THE ROMAN LAW OF SLAVERY

THE CONDITION OF THE SLAVE IN PRIVATE LAW FROM AUGUSTUS TO JUSTINIAN

BY

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PREFACE

THE following chapters are an attempt to state, in systematic form, the most characteristic part of the most characteristic intellectual product of Rome. There is scarcely a problem which can present itself, in any branch of the law, the solution of which may not be affected by the fact that one of the parties to the transaction is a slave, and, outside the region of procedure, there are few branches of the law in which the slave does not prominently appear. Yet, important as the subject is, for the light it might be expected to throw on legal conceptions, there does not exist, so far as I know, any book which aims at stating the principles of the Roman Law of slavery as a whole. Wallon's well-known book covers so much ground that it cannot treat this subject with fulness, and indeed it is clear that his interest is not mainly in the law of the matter. The same is true of Blair's somewhat antiquated but still readable little book.

But though there exists no general account, there is a large amount of valuable literature, mostly foreign. Much of this I have been unable to see, but without the help of continental writers, chiefly German, I could not possibly have written this book. Indeed there are branches of the subject in which my chapters are little more than compilation. I have endeavoured to acknowledge my indebtedness in footnotes, but in some cases more than this is required. It is perhaps otiose to speak of Mommsen, Karlowa, Pernice among those we have lost, or of Gradenwitz, