so who had not been so directed by the will instituting him. The will would name a time within which the act must be performed, whereas the general law laid down no time-limit for *aditio*, whether by *cretio* or *p. her. gest.* But there was a praetorian procedure[3] which could cause him to be excluded if he did not accept within a certain time, usually 100 days.

The earlier history of *cretio* and *p. her. gest.* is extremely doubtful. The natural view is that *cretio* must have been the original and in a sense obligatory method in all cases, but that the ineffectiveness of the requirement except in cases in which a time limit had been set by will led to the adoption of the expedient of treating any act of administration by the *heres* as being equivalent to acceptance, except where acceptance by *cretio* was prescribed by will. But though acceptance by *p. her. gest.* may be comparatively late, it does not follow that it is an informalization of *cretio*. It looks rather to be directly descended from *aditio* in the earliest sense. This is exhibited in the obviously primitive rules surviving for *usucapio p. herede*,[4] from which it seems safe to infer that the *heres extraneus*, when first he appeared, was merely the person who had the best right to acquire the vacant *res hereditariae*, and that he became owner only of those of which he took possession (*adire* in the original literal sense). It may have been in order to reduce the resulting chaos to order that jurisprudence adopted the expedient of taking acts of apprehension of individual *res hered.* as implying acceptance of the position of *heres*, with all its rights and liabilities.

[1] *Inst.* 2, 19, 7. Ulp. 22, 26.

[2] So Kunkel, *Röm. Recht* 333, n. 16. Solazzi, *Dir. ered. rom.* 2, 22, and Kniep, *ad* § 167, regard the words as a later addition. But this is improbable: cf. § 169, which would also have to be jettisoned.

[3] Incompletely described by § 167. What ordinarily happened was that the praetor, on the application of the creditors of the estate (not it seems on that of a *substitutus*), subjected the *heres* to an *interrogatio in iure an heres sit*, giving him a *spatium deliberandi* if he asked for it. Failure to answer affirmatively was taken as a repudiation, and *uenditio bonorum* could follow: 3, 78.

[4] Above, p. 71.

Cretio may have been invented by testamentary practice from the same or similar motives.[1]

Cretio. This formal act (*cretio* in the primary sense: § 164), which could be made obligatory by a properly drafted testamentary clause (§§ 165, 171–2, 177–8: also known as *cretio*), consisted in uttering a formula in the terms reported by § 168.[2] Witnesses, though not prescribed by law, would be practically necessary. The custom in Gaius' day was to execute a written *testatio* of the act with seven witnesses and to seal it up with their seals. A *heres* instituted *cum cretione* became *heres* by cerning within the prescribed time, nor was he barred by a previous decision not to cern (§ 168). The time was at the testator's discretion; 100 days were usual, but more or less might be specified; the praetor sometimes cut down too long a period (§ 170). The *dies* ought to be *utiles*, not *continui*, a point sufficiently explained by the text (§§ 171–3).

§§ 174–8. Substitutio. Cretio perfecta and imperfecta

Since a will failed entirely if no *heres* qualified under it, and since this was likely to happen if the solvency of the *hereditas* was doubtful and might easily happen in any case owing to the *institutus* dying before the testator or becoming otherwise disqualified, it was customary to provide a substitute *heres*, or even a series of substitutes, against the event of the *institutus* not taking, and to end with the substitution of a *seruus testatoris* accompanied by his manumission (§§ 153–4). The proper form is given by § 174: institution, direction to cern within so many *dies utiles* (*cretio uulgaris*: § 172), exheredation of the *institutus* if he should not cern within the time (*cretio perfecta*: §§ 177–8), substitution of an alternative *heres* (or *heredes*: § 175).

If there was no *cretio* clause, the *institutus* could accept by *cretio* or *p. her. gest.*, as he chose, at any time, subject to the praetor's power to

[1] The whole question is obscure. Cf. the divergent views of Buckland, *Tijdschr.* 3 (1922), 239 and Lenel, *Essays in Legal Hist.* (Vinogradoff) 120, 123 ff. and *SZ* 1916, 129. We have followed Lenel in many points, but cannot accept his basic argument that neither *cretio* nor *p. her. gest.* can be primitive, because they involve the conception of *hereditas* as an intellectual whole. Why should there be difficulty at any date in the idea of acceptance of the position of *heres*, a position familiar from the case of *sui heredes*?

[2] Subject no doubt to minor variations: cf. Ulp. 22, 28, and the *testationes cretionum* of the age of Gaius discovered in Egypt: *Textes* 809; Bruns 1, 319; *Fontes* 3, 179 (adds *PSI* 9, 1027). The essential seems to have been '*adeo cernoque*' with specification of the *hereditas* and alleged title.

fix a limit (§ 167). If there was a *cretio* clause, but it was not followed by an exheredation (*cretio imperfecta*: §§ 177–8), the consequences are instructive. Failure of the *institutus* to cern within the time was a realization of the condition under which the substitution was to take effect; consequently the *substitutus* could now become *heres* by accepting. But in the absence of an exheredation the first *institutus* was not excluded by his failure to cern, because in respect of his own institution his cerning was not a condition, but only a direction. Thus, even if he failed to cern in time, yet if he accepted by *p. her. gest.* within the time or by either method after the time, he became *heres*, though he had to share equally with the *substitutus* whom his failure to cern in time had let in (§ 177). There appears to have been an opinion that by *p. her. gest.* within the time the *institutus* lost his power to exclude the *substitutus* by cerning subsequently but still within the time, but Sabinus rejected this view (§ 178).[1] The question was settled by a constitution of M. Aurelius, reported by Ulpian (22, 34), to the effect that an *institutus sub imperfecta cretione* should exclude the *substitutus* altogether by either *cretio* or *p. her. gest.* within the time, but if he did neither, the *substitutus* should take the whole.

Cretio probably fell into disuse, though it may not have been formally abolished,[2] before Justinian.

§§ 179–84. Substitutio pupillaris

A man instituting as *heres* an *impubes* or unborn (expected *postumus*) *suus* could provide a substitute *heres* not only for the event of the institution failing (*substitutio uulgaris*), but also for that of the institution operating, but the *heres* dying whilst still a *pupillus* (*substitutio pupillaris*). The ordinary form (§ 179) is already a departure from the common law (§ 184), since in the second event the substitute will become *heres* of the *pupillus heres*, not the testator (§ 180). The explanation has been offered[3] that originally the *pupillus* was not *heres* till he was of full age, so that, if he died under age, the substitute could take without the principle *semel heres semper heres* being violated. But in classical law the substitute was *heres* of the *pupillus* and the consequence was not shirked that he inherited the whole of the *pupillus*' fortune, not merely what had come to him from the testator, and that

[1] On a possible ground for it cf. Buckland 314.

[2] *C.T.* 8, 18, 8, 1 (A.D. 407) compared with *C.* 6, 30, 17.

[3] Karlowa, *Röm. Rechtsg.* 2, 875; H. J. Wolff, *St. Riccobono* 3, 437. 460. Another view: Arangio-Ruiz, *R. Acc. Napoli* 53, 1 (1930), offprint; La Pira, *St. Bonfante* 3, 273.

this was so even if the *pupillus* had been exheredated by the testator (§ 182). But a relic of the original conception of the institute survived in the rule that a pupillary substitution could be made only in the ancestor's will and not by a separate act, though as a precaution it could be contained in separate *tabulae* (§ 181). As *Inst.* 2, 16, 5 puts it: *pupillare testamentum pars et sequela est paterni testamenti, adeo ut, si patris testamentum non ualeat, ne filii quidem ualebit*, or, as § 180 has it: it is a case of a single will of two *hereditates* rather than two *testamenta*.

The precaution suggested by Gaius (§ 181) indicates that there was a natural presumption that the substitute would be the same in either event, and M. Aurelius enacted that if either substitution was omitted it should be implied from the other. The point had been the subject of a famous controversy.[1]

§§ 185–90. Institution of Slaves

These sections have already been dealt with in connexion with §§ 153 *sq.*

§ 191. Legata. Generalities

Legatum was the old civil law form of singular gift by will. It could be made only by will (later also by codicil confirmed by will: § 270 a). Since a will necessarily instituted a *heres*, a legacy was always at the expense of a testamentary *heres* and, since a legacy could not be charged on a legatee (§ 271), directly so. *Heres* and legatee had to be different persons; a legacy to one of several *coheredes* was not a true legacy in so far as it fell on the *heres*-legatee and not on his *coheredes*. There was a difference of opinion (§ 244) as to whether a legacy to one in the *potestas* of the *heres* was not void *ab initio* as being in effect a legacy to the *heres* himself. True the legatee might not still be *in potestate heredis* when the will took effect, but there was a rule that a legacy which would fail if the testator died at once was void *ab initio*.[2] To the account of the controversy in § 244 we need only add that the Sabinian view came to be adopted (Ulp. 24, 23; *Inst.* 2, 20, 32). In regard to *legatum* to the person in whose *potestas* the *heres* was the more reasonable view, advocated by Seruius in the other case, was accepted, namely that the legacy only failed if the *potestas* still subsisted when the legacy took effect (§ 245).

[1] Cf. Schulz 79. Further details Buckland 302; Girard 881.

[2] *Regula Catoniana*, probably of the younger Cato. But of restricted application. Cf. *D.* 34, 7.

A legatee needed passive *testamenti factio*, the same capacity with some differences as a *heres*.[1] Thus an *incerta persona* could be neither *heres* nor legatee (§§ 238 *sq.*); on the other hand, municipalities could not in general be *heredes*, but could be legatees (e.g. § 195; Ulp. 24, 28).

If the will was void, so were the legacies in it; if in the event it failed to operate, the legacies failed likewise. An *extraneus* testamentary *heres* who was also *heres ab intestato* could make the legacies fail by not making *aditio*, but the praetor would intervene.[2]

Formal rules. A legacy preceding the institution of *heres*, on which it depended, was void (§ 229). A legacy must be expressed in one of the four forms known to the civil law (§§ 192 *sq.*), and since these forms differed in conditions of validity and effects, the, or an, appropriate form had to be employed. Both rules were abolished later,[3] but even in Gaius' day the second rule had been greatly modified.[4]

What could be legated. Because the old forms still persisted in a sense, we are obliged to consider this question under each form separately. Justinian, being disembarrassed of the forms, was able (*Inst.* 2, 20) to treat of legacies in general terms and more fully.

Condicio. Legacies could be given conditionally, the rules being much the same as for conditional institution of *heredes*.[5] Thus impossible or immoral conditions were simply struck out (3, 98; *Inst.* 2, 14, 10). But a penal condition, that is, one intended to force the *heres* to some act or abstention (*legatum poenae nomine*: § 235), made the legacy void; the same applied to a penal *fideicommissum* (§ 288) and to the penal addition of a *coheres* (§ 243). This principle, of which, since it did not depend on the character of the act demanded of the *heres*, it is difficult to see the motive, was abolished by Justinian.[6]

Dies. Here the rules differed somewhat from those applying to institutions.[7] A legacy could be left from a *dies certus*, and even from a *dies incertus* which was bound to arrive in the legatee's lifetime. Thus, whilst a legacy *post mortem heredis* (§ 232) *aut legatarii* (*Inst.* 2, 20, 35) was void and was not saved by being made as from the day before death (§ 232; cf. 3, 100), a legacy at the moment of death (*cum morietur*) was good, presumably because a man was held to be alive at the

[1] *Inst.* 2, 20, 24. Above, p. 92.
[2] *Edictum* § 168.
[3] *Inst.* 2, 20, 2. 34.
[4] Below, p. 112.
[5] Above, p. 92.
[6] *Inst.* 2, 20, 36. *C.* 6, 41, 1 (A.D. 528).
[7] Above, p. 92.

moment of his death.[1] However, the whole rule was abrogated by Justinian.[2]

Vesting and operation of legacies. *Dies legati cedit* means that the legacy has vested, so that, if the legatee now dies, his *heres* can claim it, unless the gift was of a right terminating at the donee's death. In Gaius' day, owing to the *L. Papia*, *dies cedit* on the opening of the *tabulae testamenti* (Ulp. 24, 31), but Justinian restored the older rule that *dies cedit* on the death of the testator. *Dies uenit*[3] means that the legacy is now recoverable from the *heres*. This occurred when the *hereditas* vested, i.e. at the death if the *heres* was *necessarius*, on *aditio* if he was *extraneus*, except of course where the legacy was delayed by *condicio* or *dies*.

Lapse of legacies. A legacy, though good *ab initio* and contained in a will that took effect, might fail for various reasons, chiefly the legatee's death or loss of capacity before *dies cedens* or his rejection of the gift. The civil law of lapse of a legacy left to a single legatee was that the *heres* benefited, keeping the thing or being relieved of an obligation according to the case. The effect of lapse in the person of one of several joint legatees varied with the form of legacy employed and must therefore be dealt with after the forms have been considered. But the whole law of lapse had been profoundly changed by the Augustan *Ll. Iulia et Papia Poppaea*, to which, owing to their practical importance, Gaius devotes some attention,[4] but which we shall pass over as having little interest for the ordinary student today.

Ademptio (*Inst.* 2, 21). A legacy could be revoked either by the will or by codicil; the revocation might be by express words (*ademptio*) or be implied by transference to another legatee (*translatio*); but in the latter case there might be a question as to the testator's intention. There could also be revocation operating only by *exceptio doli*, as in the case discussed in § 198 of alienation of the *res legata* by the testator after the will.[5]

§§ 192–223. The Four Forms of Legacy

Legatum per uindicationem (§§ 193–200). The original form was doubtless *do*, *lego* (cf. § 104), but according to Gaius either word sufficed, and any doubt as to *sumito* or *sibi habeto* or *capito* had disappeared before the end of the classical period (Ulp. 24, 3). This

[1] Cf. Buckland 341.
[2] *Inst.* 2, 20, 35. *C.* 8, 37, 11 (A.D. 528).
[3] Past tense: Buckland 343.
[4] Cf. §§ 111. 144. 206–8. 286. 286a.
[5] But see further *Inst.* 2, 20, 12. Other cases: Buckland 346; Girard 974.

legacy operated as a conveyance from the testator direct to the legatee, but the exception to the universality of the *heres'* succession is more apparent than real since a *leg. p. u.* was subject to debts and the *L. Falcidia*. The *res corporalis* or other right *in rem* (usufruct, praedial servitude) legated had to belong to the testator *ex iure Quiritium* both when he made his will and when he died, except that ownership at the time of death sufficed in the case of *res quae pondere numero mensuraue constant* (§ 196).[1] The Sabinians held that title to the *res legata* vested in the legatee at once on the *dies ueniens*, i.e. on *aditio* by the *heres* or on the later fulfilment of a condition, irrespectively of the legatee's acceptance or even knowledge, though if he rejected the legacy they treated it as never having been made; pending a condition they laid the title in the *heres* (§§ 195. 200). The Proculians held that title vested in the legatee only on his acceptance and what meanwhile (and pending a condition) the thing was *res nullius* (§ 200). Gaius (§ 195) regards the Proculian view as having been confirmed by a constitution of Antoninus Pius,[2] but it seems that it was the Sabinian view that on the whole ultimately triumphed.[3]

Legatum per damnationem (§§ 201–8). The original form must have been *dare damnas esto*, but Gaius (§ 201) allows *dato* and Ulp. (24, 4) also *facito* and *dare iubeo*. It transferred no previously existing right to the legatee, but merely imposed an obligation in his favour on the *heres*. It might be to convey to him, and in the best form (§ 204), a *res corporalis* or a lesser right *in rem*, to make over to him a fraction of the net *hereditas* (*partitio legata*: §§ 254 *sq.*) or the *peculium* of a slave (*Inst.* § 20), to assign to him a debt due to the testator (*legatum nominis*: *Inst.* § 21), to release him from a debt that he himself owed the testator (*legatum liberationis*: *Inst.* § 13), or in general to render him some service, such as to build him a house (*facito*: Ulp. 24, 4; *Inst.* § 21). The only case discussed by Gaius is the obligation to convey (*dare*) a *res corporalis*. Of course this could not be a *res extra commercium* nor yet a thing already belonging to the legatee (*Inst.* § 4), but it might be a thing belonging neither to the testator nor the *heres*, but to a third party; the *heres* would have to buy the thing for the legatee or pay him its value if the owner would not sell (§ 202; *Inst.*

[1] There is a curious parallel in English law. Till the *Wills Act*, 1837, a will could operate as regards real estate of freehold tenure only upon that which the testator had at the date of the will, and till the *Land Transfer Act*, 1897, a devise of freehold land operated as a conveyance direct to the devisee.

[2] As noted above, p. 5 n. 1, this remark is suspected of being an early post-Gaian addition.

[3] Cf., however, S. Romano, *Sull' acquisto del legato 'per uind.'* (Padua 1933).

§ 4). The legacy might also be of *res futurae* (§ 203). This wide scope must be a development. The original case was probably that of an obligation *dare certam rem* or even *certam pecuniam*. This is made probable by the fact that a legacy *per damn.* of *res quae pondere numero* or (perhaps) *mensura constant* was one of those releasable by *solutio per aes et libram* (3, 175) and by the further fact that if the legacy was for a *res certa* (a specific thing or a definite quantity of fungibles), a *heres* who denied liability was condemned in double (4, 9. 171; cf. § 282–3). From these features some writers infer that the original sanction of a *leg. p. d.* was *manus iniectio* (*siue damnatus*: 4, 21).[1]

The contrast between these two principal forms of legacy stands out in the respective remedies: on *leg. p. u.* it was *uindicatio* (4, 3. 5), on *leg. p. d.* an *actio ex testamento*, which was a *stricti iuris* action *in personam* (§§ 204. 213) resembling that on a stipulation except that the words *ex testamento* occurred in the claim (4, 55), and that where the claim was for a *res certa*, condemnation was in *duplum*.[2]

Legatum sinendi modo (§§ 209–15). This meant what it said (§ 209). It amounted to a mild form of *leg. p. d.* The *heres*, according to what looks like the better opinion (§ 214), was not bound to convey (*dare*), but merely to let the legatee take. Such an obligation could apply only to a thing which at the moment of the testator's death belonged either to him or the *heres* (§ 210), though a minority opinion brought in things acquired by the *heres* afterwards (§§ 211–12). Like a *leg. p. d.* this legacy was enforceable by a *stricti iuris* action *in personam* (§ 213), but apparently the *formula* always claimed an *incertum* (§ 213) and there was no doubling of damages. According to Julian (§ 280) interest and *fructus* were recoverable as on a *fideicommissum*.[3]

Legatum per praeceptionem (§§ 216–23). On the Sabinian view, which probably was historically correct, a legacy in this form (§ 216) was valid only if the legatee was one of several *coheredes*, and was enforceable only in the action for partition of the *hereditas* between them (*ao. familiae erciscundae*). Thus the thing legated had to be something falling within the scope of the *officium iudicis* in that action: it must have belonged to the testator at death, if only by bonitary title (§ 222), with an extension to property he had alienated by *fiducia cum creditore* (§§ 59–60), which the *iudex* in the partition action had power to order to be redeemed at the expense of the estate (§ 220).

The Proculian view, however, was that there was little difference between this form of legacy and one *per uind.* If a legacy *per praec.*

[1] Below, p. 246.
[2] *Edictum* § 170.
[3] Below, p. 118.

were left to any one but a *heres*, the Proculians held that the prefix *prae-* was to be disregarded as surplusage (§ 220), and even if it was to a *heres* they seem to have contemplated its enforcement by *uindicatio* as possible in suitable cases, though where that remedy was inapplicable they fell back on the *officium iudicis* in an *ao. fam. ercisc.* (§ 222). It was said that their view was supported by a constitution of Hadrian (§ 221). In any case the *SC. Neronianum*,[1] once it was properly understood, rendered the controversy of no practical importance (§ 218).

Joint legacies (§§ 199. 205–8. 215. 223). A legacy of, for example, a piece of land to Titius and Seius in named shares was not a joint legacy, but two legacies. But a legacy of a thing to Titius and Seius simply (*coniunctim*) or a legacy of a thing to Titius followed by one of the same thing to Seius (*disiunctim*) was a joint legacy (§ 199). The effect of a joint legacy varied according to the form of legacy (*per uind.*, *per damn.*, &c.) in which it was left.

A joint legacy *per uind.* or *per praec.*, whether *coniunctim* or *disiunctim*, entitled each legatee to the whole thing, but owing to the equal right of the other or others each got only an undivided share (*concursu fiunt partes*). Thus at civil law, apart from the *leges caducariae*,[2] lapse in the person of one legatee increased the share of the other or others (*ius accrescendi*: §§ 199. 223). A joint legacy *per damn.* was a distinct gift to each legatee; if made *coniunctim* it gave a proportionate part to each, if made *disiunctim* the whole or its value to each. Thus lapse in the person of one legatee did not occasion a *ius accrescendi* for the other or others, but merely relieved the *heres* of his obligation *pro tanto*. The law as to legacy *sin. modo* made *coniunctim* appears to have been the same, but the effect of one made *disiunctim* was disputed (§ 215).

The *leges caducariae* produced further complications into which we shall not enter.[3] Their disappearance and the removal of the distinctions between the old forms of legacy enabled Justinian to deal comprehensively with the whole matter of joint legacies. We need not go beyond the summary statement of *Inst.* 2, 20, 8, that all joint legacies, whether expressed *coniunctim* or *disiunctim*, were to be shared between the *collegatarii* and that lapsed shares were to accrue to the legatees who took.

Relaxation of formalism. A legacy had to be in one of these four forms and even so might fail if an inappropriate form was chosen.

[1] Below, p. 112.
[2] *L. Iulia*, 18 B.C., and *L. Papia Poppaea*, A.D. 9: §§ 111. 144. 206–8. 286. 286a.
[3] Cf. Buckland 338; Girard 986–7.

The first requirement was not severe since, as we have seen, the two principal forms could be expressed in various ways. The second requirement, of an appropriate form, was a greater difficulty. This was removed by a *SC. Neronianum* (A.D. 54–68) which laid down that a legacy that failed because of having been put in an inappropriate form should be treated as if it had been put in the most favourable form (*optimo iure*: § 197; Ulp. 24, 11 a).[1] The commonest defect would be that ownership of the *res legata* was not where the form employed required it to be; consequently the best form for practical purposes was *per damnationem*, which was exempt from any such requirement. It is in connexion with this defect that both Gaius and Ulpian mention the *SC.*, but it had a wider applicability, though this may not have been intended, or at any rate generally realized, at first. Thus Julian (§ 218), correcting Sabinus, held that a *l. p. praec.* to someone not a *heres*, even admitting the Sabinian view that it was void at civil law, was saved by the *SC.*, since it could have been validly made in one of the other forms. He was careful to add that a legacy which would have been invalid however expressed, e.g. one in favour of a *peregrinus*, would not be saved.

Thus after the *SC. Ner.* the validity of a legacy ceased to depend on the correct form being employed, but with some doubt[2] we assume that it remained necessary to employ one or other of the old forms until at length even this was made unnecessary by a constitution of 339.[3] Ultimately Justinian by a constitution of 529[4] enacted that all legacies should be treated as being of a single kind and be sanctioned by actions both *in rem* and *in personam*. Moreover by a constitution of 531[5] he fused, so far as that was possible, the law of legacies and *fideicommissa*.

§§ 224–8. The Lex Falcidia

Heredes were not liable for legacies beyond the net *hereditas*, but to that extent were liable in full at civil law. This might induce a *heres*, if not *necessarius*, to refuse the *hereditas* and thus cause an intestacy, or at least to bargain with the legatees before consenting to *aditio*. The ineffectiveness of the two earlier *leges* mentioned, the *L. Furia* (*c.* 200 B.C.; § 225; 4, 23–24) and the *L. Voconia* (169 B.C.: §§ 226. 274), is so

[1] Cf. §§ 212. 218. 220. 222.
[2] Ulp. 24, 11a reports the *SC.* in very wide terms.
[3] *C.* 6, 37, 21.
[4] *C.* 6, 43, 1, summarized in *Inst.* 2, 20, 2.
[5] *C.* 6, 43, 2, summarized in *Inst.* 2, 20, 3.

evident that one doubts whether the protection of *heredes* was their object. At any rate, the definite regulation of the matter came from the *L. Falcidia* of 40 B.C.[1] Gaius merely states the general principle of the *lex*; the account in *Inst.* 2, 22 is fuller and more exact. It was to the effect that legacies were not to be allowed to reduce what remained for the *heredes* to less than a quarter of the *hereditas*. *Hereditas* meant for this purpose its value at the moment of death (*Inst.* § 2), deducting debts, funeral expenses, and the value of slaves manumitted (*Inst.* § 3). The right given to *heredes* applied to them individually: *in singulis heredibus ratio legis Falcidiae ponenda est* (*Inst.* § 1 *fin.*; cf. § 259), each of them being entitled as against the legacies falling on his share to a quarter of his fraction of the *hereditas*, even if the total of all legacies did not exceed three-quarters of the whole *hereditas*. Abatement operated *ipso iure* and fell on the legacies affected *pro rata*. The testator could not prevent a *heres* from getting his quarter, but he could order that abatement should fall on some legacy or legacies before others. Testamentary manumissions were not interfered with by the *L. Falcidia*; they were regulated by the slightly later *L. Fufia Caninia* (2 B.C.; §§ 228 &c.).

§§ 229–45. Various Causes of Invalidity of Legacies

The several topics have already been dealt with incidentally.[2]

§ 246. Fideicommissa

Origin of fideicommissa. Until the beginning of the Empire, if a man requested someone who took a benefit by his death to make over the whole or part of that benefit or its value to someone else, but made the request in a manner not binding at civil law (*non ciuilibus uerbis, sed precatiue*: Ulp. 25, 1), the resulting *fideicommissum* was of only moral obligation. Augustus, beginning with particular requests made *per salutem eius* and outrageous breaches of faith, ordered the consuls to intervene administratively (*auctoritatem interponere*), and this intervention grew up into a regular jurisdiction for the enforcement of *fideicommissa*, which was eventually entrusted to a special *praetor fideicommissarius*.[3] This new institution, *fideicommissum*, was not praetorian, but in one sense civil; it was, however, no part of the old *ius*

[1] Text: Bruns 1, 110. Cf. Scialoja, *BIDR* 32, 273.
[2] Above, pp. 91–92, 106–8.
[3] *Inst.* 2, 23, 1.

ciuile, but *ius nouum*, an imperial creation developed by jurisprudence, enforceable under *cognitio extraordinaria*,[1] not *per formulam* (§§ 278–9).

There were two motives for the legal recognition of *fca.*: they could be created without the tiresome formalities of a *testamentum*, and they were free from a number of the restrictions that the old civil law imposed on *legata*. There followed a slow assimilation of *fca.* and *legata*, largely after Gaius, though he provides some illustrations. On the one hand some of the old restrictions on *legata* were imposed on *fca.* (§§ 284–8) and in later law the creation of *fca.* was subjected to some formality, though never to the use of sacramental words or to the full formality of a *testamentum*; on the other hand, legacies, as we have seen, lost their old formalism and were freed from some of the old restrictions freedom from which in Gaius' day constituted advantages of *fca.* (§§ 268–83). In the end Justinian was able to declare the fusion of *legata* and *fca.* (*Inst.* 2, 20, 3), though in one or two matters the distinction was ineffaceable.

Methods of creation. The request founding a *fc.* might be made in any words (§ 249),[2] so long as it was not so qualified as to show an intention to leave the addressee free.[3] It might be contained in a *testamentum* or in a codicil, or be merely spoken. Until the later Empire there was no legal requirement of witnesses for either a codicil or an oral *fc.*[4]

Codicils (*Inst.* 2, 25). Gaius mentions codicils only in connexion with *fca.* (§§ 270a. 273) and with no word of explanation. We must digress. To us a codicil is a testamentary document altering or adding to a will, but in spite of its separate name it differs from a will neither in form nor in substance. But in Roman law a codicil was any document left by the deceased, other than a *testamentum*, which dealt with his succession. There could be a codicil without a will, and a codicil differed from a will both formally and substantially. Codicils, except that they were in writing, were completely formless; even the requirement of witnesses came long after Gaius. Like *fca.* they were a juristic creation initiated by Augustus (*Inst.* 2, 25 pr.).

i. There could be any number of codicils and they could co-exist with a will; thus they practically frustrated the principle of *unitas actus* still insisted on by Justinian (*Inst.* 2, 10, 3) for a *testamentum*. If

[1] Below, p. 222.

[2] Cf. *Inst.* 2, 24, 3; Ulp. 25, 2: *Verba fideicommissorum in usu fere haec sunt: fidei committo, peto, uolo dari et similia.* 3 *Etiam nutu relinquere fideicommissum usu receptum est.*

[3] Buckland 354.

[4] *Inst.* 2, 23, 12. On later imperial legislation as to witnessing cf. Girard 978 n. 2.

there was no will, they could impose *fca.* on the intestate *heres*, thus substantially, though not nominally, frustrating the principle against partial testacy.

ii. The difference between codicils confirmed by will and those not so confirmed is important. Unconfirmed codicils (therefore all codicils of an intestate) could operate only by way of *fc.* (§§ 270. 273). In wills the practice was expressly to confirm or revoke any previous codicils and to confirm in advance any that might be made later.[1] If a will was silent as to previous codicils, it became a question of interpretation whether or not they were impliedly annulled (*Inst.* 2, 25, 1). Confirmed codicils were read into the will and treated as part of it; in other words, the *tabulae testamenti*, which had themselves originally depended on referential words in the testator's *nuncupatio* (§ 104), were allowed to extend themselves by reference to other documents.[2] Confirmed codicils, though like a will they might impose *fca.*, could make *legata* and confer *libertates* directly; the one thing they were never allowed to do was to make or unmake a *heres* (§ 273). Thus, in spite of their close association in origin and practice, there was no necessary connexion between codicils and *fca.*: *fca.* could be imposed by other means and codicils if confirmed could operate otherwise than by way of *fc.*

Substantial requirements of fca. Three persons were involved: the creator of the *fc.*, whom we will refer to as the testator, the person charged with the *fc.* (*fiduciarius*), and the beneficiary (*fideicommissarius*). The testator required active *testamenti factio* (Ulp. 25, 4), and passive *t.f.* is presupposed in the *fiduciarius*, since he had to be a person taking a benefit by the testator's death. He might be any such person—a *heres*, whether *testamento* or *ab intestato* (§ 270), the *heres* of a *heres* (indirectly: § 277), a legatee or even a *fideicommissarius* (§ 271). Whether the *fideicommissarius* needed *t.f.* depends on the date referred to. In the early days of *fca.* it was one of their chief advantages that they enabled one to benefit persons incapacitated by the ordinary law. But *fca.* to *peregrini* were put an end to by Hadrian (§ 285), *fca.* to *caelibes* and *orbi*,[3] which rather surprisingly had been tolerated, were brought under the *leges caducariae* by the *SC. Pegasianum* (reign of Vespasian: §§ 286–6a), *fca. incertis personis* were subjected to the common law of *legata* by *SC.* of the reign of Hadrian (§ 287), as were, after a doubt,

[1] At some date it became customary to direct that if the will failed as a will it was to be treated as a codicil: Buckland 360; Girard 977 n. 4.

[2] The earliest codicils to be legally enforced seem to have been codicils confirmed by will, but to have operated by way of *fc.*: *Inst.* 2, 25 pr.

[3] Above, p. 92.

fca. poenae nomine by jurisprudence (§ 288). Gaius tells us that *fca.* could still be used to evade the respective incapacities of women under the *L. Voconia* (§ 274) and of Latin freedmen under the *L. Iunia* (§ 275). In the end Ulpian puts it that a *fideicommissarius* other than a Junian Latin requires *testamenti factio* (Ulp. 25, 6. 7).

The scope of *fc.* was as wide as that of *leg. p. d.* (Ulp. 25, 5). The benefit conferred on the *fideicommissarius* could be practically anything, so long as the value of the benefit taken by the *fiduciarius* was not exceeded (§§ 261–2).

§§ 247–59. Fideicommissum hereditatis

If a *heres* was charged by *fc.* to make over the whole or a fraction of the *hereditas*, it was his duty to make over (*restituere*) the net whole or fraction to the *fideicommissarius*, but even when he had done this he remained *heres*, alone entitled to get in the hereditary assets and alone liable for the hereditary debts (§ 251). This was an awkward position, since the net value of the *hereditas* might be uncertain, but not an unprecedented one. In the case of *fc.* of the whole it was similar to that produced by a *heres* selling the *hereditas*, in the case of *fc.* of a fraction it was similar to that produced by a legacy of a fraction of the *hereditas* (*partitio legata*). These two precedents were followed. If the *fc.* was of the whole, the *heres* sold it *nummo uno* to the *fideicommissarius*,[1] the parties entering into the reciprocal stipulations usual when a *hereditas* was sold (§ 252). If the *fc.* was of a fraction, the stipulations usual between a *heres* and a *legatarius partiarius* were taken (§§ 254. 257).

This system was doubly defective. (i) The customary stipulations left either party dependent on the solvency of the other. (ii) Since the *L. Falcidia* did not apply to *fca.*, a *heres* might have no sufficient motive for accepting the *hereditas* and if he did not accept the *fc.* would fail. Legislation intervened.

(i) **SC. Trebellianum** (reign of Nero, probably A.D. 56: §§ 253. 255).[2] The effect of this *SC.* was that on the *heres* agreeing even informally[3] to transfer the *hereditas* to the *fideicommissarius*, the latter became, in whole or part according to the case, *heredis loco* and the civil title of the *heres* was rendered merely nominal. The praetor transformed all actions lying for or against the *heres* at civil law into

[1] This means a nominal contract of *emptio uenditio*, not a conveyance.
[2] Bruns 1, 202. Ulp. *D.* 36, 1, 1, 2. Cf. Lemercier, *RH* 1935, 632.
[3] Ulp. *D.* 36, 1, 38 pr.

actiones utiles for or against the *fideicommissarius* by inserting in the *formula*, as in the case of a *bonorum possessor* (4, 34), the fiction *si heres esset*,[1] and paralysed civil actions brought by or against the *heres* by an *exceptio restitutae hereditatis*. It would have been more straightforward simply to transfer the position of *heres* to the *fideicommissarius*, but the Senate had not yet been recognized as having power to alter the civil law.[2] In the circumstances it was a successful piece of legislation.

(ii) **SC. Pegasianum** (§§ 254–9, reign of Vespasian). This dealt with the second defect mentioned above by extending the principle of the *L. Falcidia* to *fca.* (including *fca.* of *res singulae*: § 254). A *heres* charged with a *fc.* of more than three-quarters of the *hereditas* was allowed to retain a quarter. Moreover, if nevertheless he refused to accept the *hereditas*, he was made compellable by the praetor to do so at the instance of the *fideicommissarius* (§ 258). In this last case the *Pegasianum* provided that the automatic transfer of the *Trebellianum* should take place, and of course the *Trebellianum* still functioned if the *heres* was not charged to transfer more than three-quarters. But in all other cases, the *Pegasianum* being applicable, it was held that the *Trebellianum* was not, even if the *heres* abstained from claiming his quarter (§ 257).[3] Consequently, in these cases the old stipulations, which the *Trebellianum* had rendered needless, had to be revived. What is astonishing is not that the *Pegasianum* should have been so badly drafted, but that it should not have been amended till Justinian (*Inst.* 2, 23, 7).[4]

§§ 260–2. Fideicommissa of res singulae

These sections contain nothing that has not been dealt with in the commentary on § 246, except the doubt at the end of § 262 as to whether a *fiduciarius* charged to make over a thing not belonging to him was bound, like a *heres* under a *leg. p. d.*, if the owner would not sell it, to pay the *fideicommissarius* its value. Justinian suppressed the doubt (*Inst.* 2, 24, 1).

[1] The evidence for the use of this fiction rather than of the *formula Rutiliana* (4, 35), which § 252 *fin.* may suggest, is Theoph. 2, 23, 4 (Ferrini 241). Cf. *Edictum* § 68.

[2] Above, p. 15.

[3] But this last point seems not to have been unanimously accepted: Paul *Sent.* 4, 3, 2.

[4] Another provision of the *Pegasianum* is mentioned in § 286a.

§§ 263–7. Fideicommissa to manumit

A slave was directly manumitted by will and became at once, on the will operating, free and a freedman of the testator (*libertus orcinus*: *Inst.* 2, 24, 2), if he had belonged to the testator *ex i. Q.* at the time both of the will and of the death and if the manumission was expressed in approved words placed in the will after the *heredis institutio* and clearly identifying the slave (§§ 230. 239. 267. 272). Indirect manumission by means of a *fc.* was much freer. The *fc.* could be imposed in any of the ways explained above on any one benefiting by the disponent's death, it was subject to no formal verbal requirements, and the slave need not have belonged to the testator at all, but might be the property of the beneficiary or any third party. The *fc.* became binding on the acceptance of the benefit regardless of the value of the slave, except that where the slave had to be bought from a third party (§ 265) the price offered for him need not exceed the value of the benefit. If the third party would not sell, the *fc.* was extinguished (§ 265); Justinian kept it alive against the possibility of a later purchase (*Inst.* 2, 24, 2). The patron of the *libertus* was the person who performed the manumission, not the deceased author of the *fc.* (§ 266).

§§ 268–83. Existing Differences between Fideicommissa and Legata

By *fc.* one could impose a duty on one's *heres ab intestato* (§ 270) or on a *legatarius* (§ 271), procure the liberation of a *seruus alienus* (§ 272), alter one's will fundamentally even in an unconfirmed codicil (§ 273), evade the rule (probably obsolete) of the *L. Voconia* against the institution of a female *heres* by a wealthy testator (§ 274), evade the prohibition of testamentary benefactions to Junian Latins (§ 275), and steer clear of a *SC.* prohibiting the institution of one's slave under 30 (§ 276). *Fca.* belonged to the *cognitio extraordinaria*, that is, they were recoverable under a special jurisdiction and not, even at Rome, by the ordinary formulary procedure (§§ 278–9). *Fructus* and interest on them could be recovered if there was delay in satisfying them, which was not the case with *legata* (§ 280: doubt as to *leg. sin. modo*), but there was no doubling of the claim in case of denial as in an action on a *leg. p. damn.* (§ 282), and consequently there was no bar to the recovery of what had been paid by mistake (§ 283). A *testamentum* had to be in Latin and its proper contents—*heredis institutio*, *legatum*, *manumissio*, *tutoris datio*—were tied to more or less fixed expressions. Later, prob-

ably after the generalization of citizenship in 212, certainly before 439,[1] *testamenta* were allowed to be in Greek. This had always been so for *fca.* (§ 281).

There is one advantage of *fca.* over civil law gifts that requires special notice. At civil law one could institute a substitute to one's *heres* for the event of his never becoming *heres*, but not one to take his place after he should have become *heres* and then died (§ 184). But by *fc.* one could charge one's *heres* when he died to hand over the *hereditas*[2] to someone else (§ 277). At least till *fca.* to *personae incertae* were disallowed by a *SC.* under Hadrian (§ 287), there seems to have been nothing to prevent the making of any number of such *fca.* to take effect successively as each successor died. Moreover, there seems to have been power to make trust property inalienable.[3]

§§ 284–8. Obsolete Differences between Fideicommissa and Legata

The contents of these sections have already been dealt with.[4]

[1] *Nou. Theod.* 16. Kreller, *Erbrechtl. Untersuch.* (1919) 331.
[2] Or for that matter *res singulae*: § 269 (?).
[3] The subject lies outside our scope. Cf. Buckland 359. 362–4.
[4] Above, p. 115.

BOOK III

SUCCESSION AB INTESTATO

As the text, supplied from the *Collatio*, stands, the transition to intestate succession is decidedly abrupt. Almost certainly the beginning of the book is lost, unless indeed it survives *incognito* in *Inst.* 3, 1 pr. That passage at any rate opens the new subject properly with a definition of intestacy: *Intestatus decedit qui aut omnino testamentum non fecit, aut non iure fecit, aut id quod fecerat ruptum irritumue factum est, aut nemo ex eo heres extitit.* But the definition is incomplete. Intestacy is not just the fact that someone has died leaving no effective will; the deceased must further have been a person capable of having a *patrimonium*; he must therefore have been a *ciuis* (male or female) and *sui iuris*.[1] There is an intestacy if such a person has left no testamentary *heres*, so that one has to be supplied by the law. But the absence of a testamentary *heres* must first be established. If a deceased has left a *testamentum* which will become effective if the *heres* instituted by it accepts, there is an intestacy only if and when *aditio* by him becomes impossible, e.g. by his dying or refusing to accept. It is at that moment that the rules determining who is *heres ab intestato* are applied; it may of course coincide with the death, but it may well be later, and if so, the results may obviously be different (§ 13; *Inst.* 3, 1, 7. 3, 2, 6). Nevertheless, even when the intestacy opens at a date later than the death, no one can become *heres* who was not in existence, i.e. either born or *in utero*, at the time of the death.

It should be observed that Roman succession on intestacy was necessarily universal. In the absence of testamentary dispositions there was no classification of *res*, similar to that into real and personal property, to cause some *res* to go one way and others another. There might be several *heredes ab intestato*, but they simply shared the *hereditas* as a whole.

Historical outline. The civil law of intestate succession as laid down by the *Twelve Tables* remained unchanged for many centuries and was not systematically reformed till Justinian. Towards the end of the Republic the praetor introduced important modifications by means of *bonorum possessio*; these left the technical devolution of the civil law *hereditas* untouched (§ 32). Changes of civil law by statute

[1] This leaves out of account the anomalous and comparatively late quasi-succession to *peculium castrense*, *quasi castrense*, and *bona aduenticia*: Buckland 376.

began only in the reign of Hadrian, with the *SC. Tertullianum*, just when further praetorian reform was made impossible by the stereotyping of the Edict. Other statutes followed, slowly at first; they were changes of detail, not of basic principles, but their cumulative effect had greatly altered the system of the *Twelve Tables* by the time that Justinian came to the throne. Justinian began by making further changes of detail, as can be seen in the *Institutes*, but finally, by *Novels* 118 (A.D. 543) and 127 (A.D. 548), he introduced a basically new system, from which the non-feudal law of modern Europe is descended.

Order of topics. Gaius deals first with succession to *ingenui* (§§ 1–38) and then with succession to *liberti* (§§ 39–76).

§§ 1–24. The Civil Law of Succession to Ingenui

Apart from the *SC. Tertullianum*, two clauses of the *Twelve Tables*, with their *interpretatio*, still constituted the whole civil law in Gaius' day. As an elementary exposition of contemporary law our text cannot be bettered. We will only add a brief commentary on the text of the *Twelve Tables*, which rather surprisingly Gaius does not quote. *XII Tabb.* 5, 4 *Si intestato moritur cui suus heres nec escit, adgnatus proximus familiam habeto.* 5 *Si adgnatus nec escit, gentiles familiam habento.*[1]

Si intestato moritur. This opening shows that wills were already normal, if not so common as later. In our view[2] the will referred to can only have been the *test. calatis comitiis*, which necessarily instituted a *heres*.

cui suus heres nec escit (§§ 1–8). We have already defined *sui heredes* and remarked on the nature of their succession, which indeed was a continuation rather than a succession.[3] The statute does not create or even confirm the first right of *sui*, but takes it for granted. Thus the law of the matter is not statutory or even interpretation in our sense, but *interpretatio*, juristic law transmitting and developing national custom, *ius ciuile* in the special sense.[4]

So long as the *hereditas* was not divided, *sui heredes* succeeding jointly were *consortes*, their *consortium* bearing the archaic name *ercto non cito*.[5] The *Twelve Tables* provided an *actio familiae erciscundae* for

[1] *Textes* 14, Bruns 1, 23 and *Fontes* 1, 38. For the literature cf. Berger, *PW* 4A, *Tabulae duodecim*, cols. 1930–1, or *Fontes l.c.*

[2] Above, pp. 86 ff.

[3] Above, p. 96 and p. 101. The words *matrimonii causa* at the end of § 3 are misleading, because wives in the fiduciary *manus* of their husbands also had *filiae iura*, though other women in fiduciary *manus* had not: 1, 115b. 118.

[4] Pomp. *D.* 1, 2, 2, 12.

[5] Below, on 3, 154a.

the enforcement of partition (4, 17a). Gaius, who tells us this, rather implies[1] that previously there had been no such action, but even so, the fact that the *Twelve Tables* say nothing as to the method of division would show that there was already in existence a well-established method, customary in non-contentious division. This ancient customary system divided the estate *per stirpes*: descendants in the first degree shared equally, and the share of any such descendants who had ceased by death or *cap. deminutio* to be *sui heredes* went to their respective descendants, if any, who had remained in the deceased's *potestas* and been rendered *sui iuris* by his death.

Besides the special nature of the succession of *sui* as being *necessarii*, the remarkable features are the absence of primogeniture and the equality of the sexes. The former is explained by and also helps to explain the abnormally early appearance of the *testamentum*. The latter was much attenuated by the *perpetua tutela mulierum*; moreover, since a woman could not have *sui heredes* (2, 161; 3, 43. 51), she was not represented by her descendants in a division *per stirpes*. This is not a sign of anti-feminism, but a logical consequence of the agnatic family system: a woman's descendants were in their father's family: *mulier familiae suae caput et finis est*.

adgnatus proximus familiam habeto (§§ 9–16). *Agnatio* and its destruction by *cap. deminutio* have already been explained.[2] The Roman system of reckoning propinquity of kinship, cognatic as well as agnatic, was to count the generations or steps (*gradus*) up to and then down from the common ancestor. Thus brothers are in the second degree, uncle and nephew in the third, first cousins in the fourth, and so on.

The law here, in contrast to that relating to *sui heredes*, has the appearance of being, except in one point, purely statutory; most of it results from a very literal construction of the *Twelve Tables*. The statute said *proximus*; therefore there was no representation by his *sui heredes* of one who would have been *proximus* if he had not died or been *cap. minutus* (§ 15). For the same reason failure by the *proximi* to take did not let in the next nearest (§ 12: no *successio graduum*). If there were several *proximi*, they shared equally, not because the singular *proximus* was taken to imply the plural, but because the words of the statute entitled one *proximus* as much as another, and *concursu fiunt partes* (§ 16).

This strict adherence to the statute along with other considerations have made it the general view that the succession of agnates was a novelty introduced by the *Twelve Tables*. Broadly speaking this is

[1] *D.* 10, 2, 1 pr.

[2] Above, p. 46.

true, but it cannot be true of the succession of *consanguinei*, as agnatic brothers and sisters were called. In primitive times it would be common for them to live on after their father's death in the old home as *consortes*, and it is inconceivable that if one of them died childless the succession did not go to the surviving *consortes*. More remote agnates, on the other hand, may well have had no special right of succession before the *Twelve Tables*. This is borne out by a difference in the law as to *consanguinei* and that as to agnates in general. It was well established (*placuit*) that *consanguineae* of the deceased shared equally with his *consanguinei*, but that his remoter female agnates did not succeed at all (§§ 14. 23). One view, fathered by Paul and adopted by Justinian,[1] is that the statutory '*proximus*' was at first taken to include *proxima*, just as *suus heres* included *sua*, and that the exclusion of *adgnatae* more remote than *consanguineae* was the work of later jurisprudence. It must be admitted that Gaius treats *consanguinei* simply as the nearest possible agnates and merely notes the difference in regard to females as an anomaly. But the difference is significant, especially when we find Ulpian[2] making *consanguinei* into a distinct class, intermediate between *sui heredes* and *proximi adgnati*. *Consanguinei* were certainly agnates and thus had a statutory title, but it seems probable that even before the *Twelve Tables* they had had a title by custom, the effect of which survived the statute, whereas the title of remoter agnates being purely statutory was regulated by an interpretation of the statute which from the first refused to allow *proximus* to cover *proxima*.[3]

familiam habeto. Why not *heres esto*?[4] We have ventured[5] to dissent from the view that the expression *heres esto* would have been impossible at the time of the *Twelve Tables* as implying a conception of *hereditas* too abstract for the fifth century. But if it had been used here in the *Twelve Tables*, it might have been taken as leaving the nearest agnate no choice but to be *heres*, whereas the intention was merely to give him the best right, if he chose, to enter on the vacant estate, in

[1] Paul *Sent.* 4, 8, 20 (22): *idque iure ciuili Voconiana ratione uidetur effectum. ceterum lex duodecim tabularum nulla discretione sexus cognatos (adgnatos?) admittit. Inst.* 3, 2, 3; *C.* 6, 58, 14, 1 (A.D. 531). Paul probably meant that jurisprudence was inspired by the same motive as that of the *L. Voconia*, but hardly that the *lex* was extended by interpretation. Cf. Kübler, *SZ* 1920, 16; Michon, *NRH* 1921, 159; Garaud, *RH* 1922, 157.

[2] *Coll.* 16, 4, 1; 16, 6, 1; 16, 7, 1. *D.* 38, 16, 1, 9 *sq.*

[3] But cf. Appleton, *RH* 1929, 235; Giffard, *RH* 1932, 385.

[4] Cf. e.g. Lenel, *Essays in Legal Hist.* (ed. Vinogradoff) 120; Michon, *NRH* 1921, 119 and *Mél. Cornil* 2, 113.

[5] Above, p. 86.

other words to do acts which only later were held to make him *heres*.[1] On these assumptions the words *familiam habeto* are apt.

Quasi-agnates. A *libertus* could have no agnates; their place was filled by his patron and his agnatic descendants (§ 39). An *emancipatus* could have no agnates; their place was filled by the person who had performed the final act in the classical ceremony of emancipation.[2]

Si adgnatus nec escit, gentiles familiam habento (§ 17). The literal interpretation applied to the previous clause would, if applied here, make the succession of the *gens* depend on there being no agnates, so that it would not occur if agnates merely abstained from taking (no *successio ordinum*). Gaius' *si nullus agnatus sit* rather favours this interpretation, but there is no real evidence, and the resemblance between the two cases is not complete. The right of the *gens* to succeed in default of *sui heredes* must be older than the *Twelve Tables*, which so far from creating the right seem to have reduced it by giving preference to the nearest agnate. But the whole subject of the *gens* and the nature of its succession is conjectural. Gaius (§ 17) dismisses it as obsolete,[3] and the praetor simply ignored it.[4] The *gens* was originally a patrician institution, but was imitated by the plebeians. In early Rome it was of very considerable social and even political importance, but by the time of the *Twelve Tables* it was already in decay. Its right of succession may have been in the nature of an escheat, by which land, the main form of wealth, went back to the body from which it had come. One should not infer from the fact that the *Twelve Tables* said *gentiles*, not *gens*, that the *gentiles* succeeded individually and not as a corporation,[5] but there is some evidence that this was so in later times. Traces of gentilitial succession and *tutela* are found up to the beginning of the Empire, but not later.[6]

Criticisms of the civil law (§§ 18–24). These are mainly directed against the narrow construction of the *Twelve Tables* and other technicalities which defeated the claims of the natural agnatic family. Gaius does indeed complain (§ 24) of the absence of any rights of succession between non-agnatic cognates, even between mother and

[1] Cf. above, p. 72, on *usucapio pro herede*, and p. 103, on *cretio*.

[2] Above, pp. 43, 46.

[3] His account in Book 1 is lost. Probably it came between §§ 164 and 165, and explained that in default of agnates the *legitima tutela* went to the *gentiles*.

[4] Below, p. 127. Q. Mucius' definition of *gentiles* (Cic. *Top.* 6, 29) is worth quoting: *gentiles sunt inter se qui eodem nomine sunt . . . qui ab ingenuis oriundi sunt . . . quorum maiorum nemo seruitutem seruiuit . . . qui capite non sunt deminuti.*

[5] Cf. Beseler, *SZ* 1925, 189.

[6] Cf. the references in Girard 897 and Buckland 369.

child as such. But his main concern is for the natural as opposed to the civil agnatic family. He enters no plea for the substitution of the cognatic for the agnatic principle.

§§ 25–38. The praetorian Reforms of Intestate Succession to ingenui

Here, as in testamentary succession, the praetor's intervention took the form of grants of *bonorum possessio*. As previously explained,[1] a grant of *bon. poss.* was in itself provisional; it might be *cum* or *sine re* according to the case. It was of course *cum re* if there was no one to disturb it, that is, if either there was no *heres* or the grantee of *bon. poss.* was himself *heres*. In these cases the grant of *bon. poss.* would be either supplementary or auxiliary to the civil law (§§ 33–38). But where the *bon. possessor* was one person and the *heres* was another, the *bon. poss.* would be *sine re* except where the case was one in which the *bon. possessor* was granted an *exceptio doli* against the *hereditatis petitio* of the *heres*. Such a case amounts to a praetorian reform of the civil law of succession though only from the practical point of view; the praetor could not make *heredes* (§ 32), but a *bon. possessor cum re* was as good as *heres*.

In these sections Gaius is dealing only with succession to *ingenui*. Of the edictal sub-title *Si tabulae testamenti nullae extabunt* as a whole a clear outline is given by Ulpian. 28, 7: *Intestati datur bonorum possessio per septem gradus: primo gradu liberis: secundo legitimis heredibus: tertio proximis cognatis: quarto familiae patroni: quinto patrono patronae, item liberis parentibusue patroni patronaeue: sexto uiro uxori. septimo cognatis manumissoris . . . et si nemo sit ad quem bonorum possessio pertinere possit, aut sit quidem, sed ius suum omiserit, populo bona deferuntur ex lege Iulia caducaria.*[2] It consisted of a series of clauses offering *bon. poss.* to various classes of relatives successively, each class having a definite time within which it could apply; on the expiry of that time or on repudiation of the right, the offer passed on to the next class. *Liberi* and *parentes* had a year, others 100 days (Ulp. 28, 10; *Inst.* 3, 9, 9). The clauses were referred to in juristic parlance—the terms are not edictal—as *Unde liberi*, *Unde legitimi* and so on.[3] Those affecting succession to *ingenui* were *Unde liberi*, *Unde legitimi*, *Unde cognati*, and *Unde uir et uxor*.

1. Unde liberi. *Liberi* here are the same persons as those to whom

[1] Above, pp. 93 ff.
[2] Cf. *Inst.* 3, 9. *Edictum* §§ 156 ff.
[3] Julian *D.* 38, 6, 2: *ex illa parte edicti unde legitimi uocantur.*

bon. poss. contra tabb. was offered,[1] i.e. only agnatic descendants. In succession to a woman the class does not exist, nor does it include descendants through women. The offer was to *sui*, adoptive as well as natural, and to all who would have been *sui* but for a *capitis deminutio minima*, excepting, however, former adoptive *sui* now emancipated or given in adoption and natural *sui* given in adoption and still in their adoptive family (2, 136–7; cf. § 31). Division was *per stirpes*, as between *sui* at civil law, *liberi* who were not *sui* having to make *collatio bonorum*.[2] The emancipation of a son converted the children he left behind him in the *potestas* of the deceased into *sui heredes*; under a clause of the Edict introduced by Julian he and they took the share of one *stirps*, he being subject to *collatio* as regards them only and not as regards the other *stirpes*.

Unde liberi seems to have been unknown to Cicero, but appears in the first century of the Empire. Its introduction cannot have been far separated from that of *bon. poss. contra tabb.*; *collatio bonorum* implies that both were *cum re*, i.e. in the present case that *bon. poss.* granted to an *emancipatus* was effective. To a *suus heres* of course *bon. poss.* would be a convenience, but not a necessity (§ 37).

2. Unde legitimi. The next offer was to the *heres* entitled at civil law.[3] In Gaius' time the civil law, and consequently the qualification for *bon. poss. unde legitimi*, was altered by two statutes, the *Sca. Tertullianum* (reign of Hadrian) and *Orphitianum* (A.D. 178).[4]

By the *Twelve Tables* the normal *legitimus heres* of an *ingenuus* was his nearest agnate, of a *libertus* his patron and the patron's agnatic descendants (§§ 39 *sq.*); by analogy jurisprudence made the *legitimus heres* of an *emancipatus* his (last) *manumissor* and his agnatic descendants, but if the manumissor was not the *parens* the praetor gave preference to certain near relatives of the *emancipatus*.[5]

The two *SCa.* mentioned took the revolutionary step of making certain cognates *heredes* in priority to the nearest agnates. The *Tertullianum* made a mother who possessed the *ius liberorum heres* of her

[1] Above, p. 98.

[2] Above, p. 99.

[3] Julian *D.* 38, 7, 1 pr.: *Haec uerba edicti: tum quem ei heredem esse oporteret si intestatus mortuus esset.*

[4] The former was no doubt dealt with in the lost passage after § 33; on the latter Gaius wrote a special treatise: cf. above, p. 1 n. 3.

[5] *Unde decem personae*, perhaps mentioned in the lost passage after § 33. Cf. Ulp. *Coll.* 16, 9, 2; *Inst.* 3, 9, 3; *Edictum* § 157. On the *parens* and *extraneus manumissor* cf. above, pp. 43, 47. This branch of law was made obsolete by Justinian's reform of emancipation.

intestate child next after the child's *liberi* and *fratres consanguinei* (§ 10), along with the child's *sorores consanguineae*, if any.[1] The *Orphitianum* (*Inst.* 3, 4) made the children of an intestate woman her first *heredes*. Before these two statutes there had at civil law been no rights of succession between a mother and child as such; any right that could exist depended on their being agnates of each other; apart from exceptional cases, this would only be so if the mother had been placed *sororis loco* to her children by having been in their father's *manus*, a fact by which a stepmother would equally benefit (§ 14). The new rights given by the two *SCa.* were civil rights, but as they did not depend on *agnatio* they were not affected by *capitis deminutio*. They depended simply on the fact of motherhood; marriage was immaterial (*Inst.* 3, 4, 2. 3).

A *suus heres* was an agnate, often the nearest; therefore if he had omitted to apply for *bon. poss. unde liberi* he could apply for it *unde legitimi*, whereas *liberi* other than *sui*, not being agnates, could not do so. But a *suus* who had not troubled to obtain *bon. poss. unde liberi* could still defeat *bon. poss. unde legitimi* granted to the nearest agnate (§ 37) by *hereditatis petitio*. In this case *bon. poss. unde legitimi*, though normally *iuris ciuilis adiuuandi gratia* and therefore *cum re*, would be *sine re*.

It should be noticed that so far various of Gaius' grievances (§§ 21–23) remain unredressed. Neither a former agnate who had ceased to be such by *capitis deminutio* (§ 27), nor (according to what seems clearly the correct view) the next nearest agnate where the nearest did not apply (§ 28), nor a woman beyond the degree of *consanguinea* (§ 29), was qualified for *bon. poss. unde legitimi*. These persons were qualified only under the next clause.

3. Unde cognati. The offer of *bon. poss.* passed next to the nearest[2] cognates up to the sixth degree and in the case of the child of a second cousin the seventh. The *gentiles* were not mentioned by the Edict, but if their rights had not been obsolete it would seem that they could have claimed as *legitimi*. Cognates were in the first place all persons related by blood, whether through males or females; these remained cognates even if *capite minuti*. Furthermore, agnates by adoption were also cognates, but only so long as their artificial kinship had not been destroyed by *capitis deminutio*.

The nearest cognate must mean the nearest who applied; otherwise a next nearest agnate, who had been debarred from *bon. poss. unde legitimi* by the existence of a nearer agnate, would by the same

[1] Ulp. 26, 8. There were later variations. Cf. *Inst.* 3, 3. [2] Above, p. 122.

fact have been debarred from *bon. poss. unde cognati*, which he was not (§ 28). The nearest agnate would be a cognate; if he had omitted to apply under the previous clause he could apply under this one, but here he might encounter mere cognates as near as or nearer than himself. Against his civil law right indeed their *bon. poss.* would be *sine re*, but his civil law right, unlike that of a *suus heres*, had to be perfected by *aditio*, and he might have lost the right of *aditio* by refusal or by lapse of time.[1] Normally *bon. poss. unde cognati* would be *supplendi iuris ciuilis gratia*; *liberi* and *legitimi* might be presumed not to exist or not to be interested.

4. Unde uir et uxor. In default of claims by relatives the praetor offered *bon. poss.* to the surviving spouse in a *iustum matrimonium* which subsisted at death.[2] This modest benefit, which may have been mentioned by Gaius in the lost passage after § 33, could have no effect if the wife had been *in manu*, since if she died first she would have nothing to leave and if she were the survivor, would have superior rights as being *loco filiae*.

§§ 39–54. Succession to Ciues Romani Liberti

1. *The Civil Law*

Under the *Twelve Tables*[3] *liberti* had the same power of testation as *ingenui*, and the order of intestate succession to them differed only in that the patron and his agnatic descendants after him took the place of the agnates whom a *libertus* necessarily lacked. The succession of this patronal class (in default of *sui heredes*) was analogous to that of agnates.[4] The right to succeed was destroyed by *capitis deminutio* (§ 51). It passed on the death of a sole patron to his agnate descendants of the nearest generation only; division among the members of that generation was *per capita* and deceased members were not represented by their descendants. If there were several patrons, they shared equally, whatever their shares in the ownership of the former slave had been (§ 59), and the lapsed share of one patron went to increase the shares of the others (§ 62). If all of several patrons were dead, they were not represented each by his own descendants, but the members of the nearest generation took in their own right, sons and daughters

[1] Above, p. 102. [2] Ulp. 28, 7. *D.* 38, 11, 1.

[3] Cf. 1, 165; 3, 46. 49. 51. Ulp. 27, 1; 29, 1. *XII Tabb.* 5, 8: *Textes* 15; Bruns 1, 24; *Fontes* 1, 41.

[4] A difference is that female descendants however remote could succeed, which gives some support to the view, rejected above, p. 123, that the exclusion of *agnatae* more remote than *consanguineae* was not the earliest interpretation of the *Twelve Tables*.

of one patron excluding more remote descendants of the other or others, and if there were in the nearest generation say two descendants of one patron and one of another, each of these took one-third (§ 61).

Adsignatio libertorum. It is important to note that a patron's descendants took in their own right and were not excluded by the patron's will, not even by *exheredatio* (§§ 48. 58. 64). At least this was the civil law. But it was upset by a *SC.* of about A.D. 45 which enabled a *manumissor* to allot, by will and otherwise, the patronal right of succession after his own death to one or more of his descendants *in potestate*, to the exclusion of the others. This highly anomalous institution, mentioned by Justinian (*Inst.* 3, 8), is passed over by Gaius.[1]

2. *The Edict*

Thus at civil law a patron would not be a *libertus*' *heres* if the *libertus* either instituted someone else in his will or, dying intestate, left *sui heredes*. On the other hand, a *liberta* could not have *sui heredes* and her will needed the *auctoritas* of her tutor, who would be the patron himself (§ 43; 1, 192), so that it was the patron's own affair if he authorized a will that left him out. In her case there was no grievance, but it came to be felt as such that a patron should be excluded either by *extranei heredes* instituted by his *libertus* or by artificial *heredes* acquired by the *libertus* through adoption or *manus*, whether these succeeded by his will or his intestacy. The praetor therefore, by means of *bon. poss. contra tabb.* or *ab intest.* according to the case, secured half the succession to the patron, except only where the *libertus* left natural children whom he had not excluded both from the *hereditas* and *bon. poss. contra tabb.* by exheredation (§ 41). In other words, the praetor secured to the patron (and to his male, but not his female agnatic descendants: § 46) a *dimidia pars* except where the *libertus* was succeeded, whether under a will, by *bon. poss. contra tabb.*, or on intestacy, by natural *liberi*.[2]

3. *The L. Papia Poppaea* (A.D. 9)[3]

a. Succession to a man manumitted by a man

(i) These edictal rights (§ 41) of *bon. poss. contra tabb.* and *ab intestato*

[1] Buckland 401; Accarias, *Précis* 1, s. 432.

[2] A will, however, needed only to institute them *heredes aliqua ex parte* (§ 41), a weak point inherent in the pure formalism of *exheredatio*: cf. above, p. 96.

[3] Cf. Accarias, *Précis* 1, s. 428.

were extended by the statute to a patron's female descendant who had the *ius liberorum* (three children: § 46).

(ii) If a *libertus* died, whether testate or intestate, worth at least 100,000 sesterces and left one child, the statute secured half the estate to the patron, as already the Edict did in all cases where there was no child; if the *libertus* left two children, the patron's share was to be one-third; if he left three or more, the patron got nothing (§ 42). These rights extended to the patron's male (§ 45) descendants, but probably not to his female descendants.

b. Succession to a woman manumitted by a man

(i) *Succession of patron and male descendants.* If the *liberta* died intestate, the *L. Papia* made no change; even if she had the *ius liberorum* (four children), the civil patronal right remained superior to the *bon. poss. unde cognati* of the children.[1] But if a *liberta* having the *ius libb.* left a will, the situation created by the fact that the *L. Papia* had freed her from *tutela* had to be dealt with. She could make her will uncontrolled by her patron, but the *L. Papia* provided that nevertheless the patron or his male descendants should take a *uirilis pars* of her estate, reckoned by the number of her children who survived her (§§ 44–45).

(ii) *Succession of female descendants of patron.* The difficult § 47 deals with the effect of the *L. Papia* in this case. It tells us first that on the intestacy of a *liberta* having the *ius libb.* the *lex* expressly gave a female patronal descendant having herself the *ius libb.* the right to a *uirilis pars* along with the *liberi libertae.* This implies that under the *L. Papia* the *bon. poss. unde cognati* of the children of a *liberta* having the *ius libb.* was given preference over the civil right of female patronal descendants, with a small saving in favour of a female descendant who herself had the *ius libb.* § 47 also tells us that if a *liberta* having the *ius libb.* left a will, one view was that the *L. Papia* made no provision for a female patronal descendant even if she had the *ius libb.* It must be borne in mind that the *L. Papia* by freeing such a *liberta* from *tutela* did not deprive a female descendant of any previous control over the will. However, what seems to have been Gaius' own opinion was that the *lex* secured to a female patronal descendant, if she herself had the *ius libb.*, the same rights *contra tabb. libertae* as a male descendant had *contra tabb. liberti.* Presumably the reference is to the edictal rights spoken of in § 41. We will not enter into the difficulties.

[1] Expressly stated by § 51 in the case of a *patrona.*

c. Succession to a man manumitted by a woman

The *L. Papia* gave to an *ingenua patrona* having had two and to a *libertina* having had three children the same rights as the Edict had given to patrons, i.e. *bon. poss. dimidiae partis* under certain conditions (§§ 41. 50). It also gave to an *ingenua patrona* having had three children, but not to a *libertina*, the same right in the succession of wealthier *liberti* as it gave to males (§§ 42. 50).

d. Succession to a woman manumitted by a woman

If the *liberta* died intestate, neither her own nor her *patrona*'s possession of the *ius libb.* mattered. The *patrona* succeeded alone, under her civil law title (with *bon. poss. unde legitimi*); only if the patronal tie had been destroyed by *capitis deminutio* of either *patrona* or *liberta* did the *liberta*'s children take first place by *bon. poss. unde cognati* (§ 51). But if the *liberta* died testate, the statute gave the *patrona*, on condition of her having the *ius libb.*, the edictal rights of a patron against the will of his *libertus*, i.e. in the absence of *liberi* instituted as *heredes*, the right to *dimidia pars* (§ 52).

Neither the male nor the female descendants of a *patrona* had any civil rights. The *L. Papia* gave her son, on condition of his not being childless, rights which § 53 describes as much the same as his mother's.

§§ 55–73. Succession to Latini Iuniani

We have already given a general account of the status of these freedmen;[1] here we encounter its most salient feature. It is that, though in his lifetime a Junian Latin had the *ius commercii*, he was incapable of either making a will or leaving an intestate succession. At his death his property (*bona Latini*) was not an *hereditas*, but *peculium* belonging to his patron or, if the patron was dead, to his patron's *hereditas*, i.e. to his patron's testamentary (including *extranei*) or intestate *heredes*.[2] There was thus no real succession, but only the realization of a right held in abeyance during the Latin's life by the *L. Iunia*. This produced a number of sharp contrasts with intestate succession to the *hereditas* of a *ciuis Romanus libertus*.[3] The conception of *bona Latini* as *peculium* of a slave implies that his children had no claim to succeed; with relentless logic none was admitted, not even a claim to *bon. poss. unde cognati* in the last resort, when the patronal right for one reason or another had failed (§ 62).

[1] Above, p. 27.
[2] Or it might be to a *legatarius*: 2, 195.
[3] Cf. §§ 57–62 and above, pp. 128–9.

SC. Largianum, A.D. 42 (§§ 63–71). It was perhaps the juristic controversies to which this *SC.* gave rise that induced Gaius to devote so much space to it.[1] Some pretty, but rather recondite, points are involved. The pith of the enactment was that, if the *manumissor* was dead, *bona Latini* were to go to any of his issue who had not been exheredated *nominatim*, in preference to his *extranei heredes*. For the *SC.* to apply, there had to be both *extranei heredes* and *liberi* not *nominatim exheredati* (§ 64a). It created no claim against instituted *liberi*, and therefore, if *liberi* only were instituted, no claim at all (§ 69). If *liberi* were instituted along with *extranei*, they excluded the *extranei* in respect of *bona Latini*, and the share that would apart from the *SC.* have gone to the *extranei* was divided equally between the instituted *liberi* and any other *liberi* who, though not instituted, had not been *nominatim exheredati*. Such was Iauolenus' opinion, generally preferred to that of Caelius Sabinus (§ 70). *Non nominatim exheredati* was taken quite literally. Failure to exheredate *nominatim* would of itself vitiate the will, *iure ciuili* in the case of sons *in potestate*, *iure praetorio* in the case of all males; but if the *praeteritus* had not exercised his edictal rights against the will, or if, being a *suus heres*, he had exercised his *potestas abstinendi* (2, 158), he could, on the death of a Junian Latin, still have recourse as against *extranei heredes* to the *SC. Largianum* (§§ 65. 67). Again, women successfully exheredated by an *inter ceteros* clause could nevertheless claim under the *SC.* (§ 66). It is interesting to read (§ 71) that Cassius allowed the benefit of the *SC.* to *liberi* without regard to the sex of the relevant ancestor or ancestors, but his view was generally rejected on the ground that the *SC.* referred only to *liberi* to whom the custom of exheredation applied, i.e. to *liberi* in the sense of *bon. poss. contra tabb.* or *unde liberi.* We have passed over the view attributed to Pegasus and rightly rejected by Gaius (§ 64); but it must be admitted that to a certain extent the *SC.* did assimilate the succession of *Latini* to that of *ciues R. liberti.*

Acquisition of citizenship by Latin freedmen (§§ 72–73). It is obvious from what has been said that a Junian Latin had strong motives for acquiring *ciuitas Romana* by one of the various methods open to him.[2] But a constitution of Trajan (A.D. 117–38) provided that if he obtained *ciuitas* by imperial grant against the will or without the knowledge of his patron, he was to be treated at death as a Latin. Thus his children were not to be his *heredes*. The only concession

[1] Besides the surviving text 21 lines are illegible between §§ 68 and 69.

[2] Above, p. 28.

made to his citizenship was that he might make a will instituting his patron *heres* (presumably sole *heres*) and substituting, in case of the patron's refusal, someone else; it is not clear whether the substitution would be valid if the patron failed to take because of his having died first. Hadrian mitigated this harsh constitution by a *SC.* exempting the freedman from it if, subsequently to having become a *ciuis* by imperial grant, he complied with the conditions of one of the regular methods (e.g. *anniculi probatio*) whereby a Latin became a *ciuis*.

§§ 74–76. Succession to Liberti Dediticiorum Numero

They were incapable of making a will or of leaving *heredes ab intestato*,[1] but they could acquire property by methods of the *ius gentium*. The fate of this property depended on the manner of their manumission. If but for their bad character it would have made them *ciues*, the property went to the patron and his descendants under the rules governing succession to a citizen freedman; this, however, did not imply power of testation. If the manner of their manumission would have made them Latins, their property was regarded as *peculium*, and went to the patron and his *heredes* as if they had been Latins.

§§ 77–81. Bonorum Venditio

We pass on abruptly to the next of the modes of acquisition *per uniuersitatem* (2, 98), *emptio* or *uenditio bonorum*, the system of dealing with insolvent or recalcitrant debtors imitated by the praetor from the procedure used against debtors to the State. Its characteristic feature was that, by vesting the debtor's assets in another private person who could and would pay, it avoided administration by the court. It required initial authorization from the praetor,[2] but its purpose was to create a situation in which the creditors could obtain redress for themselves by the ordinary legal processes.

The procedure. The procedure is not fully known, but we need only an outline.[3] (i) By a praetorian decree of *missio in possessionem* a creditor was authorized to take into his custody the debtor's whole property and was required to advertise the fact. Malicious advertisement (*proscriptio*) naturally constituted an *iniuria* (§ 220). The *proscriptio* lasted 30 days (in the case of a dead debtor 15). Presumably

[1] Above, p. 27.

[2] Or provincial governor: Paul *D.* 50, 1, 26.

[3] Cf. Theoph. 3, 12 pr. The text of § 79 is defective. We shall simply accept Krüger's conjectures as to the periods. Theophilus' account varies slightly.

it was not before the end of this period that the debtor became *infamis*.[1] (ii) On its expiry the creditors were authorized by the praetor to elect one of themselves as *magister* to prepare and conduct the sale. He had 10 days (in the case of a dead debtor 5) in which to complete lists of assets and creditors and to advertise the conditions of sale. (iii) Then, according to Theophilus after a third application to the praetor, the *magister* sold the debtor's whole estate by auction to the offeror of the highest dividend to the creditors.

Effect of the sale. The *addictio* of the *bona* by the *magister* to the *emptor* put the *emptor* in a position similar to that of a *b. possessor*. Like him the *emptor* had a special interdict for obtaining possession of the *res corporales* (4, 144–5), and he too became, pending *usucapio*, their bonitary owner (§ 80); furthermore, on all claims affecting the debtor he, like a *b. possessor*, could sue and be sued by *actiones utiles* (§ 81), that is under *formulae* which, though modified by fiction or otherwise to meet the case (4, 34–35), were substantially the same as could have been used by or against the debtor, except that the *b. emptor*'s liability for debts was limited to the promised dividend and that he had to allow the debtor's debts to be set off in full by debtors who were also creditors of the debtor (4, 65 *sq.*).

Liquidation by the court was thus avoided, but the process was ruthless to the debtor and not really considerate of the creditors. It made the debtor *infamis* and exempted him neither from personal execution nor from future sales of any property he might subsequently acquire (2, 155). The creditors, on the other hand, must often have lost by the assets being sold as one lot at a speculative price. In later law sale *en bloc* was replaced by sale in detail (*distractio bonorum*) carried out by a *curator*, a procedure that had been initiated in classical times by a *SC.* of unknown date as an alternative open to creditors of persons of high rank, for whom it had the advantage of not producing *infamia*.[2]

The cases. Gaius distinguishes the cases of living and dead debtors. We begin with the simpler case.

Bona mortuorum. *Vend. bon.* was applicable only if the deceased had left no *heres* or *b. possessor*. If he left a lawful successor, his assets and liabilities were merged in the *patrimonium* of the successor, and if the successor was thereby rendered insolvent, it was he, not the deceased, who was exposed to *b. uend.* with consequent *infamia*. A bankrupt's successor would usually be a *heres necessarius* provided for

[1] 2, 154; 4, 102. Cf. *L. Iulia Municip.* 117: *Textes* 87; Bruns 1, 108; *Fontes* 1, 149.
[2] *D.* 27, 10, 5; 9. Cf. Buckland 645.

the purpose; in his case there were alleviations (2, 154–5).[1] On the other hand, a solvent *hereditas* might go to an insolvent successor; this might damnify the deceased's creditors, who consequently could obtain from the praetor that the two estates should be kept apart.[2] But here we are dealing with the case of no successor. The vacancy would probably be due to the estate being insolvent; otherwise the State would claim.[3] The creditors might conceivably resort to *usucapio pro herede*,[4] but so could others, and, apart from other disadvantages, *u.p.h.* would not apply to incorporeal assets. The better course for the creditors was *b. uend.*, which provided a universal successor entitled in the same way as a *b. possessor* to get in all assets and bound to pay the creditors the agreed proportion of their dues. The same result could be obtained if the creditors induced a *heres* or *b. possessor* to accept the succession subject to an agreed limitation of his liabilities.

Bona uiuorum. Here some anticipation of Book 4 is inevitable.

(i) *Iudicati.* Judgment, which under the formulary procedure of Gaius' day was always for a definite sum of money (4, 48),[5] became ripe for execution after 30 days of grace.[6] The only form of execution at civil law was on the debtor's person.[7] This made the debtor a bondsman, but does not seem to have given the creditor a title to his assets. The debtor's miserable condition might satisfy primitive lust for vengeance, but economically it was chiefly valuable as putting pressure on the debtor or his friends to pay. But some debtors are very stubborn, and debtors cannot always be traced. Thus a method of getting at the debtor's property directly was needed. None existed at civil law, and it was only in connexion with the *extr. cognitio* that the rational system of seizing and selling sufficient of the debtor's property was introduced.[8] But much earlier, probably in the last century of the Republic, the praetor had introduced *b. uend.* for judgment debts. Apparently it could be employed along with or independently of civil execution on the person. It may have begun as a further means of means pressure on recalcitrant debtors, i.e. as a simple *missio in bona*, but it developed, as we have seen, into a process

[1] Above, p. 102. [2] Above, p. 102.

[3] The *fiscus* was not a successor. It would only assert its claim if the estate were solvent: Callistr. *D.* 49, 14, 1, 1.

[4] Above, p. 71.

[5] *Confessio in iure* counted as judgment: *confessus pro iudicato.*

[6] Allowed under the *Twelve Tables* for *iudicia legitima* and adopted by the praetor for *iud. imperio continentia* (4, 103 *sq.*).

[7] Below, p. 242.

[8] *Pignus ex iudicati causa captum. Pignoris capio* as described in 4, 26 *sq.* belongs to public and sacral law.

of forced realization of the debtor's assets and, if there were more creditors than one, into a system of bankruptcy.

(ii) *Indefensi and the like.* An action could not begin or proceed unless the defendant was present or represented *in jure*, and could not proceed, even if he was present, without his co-operation.[1] We are not concerned for the moment with actions *in rem*.[2] In an *ao. in pers.* the defendant was under a duty either to admit liability or to defend; he could not be compelled to do either, but if he failed in this duty he became liable to the process of *b. uend.*[3] If he was insolvent, he might well prefer to submit to this rather than to co-operate in an action that would make him *iudicatus*.

(iii) *Cessio bonorum.* A concession to debtors, the details and history of which are conjectural, was made by a *L. Iulia* (probably a chapter of the *L. Iulia iudiciaria* of 17 B.C.). Subject to praetorian approval a debtor was allowed to surrender his *patrimonium* for *uend. bon.* without incurring the *infamia* of a forced sale. If he did this, he secured exemption from execution on his person, and though he was not discharged, he could not again be proceeded against till after a year of grace and could then be condemned only *in id quod facere potest* (*beneficium competentiae*: *Inst.* 4, 6, 40). These great advantages, which, however, may not all have existed from the first, raise the question: Why did not insolvent debtors thereafter always resort to *cessio bon.*? That they did not is clear from the fact that execution on the person survived for centuries as a common, perhaps the normal, system, and that in a very severe form.[4] The accepted explanation is that *cessio ex L. Iulia* was subject to conditions: that it had to be sanctioned by a magistrate having *imperium*, that the insolvency must have been due to misfortune, and that there were assets worth ceding. But these conditions were slowly relaxed.

§§ 82–84. Universal Succession by Adrogatio and Conuentio in Manum

An account of *adrogatio* and *conuentio in manum* has already been given.[5] In what follows what is said of *adrogatio* is to be understood as applying in general also to *coemptio*.

[1] Below, p. 223.

[2] Shortly, though there was no duty to defend, the praetor would put the plaintiff into possession: details Buckland 634. 724.

[3] The various possibilities contemplated by the Edict (*Edictum* pp. 413 ff.) are imperfectly stated in the surviving text of § 78, which is probably corrupt. Cf. Part I p. 174 n. 2.

[4] Cf. v. Woess, *SZ* 1922, 485.

[5] Above, p. 34.

§ 82. The statement that these cases of universal succession (probably *in iure cessio hereditatis* is intended to be included) were established by custom and not by the *Twelve Tables* or the Edict means that they were part of that considerable body of early civil law *quod sine scripto in sola prudentium auctoritate consistit.*[1]

§ 83. The words *omnes eius res incorporales et corporales quaeque ei debitae sunt* imply that a man's *res incorp.* did not include debts due to him, which is in plain contradiction to 2, 14. One view is that the words *quaeque ei debitae* (notice the gender) *sunt* are gloss;[2] if so, the gloss must be early, since the passage is repeated in *Inst.* 3, 10, 1, unaltered except that *res corp.* are put in their natural place before *incorp.* The disorder of *incorp. et corp.* suggests that the gloss, if any, is *incorp. et.* That would mean that *iura in re aliena* were omitted from the enumeration of the rights that passed to the *adrogator*; but in fact none did pass except praedial servitudes which might be regarded as included in the *res corp.* to which they were attached. However, the most likely solution is that the comparatively recent classification of *res corp.* and *incorp.* was not firmly fixed in Gaius' mind.[3]

§§ 83–84. The succession of an *adrogator* to the *patrimonium* of the *adrogatus* was universal, subject as regards both rights and liabilities to exceptions that differentiate it from *hereditas.* Both the succession and the exceptions allow of the single comprehensive explanation that the rights and liabilities of the *adrogatus* before adrogation were treated as if they had arisen when he was in the *potestas* of the adrogator. We adopt this explanation here,[4] but it must be admitted that to some extent it rests on the assumption, probable but not certain, that the early civil law of the period in which our institution took definite shape differed in one point from the civil law of the classical period.

Rights of the adrogatus. All his patrimonial rights passed to the *adrogator* except usufruct (and no doubt *usus*), the *operarum obligatio* of a *libertus* if created by the archaic form of an oath,[5] and *lites contestatae legitimo iudicio.*[6] Gaius explains the exceptions on the ground that the rights were extinguished by *cap. deminutio*, which looks like making the rule its own reason. On the view adopted above they did not pass to the *adrogator* because they could not have been acquired for him by the *adrogatus* if he had already been in his *potestas*, and

[1] Pomp. *D.* 1, 2, 2, 12.
[2] Beseler, *SZ* 1934, 1.
[3] Buckland, *Main Inst.* 91–92.
[4] Following Bonfante, *Corso* 6, 18 *sq.*
[5] Below, p. 157.
[6] On *lit. cont.* cf. §§ 180–1 and below, p. 223. On *iud. legit.* cf. 4, 103 *sq.* and below, p. 277.

they were extinguished because the *adrogatus* had ceased to have patrimonial capacity. This is demonstrable in the case of *lites contestatae* (2, 96; 4, 82). In the case of *operarum obl.*, since the objection to the transfer was not the nature of the right but one form of its creation, it is reasonable to suppose that the right could not be acquired for a *paterfam.* by a *filius* using this form. The non-succession to usufruct can indeed be attributed to the intensely personal nature of the right,[1] but it is not very bold to assume that originally usufruct could not be acquired by a *paterfam.* through his *filius*. Even in classical law its acquisition by the normal method of *in iure cessio* was impossible through a *filius* (2, 96).

Liabilities of the adrogatus. His delictual liabilities passed to the *adrogator* in the sense that the actions on them had now to be brought in noxal form against the *adrogator*. But this only meant that the *adrogator* would be forced to surrender the delinquent unless he preferred to pay the *poena* himself. The true liability remained on the *adrogatus*, who on becoming once more *sui iuris* would be liable to an *actio directa*. The position would have been precisely the same had the delict been committed after the adrogation (4, 75 *sq.*).[2]

The contractual liabilities of the *adrogatus* did not pass to the *adrogator* (§ 84). He would not have been liable on them at civil law if they had been contracted by the *adrogatus* when *in potestate*. Far from raising a difficulty the fact that the *adrogator* did become liable for *hereditarium aes alienum*, i.e. for debts owed by the *adrogatus* as *heres*, is illuminating; for these are the only debts for which at civil law a *filius* could, by *aditio iussu patris*, make his *paterfam.* liable: as Gaius puts it, *ipse pater adoptiuus . . . heres fit*.

There is one more difficulty. One can understand that rights that did not pass to the *adrogator* were simply extinguished, since a *filius* was incapable of holding them himself. But why were debts that did not fall on the *adrogator* also extinguished? Why did not the *adrogatus* remain liable? The answer must be that though in classical law a *filius* could bind himself by his contract, in earlier law this glaring contrast with his incapacity for rights in all probability did not exist, but that originally the son's position was what that of a *filia* still remained (3, 104).

The Edict. Once it was established that a son could bind himself by his contracts it would have been reasonable to abolish the extinction of an *adrogatus*' contractual liabilities. But this by itself would have been valueless to the creditors until the *adrogator* died or unless the

[1] Above, p. 64. [2] Below, p. 271.

adrogatus had *peculium castrense*. What was needed also was that the effects of the transfer of the *adrogatus*' assets should be modified. Accordingly the praetor granted the *adrogatus*' creditors *restitutio in integrum*, i.e. rescission of his *cap. deminutio* so far as they were concerned. He gave effect to this by allowing them to sue the *adrogatus* by *formulae* containing the fiction that the *cap. dem.* had not taken place. If the *adrogator* would not undertake liability by defending, the creditors were allowed *uenditio bonorum* in respect of what would have belonged to the *adrogatus* had he not been *capite minutus* (§ 84; 4, 38. 80). An *actio de peculio* against the *adrogator* might have been more profitable in some cases, but to allow this would have been to extend that action beyond the only case contemplated by the Edict, namely debts contracted by the son whilst *in potestate*.[1] However, some jurists allowed it.[2]

§§ 85–87. In Iure Cessio Hereditatis

In this passage, which virtually duplicates 2, 34–37,[3] Gaius simply states the law without attempting a much needed justification. Perhaps this piece of early jurisprudence, likely to have been influenced by considerations as to *sacra*, was no more intelligible to him than to us.

Heredes extranei. An *in iure cessio hereditatis* (*i.i.c.h.*) made before *aditio* by a *heres legitimus* (i.e. the nearest agnate of an intestate) put the surrenderee in his place as *heres*, but made by a *heres testamentarius* before *aditio* was a complete nullity. Made after *aditio* by either it transferred the *res corp. hereditariae* to the surrenderee, but left the surrenderor still *heres* and liable to the *creditores hereditarii* and set the *debitores hered.* free.

How are we to account for the different results of *i.i.c.h.* before *aditio* in the two cases? It may be that the testator's designation of a definite person to be his *heres* was felt to be inviolable, but not so the designation by *lex* of a class of *heredes ab intest.*[4] Another consideration may have been that a *legit. heres* by abstaining from *aditio* did not let in the next nearest agnate (§ 12), so that no one would be hurt if effect were given to *i.i.c.h.* by him before *aditio*, whereas a *test. heres* by abstaining from *aditio* let in either a *substitutus* or the *heres ab intest.*, so that if effect were given to *i.i.c.h.* by him before *aditio* a definite person or persons would be damnified.

[1] *Edictum* pp. 118. 275.
[2] Buckland 399 n. 6.
[3] On the duplication cf. above, p. 65.
[4] So Guarino, 'Notazioni Romanistiche,' *St. Solazzi* (1948) 22 (offprint).

Another mystery is the result of *i.i.c.h.* after *aditio* in both cases. The inability of the *heres* to unload on to a third party obligations voluntarily assumed by *aditio* (*post obligationem*: 2, 35) is reasonable enough, and his ability to alienate the *res corp. hereditariae*, which had become his by the *aditio*, is at least understandable. But these considerations do not apply to the hereditary rights *in personam*. Rights *in personam* were inalienable *inter uiuos* (2, 38–39), and it would have been consistent to treat their attempted alienation by *i.i.c.h.* as a nullity. But why treat it as nullifying the rights themselves? Are we to say that *i.i.c.h.* estopped the *cedens* from making any claim as *heres*, but did not enable him to disclaim liability, once incurred, on the ground of being no longer *heres*?

Necessarii heredes. *Necessarii* in 2, 37 must be taken as including *sui et nec.*, and *suus autem et necessarius* in § 87 as meaning both a *suus* and a merely *necessarius*.[1] For neither class of *necessarii* was there any question of *aditio*: they were by operation of law in the same position as *extranei* after *aditio*. One would have thought the Proculian conclusion inevitable, that *i.i.c.h.* by a *necessarius* had the same effects as one by an *extraneus* after *aditio*. Yet the Sabinians held that it was null and void. It has been suggested[2] that originally *i.i.c.h.* by an *extraneus h.* after *aditio* was a nullity, on the principle *semel heres semper heres*, and that the effects attributed to it later were the work of jurisprudence. The Proculian view as to *i.i.c.h.* by *necessarii h.* would thus be an attempt to extend to them the modifications of earlier nullity admitted in the case of *extr. heredes*.

The law of *i.i.c.h.* was allowed to remain in this unsatisfactory state probably because for transferring *hereditates* classical practice had, very sensibly, taken refuge in *stipulationes*.[3]

§ 88. Obligationes

We return to the acquisition of individual patrimonial rights which we left at 2, 97. Rights *in rem* (ownership and rights *in re aliena*) having been disposed of (2, 1–96), there remain rights *in personam* or *obligationes*. Since Gaius' one general remark about *obligatio* is that it is a *res incorporalis* (2, 14a), which merely tells us that it is not ownership, we have to define it in our own terms. Modern jurisprudence distinguishes between absolute rights imposing duties on the world at large and relative rights incumbent only on a particular person or

[1] Hence most editors in § 87 emend *agat* to *agant*.
[2] Guarino, *o.c.* 26.
[3] Cf. 2, 252.

persons. In the law of property the nomenclature rights *in rem* and *in personam* is customary. This is not un-Roman, though by the Romans themselves it is not applied to rights, but to the corresponding actions (4, 1 *sq.*).[1] *Obligationes* are not all rights *in personam*, not e.g. family rights, but only those of a patrimonial character.[2] One would expect the term to denote primarily the debtor side, and this appears in the definition of *Inst.* 3, 13 pr.,[3] but in the institutional scheme *obligationes* are a class of rights.

That Gaius' conception of *obligationes* is narrower than ours appears at once in his recognition of only two sources of *obligatio*: contract and delict. Even these two sources are understood narrowly. For Gaius *obligatio* belongs to the civil law: it is confined to rights enforceable by *actio in personam* in the old strict sense of one asserting a *dare facere praestare oportere* (4, 2). This excludes praetorian liability; one can almost hear Gaius saying (cf. 3, 32) that the praetor cannot create *obligationes*, though he can grant actions producing practically the same effect (*actione teneri*). Thus Gaius' contracts do not include the so-called praetorian pacts,[4] and his delicts are civil, even if the civil has in some cases been replaced by a praetorian remedy. This limitation of *obligatio*[5] accounts for the omission not merely of the quasi-delicts of *Inst.* 4, 5, but of all the praetorian penal actions, including one so important as the *actio doli*. But it does not account for the omission of the civil law obligations classed by *Inst.* 3, 27 as *quasi ex contractu*.[6]

Gaius seems to have been further cramped by the influence of an old scheme of teaching (*institutiones*) dating from a time when contract was the only source of *obligatio* and delict formed a separate chapter. We cannot say at what date the conception of *obligatio* was extended to include delictual obligation[7] nor whether Gaius was the first to introduce it into an institutional scheme. But his subsumption of delicts under *obligatio* is imperfectly carried out, as we see from

[1] Cf., however, Paul *D.* 44, 7, 3 pr.: *Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut seruitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid uel faciendum uel praestandum.*

[2] Ulp. *D.* 40, 7, 9, 2: *ea in obligatione consistere quae pecunia lui praestarique possunt.*

[3] *Obligatio est iuris uinculum quo necessitate adstringimur alicuius soluendae rei secundum nostrae ciuitatis iura.*

[4] e.g. the *actio de pecunia constituta*: 4, 171.

[5] Said to have been antiquated even in his day. *Inst.* 3, 13, 1: *obligationes . . . aut ciuiles sunt aut praetoriae* is no innovation, though Justinian fails to draw the proper conclusions.

[6] There are incidental mentions: *legatum* 2, 204. 213; 3, 175 &c.; *tutela* 4, 62; *indebiti solutio* 3, 91; 2, 283.

[7] De Visscher, *Ét.* (1931) 257 (= *RH* 1928, 335) thinks at the beginning of the second century A.D.

the curious confusion of *genera* and *species* in §§ 88–89 (corrected in *Inst.* 3, 13), the location of the extinction of obligations between contract and delict, and the fact that more than one passage seems to regard contract as the sole source of obligation (2, 14. 38; 3, 119a). Indeed the words *obligare* and *obligatio* hardly occur in the account of delicts (only in §§·196. 208).[1] Obviously Gaius missed an opportunity of including also at least the civil obligations which Justinian has taught us to call quasi-contracts; only a glimmering of this advance appears in § 91.

Thus the term *obligatio* has a history. It originated in the contractual relations recognized by the civil law. Its (not very felicitous) extension even to delicts was possible only after a considerable development of the conceptions of both contractual and delictual liability. Gaius wrote in a period of transition. If he is the author of the relevant passages of the *Res cottidianae*,[2] he had afterthoughts, which bore fruit in Justinian's *Institutes*.

§ 89. Contracts

We are given no definition of contract, but just an enumeration of the four ways in which at civil law a contractual obligation arose. The limitation to civil law is innocuous in an elementary work, since engagements sanctioned only by praetorian actions[3] were of limited application. The absence of a general definition reflects the state of the law. *Pactum serua* is written in the heart of man, but legal enforcement is another matter. The principle that any agreement is binding which satisfies certain general requirements is reached only after long legal development. Roman law started, one may say, from the contrary principle that agreement as such is not a cause of action. The earliest agreements to be armed with actions were those embodied in certain forms. Later, from about 200 B.C., actions enforcing certain agreements made without formalities on the simple ground of their economic contents became established one by one. But the development went no further. In the time of Gaius no general law of contract existed, but only a number of distinct contracts (we should rather say actions). There was a tendency for them to coalesce into two types, the *stricti iuris* and the *bonae fidei*, but even in the time of Justinian a general contractual action had not yet been evolved.[4]

[1] The evidence is admirably set out by De Visscher, *l.c.*
[2] *D.* 44, 7, 1 pr.; 5. *Pal.* 498. 506. Above, p. 9.
[3] The so-called *pacta praetoria*: Buckland 526; *Main Inst.* 283.
[4] Cf. Buckland 413.

Naturally, however, the causes of action grouped together as contracts had a certain common character. They were all *negotia contracta*, i.e. transactions between consenting parties; in all therefore, and not merely in those specially called consensual, valid consent was essential. Consent might be invalid on account of incapacity,[1] illegality or impossibility; it might be only apparent in cases of mistake, or revocable on account of duress or fraud. Modern works on Roman law find it convenient to dispose of these and other features common to all contracts by way of introduction, once for all, but particularly as regards classical law the appearance thus created of a general theory of contract is apt to be misleading.

Prehistoric. The evidence for primitive Roman Law is very scanty and has to be eked out by hypotheses suggested by comparative law. The most archaic contractual institution that we meet with goes by the name of *nexum*.[2] It was rendered obsolete by a *L. Poetelia* (326 B.C.?) and consequently is not mentioned by Gaius; other juristic evidence is slight. All that is really certain is that by some act *per aes et libram* men were reduced to bondage on account of debt and that their miserable plight constituted a grave social question. But as to the exact nature of the act the learned disagree.[3]

If the only persons rendered *nexi* had been sons or others *alieni iuris*, there would have been no difficulty in identifying *nexum* with *mancipatio*; for by *mancipatio* a father could place his son in a status of bondage later known as *mancipii causa*, and that this was a common practice is shown by the rule of the *Twelve Tables* checking its abuse by limiting the number of times a father might mancipate his son to three.[4] The term *nexi* may well have included mancipated sons, but it appears that men also rendered themselves personally *nexi*.[5] Self-mancipation would be impossible in later law, but it may not always

[1] Considered above, on Book I.

[2] We adopt this accepted form, though *nexus* seems to be more correct. Varro, *de l. lat.* 7, 105 (Bruns 2, 60; on the defective text cf. Beseler, *SZ* 1925, 414), reports that according to Manilius the term embraced every act *per aes et libram*, including mancipation, but according to Mucius only those intended to produce obligation, excluding conveyance. Varro agrees with Mucius, but there is plenty of evidence of the wider usage: e.g. 2, 27 and Festus, *v. Nexum* (Bruns 2, 17).

[3] The older literature is given by Girard 508 n. 4. Cf. Buckland 429; Luzzatto, *Per un'ipotesi sulle origini delle obbl. rom.* (Milan 1934); Lévy-Bruhl, *Quelques problèmes* (Paris 1934) 139; Westrup, *Notes sur la sponsio et le nexum* (Danish Acad., 1947). The recent literature on *mancipatio* is also relevant.

[4] Above, p. 41.

[5] Cf. Varro, *de l. lat.* 7, 105 (Bruns 2, 60): *Liber qui suas operas in seruitutem pro pecunia quam debet dat* (*debebat* MS.) *dum solueret, nexus uocatur, ut ab aere obaeratus* (*obseratus* Mommsen).

have been so. Thus one view is that *nexum* was *mancipatio*, i.e. that the sale-form was used to create debtor-bondage. But the preferable view is that which deduces the form of creating obligations *per a. et l.* from the form of releasing them, namely *solutio p. a. et l.*, of which we have an account in §§ 173–4.[1] If *nexum* had taken the form of a sale, its release would have been in form a resale, if not a manumission *uindicta* as from *mancipii causa* (1, 138). But in *sol. p. a. et l.* there is no trace of the idea of sale; what the debtor is released from is a *damnatio* in a certain sum. Therefore *nexum* was not a conveyance, but a *damnatio* of the debtor in the sum weighed out.[2] The *damnatio*, it is held, rendered him liable to seizure by *manus iniectio* (*siue damnatus*: 4, 21). In any case, on either view, we arrive at the important result, confirmed by comparative law, that the liability of a *nexus* was not what modern law understands by obligation, not a mere *iuris uinculum*, but a bondage, which must be thought of as having been at first a literal binding or fettering. As Cuq[3] has well put it: there were *obligati* before there were *obligationes*.

Comparative law has shown that debtor-bondage is apt to develop into true obligation by way of self-guarantee; with due caution this result may be used in interpreting the scanty Roman evidence.[4] The starting-point is that a man needing credit—it may be a loan, or time in which to find the ransom from some vengeance threatened on account of his wrongdoing—and not being able to obtain it on his mere promise, which would be unenforceable, gets a friend or kinsman to give himself as a bondsman to the creditor. The bondsman (*nexus*) will owe no debt; he will be simply a hostage. The debtor will not be *nexus*, but to release the hostage by duly meeting the debt will be both his right against the creditor and his duty to the hostage. In describing this situation it is convenient to use the Germanistic terms *Schuld* for the debtor's unenforceable duty to the creditor and *Haftung* for the engagement of the hostage, but it must be borne in mind that while *obligatio* in its basic sense fairly corresponds to *Haftung*, there is no Latin equivalent for *Schuld*, and if no Latin term, no clear Roman concept.[5]

[1] Below, p. 181.

[2] Cf. Festus, *v. Nexum aes* (Bruns 2, 17).

[3] *Inst. jurid.* 1 (1904), 103.

[4] Gierke, *Holtzendorffs Enzykl.* (ed. 7 1915) 1, 267, gives a conspectus of Germanistic literature. Cf. Partsch, *Griech. Bürgschaftsrecht* 1 (1909); Koschaker, *SZ* 1916, 348 (specially relevant); Cornil, *Ancien droit* (1930) 74; Meylan, *Acceptilation et paiement* (extr. from *Recueil de travaux*, Lausanne 1934); Buckland, *Main Inst.* 237; Pollock and Maitland 2. 186. 202.

[5] Cf. Koschaker, *SZ* 1916, 349–51.

For the situation described to be transformed into true obligation two developments are necessary. First, the *obligatio*, instead of being from the outset physical, must have become a *iuris uinculum* realizable only if and when the debt is not met and then only by process of law. Secondly, it must have become possible for this eventual liability to be assumed by the debtor himself, along with others or even alone (self-guarantee). The essential points are that *obligatio* should have come to mean liability to legal process, and that debt and *obligatio* (*Schuld* and *Haftung*) should be combined in the person of the debtor.

The Roman evidence of such a development is not negligible. In contracting with the State the undertaker (*manceps*) had to find sureties (*praedes*), but he could himself be one of them (*manceps, idem praes*).[1] It seems a safe inference that he became *praes* because otherwise he would not have been liable directly. In private law the evidence comes chiefly from litigation: we find *praedes sacramenti* given to the praetor (4, 13) and *praedes litis et uindiciarum* (4, 16) given to the other party, *uades* for reappearance (4, 184)[2] and a *uindex* in *manus iniectio* (4, 21) and in *in ius uocatio*.[3] In all these cases there is reason to suspect an assumption of liability in place of another and not merely accessory liability. But the clearest illustration is the development inferable from the rule of the *Twelve Tables* that property was not to pass to a buyer unless he had paid the price, except where an *expromissor* or *pignus* had been given (*Inst.* 2, 1, 41). The exception shows the reason for the rule, namely that against the buyer himself there was no action for the price. Then comes a final exception which must be of later origin: the case where credit is given to the buyer. This means that the buyer can now be his own *expromissor*.[4]

Prehistoric sponsio. There is no reason to believe that such a development as that described ever took place in the case of *nexum*, but it is widely, though not universally, held that the other important early contract, *sponsio*,[5] grew up in this way. It is maintained that a *sponsor* was originally a hostage for another person and that *sponsio* on one's own account is an example of the familiar self-guarantee. A good many years after this conjecture was first advanced the discovery of Gaius 4, 17a showed that as early as the *Twelve Tables* a *stipulatio*,

[1] Cf. Festus, *s.vv. Manceps. Praes* (Bruns 2, 13. 26); *L. Tarent.* 7 *sq.*; *L. Malac.* c. 64; *L. Puteol.* iii, *fin.* (Bruns 1, 120; 153; 376).

[2] Cf. Varro, *de l. lat.* 6, 74 (Bruns 2, 57).

[3] Below, p. 301.

[4] Cf. Zulueta, *Sale* 3–4. Varro, *de r. r.* 2, 2, 2, 5 (Zulueta 62; Bruns 2, 63).

[5] Below, p. 152. The view in question was first propounded by Mitteis, *Festschr. f. Bekker* (1907) 107–42. His contention that the *sponsor* originated in litigation is not necessary to his main position.

or at the very least a *sponsio certae pecuniae*, was enforceable by an ordinary action, and there is no sign that the defendant was necessarily answering for another's debt. Thus the development of *sponsio* into self-guarantee, if it took place at all, must have been pretty early; but this Mitteis himself had already recognized. That the *Twelve Tables* possessed a contract engendering a true obligation is a signal proof of the Roman legal genius, but says nothing as to how such a contract was evolved. It cannot have sprung full grown from the brain of the decemvirs, though they may have given a decisive turn to its development. If we knew the earlier history of *sponsio*, our impression of the singularity of Roman law might be modified.

Historical times. *Nexum* disappeared early. We start from *sponsio* which in essentials was, as we have just said, a proper contract as early as the *Twelve Tables*. Like all ancient contracts it was formal, but its form was thoroughly rational, capable of variations (*stipulatio*), and, as regards possible contents, extremely elastic.[1] The other varieties of verbal contract[2] may be passed over here, nor need we dwell on the literal contract, another formal contract that had come into existence before the end of the Republic.[3] *Fiducia* too was another early formal contract,[4] but so closely connected with conveyance as hardly to count in the development of obligation by contract. Nevertheless the fact that there is so little to be said that is certain of the part played in the history of the contractual system by the giving of real security is probably due to our lack of information.

Development of formless contracts, i.e. of agreements sanctioned on account of their contents and not of their form. In a sense the earliest of these is *mutuum*, which is Gaius' one example of a contract formed *re*, i.e. by the transfer of a *res* (§§ 90–91).[5] It was actionable from the time of the *Ll. Silia* and *Calpurnia* (dates uncertain: 4, 19) and probably much earlier, but on the ground of enrichment *sine causa* rather than agreement. The earliest true formless contracts were the consensual.

As near as can be surmised, it was in the course of the second century B.C. that the revolutionary step was taken of providing actions for the enforcement of the commercially most important agreements even if concluded informally and without the delivery of a *res*: sale, hire, mandate, and partnership became binding by simple consent.

[1] Below, p. 151.

[2] *Dotis dictio, iusiurandum liberti* (§§ 95a–96) and the engagement of *praedes* and *uades* (Girard 797).

[3] Below, p. 163.

[4] Above, p. 73.

[5] Below, p. 148.

This reform was the response of Roman law to the demands of an ever growing trade in which *peregrini* played a large part. Foreign traders were no new problem,[1] but the creation in 241 B.C. of a special praetor to deal with cases in which *peregrini* were concerned marks an epoch, nothing less than the beginning of the dominance of the *ius gentium* in commercial matters. There is little or no evidence as to the early stages of this development. It is conjectured that it began with a consolidation by the new praetor's Edict of the previous discretionary practice in dealing with suits of *peregrini* and that thus actions on the consensual contracts became institutions. The extension of these actions to *ciues* seems to have taken place rapidly. The history of the later real contracts of *depositum* and *commodatum* (4, 47) suggests that it may have begun with the granting of actions *in factum* by the urban praetor. Whether he can have done this before the *L. Aebutia* (*c.* 150? B.C.) is disputed,[2] but he cannot have granted civil actions on the consensual contracts before that *lex* gave statutory authority to formulary procedure between *ciues*. What is certain is that these actions at the time when we first encounter them[3] were civil actions, in other words that the consensual contracts had already been fully incorporated in Roman law.

As important as their formlessness is that these new contracts were *bonae fidei*, which means that the standard by which they were judged was good faith and not, as in the case of the older contracts, the letter of the law (*strictum ius*). Their interpretation and application were governed by the real intention of the parties judged by all the circumstances and the practice of honest men, and not merely by what had been expressly provided for in the contract. Also *bonae fidei* were the considerably later civil actions on *depositum* and *commodatum*. These contracts, which required for their formation besides consent the delivery of a *res*, are omitted from the account of contracts in Gaius' *Institutes*, but not in the *Res cottidianae* which in this matter Justinian followed (*Inst.* 3, 14). This is a point to which before long we shall return.[4]

By the time of Gaius the contrast between the old *stricti iuris* and the new *bonae fidei* contracts had been much reduced. (i) *Mutuum* and all the forms of the verbal contract except *sponsio*[5] had been accepted to be *iuris gentium*. (ii) The *stricti iuris* character of the verbal contract

[1] M. David, 'The Treaties between Rome and Carthage', *Symbolae van Oven* (1946) 231; Daube, *JRS* 1951, 66.
[2] Below, p. 231.
[3] That of Q. Mucius Scaeuola, consul 95 B.C.: Cic. *de off.* 3, 17, 70.
[4] Below, p. 150.
[5] Below, p. 152.

had been greatly attenuated by the introduction of the *exceptio doli* (4, 116a). (iii) The forms of the verbal contract became ever freer and the literal contract died out. (iv) The verbal form was recognized to be the expression of consent;[1] since the consent had to be real, the doctrine of error applied. After Gaius the formalism of the verbal contract continued to wither, but it was never to be quite eradicated. Justinian missed a great opportunity.

The classification of contracts (§ 89). The fourfold classification did not originate with Gaius. It is found in Pedius, a contemporary,[2] and in later jurists who may not have known Gaius. It suited his purpose of treating obligations from the point of view of their acquisition rather than of their nature and effects. But as a dogmatic classification it is unsatisfactory. It would have been more instructive to classify them either according to their formation as formal and formless or according to their effects as *stricti iuris* and *bonae fidei*.[3]

§§ 90–91. Real Contract

Mutuum, the one example given, is the loan of money or other things for consumption. In contrast to loan for temporary use (*commodatum*) it involves transfer of ownership; the contract is said to be formed *re* because the obligation to restore an equal quantity of similar things arises on the transfer taking place. The transfer has this effect in virtue of the accompanying agreement; the obligation is therefore *ex contractu* (*obligatio re contracta*). The elements of the transaction are thus the things, their transfer, and the agreement.

The things are to be replaced by others of the same kind. Most things would be susceptible of being so treated by parties, but *mutuum* was held to be confined to things that by commercial usage were reckoned by weighing, counting, or measuring and regarded as generic, not specific, things *quae uice mutua funguntur*, for which the convenient modern term is 'fungibles'.

The transfer. Such things not being *res mancipi*, their transfer would be by *traditio*, of course in the broad sense. In later times there was even a tendency to recognize *mutuum* in some cases where there was no change of possession or ownership but merely the establishment of a credit in favour of the borrower. The subject is beyond our scope.[4]

[1] Ulp. *D.* 2, 14, 1, 3.

[2] *D.* 2, 14, 1, 3.

[3] Cf. Pernice, *SZ* 1888, 220–6.

[4] Cf. especially Girard 543 s. Also Buckland 463–4 and *Main Inst.* 263–4; Riccobono, *Rappresentanza* (*Annali Semin. Palermo* 1930) 408.

The agreement enforceable as *mutuum* could only be for the restoration of an equal sum of money or of goods equal in quantity and similar in quality to those lent, at a date named or, if no date was named, on demand. The place of payment might also be agreed and the obligation might be made conditional, but no other terms could be incorporated in the *mutuum*, not even an agreement for payment of interest.[1]

Interest. This does not mean that the Romans did not exact interest on loans; the contrary is shown by the constant legislation limiting the rate that could legally be charged. What is meant is that *mutuum* in itself could not incorporate a pact for interest. In short it was not a business contract. Liability for interest could be created only by a distinct formal contract, *stipulatio*. But if one stipulated for interest, one naturally stipulated for the principal at the same time (*stipulatio sortis et usurarum*),[2] in which case the obligation was considered to have arisen *uerbis*, not *re*.[3]

Effect of mutuum. The sole effect was to impose on the borrower a *stricti iuris* obligation to repay. The contract was unilateral. No question of risk arose; this was entirely on the borrower to whom the property now belonged (*Inst.* 3, 14, 2). The not impossible case of his suffering damage owing to an undisclosed defect in the things lent is not considered. The lender's remedy under the formulary system was the *condictio certae pecuniae*, which involved a *sponsio* and *restipulatio tertiae partis* (4, 171), and in other cases the *condictio triticaria*. In both cases the *formula* simply asserted a *dare oportere* without stating its ground,[4] but naturally in the *cond. triticaria* the *condemnatio* had to provide for valuation in money. Before the formulary system the remedy was *legis actio per condictionem* (4, 17b *sq.*) under the *Ll. Silia* and *Calpurnia*; earlier, at least on *mutuum* of *pecunia*, it was the *l. a. sacramenti in personam*.

Mutuum was held to be *iuris gentium*, liability to repay loans being common to all legal systems. The original ground of the liability seems to be that it is dishonest of a borrower not to repay. It was on this account that *condictio* on *mutuum* lay, not on the ground of *mutuum* being an agreement exempted from the general requirement of form. Thus it is with good reason that Gaius draws a parallel between *mutuum* and the liability arising out of the receipt of property mistakenly

[1] In this matter *faenus nauticum* and loans by *ciuitates* fell outside the ordinary law: Buckland 465. 549; Arangio-Ruiz, *Ist.* 306–7.

[2] Examples: *Textes* 845; Bruns 1, 352; *Fontes* 3, 393.

[3] Ulp. *D.* 46, 2, 6, 1; Paul 7.

[4] Buckland 682 ff.

believed to be owed. The parallel might have been extended to other cases of causeless enrichment (2, 79), including theft (*condictio furtiua*: 4, 4). Hence *mutuum*, unlike the other formless contracts, had no action proper to itself, but was enforced by *condictio* without *causa* specified. Hence also even when the contractual nature of *mutuum* came to be recognized its scope remained confined to simple restitution.

The other real contracts. One who has read *Inst.* 3, 14 cannot but ask why Gaius did not add *commodatum* (loan for temporary use), *depositum* (gratuitous deposit), and *pignus* (pledge) as further examples of contract formed *re*. The absence of *pignus* is explicable on the probable ground that it had not yet been provided with a civil action; also, pledge goes at least as naturally with the law of property (2, 64) as with that of contract. The latter consideration applies even more strongly to *fiducia*[1] which might have been mentioned in *Inst.* 3, 14 had it not become obsolete. Mortgages are contracts, but that is not the point of view from which they are commonly treated of in textbooks. In Gaius' day a contract of *fiducia* had long been enforceable by a *bonae fidei* action (4, 33. 62).[2] Whether, regarded as a contract, it should be classed as real, because it depended on a transfer of property, or as formal, because the transfer had to be by *mancipatio* or *in iure cessio*, is doubtful.

The omission of *commodatum* and *depositum* remains. Civil actions on them existed, as Gaius himself tells us (4, 47), and they were not recent novelties. Even if, as has been suggested, their omission here is due to his having followed an antiquated traditional scheme, he is still in fault, though not, we submit, so seriously as has been claimed.[3] He ought at least to have mentioned them in his survey of contracts, but where exactly under his fourfold classification? The only possible place is here, under the real contract. But this would require that formation *re* should be given a wider meaning, so as to cover formation resulting from transfer of detention or possession, not only of ownership as in *mutuum*. Gaius may not have thought of such an extension till later. In his *Res cottidianae* he made it,[4] and thence it passed into the *Institutes* and has become a commonplace. It may have been suggested by the *actiones commodati* and *pigneraticia* being in the

[1] Above, p. 73.

[2] *Edictum* § 107. Cic. *top.* 17, 66; *de off.* 3, 15, 61; 3, 17, 70.

[3] Schulz, 162–3, uses the omission as part of his argument for the view that Gaius never finally revised his *Institutes* for publication. One could add the entire omission of the real contract in § 136 (corrected in *Inst.* 3, 22).

[4] That is, assuming that *D.* 44, 7, 1, 3–6 is Gaian. But cf. Schulz 167–8.

same edictal title, *De rebus creditis*, as the *condictiones* which were the remedies on *mutuum*.[1] But the *actiones depositi* and *fiduciae* were in the title *De bonae fidei iudiciis*, and the extension made by the *Res cott.*, in spite of its success, has the unhappy result of producing a heterogeneous group of contracts—*stricti iuris* and unilateral *mutuum* alongside of three *bonae fidei* and semi-bilateral contracts.

§§ 92–96. The Forms of Verbal Contract

Stipulatio. This is perhaps the most important institution of Roman law. Though it remained a formal contract, its forms, never complicated, were progressively simplified, and they were capable of embodying any legal promise. Paul's derivation of *stipulatio* from *stipulus* meaning 'firm',[2] true or not, is certainly apt: by *stipulatio* one could make any promise actionable. The result is that *stipulatio* pervades the whole law, even that of property and procedure. It had its limitations: its form made it unilateral, and it was *stricti iuris*. A promise by *stipulatio* of a sum of money grounded a *condictio certae pecuniae* (*actio certae creditae pecuniae*), that of a certain quantity of fungibles or of a specific thing a *condictio triticaria* or *certae rei*, that of any performance or abstention other than a *dari* an *actio ex stipulatu*. These actions raised a question of *oportere*, not of *oportere ex fide bona*; nothing mattered but the *uerba* of the *stipulatio*, and these were construed strictly; in particular traditional terms were taken in their established meaning. But for these limitations there might have been no need of the consensual contracts, which being bilateral and *bonae fidei* enabled the *iudex* to take account of the whole transaction between the parties and of what was implied between them as a matter of good faith. At the same time, the profound change in *stipulatio* that resulted from the introduction at the end of the Republic of the *exceptio doli* must not be overlooked. This ended its complete isolation from surrounding circumstances and, amongst other things, made its *causa* relevant.[3] Also, the development of a general concept of contract caused it to be recognized that the *uerba* of a *stipulatio* were but the expression of the *uoluntas*; though it does not appear that the interpretation of the *uerba* became in consequence much

[1] Cf. Ulp. *D.* 12, 1, 1, 1 (*P. Ryl.* 474: *Fontes* 2, 313). *Edictum* pp. 231–2.

[2] *Sent.* 5, 7, 1; *Inst.* 3, 15 pr.

[3] A good illustration is provided by 4, 116a. Cf. the use of the *exc. pacti* in *Inst.* 3, 15, 3.

freer, at any rate a *stipulatio* could be pronounced void if *error* negatived consent.

History of the forms. Of the forms given by § 92 *sponsio* is the only one whose existence at the time of the *Twelve Tables* is beyond doubt (4, 17a). From the fact that it was confined to *ciues* (§ 93), whereas all the other forms were *iuris gentium*, it is often inferred to have been the original form, but the value of this argument is doubtful, since we do not know precisely why *peregrini* were excluded from *sponsio*. *Fidepromissio* may be equally old. Again, comparative law and the history of the Roman remedies combine to suggest that *sponsio* of *certa pecunia* was actionable before *sponsio* of any other *dari*, and that the latter was actionable before *sponsio* of an *incertum*. This is not confirmed by 4, 17a, but neither is it really disproved, since the illustrative formulary there given carries more weight than the general expression '*de eo quod ex stipulatione petitur*', which may represent later interpretation.

Origin of sponsio. As to the form, the most solidly supported of many conjectures is that *sponsio* began as an oath.[1] This is perfectly compatible with Mitteis' conjecture[2] that its earliest function was acceptance of *obligatio* on behalf of another. The direct Roman evidence is slight, but it is worth mentioning that throughout history, in times when *spondere* as principal was quite normal, the term *sponsor* invariably denotes a guarantor, not a principal,[3] and further that a *sponsio* to convey always takes the form *dari spondes* (§ 92 and *passim*), not *dare* or *te daturum esse*, as though the promisor was to answer for a result, not promising personal performance. However, if in the distant past *sponsio* was nothing except a method of becoming a hostage, this had ceased to be so by the time of the *Twelve Tables*.

Fidepromissio. Promissio. Fideiussio. These theories as to the original form and function of *sponsio* apply equally well to what seems to have been the earliest alternative form, *fidepromissio*.[4] It must be a verbalization of some ceremony of offering the right hand as the symbol of *fides*,[5] which is a common primitive method of assuming liability on behalf of another.[6] *Promissio* is clearly an abbreviated

[1] In this respect Girard's arguments, pp. 516–18, are not vitiated by 4, 17a.

[2] Above, p. 145 n. 5.

[3] The force of this argument is questioned by Daube, *LQR* 1946.

[4] Certainly earlier than the *Ll. Furia* and *Appuleia* of not later than *c.* 200 B.C. Probably much earlier in view of the archaic features which it shared with *sponsio*: §§ 119–20.

[5] *Fide promittere dextram*. *Fides* was deified: Livy 1, 21; further references Girard 517, n. 2.

[6] Cf. Koschaker, 'Cuneiform Law', *Encycl. of Social Sciences* 218: 'The

form, while *fideiussio* carries the spiritualization of the act a step further. Such richness of forms is common in primitive law generally, but surprising in Roman law; one suspects that the apparent Roman poverty in forms is due to a pruning of the exuberance of popular custom by an austere jurisprudence. In the present case *fidepromissio* may have been suffered to survive alongside of *sponsio* because for some unknown reason its employment by *peregrini* was unobjectionable—a decision of the utmost importance, involving that with a slight exception the whole of the Roman law of contract was to be common law for the Empire. *Fideiussio* may have originated as a device for evading certain archaic features of *sponsio* and *fidepromissio* and certain early statutes (§§ 118 *sq.*). Of the other forms mentioned in § 92—*dabis? dabo* and *facies? faciam*—one can only say that they show a complete laicization of the contract, a shedding of any mystical element.

The forms in classical times.[1] Gaius being our only juristic authority who is free from the suspicion of being interpolated, we begin by collecting what he tells us. *Stipulatio* is formed by oral (§ 105) question and answer (§ 92) exchanged between present parties (§§ 136. 138), and the answer must be an unqualified acceptance of the obligation proposed by the question (§ 102). A number of skeleton forms of the dialogue are given (§ 92), all of which except *sponsio* are equally valid in Greek (§ 93); the use of other languages may have been considered in the lost passage (§ 95).[2] No more can be gathered from Gaius, and some questions are left open.

i. Is the list of forms in § 92 exhaustive or merely illustrative? Justinian calls these same forms *sollemnia uerba* (*Inst.* 3, 15, 1).[3] Paul (*Sent.* 2, 3) adds to the list only a variant: *fidei tuae erit? fidei meae erit.* The admission of Greek translations is not really consistent with there being a magic in particular words; nevertheless in the parallel case of *testamenta* Greek was allowed at any rate in some localities before the abolition of verbal formalism in Latin *testamenta.*[4] Common sense suggests that once *dabis? dabo* and *facies? faciam* were allowed, there could be no reason to reject, for example, *aedificabisne? aedificabo*, except perhaps that *dare facere* would recur in the

terminology of suretyship involves as in other systems of law a gesture of the hand (handclasp, raising the hand) as the original form of bond through which the warrantor's liability is pledged with his body.'

[1] Any study of this subject must owe much to Riccobono. Cf. *SZ* 1914, 214; 1922, 262; *Ann. Sem. Palermo* 12 (1928) 522; *Atti, Roma* 1 (1934), 338.

[2] Cf. Ulp. *D.* 45, 1, 1, 6; Theoph. 3, 15, 1.

[3] *C.* 8, 37, 10 (Leo, A.D. 472) has *sollemnibus uel directis uerbis.*

[4] Above, p. 119 n. 1.

formula of an action. No certain conclusion is possible, but on the whole the impression created is that in Gaius' day the forms were neither strictly fixed nor freely variable.

ii. The answer had to be *congruens*,[1] but does this mean more than a substantial correspondence (§ 102)? Clearly *decem dari promittis? promitto* or *decem dabis? dabo* sufficed,[2] but was it necessary that the answer should echo at least the principal verb of the question, or would *decem dari promittis? dabo* or *decem dabis? promitto* or even *dabis?* δώσω pass muster? How Gaius would have answered is uncertain.

It may be that he was excessively traditionalistic. That, or else a considerable deformalization of *stipulatio* during the next fifty years after him, would follow from Ulpian *D.* 45, 1, 1, if that passage could be accepted as classical. Its effect is that a spoken question and answer *inter praesentes* was still necessary, but that the words used were a matter of indifference. But take Ulpian § 2: *Si quis ita interroget* (*interrogatus* Riccobono) '*dabis?*' *responderit* '*quidni?*', *et is utique in ea causa est ut obligetur: contra si sine uerbis adnuisset.* The grammatical disorder makes some interpolation certain, and yet if the passage has been doctored in order to make it conform with the constitution of A.D. 472,[3] either the interpolation does not go far enough, or else the effect of that constitution was not so drastic as is commonly believed. In short, it is impossible to accept without doubt the view dominant in modern times that the forms of *stipulatio* remained absolutely rigid and unchanged in legal theory, if not in practice, right through the classical period.

Written stipulatio (cautio).[4] The form of *stipulatio*, like that of *cretio*,[5] made no provision for evidence, but naturally one took one's precautions, and from the time when Rome became literate the most obvious precaution, suggested also by Hellenistic practice, was to record in a document subscribed by the *promissor* and retained by the *stipulator* both the solemnization of the oral act and its terms. Incidentally a great simplification was made possible. The often elaborate and always strictly construed terms having been set out, a record of the oral act could be appended in such words as: *haec quae supra scripta sunt, ea ita dari fieri neque aduersus ea fieri fide rogauit Titius, spopondit Maeuius*, or: *fide roganti Sticho, seruo Lucii*

[1] Mod. *D.* 44, 7, 52, 2. *Paul* Sent. 2, 3. Ulp. *D.* 45, 1, 1, 6.
[2] Cf. *Inst.* 3, 19, 5, which we take to be classical.
[3] Leo *C.* 8, 37, 10: cf. *Inst.* 3, 15, 1.
[4] Cf. Riccobono as cited above, p. 153 n. 1.
[5] Above, p. 104.

Titii, promisit Callimachus, or (*subscriptio* of *promissor*): *interrogatus spopondi* (ἐπερωτηθεὶς ὡμολόγησα).[1] The oral act could then take some such form as: *haec quae in hac cautione scripta sunt, ea ita dari fieri . . . promittis? promitto.* It is the same simplification as that of a testator's *nuncupatio* (2, 104). By a perfectly natural development the *cautio* and the *tabulae testamenti* thus came to be regarded as being respectively the *stipulatio* and the *testamentum*, and a layman like Cicero may well be excused for having reckoned *stipulationes* and *testamenta* among *res quae ex scripto aguntur.*[2] But in strict law he was wrong as to both: neither the *tabulae* nor the *cautio* had any legal effect unless orally confirmed, and on the other hand an oral *nuncupatio* or *stipulatio* was fully valid without a document. It is true that *iure praetorio* oral *nuncupatio* became unnecessary,[3] but in regard to *stipulatio* the praetor during the classical period did not take this step save in some exceptional cases in which he allowed the fiction of a *stipulatio.*[4] Thus in classical theory the *cautio* remained in the last resort merely evidentiary; for its binding force it depended on confirmation by an oral *stipulatio.*

That this was the law in Gaius' day is abundantly clear. His complete silence as to the *cautio*, the practical importance of which is unquestionable, admits of no explanation save that in an elementary work he decided to pass over the purely practical question of proof. Moreover, for him the only literal contract open to *ciues* is *expensilatio* (§§ 128–34). Literal contract in the wider sense is *proprium peregrinorum* and even between *peregrini* occurs only on the hypothesis that there has been no *stipulatio.* If in Gaius' day a written promise had created a conclusive presumption of an oral *stipulatio*, he could not have written (§ 134): *si quis debere se aut daturum se scribat, ita scilicet si eo nomine stipulatio non fiat*, but would have had to omit *aut daturum se*, as in the altered state of the law the compilers of *Inst.* 3, 21 felt obliged to do.

Absorption of stipulatio by cautio. It is nevertheless self-evident that a properly drawn *cautio* must always have created a strong presumption that the oral act had taken place. But it was not a presumption *iuris et de iure*; it could be rebutted, and most easily by proof that the parties did not meet.[5] On the other hand, if *praesentia* of the

[1] Scaeu. *D.* 45, 1, 122, 1. Paul *D.* 17, 2, 71 pr. 45, 1, 126, 2; 140 pr. Ulp. *D.* 2, 14, 7, 12.

[2] *Top.* 26, 96.

[3] Above, p. 95.

[4] Cf. Riccobono, *SZ* 1922, 267; *Atti, Roma* 1, 343.

[5] Or again by proof that the person expressed to have received the promise as the *stipulator*'s slave was not such in fact: *C.* 8, 37, 14 (A.D. 531).

parties could not be disproved, the presumption must in most cases have been practically irrebuttable, even before the constitution of 472[1] abolished the necessity of using any particular form of words.[2] The strength of this presumption would in itself sufficiently account for the final supersession of the oral act by the *cautio*, but other contributory causes should not be overlooked. Even if admittedly the oral act had been omitted, there were cases in which the praetor by fiction dispensed with it, and these cases may have been extended.[3] Moreover, Hellenistic businessmen, even after they had received citizenship by the *Const. Antoniniana* of 212, clung to their own secular written contract (§ 134). Their notaries indeed were vaguely aware of the fact that it was proper to add to written contracts between *ciues* a clause alleging an oral *stipulatio*, but how little some of them understood the matter is shown by their adding it to such documents as testaments and manumissions. At least *de facto*[4] the custom of pure written contract survived in the East and in the end got the better of the true Roman *stipulatio*. But the Roman theory, that the *cautio* was only evidence, died very hard; Justinian himself testifies that up to his own day a written contract could be defeated by proof that the parties had not met. This *praesentia partium* was the one surviving element of the old oral ceremony, and even Justinian did not abolish it entirely (*Inst.* 3, 19, 12).[5] *Inst.* 3, 19, 7 even adheres to the requirement that both parties must be able to speak and hear.

The unique interest of the subject has carried us beyond our province. So far as Gaius is concerned it is clear that in law oral *stipulatio* was still necessary, and all that was necessary.

Other verbal contracts. Gaius (§§ 95a–96) notices two other verbal contracts differing from *stipulatio* in that the form was a monologue, a formal utterance by the promisor only. Both are relics of old customary law, surviving from a time when *stipulatio* had not grown to its full stature.

[1] Leo *C.* 8, 37, 10; cf. *Inst.* 3, 15, 1.

[2] Cf. Paul (Vis.) *Sent.* 5, 7, 2; *Inst.* 3, 19, 17.

[3] Riccobono, *Atti, Roma* 1, 343 and elsewhere lays considerable stress on this.

[4] And perhaps *de jure*. Under Diocletian the central government reacted strongly against Hellenistic custom: Riccobono, *SZ* 1914, 261. But in recent years the assumption of Mitteis' *Reichsrecht u. Volksrecht* (1891), that the *Const. Ant.* of 212 impliedly abolished all and any *ius proprium peregrinorum*, has been questioned, first by Schönbauer, *SZ* 1931, 277. See now Lewald, 'Leș Conflits de lois dans le monde grec et romain', *Ἀρχεῖον ἰδιωτικοῦ δικαίου* 13 (1946), 80; De Visscher, *Le Statut juridique des nouveaux citoyens romains et l'inscription de Rhosos*, Brussels 1946 (extr. from *L'Antiquité classique*).

[5] Cf. *C.* 8, 37, 14 (A.D. 531).

Dotis dictio (§ 95a).[1] By *stipulatio* anyone could promise *dos* to an intending husband, but the future wife, if *sui iuris*,[2] or her *paterfamilias* could do this also by a formal unilateral declaration known as *dotis dictio*: e.g. *fundus Cornelianus doti tibi erit*. So could the woman's debtor, though why he specially and, if he, why not also her father's debtor are unsolved questions.[3] Usually such a declaration would be made at the ceremony of betrothal (*sponsalia*),[4] and since in all probability the promise to marry was actionable in early days,[5] it may be that *dotis dictio* first took shape as a subsidiary pact, and that later, when promises to marry had ceased to be actionable, it survived as a promise actionable on condition that the marriage took place. It is not a mere derivative of *stipulatio*, from which it differs both in form and in being causal (failing if the marriage failed), as well as in other respects. Hence its sanction was not a *condictio*, but the *bonae fidei iudicium rei uxoriae*.[6] In the post-classical period its place was taken by formless *dotis promissio*.[7]

Iusiurandum liberti (§ 96). The manumission of a slave was commonly accompanied by an engagement on his part to do certain work (*operae*, measured in day's work) for his patron. In developed law such a promise would be void if given before manumission (§ 104); yet to defer it till after the manumission might be imprudent. It became the practice for the slave to promise by oath before manumission and to confirm this by a second oath or a *stipulatio* after manumission. The first oath imposed at any rate a religious obligation; whether it was ever enforceable by civil action is not known; in historical times the stress is naturally on the second promise.[8] It did not matter in which of the two forms the second promise was given,[9] since either was enforceable by *iudicium operarum*, a civil *stricti iuris* action closely resembling a *condictio certae rei*.[10] Gaius' only concern here is that in contrast with *stipulatio* the oath required speech only from the promisor. He adds that this is the only case in which Roman law recognized an oath as a source of *obligatio*.[11]

[1] Ulp. 6, 1: *Dos aut datur aut dicitur aut promittitur*. Cf. above, p. 39.

[2] Naturally with *auctoritas tutoris*: 1, 178.

[3] Cf. Daube, *Jurid. Rev.* 1939, 11; Buckland, *Festschr. Koschaker* 1, 24; Solazzi, *Stud. et Doc.* 1940, 159; Riccobono, *BIDR* 1947, 39.

[4] Cf., however, *Epit.* 2, 9, 3, quoted Part I p. 182.

[5] Cf. Gell. 4, 4.

[6] Cf. Riccobono, *BIDR* 1947, 39–40.

[7] *C.T.* 3, 13, 4 = *C.* 5, 11, 6 (A.D. 428).

[8] Cf. Venuleius *D.* 40, 12, 44 pr.

[9] Or not much: 3, 83.

[10] *Edictum* § 140.

[11] Cf. Buckland 458–9. Lambert, *Les operae liberti* (1934) gives much information, but his theory as to the origin of the use of the oath does not seem acceptable.

In early law there were other forms of verbal obligation, but they were obsolete by Gaius' day.[1]

§§ 97–109. Void Stipulationes

These sections need little comment. *Inst.* 3, 19 is more instructive, and some of our sections have already been dealt with—§§ 102 and 105 in connexion with form,[2] and § 104 *fin.* and §§ 106–9 under Law of Persons.[3] The pointed omission in § 104 of the *filiusf.* should be noted: in classical but probably not in the earliest law[4] he was fully capable of incurring contractual obligation, except that a *SC. Macedonianum* of the reign of Vespasian invalidated loans of money to him.[5]

A promise of what was legally or physically impossible or one subject to an impossible condition was void (§§ 97–99; cf. *Inst.* 3, 19, 1. 2. 11). Impossibility here means absolute, not merely relative, impossibility. In the matter of impossible conditions the Sabinians distinguished between *legata* and *stipulationes* (§ 98);[6] their view was adopted by Justinian (*Inst.* 2, 14, 10).

Also void were *stipulationes* expressed to take effect only after the death (or *c. deminutio*) of either party (§§ 100–1). They were as invalid as if only the party's *heres* had been mentioned. But the benefit and burden of a validly formed *stipulatio* descended to *heredes*, and if it was a conditional *stipulatio* this was so even if the condition was not realized till after the death of the *stipulator* or the *promissor* (*Inst.* 3, 15, 4). Some writers hold[7] that in primitive law its intensely personal nature prevented contractual *obligatio* from descending to and against *heredes*, and that what we shall read of *adstipulatio* (§ 114) and the oldest forms of *adpromissio* (§ 120) is a survival of an originally universal principle; but in historical times the only objection was to obligations beginning in the person of a *heres*, and even this ceased to be strongly felt, as is shown by the validity conceded to *stipulatio cum moriar* in contrast to *post mortem meam* or *pridie quam moriar*.[8] Justinian abolished this ground of invalidity altogether (*Inst.* 3, 19, 13 *fin.*).[9]

Stipulatio in favour of an extranea persona (§ 103). A *paterf.* was solely entitled under a stipulatory promise made to a person in

[1] *Vadimonium* 4, 184 *sq. Praedes* 4, 16. Cf. above, p. 145, and below, p. 302.

[2] Above, pp. 153–4.

[3] Slaves above, p. 29; persons *in mancipio* p. 40; *in manu* p. 34; *pupilli* and women pp. 49–50.

[4] Above, p. 138.

[5] Cf. *Inst.* 4, 7, 7. Buckland 465–6.

[6] Above, p. 107.

[7] Above, p. 84 n. 1.

[8] *Inst.* 3, 19, 15; also, if Huschke is right, § 100. Cf. the same ideas in regard to legacies: above, p. 107.

[9] Cf. *C.* 8, 37, 11 (A.D. 528), and on *stip.* simply *heredi meo C.* 4, 11, 1 (531).

his *potestas*, whether or not he himself was named in it (§ 163), and also under one to himself but naming a person in his *potestas* as beneficiary (*Inst.* 3, 19, 4 *fin.*). But a *stipulatio* expressed in favour of an *extranea persona* was void. The *extr. persona* could not enforce a promise not made to him, and the *stipulator* could not enforce it because he was formally excluded by the nomination of the *extr. persona*.[1] Thus if both the *stipulator* and an *extr. persona* were named, it was a question (decided by Justinian in the Proculian sense: *Inst.* 3, 19, 4) whether the *stipulatio* was not void as to half (§ 103). The original ground for wholly or partly disentitling the *stipulator* was formal; later the more rational ground of his lack of interest was relied on (*Inst.* 3, 19, 19). Hence, *cessante ratione*, in later law a *stipulatio alteri* was enforceable by the *stipulator* (not of course by the *extr. persona*) if, as would be probable, he had an interest in its performance.[2] An older and simpler way out was for the *stipulator* to take a promise of a *poena* in the event of the promise not being performed for the *extr. persona*.[3]

Promise of performance by a third party. On this subject Gaius is silent. In principle the *stipulatio* was equally void, for a *promissor* could bind himself only to performance by himself and (agency being out of the question) the third party was not bound by a promise which he had not made. One could, however, validly engage to procure the performance of a third party, or one could agree to pay a *poena* in the event of his not performing (*Inst.* 3, 19, 3. 21).

§§ 110–14. Adstipulatio

There was *adstipulatio* when, following upon a *stipulatio*, a second stipulator took a promise of *idem* from the same *promissor*. The second stipulation was not necessarily couched in the same words as the first, and it might be for less (but not for more) than the first or be conditional or deferred where the first was absolute or immediate (§§ 112–13). But in some way the identity of what was promised, the *res*, must have been made clear. The result of these successive *stipulationes* was quite different from that of a *stipulatio mihi aut Titio* (§ 103? *Inst.* 3, 19, 4), which merely made payment to Titius an alternative method of performance, and gave Titius no right to sue. The result of *adstipulatio* was more like that of answering simultaneously two

[1] Cf. the result of a *seruus communis* stipulating *nominatim* for one owner: § 167, below, p. 186.

[2] *Inst.* 3, 19, 20. But how far classical? Cf. *Index Interpol.* on *D.* 45, 1, 38, 20. 23.

[3] *Inst.* 3, 19, 19; Ulp. *D.* 45, 1, 38, 17.

separate questions to the same effect put by two *stipulatores*. But the latter became *correi credendi* (*Inst.* 3, 16), which a *stipulator* and an *adstipulator* did not, though their position was very similar. An *adstipulator* could extinguish the debt, and therefore the *stipulator*'s rights, by receiving a real (§ 116) or (by *acceptilatio*; §§ 169–72) an *imaginaria solutio* (§§ 215–16); moreover he could sue for the debt (§ 111) and no doubt *litis contestatio* (§§ 180–1) in an action brought by him consumed the *stipulator*'s claim as well as his own. Presumably the same result followed if he novated the debt (§§ 176 *sq.*).

Thus in relation to the debtor the *adstipulator* was virtually a principal, but in relation to the *stipulator* he was merely an accessory creditor. In classical law he was a mandatary, liable to the stipulator in the *actio mandati* for anything he had received or forgone (§§ 111. 216). In earlier times, before the *actio mandati* existed, his breach of duty was not distinguished from delict. At least so it seems from the fact that the *L. Aquilia* dealt with his releasing the debtor to the detriment of his principal in conjunction with wrongful damage to property. Gaius (§ 216) apparently did not realize the comparative modernity of the *actio mandati*. An *adstipulator*'s failure to give up what he had received from the debtor was probably regarded originally as *furtum*.

An *adstipulator*'s rights were strictly personal. They did not descend to his *heres* (§ 114; 4, 113),[1] and they were extinguished by his being *capite minutus*;[2] but death and *c. dem.* destroyed his person, not the debt, which doubtless survived for the *stipulator*. Another result of the personality of the *adstipulator*'s rights was that if he was *alieni iuris* they did not vest in his superior: the *adstipulatio* of a slave was void, while that of a *filiusf.* was suspended in effects until he should become *sui iuris* otherwise than by *cap. dem.* (§ 114).

So long as an action could not be brought by a representative, *adstipulatio* must have been extremely useful, but in classical law processual representation was fully admitted (4, 82 *sq.*), and the only use Gaius can find for it (§ 117) is that a principal *stipulatio* which was itself void because *post mortem stipulatoris* could be enforced by the *adstipulator* for the benefit of the *stipulator*'s *heres*. Even this utility ceased when Justinian abolished the nullity of such a *stipulatio*;[3] consequently *adstipulatio* is not mentioned by him.

[1] Regarded by some as a survival of the general rule as to contractual rights: above p. 158.

[2] A safe inference from § 114 *fin.*

[3] Above, p. 158.

§§ 115–27. Adpromissio

This is the counterpart of *adstipulatio*, with plurality of debtors instead of creditors. If the same stipulatory question was put by a *stipulator* to several persons successively before any answer, and these persons then promised, they became *correi debendi* (*Inst.* 3, 16). In contrast, *adpromissio* supposes an already existent debt followed by a separate *stipulatio* for *idem* or *id* from a second *promissor*, or it might be by *stipulationes* from several fresh *promissores*. Here the result was not correality, but something very like it. Except that an *adpromissor* might have assumed liability for less than the whole existing debt (§ 126), *adpromissores* became severally liable *in solidum*, as liable as their principal, each for the whole debt; it was the same debt, and its destruction by the act (*solutio*, *acceptilatio*, *nouatio*, *litis contestatio*) of the principal or of any one *adpromissor* released the whole group, principal and *adpromissores*.[1]

Forms of adpromissio. Of the three forms mentioned (§§ 115–16)[2] the two oldest, *sponsio* and *fidepromissio* (between which the only difference was that *sponsio* was confined to *ciues*), were superseded in later practice by *fideiussio*, which gave the creditor better security. Security was the object of the whole institution (§ 117).

Sponsio and *fidepromissio* could guarantee no debt except one which had itself been created by *stipulatio* (§ 119), and the liability of a *sponsor* or *fidepromissor* did not descend to his *heres* (§ 120; 4, 113). As if this were not enough, a *L. Furia* (*c.* 200? B.C.) enacted that *sponsores* and *fidepromissores* in Italy should be freed by the lapse of two years; also, if there were several of them, it divided the liability equally between those of them who were alive when the debt fell due (not at that of action brought) regardless of their solvency, a creditor who exacted more than the share being liable to *manus iniectio* (§ 121; 4, 22). The *L. Cicereia* (§ 123; 4, 44) was no doubt consequential on this statute.

Creditors naturally looked elsewhere for better security. They found it in *fideiussio*, which seems to have been developed by practice in response to their need. *Fideiussio*, which like *fidepromissio* was *iuris gentium*, could be used to guarantee an obligation however

[1] This is the ordinary doctrine, based on *Epit.* 2, 9, 2 and *C.* 8, 40, 28 (A.D. 531). But recently it has been questioned whether in classical law *litis contestatio* with an *adpromissor*, or anyhow with a *fideiussor*, had the result of freeing his principal: Buckland, *Jurid. Rev.* 53 (1941), 281. But cf. Levy, *Seminar* 2 (Washington 1944), 6.

[2] Gaius does not keep his promise to explain the effect of the forms *idem dabis? dabo* or *idem facies? faciam*. It is assumed that it was the same as that of *fideiussio*: Buckland 445.

created, including a *naturalis obligatio* (§ 119a);[1] moreover the liability descended to *heredes* (§ 120) and was not subject under the *L. Furia* to lapse after two years or to division between co-sureties. But destruction of the debt by the act of either the principal debtor or of a *fideiussor* ended the liability of all, as in the case of *sponsio* and *fidepromissio*.[2] This must have meant that the creditor had to consider which of the debtors it was safest to sue for the whole, or how he would divide the claim between them, if he preferred to divide, as he was entitled to do.

So much for the effects of *adpromissio* as between the creditor and the *adpromissores*, but since it was a case of suretyship there are further questions. An *adpromissor* who satisfied the debt had in classical law an *actio mandati contraria* against his principal for indemnity. In earlier times a *L. Publilia* (§ 127; 4, 9. 22. 25. 171) had given a *sponsor* who had not been repaid within six months an *actio depensi*. What, if any, was the remedy of a *sponsor* until that statute, or of a *fidepromissor* until the appearance of the *ao. mandati*, is not known. At any rate in historical times recourse against the principal debtor was fully provided for by the *actio mandati*. But there was no right to contribution between several *adpromissores* as such; any such right depended on there being a contract between them—they might, for example, be *socii*. A *L. Appuleia* (§ 122), perhaps of the second half of the third century B.C., had removed this defect as between joint *sponsores* and *fidepromissores*, but it did not apply to *fideiussores*.

Beneficium divisionis. An *epistula* of Hadrian provided that a *fideiussor* might claim that liability should be divided between himself and any fellow *fideiussores* who were solvent at the time of action brought. The debt was not divided by law, as it was under the *L. Furia*; the *fideiussor* remained liable *in solidum* and had to ask for the relief (§ 121; *Inst.* 3, 20, 4). If he did not ask for it, that was his own affair. There was thus no implied right to contribution, but the occasion for it could be avoided.

Beneficium cessionis. To the extent that he paid the debt a surety released his principal as well as himself. He had his own right to a mandatary's indemnity from the debtor, but did not step into the creditor's shoes. The creditor's rights might, however, have been superior: thus in the probable event of the debtor's insolvency they

[1] This is one of the passages in which *obligatio* seems confined to contract. Ulp. *D.* 46, 1, 8, 5 allows *fideiussio* of delictual obligation only tentatively. Cf. De Visscher, *Études* 279.

[2] But cf. above, p. 161 n. 2.

might have ranked as privileged or have been fortified by real security. If the surety simply paid the debt, these advantages were thrown away. Consequently classical practice allowed his payment to take the form of a purchase of the debt from the creditor; if the latter would not make the necessary cession of his rights against the debtor, his action against the surety would be defeated by *exceptio doli*. Gaius does not mention this *beneficium*.

Beneficium ordinis siue excussionis. Justinian, having abolished the release of a surety by the mere fact of his principal being sued,[1] was able to enact[2] that the surety could require the principal debtor to be sued before himself, unless he had waived this right.

L. Cornelia (§ 124). For our purposes the account in the text, our sole authority, must suffice.[3] The definition of *pecunia credita* should be noted.

§§ 128–34. 137–8. The Literal Contract

The lack of references to this institution in extant classical juristic literature can be explained by the fact that it had disappeared before Justinian, but the meagreness of Gaius' account of it makes it probable that even in his day it was obsolescent. On the other hand, though not primitive, it may well be of respectable antiquity; in Cicero's time it was of some importance. The commonly received account,[4] which we adopt, is, so far as it goes beyond Gaius, more or less conjectural, but its main assumption, namely that the contract was based on book-keeping, seems to be practically proved by the terminology.[5]

In the good old times the Roman *paterf.* kept proper accounts; he took notes (*aduersaria*) of his receipts and expenses day by day, and at intervals (usually monthly) he booked them up carefully (*tabulas conficere*) in a *codex accepti et expensi*.[6] This *codex* or book showed receipts and expenses on separate pages (*tabulae accepti, expensi*). We shall assume it to have dealt only with money. Ordinary entries (*nomina*) would correspond to real receipts and payments; they would

[1] *C.* 8, 40, 28 (A.D. 531). [2] *Nov.* 4 (A.D. 535).

[3] Cf. Buckland 447–8, citing *Edictum* p. 215.

[4] Buckland 459; Girard 527.

[5] For a weighty dissent cf. Siber, *Röm. Recht* 2, 180. He reverts to a totally different view derived from Theophilus 3, 21. But Theophilus' account seems to be nothing more than an imaginative reconstruction of *expensilatio* as the opposite of the verbal *acceptilatio* (§ 169; *Inst.* 3, 29, 1) with which he was familiar.

[6] Cf. Cic. *p. Rosc. com.* 1–5; *in Verr.* 2, 1, 23; cf. *p. Caelio* 7, 17: *tabulas qui in patris potestate est nullas conficit.*

show what had happened to the contents of the cash-box (*arca*, whence *nomina arcaria*: § 131). These were purely evidentiary. If, for instance, a *paterf.* paid a sum to Titius by way of *mutuum*, the *expensilatio* to Titius recorded in the *codex* did not alter the nature of the obligation; the debt remained contracted *re* (§§ 131–2). On the other hand, in the two cases mentioned by Gaius, if in no others, the entry of a fictitious payment to Titius founded an obligation to repay it (§ 137). The entry itself rendered Titius debtor in the sum entered. This is Gaius' literal contract. The two cases are *transscriptio a re in personam* and *trs. a persona in personam.*

Trs. a re in p. occurs when Titius owes me money on some account, for example the price of a horse or the rent of a farm, and I enter the sum in my *codex* (*expensum ferre*) as paid by me to Titius, who thereupon becomes my debtor *litteris* instead of on the previous contract. *Trs. a p. in p.* occurs when my debtor, Titius, authorizes me to enter what he owes me as paid out to his own debtor, Maeuius; here the result of my entry (*expensilatio*) is that Maeuius becomes my debtor *litteris* instead of Titius, who at the same time both loses his claim on Maeuius and is released from his debt to me. It is difficult to believe that these transactions are completely reported by Gaius. The consent of the person who was made a debtor by the *expensilatio* must have been necessary, but the *expensilatio* which, we read (§ 138), did not require his presence, offers no guarantee of its having been given. The appropriate evidence would be a corresponding fictitious entry of *acceptum* in the debtor's own *codex*. This no doubt would be the correct practice, but Gaius clearly regards the creditor's *expensilatio* as being the essential act creating the new obligation (§ 137).

Further, since in both cases a previous debt to the maker of the *expensilatio* is cancelled, we should expect his *tabula accepti* to record its fictitious receipt; otherwise the balance shown by the *codex* would not agree with the cash in the *arca*. The very term *nomina transscripticia* suggests cross-entries. Similarly the debtor's *codex* ought to show a payment as well as a receipt. But all that these conjectures show is that it is easy to imagine a system of book-entries which would make a reasonable formal contract.

Effects. The effect of a *trs. a re in p.* resembles that of a novating *stipulatio* which without changing the parties or the terms substituted a verbal obligation for one derived from some other *causa* (§ 170 *fin.* 177). The advantage of the change of *causa*, as in *nouatio*, was that the creditor obtained, in place of a right that might be affected by counter-claims (4, 61) and other considerations of *bona fides*, a liquid *stricti*

iuris claim to a sum certain, pursuable like money due on a *mutuum* or a *stipulatio* by the *actio certae creditae pecuniae* with its *sponsio* and *restipulatio tertiae partis*.[1] A *trs. a p. in p.* might incidentally also have this effect, but its primary purpose, like that of a novatory *stipulatio interuentu nouae personae* (§ 176), was to substitute one debtor for another.

Gaius gives no ground for holding that *expensilatio* was possible except on the basis of an existing debt to the *expensilator*. If it was thus limited, the contract cannot strictly be called abstract. But it may be that it could also be used, or could have been in earlier times, in order to render actionable a promise that was not of itself actionable. We have an account[2] of a *donatio* being attempted in this form towards the end of the Republic; the attempt failed, but that may have been because the transaction was *contra bonos mores*. We also have an account of the successful *expensilatio* of a debt of the price of land sold consensually. The point of the story[3] is that, though the original consent of the buyer had been obtained by trickery (*dolus*), this was no answer to the *stricti iuris* action on the *expensilatio*, since at the date in question (115 B.C.) the *exceptio doli* had not yet been introduced. Probably the seller's object in making the *expensilatio* was to avoid having to use the *bonae fidei* action *ex uendito*, but it is not quite certain that this action had as yet been created. If if had not, there would have been no action at all for the price apart from the *expensilatio*. This last would be the sort of application of the literal contract that we are seeking. Evidence fails us, but there is an *a priori* probability that *expensilatio*, which is obviously in origin a fictitious *mutuum*, was used to make unenforceable debts actionable. Fictitious loan is a common device in early laws, especially for creating an action for a price. It has been described as the characteristic form of the abstract written contract in Greek law.[4]

Like *mancipatio* and *in iure cessio*, but unlike *stipulatio*, *expensilatio* could not be conditional,[5] but *dies* may have been allowed.[6] The presence of the debtor was not necessary (§ 138). This seems to be its one superiority over *stipulatio*, where, however, the requirement of *praesentia* could easily be satisfied by the creditor sending a slave to receive the promise (§ 163). The superiority of the *codex* as evidence

[1] Cf. Cic. *p. Rosc. com.* 5, 14: *Pecunia petita est certa; cum tertia parte sponsio facta est. haec pecunia necesse est aut data aut expensa lata aut stipulata sit.*

[2] Val. Max. 8, 2, 2. [3] Cic. *de off.* 3, 14, 59.

[4] Kunkel, *PW* iva, art. *Συγγραφή*, p. 4, col. 1 of offprint.

[5] Pap. F.V. 329.

[6] Cic. *ad fam.* 7, 23 is inconclusive.

was removed by the practice of *cautiones*.[1] It is thus not surprising that *expensilatio* became obsolete.

The creditor had to be a *paterf.*;[2] hence the possibility of his being a *peregrinus* is not considered. But the general view was that the whole institution was *iuris ciuilis*, and that *peregrini* were excluded from it also as debtors, though the Sabinians allowed them to be bound by a *trs. a re in p.* (§ 133).

Greek written contracts. Gaius (§ 134) is aware that in Hellenistic law obligations could be created by documents constituting abstract contracts, that is contracts depending solely on the writing and not on the underlying *causa*. He mentions two forms of document, *χειρόγραφον*, which was couched as a letter to the creditor and was written in the debtor's own hand, and *συγγραφή*, which was a witnessed document in narrative form sealed by both parties and deposited with an official. The modern view, based on an immense accession of epigraphical and papyrological evidence, is that documents in either form could be abstract contracts, though purporting to be evidence of a debt from some (fictitious) *causa*, the commonest fiction being that of a loan, e.g. of the amount of an agreed price.[3] Thus Gaius' remark as to peregrine law in § 134 has been shown to be correct. On the other hand, in Roman law such documents would be merely evidence, and if what the document showed was a *stipulatio*, the nature of the contract was not changed by its having been put in writing. Gaius maintains this Roman point of view in this last particular even where the parties to the document were *peregrini* whose *ius proprium* would have made the document binding in itself (§ 134 *fin.*). The exact effect of the *Const. Antoniniana* of A.D. 212, which turned all *peregrini*, or all of any consequence, into *ciues*, is not clear, but it was quite easy, as we have pointed out, to avoid any conflict of laws by adding a short stipulatory clause to the traditional Hellenistic written contract.[4]

§§ 135–8. The Consensual Contracts

These sections bring out the special characteristics of the consensual contracts (sale, hire, partnership, mandate) in contrast to those of the verbal and literal contracts. The real contracts are left out of the picture; not even *mutuum* is mentioned. We are bound to make the omission good, but not without noting its implications.[5]

[1] Above, pp. 154 ff.

[2] Cic. *p. Caelio* 7, 17, above, p. 163 n. 6.

[3] Cf. Kunkel, *l.c.* above, p. 165 n. 4.

[4] Above, pp. 155–6, where we have noted the significance of the omission by *Inst.* 3, 21 of the words *aut daturum se dicat* of § 134.

[5] Above, p. 150 n. 3.

All contracts require *consensus*, but *stipulatio* requires also *uerborum*, and *expensilatio scripturae proprietas* (§ 136), while the real contracts require the handing over of a *res corporalis*.[1] For the consensual contracts, however, consent suffices of itself (§ 136). This amounts to saying that agreements of certain economic types are exceptions to the general principle that mere agreement does not generate an action. This cannot have been the case in early civil law. It must be the result of custom which obtained full recognition in the course of the second century B.C. We have already mentioned the probability[2] that the actions enforcing the consensual contracts between *ciues* were at first praetorian (*in factum*) and only later civil (*in ius conceptae*: cf. 4, 47), but we must repeat that these actions as soon as we meet them are found to be *iuris ciuilis*, their *formulae* claiming an *oportere*, though an *oportere ex fide bona*. They were, however, pre-eminently *iuris gentium*, not *iuris ciuilis* in the other sense. It is not necessary to deny that there may have been praetorian actions before the introduction of the formulary system by the *L. Aebutia* (*c.* 150 B.C.) in order to hold that that change of procedure must have been essential to the incorporation of the consensual group of contracts into the civil law.

Being purely consensual the four contracts could, in contrast to *stipulatio*, be formed *inter absentes* (§ 136). Again, in contrast not only to *stipulatio* and *expensilatio*, they were bilateral and *bonae fidei*, i.e. they imposed, in the normal course, obligations on both parties, and these obligations were assessed according to the standards of men of good faith. In point of pure consensuality and bilaterality we shall find that *mandatum* stands a little apart from its three companions and resembles rather the real contracts other than *mutuum*. These last were *bonae fidei* in contrast to *mutuum*, but required for their formation *res* as well as consent and in their effects were not perfectly bilateral: they might in the event impose obligations on both parties, but did not necessarily do so.

§§ 139–41. Emptio Venditio

Concerned as he is with the acquisition of rights and only incidentally with their nature, Gaius here confines himself to what for him is the decisive point in the formation of a contract of sale, and is

[1] The revision of § 136 in *Inst.* 3, 22 is instructive: *uerborum proprietas* becomes *praesentia*, literal contract is omitted, and the real contracts are inserted: *neque dari quicquam necesse est*.

[2] Above, p. 147.

totally silent as to the obligations and other results produced by the contract. One may put it that he deals with the verification of the *demonstratio* of an *actio empti* or *uenditi*,[1] but not with the resultant obligations asserted by the *intentio*.[2] Justinian's chief addition is a valuable summary statement of the law of *periculum rei* (*Inst.* 3, 23, 3. 3a). For an exposition of the law of sale we must look elsewhere.

Emptio uenditio was formed by simple agreement to buy and sell: the requisites of any sale were thus consent to exchange a thing (*res*, *merx*) for a price (*pretium*). Gaius takes the consent as understood, merely warning against the idea, suggested by Greek law and practice, that payment of earnest (*arrha*) was needed in order to bind the contract (§ 139): in Roman law the giving of *arrha* was merely an indication that final agreement had been reached.[3] He takes for granted also the *res*, presumably because to the Romans sale in principle was of a specific thing. Of course there is plenty to be said on the subject: the *res* would normally be *corporalis*, but might be *incorporalis*—in short any right that could be transferred to the buyer.[4] In various cases too the requirement that it must be specific was whittled away.[5] However, Gaius assumes the normal case of a specific *res corporalis* and concentrates on agreement as to the price as the one thing necessary for a complete bargain (§ 139).

The pretium. There were rules as to the *pretium*, non-observance of which would result in the contract not being the consensual contract of *emptio uenditio*, whatever else it might be. The first rule was *pretium certum esse debet* (§ 140). It could be sufficiently defined by reference to existing facts which only needed to be ascertained (e.g. 'what my father gave for it'), but it could not be left to be determined (at least in entirety) by future events (e.g. 'the market price on the calends of January next'). The classical jurists disagreed as to whether this involved that the price could not be referred to the valuation of a third party (§ 140). Justinian (*Inst.* 3, 23, 1) decided that it could, provided that the third party was named: it was to be a contract conditional on the valuation being made. But even in the law of Justinian there is no question of a reasonable price being implied in the absence of a named price.

A second rule was controversial in Gaius' day (§ 141). The Pro-

[1] *Quod Aulus Agerius de Numerio Negidio hominem emit* or *Quod As. As. No. No. hominem uendidit*: 4, 40. 59.

[2] *quidquid ob eam rem Nm. Nm. Ao. Ao. dare facere oportet ex fide bona*: 4, 131a.

[3] *Inst.* 3, 23 pr. Cf. Zulueta, *Sale* 22.

[4] *Inst.* 3, 23, 5.

[5] Cf. §. 147, and further Zulueta, *Sale* 14.

culians required the price to be in money, whereas the Sabinians regarded barter (*permutatio*) as a form of sale. But Gaius, a Sabinian, produces no answer to the Proculian argument that the obligations of a buyer and of a seller were quite distinct. There could indeed be no answer in a law of contract which was a law of actions and which in the matter of sale gave the buyer an *ao: empti* and the seller an *ao. uenditi*, with very different respective consequences. The criterion suggested by Caelius Sabinus (§ 141) was unpractical.[1]

Permutatio. That barter was not sale seems to have become accepted by the end of the classical period. The question then arises by what action, if any, promises to exchange could be enforced. Such a bargain could, one would have thought, have been treated as a further consensual contract closely analogous to sale, as in modern law, each party being given an action *quasi ex empto*. But what happened was that, by an evolution which lies beyond our scope,[2] *permutatio* became a typical innominate contract (*do ut des*): if a party had made his own *datio*, but not otherwise, he was allowed to enforce the counter-promise by an *actio praescriptis uerbis*. This remedy would not have required to be mentioned by Gaius, a Sabinian, even if it had existed in his day, but in all probability it did not yet exist[3] except in a different and quite special case.[4] A contemporary Proculian would have had to advise a client who had made his *datio* that there was no action by which he could enforce the counter-promise, and that he could only bring the *condictio ob rem dati* for the restitution of his own thing or else an *actio doli*. The *condictio* survived as an alternative even after the *ao. praescr. uerb.* had become available.

Effects of the contract. Stepping outside Gaius we add a brief summary of the effects of the contract. The buyer came under obligation to make the seller owner of the price. The seller remained owner of the thing till he conveyed it, being liable to keep it with the care of a *bonus paterf.*, but the risk of destruction of or damage to it occurring by accident for which he was not to blame was normally on the buyer from the moment of the contract (*Inst.* 3, 13, 3. 3a). The seller was under obligation to hand the thing over (*uacuam possessionem tradere*) and probably, if it was a *res mancipi*, to mancipate it (4, 131a).

Warranty against eviction. Strictly he was not bound to make the buyer owner. The sale of a *res aliena* to a *bona fide* buyer was a valid

[1] Faintly echoed in *C.* 4, 64, 1 (A.D. 238).
[2] Cf. Buckland 521.
[3] Contrast § 143 with *Inst.* 3, 24, 1 *fin.*
[4] *Aestimatum: Edictum* § 112; Buckland 522.

contract.[1] But if the buyer was evicted by the owner from a thing mancipated to him before he had time to complete its *usucapio*, the *Twelve Tables* gave him an action against the seller for double the price.[2] When there was no mancipation, it became customary, and later compulsory as a matter of *bona fides*, for the seller to assume liability in the event of eviction by entering into a stipulation. This varied according to the locality and the kind of thing sold; it might be for unliquidated damages (*stip. habere licere*) or for a penal sum (commonly double the price: *stip. duplae*). In the end this liability became implied.

Warranty against defects. Naturally a seller had to make good any express warranties of quality he might give, but in the final law he was also liable, without express warranty, for serious undisclosed defects whether known to him when he sold or unknown. This implied liability is represented in Justinian's *Corpus Iuris* as a generalization of the special rules made by the aedilitian Edict for sales of slaves and cattle in the Roman market, but its pre-Justinian history cannot be established.[3]

§§ 142–7. Locatio Conductio

Definition. No definition of this consensual contract is given by Gaius or any Roman writer. This is not surprising, since the task of the jurists was not to frame a definition as if for a codification, but to decide whether the facts of a given case warranted a *demonstratio* in the form: *Quod Aulus Agerius Numerio Negidio . . . locauit* (*ao. locati*) or *de Numerio Negidio conduxit* (*ao. conducti*). It was just the same with *emptio uenditio*, only in that case the concept underlying the words *emere uendere* was found in the course of interpretation to be unitary, with the result that there emerged a clear distinction of sale from other contracts, in particular from that of hire, with which in immature systems it is apt to be confused. This demarcation of sale was an outstanding achievement of Roman jurisprudence. But the words *locare conducere* proved to bear from the legal point of view a less definite sense; they were interpreted, following current usage, as covering a variety of transactions which a modern jurist would certainly not regard as being of a single type, or even as being sub-heads of a single type, of contract.

[1] Ulp. *D.* 18, 1, 28: *Rem alienam distrahere quem posse nulla dubitatio est: nam emptio est et uenditio: sed res emptori auferri potest.* Cf. Paul *D.* 18, 1, 34, 3.

[2] So-called *actio auctoritatis*: *XII Tabb.* 6, 3 (Bruns 1, 25; *Textes* 15; *Fontes* 1, 44). Cf. Paul *Sent.* 2, 17, 1–3. Zulueta, *Sale* 43, n. 1.

[3] Cf. Zulueta, *Sale* 49.

In the texts *loc. cond.* embraces (*a*) the letting of land and the hire of chattels, in itself a surprising combination (*loc. cond. rei*), (*b*) contracts for work to be done by one party (*conductor*) on the thing of the other (*locator: loc. cond. operis faciendi*), and (*c*) contracts of service (*loc. cond. operarum*). This threefold classification is not Roman,[1] but has become common form in modern textbooks as a correct summarization of the concrete cases in the texts.

The conjunction of contracts so various under one rubric was, as we have said, the result of the interpretation of the words *locare conducere* in the *formulae* and not of the application of a previously defined legal concept. But, though primarily verbal, the conjunction was not arbitrary; a common notion, difficult to seize, underlay the various meanings of the words. There is *locatio conductio*[2] where one party (*locator*) undertakes to place at the material disposition of the other (*conductor*) a certain thing, which the *conductor* undertakes to return after having enjoyed it for a certain time (*l. c. rei*) or after having worked upon it or transported it in manner agreed (*l. c. operis faciendi*); according to the case the *conductor* or the *locator* undertakes to give the other party a certain reward (*merces*).

The root case is *l. c. rei*, where there is a *locatio* in the plain sense. In *l. c. operis* one is tempted to think of the *locatio* as metaphorical—the placing of a contract, the putting out and taking on of a job. But this is unnecessary, for here too a thing is consigned by one party (*locator*) and taken in charge by the other (*conductor*). But there is the important difference that in this case the *locatio* is for the benefit of the *locator*, in order that the *conductor* may deal with the thing as desired by the *locator*. Hence the *merces* in this case goes to the *conductor*, not the *locator*. This difference makes it impossible for a modern jurist to classify the two cases as varieties of a single type of contract, but what interested the Roman jurists was that it did not oblige them to provide a different remedy for each: the *formulae locati conducti* covered both—a good illustration of the fact already noted that the Roman law of contracts was a law of actions.

Examples of *loc. cond. operis* are plentiful: clothes are handed over to be cleaned or mended, gold to be made into rings, goods or persons to be transported, a site for the construction of a building. The handing over must be understood in a purely material sense and not as

[1] Said to have been distinctly formulated before the end of the seventeenth century: Olivier-Martin, *RH* 1936, 419.

[2] We are paraphrasing what seems the best formulation, given by Arangio-Ruiz, *Ist.* 345–6. Cf. Accarias, *Précis* 2, 316. 330; Mommsen, *Jur. Schr.* 3, 132.

involving a *traditio* in the legal sense:[1] thus one would be said *locare puerum docendum* or *mulierem naui uehendam*[2] even if the boy were one's son or the woman one's wife or daughter, though there would be no *traditio*, but just a *de facto* consignment.[3]

L. c. operarum. It will have been observed that at first sight this explanation of the underlying meaning of *locare conducere* omits *l. c. operarum*, that is contracts for services not involving the consignment of a *res locata*. They are brought into the picture by the consideration that hired workmen were usually slaves and that to hire a slave's *operae* was to hire the slave, a *res*, though in current speech this could also be, and was, described as hiring his *operae*. Then by a natural extension the phrase *locare conducere operas* was transferred to the hire of the *operae* of free men, with the significant limitation that it could not in their case be applied to services other than those usually performed by slaves or freedmen.[4] So long as one remembers that Roman ideas on the subject were not identical with ours, one may say that the exercise of the liberal arts, at any rate by an *ingenuus*, could not be brought within the ambit of the *actiones locati conducti*.[5]

Effects of loc. cond. The only statement applicable to all these three very different contracts is that each party was bound to perform his agreement with the care of a *bonus pf.* In most cases the *res* of one party was temporarily committed to the other: he was liable for any loss or damage caused by his negligence, but was not an insurer against inevitable accident: *res perit domino* (*Inst.* 3, 24, 5). Nevertheless he was liable for loss by *furtum* of a *res mobilis locata*, whether due to his fault or not (§ 205).

In *l. c. rei* the *conductor* had only detention of the thing; possession remained in the *locator* (4, 153). The conductor got no right *in rem*, but only a contractual right against the *locator*. Thus he could be ejected by the *locator* or by a purchaser from the *locator* (*Kauf bricht Miete*) no less than by a third party having a title superior to that of the *locator*. In all these cases his one remedy was an *actio conducti* against the *locator* for damages. Evidently the legal position of a *colonus* of land or an *inquilinus* of buildings was much inferior to that

[1] Of course this material act was not necessary for the *formation* of the contract; if it had been, the contract would have been real, not consensual.

[2] Ulp. *D.* 19, 2, 13, 3. 4; 19, 7.

[3] Olivier-Martin, *RH* 1936, 435, regards this attenuation of Accarias' doctrine of *traditio* as a confession of defeat. It is certainly a retreat to a stronger position.

[4] Paul *D.* 19, 5, 5, 2: . . . *factum quod locari non solet* . . . *factum quod locari non possit.*

[5] Cf. Buckland 504; Girard 607; below, p. 182.

of a modern lessee. Even the right of a *colonus* to gather crops and become their owner by *perceptio* was contractual; it could always be negatived by a *locator* who chose to break his contract. Consequently the acquisition of a *colonus* by *perceptio* was strictly by a tacit *traditio*, not the exercise of an independent right as in the case of a usufructuary.

Termination of loc. cond. The contract was essentially temporary. There might be tacit renewal of a letting by continued occupation. In the case of agricultural land (commonly let for 5 years) this gave rise to a letting from year to year, in that of a house to a letting terminable at the will of either party. In general the contract descended to the *heredes* of either party (*Inst.* 3, 24, 6), but *l. c. operis* or *operarum* might, if the personality of the party who had promised services was important, be terminated by his death.

Special points raised. The *merces* (§§ 142–4) must be *certa*. As in the case of the *pretium* in sale, Gaius is doubtful whether it could be left to be settled by a third party and whether it needed to be in money. Justinian settled both points as for the *pretium* (*Inst.* 3, 24, 1. 2). But as to the second there was an exception, not mentioned by the *Institutes*, that if a *colonus* was to pay his rent in kind (it was often a fixed proportion of the crops: *colonia partiaria*), the contract was still *loc. cond.*

The presence of *merces* is what distinguishes *l. c.* from the essentially gratuitous contracts of *commodatum*, *depositum* (*Inst.* 3, 14, 2. 3; 3, 24, 2 *fin.*) and *mandatum* (§ 162; *Inst.* 3, 26, 13). If services were to be for a definite *merces*, there was *l. c.*, but if gratuitous, *mandatum*. But what of an understanding that there was to be some reasonable reward? Gaius (§ 143) leaves the question open; Justinian (*Inst.* 3, 24, 1) says there will be an *ao. praescr. uerbis*, i.e. there will be what we call an innominate contract.[1]

Perpetual leases (§ 145). Leases at a rent in perpetuity or for a long term (100 years or more) of State and municipal lands were common (*conductio agri uectigalis*). Was the tenant a *conductor* or a buyer? The proper answer is that his position was *sui generis*. Subject to the payment of the *uectigal* he was protected in his right by praetorian actions *in rem* and in his possession by interdict.[2] His right was transferable *inter uiuos* and inheritable. Justinian (*Inst.* 3, 24, 3) fused *cond. agri uectigalis* with *emphyteusis*, a similar institution of

[1] Gaius *D.* 19, 5, 22 is made to say the same; the passage is interpolated, but Gaius probably did allow an *ao. in factum*.

[2] *Edictum* §§ 70. 239.

Hellenistic origin, first adopted by later Emperors for the exploitation of uncultivated domain lands and copied by private owners.[1]

The gladiators (§ 146). The solution given of this little problem seems common sense, but is open to criticism. It provides no remedy for the hirer-buyer if the letter-seller fails to supply the gladiators;[2] again, in the event of a gladiator being killed and sale coming into effect, the *res* will already have perished or be nothing but a corpse.[3] A more interesting point is the apparent implication at the end of the section that at one time it had been doubted whether sale and *loc. cond.* could be conditional. One can hardly believe this of any period within Gaius' memory. It may be that the doubt was limited to cases in which, as in that of the gladiators, the condition made the very nature of the contract uncertain.[4]

Contract for the making of a thing (§ 147). If on being promised a *merces* a craftsman agreed to make an article out of materials supplied by the customer, the contract was clearly *loc. cond.* But if the craftsman was to find the materials, was it not sale? Cassius' solution was an unpractical compromise: a single transaction ought not to bring into play both the *actiones empti uenditi* and the *as. locati conducti*, but the one or the other. Justinian (*Inst.* 3, 24, 4) decides for sale in accordance with what Gaius says was the majority opinion, and, in the case supposed, was certainly the better. But the mere fact that a worker transfers ownership of property is not always a decisive proof of sale and not hire. Clearly it is not so when he transfers no distinct thing, but merely merges his materials in a principal thing belonging to his customer—e.g. paints his door, patches his clothes, or even builds a house on his land. Nor is the test convincing when, though he transfers a distinct thing made out of his own materials, the value of those materials is quite insignificant in comparison with that of his work, which is what he is really being paid for.[5]

§§ 148–54b. Societas

The recently discovered passage (§§ 154a–b) contrasts the previously (§§ 148–54) described consensual contract of classical law with an archaic form of *societas* between *sui heredes* who had not divided the *hereditas* and its artificial imitation between other persons by

[1] Cf. Buckland 275; Girard 413.

[2] Cf. Beseler, *SZ* 1927, 357; *Tijdschr.* 1928, 282. It might be suggested that there would be liability for preventing the occurrence of one or other condition, but again, by what action? Cf. Buckland 425.

[3] Cf. Seckel-Levy, *SZ* 1927, 167.

[4] Cf. Accarias, *Précis* 2, 309 n. 1, but also Buckland 424–5.

[5] Cf. Zulueta, *Sale* 15–16.

means of a *legis actio* before the praetor. It is commonly assumed that the passage was intentionally omitted from the Veronese manuscript, but this is far from certain. The institutions spoken of are indeed treated by Gaius as being obsolete, but that does not account for their omission from a manuscript which preserves the account of the *legis actiones*; moreover, if the omitted passage were recovered in full, some relevance to contemporary law might become apparent.[1]

Consortium between sui heredes.[2] The continuance of joint *sui heredes* in a state of indivision known as *ercto non cito* or *consortium* is no new discovery; it had long been supposed to have been the primary form of *societas*. But the new passage raises three main problems.

(*a*) Was there *soc. ercto non cito* when joint *extranei heredes*, e.g. brothers succeeding an uncle, abstained from dividing the *hereditas*? There would at any rate be the important difference from the case of joint *sui heredes* that the *heredes* might have other property of their own. All that can be said is that Gaius speaks of *soc. e. n. c.* only between *sui heredes*.

(*b*) Between joint *sui heredes* was a formal act needed in order to create *soc. e. n. c.*? That it was not needed seems to be the proper inference from Gaius' silence and the absence of any real evidence for its existence.[3] But there are objections to our view.

(i) It seems at least to weaken the contrast drawn between *soc. e. n. c.* and classical *societas* in the matter of consensuality (§ 154). But this is precisely the point that Gaius had in mind when he observed (§ 154a) that *soc. e. n. c.* was *naturalis* as well as *legitima*: it arose of itself—by express or tacit consent—but only in special circumstances produced by the family system and law of succession laid down or implied by the *Twelve Tables*. (ii) It is contended that a formal act of creation between *sui heredes* is needed as the model of the act between others. But this is to beg the question.

(iii) It would be a stronger objection if the formation of a *soc. e. n. c.* produced results inconceivable in early law without a formal act. In our view there were no such results; all that happened was that the existing legal position was left undisturbed. There is no evidence[4]

[1] Cf. Zulueta, *JRS* 1934, 182.

[2] To the literature cited *JRS* 1935, 19 add: Wieacker, *Societas*, *Hausgemeinschaft* &c. (Weimar 1936); Daube, *Camb. L.J.* 1938, 381; Monier, *RH* 1938, 304; Szlechter, *Le Contrat de société en Babylonie, en Grèce et à Rome* (Paris 1947) 182.

[3] Cf., however, Collinet, *RH* 1934, 96. 102.

[4] Except a literary comparison with the romantic *societas inseparabilis* of the Pythagoreans: Gell. 1, 9, 12.

that *ercto non cito* implied even a temporary renunciation of the statutory right to partition (4, 17a). Indissolubility even for a time would have constituted a contrast with classical *societas*, a *proprium*, which Gaius could not have passed over. The *proprium* which he does mention (§ 154b) would in early law have been not a peculiarity, but a normal feature of co-ownership, according to the primitive conception of which each of the co-owners owns and can legally dispose of the whole. Thus even in this matter what on the classical view of co-ownership was a peculiarity was, at the time when it existed, a natural result of the position in which *sui heredes* were placed by the death of the *paterf.*

(*c*) *Ercto non cito.* The meaning of the words seems to have become a mystery by the end of the Republic. We give a bare summary of the chief modern conjectures, leaving the reader to choose between them or find a better.

(i) Gaius' *dominio non diuiso* here (§ 154a) is right in spite of his having previously explained *erciscere* as *diuidere* in 2, 219.[1]

(ii) *Erctum* was originally a herd penned off and *ciere* its being driven off.[2]

(iii) Gaius is wrong here, but right as to *erciscere* in 2, 219. The phrase *erctum* (supine) *ciere*[3] means to summon to or move for partition, and *ercto non cito* is a corruption of *erctum non cito.*[4]

(iv) We should understand: *ercto*, (*sed*) *non cito*, *ercto* referring to a fixing of the shares and *cito* to an actual division. A partition action between joint *heredes* would involve both steps—*erciscere* (*et*) *ciere* or idiomatically *erctum ciere*—but the first need not be followed at least immediately by the second. Comparative law shows that joint heirs may be obliged or may judge fit to have a formal fixing of shares even if, or all the more if, they do not intend immediate division.[5] But there is no evidence of anything of the sort at Rome, where the maintenance of a joint-family for several generations, which is what would render an anticipatory fixing of shares desirable, seems never to have been usual. This theory has the special attraction of providing an act,

[1] R. W. Lee, *Elements of Roman Law* 325; suggestion that *erciscere* is a compound formed from *erctum ciere.*

[2] Tentatively suggested by Levy, *SZ* 1934, 277; cf. *JRS* 1935, 23. Justice cannot be done to the supposed development here.

[3] Cf. Cic. *de orat.* 1, 237.

[4] Cf. Zulueta, *JRS* 1935, 22. Favoured by Kunkel, *Röm. Recht* 240–1 (n. 2), rightly in our opinion.

[5] Arangio-Ruiz, *PSI* 1182, 35; *BIDR* 1935, 596. He cites demotic and later texts from Egypt. E. M. Meijers (private letter, 16 Nov. 1935) draws attention to the action of *participatio* (*ghemachten van ghedich*) in medieval Dutch law.

erciscere, which could be employed abusively for the creation of artificial *societas* between others than joint *sui heredes*.

In spite of these problems the new information as a whole harmonizes with the traditional conception of the succession of *sui heredes*.[1] It confirms the belief that in primitive times they were often content to live as a joint-family, but not the idea that at one time the joint-family system was the general rule. If it had been, *consortium* would have assumed a very different physiognomy. As it was, the right to partition made it precarious, and the equal power of any one *consors* to alienate the common property, limit it as we may by *fides*[2] or by an assumed *ius prohibendi* of any other *consors*, made it potentially anarchical. As a stable institution the joint-family requires the headship of the eldest brother, fratriarchy. Equality of brothers leads inevitably to the breaking up of the joint-family into a number of smaller patriarchal families under each of them;[3] now the Roman family system is uncompromisingly patriarchal. Roman patriarchy provided its own antidote to the characteristic danger of excessive division: from an early date the *paterf.* could make one son sole *heres*. No doubt cases of *consortium* are still found under the Empire, but they were exceptional. In historical times at least the joint-family was no more than a voluntary and precarious union of patriarchal families; it was not a stable institution organized by legal rules appropriate to itself, not a permanent union such as that produced by *adrogatio*.

Artificial consortium (§ 154b). We have no evidence as to the nature of the *legis actio* by which a similar *societas* was set up between others than *sui heredes*. There are various conjectures.[4] An abusive application of the act for turning joint *heredes* into *socii e. n. c.* would be the natural explanation, if there was such an act, but this seems extremely improbable. Otherwise some abuse of the *l. ao. sacramenti in rem* is likely in view of what Gaius (2, 24) says of *in iure cessio*: *idque legis actio uocatur*. The epithet *certa* here probably indicates a special form of something more general known as *legis actio*.

At any rate the present passage confirms the view[5] that classical *societas omnium bonorum* (§ 48) was descended from the ancient *consortium* of *sui heredes*. The very general terms in which Gaius refers to the contractors of artificial *consortium* (*alii*, *ceteri*) imply a practice sufficiently common to have become a specific institution. Conditions

[1] 2, 157. Paul *D.* 28, 2, 11. Above, p. 96.
[2] Cf. Rabel, 'Erbengemeinschaft' &c., *Mnemos. Pappoulia* (Athens 1934) 187.
[3] Koschaker, 'Fratriarchat &c.', *Z. f. Assyriologie*, N.F. vii, especially at p. 79.
[4] Cf. *JRS* 1935, 29–30.
[5] Cf. Pernice, *SZ* 1882, 85.

were evidently such as not infrequently to induce men to throw their economic lives into one. For men desiring only a business partnership this seems an extreme step; but it may be that no other form of union was at first possible. But even after consensual *societas* had developed, an all-embracing union persisted under the name of *societas omnium bonorum* (§ 48). There must therefore have sometimes been positive motives for entering into a total economic union without accepting the personal merger produced by adrogation. But among the motives that our ingenuity may imagine we must not place that of creating reciprocal rights of succession. There is no ground for supposing a right of survivorship between artificial *consortes*. Artificial *consortium* was not an *adoptio in fratrem*.

Consensual societas. Its origins are as obscure as those of the other consensual contracts. Presumably it was part of the response of customary law to the new commercial needs of the second century B.C. The new contract reacted on the older institutions: *consortium* between *sui heredes* came to be treated frankly as a question of agreement,[1] and artificial *consortium* was replaced by consensual *societas omnium bonorum*. The historical connexion between the old and new contracts is illustrated by the fact that simple agreement to be *socii o. b.* converted the *res corporales* of the *socii* into common property. This indicates that at some date[2] the effect of the old *certa legis actio* was transferred to simple *consensus*; the exclusion of *res incorporales* would be explained if the old *legis actio* was an *in iure cessio* (2, 24. 38). A second historical vestige is that *soc. o. b.* is the hypothetical case of the model *formula* in the Edict.[3] The new consensual *societas*, even when it was not *omnium bonorum*, was coloured by the past. Thus Ulpian (*D.* 17, 2, 63 pr.) regards it as involving *ius quodammodo fraternitatis*, and this fraternal character is the best explanation of certain distinctive features—the perhaps lower standard of care,[4] the *infamia* attached to condemnation in the *ao. p. soc.* and the *beneficium competentiae*. Nevertheless the new contract cannot be thought to have been simply developed out of the old; there must have been an independent contribution from international mercantile custom.

Gaius' treatment is very summary—a bare mention of the two chief types of contemporary *societas* followed by a brief discussion of the principles governing the sharing of profit and loss (§§ 149–50) and a note on the special causes of dissolution (§§ 151–4).

[1] Ulp.-Pap. *D.* 17, 2, 52, 6. 8.
[2] The text stating the rule, Paul *D.* 17, 2, 1, 1; 3 pr., is perhaps not classical.
[3] *Edictum* § 109 *Pro socio*.
[4] Doubtful: below, p. 180.

Nature of societas. *Societas* was an agreement to contribute property or work or both to the prosecution of a common aim. *Affectus societatis* is only a way, and not a good one, of expressing the necessity of a common purpose or exploitation.[1] What it comes to is that co-ownership is not partnership unless there is also an agreement between the co-owners for common exploitation. Thus the mere acquisition of co-ownership by, for example, a joint legacy or independent purchases of undivided shares (*communio incidens*) would not make the co-owners *socii* except in a looser, but common, sense of that term. On the other hand, it is difficult to see how *affectus soc.* could be lacking if the co-ownership was acquired by joint purchase, for the common aim in *societas* did not need to be profit in the sense of the English definition of partnership.[2]

The agreed scope of a *societas* might be a single piece of business such as the purchase and sale of a house, or a course of business such as keeping a shop, or all business transactions (*omnium quae ex quaestu ueniunt*; presumed where the scope was not otherwise determined), or *omnium bonorum*. In what follows we have in mind primarily business *societates*, wide or narrow.

Besides a common aim *societas* implies a contribution of capital or work or both from each *socius* and for each *socius* a chance of profit. A *socius* who brought nothing in would be a mere donee. Equally each *socius* must stand to gain: *societas leonina*, in which one *socius* was to have the whole profit, was void. But otherwise the shares in profit and loss (*or* loss, unless one supposes periodical accounts and sharing) could be freely agreed. In the absence of agreement the shares in both were equal. If only the shares of gain were fixed, those of loss were in the same proportion. But, after a controversy (§ 149),[3] it was held that a *socius* might be allotted a larger share in gain than in loss. Indeed the whole risk of loss might be put on one *socius* in the sense that he was to provide all the capital and the other only work; but obviously the latter risked throwing away his contribution of valuable work.

Effects of societas. As in English law the contract did not create a corporation, but otherwise than in English law it did not make the *socii* each other's agents in dealing with third parties. Subject to some qualifications a contract with a third party made by a *socius* in the course of the common business affected only himself, he alone be-

[1] Cf. Buckland 507; Girard 613.

[2] Cf. on this point Ulp. *D.* 17, 2, 52, 12. 13, and on *affectus soc.* Ulp. e.t. 31–33.

[3] Q. Mucius' overruled opinion seems to have been in the older tradition of *societas*. An aristocrat of the old school would not allow that he and a mere worker, e.g. his *colonus partiarius*, could be quasi-brothers.

coming liable to the third party and having the sole right against him. This is not a peculiarity of *societas*, but results from the undeveloped state of the Roman law of agency.[1] Naturally, however, *socii* were both entitled and bound to bring their dealings with third parties into the partnership account.

Thus *societas* simply created obligations between the *socii*. Each was bound to make his agreed contribution of property and work. The standard of care required of him in the common affairs is doubtful. The best opinion seems to be that it depended on the current interpretation of the *bona fides* that he was certainly bound to show.[2] In classical law *bona fides* was taken to require a *socius* to exercise the care of an ordinary man,[3] but in post-classical only the care he showed in his own affairs.[4] Management of the common affairs would usually be regulated by the agreement; in default of agreement the presumption was for equality.

Actio pro socio. The action on the contract—there was only one, since *socii* all played a similar part—was *bonae fidei* (4, 62). Condemnation in it caused *infamia* (4, 182), a relic perhaps of liability only for *dolus*, but was limited *in id quod facere potest*.[5] Being *in personam* its *formula* did not empower the *iudex* to divide the common property, but for this one could have recourse to the *ao. communi diuidundo*.

Termination of societas. Ulpian[6] classifies the causes of dissolution as *ex personis*, *ex rebus*, *ex uoluntate*, *ex actione*.

Ex personis covers dissolution due to the death, *cap. deminutio* or insolvency of a *socius*. When a *socius* died, his existing rights and liabilities under the contract descended to his *heres*, but the *societas* ended for all (§ 152). Surviving *socii* might continue without the deceased or admit his *heres* (or anyone else) into the business, but in either case it would be a new *societas*, to form which they would not be bound even if the original contract had provided for the continuance of *societas* between the survivors or for the admission of the *heres*. *Cap. deminutio*, even *minima* (§ 153),[7] and insolvency (§ 154) of a *socius* had the same effect as his death.

Ex rebus covers termination of the enterprise by its object being achieved (*Inst.* 3, 25, 6) or its becoming impossible, e.g. by all the common capital having been lost or an essential thing having passed out of *commercium*.

[1] Cf. below, pp. 184, 185 ff. [2] Cf. Kunkel, *Röm. Recht* 243.
[3] Cf. Ulp. *D.* 17, 2, 52, 2.
[4] Cf. *Inst.* 3, 25, 9. Gaius *D.* 17, 2, 72 is believed to be interpolated.
[5] *Beneficium competentiae: Edictum* § 109. [6] *D.* 17, 2, 63, 10.
[7] Later only *maxima* or *media*: Ulp. *D.* 17, 2, 58, 2, citing Julian; 63, 10.

Ex uoluntate. Termination at a certain date or in a certain event could be provided for in advance or might be subsequently agreed. What is exceptional is that *societas* was also terminable at any time by the renunciation of any one *socius* even when there had been agreement not to renounce for a certain period. But a *socius* could not always renounce with impunity. If he renounced fraudulently, in order to secure some impending gain for himself alone or to avoid sharing in an impending loss, he had to share the gain or loss with his former partners, though, the *societas* having been dissolved, he forfeited all claim to share in their future acquisitions (§ 151). He might also be liable if he renounced at a moment disastrous for the business. All this holds even supposing that there was no agreement against renunciation or for continuance. If there was such an agreement, the possible liabilities of a renouncer may have gone further.[1]

Ex actione. This is a trifle obscure. The bringing of a hostile *actio p. soc.* might well be interpreted as a renunciation. That *litis contestatio* in such an action, if not specially limited, would end the obligations of the contract is nothing peculiar to *societas* (§§ 180–1).

§§ 155–62. MANDATUM

This too was a consensual, *bonae fidei*, *iuris gentium* contract. It cannot have existed when the *L. Publilia* (§ 127) or even the *L. Aquilia* (§ 216) was passed, but there is evidence of its being in existence about 120 B.C.[2] It was formed by a gratuitous service being requested by one party (*mandans*) and undertaken by the other (mandatary, modern name). The mandatary became bound to execute the commission and the *mandans* to indemnify him for any expenses or liabilities he should incur by so doing. The fact that the *mandans's* obligations, though normal, were only eventual, classes the contract as imperfectly bilateral like the *bonae fidei* real contracts, and its gratuitous character is a further point of resemblance with *commodatum* and *depositum*. But its closest affinity is with *societas*: condemnation of the mandatary in the *ao. mandati directa* involved *infamia*, there were rights of unilateral renunciation, and the death of either party ended the contract.

The service. This might be anything within the patrimonial sphere that was not illegal or immoral (§ 157). Thus it might be plain work, e.g. mending or cleaning clothes, but such services were usually

[1] Cf. Buckland 511; Girard 616.
[2] *Auct. ad Herenn.* 2, 13, 19.

paid for (*operae locari solitae*), and the contract was *mandatum* only if they were to be gratuitous. As we have seen, if a payment was fixed, the contract would be *locatio conductio*, and if it was contemplated but not fixed, there would be an *ao. in factum*, but not *mandati*.[1] In general, however, the services undertaken by a mandatary would be *operae locari non solitae*—the transaction of a particular piece of business or the more or less general administration of the *mandans*' affairs; very often they would lead to the mandatary entering into legal relations with third parties.

Mandatum gratuitum esse debet (§ 162). The origin of this rule is the old Roman idea that it was undignified to work for pay. The mandatary was a friend doing a friend's commission; he was not to be a loser, but he was not to profit. It was not improper, however, to accept a voluntary *honorarium*, and under the Empire, with changed social conditions, this came to be a right that might be bargained for in advance or, on occasion, implied. But this right was never incorporated in *mandatum*; an *honorarium* could be claimed only by a *cognitio extraordinaria*,[2] never by *ao. mandati contraria* or as a set-off to the *ao. directa*. The result was that *mandatum* remained nominally gratuitous.[3]

In whose interest? Gaius' doctrine (§§ 155–6), more fully elaborated in his *Res cottidianae*[4] and accepted by Justinian, is that a mandate is valid if it is in the interest of the *mandans* or of a third party or of both, whether or not it is also partly in the interest of the mandatary, but invalid if it is in the sole interest of the mandatary. This piece of academic schematization should not be taken too seriously.[5] The case of mandate to lend at interest to Titius is stated (§ 156) to be controversial, and the text clearly implies that the doubt was due to the mandate being solely in the mandatary's interest and therefore difficult to distinguish from mere advice. But though the fact that the loan is to be at interest makes it in the mandatary's interest, nevertheless it is obviously also in Titius', so that on the doctrine of the *Institutes* its validity should have been beyond controversy. This is overlooked, and the reason given for deciding the case to be one of mandate and not of mere advice, namely that the advice proves decisive, is absurd if taken literally. What must be meant is that the loan would not have been made except on the credit of the *mandans*.

[1] Above, p. 173. Cf. §§ 142. 162; *Inst.* 3, 24, 1; 3, 26, 13; Gaius *D.* 19, 5, 22.
[2] Below, p. 222.
[3] Cf. *Inst.* 3, 26, 13. Buckland 515; Girard 621.
[4] *D.* 17, 1, 2 = *Inst.* 3, 26, pr.–6.
[5] Cf. Girard 621–2.

Probably the real reason for the controversy was that the *mandans* had no direct pecuniary interest in the execution of such a mandate and could therefore have no *ao. mandati directa* for its non-execution.[1] But he would usually have some indirect interest in Titius being put in funds, and even if his motive was mere benevolence, there would be no reason to allow him to be benevolent at the mandatary's expense by refusing the latter the *ao. contraria* for any loss by the loan.[2] Thus the Sabinian doctrine, that such a mandate (*mandatum pecuniae credendae*, so-called *mandatum qualificatum*) was valid, became established (*Inst.* 3, 26, 6). In effect it was a form of personal guarantee, distinct in various respects from *adpromissio*.[3]

Duties of mandatary, enforceable by *ao. m. directa*. He was bound to execute the mandate and to hand over all benefits, including rights of action against third parties, accruing from it. Being in origin a trusted friend doing a gratuitous service, he was liable only for *dolus* in execution,[4] and on the other hand became *infamis* if condemned in the action. But late in the classical period, or even later,[5] when his services were no longer usually gratuitous, he was held liable for ordinary negligence (*culpa leuis in abstracto — diligentia boni patrisf.*). Of course he was not liable at all except in so far as his non-execution or faulty execution injured the *mandans*.

Duties of mandans, enforceable by *ao. m. contraria*.[6] He had to repay the mandatary's expenses and to indemnify him against liability.

Excess of mandate (§ 161). A mandatary who exceeded his commission had no rights. If indeed the excessive act was divisible, e.g. if he went surety for a sum in excess of his mandate, there does not seem to have been much difficulty in holding that he might recover up to the authorized sum. But where, for example, he bought a thing for a higher price than that authorized, the transaction was not naturally divisible and the Sabinians held that he could not recover the authorized price, even if he was willing to let the *mandans* have the thing at that price. But the contrary opinion of the Proculians[7] became accepted (*Inst.* 3, 26, 8).

Effects as regards third parties. Agency. In modern law a

[1] Cf. Ulp. *D.* 17, 1, 8, 6.

[2] Cf. Ulp. *D.* 17, 1, 6, 5.

[3] Cf. Buckland 520.

[4] But this is wider than deceit or malice, and covers gross negligence: Buckland 557.

[5] Buckland 516.

[6] But cf. *Edictum* § 108.

[7] Omitted by the Veronese Gaius (cf. *Inst.* 3, 26, 8), but probably accidentally, in spite of Pringsheim, *Studi Besta* 1, 328: cf. Riccobono, *Festschr. Koschaker* 2, 381, pointing out that if either opinion had been intentionally omitted, it would have been the rejected one.

mandatary would be an agent whose dealings with third parties would create rights and liabilities for the *mandans*, but not for himself. But *mandatum* was not agency, because in Roman law there was no such thing. Rights might indeed be acquired[1] and to some extent liabilities might be incurred[2] through persons in one's *potestas*, but one's mandatary was an *extranea persona*, through whom one could in principle neither acquire nor be made liable. As we have seen,[3] before the end of the classical period there was a serious departure from the principle *per extraneam personam nihil adquiri posse* in the matter of possession, but even under Justinian we find no parallel departure in the matter of obligations. At civil law contracts made by a mandatary with third parties remained exclusively his own, and the *mandans* was a stranger to them. Praetorian law did indeed make the *mandans* suable on his mandatary's contracts; in the time of Gaius this seems to have been limited to contracts made by the mandatary as manager of a business or master of a ship belonging to the *mandans*,[4] but a little later Papinian[5] seems to allow a praetorian action in all cases. But this did not mean that the mandatary ceased to be effectively liable to the third party at civil law, and no corresponding right to sue on his mandatary's contracts was given to the *mandans*. Apart from exceptional cases in which the *mandans* might be allowed an *ao. utilis*, any right to sue had to come to him from an assignment of the action by the mandatary.[6]

Assignment. The assignment, which it was the duty of the mandatary, subject to safeguarding himself, to make, itself took the form of a mandate, given by him to the *mandans*, to sue as his *procurator in litem* (4, 82), without liability to account for the proceeds (*procurator in rem suam*). This device, which was used not only in this special case, but also for assignment of obligations generally (cf. 2, 39. 252 *fin.*), gradually hardened into a separate institution exempted from the imperfections caused by its character as mandate, namely that the third-

[1] Cf. 2, 86 *sq.*; 3, 163 *sq.*

[2] Contractual only *iure praetorio*, 4, 49 *sq.*; delictual by noxal action, 4, 75 *sq.*

[3] Above, p. 82.

[4] The *aones. institoria* and *exercitoria* are stated (4, 71) to apply when the *institor* or master was an *extranea persona*, but the same is not stated of the *ao. quod iussu* (4, 70).

[5] *D.* 14, 3, 19 pr.: *actio ad exemplum institoriae* or *quasi institoria*. The text is now generally accepted as authentic; cf. Riccobono, *Sem. Palermo* 14 (1930), 395; earlier literature Girard 714 n. 2.

[6] A general right to sue has been maintained chiefly on the strength of Ulp. *D.* 19, 1, 13, 25, but the law even of Justinian's time seems to be authoritatively stated by e.g. Pap. *D.* 41, 2, 49, 2. Cf. Buckland 519; Girard 717–18.

party debtor could still pay the assignor and that till *litis contestatio* the mandate was revocable by the assignor and lapsed by the death of either assignor or assignee. In the end this kind of mandate ceased practically to be revocable by notice or terminable by death, and notice of the assignment given to the debtor precluded both the assignor from suing and the debtor from validly paying the assignor.[1] The parallel to the evolution of assignment in English law is too obvious to need more than bare mention.

Termination of mandate (§§ 159–60). As with *societas*, renunciation and death were special causes.

Renunciation. The *mandans* could revoke at any time, subject to indemnifying the mandatary as far as he had gone; if he had done nothing (*re integra*) the mandate simply disappeared (§ 159). Of course revocation had to be notified. Thus an implied mandate to one's debtors to pay one's *dispensator*[2] was not revoked by his manumission of which the debtors were unaware (§ 160). The mandatary too could renounce, subject to the *mandans* not being injured. If performance had not begun, this would still involve giving the *mandans* timely notice; if it had begun, accrued liabilities would be unaffected, but the notice would be more likely to be too late.

Death. That of either party terminated the mandate, subject in the case of death of *mandans* to the common-sense qualification stated in § 160, and in that of the mandatary subject probably to a liability of his *heredes* to do what was urgent. But of course termination by either death would not affect accrued rights and liabilities; these would descend to *heredes*. We have accepted in § 158 the usual insertion of *mihi*, which limits the statement to a mandate *post mortem* of the mandatary, because § 117 seems to imply that a mandate *post mortem mandantis* might be good. But according to § 100 *stipulatio post mortem* is void whether the death contemplated is that of the *stipulator* or that of the *promissor*. The emendation is therefore doubtful.[3]

§§ 163–67a. Acquisition of Contractual Rights through Others

These sections treat the impossibility of the agency of an *extranea persona* as too obvious to be mentioned. They also omit any question of

[1] The history of the development up to Justinian is obscure: Buckland 520–1.
[2] On whom Debray, *NRH* 1919, 45.
[3] Cf. Sanfilippo, 'Mandatum post mortem', *St. Solazzi* (1948) 554.

liability being incurred through the contracts of other persons whether *extraneae* or in one's *potestas* &c., this being a matter of praetorian actions (4, 69–74a), not of obligation in the full sense of civil obligation. The acquisition of rights through persons in one's *potestas* was automatic (§ 163); the law was exactly the same as for the acquisition of ownership, without the complication produced by the connexion of the acquisition of ownership with that of possession.[1] Rights acquired through the contracts of a *liber homo* or a *seruus alienus bona fide possessus* (§ 164; cf. 2, 92. 93) and those of a usufructuary slave (§ 165) were divided in the same way. We knew already that the bonitary and not the Quiritary owner of a slave was considered to have the *potestas* over him (1, 54) and that his acquisitions went exclusively to the former (2, 88). Here (§ 166 *fin.*) it is doubted whether even the fact that acquisition by the bonitary owner was made impossible by the slave stipulating in the name of the Quiritary owner would enable the latter to acquire.

The only case not previously mentioned is that of acquisition by a slave jointly owned by several masters. The basic principle was that whatever such a slave acquired was common to the *condomini* in proportion to their shares in him (§ 167; cf. § 59; *Inst.* 3, 28, 3). This held good even if the acquisition was *ex re unius*, e.g. paid for with his money, though that fact would create a claim enforceable by *ao. communi diuidundo*.[2] But the only reason why acquisitions had to be shared was that all the *condomini* had a right to them, and therefore if some particular acquisition was impossible for one *condominus*, the other or others were so much the better off. Thus when a slave received a stipulatory promise or a mancipation naming one *condominus* alone, that one alone acquired, the others being excluded from the promise on formal grounds (§ 167). In *traditio* the formal grounds are absent, but the analogy seems to have been followed.[3] In § 167a the question is raised whether the *iussum* of one owner had the same effect as his being solely named. The Sabinian ruling that it had (*iussum pro nomine*) seems to have become established before the end of the classical period and was definitely adopted by Justinian.[4] What then if though authorized by one *condominus* the slave stipulated in the name of another? Justinian probably decided in favour of the *iussum*.[5]

[1] Above, p. 82.
[2] Gaius *D.* 41, 1, 45.
[3] At any rate under Justinian: Iul. *D.* 41, 1, 37, 3.
[4] Cf. Schulz, *SZ* 1930, 236–7.
[5] *C.* 4, 27, 2 (3), A.D. 530—a *crux interpretum*: cf. Schulz, *SZ* 1930, 230.

§§ 168–81. Extinction of Obligations

These sections deal with extinction of obligations at civil law (*ipso iure*) by act of the parties. *Tollitur obligatio* is the refrain (§§ 168. 169. 176. 180), and by making it *omnis obligatio* in his opening paragraph (*Inst.* 3, 29 pr.) Justinian leaves no doubt that he means all obligations of all kinds. But without this addition the passage, placed at the end of contracts and before delicts, should properly be understood as applying only to the former. Justinian could make the addition because the modes of extinction mentioned were in fact also applicable to non-contractual obligations, but Gaius' own meaning is at least doubtful. If he had had delictual obligations in mind, he would inevitably have mentioned release by *pactum* (informal agreement), which from the earliest times extinguished delictual obligations even at civil law, and almost as inevitably the extinction of delictual obligations by the death of the delinquent (4, 112). But if he had only contractual obligations in mind, the omission of both these modes of extinction was correct, that of *pactum* because it released contractual obligations only *iure praetorio* (*per exceptionem*: 4, 116b), and that of death because it extinguished contractual obligations very rarely (4, 113). If Gaius meant *omnis obligatio*, he should have said so, but probably the placing and contents of the present passage are derived from a tradition of exposition which had become fixed before delictual liability had been subsumed under *obligatio*.[1]

We shall find here only modes of extinction *iure ciuili*, only those which enabled the debtor to deny the very existence of the debt, without the need of a special praetorian defence (*exceptio*). We shall find only voluntary modes. Extinction by death (4, 112–13), by *cap. deminutio* of the debtor (§ 84), by supervening impossibility (*Inst.* 3, 19, 2), and by the union of right and liability in one person (*confusio*)[2] are not mentioned.

i. *Solutio* (§ 168)

The term can denote liberation by any means,[3] but in the present connexion it refers to liberation by performance, and that mostly by payment. The original meaning of *soluere* appears in the *formula* of § 174, where what the debtor 'solves' is himself.[4] It is generally held that in the earliest law a formally created obligation was not extin-

[1] Cf. above, pp. 141–2.
[2] Cf. Buckland 563–4.
[3] Paul *D.* 46, 3, 54. 50, 16, 47.
[4] Cf. Eisele's emendation of 4, 21.

guished by simple performance, but only by performance accompanied by a formal act of release. But from the earliest historical times, simple payment or other performance was sufficient, formal release being needed only when payment or performance was being forgone.

Solutio in the sense or performance was the normal way of ending obligations. It freed any sureties and real security that the debtor had given as well as the debtor himself. The creditor might if he chose accept *solutio* in part (§ 172)[1] or substituted performance (*aliud pro alio:* § 168); but as to the latter there was a Proculian doctrine, later overruled (*Inst.* 3, 29 pr.), that the extinction was only *iure praetorio* (*per exceptionem*).

Solutio (§ 168) freed the debtor only if the creditor receiving it had capacity; this without *auctoritas tutoris* a woman had, but a *pupillus* had not (2, 84–85).[2] Equally the debtor had to be capable: payment by a *pupillus* without *auctoritas* would fail, because it would not pass property to the payee (2, 81–82). Payment might be made to the creditor's agent—his *dispensator* (§ 160), his *adstipulator* (§ 111), his *adiectus solutionis gratia* (§ 103a?) or other mandatary. It might be made by a third party and even without the debtor's knowledge or against his will (*Inst.* 3, 29 pr.), but not of course when it was a question of services and the person rendering them mattered.

ii. *Voluntary release* (§§ 169–75)

Only release operating *ipso iure* is in question. The maxim: *prout quidque contractum est, ita et solui debet*, is well established in the classical jurists.[3] The formalities necessary, we may think, in early law for release from obligation even by performance were a reversal (*contrarius actus*) of those by which the obligation had been contracted, and these reversing formalities survived as forms of voluntary release (*imaginariae solutiones*) long after they had ceased to be necessary for release by actual performance. But the principle must not be exaggerated. Though the idea is a natural one, *contrarius actus* is only fully verified in relation to verbal and literal obligation, with a late and artificial extension to consensual.

The forms mentioned by Gaius are those applicable to obligations created *uerbis* and *per aes et libram* respectively. He does not mention the appropriate form for literal obligations, which were practically

[1] Not so simple as it looks: Buckland 566.

[2] Above, p. 80.

[3] § 170. Pomp. *D.* 46, 3, 80; Gaius *D.* 50, 17, 100; Paul *e.t.* 153 (referred to by a Greek gloss in F: Part I p. 208 n. 6); Ulp *e.t.* 35.

obsolete.[1] Nor does he mention the doctrine of extinction of consensual obligations by *contrarius consensus re integra* (*Inst.* 3, 29, 4).[2] Of a special form of release from real obligations there is no question; obviously performance of the duty of restoration could be rendered nominal by the thing restored being returned at once to the giver.

(*a*) **Acceptilatio** (§§ 169–72). Only obligations contracted *uerbis* could be released by this verbal formality (§§ 169. 170), which needs no explanation. Ulpian allows the alternative '*acceptum facis? facio*' and the use of Greek.[3] Like *stipulatio* it consisted of an oral question and answer *inter praesentes*, and normally the obligation released would have been contracted by *stipulatio*; but it seems to have been applicable also to release from *iusiurandum liberti*.[4] Like *stipulatio* it was *iuris gentium*, but it retained characteristics that show it to have once been an *actus legitimus*: neither *condicio* nor *dies* might be expressly added to it, and a woman needed *tut. auctoritas* for using it, though not for receiving a real *solutio* (§ 171). Apparently it was only after Gaius (§ 172) that *acceptilatio pro parte* of a divisible obligation was settled to be valid.[5]

General use. Its limitation to verbal obligations did not prevent *acceptilatio* from being the general form of release, because by *nouatio* any other kind of obligation would be replaced by a verbal one which could then be released *uerbis* (§ 170; cf. §§ 176–9). For a general settlement of accounts a comprehensive novating stipulation drafted by Aquilius Gallus[6] was taken and then released.

(*b*) **Solutio per aes et libram** (§§ 173–5). The debts to which we are definitely told in § 173 that this form of release applied are debts arising out of a *gestum per aes et libram* and judgment debts; whether *certis ex causis ueluti* implies that there were others is not clear, so that when § 175 gives us the form of releasing from a *legatum per damnationem*, we are in doubt whether this is meant as an illustration of debt *p. a. et l.*, because imposed by *testamentum p. a. et l.*, or as a distinct category. The former seems more probable, since otherwise

[1] *Accepti relatio*, of which the existence, though not the form, is well attested. It was probably an entry in the debtor's *codex* (above, p. 163), to which an entry in the creditor's *codex* ought to correspond. Cf. Girard 756 n. 2; Buckland, *Festschr. Koschaker* 1, 21.

[2] Zulueta, *Sale* 53–54; Siber, *SZ* 1921, 68; Stoll, *SZ* 1924, 1; Boyer, *RH* 1931, 132.

[3] *D.* 46, 4, 7; 8, 4.

[4] Ulp. *D.* 46, 4, 13 pr.

[5] Ulp. *D.* 46, 4, 13, 1; *Inst.* 3, 29, 1 *fin.* But see Pomp. *D.* 46, 4, 10.

[6] *Stipulatio Aquiliana: Inst.* 3, 29, 2; Flor. *D.* 46, 4, 18, 1. Cf. Wlassak, *SZ* 1921, 394; later literature is given by Monier, *Manuel* 2, 360.

the *formula* for releasing debts *p. a. et l.* would be simply passed over. It is true, however, that the principal case of such debts, *nexum*, had long been obsolete.[1] The debts that could still arise *p. a. et l.*, unless *leg. p. d.* is one, were of minor importance; liabilities under the *actiones auctoritatis* and *de modo agri*[2] are all that can be suggested.

The formulae. We have in § 174, so far as it has reached us, the form for releasing a judgment debt and in § 175 the variation required for releasing a *leg. p. d.* But the text of § 174 is doubtful. In our edition we have kept to the old version, based on V: *quod ego tibi . . . condemnatus sum.* Levy's conjecture—*quod ego tibi . . . iudicatus uel damnatus sum* (cf. 4, 21)—was justified when it was made by what was then known of F's reading, but has been rendered less tenable by later information.[3] It was very attractive, because *iudicatus*, not *condemnatus*, must surely have been the earlier expression, and *damnatus* might cover the debts *p. a. et l.* mentioned in § 173 alongside of *iudicatum*, and possibly other debts *per damnationem.*

The common feature of the two *formulae* is that the cause of the admitted debt is (*con-*)*damnatio.* It is mainly on this ground that the form of *nexum* is thought to have been a *damnatio p. a. et l.*[4] Also notable is the fact that what is 'solved' or released is not the debt, but the debtor: it is the weighing, not the *solutio*, that is imaginary. *Soluere* in this oldest sense is more appropriate to discharge from bondage than from obligation in the modern sense. The two primary cases in question, *nexum* and *iudicatum*, were cases of bondage, actual or imminent.

Nothing is known of the *lex publica* referred to at the end of the *formula* (cf. 2, 104). Presumably it is the *Twelve Tables.*

Other obligations releasable p. a. et l.? It is widely believed that all obligations sharing with *iudicatum* and *leg. p. d.* the feature of involving a *lis crescens in duplum* if they were disputed (4, 9. 171) were also releasable *p. a. et l.*, and that they and *leg. p. d.* derive their *lis crescens* from having been originally enforceable, like *iudicatum*, by *manus iniectio.*[5] The most probable case is that of the obligation of a debtor for whom his *sponsor* had paid (*actio depensi* under the *L. Publilia*: § 127). It was originally enforced by *man. iniect. pro iudicato* (4, 22) and under the formulary system it had the same special features as the

[1] Above, p. 143. [2] Above, p. 60.

[3] Part I p. 210 n. 7. Kübler nevertheless adopts it, but his manner of presenting it is misleading.

[4] Above, p. 144. [5] Below, p. 246.

actio iudicati (4, 25); in particular the *condemnatio* was doubled if the defendant denied liability. If the *sponsor*, in order to get the benefit of the *L. Publilia*, had to pay the original debt by weighing in solemn form (*depensum*), his claim against the debtor after six months might be thought of as having arisen *p. a. et l.*

The other known cases of *man. iniect. pro iudicato* (4, 22) may also have been releasable by *sol. p. a. et. l.* On the other hand, *legatum p. d.*, which arose out of a *damnatio* (2, 201), involved *lis crescens*, (2, 282; 4, 9. 171) and, provided it was of fungibles (*mensura* doubtful: §175), was releasable *p. a. et l.*, may originally have been enforceable by *man. iniect.* The case for bringing the *actio L. Aquiliae* into the same group is weaker:[1] the statute declared the delinquent *damnas* and there was *lis crescens*, but there is no direct evidence of enforceability by *man. iniect.* as in the case of *depensum* or of releasability by *sol. p. a. et l.* as in that of *legatum p. d.*

What then of a *sponsor*'s liability? A modern tempting conjecture,[2] combining Mitteis's theory of the original nature of *sponsio* with the new evidence of 4, 17a, is that the transformation of the bondsman-*sponsor* into a debtor of the modern type was consummated by the *Twelve Tables*, when they provided the new remedy of *iudicis postulatio*; till then, it is maintained, he could have obtained liberation from bondage only by solemn weighing—a fictitious weighing if he was being released without payment.

(*c*) **Release by pactum de non petendo.** *Pactum* (*pacisci*) is connected with *pax* and meant originally an agreed settlement of a dispute. Later it acquired the general meaning of agreement (*conuentio*),[3] but it retained, as we see here, the special meaning of an agreement to forgo a claim. The classical law of pact in this sense was that it extinguished delictual obligations *ipso iure*,[4] but other obligations, in particular contractual, only *iure praetorio* (*per exceptionem pacti conuenti*). This explains why Gaius does not mention extinction by pact here.

The rule as to delicts is old civil law.[5] The problem as to how such an effect could be attached in early law to a formless act is eased if we

[1] Girard 441. 1043 n. 4. *L. Aquilia*, below, p. 210.

[2] Meylan, *Acceptilation et paiement* 31 (offprint from *Recueil de travaux*, Lausanne 1934).

[3] Ulp. *D.* 2, 14, 1, 1.

[4] *Actiones iniuriarum* and *furti*: Paul *D.* 2, 14, 17, 1, but not it seems the *ao. L. Aquiliae*: Paul *Sent.* 1, 19, 2. Cf. Girard 423 n. 4.

[5] Cf. *XII Tabb.* 8, 2 (*si membrum rupsit, ni cum eo pacit, talio esto*); 8, 16 (*furtum nec manifestum — duplione damnum decidito*): cf. 4, 37. 45. Also *XII Tabb.* 1, 7; 3, 5.

think of early pacts buying off vengeance as formless payments, not formless agreements.[1]

The classical rule as to contracts is on the contrary a later edictal development. As we have seen, the civil law required voluntary release to be formal (*imaginaria solutio*), even though actual *solutio* was or had become formless. On this supervened the Edict *De Pactis: Pacta conuenta . . . seruabo*,[2] a famous pronouncement, but not so far-reaching as may appear, since *pacta* is meant in its older and narrower sense. The praetor is not promising to enforce *pacta* in the wide sense of any and every formless agreement, but only to secure the observance of *pacta* in the sense of settlements of claim, and this only by granting the *exceptio pacti conuenti* (implied in *bonae fidei* actions) against claims which the plaintiff had expressly or by implication (e.g. *Inst.* 3, 15, 3) agreed to waive (4, 116b. 119. 121–2. 126). The resulting position is summed up in the familiar adage: *nuda pactio obligationem non parit, sed parit exceptionem*.[3]

Extinction by pact had over *acceptilatio* all the advantages of a consensual over a formal act: it could occur by implication, be partial, temporary, or conditional, and be limited to the protection of a certain person or persons (distinction between *pacta in rem* and *in personam*). On the other hand, it did not produce a total extinction; the obligation subsisted and might still have effect, notably if the defendant omitted to have the *exceptio* inserted in a *formula stricti iuris* (distinction between *exceptio peremptoria* and *dilatoria*: 4, 120 *sq.* 125), or if the pact was cancelled by a later pact (*replicatio pacti*: 4, 126).[4]

iii. *Nouatio* (§§ 176–9)

Nouatio was the transfusion or transference of the content of an existing obligation (i.e. what was owed, the *debitum*) into a new obligation created by *stipulatio*.[5] The old obligation was extinguished *iure ciuili* and the new one was substituted for it. Extinction of the old obligation was not prevented by the novating *stipulatio* being in certain respects invalid: §§ 176, 179.[6] Novation depended on the *debitum* of the new obligation being the same as that of the old; otherwise both obligations would exist. But it depended also on there being some new

[1] Koschaker, *SZ* 1916, 365–7.
[2] *Edictum* p. 64 (§ 10); cf. pp. 31–32.
[3] Ulp. *D.* 2, 14, 7, 4.
[4] Cf. Buckland 573; Girard 760.
[5] Or by *expensilatio*, if we may regard the *transscriptiones* of § 128 as novations. Gaius' reason for not mentioning them here may have been that they were obsolete in practice.
[6] Cf. Ulp. *D.* 46, 2, 1, 1 (interp.).

element in the second obligation; otherwise the new obligation would be redundant and void. In the law of Justinian there was a further condition: the parties must have and must express the intention to novate (*animus nouandi: Inst.* 3, 29, 3a). But in the time of Gaius *animus nouandi* had not yet emerged as a distinct requirement. To judge by his account there was novation if the two requirements of *idem debitum* and *aliquid noui* were satisfied; the parties would have *animus nouandi* on the assumption that they understood the legal effect of their act. By drafting their *stipulatio* correctly they could produce novation or cumulation as they chose.[1] But if the interpretation of their *stipulatio* was doubtful, the question would after all be one of their intention, i.e. of the presence or absence of *animus nouandi*.[2] It was this problem of intention that Justinian[3] wished to obviate.

Idem debitum. This requirement involved that extinction was not produced, as it would be in modern law, by the agreed substitution of any new obligation for the old. The debt of thing *X* would not be extinguished by stipulating for thing *Y*, even if novation was intended. But this only means that there would be no *ipso iure* extinction. It does not follow that there would not be extinction *iure praetorio* by means of the *exc. pacti*; in general there would be. Moreover, as the formalism of *stipulatio* decayed and the *animus* of the parties became more and more decisive, there were relaxations: e.g. there would be extinction by novation if the *stipulatio* was for the money value of the thing owed or for a different amount of money from that owed. But it is doubtful how far these relaxations were classical, and in any case even Justinian did not abolish the principle of *idem debitum*.[4]

Aliquid noui. (*a*) This requirement was satisfied if one of the parties was changed. Suppose *A* to be *B*'s creditor. If *B* on *A*'s *iussum* promised *C* the same thing by *stipulatio*, *B*'s debt to *A* was extinguished and he was debtor to *C* (2, 38; 3, 130). Or if *C* by *stipulatio* promised *A* what *B* owed him (*A*), *B* was released and *C* was *A*'s debtor in his place; in this case no *iussum* was needed (§ 168). Two novations might well be involved in such transactions. In the first

[1] e.g. in novating a money debt it would not do to stipulate for the amount simply; the *stipulatio* should be, e.g.: '*sestertios decem quos mihi ex testamento debes dari spondes?*' But where what was owing was a definite thing, further specification would be needless.

[2] Ulp. *D.* 46, 2, 6 pr.: *Si ita stipulatus fuero*: '*quanto minus a Titio debitore exegissem, tantum fideiubes*'*?, non fit nouatio, quia non hoc agitur ut nouetur.*

[3] *C.* 8, 41 (42), 8: *Nouationum nocentia corrigentes uolumina et ueteris iuris ambiguitates resecantes, sancimus* . . . Cf. *Inst.* 3, 29, 3a.

[4] Buckland 569; Girard 740.

example *A* may have given his *iussum* in order to extinguish a debt of his own to *C*; in the second *C* is likely to have been indebted to *B* and to have extinguished that debt by making the promise to *A* on *B*'s *iussum*. The parallel to *transscriptio a persona in personam* is plain.

(*b*) There was also novation when the only change was to substitute obligation by *stipulatio* for an existing obligation from any other source. This is so obvious to Gaius that he does not mention it here, but he assumes the point in § 170. An excellent illustration is the *stipulatio Aquiliana*.[1] The parallel here is to *transscriptio a re in personam*.

(*c*) The two cases already mentioned are the important applications of *nouatio*. Novation of an already stipulatory obligation by a second *stipulatio* between the same parties does not amount to much, since there had to be both *idem debitum* and *aliquid noui*. As possibilities Gaius suggests the addition or removal of *dies*, *condicio*, or a *sponsor* (§ 177).[2] *Dies* raises no difficulty; it is the one clear case. To add *dies* would turn an immediate into a future liability; *iure ciuili* this required a fresh *stipulatio*, but *iure praetorio* a *pactum* would suffice (*exc. pacti*: 4, 122). To remove *dies* would be to turn a future into an immediate liability; in this case *pactum* would not serve even *iure praetorio*. *Condicio*, whether added or omitted by the second *stipulatio*, is a doubtful case. According to the accepted view (overruling Seruius: § 179) a second *stipulatio* adding a *condicio* would not novate the first, because pending the condition it created no obligation. Similarly a conditional *stipulatio* could not be novated by a *stipulatio pura* because pending the condition there was no obligation to be novated. In both cases there would on the realization of the condition be two identical *stipulationes*, one of which, presumably the later, would be void.[3] Our limited knowledge does not wholly explain *nouatio* by the addition or removal of a *sponsor*; the Proculians denied it (§ 178). If a *sponsor* was simply released, the principal obligation was extinguished; here one can see the need for a second *stipulatio* in order to preserve the principal obligation. But why should it be needed if a *sponsor* was added? Was it because a *sponsio* for *idem* taken from a second debtor (the *sponsor*) was a *nouatio* unless taken concurrently with the principal promise (*adpromissio*)?

[1] Above, p. 189.

[2] The text is restored from *Inst.* 3, 29, 3; § 178 makes it pretty certain that Gaius wrote *sponsor* where Justinian has *fideiussor*.

[3] Ulp. *D.* 46, 2, 14. Buckland 570: Girard 742 n. 1.

Effects of nouatio. The old obligation was extinguished. If it was already overdue, the *mora* was purged; consequently the risk of the thing owed and any liability for interest ceased to affect the debtor. At the same time the securities, real and personal, of the old obligation were released, unless expressly saved for the new obligation. Similarly special defences against the enforcement of the old obligation were in principle not available to the new, but this result also might be evaded by proper formulation.[1]

iv. *Litis contestatio. Condemnatio* (§§ 180–1)

Proceedings in a pre-classical or classical lawsuit were divided into two stages—a stage before the magistrate (*in iure*) in which the question at issue was defined and formulated, and a stage in which the defined issue was decided by a *iudex* or similar authority (*apud iudicem*).[2] *Litis contestatio* was the culminating act of the first stage. Its exact form is imperfectly known; essentially it consisted in the acceptance by the litigants of an issue and a *iudex* authorized by the magistrate. The act had important effects.[3] That with which we are concerned here is that it extinguished the claim sued on and replaced it by a right to have the question as formulated decided by the *iudex*, a right which itself was extinguished by the decision. The ancient saying quoted by Gaius (§ 180) assumes an action on an obligation in which the defendant is in the wrong.

This extinction of the original claim does no more than express the universal legal principle: *bis de eadem re ne sit actio* (or *ne bis in idem*). Under the older procedure of *legis actiones* it took place in all cases *ipso iure*, at civil law, but under the classical formulary procedure it operated only *per exceptionem* when the action was *in rem* (4, 3) or, if it was *in personam* (4, 2), when the proceedings were by *iudicium imperio continens* (4, 103 *sq.*) or when the *formula* was *in factum concepta* (4, 45–47). In the present passage the action is assumed to be *in personam*; the explanation of the distinction between *iudicia legitima* and *imperio continentia* is properly deferred to Book 4; the necessity of the *formula* being *in ius concepta* is, however, ignored (but see 4, 106–9).

This extinction of the obligation sued on and its replacement by another resembles *nouatio* and is termed *nouatio* by some texts.[4] But there were differences. *Litis cont.* extinguished the liability of *adpromissores* and correal debtors, but it did not purge *mora*, nor did it

[1] Girard 745–6. [2] Below, p. 223. [3] Below, pp. 223–5.
[4] *Nouatio necessaria* of the commentators; cf. Paul *D.* 46, 2, 29.

release real securities or special privileges of the original debt. On the contrary it might have effects favourable to the creditor.[1]

§ 182. Obligationes ex delicto

The rest of the book is occupied with the second of the '*species*' of *obligationes* mentioned in § 88, those originating from *delictum*. We are taken to understand the general nature of delict, the only remark being that all delictual obligations are of one *genus* (§ 182); elsewhere it is explained that in contrast to the four sources of contractual obligation they all arise *re*.[2]

The conjunction of contracts and delicts as engendering the same kind of right, *obligatio*, was not possible so long as contractual *obligatio* meant a more or less literal bondage and delictual liability a liability to physical vengeance. It became possible[3] only when both contract and delict had become sources of a right to sue for a condemnation in money. The original idea of contractual *obligatio* had first to be spiritualized and physical revenge for delict to be abandoned. At what date delictual liability came to be regarded as *obligatio* in this later sense cannot be determined exactly; probably it was not before the early Empire.[4] As has already been observed,[5] in the old scheme on which Gaius seems to have based his work the treatment of *obligationes* evidently ended with the topic of their extinction (§§ 168–81) and delicts formed a separate chapter. Whether the subsumption of delicts under *obligationes* originated with Gaius himself we cannot tell.[6]

His treatment of the subject does not show a progressive mind. As in his account of contracts,[7] he clings to the old civil connotation of *obligatio*, and here the omission of praetorian liabilities is far more serious, since praetorian penal *actiones in factum* were numerous and some of them (notably the *actio doli*) of great importance.[8] The distinction between liabilities sanctioned by them and by civil law actions had become a mere technicality, and even in his own day Gaius' point

[1] Cf. below, on 4, 110–13. Paul *D.* 46, 2, 29: *neque enim deteriorem causam nostram facimus actionem exercentes, sed meliorem, ut solet dici in his actionibus quae tempore uel morte finiri possunt.*

[2] *quarum omnium rerum*: § 182. Cf. *Inst.* 4, 1 pr. Gaius *D.* 44, 7, 4.

[3] Possible, but not beyond criticism: cf. Buckland, criticizing Holmes, *Camb. L. J.* 1944, 247; *Reflections on Jurisprudence* 97.

[4] De Visscher, *RH* 1928, 335 (*Études* 257) thinks not before the early second century of our era.

[5] Above, p. 141.

[6] Cf. Arangio-Ruiz, *Ist.* 283–90.

[7] Above, p. 142.

[8] Cf. Buckland, *Main Inst.* 338 ff.

of view is generally thought to have been antiquated.[1] That it should have been still allowed to limit the treatment of delictual obligations in Justinian's *Institutes* is astonishing.

The result is that we are confronted with only three delicts, *furtum*, *iniuria*, and *damnum iniuria datum*; a fourth, *rapina*, is really a special case of *furtum*. *Furtum* and *iniuria* come from the *Twelve Tables*, *damnum iniuria datum* from the *L. Aquilia*; the foundations were thus of civil law, though far-reaching edictal modifications had taken place. Other civil law delicts, even if they still existed in theory at civil law, were of minor importance and negligible in an elementary work.

In modern law public wrongs or crimes are prosecuted by the State and punished with fine, imprisonment, &c., while private wrongs or torts entitle the injured party to recover pecuniary compensation normally for his economic loss by private action for damages. Thus in our own law, if we omit the cases—exceptional, but significant—in which vindictive damages may be awarded for tort, crime is visited by punishment and tort by compulsion to compensate. For us, broadly speaking penal and criminal law are identical.

Criminal prosecution for public and civil actions for private wrongs[2] existed also in Roman law, but the civil actions were primarily penal, not compensatory. The explanation undoubtedly is that the sum recoverable by the injured party originated as the composition (*poena*), at first agreed (*pactum*) and later made compulsory, of a primitive right of revenge.[3] The persistence of this idea even in the latest law is not surprising in the case of *iniuria*, which was not committed without an intention to insult; even our own unsentimental remedies can be penal. It is less natural in the case of wrongs to property. The pure penality of the *actiones furti* was undeniable in view of the coexistence of compensatory remedies; the singularity here is that the function of punishment was not entirely transferred to the criminal law.[4] But the penality of the remedies for wrongful damage to property was more questionable. The statute establishing them,[5] though early, was less primitive than the *Twelve Tables*, and the delict could be committed without any intention calling for punishment. The idea of compensation is clearly present in the remedies given, but it is

[1] Buckland, *Main Inst.* 235. Cf., however, Siber, *Röm. Recht* 2, 224.

[2] The strict terminology seems to be *crimina* for public and *delicta* or *maleficia* (4, 75. 112) for private wrongs, but it is not always observed: 1, 128; 2, 181; 3, 197. 208; 4, 178.

[3] This common primitive development is most clearly illustrated by the history of the delict *iniuria*: below, p. 217.

[4] Below, p. 199.

[5] *L. Aquilia*, below, p. 209.

compensation assessed vindictively. Later jurisprudence (4, 9; *Inst.* 4, 6, 19) recognized that compensation was one function of the *actio l. Aquiliae*; indeed compensation was not, as in the case of *furtum*, otherwise provided for. But that the action was primarily penal is clear from the application to it of the general rules of an *actio poenalis*.

The penal character of delictual obligation appears in the following points. (*a*) There were no involuntary delicts; there had to be guilt, generally guilty intention (*dolus*), though under the *l. Aquilia* negligence (*culpa* in the narrower sense) sufficed. Hence *furiosi*, *infantes*, and *infantiae proximi* (§ 208) were incapable of delict, because incapable of the necessary fault. But capacity to commit delict was possessed by many, such as slaves, women, *impuberes*, and *prodigi*, who were incapable of incurring obligation by contract. (*b*) Liability *ex delicto* did not descend to the delinquent's *heredes*, since against them there was no right of vengeance. In the case of *iniuria* even the right to sue did not descend to the *heredes* of the injured party (4, 112). (*c*) A noxal action lay against the superior of a delinquent who was *alieni iuris*.[1] There is no clearer survival of the idea of vengeance underlying the penal actions. (*d*) If the purpose of an action *ex delicto* had been compensation, payment of the *poena* by one joint delinquent would have extinguished the action against the others, though the payer might have had a claim to contribution from them. But the purpose was punishment; therefore previous payment of the *poena* by someone else was no defence.[2] Similarly, if more than one delict was involved in a single act, the doer in strict theory was liable to the several *poenae* cumulatively; but in later law this result was evaded.[3] (*e*) Lastly, an *obligatio ex delicto* could be extinguished by informal agreement (*pactum*), and extinguished thereby at civil law, not, like an *obligatio ex contractu*, only by means of the *exceptio pacti*.[4] This is a survival from the primitive practice of voluntary buying off of vengeance: *talio ni cum eo pacit* is how the *Twelve Tables* define the penalty for *membrum ruptum*.[5]

§§ 193–208. Furtum[6]

Taking the general sense of *furtum* for granted Gaius begins (§§ 183–94) by working through the civil *actiones furti*, the traditional

[1] Below, p. 271.

[2] Ulp. *D.* 9. 2. 11. 2: *ex lege Aquilia quod alius praestitit alium non relevat, cum sit poena.*

[3] Paul *D.* 44, 7, 34 pr.

[4] Above, p. 191.

[5] Below, p. 217.

[6] Cf. Jolowicz, *D.* 47, 2 *De Furtis*.

use of which as a classification of *furta* he agrees with Labeo in criticizing.[1]

Furtum manifestum and nec manifestum. That by the basic *Twelve Tables*[2] a thief caught in the act should have been dealt with more severely than one detected later requires no special Roman explanation. The explanation of this common primitive phenomenon is that in the case of flagrant theft the sufferer's indignation is hotter and also that the delinquent's guilt is certain.[3] The first step taken by the State in the repression of self-redress is to insist that proper cause for self-redress shall be shown.[4] But when a thief is caught red-handed, little or no proof is needed; thus full legal process develops more slowly in this case than where guilt needs to be proved.

On the other hand, the survival of a distinction between *furtum m.* and *n. m.* not only in the time of Gaius but even in the law of Justinian is a discreditable example of Roman conservatism, palliated but not excused by the fact that the survival was largely theoretical. Under the Empire the sanctions of the new imperial criminal law were generally preferred to the old private penal actions in cases of common theft. In such cases, except where the thief was the son or slave of a substantial man (*actio noxalis*), multiple damages could seldom have been recovered. The more refined forms of *furtum* might be committed by the less indigent, but they would be *nec manifesta.* If the *actio furti m.* had been in common use, the law as to what constituted *furtum m.* would necessarily have been settled.

The distinction. It is symptomatic that Gaius (§ 184)[5] mentions as tenable four views of the test of flagrancy. We regard it as proved[6] that the primitive test was that the thief should have been apprehended (*deprehensus*, not merely *uisus*, in spite of *Inst.* 4, 1, 3) with the thing before he had taken it to its destination,[7] and this is the test adopted by Justinian, not that stated by Gaius to be the most popular (apprehension *eo loco ubi fit*).

For Gaius the difference in the treatment of *furtum m.* and *n. m.* is

[1] Cf. still Paul *Sent.* 2, 31, 2; *Epit.* 2, 11, 2.

[2] *XII Tabb.* 8, 12–17: *Textes* 19; Bruns 1, 30; *Fontes* 1, 55. Cf. Arangio-Ruiz, 'La répression du vol flagrant', *Rev. Al Qanoun Wal Iqtisad* 2 (Cairo 1932), 109–35; Carrelli, *La repressione del furto flagrante*, Univ. Bari, 1939.

[3] Cf. Pollock and Maitland, *Hist. of English Law* 2, 497.

[4] Cf. H. J. Wolff, 'The Origins of Judicial Litigation among the Greeks', *Traditio* 4 (1946), 31.

[5] Cf. *D.* 47, 2, 2–8.

[6] By De Visscher, *RH* 1922, 442 (*Études*, 1931, 137); cf. Rabel, *SZ* 1932, 476.

[7] In answer to Gaius' objection, its immediate destination—*eo die*, Paul *D.* 47, 2, 4.

one of penalties: for *furtum m.* a *poena capitalis* later reduced by the praetor to fourfold damages (§ 189; 4, 111), for *furtum n. m.* twofold damages. The contrast is correct for the law of his day, but in that of the *Twelve Tables* there was also a significant difference in the procedures. In regard to *furtum n. m.* self-redress was already a thing of the past. The remedy was, and was to remain, an action *in duplum* (§ 190), in which only the terms of the claim (*pro fure damnum decidere oportere*: 4, 37. 45) preserved a reminiscence of the earlier system of voluntary composition. But on *furtum m.* the procedure was criminal rather than private. The *fur m.* had to be haled before the magistrate, who, if he was satisfied of the prisoner's guilt, ordered him to be scourged and, if a free man, to be *addictus* to the complainant or, if a slave, to be hurled from the Tarpeian rock.[1] Thus it was only after *addictio* by the magistrate that revenge was allowed to take its course.[2]

Furtum m. The term *poena capitalis* (§ 189) would, if it came from the *Twelve Tables*, mean that the penalty was death.[3] But probably the description is Gaius' own, and in his mouth it implies merely loss of status. The position of the *fur m.* after *addictio*, which puzzled even the *ueteres*,[4] cannot have been better than that of a judgment-debtor after *addictio* in a *manus iniectio* (4, 21) which would be the position of a *fur n. m.* who had failed to pay the *duplum* in which he had been condemned in the *a. furti n. m.* That position was grim enough, but the guilt of the *fur n. m.* had to be proved in a private action and he had the right to compound by paying the *duplum*, whereas the guilt of the *fur m.* appears to have been decided by a summary *cognitio* of the magistrate, and though there are indications that the possibility of his compounding (*damni decisio*) was contemplated, the general view is that acceptance of composition by the complainant was not compulsory.

On both these last points there is something to be said. The *cognitio* may normally have been very summary, but a hearing of some sort there must have been, and this would give the magistrate an opportunity of pressing for the voluntary acceptance of composition. Then

[1] § 189; Gell. 11, 18, 8.

[2] In two cases it was lawful to kill a thief out of hand—the thief by night and the thief who defended himself with a weapon: *XII Tabb.* 8, 12–13. Not mentioned by Gaius, probably because regarded in his day as cases of legitimate self-defence, so that unnecessary killing was a crime.

[3] Levy, *Die röm. Kapitalstrafe* (Heidelberg 1931) 11–12; Daube, *Tijdschr.* 15, 64 n. 2.

[4] Presumably the jurists of the second century B.C.

too, in cases (easily conceivable) where the prisoner's guilt was seriously disputed one does not see why the magistrate should not have referred the question to a *iudex*. Perhaps, as in other cases of *manus iniectio*, he was bound to do so provided that a *uindex* came to the prisoner's rescue. If we go on to assume that acceptance of the normal composition of *duplum* was or became compulsory by custom, the *uindex* would defend at the risk of a further doubling; this would account for the *quadruplum* of the praetorian *a. furti m.* (§ 189; 4, 111) by which at an unknown date the ancient procedure was replaced.[1]

Search (§§ 186–7. 191–4).[2] The *Twelve Tables* enacted that a man on whose premises a stolen thing was found by ritual search (*lance et licio*) was to be treated as guilty of *furtum m.* (§ 192). This form of search disappeared in consequence of the *L. Aebutia* (*c.* 150 B.C.)[3] and had ceased to be understood long before Gaius; it has therefore to be interpreted in the light of comparative law. There are many parallels to it, especially in the Indo-Germanic field.[4] The ceremonial is believed to have been magical.[5] The right to search must have been subject to conditions; Gaius mentions none, probably because they were not mentioned in the *Twelve Tables*, being settled by age-old custom. It may well be that Gaius is wrong in implying (§ 193) that ritual search could be prevented with impunity; probably, if the customary conditions were satisfied, submission to it was obligatory and refusal to submit was tantamount to an admission of guilt. The later praetorian penalty (*a. prohibiti furti in quadruplum*: §§ 188. 192) for preventing search was the same as his penalty for *furtum m.*

Ritual search and its consequences are a common primitive institution. But a serious difficulty arises from Gaius' ascription of an *a. furti concepti in triplum* (and *oblati*) to the *Twelve Tables* (§ 191). True, the conditions of this action are quite distinct from those grounding a case of *furtum m.* by finding *lance et licio*. The search, though not informal (*testibus praesentibus res quaesita et inuenta*: § 186), was evidently not ritual, and though it seems that there must have

[1] Suggested by Arangio-Ruiz, *o.c.* above, p. 199 n. 2. Cf. Carrelli *o.c. ibid.*; Kunkel 253 n. 5.

[2] *XII Tabb.* 8. 15: *Textes* 19; Bruns 1, 32; *Fontes* 1, 59. Cf. Krüger, *SZ* 1884, 219; Hitzig, *SZ* 1902, 313. 328; De Visscher, *Études* (1931) 217; Rabel, *SZ* 1932, 477; Daube, *Tijdschr.* 15, 48.

[3] Gell. 16, 10, 8.

[4] Cf. De Visscher and Daube, *ll.c*

[5] Beyond our scope. Gaius' explanation of the *licium* seems reasonable. De Visscher, *o.c.* 218 n. 3, favours the view that the *lanx* was a magic mirror which was supposed to reveal the thief and the thing.

been a *furtum*, neither the householder nor the third party against whom he might have an *a. f. oblati in triplum* for passing off (§ 187) needed to be guilty of it.[1] But it is difficult to believe that both forms of search stood side by side in the *Twelve Tables* and that, in the *a. f. concepti* an action was provided carrying a higher penalty than that for *furtum n. m.* regardless of the guilt, real or presumed, of the defendant, not to mention that the *a. f. oblati* is in a different order of ideas from the contemporary system of vouching to warranty evidenced by the so-called *a. auctoritatis*.[2] These improbabilities have led to differences of opinion in modern times.

The radical view is that Gaius is wrong in ascribing the *a. f. conc. in triplum* to the *Twelve Tables*. There *furtum conc.* can have referred only to finding by ritual search, and such finding was treated as establishing *furtum m.* Hence the action *in triplum* must have been introduced later in connexion with the rationalized form of search either by the Edict[3] or better, since the action was civil, by some post-decemviral *lex*.[4]

The conservative view.[5] It is unwarrantable to reject Gaius' quite definite statement in § 191, even though it is possible to understand a passage of Aulus Gellius[6] as contradicting him. We must simply accept the coexistence of two forms of search on Gaius' authority. As to the distinction between them, the ingenious suggestion has been made[7] that till the *Twelve Tables* search *l. et l.* with its barbaric consequences alone existed, and that rationalized search, with its milder consequence of an *actio in triplum*, was introduced by the decemvirs as a compromise. This was to be the normal form of search, and only if it was resisted was recourse to be had to (compulsory) ritual search leading to liability for *furtum m.* Some support for this conjecture may be found in § 193, where Gaius assumes that ritual search would be demanded only when simple search had been resisted.

A compromise view. The most satisfactory suggestion as yet made[8] accepts § 191 as correct, but reconstructs the conditions of the *ao. f. conc.* under the *Twelve Tables* in the light of comparative law rather than of § 186. Search was always *l. et l.*, but finding made a case of *furtum m.* only when guilt was self-evident from customary *indicia* such as are suggested by other primitive systems—immediate tracing of the stolen thing (e.g. tracking cattle while the spoor was still fresh

[1] *quamuis fur non sit*: §§ 186–7.
[2] Above, p. 60.
[3] Krüger, *SZ* 1884, 222; Huvelin, *Ét. sur le Furtum* 53.
[4] Hitzig, *SZ* 1902, 328.
[5] e.g. Girard 436.
[6] 11, 18, 10–12.
[7] Daube, *Tijdschr.* 15, 73–74.
[8] By De Visscher, *Études* 217.

and the scent hot), concealment of the thing, refusal to allow search. In the absence of the customary *indicia* guilt was not presumed from finding, or at least the case was not one of *furtum m.* The householder had to pay a heavy penalty under the *ao. f. conc.*; he might be guilty, but if he was not, he could by the *a. furti oblati* recover the penalty from the person from whom the thing had come to him.

Classical law. The two principal actions were the praetorian *a. furti m. in quadruplum* and the civil *a. furti n. m. in duplum.* Constructive *furtum m.* by finding *lance et licio* had disappeared along with that form of search, but there remained the civil *a. furti concepti*, with its attendant *a. furti oblati*, both *in triplum*, grounded on finding by private search in the presence of witnesses. These last actions were reinforced by a praetorian *a. furti prohibiti in quadruplum* for preventing search and, according to Justinian (*Inst.* 4, 1, 4: the only mention), there was also a praetorian *a. furti non exhibiti* for failing to produce a thing found on one's premises by search. Later, when police search took the place of private, the search actions disappeared and there survived only the *a. furti m. in quadruplum* and the *a. furti n. m. in duplum.*

Definition of furtum. At § 195 Gaius at last addresses himself to the question, What is *furtum*? Such was the variety of acts of dishonesty covered by the conception in classical law that a comprehensive definition was almost impossible. The clumsy attempt in *Inst.* 4, 1, 1, attributed by the *Digest* to Paul,[1] shows as much. Gaius is content (§ 195) to state the basic case, and to complete the picture by adding illustrations and qualifications.[2]

He begins by correcting the idea[3] that *furtum* meant stealing in the popular sense of appropriating another man's thing by taking it from him: there could be *furtum* without any removal and without any appropriation beyond merely temporary user (§§ 196–7). All that was needed was a *contrectatio* or physical handling of a thing against the will of its owner. It is probable nevertheless that *furtum* originally involved a removal, and the reason why *contrectatio* was substituted for it (at latest by Sabinus in the first century of our era) is obscure. It may be that the original conception of *furtum* was intuitive and not statutably formulated, and that insensibly the remedies for *furtum* were applied in practice to a variety of cases lying outside their original

[1] *D.* 47, 2, 1, 3, same text with the words *lucri faciendi gratia* inserted before *uel ipsius rei* &c.

[2] Cf. Paul *Sent.* 2, 31, 1: *fur est qui dolo malo rem alienam contrectat.* Sabinus, in Gell. 11, 18, 20: *qui alienam rem adtrectauit, cum id se inuito domino facere iudicare deberet, furti tenetur.*

[3] Gell. 11, 18, 13. 14.

scope, so that by the time that jurisprudence came to frame a definition *furtum* could no longer be limited to acts of removal. At any rate the test adopted was any physical handling, from which it resulted that *furtum* covered not only ordinary stealing but embezzlement and even misuse by bailees (*furtum usus*) and cases which we should regard as obtaining by false pretences. The extended conception made *furtum* of land logically possible, as Sabinus for one held, but this doctrine was ultimately rejected.[1] But *contrectatio* was a limiting as well as an extending idea: Gellius (11, 18, 23) was wrong to write in the second half of the second century: *furtum sine ulla adtrectatione fieri posse, sola mente atque animo ut furtum fiat*. No doubt there were decisions of the late Republic and first years of the Empire supporting such a view, but they were out of date. As Ulpian puts it: *hoc iure utimur ut furtum sine contrectatione non fiat*.[2]

Animus furandi. Gaius might well have added the words *dolo malo* to his introductory statement of essentials (§ 195), but he comes to the point almost immediately (§ 197 *fin.*). In general the *dolus malus* of a *fur* (also described as *animus* or *adfectus furandi*: 2, 50; 208; 4, 178) consisted in his knowing that the owner would not have allowed the *contrectatio* (§ 197) or, as Sabinus more cautiously put it, in his having no reasonable belief that he would have allowed it.[3] But it was also necessary that the owner should actually be unwilling (§ 198).[4] Hence the difficulty of setting a trap, illustrated by a stock problem (§ 198).[5]

There were, however, cases in which knowledge that the owner would object did not involve *animus furandi*. Thus if I damaged your property out of mere spite and with no idea of making profit, I was liable under the *L. Aquilia*, or if I released your slave from his bonds out of compassion, so that he escaped, I was liable to an *actio in factum* (*Inst.* 4, 3, 16), but in both cases it was arguable and eventually was held that I was not liable *furti*. This seems to make intention to make profit a necessary ingredient of *animus furandi*, but though *animus lucrandi* is the normal case, the wide Roman conception of *furtum* produces cases of the delict in which such an *animus* can be found only by understanding *lucrum* artificially as getting for nothing what one ought to pay for.[6] This is one illustration of the difficulty of framing a fully satisfactory definition of *furtum*.

[1] Cf. 2, 51; Gell. 11, 18, 13; Ulp. *D.* 47, 2, 25 pr. Jolowicz, *De Furtis*, xvi–xvii.
[2] *D.* 47, 2, 52, 19. [3] Gell. 11, 18, 20. 21.
[4] A point on which earlier there was disagreement: Nerat. *D.* 47, 19, 6; Pomp. *D.* 47, 2, 46, 8.
[5] In this particular case Justinian allowed both actions: *Inst.* 4, 1, 8; *C.* 6, 2, 20.
[6] Cf. Jolowicz, *De Furtis* lix.

The res. Gaius omits to tell us that *res extra commercium* could not be objects of *furtum*; to steal *res diuini iuris* was, however, *sacrilegium* and to steal *res publicae* was *peculatus*. Nor does he mention here (cf. 2, 51) that misappropriation of *res immobiles* was not *furtum*. What he tells us (§ 199) is that a *paterf.* could sue for *furtum* of his free dependants who were not *res* at all. *Furtum liberorum*[1] is a survival of the primitive non-distinction of *potestas* and ownership,[2] but in classical times the usual remedy was an interdict.[3] Again (§ 200) there were cases of *furtum* of *res* which were not *alienae* but one's own.[4] Thus a creditor holding a *pignus* had the *actio furti* not only, as we shall learn (§ 204), against stranger thieves, but also against the owner (the debtor) who had deprived him of his lawful possession. So too had the *bona fide* possessor of a *res aliena*,[5] but unless he had a lien (right of retention) for expenses incurred on the thing, his loss by the thing being taken by its owner could be little more than nominal.

Then in § 201 two cases are mentioned in which taking was not *furtum* because in the circumstances the law allowed the taker to acquire ownership by *usucapio* though aware that the thing was not his (*usucapio lucratiua*: 2, 52–61). The case of *usucapio pro herede* can be put on the ground that so long as a *hereditas* was *iacens* (i.e. until *aditio* by an *extraneus heres*) the *res hereditariae* were ownerless and therefore not *alienae*. But the explanation is insufficient, because even after the *heres* had become owner by *aditio*, *res* of which he had not yet taken possession remained open to *usucapio p. h.*[6] However, *u. p. h.* was virtually abolished by a *SC.* of Hadrian; moreover, M. Aurelius created a special criminal process (*crimen expilatae hereditatis*) for cases in which *res hereditariae* were stolen without *furtum*.[7]

Complicity (§ 202). An accomplice was liable equally, except that *ex hypothesi* he could not be a *fur manifestus*, and cumulatively, with the principal thief who committed the *contrectatio* without which there could be no *furtum* at all. So far as the *actio furti nec manifesti* was concerned it made no difference whether the defendant was

[1] As to the *iudicatus* see below, p. 242. The *auctoratus* was a free man, a *ciuis* it might be, who had engaged by certain special formalities to serve as gladiator, thereby surrendering some of his rights as a free man. Cf. Girard 142; Debray, *NRH* 1919, 54. Persons *in mancipio* were too obvious to be mentioned.

[2] Cf. above, p. 29. Gaius 1, 134; Ulp. *D.* 6, 1, 1, 2.

[3] *D.* 43, 30.

[4] So-called *furtum possessionis*.

[5] His right to sue the owner is stated in § 200, but omitted by *Inst.* 4, 1, 10; his right to sue strangers is stated by *Inst.* 4, 1, 15, but omitted by §§ 203 *sq.*

[6] Cf. above, p. 72.

[7] *D.* 47, 19. *C.* 9, 32.

principal or accomplice, and it is doubtful whether the *formula* of the action made any distinction.[1] A man's complicity was established by showing *ope consilio eius furtum factum esse*; a *furtum* had to be proved, and active participation in it (*ope*) as well as advice or incitement (*consilio*). The latter alone was not enough (*Inst.* 4, 1, 11), nor on the other hand was a wrongful act which had undesignedly made the *furtum* possible, as the illustration given in § 202 shows.[2] An accomplice might even be liable where the actual thief was not. Thus a dependant did not make himself liable by stealing from his *paterf.* (4, 78) nor a wife by stealing from her husband,[3] and liability in their case did not come to life if the bar was subsequently removed; but there was nevertheless *furtum*, and accomplices were liable (*Inst.* 4, 1, 12).

The plaintiff (§§ 203–7). The principle laid down by § 203 is broadly speaking correct.[4] Modern books conveniently distinguish the interest in the thing entitling one to bring an *actio furti* as either positive or negative. To the owner (§ 203), the *creditor pigneraticius* (§ 204), and the *b. f. possessor* (§ 200; *Inst.* 4, 1, 15), who are the examples of positive interest mentioned by Gaius, we may add the usufructuary and the usuary, not, however, persons having merely a right *in personam* connected with the thing, though injured by its being stolen. Thus if a thing was stolen from its seller before it had been delivered to the buyer, the latter could only look to the seller for an assignment of the *actio furti*.[5] Logically the *colonus* of land from which *fructus* had been stolen before he had become their owner by *perceptio* was in the same position, but in late classical law he seems to have been allowed the *actio furti* in his own name.[6] Negative interest is exemplified (§§ 204–7) by various persons holding the thing under a contract with the owner and responsible to him if it was stolen. The whole loss by the theft would fall on such a person, if he was solvent; hence it was he who had the *actio furti*, not the owner, who was covered. The *rationale* of the rule is shown by the requirement that the bailee must be solvent, and again by the contrast between the *commodatarius* who owes *custodia* and therefore has, and the *depositarius* who does not owe *custodia* and therefore has not, the *actio furti* (§§ 206–7). In these cases of negative interest there is no question of

[1] Below, p. 257, on 4, 37.

[2] So Paul *D.* 47, 2, 54 pr. 50, 16, 53, 2. But there are conflicting texts: Jolowicz, *De Furtis*, lxvii.

[3] *Actio rerum amotarum*: Jolowicz, *De Furtis* lxxxvi.

[4] Cf., however, Jolowicz, *De Furtis* xxviii *sq.*; Buckland 578 and *NRH* 1917, 5.

[5] *Inst.* 3, 23, 3a. But see Jolowicz, *De Furtis* liii *sq.*

[6] Jolowicz, *De Furtis* xlviii; Buckland 579 n. 12.

dividing the action or the *poena* recovered: either the bailee was solely entitled or, if he was insolvent, the owner. But obviously the question of division arises in the cases of positive interest less than ownership and therefore coexistent with another's ownership. There certainly was division in such cases, but we need not go into the vexed question as to how it was carried out.[1]

The simplum to be multiplied.[2] In the ordinary case of theft from an owner this was the highest value of the thing at any time during the theft, together with any consequential damages caused by its loss. If the theft was from a non-owner having a positive interest, the value, as we have said, was divided. If it was from a non-owner having a negative interest, the owner was not concerned unless the non-owner was insolvent; the *simplum* was the amount of the non-owner's liability over to the owner.

Condictio furtiua. The multiple damages of the *Twelve Tables* may have been intended to be a complete settlement, but the law failed to provide that on the damages being paid the owner's title should be extinguished. On the contrary, the *res* remained *furtiua* and thus not even open to *usucapio*. Thus the owner still had his *uindicatio* against whoever had the thing. But the operation of the *uindicatio* would be unequal and casual, for it would lie only against the actual possessor of the thing, who might not be traceable and might well be innocent; or the thing might have been destroyed. Jurisprudence therefore allowed a personal action (*condictio furtiua*: 4, 4) for the value of the thing against the thief or his *heredes*. It was not cumulative with the *uindicatio*, but, as being *rei persecutoria*, it was cumulative with the penal *actio furti*. It could be brought only by an owner,[3] who (anomalously: 4, 4) was made by the *formula* to assert a *dare oportere* of his own property. It had the advantage over *uindicatio* that possession by the defendant was immaterial (cf. 2, 79 *fin.*) and over the penal actions that it lay against the thief's *heredes* (4, 111). But it did not lie against mere accomplices.

§ 209. Vi bonorum raptorum

Theft by violence was punished by a special praetorian action (popularly *a. ui bonorum raptorum*) which lay for four times the value of the stolen thing during an *annus utilis* and after that for simple

[1] Cf. Jolowicz, *De Furtis* lxiii–lxiv.

[2] Cf. Jolowicz, *De Furtis* lxi.

[3] It is said also by a *creditor pigneraticius*: Ulp. *D.* 13, 1, 12, 2. Cf. *Edictum* p. 158 n. 3.

value.[1] Opinion was divided (4, 8) as to whether the *quadruplum* was pure penalty or included compensation (*rei persecutio*). On the latter view the penalty was only *triplum*, since the *condictio furtiua* would be excluded. In later classical law the view became established on Julian's authority that the *quadruplum* was pure penalty, but Justinian (*Inst.* 4, 2 pr.; 4, 6, 19) reverted to the other view which was probably the older. Thus though Gaius regards the case as one of aggravated *furtum*, the penalty of *furtum m.* was at least not increased, and in any case the *actiones furti* had the advantage of being *perpetuae* (4, 111), which makes the *a. ui bon. rapt. in simplum* after a year look pointless. Obviously the advantage of the *a. ui b. r.* did not lie in its penalties, but in its being tried by *recuperatores* instead of a single *iudex*,[2] which meant a more summary remedy before a stronger court.

The action was not a considered reform, but a sort of by-product of a special praetorian remedy introduced in the last years of the Republic for damage to property (*damnum*) caused by the violence of an armed gang or mob.[3] Its quadruple penalty for *damnum* was held to include compensation on the analogy of the *L. Aquilia*,[4] but in contrast to the *L. Aquilia damnum* in this edict was interpreted as covering *furtum*, a common feature in public disorders, and any doubt as to this interpretation was removed by the addition of a special clause to the edict. When by a curious evolution theft with violence by a single unarmed person was held to be covered, the view that the *quadruplum* included compensation was at first adhered to, inappropriate though it was to an action on theft.

Another peculiarity may have been that in some cases the *a. ui b. r.* could be brought by a plaintiff who would not have had sufficient *interesse* to bring an *a. furti*.[5] But this is probably not the classical law.

There had to be *furtum* and therefore *dolus malus*; the action did not lie for taking by force under a *bona fide* claim of right. But forcible self-help was a crime from the end of the Republic; moreover Marcus Aurelius enacted that it should cause forfeiture of the claim. This was kept by a constitution of A.D. 389,[6] which added that if the claim was unfounded, the violent taker was to pay the value of the

[1] The ordinary editorial insertion of *ui* in § 209, from *Inst.* 4, 2 pr., is doubtful because unnecessary: Levy, *Konkurrenz* 1, 430 n. 5; but cf. Edictum p. 394 n. 1.
[2] Below, p. 225.
[3] Cic. *p. Tullio* 3, 7 &c. Cf. *Edictum* § 187; Levy, *Konkurrenz* 1, 429.
[4] Below, pp. 210–11.
[5] *Inst.* 4, 2, 2 *fin.*; Ulp. *D.* 47, 8, 2, 22–24. Cf. Buckland 584.
[6] *C.* 8, 4, 7; *Inst.* 4, 2, 1; 4, 15, 6.

thing to the person robbed. This applied to immovables as well as movables, whereas the *a. ui b. r.*, as presupposing *furtum*, did not.

§§ 210–19. The Lex Aquilia

Ulpian[1] says that the *L. Aquilia* was a plebiscite and that it repealed or modified (*derogauit*) all previous legislation *de damno*—the *Twelve Tables* and other statutes.

The date of the *lex* is unknown. It was later, probably considerably, than the *Twelve Tables* and earlier than about 150 B.C.[2] Cicero[3] speaks of it as coming from an age of primitive simplicity; the terms of the *lex* likewise point to a pretty early date.[4] There is Byzantine authority[5] for the *lex* being contemporaneous with the *L. Hortensia* of 287 B.C. This is probably a guess, but may be not far from the mark.

Previous law. This has disappeared except for a few fragments of the *Twelve Tables*[6] that have survived perhaps because damage to *res immobiles* was outside the original scope of the *L. Aquilia*. But there must have been previous law as to damage to movables. The *L. Aquilia* cannot have followed directly upon a system of vengeance and voluntary composition. Probably fixed penalties were prescribed for specific acts of damage.[7]

Contents. The *lex* contained three (main) chapters.

Cap. 1. *Si quis seruum seruamue alienum alienamue quadrupedemue pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes ero dare damnas esto.*[8]

Cap. 2. § 215.[9]

Cap. 3. Ulp. *D.* 9, 2, 27, 5: *Tertio autem capite ait eadem lex Aquilia: 'Ceterarum rerum praeter hominem et pecudem occisos si quis alteri*

[1] *D.* 9, 2, 1.

[2] Commented on by M. Iunius Brutus: *D.* 9, 2, 27, 22. [3] *p. Tullio* 4, 8.

[4] To mention one point only: the money supposed is *aes*. But 269 B.C. hitherto accepted as the date of the first silver coinage is now held to be too early. Cf. *JRS* 1953, 193.

[5] Theoph. 4, 3, 15 (Ferrini 404); *Schol. ad Bas.* 60, 3, 1 (Heimbach 5, 263).

[6] *XII Tabb.* 8, 6–11.

[7] The old view that the *Twelve Tables* (cf. 8, 5) had a general remedy *de rupitiis sarciendis* is now abandoned.

[8] §§ 210. 214. Cf. *Inst.* 4, 3, pr. 9; Gaius *D.* 9, 2, 2 pr.; Ulp. *e.t.* 11, 6; 21 pr. Bruns 1, 45. The only substantial doubt is as to *quanti id* (Gaius in *D.*) or *quanti ea res* (§ 214 and *Inst.*). Ulp. *D.* 9, 2, 21 pr.: *Ait lex 'quanti is homo in eo anno plurimi fuisset'*. If the *lex* ran: *quanti is seruus eaue serua rell.*, one could better understand why consequential damages are said not to have followed *ex uerbis legis* (*Inst.* 4, 3, 10). Cf. Daube, 'On the Use of the Term *damnum*', *St. Solazzi* (1948) 57 (offprint).

[9] Below, p. 216.

damnum faxit quod usserit fregerit ruperit iniuria, quanti ea res erit in diebus triginta proximis, tantum aes ero (*domino* Dig.) *dare damnas esto.*' It is as certain as such a thing can be that *Ceterarum–occisos* is a gloss intended to convey what is better expressed in § 217: *Capite tertio de omni cetero damno cauetur.*[1]

Somewhere later the *lex* provided that the damages should be doubled if the defendant denied liability.[2] This doubling (4, 9) and the words *damnas esto* are widely believed to indicate that the *actio legis Aq.* was originally by *manus iniectio.*[3]

Capp. 1 and 3. *Cap.* 1 is limited in primitive style to a particular kind of injury done to particular kinds of property. *Cap.* 3 shows a striking advance: it has a general concept of loss (*damnum*) caused in ways which are described with such generality that any physical damage to property could be held to be covered; if *usserit fregerit* were limited, *ruperit* proved to be elastic (§ 217). Indeed the specific cases of *cap.* 1 would have fallen under *cap.* 3 but for the fact that they had already been disposed of.

Another advance is the first, rather halting, appearance of compensation for the actual damage instead of penalty for wrong. Not that from the point of view of its authors the *actio l. Aquiliae* can have been anything but penal. Early jurisprudence stamped it once for all with the characteristics of an *actio poenalis*: it lay noxally (4, 75), was extinguished by the death of the delinquent (4, 112) but not by his *cap. deminutio* (4, 77), and was cumulative against joint delinquents. In classical law, at any rate, the plaintiff did not, except for occasional profit from retrospective valuation or doubling of damages *adversus infitiantem*, recover more than what would make good his loss, and in contrast to *furtum* there was no concurrent compensatory action.[4] Thus the *actio l. Aq.* was penal in its legal characteristics, but compensatory in its normal result—an ambiguity that created a problem in classification which neither Gaius (4, 6–9) nor Justinian (*Inst.* 4, 6, 19; cf. 4, 3, 9) is particularly successful in solving.[5] So much for the developed law. As to the primitive law, it is obvious that even from the first compensation was the normal effect of *cap.* 1; the original meaning of *cap.* 3 remains to be examined.

Damages under cap. 1. The property having been destroyed,

[1] Cf. Jolowicz, *LQR* 1922, 225; Lenel, *SZ* 1922, 575.
[2] Gaius *D.* 9, 2, 2, 1.
[3] Below, p. 246.
[4] Except when the delict was also a breach of contract. But cf. Buckland 716–17.
[5] Below, p. 230.

compensation is the cost of replacement. This was what the plaintiff was to get, except that the highest (presumably market) value in the last 365 days[1] would sometimes be more. On the other hand, the market value might not always cover the loss actually sustained, and by the beginning of the Empire at latest interpretation (*Inst.* 4, 3, 10) admitted the addition of consequential losses (illustrated § 212). In this matter, however, the retrospective principle was not applied; consequential loss was admitted only if actually suffered.[2] Thus if a slave instituted as *heres* was killed before *aditio*, the value of the *hereditas* was added to his personal value, since it was lost to his master, but it was not added if he was killed within a year after *aditio*, though within the year the *hereditas* had been part of his value.

Damages under cap. 3. Classical law took the statutory words *quanti ea res erit* in their then current sense of 'what the matter comes to', in the present case the aforesaid *damnum quod usserit*, &c. In short the measure of damages was the plaintiff's loss, his *interesse*. If the thing was permanently injured, he would get the difference between its value before and after the injury. The valuation of an injured thing in its state before the injury is necessarily retrospective, but we hear next to nothing of the retrospect being extended for the statutory 30 days, except that the word *plurimi* was implied (§ 218). Sabinus is given as the authority for this, but he cannot have been the first to think of the only possible interpretation. Consequential damages, such as loss of work and expenses of cure or repairs, were normal. If the injury was only temporary, the plaintiff got no more.

The classical law seems clear, but the original meaning of *quanti ea res erit* in *cap.* 3 is very doubtful. The general view is that *ea res* meant the injured thing and that the plaintiff was in all cases, however slight the damage, to get its highest value in the last 30 days. It is in favour of this view that it takes *ea res* for what on any view must have been the object retrospectively valued. Another view[3] makes the phrase mean the loss calculated on the highest value of the thing in the last 30 days. To this it is objected that so artificial a system is inconceivable in early jurisprudence. But in spite of the high authority supporting it[4] the first view must be pronounced impossible because of its intolerable results. It is argued that the system supposed is less irrational than a tariff of fixed penalties. But is this so? A marked feature of such tariffs is that they graduate penalties meticulously. What makes the proposed interpretation of *cap.* 3 untenable is not so

[1] 304 before the Julian calendar.
[2] Jolowicz, *LQR* 1922, 227–9.
[3] Girard, 441–2.
[4] e.g. Lenel, *SZ* 1922, 577.

much that the penalty might be wildly exorbitant as that it would be completely indiscriminate. The difference between *caps.* 1 and 3 would be reduced to no more than one of periods of retrospective valuation. On this view a man was to pay as much for a minor injury to a slave as for killing him. The case of a slave deserves special attention because we happen to know that the *Twelve Tables* had fixed the penalty for *os serui fractum* at 150 *asses* (2, 223). It is inconceivable that for this the considerably later *L. Aquilia* substituted the full value of the slave. The case against this view would be met if payment of the *poena* entitled the delinquent to keep the injured thing, but of this there is admittedly no evidence.

Another suggestion[1] is that *cap.* 3 originally dealt only with the total destruction of, not minor damage to, things other than those under *cap.* 1, slaves and *pecudes.* But if we expunge Ulpian's opening words '*Ceterarum rerum*', as it seems now to be agreed that we should, this interpretation becomes unconvincing.[2]

The proper verdict is *non liquet*, for after all the exact wording of *capp.* 1 and 3 is not known, and we are apt to forget that *cap.* 2 intervened. But if we must choose, we prefer the conservative view that *cap.* 3 meant from the beginning substantially what it meant later. The objection that so artificial an interpretation is an anachronism is not so strong as the objections to the other principal view. It would disappear if one could accept the very ingenious suggestion that the *dies xxx proximi* meant 'next following', not 'last past', so that what the plaintiff was to get was his loss as it declared itself within the next 30 days.[3] The result would be a thoroughly rational system, but for that very reason we cannot believe that it ever existed. If it had, it could not have been forgotten by the tenacious Roman tradition.

Developments by civil interpretation. Short as it was, the *lex* was too precise to give the jurists the free hand that was left to them by the *Twelve Tables* in the matter of *furtum.*[4] Their developments by *interpretatio* were not indeed negligible. Well before the end of the Republic it was settled that *ruperit* in *cap.* 3 covered physical injury of whatever kind (§ 217).[5] The only injury not covered was the killing of slaves and *pecudes*, which had been disposed of in *cap.* 1. By the beginning of the Empire the admission of consequential damages had been established.[6] Also, if it is true that liability under the *lex* was

[1] Jolowicz, *LQR* 1922, 225.
[2] Cf. Lenel, *SZ* 1922, 575.
[3] Daube, *LQR* 1936, 253. Justice cannot be done to his argument here.
[4] Buckland, *Main Inst.* 332.
[5] Cf. Ulp. *D.* 9, 2, 27, 22.
[6] Above, p. 211.

originally absolute, another notable advance under the Republic was the ruling that injury inflicted *casu*, without fault, was not inflicted *iniuria* within the meaning of the *lex*.[1] Doubtless pure *interpretatio* would have gone further had not an easier mode of progress been available.

Developments by praetorian actions. Under the formulary system confessedly analogous extensions of the *lex* could be effected by means of praetorian actions, and it was by their means chiefly that the scope of the statute was extended. They were not propounded in the Edict;[2] though they depended on the praetor's powers and had to be approved by him, substantially they were established by practice and doctrine. The stereotyping of the Edict under Hadrian does not appear to have put an end to this method of development; it seems to have remained possible for a *prudens* to suggest and the praetor to grant a novel *formula*.

As we shall see,[3] praetorian actions might be *ficticiae* (4, 34 *sq.*) or *in factum conceptae* (4, 45–47), or might substitute in the *condemnatio* a different name from that with reference to which the claim was couched (4, 35. 82 *sq.*). *Conceptio in factum* may be presumed in most of the Aquilian praetorian actions; in one known case there was a fiction (4, 37); in others there may have been variation of names.[4] But we need not concern ourselves with the particular *formulae* in the various cases, nor much with the further point that an *a. in factum* presented as classical in the *Corpus Iuris* may not be classical or, if classical, may not have originated as an analogous extension of the *L. Aquilia*, but may be a product of general praetorian equity.[5]

i. *The plaintiff* specified by the *lex* was the owner (*erus*), but persons having lesser rights *in rem* were given praetorian actions to the extent of their interest. This development (doubtfully classical) is much the same as the civil extension of the *actio furti*, except that we do not hear of actions based on what in connexion with *furtum* is known as negative *interesse*.[6]

[1] Below, p. 215. [2] *Edictum* p. 205. [3] Below, pp. 256, 261.

[4] The classical literature that has reached us speaks in this connexion indiscriminately of *actio utilis* and *a. in factum*. On this point *Inst.* 4, 3, 16 is certainly misleading. The natural idea that *a. utilis* covers all forms of praetorian action and that *a. in factum* must mean *in factum concepta* is unprovable. Cf. *Edictum* pp. 203. 204.

[5] Cf. Pomp. *D.* 19, 5, 11: *Quia actionum non plenus numerus esset, ideo plerumque actiones in factum desiderantur. sed et eas actiones quae legibus proditae sunt, si lex iusta ac necessaria sit, supplet praetor in eo quod legi deest: quod facit in lege Aquilia reddendo actiones in factum accommodatas legi Aquiliae, idque utilitas eius legis exigit.*

[6] Above, p. 206.

ii. *The thing injured* had to be a *res corporalis*, an object of ownership.[1] Hence the action did not lie for injury to the body of a free man, whether *sui* or *alieni iuris*. But since the *actio iniuriarum* (§§ 220 *sq.*) did not lie unless the injury was intentional, a praetorian action came to be granted for negligent injury short of killing done to the body of a free man. By it expenses and compensation for loss of work could be recovered, but not damages for the injury itself. It is questioned, however, whether this action is classical or is derived from the *L. Aquilia*.[2]

iii. *The Injury*. Only physical injury was contemplated by the *lex*, and the civil interpretation required that it should have been inflicted by the direct physical action of the defendant. This is commonly expressed by saying that the injury must be *corpore corpori datum* (*Inst.* 4, 3, 16).

Corpore. The point being the same under both chapters we need speak only of *cap.* 1. *Occidere* was taken to mean only killing with one's own body or with an instrument in one's hands. Hence for *causam mortis praestare* a praetorian action was necessary. The line was not easy to draw. Killing with a missile was held to be *corpore*, and Gaius seems to consider it possible that drowning a slave by throwing him into a river was killing *corpore* (§ 219 *fin.*); but Ulpian holds that to produce the same result by making the slave's horse shy was ground only for an *a. in factum*.[3] If I administered poison myself I was liable to the *a. directa*, but only to an *a. in factum* if I gave it to the victim to take for himself.[4] The distinction mattered in classical times so long as the strict formulary system prevailed; later it was purely theoretical. The substantial question became not whether the *actio* should be *directa* or *in factum*, but how far the *a. in factum* could be carried. Indirect causation having thus been admitted to be a source of liability, the question of remoteness was bound to arise, not indeed where the injury had been intended, but where the ground of liability was negligence. The limits of the *a. in factum* and the consequences that can properly be attributed to negligence are not severable topics.

Corpori. Not only had the injury to be physical; it must also have caused economic loss (*damnum*).[5] Usually the two things go together,

[1] It is said that originally it could not be a *res immobilis*, but there is no trace of this limitation in classical law.

[2] Buckland 589 nn. 1 and 2; *Main Inst.* 336.

[3] Ulp. *D.* 9, 2, 9, 3.

[4] Ulp. *D.* 9, 2, 9 pr. 1.

[5] Daube, 'On the Meaning of *damnum*', *St. Solazzi*, offprint.

but not always. If I give your slave a black eye, the economic loss may not be worth considering; if so, there is no Aquilian action, though in some circumstances an *a. iniuriarum* may lie. On the other hand, if I unchain your slave out of compassion and so enable him to run away (*Inst.* 4, 3, 16), or stampede your herd in a frolic with the unintended result that someone steals it (§ 202), or drop your gold ring into the Tiber by negligence (Alfenus *D.* 19, 5, 23), there is economic loss to you, but no injury to the thing, no *damnum corpori datum*. Such cases were outside the *lex*, and it is considered doubtful how far the *a. in factum* allowed by admittedly classical texts was thought of as an analogous extension of the *L. Aquilia*. The analogy does appear to be in mind in § 202,[1] but there seems to have been no systematic extension of the *L. Aquilia* to cases of damage in respect of a thing without injury to the thing itself[2] till much later, and even this is a long way from the generality of *Code Civil* art. 1382.[3]

Iniuria. Under both chapters the act of lesion must have been done *iniuria*; *damnum iniuria datum* is the general name for the delict.[4] Here *iniuria* is used in its proper and always popular sense of unlawful act (*omne quod non iure fit*), without the special nuance of *contumelia* which it has in connexion with the *a. iniuriarum* (§§ 220–5). Its original meaning in the *lex* was probably 'without justification or lawful excuse', and that is the first point in Justinian's (*Inst.* 4, 3, 2) explanation of the term. But Gaius does not mention it; he is content to say: *iniuria occidere intellegitur cuius dolo aut culpa id acciderit* (§ 211), i.e. that liability under the statute depends on either malice or negligence. Originally liability in the absence of special justification may have been absolute; it must be borne in mind that at first there was liability only for direct consequences. However that may be, it was settled before the end of the Republic that there was no liability for damage done *casu*, without fault (*culpa* in the wide sense).[5] *Culpa* here covers not only intention to cause the injury, but also what we call negligence (*culpa* in the narrow sense), in other words failure to provide against harmful consequences that ought to have been foreseen.[6] It is said[7] that

[1] Also in Ulp. *D.* 9, 2, 27, 21.

[2] *Inst.* 4, 3, 16: *si non corpore damnum fuerit datum neque corpus laesum fuerit.*

[3] Cf. Rotondi, *Scritti Giurid.* 2, 411 *sq.*, especially 468.

[4] On the usage of the compound term *damnum iniuria* or *damnum iniuriae* cf. Buckland, *RH* 1927, 120.

[5] Q. Mucius in Paul *D.* 9, 2, 31.

[6] The three possibilities—*dolus*, carelessness, and *casus*—had for centuries been a truism of Greek philosophy. Cf. Kübler in *Rechtsidee u. Staatsgedanke* (ed. K. Larenz 1930) 63–76.

[7] Kunkel, *SZ* 1929, 158.

except when contrasting *damnum i. d.* with other delicts (as in § 202) the classical jurists never analyse *culpa* as consisting in either *dolus* or negligence. If so, various texts must be interpolated, including our § 211. Some of the alleged interpolations are probable, but there is no sufficient ground for suspecting § 211. All that can be admitted is that classical jurisprudence developed no theory of Aquilian negligence. But an elaborate theory was not necessary, since the only possible measure of a man's duty to provide against harmful consequences of his acts is what in the circumstances a reasonable man would have foreseen.

Cap. 2 (§§ 215–16). Probably this had become obsolete before Gaius. At any rate he is our sole source of information. An *adstipulator*[1] who released the debt in fraud of the principal *stipulator* was to be liable to make good the loss (*damnum*), and if he denied liability the damages were doubled, as they were also under *capp.* 1 and 3 (4, 9). The *lex* may have contemplated only debt of *pecunia* and *in fraudem* may mean simply 'to the detriment of'.[2] Evidently the *a. mandati* did not exist when the *L. Aquilia* was passed, so that Gaius' criticism is beside the mark. The conjunction of this form of wrong with that of injury to corporeal property is, no doubt rightly, regarded as showing that early jurisprudence did not distinguish clearly between delict and breach of faith, but this is no explanation of the extraordinary interposition of *cap.* 2 between *capp.* 1 and 3. A good suggestion is that the subject-matters of *capp.* 1 and 2 had been combined in some earlier *lex* and that, when the *L. Aquilia* introduced the subject-matter of *cap.* 3, the original order was left undisturbed, i.e. *cap.* 3 was simply appended instead of being interposed.[3]

§§ 220–5. Iniuria

Iniuria, the delict of insult or outrage by words or conduct, was a product of the Edict and jurisprudence. The provisions of the *Twelve Tables*, from which the classical delict ultimately descended, concerned only physical assaults.[4] There were indeed also provisions against *malum carmen incantare* and *occentare*[5] which later writers[6] identified with *iniuria* (in the later sense) by defamatory lampoon

[1] Above, p. 159.

[2] Both points are made by Daube, *St. Solazzi* (1948, offprint). That as to *pecunia* is missed by our translation of § 215, Part I p. 225.

[3] Daube, *LQR.* 1936. 237 and *St. Solazzi* 64–65.

[4] *XII Tabb.* 8, 2–4.

[5] *XII Tabb.* 8, 1. The literature up to 1941 is given by *Fontes* 1, 52.

[6] Cic. *de re pub.* 4, 10, 12; *Tusc.* 4, 2, 4; Paul *Sent.* 5, 4, 6.

(*carmen famosum*). But *malum carmen incantare* is believed to have referred to magical incantations, and *occentare*, though there is good authority for identifying it with *conuicium* (noisy 'demonstration' against a person) which was *iniuria* in the sense of developed law (§ 220), was not *iniuria* in the sense of the *Twelve Tables*, as is shown by the fact that the earliest edict *De iniuriis* applied only to physical assaults and that *conuicium* was brought into the edictal title only by a clause added later. The clauses of the *Twelve Tables* on assaults are reconstructed as follows.[1]

viii. 2. *Si membrum rup[s] it, ni cum eo pacit, talio esto.*

3. *Manu fustiue si os fregerit libero, CCC, si seruo, CL poenae sunto.*

4. *Si iniuriam faxsit, uiginti quinque poenae sunto.*

The only differences from our § 223 are the presence of *ni cum eo pacit* in cl. 2 and of *manu fustiue* in cl. 3, and the omission of anything corresponding to *aut collisum* in cl. 3. The last is probably *interpretatio*.[2]

We have here an admirable illustration of the evolution of delictual obligation: in the gravest case composition for vengeance is still voluntary,[3] in the others there is a tariff of fixed penalties, but not yet estimation according to the case. Adequate commentary belongs to comparative law.[4] An obvious problem is the meaning of *membrum ruptum* and its distinction from *os fractum*. One view is that *membrum ruptum* meant amputation of a limb, a mutilation; but if so, a serious wound which neither severed a limb nor broke a bone carried no higher penalty than a punch with the fist—25 *asses*. This objection leads to the supposition that a clause dealing with bloody wounding has been lost;[5] but the loss is improbable. Perhaps the most popular view is that *membrum ruptum* meant a permanent disablement of some part of the body;[6] thus if a bone was broken it would depend on the ulterior consequences whether *talio* or 300–150 *asses* should be the penalty. The conjecture may be ventured that the distinction lay in the nature of the act rather than in the result: *membrum ruptum* was wounding with a cutting weapon—a sword, dagger, or knife—which would be an act of private war deserving of *talio*, whereas a blow with a stick or the fist was simple *iniuria*, carrying a *poena* of 25 *asses*, but multiplied by 12 or 6 when a bone was broken.

[1] For the authorities cf. Bruns 1, 29; *Textes* 17; *Fontes* 1, 53.

[2] Or perhaps gloss: *Inst.* 4, 4, 7.

[3] At least nominally: cf. Gell. 20, 1, 33 *sq.*

[4] Cf. Binding, *SZ* 1919, 106.

[5] So Binding, *l.c.*

[6] Cf. Santi di Paola, 'La genesi storica del delitto di "Iniuria" ', *Sem. Giurid. Catania* (1947) 1.

From the point of view of future development the interesting feature of these clauses is that in cl. 4 we have the beginning of a general concept of *iniuria*. How a word which properly meant any unlawful act had come to have the special meaning of physical assault is a mystery.[1] But in the context it could mean nothing else, and this had a decisive effect on its future usage.

Also notable is the treatment of *os serui fractum* as parallel to *os liberi fractum*; we are not told what was the result if the victim of *membrum ruptum* or *ceterae iniuriae* was a slave. One cannot conceive that even at this early date the penalty of 150 *asses* for *os serui fractum* did not go to the master. Nevertheless even in later law the idea persisted that graver assaults on a slave (*uerberatio*, torture) were wrongs to the slave himself, without regard to the implied insult to the master.[2] But the altered conception of *iniuria* removed any difficulty in regarding *iniuriae* to a slave as insulting to his master, and Gaius (§ 222) takes the simpler view that graver assaults on a slave were insulting to his master as a matter of course, but that minor *iniuriae* to slaves were actionable only exceptionally.

Classical law. In classical law *iniuria* is found to have acquired a new meaning. Its essence had come to be *contumelia*, an affront to another's self-respect or reputation, an overweening self-assertion at his expense (*ὕβρις*). It covered assaults if intentional, but it covered also defamation and other invasions of honour and good name, including in the end even wanton interference with another's proprietary or public rights. The essence of the delict was insult; insulting words might carry higher damages if they injured reputation, but they constituted *iniuria* without publication to a third party. 'An abusive letter seen only by the plaintiff would suffice.'[3] In one way or another our own law provides for most, though by no means all, cases of *iniuria*, but its basic point of view is different.[4]

The Edict. The evolution of this classical concept of *iniuria* from the archaic law of the *Twelve Tables* was led by the Edict and completed by jurisprudence. What action the *praetor urbanus* may be thought to have taken before the *L. Aebutia* (*c.* 150 B.C.) depends on one's view of his pre-Aebutian powers.[5] History begins from when,

[1] Santi di Paola, *o.c.* 27 attributes it to the remedies for *membrum ruptum* and *os fractum* having been derived from *fas* and that for lesser assaults from *ius*.

[2] Ulp. *D.* 47, 10, 15, 34–35. Buckland 591–2.

[3] Buckland, *Main Inst.* 337. But see Mommsen, *Strafrecht* 796.

[4] Buckland, *Main Inst.* 336; Buckland and McNair, 295.

[5] Below, p. 231. Earlier action by the *pr. peregrinus* is probable in view of the evident influence of Greek law on the edictal development. Cf. Hitzig, *Iniuria* (1899);

using his powers under the *L. Aebutia*,[1] he offered an action for damages assessable according to the case in place of the obsolete *talio* and the fixed penal sums of the *Twelve Tables* which had been rendered derisory by the depreciation of the *as*.[2] This first edict was confined to physical assaults; it reformed the remedy, without altering the conception of *iniuria*.

Later the reformed remedy was made applicable to wrongs that were not *iniuriae* in the old sense by the addition of one edict after another to the title *De iniuriis*—first the edict *De conuicio* (*contra bonos mores*), a wrong approximating to physical assault and under the name *occentare* perhaps not unknown to the *Twelve Tables*, next the edict *De attemptata pudicitia*, and finally the edict *Ne quid infamandi causa fiat*. This last was a radical reform, because it frankly admitted the idea, only adumbrated in *De conuicio* and *De att. pud.*, of *iniuria* consisting in words or conduct damaging reputation.[3] There were subsidiary edicts on *iniuria* to a slave,[4] the noxal action (4, 76), permission to a son to sue on his own account in his father's absence, and (presumably) the *contrarium iudicium* (4, 177).

The assemblage of these new forms of wrong along with the old cases of *iniuria* under one edictal title enabled jurisprudence to widen the meaning of *iniuria*. It came to cover not only physical assaults, but also an ever growing field of invasions of honour. The change of meaning had two results: it made the added edicts seem superfluous, since the whole ground was now covered by the first edict, which thus became *generale edictum*,[5] and it opened the way for jurisprudence to extend the delict to any and every wanton interference with another's rights. For example, to go on another's land was not in itself a wrong, but if wanton, it would be *iniuria*.

The recognition of the fact that insult to one's wife or dependants is also an insult to oneself (§§ 221–2) shows the keenness of Roman sensibility. The difficulty about the text of § 221 is probably due to the original rule having been that a husband suffered *iniuria* through his

Partsch, *Archiv f. Papyrusforschung* 6, 54; De Visscher, *Études* 329; Pringsheim *SZ* 1932, 86.

[1] Gell. 16, 10, 8; 20, 1, 13. The evolution of the Edict is plain because Julian kept the clauses of Tit. XXXV *De Iniuriis* in their historical order. Cf. Girard 429 n. 6 and (fuller) *Mél.* 2, 385.

[2] Cf. the absurd story quoted from Labeo by Gell. 20, 1, 13.

[3] This is so even if Daube, *Atti*, Verona (1951) 3, 413, is right in holding that it contemplated originally only attempts to make a man technically *infamis* (below, p. 300) and not injury to reputation in general.

[4] Ulp. *D.* 47, 10, 15, 34–35; above, p. 218 n. 2.

[5] Cf. Labeo–Ulp. *D.* 47, 10, 15, 3. 26.

wife only if she was in his *manus*. On the other hand, a wife was not considered to be insulted by an insult to her husband.

The remedy. This was a praetorian *ao. iniuriarum aestimatoria*, the *formula* of which stated the act complained of with some particularity[1] and demanded condemnation of the defendant in such sum, not exceeding a named maximum (§ 224), as should be deemed *bonum et aequum* by the court.[2] A motive for the plaintiff not to name too high a maximum was provided by the fact that if his action failed he was automatically condemned under a *iudicium contrarium* in one-tenth of his claim (4, 177–8).

The action, being penal (4, 8), did not lie against a delinquent's *heredes* (4, 112), was cumulative against joint delinquents, lay noxally (4, 76), and was extinguished by *pactum*; condemnation or even *pactum* carried *infamia* (4, 182). It had also peculiarities due to its specially vindictive character: it could not be brought by the *heredes* of an injured person (4, 112) and was extinguished if resentment was not shown at once: *haec actio dissimulatione aboletur* (*Inst.* 4, 4, 12), which may be why the ordinary limitation of praetorian actions to an *annus utilis* was not waived for it, as it was for the praetorian *a. furti manifesti* (4, 111). Not being in *ius concepta* (4, 47), the *formula* did not need the insertion of a fiction of citizenship when a party was a *peregrinus* (4, 37).

Criminal remedies. Gaius does not mention the Sullan *L. Cornelia* instituting a remedy in the form of a criminal prosecution for personal assaults and breaking into a dwelling (*Inst.* 4, 4, 8). His silence makes the view[3] improbable that for such *iniuriae*, until a rescript of Severus and Caracalla,[4] i.e. till after Gaius, the *L. Cornelia* had the effect of suppressing the civil action. In later law there was always an alternative criminal remedy *extra ordinem* open to the injured party (*Inst.* 4, 4, 10).[5]

[1] 4, 60. Below, p. 259, example E.

[2] *Recuperatores* at least originally, but probably *unus iudex* (§ 224) later. The point is controversial: *Edictum* p. 397, n. 10. *Recuperatores* gave greater dispatch: *Edictum* p. 27.

[3] Girard, *Mél.* 2, 388. 407. But cf. *Edictum* p. 397, n. 10.

[4] Ulp. *D.* 47, 10, 7, 6; Marcian 37, 1.

[5] Hermog. *D.* 47, 10, 45 implies that criminal remedies were ordinarily preferred.

BOOK IV

THE LAW OF ACTIONS

THE transition to the third term of the trichotomy of 1, 8 is abrupt; if there was a connecting passage it has perished. As of *personae* and of *res* so of *actiones* no definition is given.

Actio. The word meant act, but in legal usage it became appropriated to acts in a defined form and usually, though not exclusively,[1] to the forms of claim in litigation. In the republican period *actiones* designated the old forms of claim, the younger *formulae* being known as *iudicia*.[2] But in the classical period *actiones* applied to both, the old forms being distinguished by the epithet *legis*. It was not till the post-classical period, when the *formulae* had disappeared, that the term was applied to actions of the *extraordinaria cognitio* (now become universal) and even to interdicts.[3] Indeed by that time, there being no longer forms of action, the meaning had shifted from the form to the right of action: *actio nihil aliud est quam ius persequendi iudicio quod sibi debetur* (*Inst.* 4, 6 pr.).

Book 4. The central theme is *actiones* in the sense of the contemporary *formulae*, not procedure as a whole, though incidentally a number of connected procedural matters are introduced.[4] It is a common criticism that in dealing with the so-called *actiones adiectitiae qualitatis* (§§ 69–74) Gaius pays more attention to the conditions of the right of action, which in dealing with other *formulae* he takes for granted, than to the form of action. The explanation is that the only civil law on the subject was that there was no right of action and that only civil *obligationes* had been dealt with in Book 3. Of course the permanent incorporation of these *formulae* in the Edict amounted to the creation of new (praetorian) substantive law, but that was not how Gaius saw the matter.[5] A similar defence cannot be offered for his placing of the noxal actions (4, 75 *sq.*) Attraction by the *actiones adi. qual.* as much as the procedural peculiarity of noxal actions may be the explanation, but they were old civil law and could have been expounded along with delicts.

[1] Cf. 2, 24; 3, 154b. Also Paul *F.V.* 47a; *D.* 17, 2, 65 pr.
[2] Wlassak's doctrine, but not undisputed.
[3] *Inst.* 4, 15 pr. 8.
[4] Cf. §§ 82–102, 171–82.
[5] Above, p. 141.

The treatment of interdicts (§§ 138 *sq.*) under *actiones* is terminologically incorrect. But they were an integral part of the ordinary system of remedies and were actions in all but name.[1] It must be admitted that the only information as to the law of possession is found here, though it cannot be said that possession was not a civil law concept; it was fundamental in *traditio* and *usucapio*, to say no more. But the right of possession in itself consisted in nothing but the right to certain interdicts.[2]

A systematic account of procedure would be out of place in a commentary on Gaius, but the function of the *formula* cannot be understood without a general notion of the procedure of which it was the pivot.

Procedure.[3] Three systems of procedure were successively normal in suits at Rome between *ciues*: (i) the *legis actiones*, going back to and beyond the *Twelve Tables*, (ii) the formulary system, introduced by the *L. Aebutia* (*c.* 150 B.C.) and generalized under Augustus,[4] and (iii) the *cognitio extraordinaria*, which gradually encroached on the formulary system during the early Empire and by the time of Diocletian and Constantine superseded it.

The cognitio.[5] This was a procedure of the modern type in which a sovereign State does justice between its subjects from above. In contrast to the earlier systems there was no division of the trial of a lawsuit between the magistrate and a *iudex* empowered by the parties and the magistrate jointly. The magistrate, either personally or through his delegate, heard the whole case and decided it. This was not entirely unprecedented. Even within the formulary system important matters, such as the issue of *missiones in possessionem*, praetorian stipulations and interdicts, were decided by the *cognitio* of the magistrate or at least grounded on it. But the Empire from the beginning gave to personal *cognitio* by the magistrate an impulse which in the long run proved irresistible. It is a matter of general history that the old republican magistrates were gradually superseded by the new imperial civil service. Along with this came, in the field of jurisdiction, the supersession of the old *ordo iudiciorum* by the *cognitio extra ordinem*, which was the system natural to a bureaucracy. But by the time of Gaius the supersession had not gone very far. Various matters, for instance the

[1] In § 155 an interdict is referred to as *actio*, but the text is questioned.

[2] Buckland 605.

[3] See in general Jolowicz; Wenger, *Abriss* in Kunkel 365–87; Arangio-Ruiz, *Cours de droit romain* (*Les Actions*) (Naples 1935).

[4] Below, p. 250.

[5] Cf. Jolowicz 400; Buckland, *Main Inst.* 385.

new and important institution of *fideicommissa*, had been committed to new jurisdictions using the *cognitio* (2, 278–9; *Inst.* 2, 23, 1), and even at Rome more general encroachment on the republican jurisdictions by imperial prefects had begun. But the normal system was still the formulary. Beyond it, like Gaius, we need not go.

The two older procedures had in common the outstanding feature that the hearing of a lawsuit was a drama in two acts. Act 1 took place in the magistrate's court (*in iure*); its object was to define the issue and to empower an unofficial authority (normally *unus iudex*) to hear and decide it. Act 2 (*apud iudicem*) was the trial by the appointed authority.

In historical times this division[1] was compulsory in lawsuits at Rome between *ciues*; in other words the *praetor urbanus* could not decide the case himself. Other superior magistrates—the *pr. peregrinus* and the provincial governors—were subject to no such limitation, though *de facto* they probably made use of the formulary system, which seems to have originated in their jurisdictions. But like Gaius we shall in general be referring to the jurisdiction of the *pr. urbanus*.

Litis contestatio. The object of the proceedings *in iure* was the same under both the earlier systems, namely to bind the parties to a definite issue and to constitute an authority to try it. Under both the achievement of this result was registered by a culminating act known as *litis contestatio*. Its formalities, apart from the witnessing implied by its name, are unknown,[2] and even its nature under the *legis actiones* is a matter of inference. The issue in a *legis actio* was reached by a ritual (words and sometimes acts) settled by the jurists, and *lit. cont.* may have been no more than a witnessing of the ritual.[3] Since the parties had to co-operate in the ritual, its enactment showed their consent. Under the better known formulary system[4] the issue was reached without ritual by informal debate *in iure* and was embodied in a *formula* which was reduced to writing.[5] The *formula* was granted by the praetor to the plaintiff and accepted by the defendant. *Litis contestatio* was the formal agreement of the parties to the *formula* and the *iudex* named in it.

Consent of the parties. By refusing to co-operate either party could prevent *litis cont.* and the subsequent development of the action from taking place. That a plaintiff could drop proceedings if he chose seems natural, but that even under the formulary system a

[1] As to its origin see below, p. 227.
[2] Wenger, *ZPR* 118. 131.
[3] Meylan, *RH* 1926, 577.
[4] The latest work seems to be: F. Bonifacio, '*Lit. cont. nel processo formulare*', *St. Albertario* (1950).
[5] Below, p. 251.

defendant could stop the action is a paradox. Probably we have here a survival from the more primitive procedure by *l. actio*. If, as is believed,[1] the earliest legal process is an appeal to the magistrate against a claimant's self-help, it is the defendant who is primarily interested in the case being tried. It is only in later times that the organization of a trial is likely to be unwelcome to him. But though his power even under the formulary system to stop the action is undeniable, it was unreal.[2] Refusal to defend an *actio in rem* was within one's rights, but resulted in the plaintiff being authorized by the *praetor* to take the thing.[3] In the face of an *actio in personam* there was a duty either to admit the claim (*confessio in iure*) or to defend *uti oportet*. Nevertheless if one would neither confess nor defend, one did not incur judgment by default. One was, however, subjected as an *indefensus* to the same process of praetorian execution as a *iudicatus*, namely *missio in bona* and eventually *uenditio bonorum*.[4]

Effects of litis contestatio.[5] These are important.

(*a*) The principle that a case once legally decided cannot be reopened is universal: *bis de eadem re ne sit actio*. But the Romans applied it not merely as we do to *res iudicata*, but also to *res in iudicium deducta*. A claim once embodied in a *lit. cont.* could never be repeated; all that was left after *lit. cont.* was the right to carry the issue as formulated by it through to judgment. There were technical differences according to the nature of the action in the operation of this principle, but the practical result was always as stated.[6] The *formula* fixed by the *lit. cont.* was what went to the *iudex*; he had to decide on it and nothing else. The praetor allowed the *formula* to be amended only very exceptionally (§§ 53. 57. 125). Thus a mistake in the *formula* might cost the plaintiff his case, and his claim, having been extinguished by *lit. cont.*, could not be renewed.[7]

(*b*) The claim engendered by *lit. cont.* (3, 180) descended to the *heres* of the plaintiff and against the *heres* of the defendant even where the original claim or liability was not descendible.

(*c*) It was on the state of right existing at the moment of *lit. cont.* that the *iudex* had to pronounce, at least normally (§ 114). If the

[1] Cf. H. J. Wolff, 'The Origin of Judicial Litigation among the Greeks', *Traditio* 4 (N. York 1946), 37–81.

[2] Wenger, *ZPR* 101 ff.; Buckland 634–5. 736.

[3] Production in court of a *res mobilis* was enforced by an *ao. ad exhibendum* (a personal action). Possession of a *res immobilis* was obtainable by interdict.

[4] Above, p. 136, on 3, 78.

[5] Wenger, *ZPR* 165.

[6] Above, p. 195, on 3, 180; below, p. 277, on §§ 103–9.

[7] Below, pp. 265, 283.

action was one that had to be brought within a certain time (§§ 110–11), time stopped running at *lit. cont.* Again, the time within which action brought had to be carried to judgment began to run at the same moment (§§ 104–5).

The trial authority: unus iudex. Normally the issue defined by *lit. cont.* went for trial to a single private citizen who was chosen from an official list and empowered *ad hoc* by the parties and praetor. The exact method of choice is uncertain; the essential is that the consent of the parties and the authorization of the praetor (*datio iudicis*) were as necessary in this matter as in the settlement of the *formula.* For long only senators were chosen, but in the last century of the Republic the composition of the juries of the new criminal *quaestiones perpetuae* became a political question between the Senate and the moneyed interest (*equites*). Ultimately a compromise was reached,[1] but this is a matter rather of political history. For us the notable point is that the *album iudicum*, from which *iudices priuati* as well as the jurors of the *quaestiones* were chosen, was at all times confined to the well-to-do.

Iudex arbiterue.[2] In the *Twelve Tables* this phrase presumably indicated an alternative, but in historical times *arbiter* was merely a special name for a *iudex* in a suit in which more was left to his discretion than in a *strictum iudicium.*[3] Not every *iudex* was an *arbiter*, but every *arbiter* was a *iudex* and properly described as such.[4]

Recuperatores. In cases between *ciues* trial *sub uno iudice* was the rule, but sometimes there were several *iudices* (an odd number, deciding by majority; chosen in the same way). They were called *recuperatores*, a name derived from the legal redress provided for foreign merchants by early treaties.[5] *Recuperatores* were common in the court of the *praetor peregrinus*, but were employed only occasionally by the *praetor urbanus.*[6] The advantage of a *iudicium recuperatorium* was its celerity; this is perhaps why it was popular in cases of violence. Gaius mentions only three cases (§§ 46. 141. 185), but there were others—we are referring to cases between *ciues* at Rome. In the most important known case, namely the *actio iniuriarum*,[7] he seems to contemplate *unus iudex* (3, 224).

[1] Buckland 636; Girard 1071 n. 2. [2] Below, p. 240, on § 17a.
[3] e.g. *actiones bonae fidei* or for partition or valuation. Cic. *p. Rosc. com.* 4, 10.
[4] e.g., § 163; cf. § 141. Cic. *p. Mur.* 12, 27 scoffs at '*iudex arbiterue*' as pedantry.
[5] Festus *v. Reciperatio* (Bruns 2, 30). Probably juries of mixed nationality.
[6] *Iudicia recuperatoria* were not *legitima*: §§ 104–5. 109.
[7] Cic. *de inu.* 2, 20, 60; Gell. 20, 1, 13. Cf. Girard, *Mél.* 2, 386. 402; *Edictum* p. 397.

Centumuiri. Decemuiri stlitibus iudicandis. Exceptionally the issue reached *in iure* might go for trial to an official court instead of to an authority constituted by act of the parties. The court of *Cuiri*[1] appears to date at the earliest from the second half of the third century B.C., and the court of *Xuiri* was somewhat later.[2] The centumviral court lasted till the end of the early Empire; the decemviral court was abolished by Augustus, who turned the decemvirs into presidents of the divisions in which the centumviral court functioned.

The centumviral court is mentioned in §§ 16, 31, and 95. Even after the generalization of the formulary procedure a case that was to go to it had to be initiated *in iure* by *l. ao. sacramenti.* Its competence is an obscure subject.[3] We hear of it chiefly as trying claims of inheritance, but it was competent also in claims of *tutela* and perhaps in other *uindicationes.* The better view is that its jurisdiction was in no case exclusive, i.e. that normal trial by a *iudex* was always possible.

The *Xuiri stl. iud.* appear in Cicero as trying cases of *libertas.*

Procedure apud iudicem. In this matter the change from *l. actio* to *formula* seems to have made no difference. We shall therefore speak only of a formulary action, and for the sake of brevity we shall suppose an ordinary action for the enforcement of a claim, taking no account of actions for partition (§ 42) and for declaration of right (§ 44).

The *iudex* could not refuse the duty with which he was charged by the praetor (in a supposed *iussum iudicandi*). Proceedings before him were oral and informal, but he had to sit in public and might not sit on certain days. Both parties had a right to be heard, but if one of them failed to appear judgment went against him, there being no longer need for consent. The *formula* laid down the precise question or questions that the *iudex* was to decide. The dispute might be as to law or fact or both, and of course the issue might be expressed as one of law though the real difference was as to the facts. On law the *iudex* might obtain the *responsum* of a *prudens*, on facts there would be the usual evidence. The *iudex* was free to form his opinion by such methods as he thought best, but having formed it he was bound to draw the conclusion indicated by the *formula.* He had no power to step outside the terms of the *formula*, but these sometimes left him considerable discretion.[4]

Judgment (*sententiam dicere*) in an ordinary action had to be a *con-*

[1] Really 105—three from each of the thirty-five tribes. Number raised under the Empire: Plin. *Epp.* 6, 33, 3.

[2] Pomp. *D.* 1, 2, 2, 29.

[3] Wlassak, *RPG* 2, 291–3. Koschaker, *SZ* 1930, 679.

[4] Cf. §§ 61. 114.

demnatio or an *absolutio* of the defendant, and under the formulary system *condemnatio* was always in a sum of money (§§ 48 *sq.*). Execution was by *actio iudicati.*[1] There was no appeal, to the praetor or any one else;[2] but occasionally the praetor might grant *restitutio in integrum*, which though not an annulment of the judgment came to much the same in effect. Also an aggrieved party might have a praetorian penal action against an incompetent or dishonest *iudex* (*qui litem suam fecerit*: *Inst.* 4, 5 pr.).

The origin of the divided procedure. This is a much debated question, as to which we must be content barely to state the two main views.[3]

1. Self-help was first mitigated by voluntary submission to arbitration. Next the infant State made submission compulsory. Finally the State took adjudication entirely into its own hands. Classical procedure falls late in the second stage: the magistrate was in control, but the consent of the parties was still required. The third stage was not fully reached till the later Empire, with the generalization of the *cognitio extraordinaria.*

2. The other view agrees with, though it does not unduly rely on, the Roman tradition that in the beginning the kings exercised undivided jurisdiction, but that early in the Republic[4] the magistrates who had succeeded to the royal jurisdiction were placed under obligation to remit the hearing and decision of lawsuits to a *iudex* agreed by the parties. Previously remission to a *iudex* had been a voluntary delegation of work by the magistrate. On this view the arbitral character of classical procedure is not a survival from primitive custom, but a democratic reform of the early Republic. A revised version,[5] seeking to meet the objection that this view antedates the influence of Greek democratic ideas by centuries, puts the alleged reform in the revolutionary period of the end of the second century B.C. Till then it had been customary, but not obligatory, for the *praetor urbanus* to delegate cases for trial to a senator chosen by himself. Thenceforward he was bound to remit them to a *iudex* chosen by the parties from the new list of *iudices* set up by the *L. Sempronia* of 122 B.C.

[1] Below, p. 247.

[2] Appeal to the Emperor may have penetrated into the ordinary procedure from the *cognitio extraord.*

[3] The latest literature is given by Wenger, 'Vom zweigeteilten röm. Zivilprozesse', *St. Solazzi* (Naples, 1948). Jolowicz, 'Procedure in iure and apud iudicem', *Atti, Bologna*, 2 (1934), 59–81, is specially notable.

[4] As usual, the reform is to be found attributed to good King Seruius Tullius: Girard, *Organisation judiciaire* 1, 4 n. 1.

[5] Wenger, *l.c.* above, n. 3.

The core of the problem is the quality or character of the early *iudex*. The fact that he was *datus* by the magistrate implies a certain subordination to him, but that he originated as no more than his delegate seems to us highly improbable. It is a fascinating suggestion[1] that he was at first accepted, like our own jury, as being one who knew the facts, and that the ἴστωρ of the Shield of Achilles (*Iliad* 18, 497–508) may be another parallel.[2]

§§ 1–5.[3] Actiones in rem and in personam

We are here at the source of the familiar distinction between rights *in rem* and *in personam*. It began with the Romans, but characteristically as a distinction between actions.

§ 1 admits only these two *genera actionum*. The two further *genera* suggested by unnamed jurists were probably the two forms of *actio per sponsionem* (*praeiudicialem*) which in §§ 91 *sq*. Gaius, no doubt rightly, treats as forms of *actio in rem*.[4] A question that he does not consider is how to bring the divisory actions under the classification *in r.* and *in p.* (cf. *Inst.* 4, 6, 20).

§§ 2–3. In the two oldest forms of action (§§ 16. 21) the distinction *in rem* and *in personam* was, one might say, physical. It was hardly less clear in the *intentiones* of the typical *formulae* (examples in § 41), and it is on them that Gaius' definitions of the two *genera actionum* are based (§§ 2. 3). But, as Justinian (*Inst.* 4, 6, 3) notices, these definitions take account of civil law actions only. They can be understood as applying to praetorian *formulae* with fiction (§§ 34 *sq*.), but cannot be made to cover *formulae in factum conceptae* (§§ 45 *sq*.). If then such praetorian actions are neither *in rem* nor *in personam* and if (§ 1) this classification comprises all actions, it follows that these praetorian actions are not actions at all. This may have been true in earlier terminology, but in the time of Gaius it was untrue, since he regularly refers to praetorian *formulae* as *actiones*.[5] The truth seems to be that Gaius has failed to bring the traditional definitions of actions *in rem* and *in personam* up to date. But he could only have done so by trans-

[1] Made by Jolowicz, *l.c.* above, p. 227 n. 3

[2] Cf. H. J. Wolff, 'The Origin of Judicial Litigation among the Greeks', *Traditio* 4 (N. York 1946), 34.

[3] Buckland, *Jurid. Rev.* 1936, 357.

[4] So Huschke, *Multa u. Sacr* 481. Others have thought that the two were *a. p. sp. praeiud.* and *a. p. sp. poenalem* (?). But penal *sponsiones* (e.g. §§ 165 *sq*.) were enforced by ordinary *a. in personam*.

[5] e.g. 3, 189. 209; 4, 69 *sq*. 109. 110–12. One passage, §§ 106–7, can even be taken as applying the distinction *in rem* and *in pers.* to *actiones in factum conceptae*.

ferring the distinction from the remedies to the rights. From this, the modern, point of view there is no special difficulty in bringing the rights resulting from praetorian actions under the classification.[1]

A minor criticism of § 2 is that not even every civil *a. in personam* was covered by the definition: the *intentio* of an *a. furti nec man.* was *damnum decidere oportere* (§ 37), not, as the definition requires, *dare facere praestare oportere.* But in an elementary work it sufficed to state the typical case.

§ 4. Here the distinction between the two kinds of action is illustrated by the fact that one cannot claim *dare oportere* in respect of what belongs to one already (2, 204; 3, 91). The anomaly of the *condictio furtiua*[2] is attributed by Gaius *odio furum.* The explanation is acceptable,[3] though some prefer the doubtful explanation that in primitive times possession even by a thief gave ownership.

Other differences between actions *in rem* and *in personam* were that there was a duty to defend an *a. in pers.* but not an *a. in rem*,[4] that an *a. in rem* was never consumed *ipso iure* by *lit. contestatio* (§ 106), and that in an *a. in rem* the defendant had to give security (§ 89).

§ 5. The term condictio. The original sense was obsolete (§ 18). The statement here that currently it was used to designate actions claiming *dari fieriue oportere* is too wide, even if we take *oportere ex fide bona* to be tacitly excluded. The term did not apply to an *a. ex testamento* or to one *ex stipulatu* for an *incertum.* The error is probably not due to Gaius, but to *fieriue* being a thoughtless gloss that has got into the text. For one thing it imposes the correction of the MS. *dare* to *dari.* For another *id nobis opportere* of the MS. in § 18 can only be corrected to *dari*, or better *dare, nobis oportere*, with no question of *fieri.*[5]

§§ 6–9. Reipersecutory and penal Actions[6]

The importance of this distinction lies in the special characteristics of penal actions, of which we have already spoken.[7] They were actions the original and primary purpose of which was to exact expiation from the defendant. In contrast, the reipersecutory actions were those asserting a patrimonial right of the plaintiff. *Res* here has a wider

[1] Cf. *Inst.* 4, 6, 3, *sq.*
[2] Above, p. 207.
[3] Scialoja, *Teoria della proprietà* 1, 247.
[4] Above, p. 224.
[5] Cf. Pflüger, *SZ* 1922, 159 n. 1; Siber, *Atti, Roma*, 1, 428.
[6] Levy, *Privatstrafe u. Schadensersatz* (1915).
[7] Above, p. 198.

meaning than in the previous classification; this is probably why in § 7 actions *ex contractu* are chosen to exemplify the reipersecutory.

The point chiefly requiring comment is Gaius' treatment of the *a. l. Aquiliae*. The action provided compensation for the wrong, but normally no more. This put Gaius in a difficulty, because he made the mistake of regarding as *poena* only what was recoverable in excess of compensation. Where then was the *poena* of this undeniably penal action (e.g. § 112)?[1] He is driven to finding it in the doubling of damages against a defendant who denied liability (§ 9).[2] But this doubling was a processual penalty found also in certain clearly non-penal actions. Thus we arrive at a third category of actions *quibus rem et poenam persequimur* (§ 9), Justinian's *actiones mixtae* (*Inst.* 4, 6, 19).[3]

It is widely believed that the doubling of condemnation in the four actions mentioned in § 9 (cf. § 171) comes from their having originally been cases of *manus iniectio* (§§ 21 *sq.*). *Manus iniectio iudicati* and *m. i. depensi* are certain (§§ 21. 25), but *m. i.* in the other two cases is only conjectured.[4]

§§ 10–12. The Legis Actiones in General

The excuse (§ 10) for this excursus on the obsolete *legis actiones* (§§ 11–29) is that some contemporary actions were based on (the fiction of?) a *l. actio*. From what survives (§§ 32–33) of the account of these actions one cannot judge of the adequacy of the excuse. But the reader will require none.

§ 11. Meaning of l. actio. We gather from § 11 (sadly overworked in modern literature) that the term *l. actiones* is ambiguous. In a general sense it designates the ancient system of procedure as a whole and particularly the five general forms of action (§ 12),[5] the epithet *legis* indicating a general statutory origin (*legibus proditae*). But the term also has the narrower meaning of the specific formularies of claim which were framed by the jurists (at first the *pontifices*) in the very words of the statute upon which the claim was based and were thus endowed with a fixity and authority equal to that of *lex*.[6]

[1] Above, p. 210. Levy, *o.c.* 135 ff.

[2] *Inst.* 4, 6, 19 adds the profit that might result from the retrospective valuation. The point might have been made that damages were recoverable in full from each of several joint delinquents.

[3] Levy, *o.c.* 140.

[4] Above, pp. 190–1; below, p. 246. Doubling only *aduersus infitiantem* in the case of the *a. depensi* is not what 3, 127 would lead one to expect, but is confirmed by § 171.

[5] Cf. Lenel, *SZ* 1909, 340–1.

[6] Cf. Pomponius *D.* 1, 2, 2, 6–7. 38.

The statutory character of the *l. actiones* in either sense needs to be taken with a grain of salt. *Manus iniectio*, *sacramentum*, and *pignoris capio* must be older than the *Twelve Tables*; the customary law relating to them cannot have been entirely superseded by that statute. Prone as he is to emphasize the statutory definition of the applicability of the various forms of action (§§ 17a. 17b. 19. 21), Gaius does not attribute to statute the general applicability of *sacramentum* (§ 13), and he admits non-statutory cases of *pignoris capio* (§ 26). The narrower meaning of *l. actio* expresses the dependence on statute which it was the purpose of the *Twelve Tables* to impose on the law of remedies. But such dependence could not last for ever. We are told that the jurist Sex. Aelius (consul 198 B.C.) composed new actions which the expansion of the city rendered necessary.[1] The text negatives the idea that he was interpreting new *leges*, and we can hardly suppose that at this date there were new literal interpretations of old *leges* left to be discovered. Thus it seems that jurisprudence had become freer and that Aelius' new *actiones* were *legis* in a loose sense.

The praetor in the l. actio. This is a controversial subject on which it is well not to dogmatize. Cicero's picture of the praetor in the *l. actio* as automatically accepting the words put into his mouth by the *prudentes* is clearly a caricature.[2] In the inevitable expansion of the civil law actions the praetor must evidently have had a decisive voice. On the other hand, Gaius' testimony is clear that in the time of the *l. actiones* there were no praetorian actions (§ 11) and no *exceptiones* (§ 108). This may be incorrect, but it is what Gaius says.[3] As a general characterization of the pre-formulary procedure in its prime it is probably correct. If, as some great authorities hold, there is evidence of praetorian refusal of actions (*denegatio actionis*) and grant of praetorian actions before the introduction of the formulary procedure by the *L. Aebutia*, (*c.* 150 B.C.),[4] these developments probably belong to the final phase of the ancient system, when it was breaking up under the strain of the revolutionary change in social conditions.[5] Broad general characterization is all that we have a right to expect from § 11 and all that we get.

[1] Pomp. *D.* 1, 2, 2, 7: *augescente ciuitate quia deerant quaedam genera agendi . . . Sextus Aelius alias actiones composuit et librum populo dedit qui appellatur ius Aelianum.*

[2] Cic. *p. Mur.* 12, 26.

[3] Girard, *SZ* 1908, 148–52 (*Mél.* 1, 148–51) disposes of Wlassak's minimizing interpretations of §§ 11 and 108 in his *RPG* 2, 303 and *SZ* 1907, 100 (in note).

[4] Below, p. 250.

[5] Contrast e.g. Lenel, *SZ* 1909, 333. 354 with Girard, *Mél.* 1, 160–1. 174.

The five forms of l. actio (§ 12). In § 29 a doubt is reported as to whether one of the five, *pignoris capio*, was truly a *l. actio*. The point is discussed below.[1] In contrast to the other four it was not a form of litigation, but the fact that a fiction of *pign. capio* was used in a contemporary action (§ 32) would account for its being mentioned here.

The other four were forms of litigation. They could take place only before the magistrate in court (*in iure*) and therefore not on days on which he might not sit (*dies nefasti*, reserved for religious festivals: § 29).[2] Both parties had to be present in person (no representation: § 82), the plaintiff having the right to compel the defendant to appear (*in ius uocatio*: §§ 46. 183). The *l. actio* thus performed *in iure* was a ritual consisting of set words (*certa uerba*) and sometimes acts; it was regulated by *lex* and the *interpretatio* of the *prudentes*. It varied in each of the forms, but in all of them the plaintiff asserted a claim which, if expressly or passively admitted, established his right, but which, if duly resisted, led to *litis contestatio*. There, with the nomination of a *iudex*, the magistrate's task ended. How far he could control the proceedings up to this point is, as we have just said, a controversial question.

§§ 13–17. Sacramentum

This was the general form of action, i.e. used when no other was prescribed by statute (§ 13). It does not follow that if another form was provided *sacramentum* was excluded as an alternative; probably it was not, but information is lacking (§§ 20. 95).[3]

Being general, the action had two forms, *in personam* and *in rem*. All except the end of Gaius' account of the *actio in personam* (§ 15) is missing, but of the account of the *actio in rem* only the end (§ 17). Neither gap has been made good by the Antinoite fragments (F).

A. *The actio in rem* (§§ 16–17)

This was used for claiming not only ownership (including *hereditas*: § 17) and doubtless servitudes so far as they existed, but also absolute rights such as *patria potestas* (1, 134) and liberty (§ 14). Like Gaius we shall speak only of a claim of ownership.

The parties appeared *in iure* with the *res* or, if it was not transportable, a piece or part of it (§ 17), a device that enabled the original necessity of repairing to disputed land[4] to be dispensed with. In the

[1] p. 248.
[2] Girard 1035 n. 5.
[3] Below, p. 240.
[4] Cic. *p. Mur.* 12, 26; Gell. 20, 10.

subsequent proceedings the essential steps were (i) claim and counterclaim (made in identical terms), (ii) intervention by the praetor, (iii) demand for declaration of title met by reaffirmation of right, (iv) challenge and counterchallenge by (or to?) a wager (*sacramentum*), (v) allotment of interim possession, (vi) nomination of *iudex*.

i. **Claim and counterclaim.** These being identical do not distinguish the parties as plaintiff and defendant; nor are we told who took the initiative. Each party in turn grasping the thing declares it to be lawfully his and at the same time lays on it a staff representing a spear as the symbol of ownership (§ 16 *fin.*). There is thus a direct collision of two physical appropriations. This is terminated by the intervention of the praetor.

The accepted view has long been that this ceremony dramatizes the origin of legal process; that it represents what was once a real struggle being summarily arrested by the State. But there is a modern suggestion that it is not a dramatization of two acts of violence, but a collision of two ritual acts each having the religious or customary effect of creating title.[1] In our opinion it is almost undeniable that the ceremony originated as a ritualization of acts of real violence. But the ritualization of force is precisely a recognition of the fact that superior force is not superior right. This recognition may well have taken shape very early; it may have been produced by religion and custom long before the very existence of the Roman State. The ceremony is no evidence that the Romans at one time used trial by battle.

ex iure Quiritium meum esse aio: the words seem more appropriate here than in *mancipatio* (1, 119). If they were not contested, the magistrate awarded the thing to the claimant (2, 24).

secūndum suam causam: it is not clear whether these words go with what precedes or with what follows them. The usual punctuation (there is none of course in the manuscript) makes them go with *meum esse aio*, but it has been pointed out[2] that this punctuation is to say the least doubtful seeing that Valerius Probus makes a single phrase of *sec. suam causam* and *sicut dixi ecce tibi uindicta*.[3] In our view, whichever is the correct punctuation, the only possible sense is that the speaker claims to have a good title (*causa*), but refrains from specifying it, an attitude which is maintained in the later dialogue in spite of an express challenge to declare title. But it must be admitted that this

[1] Lévy-Bruhl, *Quelques problèmes* (1934) 171; Noailles, *Fas et ius* (1948) 45, originally in *RH* 1940–1 and reviewed by Koschaker, *SZ* 1943, 466. Further literature: Monier 1 (ed. 5, 1945), 141.

[2] Noailles, *Fas et ius* 66.

[3] *SSCSDETV*: Val. Prob. 4, 6 (*Textes* 216).

interpretation is not so evident if we punctuate according to Valerius Probus. With that punctuation, it is argued,[1] *sicut dixi* must refer to *sec. suam causam* and imply that a *causa* has already been stated. From this it follows, since all that has as yet been said is *meum esse*, that the speaking of these words in itself constituted a title. But this view makes it impossible to explain the subsequent *postulo anne dicas qua ex causa*. It is plain that though *causa* has been asserted to exist it has not been specified. We conclude that with either punctuation we must connect *sicut dixi* with *uindictam imposui*, the sense being that the symbolic act is to be understood in the light of the previous assertion of ownership.

ecce tibi uindictam imposui (*et simul homini festucam imponebat*). *Vindicta* is generally taken to be the ceremonial name for the staff (*festuca*) used to represent a spear as the symbol of ownership (§ 16 *fin.*). Express evidence for this meaning is late,[2] but that it was already accepted by Gaius is the readiest inference from the present passage (*uindictam imposui—festucam imponebat*), though in his comment he uses the term *festuca*. Nevertheless it may not have been the original meaning. The derivation of *uindicta* is doubtful,[3] but probably the word comes from *uim dicere*[4] meaning to do an act of ritualized force, a show of force explained by an accompanying *formula* (*sicut dixi*).[5] The fact remains that the words *ecce tibi uindictam imposui* of the version of the *formula* in Gaius are difficult to explain away. Perhaps Valerius Probus' (4, 6) *ecce tibi uindicta* is the original form.

ii. **Mittite ambo hominem.** Counterclaim having been made by the same ritual, the praetor summarily arrests the development of *dicta* into *uera uis*. At once the question of right comes to the front.

iii. **Postulo anne dicas qua ex causa uindicaueris.** That it is the first vindicant who summons the second to declare his title shows that the parties are not to be thought of as plaintiff and defendant.

Ius feci (V *fecii*) *sicut uindictam imposui*. The meaning of this answer is shown by the rejoinder: *quando tu iniuria* (i.e. *non iure*) *uindicauisti*. *Ius feci* must mean 'I acted lawfully', though one is inclined, expecting *iure feci*, to soften the translation. A recent suggestion is that *ius feci*

[1] Noailles, *l.c.*

[2] Cf. Bruns 2, 73 n. 3.

[3] Noailles, *Fas et ius* 52 s.; Kaser, *Das altröm. Ius* (1949) 327.

[4] The parent of *uindicare*; so *iudicare* from *ius dicere*.

[5] Cf. *XII Tabb.* 3, 3: *Ni iudicatum facit aut quis endo eo in iure uim dicit, secum ducito.* Here *uim dicit* describes the intervention of a *uindex* (cf. *iudex*) in a *manus iniectio*: below, p. 243. Gell. 20, 10, 10 contrasts *uis illa ciuilis et festucaria* with the *uera uis atque solida* of war.

claims to have *created* the right (or law?) by the ritual act of vindication[1] and that the purpose of the words is to transfer the matter from the ritual to the civil sphere. But this seems to overlook the fact that the claim from the outset has been based on *ius Quiritium*.

iv. **Quando tu iniuria uindicauisti &c.** Not satisfied with this evasive answer the first vindicant has recourse to the device from which the *l. actio* takes its name: he challenges his adversary *sacramento* and is met by an identical counterchallenge.

Sacramentum. In historical times *sacramentum* was merely a traditional and probably not well understood procedure for obtaining a civil trial by a *iudex* or the *Cuiri*. There is thus little evidence as to its origin, especially since at this point Gaius refers us back to his account of the *a. in personam*, which is lost (§§ 14–15). All that the text now tells us is that each party backed his claim by giving the praetor sureties (*praedes*) for the *sacramentum* or *summa sacramenti* and that the loser's stake went to the public treasury, not to the winner. The amount of the *sacramentum* was 500 or 50 *asses* according to the value of the thing, except that in cases concerning *libertas* it was always 50 (§§ 13. 14. 16). Other sources[2] add that of old the stakes were deposited with the religious authorities and that the loser's stake, which went to the State, was spent on public sacrifices. Cicero[3] speaks of a *iudex* as deciding whether a *sacramentum* was *iustum*. The inference generally drawn[4] is that this was the only issue that went to the *iudex*, so that the question of ownership was decided only by implication. The one serious objection is that § 48 says that in an *a. in rem* the *condemnatio* was formerly (*olim*) *in rem ipsam*. This sounds like a direct pronouncement on the ownership, but both the wording and the meaning of the text are extremely doubtful.[5]

On this evidence the best conjecture is that *sacramentum* was an oath whereby the parties called on heaven to witness to the justice of their respective claims, and that the sacrifices paid for out of the loser's stake were offered in expiation of his perjury.

The interesting problem is, what was the object of evoking divine intervention instead of trying the disputed question of ownership directly? A recent conjecture is that in primitive times the question

[1] Noailles, *Fas et ius* 75 s., 79 n. 1.: 'j'ai créé le droit de la façon que j'ai imposé la vindicte.' Cf. Monier 1 (ed. 5, 1945), 141.

[2] Varro *de l. lat.* 5,180 (Bruns 2, 54) and Festus *vv. Sacramento* and *Sacramentum* (Bruns 2, 33–34).

[3] *p. Caec.* 33, 97; *de domo* 29, 78.

[4] Denied by Jobbé-Duval, *Proc. civile* 1, 20 s. Cf. Mitteis, *RPR* 30 n. 16.

[5] Below, p. 264.

of ownership would be tried by sacral methods and that the *sacramenta* were intended to reinforce them: e.g., if there was to be trial by battle, heaven would more certainly ensure the defeat of a perjurer.[1] The view generally held[2] sees in *sacramentum* not so much an appeal for divine intervention as a device for provoking the intervention of the King, who as the religious chief would in the public interest require that the perjurer should be ascertained and should make expiation. This view has the merit of accounting for the form in which, if we may trust Cicero, the question was put to the *iudex*.

v. **Interim possession.** In an *a. in rem*, before the case could pass on to a *iudex*, the interim possession of the disputed thing had to be regulated. The praetor allotted it to one of the parties and ordered him to give the other party sureties for it and the mesne profits (*praedes litis et uindiciarum*: §§ 16. 94). On what principle if any the allotment was made is not known,[3] except that in cases concerning *libertas* it was always in favour of interim liberty.

vi. **Nomination of iudex.** This final act *in iure* originally took place at once, but an otherwise unknown *L. Pinaria* (§ 15) imposed an interval of 30 days, presumably in order to give an opportunity for an agreed settlement. We learn this from the account of the *a. in personam*; but there seems to be no reason why the statute should not have applied also to the *a. in rem*. Security was probably taken for the reappearance of the parties before the praetor on the 30th day. On their reappearance the praetor, if the case had not been settled in the interval, granted a *iudex* (*dabatur*: § 15), the parties presumably co-operating in the usual way. The parties then exchanged notices to appear on the next day but one before the named *iudex*. The case now passed to him.

vii. **After judgment.** The party whose *sacramentum* was pronounced *iniustum* forfeited his stake to the State, payment being exacted, if necessary, from the *praedes* he had given to the praetor.[4] This was the direct result, but after all the real dispute was as to the *res*. If possession had been allotted to the successful party, naturally he kept it. But what if it had been allotted to the defeated party and he would not even now give it up of his own accord? Clearly it was not taken from him by direct State execution; even under the formulary system it was for a successful plaintiff to enforce his own rights.[5] In

[1] Kaser, *Das altröm. Ius* 11 ff. 18, if we understand him correctly.

[2] Girard 1047 n. 3. Objections: Juncker, *Gedächtnisschrift f. Seckel* 246 ff.; Jolowicz, *Atti, Bologna* 2, 79.

[3] Below, p. 292.

[4] Cf. Festus v. *Sacramentum* (Bruns 2, 34).

[5] Below, p. 247.

early times the only form of execution was by *manus iniectio*. But this supposes a debt, whereas the loser of an *actio in rem* was under no obligation, even unliquidated, to the winner until later times, when the system of *pecuniaria condemnatio* had been adopted (§ 48). The only discoverable obligation in early times is that of the *praedes litis et uindiciarum*, given, be it noted, to the other party, not the praetor. The dominant doctrine[1] therefore is that the victor's sole remedy was to proceed against these *praedes*. The mere threat would, it is thought, induce the loser to surrender the thing. But though this may be how things worked out in practice, the legal result of a primitive *a. in rem* cannot have been to give the winner merely a right *in personam* against third parties.[2] The obvious result of his *sacramentum* having been declared *iustum* must have been that he was now free to proceed with his unjustly interrupted *uindicatio*. Further resistance to it by the interim possessor had become manifestly unlawful. This does not mean that the *praedes l. et u.* were superfluous; they were security against damage to or destruction of the thing and for mesne profits (cf. § 89).

B. *The actio in personam* (§ 15)

Most of Gaius' account (§§ 14–15) is lost. *Manus iniectio* (§ 21), the oldest process *in personam*, was unsuitable for any but practically indisputable claims of money, the earliest to be enforceable. When, later, provision for the enforcement of claims needing to be proved had to be made, the device of *sacramentum* was adopted from the more primitive *a. in rem*. As there, the essentials must have been solemn contradictory assertions *in iure* followed by challenge and counterchallenge *sacramento* and nomination of a *iudex*. In this case the assertions were claim and denial, so that we may regard the parties as plaintiff and defendant. The formula of claim: *aio te mihi dare oportere*, preserved by Valerius Probus,[3] though identical with that in a *condictio* (§ 17b), is shown by the context to be intended as that in an *a. sacr.* (cf. § 20). Probus does not mention the form of the defendant's denial, probably because, as in *iudicis postulatio* and *condictio* (§§ 17a. b), there was no set form. Probus' next *formula* (4, 2) is: *quando negas, te sacramento quingenario prouoco*. If the defendant neither admitted nor denied the claim,[4] he was treated as admitting liability (*confessus*).

[1] e.g. Girard 361; Arangio-Ruiz, *Actions* 16.

[2] See Koschaker, *SZ* 1916, 357–8. His objections to the dominant view have never been answered.

[3] 4, 1: *Textes* 216.

[4] Val. Prob. 4, 3: *quando neque ais neque negas*.

Any claim *in personam* recognized by law could presumably be enforced by this *a. generalis* (§§ 13. 20). It is impossible to say whether the *causa* of the claim had to be stated: Probus' silence proves nothing, as there could be no standard abbreviations. The words *dare oportere* were not used in all cases.[1] Thus a probable reconstruction of the claim in an *a. furti nec man.* under the *Twelve Tables* (3, 190) is: *aio mihi a te furtum factum esse paterae aureae ob eamque rem te mihi damnum pro fure decidere oportere* (§ 37).[2]

Execution. If the plaintiff's *sacramentum* was pronounced *iustum*, the obligation claimed was established. If the claim had been for a definite sum of money, the plaintiff after 30 days[3] could proceed against the *iudicatus* by *manus iniectio* (§ 21); in other cases the liability would first have to be assessed in money by an arbitral process (*arbitrium liti aestimandae*).[4]

§§ 17a–20. Iudicis Postulatio. Condictio

In both these *l. actiones* the issue was raised, as in the *a. sacr. in personam*, by simple affirmation and denial, but thereupon the plaintiff instead of challenging *sacramento* applied for a *iudex* to try the issue directly. The circuitous formalities of *sacramentum* and the forfeiture of a penal sum to the State were thus avoided. There was no penalty in *iud. post.* (§ 17a) and there is no reason to believe that there was one in *condictio certae rei* under the *L. Calpurnia* (§ 19), but there are strong arguments for the view that there was one in *cond. certae pecuniae* under the earlier *L. Silia* from which the *sponsio et restip. tertiae partis* of the formulary *condictio c. pec.* (*a. c. creditae pec.*: §§ 13. 171) is likely to have descended. This, however, is not the natural inference from Gaius' silence as to any penalty in §§ 17b–20 and from his finding his contrast to the sacramental penalty in the *sponsiones* of the formulary *cond. c. pec.* (§ 13). If there was a penalty, it was presumably payable to the winning party and proportionate to the amount in dispute.

The procedure of referring an issue to the decision of a *iudex* authorized by the magistrate is found already in the composite sacramental procedure. Quite possibly *iudicis postulatio* in a broad sense existed by general custom before the *Twelve Tables*, but the historical

[1] Above , p. 229, on § 2.
[2] Arangio-Ruiz, *Actions* 18.
[3] *XII Tabb.* 3, 1. Cf. 3, 78.
[4] Opinions differ as to whether this was an appendix to the *a. sacr.* or a preliminary step in the *manus iniectio*. Cf. Arangio-Ruiz, *Actions* 18–19; Kaser, *Das altröm. Ius* 203.

l. actio per iud. post. dates from its establishment by the *Twelve Tables* as the proper procedure in a defined field of cases, to which a *L. Licinnia* later added another case. Substantially the same procedure, but with a difference that gave rise to the new name of *condictio*, was sanctioned in certain further cases by the *Ll. Silia et Calpurnia* (dates unknown). But *iud. post.* and *cond.* remained confined to the cases allowed by statute, and the *a. sacr.*, in spite of its archaic character, survived for centuries as the *a. generalis*, being suppressed only at the beginning of the Empire, and even then not entirely (§ 31).

Procedural differences between iud. post. and cond. (i) In *iud. post.* the plaintiff declared his cause of action, *in cond.* he did not. (ii) On the defendant's denial of liability the plaintiff in *iud. post.* forthwith requested the praetor to grant *iudicem siue arbitrum*, whereas in *cond.* he gave the defendant notice to appear on the thirtieth day in order to take a *iudex*. (iii) There may have been a penalty for the loser in *cond. c. pec.* under the *L. Silia*.

Iudicis postulatio. The procedure being one under which any claim might conceivably have been brought, it has been conjectured to have been used in various cases for which an *a. sacr.* seems unsuitable,[1] but we must confine ourselves to the cases vouched for by Gaius. They are: by the *Twelve Tables* claims under *stipulatio* and suits for partition of *hereditas* and by a *L. Licinnia* suits for partition of common property. The dissimilarity between an action to enforce a *stipulatio* and one for partition produced a difference in the plaintiff's request to the praetor. In the former he asked for a *iudex* or *arbiter*, in the latter for an *arbiter* only (§ 17b *fin.*). A partition action required only an *arbiter* because the question would not be one of right or no right but of sharing, whereas an action on a *stipulatio* required a *iudex* in all cases to pronounce for or against the alleged liability and in all cases except that of *stipulatio certae pecuniae* an *arbiter* as well to assess the liability, if any, in money. We understand the request for *iudicem siue arbitrum* (*arbitrumue*: Val. Prob. 4, 8) as being one for an authority who would combine both functions, so that if as *iudex* he found for liability he could proceed as *arbiter* at once to assess it in money, thus making a separate *arbitrium liti aestimandae* unnecessary. This combination, if it was an innovation made by the *Twelve Tables*, was a memorable reform.[2] We are assuming that at the time of the *Twelve Tables iudex* and *arbiter* were clearly distinguished.[3] Later the functions of an *arbiter* became implied in the office of *iudex*.

[1] Cf. Zulueta, *JRS* 1936, 177–8.

[2] Cf. Levy, *SZ* 1934, 304.

[3] Above, p. 225.

Thus we hear nothing of an *arbiter* in connexion with the *condictio certae rei* under the *L. Calpurnia*.

Iudicem siue arbitrum. It is an objection to the view just expressed that the *formula* in § 17a asks for *iudicem siue arbitrum* though the claim is for *certa pec.*, the one case in which the arbitral function would not be needed. The explanation may be that the *Twelve Tables* allowed the plaintiff *ex stipulatione* to ask for *iudicem siue arbitrum*, leaving him to decide whether he would ask for one or other or both, and that the *interpretatio*, clinging characteristically to the *uerba legis*, settled the *formula* in the very words of the statute: in a given case *siue arbitrum* might be superfluous, but *superflua non nocent*.

Another view[1] is that we ought to print *IVDICEM siue* (not *SIVE*) *ARBITRVM*. One asked for one or other, not both: in an action *ex stipulatione* for a *iudex*, in a partition action for an *arbiter*.[2] This implies that in an attempt to make one illustrative *formula* cover both cases Gaius has given his readers an entirely false impression. There is a parallel condensation in § 21 if *siue DAMNATVS* is the correct version, but the sacrifice of accuracy is much less serious.

Iud. post. ex stipulatione (§ 17a). Gaius describes the applicability of *iud. post.* in terms that cover the verbal contract in all its forms and whatever the nature of the performance promised. We may be confident that at least this was how the *Twelve Tables* came to be interpreted; some writers, however, hold that at the time of that statute it is probable that the only verbal contract recognized was *sponsio certae pecuniae*. But, except on the hypothesis that Gaius has misreported the *formula*, the plaintiff in suing on a *sponsio* asked or might ask for an *arbiter*, and this means that a claim for *certa pec.* cannot have been the only one possible; a claim for *certa res*, if not for an *incertum*, must have been contemplated by whoever framed the *formula* reported, and *siue arbitrum* can hardly have been added by *interpretatio* without statutory warrant. However, as we have just said, the correctness of Gaius' report of the *formula* is seriously questioned.

Concurrence with the a. sacr. From § 13 we have learnt that the *a. sacr.* lay where no other form of action was provided by statute, but it does not follow that it would not lie where another form had been provided. We do not know whether before the *Twelve Tables* a *sponsio certae pec.* was enforceable by *a. sacr.*,[3] but that long after the *Twelve*

[1] Arangio-Ruiz, *BIDR* 1935, 614–16.

[2] Arangio-Ruiz, *Actions* 21 n. 1.

[3] On Mitteis's theory of the hostage-*sponsor* (above, p. 145) the original remedy would have been by *manus iniectio*. Cf. Meylan, *Acceptilation et paiement* (Lausanne 1934) 27.

Tables the *a. sacr.* could lie on a *sponsio c. pec.* is shown by its being the proper form of action in the special case of a real action *per sponsionem* before the centumviral court (§ 95).

Iud. post. for partition (§ 17a *fin.*). In this case also the plaintiff declared his *causa*, but he asked only for an *arbiter*. Gaius (*D.* 10, 2, 1 pr.) attributes the origin of the *a. de hereditate diuidunda* to the *Twelve Tables*. We need not infer that till then *coheredes* had no right to partition; more probably the decemvirs consolidated an existing customary right. Presumably artificial *consortes* (3, 154b) had the same right. A *L. Licinnia* extended the action to joint owners of *res singulae* (*de aliqua re communi diuidenda*). The date of this statute is unknown; in all probability it was earlier, perhaps considerably earlier, than the *L. Aebutia* (*c.* 150 B.C.).[1]

Condictio (§§ 17b–20). An important difference between *condictio* and *iud. post.* was that in *condictio* the cause of action was not stated. In framing the *l. actiones* the jurists stuck to the words of the statutes (§ 11), and whereas the causes of action pursuable by *iud. post.* were specified by the *Twelve Tables* and *L. Licinnia*, the sphere of *condictio* was defined by the *Ll. Silia et Calpurnia* in terms merely of the right claimed—a *dari oportere* of *certa pecunia* or *certa res*. Hence the *l. a. per cond.* stated what was claimed to be owed, but not the ground of the claim. To enumerate the possible causes of *dari oportere* was no doubt beyond the powers of contemporary jurisprudence.[2] A good result, intended or not, was that the field was left clear for jurisprudence to develop the law of causes of action. On the other hand, a form of action that gave the defendant no notice of the ground on which he was being sued seems defective almost beyond belief. It is true that the *a. sacr. in pers.* is generally thought to have had the same defect.[3] The 30 days' interval between the claim and the nomination of the *iudex* may have been intended to give the defendant time to get the information. But this by itself is miserable technique. Evidently there is something that we do not know. What we do know is that the non-declaration of the cause of action cannot have caused manifest hardship, since the feature was preserved in the formulary *condictiones certae pecuniae* and *certae rei*.[4] In contrast the *demonstratio* of an *a. ex stipulatu* specified, like *iud. post.*, the cause of action.[5]

In § 20 Gaius says that it is a great question why *condictio* should

[1] The only other mention of it is by Marcian *D.* 4, 7, 12. Cf. *JRS* 1936, 178–9.
[2] Levy, *SZ* 1934, 309–11.
[3] Val. Prob. 4, 1.
[4] *Edictum* pp. 237. 240. Cf. Girard 649 n. 1.
[5] *Edictum* p. 151. Cf. Gaius 4, 136–7.

have been wanted seeing that *dari oportere* was already provided for by *sacramentum* and *iud. post.* So far as *iud. post.* is concerned the question seems hardly to arise; simply the authors of the *Ll. Silia et Calpurnia*, when they established *condictio* as a general remedy for *dari oportere* did not trouble to say that it was not to apply to the special cases of *dari oportere* (*stip. certae pec.* and *rei*) already covered by *iud. post.* So far as *sacramentum* is concerned the superiority of the new procedure is enough to explain its introduction. The only objection to this explanation is that it is too obvious. Why did not Gaius give it?

Thus *iud. post.* survived as an alternative to *condictio* in the special field of *stip. certae pec.* or *rei.*[1] We are in no position to contradict Gaius' apparent assumption (§ 20) that *sacramentum* covered the whole field of *dari oportere*, but it may be that the superiority of *condictio* was not solely procedural. New cases of *dari oportere* may have obtained recognition more easily under *condictio* than under *sacramentum* with its settled *interpretatio*. The *condictiones* of later times are largely for debts arising out of unjust enrichment, and these, apart from *mutuum* and *indebiti solutio*, are not likely to have fallen within the primitive province of the *a. sacr. in pers.*, in spite of Gaius' implication that they did.[2]

§§ 21–25. Manus Iniectio

Gaius gives three varieties of the *l. actio*: (1) *m. i. iudicati* on a judgment debt, (2) *m. i. pro iudicato* on debts privileged to be enforced in the same way, (3) *m. i. pura* on other debts, still privileged but less so. Accordingly, in the forms of claim the alleged debt was qualified as *iudicati* or *pro iudicato* (§ 22) or left unqualified (*pura*: §§ 23–25). The practical difference was that in (1) and (2) self-defence was not allowed, whereas in (3) it was. Thus (1) and (2) were processes of execution safeguarded against abuse by the possibility of the right being contested by a third party (*uindex*), while (3) was an action, though of a very summary kind, incorporating execution. The basic case is (1).

M. i. iudicati. In § 21 Gaius is concerned only with the procedure *in iure*; for a picture of the whole process of execution we must turn to the *Twelve Tables*.[3]

[1] Cf. Arangio-Ruiz, *BIDR* 1935, 623, on the possibility even under the formulary system of proceeding by *a. ex stipulatu* alternatively to *cond. certae pec.*

[2] Cf. Levy, *SZ* 1934, 309–11.

[3] *XII Tabb.* 3, 1–6: Bruns 1, 20; *Textes* 13; *Fontes* 1, 32. The source is Gell. 20

3, 1, *Aeris confessi rebusque iure iudicatis XXX dies iusti sunto.* The judgment debtor, to whom the *confessus* is equated, is given 30 days' grace (3, 78).

3, 2. *Post deinde manus iniectio esto. In ius ducito.* Unless the debtor paid, the next thing was to bring him before the magistrate. The procedure seems more summary than that of an ordinary summons (*in ius uocatio*).[1] The *iudicatus* is not first invited to come voluntarily; as with a *fur manifestus* (3, 189) no risks are taken. Nor is the possibility of a *uindex* intervening on his behalf at this stage mentioned. But, desirable as a show of superior force may have been, the arrest of a *iudicatus* should not be thought of as an act of pure force. It must have been accompanied by a justificatory declaration similar to that made later *in iure* (§ 21). Without it the seizure would have been *iniuria* and resistance to it would have been lawful.

3, 3. *Ni iudicatum facit aut quis endo eo in iure uindicit, secum ducito* . . . We are now *in iure*. The statute left the proceedings there to be settled by *interpretatio*. Gaius' account is fully explicit only as to the creditor's *actio*. That the *uindex* intervened by removing the creditor's hand is implied by the contrasted *sibi manum depellere*; his act was doubtless accompanied by the utterance of some *formula* (*quando tu iniuria manum iniecisti?*). The intervention set the debtor free, but whether provisionally or finally is uncertain. The general opinion is that liability was transferred once for all to the *uindex*, between whom and the creditor the question whether the *m. i.* had been justified had now to be tried. In this trial, to judge by the formulary *a. iudicati*, the justice of the alleged judgment could not be questioned; the only defence open was that there was no such debt on the ground either that the alleged judgment was legally void or that it had already been satisfied. As to how this issue was tried we are completely in the dark. It may have been handed on forthwith to a *iudex*, or a distinct *a. sacr.* may have been organized. That the *uindex*, if he lost the case, was condemned *in duplum* may be taken as certain; besides the doubling in the formulary *a. iudicati* (§§ 9. 171) there is the evidence of the *L. Col. Genetiuae* c. 61.[2] An unanswerable question is whether the *uindex* if condemned had the 30 *dies iusti* in which to pay the *duplum* or whether in default of payment he fell himself at once under *m. i.* and was led off to the fate from which he had saved the original *iudicatus*.

1, 42–52, who gives besides much of the text a commentary by a jurist Sex. Caecilius, generally identified with Africanus the pupil of Julian. Cf. Noailles, *Fas et ius* 151.

[1] *XII Tabb.* 1, 1–2. Below, p. 301.

[2] Quoted below, p. 245 n. 2.

Failing a *uindex* the *iudicatus* was led off by the creditor *domum*, i.e. to private imprisonment. A formal authorization of the *ductio* by the praetor (*addictio, duci iubere*) is to be assumed.

The *Twelve Tables* (3, 3–4) proceed to regulate the treatment of the prisoner.

3, 3. . . . *secum ducito, uincito aut neruo aut compedibus XV pondo, ne minore, aut si uolet maiore*[1] *uincito.* 4. *Si uolet suo uiuito. Ni suo uiuit, qui eum uinctum habebit libras farris endo dies dato. si uolet, plus dato.*

The provision that the debtor might live of his own shows that he was not yet completely subject. In fact, for a period his imprisonment was provisional. We do not possess the text of the statute (3, 5), but according to Africanus[2] he could still compound (*pacisci*) with the creditor; otherwise he was kept in bonds for 60 days, during which he was brought publicly before the praetor on three successive market-days and the amount of the debt was proclaimed. This gave his friends a last chance of redeeming him. But on the third market-day he was put to death or sold into slavery across the Tiber: *tertiis nundinis capite poenas dabant aut trans Tiberim peregre uenum ibant.* To crown the horror, if there were several creditors, they could cut him in pieces without liability being incurred for taking more than a proportionate share. On this last point we have another textual quotation:

3, 6. *Tertiis nundinis partis secanto. si plus minusue secuerunt, se fraude esto.*

Africanus' account shows how the *Twelve Tables* were currently understood in the time of Gaius, but it is very possible that after 600 years the original meaning had been lost. There is no recorded instance of a debtor being put to death, and Africanus had never heard or read of a case of dissection.[3] The clause *partes secanto* is certainly statutory, and if it meant dissection, *a fortiori* the right to kill must have existed. But it has been suggested that the clause referred only to a sharing of the debtor's assets.[4] On the other hand, if, as seems likely, the phrase *capite poenas dabant* echoes the phraseology of the statute, it cannot be explained away as meaning only *capitis deminutio*: so early as this it must have meant death.[5] Not possessing the text of the statute, we are thrown back on general probabilities. In primitive law a right to kill a defaulting debtor is far from improbable,

[1] That *minore* and *maiore* ought to be transposed is not so certain as it may seem: *Fontes*, 1, 32, 3A.

[2] Gell. 20, 1, 46–52.

[3] Gell. 20, 1, 52.

[4] Lenel, *SZ* 1905, 507–11.

[5] Levy, *Die röm. Kapitalstrafe* 11–12.

nor is a derived right to cut him into shares incredible.[1] The real doubt is as to such practices having continued so late as the *Twelve Tables*. A tenable view is that originally the debtor was entirely at the creditor's mercy and that the *Twelve Tables* left things as they were, though perhaps already public opinion and the creditor's own interest had rendered the exaction of the extreme penalty obsolete in practice.

There is good evidence that by the end of the Republic (probably much earlier) the right to kill or to sell into slavery and the provisional detention for 60 days had ceased to exist. But the right to put in bonds and imprison privately survived under the Empire through and after the classical period.[2] The old form of personal execution remained normal. In this respect the substitution of the formulary *a. iudicati* for *m. i. iudicati* made no practical difference. One thinks that creditors would prefer praetorian execution by *uenditio bonorum*[3] especially if they were numerous and there were substantial assets. Moreover, the debtor might have the privilege of forcing them to this course by making a *cessio bonorum*.[4] But apart from an atavistic desire to punish the defaulter, creditors might still be influenced by the consideration that the severity of personal execution would induce the debtor to produce concealed assets. Also, if there was a deficit, the debtor could, it is presumed, be made to work as a bondsman; we know at least that he could be the object of a *furtum* (3, 199). It was only at a quite late date that the Emperors substituted, or endeavoured to substitute, public for private imprisonment of debtors.[5] Gradually also the privilege of *cessio bonorum* was generalized.[6]

Oldest cases of m. i. For Gaius *m. i. iudicati* is the original case and all others are statutory imitations. This has been doubted on the ground that *m. i.* is probably older than any other *l. actio* and must therefore have existed before there could be a *iudicatum* on which to base it, but the argument is not conclusive, because *m. i.* is one thing (e.g. 3, 189) and a *l. actio per m. i.* another. But the doubt is strengthened by the *formula* in § 21. If we make the text: *IVDICATVS (siue*

[1] Cf. Autun Gaius 4, 83, where Gaius' own text is lacking.

[2] *L. Col. Genetiuae* (44 B.C.) c. 61 (*Textes* 91; Bruns 1, 123; *Fontes* 1, 179): . . . *iudicati iure manus iniectio esto . . . Ni uindicem dabit iudicatumue faciet, secum ducito. Iure ciuili uinctum habeto. Si quis in eo uim faciet, ast eius uincitur, dupli damnas esto* . . . Gell. 20, 1, 51 (Africanus): *addici namque nunc et uinciri multos uidemus.* Cf. v. Woess *SZ* 1922, 485.

[3] Above, p. 135.

[4] Above, p. 136.

[5] *C.T.* 9, 11, 1 (A.D. 388); *C.* 9, 5, 1 (486); 2 (Justinian).

[6] Cf. v. Woess, *SZ* 1922, 528.

DAMNATVS), as is generally done, we have two *formulae*, one against a *iudicatus* and another against a *damnatus*; we must, however, suppose that by Gaius' fault or a copyist's *siue DAMNATI* has been omitted from the conclusion. If we make it *SIVE DAMNATUS*, we have a single *formula* which contemplates that a debtor might be liable to *m. i.* without being safely describable as simply *iudicatus*; in this case the insertion of *SIVE DAMNATI* in the conclusion is not so imperatively demanded.

Damnati. The problem is to find debts executable by *m. i.* in their own right without having been assimilated by statute to *iudicatum*, cases of *m. i.* as old as and perhaps older than *m. i. iudicati*. There is of course the liability of a *confessus in iure* which the *Twelve Tables* (3, 1. 2) treat as parallel to *iudicatum*, but though the *formula* of *m. i.* may have been varied in the two cases, they were essentially one. Then there is the liability of a debtor to his *sponsor* who had had to make a *depensum* on his behalf; as we know it, this *m. i.* was *pro iudicato* (§ 22), but it is likely enough that the *L. Publilia* in giving *m. i. p. iud.* was regulating an existing *m. i.* A widely and authoritatively held view adds to these the other cases in which, as in the *a. iudicati* and *depensi*, liability was doubled if it was denied (*lis crescens in duplum aduersus infitiantem*), the doubling being thought to be a survival from the doubling against a *uindex* when the procedure had been by *m. i.* Among the cases so added are liability under the *L. Aquilia* and under *legatum p. damnationem* (§§ 9. 171); many authorities would add debts arising *p. aes et l.*, in particular *nexum*.[1] In none of these cases is the evidence conclusive, but cumulatively it is pretty strong.[2]

M. i. pro iudicato (§§ 21–22). *M. i.*, when extended to cases other than *iudicatum* by statutes after the *Twelve Tables*, was described in the statutes and in the forms of claim as *pro iudicato* (§ 24). Gaius cites the *L. Publilia* (3, 127) and the *L. Furia de sponsu* (3, 121), and he says that there were a number of other such *leges*. It is unlikely that the *L. Aquilia* was one of them. If *m. i. pro iud.* had been expressly provided by that *lex*, Gaius could not have failed to cite so important an example here. That *m. i.* lay against an Aquilian delinquent is, as we have just seen, a tenable conjecture, but if so, it must have been a continuation of an existing remedy for wrongful damage to property and have been taken for granted by the *L. Aquilia*.

M. i. pura (§§ 23–25). Other statutes, doubtless later, gave *m. i. pura*,

[1] Above, pp. 143–4. Cf. *XII Tabb.* 6, 1. 2; Paul *Sent.* 1, 19.

[2] We have discussed this same group of cases above, p. 190, in connexion with *solutio p. a. et l.* (3, 173–5). Good account by Kaser, *Das altröm. Ius* 118 f.

i.e. not qualified as either *iudicati* or *pro iud.*, in certain cases. Here the *uindex* was dispensed with; one could defend oneself, but whether like a *uindex* at the risk of condemnation *in duplum* is uncertain. The argument that *m. i. pura* without this feature would be pointless[1] assumes that if the defence failed, *m. i.* had to be begun all over again. But it is conceivable that the original *m. i.* could be resumed at once after having been shown to be justified. Gaius' examples are the *L. Furia testamentaria* (2, 225) and a *L. Marcia.*[2] The latter allowed debtors to recover by *m. i.* usurious interest (quadrupled?) which had been exacted from them. Gaius notes as an anomaly that though the *L. Furia test.* did not qualify the *m. i.* allowed by it as *pro iud.*, the form of claim,[3] settled presumably by the jurists, did so.

The L. Vallia (§ 25)[4] turned all *m. i. pro iud.* except under the *L. Publilia* into *m. i. pura*. Thereafter the *uindex* survived only in the excepted case of *m. i. depensi* (*pro iud.*) and *m. i. iudicati*, and he disappeared altogether when the *l. a. per m. i.* was replaced by *formulae* (§ 31). But substantially this made no difference, since a formulary *a. iudicati* or *depensi* could be defended only if the defendant gave *satisdatio iudicatum solui*, i.e. a sufficient surety who promised the plaintiff by verbal contract (*cautio*) that judgment against the defendant would be satisfied.[5] Moreover unsuccessful defence still involved *condemnatio in duplum* (§§ 9. 171).

The actio iudicati, in spite of its name, was merely the formulary version of *m. i. iud.*: it could develop into an action, but was normally a process of execution on the person. It began like an ordinary action with in *ius uocatio*[6] and a statement of claim *in iure*, but defence, with consequent *litis contestatio* and trial by a *iudex*, though conceivable (on condition of *satisdatio iud. solui*), would be very rare, since it could not question the correctness of the previous judgment, but had to establish that the alleged judgment was a nullity or that it had already been satisfied.[7] Usually the defendant could but admit the judgment debt. Thereupon, as in the *l. a. per m. i.*, the praetor authorized (*duci iubere*) the plaintiff to lead him off to bondage.

[1] Buckland 622.

[2] 104? B.C. Rotondi, *Leges publicae* 326; Girard 549 n. 4.

[3] *Forma* is Gaius' term, used, we think, in order to avoid confusion with the *formula* of later times.

[4] Probably from the last phase of the pure system of *l. actiones*. No conjecture as to date in Rotondi, *Leges pubb.* 478 or Berger, *PW Suppl.* 7, 416.

[5] A rare feature: § 102.

[6] Below, p. 301, on § 46.

[7] See, however, Wenger, *ZPR* 220.

§§ 26–29. Pignoris Capio.[1]

The majority opinion (§ 29) was clearly right in regarding *p. c.* as a *l. actio* in spite of its taking place *extra ius*, being possible on a *dies nefastus*, and not requiring the presence of the other party. It was an *actio* as being an act in the law of a defined form (*certa uerba* and doubtless witnesses); it was *legis* as being sanctioned at least in some of its applications by the *Twelve Tables* (§ 28). In this wider sense various other acts were *l. actiones*,[2] but in enumerating his *quinque modi lege agendi* Gaius (§ 10) had in mind the forerunners of *agere per formulam*. In other words, he was using *actio* much as we use 'action'. It is true that *m. iniectio* looks more like a process of execution than an action, but it was just as much an action as the formulary *actio iudicati*. The inclusion of *p. c.* in Gaius' list is less easily justified, but is explained by § 32.

The general nature of *p. c.* can be described in words written of our own distress at common law: 'the idea of distress is that of bringing compulsion to bear upon a person who is thereby forced into doing something or leaving something undone; it is not a means whereby the distrainor can satisfy the debt due to him'.[3] The taker of *pignus*, like a distrainor, had no right of sale.[4]

Application of p. c. For the magistrates it was a general mode of *coercitio*[5] but as a *l. actio* open to private persons it was an exceptional act of self-help, not based on a previous judgment nor requiring subsequent recourse to a court. The few cases in which it was allowed have the common characteristic of involving either a public or a religious interest; this disposes of the natural idea that they are survivals of a general primitive method of self-help in the enforcement of debts. In the military cases (§ 27)[6] the distrainor was simply enforcing a public duty in the performance of which he had a special interest. His customary right (*moribus*) to do this may be regarded as a tacit delegation of a power properly appertaining to the State. The right of tax-farmers to distrain for taxes (§ 28) came by express delegation: the *lex censoria*, i.e. the conditions announced by the censors for the farming out of taxes, gave the farmer this means of *coercitio* which properly belonged to the censors themselves. The two religious cases (§ 28) rest directly on *lex* in the ordinary sense—the *Twelve Tables*—

[1] Buckland 623; Girard 1040. Full literature is given by Steinwenter, *PW s. vv.*

[2] Thus search *lance et licio* (3, 192), *operis noui nuntiatio* (not mentioned by Gaius), and perhaps the older procedure for *damnum infectum* (§ 31). See further Noailles, *Fas et Ius* 159.

[3] Pollock and Maitland 1, 353.

[4] In our law this depends on statutes.

[5] Mommsen, *DPR* 1, 183–4.

[6] Girard, *Organisation judiciaire* 1, 142 n. 1.

and not immediately on delegation. But possibly the *Twelve Tables* merely gave statutory sanction to a previous practice of delegation by the religious authority.[1] These two cases differ from the others also in being for the enforcement of duties which, though not as yet actionable, arose out of private transactions between the parties.

Gaius' enumeration may not be exhaustive, but presumably it includes all the important cases of *p. c.* In particular, it is unlikely that if the ancient procedure for *damnum infectum*, which is unknown to us but survived nominally in Gaius' day (§ 31), had been *per p. c.* he would have omitted it.

Operation of p. c. *Pignus* having been taken in due form, what ensued? If the *capio* was unjustifiable, the distrainee would have the usual remedies of an owner—*uindicatio* and possibly *a. furti*. If it was justifiable, he had a right to redeem (*luere pignus*), but perhaps only by paying a penalty as well as the principal debt. The distrainor had the right to keep the *pignus* till redemption, but not to sell it.[2] If, as seems to be the case, there was no limit to what might be seized, mere withholding might be effective enough. It used to be thought that the formal *capio* conferred on the *capiens* a right to enforce redemption by action; but this conjecture depends on what is now thought to be an erroneous interpretation of § 32.

§ 32. Fictitious p. c. This is the only example surviving in our text of the class of fictions which form the excuse (§ 10) for the excursus on the *l. actiones*. In Gaius' day a publican had an action containing a fiction of *p. c.*; it is called *forma*, not *formula*, because it emanated from the censorial conditions for the sale of taxes (*lex censoria*: § 28), not the praetorian Edict.[3] The praetorian fictions spoken of in §§ 34–38 instructed the *iudex* to treat as true something essential to the plaintiff's cause of action, e.g. that he or the defendant was someone's *heres* (§ 34), that he had been in possession for the period of *usucapio* (§ 36) and so on. But these fictions were *alterius generis* (§ 34). The fiction of *p. c.*, to judge by the language of § 32,[4] served the different purpose of providing the measure of the amount in which the defaulting taxpayer was to be condemned: he was to pay what under the old system he would have had to pay if he chose to redeem his property.

[1] Girard 1040 n. 4. It is objected that the *pontifices* themselves had no power of *p. c.* against private individuals; but the King, who till the Republic was the chief priest as well as the chief magistrate, had it.

[2] So at first in the contract of *pignus*: above, p. 75.

[3] *Edictum* p. 389.

[4] *. . . talis fictio est, ut quanta pecunia olim, si pignus captum esset, id pignus is a quo captum erat luere deberet, tantam pecuniam condemnetur.*

Evidently the publican's right of *p. c.* was now replaced by an action, but it does not in the least follow that previously *p. c.* gave him a right of action to compel the taxpayer to redeem. If that had been the case one would expect *quantam pecuniam dare oporteret* rather than *quanta pecunia luere deberet.* But if redemption would have cost the distrainee no more than the amount of his unpaid taxes, the *forma* could have given the publican an action for that amount without referring to an imaginary *p. c.* Perhaps under the old system the taxpayer, if he wished to redeem, had to pay something more by way of penalty; the object of the fiction may have been to preserve this penal addition.[1]

§§ 30–31. Substitution of the Formulary System for the Legis Actiones

Gaius attributes the substitution to the *Ll. Aebutia et duae Iuliae.* The two Julian laws are the Augustan *leges iudiciariae* of 17–16 B.C.,[2] but the date of the *L. Aebutia* cannot be determined exactly.[3] It must have been later than the *Tripertita* of Sex. Aelius (consul 198 B.C.), in which the formulary system is ignored, and sensibly earlier than Cicero, in whose time the formulary system was no novelty. Can we reduce these wide limits? Girard[4] puts it definitely between 149 and 126 B.C., but his arguments for the earlier limit have been shown to be unsound and those as to the later have met with weighty dissent.[5] The difficulty as to the latter is due to uncertainty as to the powers of the *praetor urbanus* before the *L. Aebutia.*[6] If, as Girard holds, he then had power neither to refuse a *l. actio* brought in proper form (*denegatio actionis*) nor to grant an action not based on a *lex* (*sine lege iudicium*), any exercise by him of these powers would be proof that the *L. Aebutia* was in force. Cases of their exercise begin to multiply from about 125 B.C. The change made by the *L. Aebutia* may not have been so drastic as Girard holds, but even so, the *lex* must have been followed by a great increase of praetorian activity. In our view the cases

[1] Cf. Buckland 624–5.

[2] Proved by Girard, *SZ* 1913, 295–372. Cf. *Acta Diui Augusti* (R. Ac. Ital. 1945) 1, 142. One of the two known *Ll. Iul. iudic.* was *iudiciorum publicorum.* In order to account for *duae* here Wlassak, *RPG* 1, 191, conjectures a second, unknown, *lex iud. priuatorum.* But more probably the two known *leges* were habitually referred to as a whole.

[3] The only other reference to it is Gell. 16, 10, 8: . . . *omnisque illa duodecim tabularum antiquitas lege Aebutia lata consopita sit.*

[4] 1058; *Mél.* 1, 65–174.

[5] Wlassak, *SZ* 1907, 108; Lenel, *SZ* 1909, 329; Mitteis, *RPR* 38 f. 52 n. 30; Jolowicz 222 ff.

[6] Above, p. 231.

referred to make it probable that the *L. Aebutia* was already in force by about 125 B.C. There is indeed fairly general agreement that Girard's dating is not far from the truth.[1]

Gaius gives us merely the total result of these statutes and in very general terms. We have no other direct information, but the coexistence in the time of Cicero of all the *l. actiones* and of *formulae* for all sorts of actions justifies the conclusion[2] that the *L. Aebutia* made the *formula* alternative to the *l. actio* and that the *l. actiones* were abolished (with the exceptions mentioned in § 31) only by the *Ll. Iuliae*.

Nature of the formulary system. The distinction between proceedings *in iure* and *apud iudicem* remained. The latter underwent no change and the object of the former was still to define the issue and to appoint a *iudex* (normally) who should try it. The change lay in the manner in which the issue was reached and formulated *in iure*. In a *l. actio* it was formulated in *certa uerba* (§§ 11. 29), i.e. in stereotyped phraseology derived by *interpretatio* from the *leges* (§§ 11. 30), whereas in a formulary action it was expressed in *concepta uerba*, i.e. in phraseology arrived at by rational debate and thus adapted to the case in hand. This is the only difference mentioned by Gaius.

He says nothing of another difference which some modern writers treat as the essential, namely that the *certa uerba* of the *l. actiones* had to be spoken, whereas the *concepta uerba* of the *formulae* had to be written. No one doubts that for practical purposes the *formula* was a document.[3] But there is no ground for holding that the *L. Aebutia* suppressed the requirement of oral pleadings. Common sense, however, tells us that one would not have got far in the praetor's court without being required to put one's *formula* in writing. The difference between practically indispensable evidence and essential formality does not amount to much, as is illustrated by the history of the forms of *testamentum*. If an oral recital of the *formula* remained necessary,[4] it would probably be as part of the traditional formalities of *lit. contestatio*. Conceivably the recital may have been in some such form as: *haec ita ut in his tabulis scripta sunt* (2, 104).

A less superficial difference is the following. The *l. actiones* settled nothing but the bare issue; except in *iud. post.* the constitution of the trial authority was a further step, and when that authority had

[1] Berger, *PW Suppl.* vii, 379.

[2] Wlassak, *RPG* 1, 103 f. Cf. Girard 1056 n. 2; Jolowicz 229 n. 1.

[3] There is curiously little evidence. The term *praescriptio* (§§ 130 *sq.*) is not quite decisive. Cf. Kübler, *SZ* 1895, 179; Erman, *SZ* 1896, 334.

[4] So Arangio-Ruiz, *Iura* 1 (1950), 15, is inclined to think, writing being required only *ad probationem*.

pronounced on the issue yet further proceedings might be necessary, e.g. *litis aestimatio*, in order to reach a final result. The *formula*, on the other hand, saw the case through to the end; it too stated the issue, but in the form of the conditions upon which the *iudex* was to condemn the defendant to pay a sum of money to the plaintiff or else to absolve him. A complete *formula* named its chosen *iudex*. Having been granted by the praetor and accepted by the parties (*lit. cont.*)[1] it became for the *iudex* the programme of the duties with which he was charged.[2]

In iure the initiative was with the parties, but the last word was with the praetor.[3] The plaintiff asked for the *formula* he desired and the defendant might object to it on various grounds, such as that it was not in the Edict, or ask for it to be modified, e.g. by the insertion of a special defence (*exceptio*: §§ 115 *sq.*). Their proposals were subject to the overriding criticism of the praetor, but he did not draw up the *formula* for the parties. If they were wrongly advised, that was their affair. A party who asked for a *formula* or an *exceptio* offered by the Edict would ordinarily get it as a matter of course. The praetor was not concerned with the merits of the case; his business was to see that the *formula* raised an issue proper to be tried. Occasionally, however, the Edict provided that a certain action or exception would be granted only after consideration (*causa cognita*). Moreover, the Edict did not exhaust the praetor's powers: a *formula* or *exceptio* not foreseen in it might be applied for and granted. But even in these cases the praetor's proper concern was with legal policy: ought there on the alleged facts to be an extension of remedies?

In the end the praetor announced the terms of the *formula*, if any, that he was willing to grant. But this only came into operation if the parties accepted it by formal *lit. cont.*[4] If the plaintiff refused it he went without his remedy. The defendant equally could refuse, but we have already seen that he gained nothing by doing so.[5] After *lit. cont.* the praetor authorized and ordered the *iudex* to hear and determine the case. Only then was the *iudicium* fully constituted.

Origin of the formulary system. It is generally accepted that the *formula* was in all probability first used at Rome in the special juris-

[1] Above, p. 223.

[2] The imperatives *condemna* and *absolue*, in the second person, which are frequent in our MS. must be addressed to him, but they may be scribal errors; *condemnato* and *absoluito* are indecisive. But the point is immaterial. Cf. *Edictum* p. 114; Pringsheim, *SZ* 1928, 727; Wenger, *SZ* 1935, 441–2.

[3] Jolowicz 202–5.

[4] Above, p. 223.

[5] Above, p. 224.

diction of the *praetor peregrinus*, a sphere to which the *ius ciuile* did not apply and in which everything depended on the *imperium* of the magistrate. Ultimately it may have come from the practice of the Hellenistic provinces, where the position was similar.[1] In doing justice between foreign traders at Rome or between them and Romans who had dealt with them the magistrate's only guide was his Roman conscience. He is believed to have adopted a formulary procedure, i.e. trial by *recuperatores*[2] of an issue embodied in a *formula* authorized by himself. There was no law in accordance with which he could instruct the *recuperatores* to decide, but being unfettered by *lex* he could refer them to commercial usage and the standards of *bona fides* recognized by honest traders. One supposes that in course of time he stabilized an otherwise too elastic system by announcing in his Edict models of the *formulae* which in the most frequent cases he was prepared to authorize. In this way the custom of merchants took shape as the *ius gentium*, but in Roman dress.

The existence and success of this precedent perhaps account for the extension of the formulary system to *ciues* by the *L. Aebutia* and for the rapidity with which it thereafter was organized by the urban Edict, in particular for the speedy reception of the consensual contracts into the civil law.[3] But some writers think that such a transition from the peregrine Edict to the civil law is too abrupt to be credible and that it must have been prepared by pre-Aebutian urban practice also, in other words that even before the *L. Aebutia* the urban praetor had been granting *bonae fidei* actions and actions *in factum* between *ciues*. On this view the effect of the *L. Aebutia* was merely to raise such actions from the status of *iudicia imperio continentia* to that of *iudicia legitima* (§§ 103 *sq.*).[4] But this clearly gets no support from, though it is not actually contradicted by, Gaius § 30.

Praetor and formula. Precedented or unprecedented, the powers of the post-Aebutian praetor under the formulary system were clearly enormous. By authorizing a *formula* he might give an action where none lay at civil law; by allowing an *exceptio* or refusing to grant any *formula* he might render a civil cause of action nugatory. But these powers were only formally his; in fact they were manipulated by the *prudentes*, in whose hands they proved an unrivalled instrument of legal progress. The Edict on the face of it is a technical masterpiece

[1] Cf. Partsch, *Die Schriftformel im röm. Provinzialprozesse* (1905). On the *pr. peregr.* cf. Daube *JRS* 1951, 66.

[2] Above, p. 225.

[3] Above, p. 147.

[4] On this distinction see below, p. 277. Jolowicz 222–7, gives an excellent summary of the arguments.

that cannot have been drafted by a succession of annual praetors not chosen for their legal attainments. An incoming praetor adopted his predecessor's Edict with such modifications as professional opinion, represented by his legal advisers (*consilium*), recommended, and in the granting of extra-edictal remedies he would be similarly guided. The first suggestion of a desirable modification may often have come from a practising jurist who, judging that the Edict offered his client no suitable *formula* or *exceptio*, gave a *responsum* supporting the granting of an extra-edictal *formula* or *exceptio* drafted by himself. If this stood the test of practice, it might earn incorporation in the Edict. Thus Aquilius Gallus was certainly the originator of *formulae de dolo*,[1] but not as praetor.[2] Presumably he proposed them in his practice as a *prudens*. Similarly the *iudicium Cascellianum* (§ 169) may well have been devised by the jurist Cascellius, though he was never praetor.[3]

Surviving uses of l. actio (§ 31). The *L. Iulia* allowed a *l. actio* in only two cases.

i. *Centumviral causes*. As we have said,[4] recourse to the centumviral court in the cases within its limited competence was probably not obligatory, but if it was resorted to the preparatory proceedings *in iure* had to be by *sacramentum*. Wlassak's explanation[5] of *apud praetorem urbanum uel peregrinum* is that by consent of the parties the *l. actio* might be enacted before the *pr. per.* instead of the *pr. urb.*, a choice which he says was allowed by the *L. Iulia* for all proceedings *in iure*, and not merely for the *l. actio* in centumviral causes.[6] The reason he suggests is that under the Empire the special business of the *pr. per.* steadily dwindled and that of the *pr. urb.* correspondingly increased owing to the spread of citizenship. Possibly the option is expressly mentioned here in order to guard against the supposition that the *l. actio* could be enacted before the *pr. hastarius* (*hasta*: § 16 *i. f.*) who under the Empire had charge of the centumviral court.[7]

ii. *Damnum infectum*. This means damage to one's premises threatened by the state of one's neighbour's premises, damage which he would not be liable to make good unless by some positive act (not a mere omission to repair) he had brought himself under the *L. Aquilia*. The remedy in use in classical times was a stipulation (*cautio damni infecti*) which the praetor compelled him to give to the owner

[1] Cic. *de off.* 3, 14, 60; *de nat. deor.* 3, 30, 74.

[2] As praetor in 66 B.C. he was president of the *quaestio ambitus*, therefore not *p. urb.* or *p. per.*: Cic. *p. Cluent.* 53, 147. Cf. Wlassak, *Die klass. Prozessformel* (1924) 25 ff.

[3] *D.* 1, 2, 2, 45.

[4] Above, p. 226.

[5] *RPG* 1, 201 ff. Cf. Daube, *JRS* 1951, 66.

[6] Cf. Ulp. *D.* 5, 1, 2, 1.

[7] Wenger, *ZPR* 58 n. 13.

of the threatened property to make good the damage should it occur. The device is that of the *stipulationes praetoriae* in general: to compel the assumption of a clear civil liability where none or only a doubtful one existed.[1] We learn here (§ 31) that there was an older remedy, a *l. actio d. i.*, left in force by the *L. Iulia*, but superseded in practice by the praetorian stipulation. Its name shows that it too must have been precautionary, but otherwise its nature is unknown.[2] There are strong objections to its having been an action by one of the five general *modi agendi* of § 12. The least improbable is *pignoris capio*,[3] but if *d. i.* was a case for *pign. c.*, Gaius could hardly have omitted it in §§ 26–29. The best view is that it was a *l. actio* in the same wider sense as *pign. c.*,[4] i.e. a solemn act with *certa uerba* performed *extra ius*, presumably on or at the defective premises.

§§ 32–33. Fiction of Legis Actio

All but the end of Gaius' account of this subject (cf. § 10) is lost. The publican's action with fiction of *pignoris capio* (§ 32) has already been discussed.[5] Beyond that we have only the information (§ 33) that there was no *formula* with fiction of *condictio*. Thus *aio te mihi X milia dare oportere* (§ 17b) passed straight into *si paret Nm. Nm. Ao. Ao. X milia dare oportere* (§ 41). From Gaius' language it seems that there were *formulae* with fiction of one or more of the other three *l. actiones*, perhaps of all. But we are in complete darkness. The most favoured conjecture[6] is a fiction of *manus iniectio* in order to preserve the penalty of doubled damages in case of denial (§§ 9. 171).[7] The *demonstratio* of the *a. communi diuidundo*[8] might be said to be *ad iud. post. expressa* (§ 10), though there is not exactly a fiction.

Gaius' contrast with *formulae ad l. actionem expressae* is *formulae quae sua ui ac potestate ualent* (§§ 10. 33). His examples of the latter are *actiones commodati, fiduciae, negotiorum gestorum et aliae innumerabiles*. Are the three named actions taken at random from the *aliae innumerabiles* or is there a special reason for mentioning them? Discussion of this interesting question is beyond our scope.[9]

[1] Buckland 728; Girard 1116.

[2] Girard 1059 n. 4. Exhaustive discussion: Branca, *Danno temuto &c.* (Padua 1937).

[3] So Karlowa and others. Thus Muirhead makes § 31 end: *plenius est ⟨quam⟩ per pignoris capionem.*

[4] Above, p. 248.

[5] Above, p. 249.

[6] Entirely without evidence according to *Edictum* pp. 368, 443.

[7] Above, p. 230.

[8] Below, p. 259, G.

[9] Lenel, *SZ* 1909, 344 f., holds that they are singled out because they had once

§§ 34–38. Other Fictions

There is no attempt at system. The subject of formulary fictions in general is simply attracted by the previous topic. Thus we find ourselves dealing with praetorian *formulae* of a certain kind before we have touched on the basic civil *formulae*. We are forced to anticipate a little on later sections.

Civil *formulae* instructed the *iudex* to condemn or absolve according as he decided on a question which in form was one of civil law. The real difference between the parties might be on matter of fact, but the *formula* was couched as a question of law—*in ius concepta*: was there *dominium ex i. Q.*, was there an *oportere*, and so forth? But the praetor's complete control enabled him to authorize *formulae* instructing the *iudex* to condemn or absolve according as he decided on a question of pure fact. We shall return to this contrast later (§§ 45–47). These *formulae in factum* were of course praetorian. But there were also *formulae in ius conceptae* which were praetorian. These were the *formulae ficticiae*, which instructed the *iudex* to decide on a question framed as one of civil law, but on the basis of an hypothesis which was not true, or not necessarily so. The hypothesis might be of the existence of something essential at civil law to the right asserted by the *formula* or of the non-existence of something that at civil law would negative that right.

Formulae in factum conc. and *formulae* with fiction were both methods of effectively altering the law without formally touching it. Which method the praetor would use must have been determined by convenience. When what he wished to do was to extend or modify some existing civil institution, a *formula ficticia* might give the desired result in a terse and admirably precise form. It was legislation by analogy (*imitatur ius legitimum*: § 111). The fictions mentioned here (§§ 34–38) are no doubt the most important, but there were probably many others.[1]

§§ 34–35. Fiction of hereditas. We have said[2] that *bonorum possessores* and *b. emptores* had praetorian actions by which they could get in the assets of the deceased or bankrupt or by which they could be held liable to his creditors. Here we learn how *formulae* lying in

been *l. actiones*, so that a fiction of *l. actio* would be conceivable in their case. He argues that, since all three had an older *formula in factum* as well as one *in ius concepta*, the *l. actiones* had been *in factum*. His argument is impressive, but requires that *et aliae innumerabiles* should be a gloss. Cf. Girard, *Mél.* 1, 172–4.

[1] Riccobono, *Tijdschr.* 9 (1929), 1–61 (offprint): 'Formulae ficticiae a Normal Means of creating New Law.'

[2] Above, p. 134.

favour of or against the deceased or bankrupt were modified so as to be applicable in favour of or against the *b. possessor* or *b. emptor*. The modifications were quite simple: in the case of a *b. possessor* a fiction that he was *heres* (cf. 3, 32), in that of a *b. emptor* the same fiction (*actio Seruiana*)[1] where the bankruptcy was of a deceased, but where it was of a living person, instead of a fiction, the substitution in the *condemnatio* of the *formula* (§ 43) of the name of the *b. emptor* for that of the bankrupt (*formula Rutiliana*).[2] This device had a more general application as a means of enabling litigation to be conducted through representatives (§§ 86–87).

§ 36. So-called fiction of usucapio. We have nothing to add to what has already been said as to the *actio Publiciana*. It should be noticed that the first sentence of § 36 is conjectural, though generally received. The name *Publiciana* is said by *Inst.* 4, 6, 4 to come from that of an unknown praetor who first put the *formula* into the Edict.[3]

§ 37. Fiction of ciuitas. The illustrative *formula*, being *in ius concepta* (§ 45), must be that of an *a. furti nec man.* That of the *a. furti man.*, being *in factum* (3, 189), would not need a fiction. Our manuscript makes the *formula* begin: *si paret consilioue dihoniser.mei filio.* The simplest emendation is: *si paret ope consilio Dionis Hermaei filii*, but it is disputed whether *ope consilio*[4] would be proper if the defendant was being sued as a principal thief (the natural supposition in the present passage) and not merely as an accomplice. Some hold that *ope consilio* applied equally to a principal thief, *ope* standing for the material act of *contrectatio* and *consilio* for the *animus furandi*, others that we should read: *a Dione Hermaei filio opeue consilio Dionis.* Both views have powerful support.[5]

This fiction was made necessary by the principle that *ius ciuile* did not apply to *peregrini*. At no date were they affected by *leges* in the strict sense. Thus as late as Hadrian a provision of the *L. Aelia Sentia* of A.D. 4 had to be extended to them by *S.C.* (1, 47). But the principle did not apply to the imperial forms of legislation by *SC.* or constitution.[6] It has been suggested that the fiction of *ciuitas* comes from the peregrine praetor's Edict.[7] That certainly seems its natural

[1] Author unknown.

[2] As good as certainly the P. Rutilius mentioned in § 35 is the celebrated jurist who was consul 105 B.C. and must have been praetor not later than 118: Girard, *Mél.* 1, 91–94.

[3] Cf. Wlassak, *Die klass. Prozessformel* 33 n. 22. Above, p. 67.

[4] Cf. 3, 202.

[5] *Edictum* pp. 324 f.; Jolowicz, *De Furtis* lxv. lxxix.

[6] Mitteis, *RPR* 69.

[7] Krüger, *Quellen* 40 n. 27; *Edictum* pp. 3–4.

home, though there one would expect redress for *furtum* and wrongful damage to be treated as being *iuris gentium* and not requiring to be imitated from the civil law. The multiple penalties, however, would not be *iuris gentium*.

§ 38. From 3, 84 (cf. 4, 80) we have learnt how the *formulae* with the fiction that a *cap. deminutio* had not taken place were made effective in spite of the assets of the *c. deminutus* having passed by universal succession to his *adrogator* (or her *coemptionator*). Such a *formula* though praetorian was *perpetua*.[1] Allowed, apparently, as of course, the fiction amounted to a praetorian abrogation of the civil law rule that contractual liabilities were extinguished by the *cap. deminutio* of the debtor.

Restitutio in integrum. There were a number of other cases in which the praetor might decree that something that had happened or been done was to be disregarded, so that the legal situation was restored to what it had been previously (*restitutio in integrum*). A case, not a common one, mentioned below is cancellation of the effects of *litis contestatio* on account of a mistake in pleading. In *Inst.* 4, 6, 5. 6 there is mention of rescission of usucapion *ob absentiam* and of rescission of a conveyance *ob fraudem creditorum*. Also we have had occasion to note[2] that *rest. in int. ob aetatem* was part of the praetorian protection of persons under 25. But the cases[3] and their edictal treatment are too various for us to deal with. In principle *rest. in int.* was decreed only after consideration by the praetor, but the consequences of the decree were left to be enforced under the ordinary forms of litigation by the interested party. If he was a plaintiff he could, as in § 38, obtain a *formula ficticia*, if a defendant an *exceptio*.

§§ 39–44. The Partes Formularum

A technical style of drafting *formulae* became established, with the result that all *formulae* were analysable into one or more clauses of fairly definite types, each of which had its name. The essential clauses of any given *formula* were called its *partes*. Of these there were four types: *demonstratio*, *intentio*, *adiudicatio*, *condemnatio* (§ 39). Clauses that might on occasion be added to *formulae* were called *adiectiones* (§ 129); we shall come to them later (§§ 115 *sq.*). There are differences of opinion as to the application of the analysis to some *formulae*. This

[1] Cf. § 111; Ulp. *D.* 4, 5, 2, 5.

[2] Above, p. 54.

[3] Others are *ob metum* and *ob dolum*. Cf. *Edictum*, *Tit.* X; Buckland 719; Girard 1127; Jolowicz 234.

only means that the analysis is not perfect. The *formulae* were constructed first and analysed later.

The analysis is not intelligible unless we have actual *formulae* before us. We give some examples, confining ourselves for the moment like Gaius to civil *formulae*.[1] After the first example we have omitted the nomination of the *iudex* (*X iudex esto* or *XYZ recuperatores sunto*),[2] with which every completed *formula* began, and have abbreviated the names of the stock plaintiff and defendant and the standing words of the *condemnatio*. In some places we have omitted the phrase *qua de re agitur* or the like and in one or two *formulae* a possible *taxatio* (§ 51).[3]

A. (*Formula petitoria*) *L. Titius iudex esto. Si paret rem qua de agitur ex iure Quiritium Auli Agerii esse neque ea res arbitrio iudicis Aulo Agerio restituetur, quanti ea res erit tantam pecuniam iudex Numerium Negidium Aulo Agerio condemnato. si non paret, absoluito.*[4]

B. (*Actio certae creditae pecuniae*) *Si paret Nm. Nm. Ao. Ao. sestertium X milia dare oportere, iudex Nm. Nm. Ao. Ao. sestertium X milia c. s. n. p. a.*[5]

C. (*Actio ex stipulatu*) *Quod As. As. de No. No. incertum stipulatus est, cuius rei dies fuit, quidquid paret ob eam rem Nm. Nm. Ao. Ao. dare facere oportere, eius iudex Nm. Nm. Ao. Ao. c. s. n. p. a.*[6]

D. (*Actio furti nec manifesti*) *Si paret Ao. Ao. a No. No. opeue consilio Ni. Ni. furtum factum esse paterae aureae, quam ob rem Nm. Nm. pro fure damnum decidere oportet, quanti ea res fuit cum furtum factum est, tantae pecuniae duplum iudex Nm. Nm. Ao. Ao. c. s. n. p. a.*[7]

E. (*Actio iniuriarum*) *Quod . . . Ao. Ao. pugno mala percussa est . . . quantam pecuniam iudici bonum et aequum uidebitur ob eam rem Nm. Nm. Ao. Ao. condemnari, tantam pecuniam dumtaxat sestertium X milia, si non plus quam annus est cum de ea re experiundi potestas fuit, iudex Nm. Nm. Ao. Ao. c. s. n. p. a.*[8]

F. (*Actio uenditi*) *Quod As. As. No. No. hominem quo de agitur uendidit, quidquid ob eam rem Nm. Nm. Ao. Ao. dare facere oportet ex fide bona, eius iudex Nm. Nm. Ao. Ao. c. s. n. p. a.*[9]

G. (*Actio communi diuidundo*) *Quod L. Titius C. Seius de fundo Capenate diuidundo . . . iudicem sibi dari postulauerunt, quantum . . .*

[1] Example E is praetorian.
[2] Above, p. 225.
[3] Cf. Buckland, *Manual* 419–20.
[4] Cf. §§ 34. 36. 41. 45. 51. 86. 114. *Edictum* p. 185.
[5] Cf. §§ 33. 41. 50. *Edictum* p. 237.
[6] Cf. §§ 41. 131. 136–7. Possibly with *taxatio* (§§ 43. 51). *Edictum* p. 151.
[7] Cf. §§ 37. 45. *Edictum* pp. 324 f.; Buckland, *Manual* 420; above, p. 257.
[8] Praetorian and therefore *annalis*; possibly *recuperatores* instead of *iudex*: above p. 225. Cf. 3, 224; Paul *Coll.* 2, 6, 1. 4. *Edictum* p. 399.
[9] Cf. §§ 40. 131a. Possibly with *taxatio*. *Edictum* p. 299.

adiudicari oportet iudex L. Titio C. Seio adiudicato: quidquid ob eam rem alterum alteri praestare oportet[1] *eius iudex alterum alteri c. s. n. p. a.*[2]

H. (*Formula praeiudicialis*) *An Ns. Ns. libertus sit Ai. Ai.*[3]

Demonstratio (§ 40). This occurs only in combination with an *intentio incerta* (C, E, F, G) of which it is an integrating complement. It looks like a recital of admitted facts, but this cannot be, because it was open to the defendant in C and F to deny the existence of the alleged contract and in E the truth of the accusation. One explanation of '*Quod*' is that the *condemnatio* in these *formulae* is a clumsy addition to what was originally a form of submitting to arbitration only a question of valuation.[4] Thus 'whereas' is not a good translation of '*quod*' here; 'if' would be better[5] or, if that is too bold, 'inasmuch as' or 'in so far as'.[6]

Intentio (§ 41). The term as defined by Gaius is fully appropriate only to the *l. actiones*, especially *condictio* (§ 17b). Applied to *formulae* it is more appropriate to the clauses of A, B, and D, which more or less reproduce claims formerly made by *l. actio*, than to the *quidquid paret* &c. of C and F, which is meaningless without the *demonstratio*, as the meticulous *ob eam rem* shows. Whether every *formula*, or at any rate every civil law *formula*, had an *intentio* is a question purely of terminology. Owing to the state of the text of § 44 the answer is uncertain. Is *quantum adiudicari oportet* in the partition action (G) or *quantum bonum et aequum uidebitur* in the *actio iniur.* (E) to be classed as *intentio* on the analogy of *quidquid paret dari fieri oportere* (*ex fide bona*) (C, F), or as part of the *condemnatio* on the analogy of *quanti ea res erit* (*fuit*) (A, D)? We now prefer the first alternative.[7] At any rate an *intentio* was the only clause that might stand alone, namely in the *actiones praeiudiciales* (H) for deciding preliminary questions (§ 44).[8]

Adiudicatio (§ 42). This clause in the *formulae* of partition actions (G) empowered the *iudex* to allot all or part of the common property to one or more of the parties. With the divisory clauses were combined other clauses[9] enabling the *iudex* to condemn in money if that was

[1] *ex fide bona*? *Inst.* 4, 6, 20; 4, 17, 4.

[2] From *Edictum* p. 210, but shortened. Cf. §§ 17a. 42.

[3] Cf. § 44. *Edictum* p. 341.

[4] Arangio-Ruiz, *Actions* 32 n. 1.

[5] Schulz 258 n. 6.

[6] Betti, cited by Arangio-Ruiz, *Ist.* 122 n. 1.

[7] The view taken in Part I p. 250 n. 4 is expressed too positively. Krüger may be right.

[8] Not necessarily of law: e.g. *quanta dos sit* or *an ex lege Cicereia praedictum sit* (3, 123).

[9] A *demonstratio*, which we have omitted in G, and an *intentio* (*quidquid ob eam rem*) followed by an ordinary *condemnatio*.

necessary either in order to equalize the division or to settle claims that might have arisen owing to profits and expenses not having been proportionately shared during the co-ownership. These latter claims came to be judged of as if between contractual *socii* on the basis of *bona fides*, but if '*ex fide bona*' had been in the *formula* the partition actions would have appeared in Gaius' list of the *b. f.* actions (§ 62). They are in Justinian's list (*Inst.* 4, 6, 28), but by his time the *formulae* had vanished and the classification of actions as *b.f.* or *stricti iuris* depended on the substantive law.

The *formula communi diuidundo* (G) bases the *adiudicari oportere* on a *iudicis postulatio* recited in the *demonstratio*. It might, we think, be said to be *ad l. actionem expressa*; as there is not exactly a fiction, we are inclined to doubt the correction of that phrase in § 10 to *ad l. actionis fictionem*.

There was an *adiudicatio* also in the *formula* of the *a. finium regundorum* for the regulation of boundaries (§ 42), which gave the *iudex* a power of adjustment.

Condemnatio (§ 43). See below, at §§ 48–52.

§§ 45–47. Conceptio in ius and in factum

We come to another kind of praetorian *formula*, that *in factum concepta*. The distinction between *conceptio in ius* and *in factum* is clearly drawn in the text. *Formulae ficticiae*, though praetorian, were *in ius conceptae*. The decision on a *formula in ius conc.* might of course really depend on a decision as to disputed facts. Again, though in appearance a *formula in f. conc.* raised no question of law, the distinction between questions of law and of fact is unstable: thus the *formula de dolo* was *in f. conc.*,[1] but what constituted *dolus* was a matter of juristic discussion.[2]

The view has been advanced[3] that *formulae in factum conc.* had no *intentio*, in other words that to apply the word *intentio* to the hypothesis of facts with which a *formula in f. conc.* begins is incorrect. The beginning of § 46, whichever way it is restored,[4] is indecisive, but the end of § 60 disproves this view; it is, however, claimed to be a post-classical addition. But in any case it seems improbable that the analysis

[1] *Si paret dolo malo Ni. Ni. factum esse . . .*

[2] Siber, *RR* 2, 234.

[3] By De Visscher, *Études* 1, 361, a re-edition of an article in *NRH* 1925 which had been criticized by Lenel, *SZ* 1928, 1–20.

[4] Part I, p. 250 n. 6.

of *formulae* given in §§ 39–44 was intended tacitly to exclude the very numerous *formulae in f. conc.*

The praetor's power to grant *formulae in f. conc.* involves that he could make *condemnatio* depend on the verification of any facts that he considered to demand it. The changes of law so made, though more open, were not necessarily more revolutionary in effect than those made by *formula ficticia*. But the cases in which a fiction would serve the praetor's purpose were limited by technical considerations, whereas *formulae in f. conc.* were not thus limited and were in fact, as the text says, innumerable.

The use the praetor made of *actiones in factum* was mainly to repress conduct of which he disapproved, but with which the civil law did not deal, or not adequately. Leading examples are the *a. quod metus causa* and the *a. doli*. The motive of the *a. de pecunia constituta* (§ 171)[1] is thought also to have been penal. *Formulae in f.* were not all pure novelties: thus the *formulae* of the edictal title *De in ius uocando*, which are the illustrations chosen in § 46, merely gave a cutting edge to old civil law, and something similar must be true of the remedy against a *iudex* who misconducted himself (§ 52).[2] In other cases a *formula in f. conc.* was just an extension of a civil law remedy and only technically different from a *formula ficticia*. Thus the *actiones utiles* by which the scope of the *L. Aquilia* was extended comprise both these kinds of praetorian action, not to mention *formulae* with variation of names (§ 35).[3]

§ 47. On *depositum* and *commodatum*[4] the Edict offered both a *formula in ius* and a *formula in f. conc.* There may have been other such cases; *pignus*, *negotiorum gestio*, and *fiducia* have been suggested. The history of the remedies on *depositum* is fairly well established.[5]

The *Twelve Tables* had given a penal action *in duplum* against a depositary.[6] At the end of the Republic[7] the praetor substituted an *a. in factum* which in general was *in simplum*.[8] Its *formula*, the second in

[1] Below, p. 298 n. 3. Cf. *Edictum* p. 247; Levy, *Privatstrafe* 17.

[2] *Inst.* 4, 5; *Edictum* p. 169.

[3] Cf. *Edictum* p. 203, where it is pointed out that in the texts *a. in f.* is not equivalent to *formula in f. conc.*, but means merely that the model *formula* in the Edict has been modified to meet a case which might otherwise have gone unredressed.

[4] Above, p. 150.

[5] Rotondi, *Scr. Giurid.* 2, 1.

[6] Only mentioned by Paul *Sent.* 2, 12, 11 (*Coll.* 10, 7, 11). Perhaps only for failure to restore the thing, which as not involving an *amotio* (3, 195) would at that date probably not have been *furtum*.

[7] Rotondi, *o.c.* 27.

[8] Where the deposit had been made under stress of riot, fire, shipwreck, or the like (*depositum miserabile*) the double penalty remained.

§ 47, contemplates only fraudulent failure to restore the thing. But this is not the only possible question between parties to a *depositum*, and at length, late but certainly before Julian's Edict, a *formula in ius* was added under which the *iudex* could settle all questions on the basis of *bona fides*. The superiority of the *formula in ius* in this and other respects[1] accounts for its introduction, which may have been facilitated by the existence of the ancient civil action. The subsequent retention of the *formula in f.* seems to be just a case of Roman conservatism. The duplication certainly existed in Julian's Edict, but it was not very old and owing to the disappearance of the formulary system did not last very long.

The *formulae* on *commodatum* seem to have followed by analogy, except that here there was no penal civil action to start from.

Neither the *a. depositi* nor the *a. commodati* figures in Cicero's lists of *bonae fidei* actions. The *a. depositi* is in Gaius' list (§ 62), but not the *a. commodati*, though this may be due to textual corruption. Gaius was certainly aware of the existence of a civil *b. f. actio commodati* (§ 47 *fin.*; cf. § 33). Thus the absence of *depositum* and *commodatum* from Gaius' scheme of contracts requires explanation. The best is that their *formulae in ius* were introduced only after the fixing of the traditional scheme which Gaius was all too faithfully following.[2]

§§ 48–52. Condemnatio

All *formulae* containing a *condemnatio*, that is all except the *praeiudiciales*, empowered the *iudex* to condemn or absolve the defendant. If he condemned, it was in a definite sum of money, whatever might have been the nature of the plaintiff's claim, even if it was to be the owner of specific property (§§ 48. 51 *fin.*). If the *formula* named the sum (*condemnatio certa*)[3] the *iudex* could condemn only in precisely that sum; if he condemned in more or less, he was said *litem suam facere* and was liable in an *a. in factum* to the injured party *in quantum aequum uidebitur* (§ 52).[4] If the *condemnatio* fixed a maximum (*cond. incerta cum taxatione*),[5] the *iudex* was similarly liable if he condemned in a greater sum (§§ 51–52). If it was *incerta et infinita*,[6] he had unfettered discretion.

The principle of *condemnatio pecuniaria* held good even in *uindicatio* of a *res corporalis*; under the formulary system *condemnatio* was never

[1] Rotondi, *o.c.* 47. Cf. 4, 60. 107.
[2] Above, p. 156.
[3] Example B, above, p. 259.
[4] *Inst.* 4, 5 pr. *Edictum* p. 169.
[5] Example E, above, p. 259.
[6] Example A, above, p. 259.

in ipsam rem. But the practical effect of this principle was greatly mitigated by the special clause, which is found in the *formula petitoria* amongst others,[1] *nisi arbitrio iudicis restituat*. Before pronouncing *condemnatio* the *iudex* made a preliminary announcement of his decision, which was a warning to the defendant that he could escape condemnation only by giving up the property; only if he did not comply did the *iudex* condemn him in the money value of the thing, which, subject to the control of the *iudex*, was assessed on the oath of the plaintiff.

An important point arises on § 48, but the text is corrupt. The simplest correction is to excise *sicut olim fieri solebat* as a gloss.[2] If we do this, the insertion of *sed* is still necessary, but there is no doubt as to its position. If, on the other hand, we keep *sicut olim fieri solebat*, it becomes a question whether we should place *sed* before or after that clause, in other words whether the clause refers to what follows or to what precedes it. The usual placing, after it (*solebat ⟨sed⟩ aestimata*), seems the better.[3] The objection is that this makes *cond. in ipsam rem* the practice of older times, presumably those of the *l. actiones*, whereas the farther back one goes the more unlikely such a practice becomes; moreover, if it had at one time existed, it would not have been abandoned under the formulary system. But what exactly did Gaius mean by *cond. in ipsam rem*? We agree that he cannot have meant anything in the nature of execution by the State; this is not found till the later Empire. But he may have regarded judgment in an *a. sacr. in rem* as amounting virtually to a declaration of the ownership of one or other party; there was certainly no *condemnatio pecuniaria*, and this was the point. The direct effect of the judgment would be to justify the successful party in taking the *ipsa res* if he was not already in possession. If *litis aestimatio* should be necessary, further proceedings would be required. The reason why *condemnatio pecuniaria* replaced this system is thought to have been that the only legally controlled method of executing judgments was *manus iniectio*, and this was applicable only to a debt of money. The *clausula arbitraria* nevertheless made specific satisfaction probable, and *condemnatio pecuniaria* got rid of special proceedings for *litis aestimatio*.

[1] Example A, above, p. 259.

[2] Or, with Kreller, *SZ* 1935, 180–2, *argumentum* (usually corrected to *aurum argentum*) — *solebat*. This makes it unnecessary to insert *sed*, but leaves one to understand *iudex* as the subject of *condemnat*.

[3] The alternative placing (⟨*sed*⟩ *sicut olim*), preferred by Nicolau-Collinet, *RH* 1936, 751 and in effect by Wenger, *ZPR* 136 n. 10 *fin.*, makes *sicut olim fieri solebat* so pointless that it must after all be gloss.

§§ 53–60. Plus Petitio

The *iudex* was tied to the *formula*. He was bound to condemn or absolve according as he found the conditions of condemnation laid down by it to be verified or not; if he condemned, he had to observe the limitations on his discretion mentioned above (§ 52). He had no power to amend or depart from the *formula* in the least particular. Hence a plaintiff who overclaimed in his *formula* (except in the *condemnatio*: § 57) simply lost his action. The special effect of overclaim with which these sections are mainly concerned is, however, not the loss of the actual action, which is taken for granted (e.g. § 55), but the destruction of the possibility of obtaining the less that was really due by bringing a fresh action, the reason for this being that a claim could never be repeated (§§ 103 *sq.*) and that a claim of the less had been included in the defeated claim of more. According to Gaius this effect followed only from overclaim in the *intentio* (§§ 53. 56). The only possible relief, once there had been *lit. cont.*, would be *restitutio in integrum*, but this was granted by the praetor, except in the case of minors, only when the mistake was specially excusable.[1]

What amounts to *plus petitio* is explained in §§ 53a–d, for which we have to depend in part on *Inst.* 4, 6, 33a–d. In § 53b not everyone accepts the restoration of *ante condicionem* from Justinian.[2] At the end of § 53c Gaius probably mentioned that *plus petitio loco* could, if the *actio* was *certa*, be avoided by using the special *actio de eo quod certo loco*, which empowered the *iudex* to make an allowance in his *condemnatio* for the change of place (*Inst.* 4, 6, 33c).[3]

According to § 54 *plus petitio* was impossible in *intentiones incertae* (*quidquid dare facere oportet*). Let us accept this, though it is more clearly true of *plus pet. re* than in the other cases.[4] Another way of stating the point is that in *actiones incertae* the overstatement would be in the *demonstratio* and that this, though fatal to the actual action, did not consume the right of action. As Gaius says: *nihil in iudicium deducitur* (§ 58).[5] Some jurists, however, held that in an infaming action, e.g. *depositi* or *iniuriarum*, overstatement in the *demonstratio* did extinguish the right of action. In a defective passage (§ 60) Gaius begins

[1] *Edictum* p. 124. The end of § 53 is illegible, but cf. *Inst.* 4, 6, 33.

[2] G. Segrè, *BIDR* 32 (1922), 288. The objection is that pending the condition there was no obligation to be extinguished. Cf. above, on 3, 179; Buckland 423 n. 9. 702.

[3] *Edictum* p. 240.

[4] Cf. Buckland 701–2.

[5] Buckland 702: 'the truth of the *demonstratio* is a condition not on the *condemnatio*, but on the submission to the *iudex*'.

by pointing out that as regards the *a. depositi* we must distinguish between the formulations *in factum* and *in ius* (§ 47). In the former the overstatement would be in the *intentio* and therefore fatal.[1] His opinion as to the latter, if he expressed one, is lost.

Overstatement in the *condemnatio* would hurt only the defendant, but he could get *rest. in integrum* as a matter of course (§ 57; cf. § 125).

Underclaim. This if in the *intentio* did not prevent the plaintiff from winning the actual case nor, since *ex hypothesi* the *intentio* would be *certa*, did he need to preserve his right to sue afresh for the balance by using a *praescriptio* (§ 131). He was, however, barred from suing again during the same praetorship by the *exceptio litis diuiduae* (§§ 56. 122). But if he underclaimed in the *condemnatio* he would get only what he had claimed and could not sue for the balance because he had brought his whole right into issue (*tota res in iudicium deducitur*); only a minor could get *rest. in int.* (§ 57). Understatement in the *demonstratio* was not fatal to him. Some held that it cost him the actual action, but Labeo reasonably dissented (§ 59). However, on either view, he could sue again for what he had failed to get (§ 58), though presumably he would have to wait till the next praetorship, at least if he had got part of his right by the first action.

§§ 61–63. Bonae Fidei Iudicia

Besides the conclusion of the treatment of *plus petitio*, what did the two illegible pages between §§ 60 and 61 contain? One clue is that § 69 refers to a previous mention of the *a. de peculio* for which this is the only possible place. Another is that § 61, so far as we have it, is more or less reproduced in *Inst.* 4, 6, 30 and 39. The sequence of thought in *Inst.* 4, 6, 36 *sq.* is closer to that of § 61 *sq.* than is that in *Inst.* 4, 6, 28 *sq.* It (*Inst.* §§ 36 *sq.*) is a grouping of actions in which the claim is liable to be denied satisfaction in full, and among the actions mentioned are the *a. de peculio* (§ 36) and actions admitting of set-off *ex eadem causa* on equitable grounds (§ 39). The lost passage of Gaius ends with this last topic; thus it is likely that it had previously dealt with the other cases mentioned by Justinian (§§ 37–38) or some of them.[2]

The point made in what is left of § 61 is that the *formula* of a *b.f.*

[1] But from *quod an debeamus credere* to the end of § 60 is regarded by De Visscher as spurious. Cf. above, p. 261 n. 3.

[2] *Beneficium competentiae* in actions *de dote* (*rei uxoriae*) and actions against a parent, patron, *socius* (above, p. 180), or one who had made a *cessio bonorum* (above, p. 136).

action empowered the *iudex* to set against the plaintiff's claim any counterclaim by the defendant arising out of the same transaction (*ex eadem causa*). This required no special plea, but rested on a reasonable interpretation of the words *ex f. b.*, of which, however, the *iudex* was not bound to avail himself (§ 63). The limitation to *eadem causa*, i.e. that specified in the *demonstratio*, was imposed by the words *ob eam rem*.[1]

The rescript of M. Aurelius allowing counterclaim to be raised even in *stricta iudicia* by *exceptio doli* (*Inst.* 4, 6, 30) seems to be unknown to Gaius. Such *iudicia* being on unilateral transactions, the counterclaim could only be *ex alia causa*. Thus the rescript introduced the novelty of trying distinct questions under a single *formula*. One would think that sooner or later, perhaps not till the formulary system was dead, the new idea must have been extended to *b.f. iudicia*, but there is some doubt.[2]

§ 62. We come to the list of *b.f. iudicia*.[3] Their proper mark was an *intentio* claiming *oportere ex fide bona*, but there was a natural tendency to bring other *formulae* giving the *iudex* discretion to apply equity into the same category.[4] Thus in Gaius' list we have the *a. rei uxoriae* in which the discretion was conferred by the *condemnatio*.[5] Justinian's list (*Inst.* 4, 6, 28) goes further, but the test was no longer the words of the *formula*, but the substantive law.[6] Gaius' list ought to have included the *a. commodati* (§§ 33. 47), but it is impossible to say whether its omission is due to a copyist[7] or to Gaius having followed a list compiled before *commodatum* had been endowed with a *formula in ius conc.* Whether the *a. pigneraticia* was, or ought to have been, in the list is even more doubtful, because the existence of a *formula in ius* is uncertain.[8] None of the other actions added in Justinian's list are at all likely to have been in Gaius'.

§§ 64–68. Special Cases of Set-off

M. Aurelius' reform (*Inst.* 4, 6, 30) was not entirely unprecedented. A banker suing a customer was required to claim only the balance due to him after allowing for any debt of the same kind of things

[1] Example F, above, p. 259.
[2] Buckland 704–5.
[3] Earlier: Cic. *de off.* 3, 15, 61; 3, 17, 70; *de nat. deor.* 3, 30, 74; *top.* 10, 42; 17, 66. Later: *Inst.* 4, 6, 28–9. Buckland 678.
[4] Cic. *top.* 17, 66.
[5] *Edictum* pp. 305, 307. The *a. fiduciae*, also in the list, may have had a *b.f. formula in ius conc.*: *Edictum* pp. 292–3; Buckland 686 n. 9.
[6] Above, pp. 221, 228–9.
[7] Part I p. 260 n. 4.
[8] *Edictum* p. 255.

actually due from himself to the customer. This *compensatio* had to be made in the *intentio*, where the least overstatement of the balance due was a *plus petitio* involving extinction of even the correct claim. The form of *intentio* given in § 64 makes this perfectly clear.

With this is contrasted the set-off, distinguished as *deductio*, which a debtor of an insolvent estate might raise, if he was sued by the *bonorum emptor* (§ 35), of anything owed by the insolvent to himself. The debt set off might be of a different kind and need not be already due. The *deductio* was made in the *condemnatio* (formulation unknown: § 68), so that the *bonorum emptor* incurred no risk by overstatement, though the defendant could get the *formula* amended by *restitutio in int.* (§ 57) or, if he had paid in full, could recover any overpayment. He did not have to pay in full what he owed and receive only a dividend on what was owed to himself.

§§ 69–74a. Liability on Contracts of Sons and Slaves

If modern habits of thought require us to endow Gaius with a system, we can only say that at this point he passes to the subject of the parties to an action.[1] What Gaius himself says is that his previous mention (§§ 60–61?) of the *a. de peculio* obliges him to explain this and the other actions lying against a *paterf.* on the contracts of his son or slave. It is not a happy approach to this group of actions. It has the defect of making the *a. exercitoria* and *institoria* (§ 71) appear to have been primarily actions on the contracts of a son or slave, which was not the case. A further defect is the order of treatment: the *a. quod iussu* (§ 70) is put first, followed by the *exerc.* and *instit.*, but though like them it enforced liability in full, it would have gone better with the *a. tributoria* (§ 72) and *de peculio* (§§ 72a–73), as being confined to contracts of dependants.[2]

All five actions were praetorian. Their sole effect was to add a praetorian obligation of a stranger to the contract to the civil, or in the case of a slave natural, obligation of the actual contractor. Hence the modern name *actiones adiectitiae qualitatis*. The obligation of the actual contractor remained unaffected. The rights on his side of the contract remained vested in himself if he was *sui iuris*; if he was *alieni iuris* they belonged to his *paterf.* by civil law (3, 163 *sq.*). Any idea that these actions created a praetorian law of agency should be dismissed.

[1] So in Böcking's excellent scheme reproduced with improvements in Seckel and Kübler's editions.

[2] Cf. *Edictum* §§ 101–4.

We need only supplement Gaius' admirable elementary account of the five actions.

§ 70. Quod iussu. *Iussum* here does not mean an order to the son or slave, but a declaration of assumption of responsibility, which was ordinarily, perhaps necessarily, made to the third party. A creditor claiming under this head is one *qui iussu patris contraxit* (§ 74).[1]

§ 71. Exercitoria. Institoria. The former takes its name from the appointer, the latter from the appointee. The terms in which both actions were announced by the Edict were applicable equally to contracts made by appointees who were outside the appointer's *familia* (*extranei*) and to those made by his son or slave, provided in both cases that the contracts were within the scope of the undertaking for which the appointment was made. In the case of the *institoria* this might be a business of any kind; *taberna* is only the example used in the model *formula*. This has been reconstructed as follows:[2] *Quod As. As. de Lucio Titio, cum is a No. No. tabernae instructae praepositus esset, eius rei nomine decem pondo olei emit, qua de re agitur, quidquid ob eam rem Lucium Titium Ao. Ao. dare facere oportet ex fide bona, eius iudex Nm. Nm. Ao. Ao. c. s. n. p. a.*

The essential point, believed to be common to all five actions,[3] is that the *formula* is that of the ordinary action on the contract in question and names the actual contractor, but liability is imposed on the defendant by his name being substituted in the *condemnatio* for that of the contractor (cf. § 35). Naturally the special circumstances rendering the defendant liable had to be stated—in the *demonstratio* or, if there was no *demonstratio*, in the *intentio*. If the actual contractor was a slave, a fiction of liberty was inserted in the *intentio* (*quidquid ob eam rem Stichum, si liber esset, Ao. Ao. dare facere oporteret*), since *oportere* in the strict sense did not apply to a slave.

Why *tabernae instructae* in the model *formula*? Because the shop must have been equipped by the owner (*merx dominica*). The contrast is with the *tributoria*, where the trading was with *merx peculiaris* (§ 72).[4]

§ 72. Tributoria. This is less straightforward. The text of the second half of this section, recovered in 1927,[5] makes no material difference to what had been previously conjectured from *Inst.* 4, 7, 3. The case supposed is that a son or slave, with the knowledge of his *paterf.*, is trading with *merx peculiaris*, i.e. with capital constituting

[1] Ulp. *D.* 15, 4, 1, 1. Girard 709 n. 3.
[2] *Edictum* p. 263.
[3] *Edictum* pp. 264 ff.
[4] *Edictum* p. 259. Ulp. *D.* 14, 3, 11, 7.
[5] By Hunt, *Oxyrhynchus Papyri* xvii, 2103.

the whole or part of his *peculium*. On the demand of a creditor of the business the praetor would order the *paterf.* to distribute this capital or any property representing it (§ 74a) among the creditors of the business *pro rata*. The *paterf.* himself, if a creditor, took his share; he was not a preferred creditor as in the *a. de peculio*, but strangely he had the right to claim on any debts and not merely on those due to him from the business.[1] For dishonest distribution he was held liable in this *a. tributoria*.

§§ 72a–73. De peculio et de in rem uerso. § 72a is illegible in V. O supplies the beginning, but soon grows so fragmentary that reconstruction becomes guess-work.[2] In *Inst.* 4, 7, 4 we have a guide to the general sense, but not to Gaius' exact text. Gaius himself gives one indication when he remarks later (§ 74a *fin.*): *nam ut supra* (i.e. in § 72a) *diximus, eadem formula et de peculio et de in rem uerso agitur.* The missing passage evidently discussed the *formula*. The Oxyrhynchite fragments point distinctly to some quotation, and this is likely to have been of the double-barrelled *condemnatio*[3] which was the most characteristic feature. This would account for the *duas condemnationes* of *Inst.* 4, 7, 4b, though the phrase itself can hardly be Gaian.

Liability in this action was independent of any authorization or holding out other than such as might be inferred from the existence of a *peculium*. On any contract of his son or slave the *paterf.* was liable to the extent of the *peculium* and to the extent that his own estate had profited from the contract. The latter liability is illustrated in *Inst.* 4, 7, 4a–b; what Gaius may have said is lost. The *peculium* was part of his property which the *paterf.* had handed over to the administration of his son or slave, but which he could withdraw at any time. It was still part of the *paterf.*'s estate, but was kept distinct and was *de facto*, though precariously, something like the property of the son or slave. It was a separate account, and as a matter of account both the *peculium* could be in debt to the *paterf.* (or to other persons in his *potestas*) and he to it. There could, of course, be no legal debt either way, but this was how in practice the *peculium* was handled. Thus in making the *paterf.* liable *de peculio* to third-parties contracting with

[1] Ulp. *D.* 14, 4, 5, 7.

[2] Kübler adopts the reconstruction given by Levy, *SZ* 1928, 537–8. He fails to note that in *Studi Bonfante* 2 (1930), 277–87, Levy, for conclusive reasons of space, withdrew the last part of his proposals (from *licet enim una est formula* onwards). Discussion, the basis of which should be Hunt's text in *P. Oxy.* 2103, is impossible here.

[3] *Edictum* p. 282: *eius iudex Nm. Nm. Ao. Ao. dumtaxat de peculio . . . uel si quid in rem Ni. Ni. inde uersum est c. s. n. p. a.*

its holder the praetor was giving a certain legal recognition to an institution well established in social practice. In the action the *peculium* meant the net *peculium* at the time of judgment after allowing for debts either way between it and the *paterf.* or persons in his *potestas* other than those themselves slaves of the *peculium* (*uicarii*: § 73 *i. f.*). If the resulting balance of debt was against the *paterf.*, his liability *de peculio* was to that extent increased.[1] If the balance was in his favour, he was entitled to deduct it before paying other creditors. The rule in this action was first come first served, and naturally the *paterf.* came first.

§§ 74–74a. Advice to creditors. One can only agree with § 74 that a creditor who had one of the three actions *in solidum* would be wise to use that rather than *de peculio*, which would also be open to him. The choice between *de peculio* and *tributoria* (§ 74a) is not so plain. The merit of the *tributoria* was that it ensured distribution *pro rata* between the creditors including the *paterf.*, but no doubt Gaius is right in thinking that *de peculio* would usually be more profitable to a creditor, provided that he sued in good time.

§§ 75–81. Noxal Actions

Responsibility for the delicts of one's sons or slaves is a very different story, going back to the oldest civil law.

If a son or slave had committed a delict, his *paterf.* could be sued by an action, called noxal, giving him the choice between paying the damages and surrendering the delinquent (*noxiam sarcire aut noxae dedere*). This action was not grounded on failure by the *paterf.* to keep his subordinate in order. It was immaterial whether or not the delinquent had been in his *potestas* when the offence was committed. He might at that time have been in someone else's *potestas* or *sui iuris*. The noxal action lay against his holder *in potestate* at the moment of *litis contestatio*. If after committing a delict while *in potestate* the delinquent became *sui iuris*, the action on the delict was no longer noxal, but *directa*, against the delinquent himself. If the delinquent died before *lit. cont.*, the delictual action died with him; this is as true of the action in noxal as in direct (§ 112) form.

All that we have said is summed up in the maxim: *actio noxalis caput sequitur* (§ 77). The general outline of the evolution of this

[1] Since payments made out of *peculium* on account of the *paterf.*'s affairs would ordinarily create a debt to the *peculium*, one does not see much use for the separate liability *de in rem uerso*: Buckland 534. But a slave might have no *peculium*; again *in rem uersio* might be easier to prove.

system is clear, though many details are obscure.[1] In the primitive period, when the redress for delict was vengeance on the person, the strength of the patriarchal system prevented a delinquent *in potestate* from being taken for vengeance except through a demand for *deditio* made on his *paterf.* When money penalties took the place of vengeance for delicts, it would have been unfair (§ 75) simply to convert the *paterf.*'s duty of *deditio* into one of paying the penalty. He was allowed to choose between paying and surrendering.[2] The *formula* of a noxal action expressed this alternative not only in its *intentio*, but also in its *condemnatio*.[3] Hence even after being condemned the *paterf.* could still choose surrender. It makes little difference whether we regard him as under a duty to surrender qualified by a power to pay (the historical view) or as under a duty to pay qualified by a power to surrender (the later view: § 75).

§ 76. The noxal actions mentioned are merely the chief examples; the system applied to delicts generally,[4] but not to contracts or quasi-contracts. The attribution of the noxal actions on *furtum* to the *Twelve Tables* and of those on *iniuriae* to the Edict raises a question. Were noxal actions on *iniuriae* not contemplated by the *Twelve Tables*?[5] Or had the delict of *iniuria* been so completely transformed both in conception and remedy by the praetor that there was no reason to look back beyond the Edict? Both views are held; discussion would be out of place here.

§ 78. A wrong done by a son or slave to his *paterf.* created no obligation, so that there was no obligation that could follow his *caput* if he was transferred to another *potestas* or became *sui iuris*. But what if a man came under the *potestas* of one whom he had previously wronged? So long as he remained in this *potestas* there could be no action, but while the Proculians held that the obligation was merely dormant and revived if the delinquent passed out of the *potestas*, the Sabinian view (adopted in *Inst.* 4, 8, 6) was that it had been extinguished for good and all.

§ 79. Noxal surrender of a slave by *traditio* gave the surrenderee only bonitary ownership, but he had a right to demand *mancipatio.*

[1] Cf. De Visscher, *Le Régime rom. de la noxalité* (1947); rev. by Campbell, *JRS* 1949, 164.

[2] In classical times a delinquent *filiusf.* could be sued personally (Gaius *D.* 44, 7, 39), but unless he had *peculium castrense* this might not be worth much.

[3] *Edictum* p. 195.

[4] Cf. Buckland 600.

[5] So De Visscher, *Le Régime de la noxalité* 180 s., reaffirming, against Daube, *Camb. L. J.* 1939, 26, his thesis that *iniuria* was outside the noxal system of the *Twelve Tables*, though under a kindred system of *uindicta*.

The surrender of a son by *mancipatio* put him *in mancipii causa* (1, 116 *sq.* 140–1). The Sabinians held that a single *mancipatio* sufficed; the Proculians required three, because otherwise the *patria potestas* would not be ended, and though this reasoning is unconvincing historically, it harmonizes with the rule reported by Papinian[1] that a free man noxally surrendered was to be manumitted when he had worked off the damages. Under the later Empire noxal surrender of sons died out (*Inst.* 4, 8, 7). Noxal surrender of daughters had been disused much earlier.

§ 80. Persons in manu mancipioue. Having disposed of the contracts and delicts of persons *in potestate* (§§ 69–79) Gaius proceeds to those of persons *in manu mancipioue*. But we have only the beginning of his text and even that is obviously defective. As it stands it seems to apply the praetorian system of dealing with the contractual obligations of *adrogati* and women *in manu* entered into by them when *sui iuris* (§ 38) to the contracts of women made when *in manu* and of persons *in mancipio*. Gaius cannot have written thus. Krüger may well be right in supposing a considerable copyist's omission before *ita ius dicitur*. But materials for verbal reconstruction are lacking and even the recovery of the sense is a matter of conjecture owing to the subsequent disappearance of *manus* and *manc. causa* from practice and therefore from the texts.

There is no reason to doubt that in principle the obligations incurred by a woman when she was *in manu* were treated like those of a *filiafam.* and those of a person *in mancipio* like those of a slave. Their contracts certainly created no civil liability (3, 104) and there is no indication that the contracts of women *in manu* could be enforced by praetorian action *adiect. qual.*; this is more conceivable for contracts of persons *in mancipio*, but practically negligible. As to delicts, noxal actions seem unobjectionable in the case of persons *in mancipio*, but in that of wives *in manu* it is doubtful whether *noxae deditio* was ever practised.[2]

§ 81. Actio de pauperie. The Autun Gaius §§ 81 *sq.* and *Inst.* 4, 9 pr. make it certain that the illegible text of V 219 contained Gaius' account of this action. For damage (*pauperies*) done by a quadruped (later extended to other animals) the *Twelve Tables* gave a noxal action, i.e. an action holding the owner of the animal at the time of *lit. cont.* liable either to compensate for the damage or to surrender the animal. The maxim was: *etiam in quadrupedibus noxa caput sequitur*;[3] liability

[1] *Coll.* 2, 3, 1. Above pp. 40–41.
[2] Girard, *Mél.* 2, 325.
[3] Ulp. *D.* 9, 1, 1, 12.

followed the animal through any change of ownership up to *lit. cont.* and was extinguished by its death before *lit. cont.* The verbal coincidence between Autun § 81 and *Inst.* 4, 9 pr. in expressing the requirement that the damage should have been caused by the animal's own vice (*lasciuia aut feruore aut feritate*) must be due to their common source, Gaius. If it was caused by human fault, such as bad driving, it was *damnum iniuria datum* under the *L. Aquilia*, not *pauperies* under this action.[1]

If the animal died after *lit. cont.*, the liability remained and one could not satisfy it by surrendering the carcass: *noxae dedere est animal tradere uiuum*: Ulp. *D.* 9, 1, 1, 14; Autun § 82. One would have expected the same rule to apply to the surrender of the corpse of a son or slave who died after *lit. cont.*, and this is what the accepted, though not very certain, reading of our § 81 says, but with the very puzzling qualification that the corpse could be surrendered in a case of natural death. The Autun fragments likewise, so far as they have been read, complete our bewilderment by seeming to contemplate the surrender of human corpses or parts of them. Startling as this is in classical law, it is not absolutely incredible as a survival of primitive ideas of vengeance and magic.[2]

§§ 82–87. Representation in Litigation[3]

In a *l. actio* representation was exceptional. According to Justinian (*Inst.* 4, 10 pr.), enlarging on § 82, it was allowed only in four cases: *pro populo*, i.e. probably in the *actiones populares*,[4] *pro libertate*, i.e. in claims to freedom, *pro tutela*, which may mean in the *crimen suspecti tutoris* (*Inst.* 1, 26), and under a *L. Hostilia* in an *a. furti* on behalf of one who or whose tutor was absent on public service. But under the formulary system it was allowed generally, by means of the device of substituting in the *condemnatio* the name of the representative for that of the principal (§§ 86–87). We have already encountered this device in the *formula Rutiliana* of a *bon. emptor* (§ 35) and in the *actiones adiect. qualitatis*.[5] It meant that the actual plaintiff or defendant was the representative, not the principal.

[1] *Inst.* 4, 9 pr. *i.f.*

[2] Full discussion by De Visscher, *Le Régime de la noxalité* 164 *s.* Note especially his hypothesis at p. 176. Cf. also Girard, *Mél.* 2, 339; Korošec, *Erbenhaftung nach r. Recht* (1927) 89. 93; Luzzatto, *Ipotesi sulle origini &c. delle obbl. romane* (1934) 202.

[3] Buckland, *Main Inst.* 375.

[4] Penal actions brought by common informers, to use our own term.

[5] Above, p. 269.

Representatives using this method were in general either *cognitores* or *procuratores*. But it could also be employed by tutors and curators (§ 82), for whom it must often have been more convenient than litigation conducted by their wards with their authorization. They need no special consideration, since they were in much the same position as *procuratores* (§§ 85. 99).

A *cognitor* was appointed by formal words spoken to the other party (§ 83). The formality suggests some antiquity. The alternative forms reported may have been used according as the action was *in rem* or *in personam*, or perhaps according as the appointment was before or after proceedings had begun, though of course before *lit. cont.* A *procurator* was appointed by simple mandate without need of the presence of the other party; indeed he might be a volunteer acting without mandate (§ 84).

In principle any *actio iudicati* resulting from the action would lie for or against the representative, not his principal, he and not the principal being named in the *condemnatio* of the *formula*. But by a development which in the case of *cognitores* had taken place before Gaius and in that of *procuratores* came later, the *a. iudicati* became transferable to or against the principal. A decree of the magistrate was required for this (*causa cognita*); one consideration may have been that the representative might be acting in his own interest (*cognitor* or *procurator in rem suam*), that is as an assignee and not as agent, in which case the transference would be unjust.

The other party to the action was carefully protected against any danger that might result from dealing with a representative instead of the principal. There was no danger and he was given no protection when he was sued by a *cognitor*, because the formality of a *cognitor*'s appointment rendered repetition of the action by the principal as impossible as if he had sued himself. But action brought by a *procurator* did not extinguish his principal's right of action; a *procurator* therefore had to give the defendant security *ratam rem dominum habiturum*, i.e. that his principal would not bring the action afresh (§§ 97–98).[1] On the other hand, where the representative, whether *cognitor* or *procurator*, appeared as defendant, the plaintiff was using his right of action once for all and would not be able to use it again against the principal. Hence he was entitled in all cases to security for the satisfaction of the judgment, should it be in his favour (*satisdatio iudicatum solui*: § 101). This was given for a *cognitor* by his principal, for a *procurator* by himself. If the *a. iudicati* against the *cognitor* was

[1] *Edictum* p. 541.

transferred against the principal, the security would serve no particular purpose, but the transference was not a matter of course.

Certain persons could not be representatives, for instance a woman or a soldier. Others could neither represent nor be represented, notably *infames* under the Edict.[1] Hence the *exceptio cognitoria* mentioned in § 124.

§§ 88–102. Security required from Parties

We have just dealt with the special requirements when there was representation. When the action was between principals the law was fairly simple. Of a plaintiff no security was required (§§ 96. 100), of a defendant it was always required in an action *in rem* (§ 89), but only exceptionally in an action *in personam* (§ 102). Security (*satisdatio*), when required, was given by *stipulatio* with sureties. In actions *in rem* this *stipulatio* was *iudicatum solui* if the proceedings were *per formulam petitoriam* (§ 92),[2] and if they were *per sponsionem* it was *pro praede litis et uindiciarum* (§ 91). The general effect of both was the same; it is stated in § 89.[3] In those actions *in personam* in which by exception *satisdatio* was required it was given by *stip. iudicatum solui* (§§ 25. 102).

Actio in rem per sponsionem. There is nothing to be added to Gaius' description (§§ 93–94) of the mechanism. The action was in form *in personam* for the nominal sum conditionally promised by the prejudicial *sponsio*, but it was in effect converted into an action *in rem* by means of a *stip. p. p. l. et u.* A *stip. iud. solui* would not have served, because the actual judgment would be only for the nominal sum. In all probability this device was invented before the formulary period, as a way of evading the expense and formalities of the *a. sacr. in rem*; the name of the *satisdatio* declares it to be in place of the *praedes l. et u.* of that action (§ 16). The new procedure turned the rival vindicants of a *sacramentum* into plaintiff and defendant. But this may have made no great practical difference, since in *sacramentum* the interim possessor would presumably keep the thing if both *sacramenta* were pronounced *iniusta*. Procedure *per sponsionem* may be older than the *L. Silia*, to judge by the fact that even in Gaius' day when the case raised by the *sponsio* was to go to the centumviral court (§ 31) the *l. actio* used was the *a. sacr. in personam*, not the simpler *condictio* (§ 95). Nothing is known of the *L. Crepereia*[4] in consequence of which the prejudicial *sponsio* in centumviral cases was for 125 sesterces. Per-

[1] Below, on § 182.
[2] Above, p. 259.
[3] *Edictum* §§ 281–2.
[4] Even the name has been doubted: Berger, *PW Suppl.* vii, 384.

haps the *lex* fixed this as the minimum of which the centumvirs would take cognizance. Outside this court the formulary *a. certae cr. pec.* was used (§ 93).

The exceptional cases in which security was required of the defendant to an *a. in personam* are given in § 102. We have spoken of the actions *iudicati* and *depensi*.[1] The *a. de moribus* seems to have been a way of exacting the penalties consequent on divorce caused by a wife's misconduct; usually they were obtained by deduction from the *dos* restored to her (*retentio propter mores*).[2]

§§ 103–9. Iudicia Legitima and Imperio Continentia

The distinction. A *iudicium* was *legitimum* if it was brought at or within a mile of Rome, between citizens and before a single citizen *iudex* (§§ 104. 109). It was *imperio continens* (i.e. *quod imperio continetur*) if any one of these conditions was not satisfied. The distinction is not the same as that between a civil and a praetorian action: a praetorian action would be *legit. iud.* if it satisfied the conditions, a civil action *imp. cont.* if it did not (§ 109).

Consequences of the distinction. We have already seen that as in a *l. actio* so in a *iud. legit.* a woman needed *tut. auct.*[3] and that in such an action between herself and her tutor she was given a *tutor praetorius* (1, 184); also that *legitima iudicia* were extinguished by *cap. deminutio* (3, 83).[4] Two consequences of more general importance are now mentioned.

(1) Under the *L. Iulia*[5] a *iud. legit.* was extinguished if it was not carried to judgment within 18 months from *lit. cont.* (§ 104), whereas a *iud. imp. cont.* lapsed if not carried to judgment within the term of office of the magistrate on whose *imperium* it depended (§ 105).

(2) *Lit. cont.* in a *iud. legit.* on a *formula in personam* with an *intentio iuris ciuilis*[6] extinguished the obligation sued on *ipso iure* (§ 107; cf. 3, 180–1). In other *iud. legitima* and in all *imp. continentia* the *exceptio rei iudicatae uel in iudicium deductae* was required in order to bring the principle *bis de eadem re agi non potest* into play (§ 106). From Gaius' phraseology (3, 181; 4, 106. 107. 121) it seems to be a single *exceptio*, not two, but clearly the defendant would not need both alternatives;

[1] Above, p. 247.
[2] *Edictum* § 116. On *heres suspectus*: *Edictum* § 211.
[3] Ulp. 11, 27.
[4] Cf. Girard 1099 n. 5.
[5] Above, p. 250.
[6] That is *in ius concepta* and without fiction. Taken for granted in 3, 180–1, because there only civil obligations were in mind.

either would suffice. What is puzzling is the *res iudicata* should be put first and even that it should appear at all, seeing that *res iud.* would be impossible without a previous *lit. cont.*, i.e. *res in iud. ded.* No really satisfactory explanation has been suggested. *Res iud.* would no doubt be the common case and, by comparison with *res in iud. ded.*, was a substantial and not merely a technical defence.[1]

We are thus left in no doubt as to the line of distinction and its consequences. But Gaius tells us nothing as to its *rationale* or origin, an abstruse subject on which we must touch lightly.[2] *Iudicium* here means the proceedings in a lawsuit from *lit. cont.* (cf. *iudicia accipiuntur*: §§ 104–5) to judgment inclusively. The contrast is between *iudicia* founded on *lex* and those resting on the *imperium* (discretionary power) of the magistrate. But what *lex* or *leges*? Perhaps the *Ll.Aebutia* and *Iuliae* by which the use of *formulae* in the old sphere of the *l. actiones*, namely in lawsuits at Rome between *ciues*, was first allowed and then imposed.[3] On any view there is a survival of the conditions of a primitive lawsuit between *ciues*. In classical law the distinction was a technicality which ought to have been abolished, but it survived as long as the formulary system.

Incidentally, in § 108, we are informed that the rule *bis de eadem re* operated of itself in the *legis actiones* and that the later usage of *exceptiones* did not then exist. In our view what is meant is that there were then no *exceptiones*,[4] but the meaning that there were then *exceptiones*, but used otherwise than now, has authoritative support.

§§ 110–11. Limitation of Actions by Time

Civil actions were not barred by lapse of time (§ 110). There were some exceptions; thus, by the *Twelve Tables* the so-called *a. auctoritatis* was barred by the lapse of the period of *usucapio*, obviously because it should no longer be needed; by the *L. Furia de sponsu* the lapse of two years liberated *sponsores* and *fidepromissores* in Italy (3, 121); the *praeiudicium* under the *L. Cicereia* was barred after 30 days (3, 123).

Praetorian actions were not usually granted after the lapse of an *annus utilis*. The year did not start till the first day on which an action was possible, but whether the year then ran continuously (*annus ut. ratione initii*) or only *dies utiles* (i.e. on which there was no impedi-

[1] *Edictum* p. 506; Buckland 696.

[2] Mommsen, *DPR* 1, 213; *Jur. Schr.* 3, 356. 363; Wlassak, *RPG* 1, 31; 2, 70; *Judikationsbefehl* 282; Buckland 687; Mitteis, *RPR* 35.

[3] Above, p. 250.

[4] Above, p. 231.

ment) were counted (*annus ut. ratione cursus*) is doubtful.[1] There were, however, certain important praetorian actions which were *perpetuae*, but as this depended on what the Edict said in each case it was difficult to bring them under a single principle. Gaius accounts satisfactorily for the perpetuity of the praetorian actions that he mentions (*imitatur ius ciuile*: § 111), but if a basis in civil law was the test, why was the *a. iniuriarum* only *annua*? Another suggestion, that reipersecutory praetorian actions (for compensation or restitution: §§ 6 *sq.*) were *perpetuae* and penal *temporales*, proved impracticable.[2]

§§ 112–13. Transmission of Actions on Death

The general rule[3] was that actions passed to the *heres* of the person entitled and lay against the *heres* of the person liable.

Descent of liability. The chief exception was that penal actions on delicts were extinguished by the death of the delinquent before *lit. cont.* (§ 112). The contrast with the effect of his being *cap. deminutus* (§ 77) is only superficial; the underlying principle in both cases was that the wrongdoer and he only was liable to vengeance and therefore to the substituted pecuniary *poena*. Contractual liabilities on the contrary, with the exception of those of *sponsores* and *fidepromissores* (3, 120), survived the death of the *obligatus* (§ 113), but were extinguished by his *cap. deminutio* (3, 84).

Descent of the right to sue. Here the exceptions are of minor importance. The *heres* of an *adstipulator* had no action (3, 114) and the *a. iniur.* because of its predominantly sentimental nature could not be brought by the *heres* of the injured party.

Naturally contractual obligations in which the personality of the deceased, whether as promisor or promisee, was essential were extinguished by his death.[4]

The extinction of delictual actions by the death of the delinquent was unreasonable where the 'penal' action was the only redress for economic damage caused by the delict.[5] Hence there developed gradually a principle that the *heres* of a wrongdoer could be sued to the extent that he had been enriched by the wrong.[6] But he ought to have been made liable to the extent of his enrichment by the *hereditas*.[7]

[1] Buckland 563; Girard 773.

[2] Cassius–Paul *D.* 44, 7, 35. Cf. Buckland 689–90; Levy, *Privatstrafe* 6 f.

[3] Attributed to *XII Tabb.* 5, 9 (Bruns 1, 24; *Textes* 15; *Fontes* 1, 41). Cf. Korošec, *Erbenhaftung* (1927) 52; Berger, *St. Riccobono* 1 (1933), 608.

[4] Cf. also 3, 83 *fin.*

[5] e.g. the Aquilian action: above, pp. 210, 230.

[6] Buckland 691.

[7] A post-Roman development: Rotondi, *Scr. Giurid.* 2, 520.

§ 114. Satisfaction between Litis Contestatio and Judgment

We have here a victory of common sense represented by the Sabinians over logical formalism represented by the Proculians. A few *formulae* expressly provided that the *iudex* was to condemn the defendant only if he had not satisfied the claim in accordance with the preliminary *pronuntiatio* of the *iudex*. The important example is the *formula petitoria*[1] with the words *neque ea res arbitrio iudicis Ao. Ao. restituetur*. The personal actions referred to at the end of § 114 include the *actiones ad exhibendum*, *doli* and *metus*.[2] But in the great majority of cases the effect of the *formula* was that the *iudex* was to decide on the legal position as it stood at the moment of *lit. cont.* (*acceptum iudicium*: § 114). That the defendant had subsequently satisfied the claim was irrelevant. Logically this was as true in *bonae fidei* as in *stricta iudicia*.[3] But even the Proculians did not accept it in *bonae fidei iudicia*, thereby really giving away the position. The Sabinians took the common-sense view that even in *stricta iudicia* there should not be condemnation on a claim that had been satisfied before judgment: *omnia iudicia absolutoria esse*, and this became accepted law before the end of the classical period.[4]

§§ 115–19. Exceptiones

General nature. *Exceptiones* were special defences: they did not directly negative the claim made by the *formula*, but pleaded something as a bar to the claim being enforced, something the contrary of which would not have to be proved in establishing the claim as stated and which therefore needed to be brought into the issue by the addition of a further clause to the *formula*. Thus a claim of debt could be answered without a special plea by showing that the debt did not exist, for instance that there never had been a legal debt or that it had been extinguished at law by *solutio* or *acceptilatio*. But if the defence was that the debt had been procured by duress or fraud or that subsequent events had made its enforcement inequitable, then, since the debt still existed at civil law, a special plea was needed in order to bring the defence into the issues raised by the *formula*. Otherwise the *iudex*, being limited by the *formula*, could take no cognizance of it.

[1] Above, p. 259. [2] Buckland 659.

[3] The latter term is not classical, but Krüger's restoration of § 114 no doubt gives the sense.

[4] On the theoretical justification, if any, of this view cf. Kaser, *Restituere als Prozessgegenstand* (1932) 137.

Whether special defences in any form were possible in actions between *ciues* before the *L. Aebutia* is very doubtful (§ 108).[1] At any rate in the form of *exceptiones* they belong to the formulary system, and even there they look to be a development, though, may be, a fairly early one. The earliest form of defence was perhaps *praescriptio* (§ 133).[2] We shall confine ourselves to the *exceptio* in the formulary system.

An *exceptio* was a clause inserted in the *formula* after the *intentio* in order to subordinate the *condemnatio* to a further condition, one not implied by the *intentio*. Thus if the *intentio* was itself *bonae fidei*, the *exc. doli mali* was unnecessary, since the issue of good faith was already raised: *exceptio doli mali inest bonae fidei iudiciis*. As expressing a condition of the defendant being condemned, the added clause was framed so as to contradict the defendant's contention (§ 119).[3] Nevertheless the burden of proving the *exceptio* was on the defendant: *reus in exceptione actor est*.[4] If this burden was discharged, a condition of the defendant being condemned failed just as much as if proof of the *intentio* had failed. The logical result was that the plaintiff had lost his whole case, and lost it finally. That this was the normal result can be seen from § 123, and the better opinion is that this is the true classical law.[5] The texts which appear to show that in some cases *exceptiones* might merely reduce the condemnation have, it is thought, been tampered with or refer to non-formulary procedure.[6]

All *exceptiones* were praetorian in the sense that they depended on the praetor's control of the *formula* and in the end on his power to refuse to grant a *formula* not containing the *exceptio*. They were either propounded in the Edict or were specially drafted to meet the case in̄ hand and granted by the praetor after consideration (*causa cognita*: § 118).[7] Moreover, the great majority of them were praetorian in the sense that they rested on praetorian equity, which is the general ground taken by § 116. The *exceptio* was in fact one of the most effective

[1] Above, pp. 231, 278.

[2] But this text is not decisive. The real argument is that whereas *praescriptio* harmonizes perfectly with the *formula*, *exceptio* looks like a clumsy addition made after the *formula* had been consolidated: Girard 1094 n. 1; Buckland 657.

[3] Generally therefore in the negative, but not always: *Edictum* p. 503. In the translation of § 119 (Part I p. 281) for 'negative' substitute 'contradictory'.

[4] Ulp. *D.* 44, 1, 1. 22, 3, 19 pr. Wenger, *ZPR* 186.

[5] Girard 1097; Buckland 655; Solazzi, *BIDR* 42 (1934), 268.

[6] Paul *D.* 44, 1, 22 pr. The obvious case pointing to mere diminution of the claim is the *exceptio doli* when used under M. Aurelius' rescript (above, p. 267) to make a counterclaim, but the matter is obscure.

[7] A few of those propounded (e.g. the *exc. iusti dominii*: above p. 67) were by the terms of the Edict also granted only *causa cognita*.

instruments by which the praetor under the inspiration of jurisprudence was able progressively to civilize the law. Some *exceptiones*, however, rested on legislative enactment (§ 118); this merely means that sometimes the legislator found this familiar praetorian technique convenient for his purpose.[1]

§ 116a. Exceptio doli mali. This *exceptio*, introduced by Cicero's contemporary Aquilius Gallus,[2] proved perhaps the most important and far-reaching reform in Roman legal history,[3] the most effective weapon in establishing the victory of *ius aequum* over *ius strictum*. The *exceptio* said: *si nihil dolo malo Ai. Ai. factum sit*, but added: *neque fiat* (§ 119). Thus the *dolus* in question covered not only fraud in procuring the transaction impugned (styled by later commentators *dolus praeteritus* or *specialis*), but also dishonesty consisting in the fact of suing (*dolus in agendo*, *praesens*, *generalis*). Thus we have seen the *exceptio* used in order to convert *bon. possessio* into *b. p. cum re* and again as a way of raising a counterclaim.[4] The present § 116a gives a striking illustration.

The *stipulator* might have obtained the promise honestly and his failure to make the intended advance might have been involuntary, but as matters had turned out it was *dolus* for him to seek to enforce the promise. Now this is a revolutionary change. At civil law a promise by *stipulatio* was independent of anything not included in the spoken words. One does not make engagements without a reason, but failure of what we should call consideration did not affect the validity of the obligation. In effect the *exceptio* turned *stipulatio* into a causal contract.

A further point is that the *dolus* must be the plaintiff's own (*Auli Agerii*). It was not available against one who had taken for value from the fraudulent party.

§ 116b. The effect of a *pactum de non petendo* has already been considered.[5] Ordinarily *exceptiones* were open to any defendant, but a *pactum* might be worded so as to confine the benefit of an *exceptio* based on it to a particular person.[6]

§ 117. As examples of *exceptio* against an *a. in rem* may be mentioned the *exc. rei uenditae et traditae* available to a bonitary owner against

[1] *Edictum* p. 513; Buckland 653; Wenger *ZPR* 145.

[2] Cic. *de off.* 3, 14, 60. Above, p. 165.

[3] For a very wide view of its operation cf. Sohm–Mitteis–Wenger, *Inst. d. r. R.* (ed. 17, 1923) 705–7 (Ledlie's trans., 1907, 279).

[4] Above, p. 94 and p. 267. More widely: *dolo facit qui petit quod redditurus est* (Paul *D.* 44, 4, 8 pr.).

[5] Above, p. 191.

[6] Distinction of *pactum rei* or *personae cohaerens*: Buckland 573–4.

the Quiritary owner's *uindicatio* and the owner's *exc. iusti dominii* against the *a. Publiciana.*[1] The *exc. metus* alluded to here ran: *si in ea re nihil metus causa factum est.* Unlike the *exc. doli* it did not name the plaintiff, but was available against anyone who was seeking, consciously or not, to profit by the *metus.*

§ 117a. The *exc. rei litigiosae* gave effect to an edict of Augustus ordaining that a purchase of a thing known to be the subject of litigation (*litigiosa*, i.e. after *lit. cont.*) from a non-possessor was to be of no effect.[2] The *exceptio* shows that property was nevertheless considered to pass by the conveyance. As the conveyor was a non-possessor, the conveyance must have been a *mancipatio* of land.[3]

§§ 118–19. These sections have already been commented on. Not to be overlooked are the words (§ 119): *omnis exceptio obicitur . . . a reo.* In spite of the praetor's control the *formula* was the work of the parties.

§§ 120–5. Exceptiones Peremptoriae and Dilatoriae

A dilatory exception was one which up to *lit. cont.* the plaintiff could evade by delaying *lit. cont.* (*exc. dilat. ex tempore*: § 122, the natural meaning) or by dropping or changing a *cognitor* or *procurator* (*exc. dilat. ex persona*: § 124). Thus if the defendant asked for an *exc. dilat.* the plaintiff had to consider whether he would not do well to defer *lit. cont.* or to change his tactics (§ 123). A peremptory exception (§ 121) was one which left the plaintiff no choice but to withdraw his action or face the exception.

Once an exception had been incorporated in a *formula* accepted by *lit. cont.*, it did not matter in strict principle whether it was peremptory or dilatory. In either case if it succeeded the plaintiff, as we have said, lost his case and lost it finally (*rem perdit*: §§ 123–4). Equally the defendant, if he accepted a *formula* not containing an essential exception, threw away his case, but subject to the qualification that unlike the plaintiff he might be able to get *restitutio in integrum* (§ 125; cf. § 57). The praetor would grant him this *causa cognita*,[4] i.e. on being satisfied that the omission was due to reasonable mistake, provided that the omitted *exceptio* was *peremptoria*, but not, as was settled after Gaius' time, if it was *dilatoria* (§ 125). The effect of *rest. in int.* would

[1] Above, p. 67.

[2] Ulp. *D.* 44, 6, 1; *Fr. de iure fisci* 8. Cf. Buckland 722 n. 9; Wenger, *ZPR* 172 n. 25d.

[3] Above, p. 58.

[4] A formality according to Kipp, *SZ* 1921, 335; but cf. Wlassak, *Die klass. Prozessformel* 150.

be to nullify the previous proceedings *iure praetorio*, so that, if the plaintiff still persisted, there would have to be a fresh *lit. cont.* with a new *formula* containing the *exceptio* (§ 125).

Peremptory exceptions. The examples in § 121 are already familiar. But with regard to the *exc. doli mali* it is to be noticed that Gaius' words here, taken strictly, cover only *dolus praeteritus* (*quod dolo malo factum est*), not *dolus in agendo* (*neque fiat*: § 119).[1] Elsewhere, however, Gaius[2] speaks simply of the *exc. doli mali*. Probably here he was merely abbreviating, not implying that only the *exc. doli praeteriti* was peremptory. But this is not at all certain, because one can think of various circumstances in which a plaintiff threatened with an *exc. doli praesentis* would be able to forestall it before *lit. cont.* In the case put in § 116a he might make the advance, though he would have no motive for doing so unless it was smaller than the sum promised by the *stipulatio*. A plaintiff threatened with the *exc. mercis non traditae* might make the *traditio*. The threat of a counterclaim being raised by *exc. doli mali* under the rescript of M. Aurelius[3] might induce him to settle the counterclaim before he proceeded with his claim.

Dilatory exceptions. Thus if any and every exception that could be avoided by a change of tactics is properly called dilatory, one could add considerably to the examples mentioned in §§ 122 and 124. Among those mentioned the *exc. rei residuae* is puzzling. If I have several claims against a man, what justification can there be for putting pressure on me to proceed on all of them at once and have them all tried by the same *iudex*? We need further information. The best conjecture[4] is that the hypothesis of the *exceptio* is that I have not merely several possible claims, but several *lites* in progress, but not yet *contestatae*, against the same man, and that the cases are so connected with each other that convenience and perhaps even justice require that they should all be tried together. I am not to be allowed to embarrass the defendant by holding back some of them.

§§ 126–9. Replicatio, Duplicatio, etc.

These are further clauses that could be added to the *formula* after an *exceptio* alternately in the interest of plaintiff and defendant: *replicatio* answers *exceptio*, *duplicatio* answers *replicatio*, and so on (§ 128). The most notable point is that Gaius repeatedly bases them

[1] Above, p. 282.
[2] Or Justinian: *D.* 44, 1, 3.
[3] Above, p. 267. Cf. Kipp, *SZ* 1921, 326.
[4] Buckland, *RH* 1932, 301.

on equity. Apart from context *iustum* is ambiguous; it can mean 'fair' or 'right', but also simply 'in accordance with the law'. But *iniquum* (§ 126) is unambiguous.

The formulation of the two examples of *replicatio* as given by the text is not the same. That of the *replicatio pacti posterioris* in § 126 can hardly be correct pleading, but since it expresses the common sense of the matter it may be what Gaius wrote.[1] That in § 126a (*aut si praedictum* &c.) is in the regular form.

The case in § 126a is of special interest. If we suppose the *argentarius* to be suing *ex uendito*, what need is there of the *exc. mercis non traditae*? How could the price be due *ex fide bona* unless there had been delivery of the thing made or offered? If the *argentarius* was relying on a special term in the contract, surely this would be held to be incorporated in the contract pleaded by his *formula*? Lenel explains that we are dealing with special law affecting bankers.[2] But Girard points out that the practice of bankers when selling by auction was to take a promise of the price by verbal contract. If the action supposed in § 126a is on a verbal contract, all difficulty disappears. One sees no reason why sellers other than bankers should not, if they chose, have secured themselves in the same way; if they did so, buyers might need the *exceptio*.[3]

§§ 130–7. Praescriptiones

The term *praescriptio* implies that the *formula* was a document,[4] but as to the clause denoted tells us no more than its position, which was at the head of the *formula* after the name of the *iudex* (§ 132). *Praescriptio* in this sense has nothing to do with the later usage of the term as a general name for any objection or defence. *Praescriptio longi temporis*, for example, does not belong to the classical formulary system.[5]

Gaius distinguishes between *praescr. pro actore* (§§ 130–1a. 134–7) and *pro reo* (§ 133). The illegible page after § 133 must have contained more about *praescr. p. reo* before it returned, by a train of thought which is irrecoverable, to *praescr. p. actore*.

[1] Cf. Part I p. 284 n. 2.

[2] *Edictum* pp. 503–4. Biondi, *Iudicia bonae fidei* (1920) 43 n. 1, says that the inherence of various exceptions in *b.f.* actions was only gradually established.

[3] Girard 567 n. 4. 570 n. 1. Iul. *D.* 19, 1, 25 is best so explained. The *exceptio* is given there: *si ea pecunia qua de agitur non pro ea re petitur quae uenit neque tradita est.*

[4] Above, p. 251 n. 3.

[5] Above, p. 70. Cf. Partsch, *Longi temp. praescr.* (1906); Wlassak, *SZ* 1912, 82.

§ 131. If a man in claiming only part of his rights under a contract, the rest not having yet fallen due, used a *formula* with an *intentio certa*, he incurred no risk of not being able thereafter to sue for the rest of his rights (§ 56). But if his *intentio* was *incerta* (*quidquid ob eam rem dare facere oportet*) he would, unless he was able to limit the scope of the *lit. cont.*, bring the whole of the contract alleged in his *demonstratio* into issue and would have no further right of action on it left. The *praescr.* given in the text was his means of making the necessary limitation. One does not see why the plaintiff in the illustration did not claim the money due as *pecunia certa*; perhaps he could not have done so on a contract for payment by instalments. And it is not explained why the required limitation was not obtained, as in § 136, by simply adding *cuius rei dies fuit* to the *demonstratio*.[1]

§ 131a. The second example of *praescr. p. actore* has a special interest.[2] If the action *ex empto* is, as one naturally thinks, the *b. f.* action on a consensual *emptio uenditio*, the text supports the common opinion that such a contract imposed on the seller of a *res mancipi* a duty *ex fide bona* to mancipate the thing distinct from the duty of delivering vacant possession. The text, however, proceeds to give an *intentio* without the words *ex fide bona*. Gaius probably meant them to be understood, but their omission makes it conceivable that the sale is supposed to have been completed by a *stipulatio* which provided expressly for both *mancipatio* and *uacuae possessionis traditio*.[3]

Passing over § 133 for the moment, we come in §§ 134–7 to *praescriptiones p. actore* having a close affinity to *demonstrationes*. As we have seen, *demonstratio* (§ 40) also had the function of defining the scope of the *formula*, so that logically the same result could be obtained by either *praescr.* or *demonstr.* Thus the *praescr.* spoken of in § 134, the lost terms of which presumably included *cuius rei dies fuit*, must have defined the ground of the action as being a stipulatory promise made to the plaintiff's slave. So far as we can judge this could equally have been done by a *demonstratio*, which is how a slave's contract was pleaded in actions (praetorian however) against his *dominus*.[4]

In § 136, on the other hand, we find the *praescr.* of § 131 transformed into the clause *cuius rei dies fuit* appended to the *demonstratio* of an *a. ex stipulatu*, which action is also that supposed in § 131. The

[1] Kniep, *Praescr. u. Pactum* (1891) 13, thinks that the form given in § 131 was obsolete and just copied by Gaius from an older model. But the cases in §§ 131 and 136 are not identical.

[2] Zulueta, *Sale* 36–37.

[3] cf. Biondi, *Iud. b. f.* 254.

[4] Above, p. 269 *Edictum* is silent as to § 134.

words *loco demonstrationis* indicate the placing; in spite of Gaius' language the clause is no longer a *praescr.* (§ 132).[1] Gaius gives no reason, and we can find none,[2] why, when the same form of action was used against a surety, what might obviously have been a *demonstratio* was put as a *praescr.* (§ 137).

Praescr. p. reo (§ 133). In the past there had been various (*quaedam*) *praescriptiones* in favour of the defendant. One example is given, and we are told that it had been turned into an *exceptio*. Further examples may have been given in the lost passage that followed. They too must have been turned into *exceptiones* or have disappeared altogether. The most probable cases are certain other *exceptiones* directed to preventing the determination of a major claim incidentally to the trial of a minor claim (*praeiudicium*).[3]

It is an interesting problem[4] whether the change from *praescr.* to *exceptio* was more than a change of form. We know that the success of an *exceptio*, even *dilatoria*, meant the final defeat of the plaintiff, because the right on which he had proceeded had been extinguished by *lit. cont.* One view is that the effect of a successful *praescr. p. reo*, when such existed, had been the same; Gaius certainly gives no hint to the contrary. But another view, preferable because of the analogy of the effect of *praescr. p. actore*, is that its effect had been merely to establish that no case had been sent to be tried and that the *lit. cont.* was a nullity.

If we accept this second view we can conjecture a genealogy of the classical *exceptio*, that is, of its form, not of individual *exceptiones*. We start under the *l. actiones* with the primitive principle of unity of issue and no special defences. But even in this period a power of *denegatio actionis* is hardly to be denied to the magistrate. He might refuse to co-operate in an action which according to the law the plaintiff would win, but which public policy or equity required that he should not win. This would not affect the plaintiff's legal rights; he could try again under another praetor. But *denegatio actionis* involved personal *cognitio* by the magistrate. Hence the invention of *praescriptio* as a means, at any rate in some cases, of throwing on the *iudex* the burden of deciding whether or not the action should be refused. If a *praescr.* succeeded, there would be no *res in iudicium deducta*

[1] The translation (Part I p. 289) 'in place of a *demonstratio*' will not do. But a satisfactory translation is hard to find. To paraphrase is easy enough: Wlassak, *SZ* 1912, 89 n. 1.

[2] Cf. *Edictum* pp. 153–4.

[3] Buckland 648.

[4] Buckland 649; Wlassak, *SZ* 1912, 84 f.

precisely as would have been the case if there had been *denegatio* by the praetor. *Exceptio*, which seems to be a later device,[1] operated on the contrary as a condition on the *condemnatio*. Whichever way it was decided, there would have been *res in iud. ded.* Its invention may have given the death-blow to *praescr. p. reo*. Henceforward new defences were given as *exceptiones* and the existing *praescriptiones p. reo* were turned into *exceptiones*. If these conjectures are correct, *praescr.* was the bridge between *denegatio actionis* and *exceptio*. But a reserve power of *denegatio* continued throughout the formulary period.

§§ 139–42. Interdicts: General Nature

The key-word in § 139 is *principaliter*: an interdict emanated from the praetor's high executive power,[2] not from his *iurisdictio*. Hence it could be issued on a *dies nefastus* (§ 29) and, in contrast to the *formula* of an action, was worded as an order to the parties. Of course not every individual administrative order would be called an interdict; some standardization is implied: *formulae et uerborum conceptiones quibus in ea re praetor utitur.*

Rudimentary interdicts appear quite early, but the great wealth of interdicts in the classical period is a post-Aebutian development. Gaius makes no attempt at a comprehensive survey.[3] He just mentions the main classification into exhibitory, restitutory, and prohibitory interdicts (§§ 140. 142. 156). The two former were sometimes called *decreta* (§ 140; *Inst.* 4, 15, 1). Exhibitory interdicts, ending *exhibeas*, ordered the production of a person or thing, usually of a free person said to be improperly detained (e.g. § 162);[4] restitutory, ending *restituas*, ordered usually the restoration of a thing or state of affairs (e.g. possession: *Unde ui*, § 154), but also, it might be, a first handing over (e.g. *Quorum bonorum*, § 144);[5] prohibitory, ending *ueto*, generally *uim fieri ueto*, ordered abstention from some conduct (e.g. *Uti possidetis* and *Utrubi*, §§ 148 *sq.*).

Gaius' principal concern is with interdicts dealing with possession, which, he remarks, were the most important in practice. The remark,[6] being parenthetical, could be a later addition to Gaius, and that it is

[1] Above, p. 281 n. 2.

[2] So did *missio in poss.* (e.g. 3, 78), *rest. in int.* (e.g. 2, 163; 4, 38), and *stipulationes praetoriae* (e.g. *damni infecti*: 4, 31).

[3] Cf. *Edictum Tit.* XLIII and p. 45.

[4] Buckland 731.

[5] Cf. the use of *restituere* in 2, 248 *sq.*: Daube, *RDA* 1951, 24 n. 2.

[6] § 139: *quod tum maxime facit cum de possessione aut quasi possessione inter aliquos contenditur.*

this has been argued[1] from the phrase *quasi possessio*, which it is claimed is impossible in a classical jurist. But quasi-possession is so apt in reference to the interdictal protection of the *de facto* enjoyment of rights less than ownership, especially usufruct,[2] that the argument is far from convincing.

The description of interdicts as administrative orders to parties, though formally correct, is nevertheless substantially misleading for the classical period. It may be that the procedure was originally purely administrative and that the magistrate having examined the case gave a final order which he would enforce if need be by administrative coercion. But the classical interdict was far from being a final order (§ 141). The complainant, having brought the other party before the praetor, got his interdict as of course, but it was in effect only a conditional order. Whether it applied to the party addressed or, in a double interdict (§ 160), to which of the parties, depended on the verification of their allegations. This question could have been examined by the praetor or his deputy, and that was probably the early procedure. But in historical times the duty of verification was thrown on to an ordinary *iudex priuatus* by means of a very characteristic device. The parties entered (by compulsion if necessary: § 170) into reciprocal *sponsiones* of penal sums so framed that liability to the penalty depended on the decision of the precise question raised by the interdict: *an aliquid aduersus praetoris edictum factum sit uel an factum non sit quod is fieri iussit* (§§ 141. 165). Liability under the *sponsiones* was tried by ordinary civil actions, and the decision on them was treated as settling the question under the interdict.

This device was in all probability the first step in the process of bringing the interdicts into the general framework of civil remedies. The *sponsiones* may at first have been the only sanction of the interdicts: they were for serious sums, not merely prejudicial.[3] Later, as we think, under the formulary system, they were reinforced by a *iudicium secutorium*[4] which stands in much the same relation to the penalties of the *sponsiones* as the *condictio furtiua* to those of an *a. furti*. Furthermore, it became possible for the defendant under an exhibitory or restitutory but not a prohibitory interdict to avoid the penal *sponsiones* and have the simple question whether he had disobeyed the interdict tried by an *a. arbitraria*.[5] It is hard to understand why this sensible procedure was not generalized, but it was only in the

[1] By Albertario. But cf. Riccobono, *SZ* 1913, 251 and Bonfante, *Corso* 3, 163.
[2] *F.V.* 90–2.
[3] *Edictum* pp. 450. 471.
[4] Below, p. 297: §§ 165. 166a.
[5] Below, p. 295: §§ 141. 162–4.

post-classical period that the old interdict procedure was replaced by an *a. utilis ex causa interdicti* (*Inst.* 4, 15 pr. 8).

§ 142. Possessory interdicts. The interdicts for obtaining possession were not possessory in the same sense as those for retaining and recovering possession. They did not turn on previous possession. On the contrary, if the claimant had previously obtained possession and lost it, they were no longer available to him (§ 144 *fin.*).

§§ 143–7. Possessory Interdicts. a. Adipiscendae possessionis causa

Four interdicts are mentioned.

§ 144. Quorum bonorum ran:[1] *Quorum bonorum ex edicto meo illi possessio data est, quod de his bonis pro herede aut pro possessore possides possideresue si nihil usucaptum esset, quodque dolo malo fecisti uti desineres possidere, id illi restituas.* The clause *possideresue si nihil usucaptum esset* is due to the *SC.* of Hadrian nullifying the effect of *usucapio p. herede* (2, 57) and the clause *quodque dolo — possidere* to the *SC. Iuuentianum* of A.D. 129.[2] The omission of both clauses from Gaius' summary as it stands in our manuscript would be perfectly natural in an elementary work. That seems to us now the best explanation. But the fact that the manuscript reads *possideret* where we should expect *possidet* (or *possideat*: *Inst.* 4, 15, 3) raises a doubt. It may be a copyist's slip, but if not, something must have dropped out of the text.[3]

The general effect of this meticulously drafted interdict has been considered in connexion with *bonorum possessio*.[4] The plaintiff had to show the grant of *b. poss.* to himself and that the grant was in accordance with the Edict which, since grants were made as of course, might not be the case. He had further to show that the property of which he was seeking possession (*res corporales* only, therefore) was part of the deceased's estate. Moreover, the interdict operated only against a defendant who held *pro possessore* (i.e. without claiming any title) or *pro herede* (i.e. claiming honestly to be the deceased's *heres*).[5] A defendant *p. herede* might really be *heres*, but that was no answer to *Quorum bonorum*. He could assert his right only as plaintiff in a *hereditatis*

[1] Ulp. *D.* 43, 2, 1 pr. *Edictum* p. 452.

[2] *D.* 5, 3, 20, 6. Girard 956. 959. 962–3.

[3] Part I p. 290 adopts the latter view from Huschke-Kübler, but it would have been sounder to keep it in the footnotes.

[4] Above, pp. 94, 134.

[5] The words *p. herede* did not cover holding under an alleged legacy from the deceased (*pro legato*). This was dealt with by a supplementary interdict *Quod legatorum* (*Edictum* § 228.)

petitio. According as he failed or succeeded in that the *bon. poss.* would be shown to be *cum* or *sine re*.

§§ 145–6. We have no special information as to the *interdictum possessorium* of a *b. emptor*[1] or as to the *interdictum sectorium* of the buyer of the estate of a public debtor.[2]

§ 147. A farmer might agree that all property of his brought on to the land (except in passage) and the crops when they had become his by *perceptio*[3] should be security for rent due but unpaid. The *interdl. Saluianum* enforced the landlord's right of seizure against the farmer.[4] It is historically important as being the earliest sanction of real security being given without ownership or possession being transferred to the creditor.[5]

§§ 148–53. Possessory Interdicts. B. Retinendae possessionis causa

Gaius discusses the two chief interdicts of this class. Let them speak for themselves.

Uti possidetis: *Uti nunc eas aedes quibus de agitur (or eum fundum q. d. a.) nec ui nec clam nec precario alter ab altero possidetis, quo minus ita possideatis uim fieri ueto.*[6]

Utrubi: *Utrubi uestrum hic homo* (or other *res mobilis*) *quo de agitur maiore parte huiusce anni nec ui nec clam nec precario ab altero fuit, quo minus is eum ducat uim fieri ueto.*[7]

Uti poss. protected the existing possession of land or buildings, whereas *Utrubi* allotted the possession of a chattel to the party who had held it longer than the other during the preceding 12 months, the possession of his predecessors in title (§ 151) being added to his own. But there is a very important qualification: possession obtained by one party from the other by force, clandestinely, or by licence was neither

[1] Above, p. 134.

[2] *Edictum* §§ 233–4.

[3] Above, p. 173.

[4] *Edictum* § 266; Buckland 475. Cf. now Daube, *RDA* 1951, 46 ff.

[5] Above, p. 75.

[6] So Ulp. *D.* 43, 17, 1 pr., but without *nunc*, which is not strictly needed, though probable from §§ 160. 166a. Cf. *Edictum* p. 470.

[7] Cf. *Edictum* p. 489. Obsolete in later law: *Inst.* 4. 15, 4a. From the summary form given in § 160 Mommsen excluded *apud quem* as a gloss on the unfamiliar *utrubi*. Partsch, *SZ* 1910, 434, dissented, but Fraenkel, *SZ* 1934, 312, has shown that Mommsen was right. Unfortunately in the interval Partsch had been followed by Lenel, *Edictum* p. 489, and Girard 302, not, however, by Buckland 734. Two points of phraseology are notable: the term *possidere* is not used, and the victor is to be allowed *ducere*, which implies that the thing was in court. So Daube, *RDA* 1951, 32 ff.

maintained by *Uti poss.* nor reckoned under *Utrubi* (*exceptio uitiosae possessionis*). That it had been so obtained from anyone except the other party was, however, irrelevant. In Paul's emphatic words: *Iusta an iniusta aduersus ceteros possessio sit in hoc interdicto nihil refert: qualiscumque enim possessor, hoc ipso quod possessor est, plus iuris habet quam ille qui non possidet.*[1] As Gaius (§ 150 *fin.*) observes, the *exc. uitiosae possessionis* explains itself. Though old, it is probably an addition to the earliest forms of the interdicts, made perhaps in order to avoid collision with the interdicts *recup. poss. causa.* It has the result of giving the interdicts possibly a recuperatory effect. And apart from that, the classification of *Utrubi* as *retinendae poss. c.* is not strictly accurate.[2]

In classical times *Uti poss.* and *Utrubi* were chiefly used for settling which of the two parties to a *uindicatio* should have the advantage, as possessor, of being defendant (§ 148; *Inst.* 4, 15, 4), and there is no reason to doubt Ulpian's view[3] that this was their original purpose. Though in the *a. sacr. in rem* the parties were not plaintiff and defendant, the interim possession had to be regulated. In the absence of evidence we can only assume that from the practical point of view the interim possessor was in the same favourable position as a defendant in the later real action. Interim possession was allotted by the praetor (*uindicias dicere*: § 16) apparently as he thought fit. But the matter was too important to be treated arbitrarily. The interdicts *Uti poss.* and *Utrubi*, it is conjectured, embody the rules for allotting possession which the praetor evolved for himself in the course of practice. *Uti poss.* adopts the natural presumption in favour of the actual possessor. What rational principle underlies *Utrubi* is a mystery. A recent suggestion[4] is that the comparative instability of possession of movables made *Uti poss.* unsuitable for them, at any rate till the *exc. uit. poss.* had been added. In post-classical times *Utrubi* was dropped and *Uti poss.* generalized (*Inst.* 4, 15, 4a).

No question of title was allowed to arise under the interdicts: *separata esse debet possessio a proprietate.*[5] But though this is a fundamental historical fact in Roman law, it is not a principle of universal validity. So far as the interest of the question of possession lies in its possible effect on the decision of the question of ownership, there need not be separate possessory and petitory actions. It is only neces-

[1] *D.* 43, 17, 2. Cf. Venuleius *D.* 41, 2, 53.
[2] Defended, however, on historical grounds by Daube, *RDA* 1951, 35 ff.
[3] *D.* 43, 17, 1, 2. 3.
[4] Daube, *l.c.*
[5] Ulp. *D.* 43, 17, 1, 2.

sary to put the burden of proof in a petitory action on the party who would be defeated in a purely possessory action or to allow title to be pleaded in a possessory action.

The question what constitutes possession must have arisen earliest in connexion with *usucapio*, but it was posed with special distinctness by the interdicts. No doubt it was at first answered empirically, case by case. Thus, when the advance of jurisprudence produced a demand for a general definition, the problem was to discover what principle underlay already established decisions. That the problem proved strictly speaking insoluble need not surprise us. It was impossible to frame a definition of possession to which there were no exceptions. Is physical possession (detention in the convenient modern usage) in principle, though with exceptions on practical grounds, possession, or does possession in principle, again with exceptions on practical grounds, require besides detention a mental attitude to the thing? The concrete decisions are not in dispute, but they can be summed up in either of the two ways. The controversy is really as to which of the two points of view was Roman, and there is no reason why that should have always been the same. A hint of Gaius' own point of view may perhaps be gleaned from § 153. If my land or house is held by a tenant or my chattel by a depositary or borrower, its possession is in me, not them. Why so, except that I have the mental attitude of an owner (*animus domini*, or *dominantis*, in later phraseology), whereas they, holding *alieno nomine*, have not? Furthermore, if I leave my thing temporarily unoccupied, I may retain possession of it by mere *animus*, though this would not suffice for acquiring possession.

§§ 154–5. Possessory Interdicts. C. Reciperandae possessionis causa

The only interdict of this class dealt with is *Unde ui*. Its two classical forms have been reconstructed as follows:

(*De ui cottidiana, non armata*) *Unde in hoc anno tu illum ui deiecisti aut familia tua deiecit, cum ille possideret, quod nec ui nec clam nec precario a te possideret, eo illum quaeque ille tunc ibi habuit restituas.*[1]

(*De ui armata*) *Unde tu illum ui hominibus coactis armatisue deiecisti aut familia tua deiecit, eo illum quaeque ille tunc ibi habuit restituas.*[2]

Both forms applied to eviction from land (*Unde*) but not from movables other than those incidentally involved in the ejection from

[1] *Edictum* p. 465. [2] *Edictum* p. 467.

the land (*quaeque ille tunc ibi habuit*). The first lay when the force used, though real, was unarmed, the second when it was armed. The second is consequently stiffened by the omission of the *exc. annalis* (*in hoc anno*) and of the *exc. uitiosae poss.* The presence of the latter in the first form implies that a man might retake by force what had been taken from him *ui*, *clam* or *precario* (§ 154).

Not being applicable to dispossession from movables, *Unde ui* did not overlap with *Utrubi*, which could itself be recuperatory and which, though not expressly limited to a year, would become ineffective by the lapse of that period and quite possibly of 6 months or even less. The forcible seizure of movables except under a *bona fide* claim of right would ground an *a. ui bonorum raptorum* (3, 209) within a year or an *a. furti* and the *condictio furtiua.*[1]

But *Unde ui* might overlap with *Uti poss.*, owing to the presence in the latter of the *exc. uit. poss.* How the choice was made when either interdict was open is difficult to say. *Unde ui* had the advantages of covering movables taken with the land, of being available to the *heredes* of the person ejected, and of lying against those of the ejector to the extent of their gain.[2] On the other hand, possession recovered by *Unde ui* was reckoned a new possession, so that if it is true[3] that possession recovered by *Uti poss.* was reckoned a continuation of the previous possession, it would be more advantageous than *Unde ui* where *usucapio* was running.

The origin of this overlapping is thought to be the fact that *Uti poss.* did not at first contain the *exc. uit. poss.* and that this was inserted in order to avoid collision between it and the recuperatory interdicts. This leads one to expect two further interdicts *recip. poss. causa* corresponding to *clam* and *precario* in the *exceptio*. There was in fact an interdict *de precario*,[4] but if an interdict *de clandestina poss.* ever existed, all clear trace of it has disappeared; it was certainly not in Julian's stereotyped Edict. But the analogy of *Unde ui* and *De precario* makes it probable that at one time it had existed. If so its suppression may have been due to the establishment of a doctrine as to the loss of possession which practically excluded loss of possession of land *clam.*

In § 155 the sentence *nam propter — possessionem* says what is so obvious as to be hardly worth writing. Moreover, if *actionem* has been correctly read, the phraseology is untechnical in a classical writer,

[1] Above, p. 207. [2] *Edictum* p. 466.

[3] The point is doubtful: Buckland 735 n. 7; Girard 304 n. 2.

[4] *Quod precario ab illo habes aut dolo malo fecisti ut desineres habere, q. d. r. a., id illi restituas: Edictum* p. 486.

though not impossible. Hence the sentence has been pronounced a gloss by some writers.[1] Its only interest is that by describing *uis* as a *delictum* it reminds us that from the beginning of the Empire the use of violence to assert one's right was punished as a crime.[2]

§§ 156–60. Simple and Double Interdicts

Gaius' exposition of the distinction suffices. It will be illustrated in the account of interdict procedure. The only double interdicts were some of the prohibitory, one might almost say only *Uti poss.* and *Utrubi.*[3] The shortened forms of these given in § 160 contain all that Gaius needed to illustrate his point. No other explanation of the omission of the *exc. uit. poss.* is required and none holds water.[4]

§§ 161–70. Procedure under Interdicts

Those who find these sections stiff reading can console themselves with the reflection that they have before them practically all the surviving evidence. But the text is imperfect. The account of procedure under restitutory and exhibitory interdicts (§§ 162–5) is complete except at the end, but that of procedure under simple prohibitory interdicts, which must have followed, is entirely lost. When the text resumes in § 166 the account of procedure under double interdicts has already begun; enough of that, however, remains to enable a fair picture to be formed. The account of secondary interdicts (§ 170) breaks off before its end. The gap that follows (§§ 170–1) is considerable.

There were two forms of procedure, *per sponsionem* and *per formulam arbitrariam.* Let us dispose of the latter first, as being exceptional.

Procedure per formulam arbitr. (§§ 162–5). The defendant to a restitutory or exhibitory interdict (§ 141) could have the ordinary procedure by penal *sponsiones* replaced by a penaltiless *a. arbitraria*, provided that he applied for an *arbiter* before leaving court, immediately on the issue of the interdict (§ 164). If he did this, the question whether he was bound by the interdict to make restitution or exhibition was cast into a *formula arbitraria* and sent for trial by a *iudex.* By the terms of this *formula* he was to be condemned in damages

[1] Albertario, *Studi* 3, 161; Beseler, *SZ* 1927, 359. But cf. *Edictum* p. 477; Riccobono, *Festschr. Koschaker* 2, 372. 379.

[2] *Inst.* 4, 18, 8. Later legislation: Girard 1026 n. 2. *Inst.* 4, 2, 1. 4, 15, 6.

[3] Buckland 740 nn. 2. 3.

[4] Such as that Gaius has carelessly given pre-Julian forms, or that in Julian's forms the *exceptio* was not an integral part of the interdicts. Cf. Ciapessoni, *Appunti sul testo edittale degli interdetti Uti Poss. e Utrubi, Studi Albertoni* (Padua 1937) 2, 31.

(*quanti ea res erit*) only if he did not comply with a preliminary pronouncement by the *iudex* that restitution or exhibition was due from him (§ 163). The unsuccessful party, plaintiff or defendant, incurred no penalty in the action itself, but, as in actions generally, a defeated plaintiff was liable in a *iudicium calumniae* for one-tenth value if he could be shown to have instituted the proceedings in bad faith (§§ 163. 174 *sq.*).[1] Proculus' opinion that in the present case the *iud. cal.* ought not to be allowed had been overruled. We doubt if he is fairly reported (§ 163) as having argued that a defendant's request for an *arbiter* implied an admission that he was in the wrong. The most that the request necessarily implied would be that the plaintiff had a *prima facie* case. Proculus perhaps argued that this admission ought to estop the defendant from charging the plaintiff with bad faith.

Procedure per sponsionem under simple interdicts. This was the only procedure under a prohibitory interdict (§ 141), and under a restitutory or exhibitory interdict it could be avoided only in the way we have said. It was in effect a bet as to whether or not the defendant had contravened the interdict. Each party by *sponsio* promised the other a sum of money[2] if his contention should prove to be wrong. A *formula* was taken out on each of the two civil causes of action created by the *sponsiones*, but as the two *formulae* raised the same question—whether or not the defendant had contravened the interdict—they were tried simultaneously by the same *iudex* or *recuperatores*. The *sponsiones*, however, were purely penal; they did not give a successful plaintiff specifically what he had claimed by the interdict. Hence, if the interdict was exhibitory or restitutory, there issued along with the two *formulae* on the *sponsiones* a third *formula* entitling the plaintiff, if he succeeded on the *sponsiones*, to have the defendant condemned in damages (*quanti ea res erit*) unless the latter *arbitratu iudicis* (*formula arbitraria*) made the required exhibition or restitution (§ 165). We must assume that there was likewise a consequential *actio arbitraria* under a simple prohibitory interdict, but Gaius' account of it has been lost. Of its existence there is little doubt in view of the *iudicium Cascellianum siue secutorium* under a double (prohibitory) interdict (§ 166a), but it may have had special features.[3]

Thus under simple interdicts there were three actions, the two on the *sponsiones* and the *iudicium* which we may call *secutorium*, all decided simultaneously.

Procedure under double interdicts (§§ 166–9). This means

[1] Below, p. 299.

[2] Considerable: *Edictum* pp. 450, 471.

[3] Cf. *Edictum* p. 451.

practically procedure under *Uti poss.* and *Utrubi.* Both were prohibitory, so that there was no alternative to proceeding *per sponsionem.* Each party being at the same time plaintiff and defendant there were four penal *sponsiones* instead of two.[1] Further, since each party claimed to be the true possessor, the interim holding, with taking of profits, had to be regulated. It was allotted to the highest bidder, he engaging (*cautio, stipulatio fructuaria*) with security (§ 170) to pay the amount of his bid as a penalty in the event of his being defeated (§ 166). There were thus five penal *sponsiones* which, as all raising the same question, namely which party was the true possessor at the moment of the issue of the interdict (§ 166a), were decided simultaneously by the same *iudex.* Furthermore, if it was the winner in the auction for interim holding (*fructus licitatio*) who was defeated, he was condemned at the same time in the *iud. Cascellianum siue secutorium* unless he restored not only possession but also the interim fruits or mesne profits (§§ 166a–7). This of course shows that the sum bid and promised by the *stip. fructuaria* was penal, not the price of the mesne profits. Finally (§ 169) Gaius notes that the *stip. fruct.* might not be insisted on, but that in that case the amount bid in the *fructus licitatio*[2] could be recovered by a special *iudicium fructuarium,* also called *secutorium* but not *Cascellianum,* in which the defendant had to give security *iudicatum solui.*

Secondary interdicta (§ 170).[3] We have found that interdicts, in spite of their original character, had by classical times become virtually actions tried by the formulary procedure, very complicated actions involving the co-operation of the parties at every turn. We have previously mentioned the measures of constraint used against a defendant who refused co-operation in an ordinary action.[4] The secondary interdicts spoken of in § 170 are corresponding measures taken in proceedings under an interdict. The passage is incomplete, but it is our sole authority.[5] So far as it survives, it refers only to secondary interdicts following double interdicts, primarily *Uti poss.* Something of the same nature is probable under simple interdicts, but we can say no more. Even in the case contemplated we do not

[1] From the defective end of § 166 it seems to have been possible to combine the four into two.

[2] This is not quite certain, but seems the natural inference from the words *de fructus licitatione.* Cf. Buckland 741 n. 3.

[3] *Edictum* p. 473; Buckland 742; Girard 1126.

[4] Above, p. 224.

[5] The illegible text following § 170 amounts to 1½ pp. of V. It may not have been confined to secondary interdicts, but no other subject is suggested by *Inst.* 4, 15–16.

learn much about the nature and working of secondary interdicts. They were either absolute orders, which would be a reversion to what is supposed to have been the original type of an interdict, or (more probably) still conditional, but more narrowly conditioned than the original interdict, so that, as Gaius says, a party who would have succeeded under the original interdict, *Uti poss.*, might fail under the secondary. If the recalcitrant party refused to join issue under the secondary interdict, we can only suppose that the praetor at length fell back on the extremer measures applicable against an *indefensus*.[1] The passage though defective throws some welcome light on the course of proceedings under *Uti poss.*: issue of the interdict, acts of conventional force by both sides, *fructus licitatio*, security given by the winning bidder, the *sponsiones*, the acceptance of the *formulae* on the *sponsiones* (and those of the consequential actions). The acts of conventional force are explicable as serving to define the positions taken up by the parties beyond a doubt, but the reason for compulsory bidding in the *fructus licitatio* is difficult to conjecture. Why should a party not have been free to allow the other to have the interim enjoyment of possession and fruits for a nominal sum? He had an independent right to compensation in any case, if he should be successful (§ 167). Perhaps refusal to bid was regarded as a sign of having no real case; that consideration ought to have led to insistence on a substantial bid, and this may be what is meant.

§§ 171–82. Penalties of Litigation

Classical law did not provide for costs to be paid by the defeated party. In theory there were no costs, and no doubt in fact they were comparatively low. Even so, to be saddled with an unnecessary action is always a hardship. These sections deal with such discouragements as there were of vexatious litigation.

1. **Vexatious defence** (§§ 171–3). There were in the first place actions in which a defendant by denying liability exposed himself to doubled condemnation (§§ 9. 171). Further, in an *a. certae creditae pec.* he risked by *sponsio* a penalty of one-third of the claim[2] and in an *a. de pec. constituta*[3] similarly a penalty of a half (§ 171). In both cases there was a corresponding *restipulatio* from the plaintiff (§ 180).

[1] Above, p. 136.

[2] The word *permittitur* in § 171 suggests some sort of option, but other evidence, especially § 13, makes this unlikely: Jobbé-Duval, *Mél. Cornil* 1, 553. On the origin of this *sponsio* see above, p. 238.

[3] A praetorian action penal in origin mentioned only here by Gaius. *Constitutum*

There were also actions which, whether contested or not, enforced a liability to pay more than simple damages. Their only relevance here is that the *iusiurandum calumniae* could not be demanded of the defendant to them (§ 172). Gaius specifies (§ 173) only the *actiones furti*, but refers to others. Such would be the praetorian actions *de seruo corrupto in duplum* and *quod metus causa in quadruplum* (*Inst.* 4, 6, 23. 25); the latter, however, was *arbitraria.*

Iusiurandum calumniae (§ 172). In all actions except those involving a pecuniary penalty for the defendant, and therefore even in those in which a normal penalty was remitted because the defendant was a *heres*, woman, or pupil, the plaintiff could demand that the defendant should swear that he was defending in good faith. A defendant who refused the oath was not defending *uti oportet* and was treated accordingly.[1]

2. **Vexatious action** (§§ 174–81). If defeated in an *a. certae cr. pec.* or *de pec. constituta* the plaintiff incurred under his *restipulatio* a penalty of a third or a half of his claim (§§ 171, 180). If defeated in certain other actions he was liable in a *iudicium contrarium* (§ 177). Of the three such actions mentioned—we know of no others—the *a. iniuriarum* alone was of general importance; there the liability was for a tenth of the amount claimed (3, 224), in the two other actions it was for a fifth.[2] For a plaintiff to be liable under either his *restipulatio* or a *iud. contr.* it was only necessary that he should have lost the case; the honesty or dishonesty of his claim was irrelevant (§§ 178 *fin.* 180). Thus the *formulae* enforcing these liabilities were merely appendages of the principal *formula.*[3]

The above penalties applied in only a few special cases. In general the defendant's protection against vexatious suits was his power to exact a *iusiurandum calumniae* from the plaintiff before the action or to bring a *iud. calumniae* for a tenth of the claim after it had been defeated (§§ 175–6).[4]

was an informal promise to pay an existing debt, one's own or another's, on a fixed day: *Inst.* 4, 6, 8. 9. Cf. *Edictum* § 97; Buckland 529; Girard 640.

[1] Above, p. 224.

[2] *Bonorum poss.* was granted *uentris nomine* to a woman having in the womb a child who if born would be *suus heres*: *Edictum* § 147; on the action against her and *contrarium iud. cf. Edictum* § 119. Action by *missus in poss.* and *contr. iud.*: *Edictum* § 216.

[3] Cf. *Edictum* p. 403 on the *a. iniuriarum contraria.* Biondi, *Iud. b. f.* 157 holds that it was part of the principal *formula.*

[4] Gaius adds (§ 175) that against a defeated *adsertor libertatis* it was for a third. Giffard, *Leçons de proc. civ. romaine* 146 n. 1 (not seen) is said to have shown that this represents post-Gaian legislation and must therefore be a gloss: Buckland, *Jurid. Rev.* 1936, 348.

The oath was to the effect that the plaintiff honestly believed in his claim; the action depended on showing that the claim had been dishonest (§ 178). The oath could be exacted in every action except one in which the plaintiff was bound by a *restipulatio* (§ 181), but if it was exacted it was a bar both to the *iud. cal.* and the *iud. contr.* (where that existed), though why to the latter, in which the issue of the original plaintiff's honesty was not raised, is not clear; and indeed Gaius seems a little doubtful (*dari non debet*: § 179 *fin.*). Where the oath had not been exacted and in the absence of a *restipulatio* the *iud. cal.* was always open. It was so even where a *iud. contr.* was possible, but in such a case the defendant had to choose between the two actions (§ 179), and the latter would be his obvious choice (§§ 178–9).

Other uses of the oath. *Ius iurandum in litem.* As already mentioned, the defendant to a *formula petitoria* who did not comply with the warning of the *iudex* given under the *clausula arbitraria* to hand over the thing was condemned in its value assessed on the oath of the plaintiff, subject of course to judicial control. There were similar cases under other *formulae* with a *cl. arb.*, some of them in interdict procedure.[1]

Iusiurandum necessarium. It is now held that this was confined to *condictio certae pecuniae* and similar actions, perhaps including *cond. c. rei.* It worked as follows. *In iure* the plaintiff before asking for his *formula* said to the defendant: 'Swear that my claim is not good.' If the defendant took the oath he won the case. But instead of swearing he could throw back (*relatio*) the oath by replying: 'Swear that your claim is good.' If the plaintiff took the oath he won his case; if he refused it the praetor denied him his action. If the defendant would neither swear nor throw back the oath he was condemned.[2]

§ 182. Infamia.[3] The Edict gave lists of persons whom it disqualified from appearing as advocate for another (*postulare*),[4] or from acting as *cognitor* or (by extension) *procurator* in another's suit, or from being themselves represented by a *cognitor* or *procurator* (cf. § 124).[5] In a number of these cases the disabilities were imposed for disgraceful conduct and those disabled were currently called *infames* or *ignominiosi*, though these terms were not used by the praetor. *Infamia* was not a sharply defined legal concept, but covered a variety of cases statutory as well as edictal, and its consequences were not confined to the procedural disabilities mentioned above. But in the

[1] Above, pp. 280, 295. Cf. Girard 1087; Buckland 659.
[2] Buckland 633; Girard 1065.
[3] Buckland 91; Girard 215.
[4] *Edictum* pp. 76 f.
[5] *Edictum* pp. 76 f. 86 f.

present context Gaius is speaking only of *infamia* resulting from being condemned in certain actions or, though this is strictly irrelevant, from even compounding some of them. His list of such actions coincides with that of the edictal title *De postulando* so far as it can be reconstructed,[1] except that it omits the *a. de dolo* found in the *Digest* and contains the *a. fiduciae* omitted there. The fact that condemnation in certain non-delictual actions produced *infamia* is an indication that the original ground of liability in them was *dolus*. The Aquilian action is not in the list, because condemnation in it did not necessarily imply *dolus*.

§§ 183–7. In Ius Vocatio. Vadimonium

Neither a *legis actio* nor a formulary action could be set on foot without both parties appearing *in iure*, i.e. before the magistrate at the proper place and time. Proceedings could not be by default. It was the plaintiff's own affair to get the defendant before the court. This he did by an oral personal summons, *in ius uocatio*, which was essentially the same under the formulary system as under the *Twelve Tables*.

The *Twelve Tables*[2] provided that the defendant must either obey the summons by going into court or give a *uindex* who would be responsible for his appearance.[3] If he did neither, the plaintiff was empowered, having called bystanders to witness, to arrest him, using force if he resisted or tried to escape.

Under the formulary system summons was by personal *in ius uocatio*, accompanied by a preliminary notification of the claim (*editio actionis*), and the defendant was still faced with the necessity of either obeying the summons or finding a *uindex*. If he did neither, he was now liable to a penal praetorian *a. in factum* (§§ 46. 183), but the plaintiff might as of old bring him into court by force; this is shown by the existence of another penal *a. in factum* against anyone who rescued him from the arrest by force (§ 46). This piling up of actions strikes one as unsatisfactory, but arrest by officers of the court or alternatively procedure in default remained unknown under the formulary system. The ultimate sanction against a recalcitrant defendant was in all probability seizure of his assets (*missio in bona*) leading to *uenditio bonorum*.

[1] *Edictum* p. 77.

[2] *XII Tabb.* 1, 1–4: Bruns 1, 17; *Textes* 12; *Fontes* 1, 26.

[3] Direct evidence of there having been a *uindex* in this first period is lacking, but he cannot have been an invention of the formulary period (§ 46). His exact function is a matter of doubt: Girard 1032 n. 3.

Such at any rate was the procedure when the defendant evaded summons by going into hiding (3, 78).

Vadimonium. If proceedings *in iure* could not be concluded at the first appearance, the reappearance of the defendant was secured by *uadimonium*. Originally this took the form of security given by sureties known as *uades*. The manner of their engaging themselves is not known; it disappeared in consequence of the *L. Aebutia*.[1] In the formulary period *uadimonium* consisted in the defendant binding himself to reappear by means of a verbal contract of the normal type (§ 184), the penal sum promised in the event of non-appearance being fixed as stated in § 186 (cf. 3, 224). As briefly recounted in § 185, the promise had in some cases to be supported by sureties or otherwise. In the cases in which the praetor's leave was needed for *in ius uocatio* (§§ 46. 183) it was needed also for the exaction of *uadimonium* (§ 187).

Vadimonium in this classical form seems also to have been used by agreement as a substitute for *in ius uocatio* in order to secure a first appearance.[2]

As an ending to the whole work these sections seem decidedly abrupt, but there is no reason to think that they are not the real end. The Veronese text ends in the middle of a recto; the rest of the page is blank except for a scroll, and the verso is blank. Nothing in the last two titles of Justinian's *Institutes* seems to be derived from Gaius'.

[1] Gell. 16, 10, 8.
[2] Buckland 631; Girard 1062 n. 2.

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PRINTED IN GREAT BRITAIN
AT THE UNIVERSITY PRESS, OXFORD
BY VIVIAN RIDLER
PRINTER TO THE UNIVERSITY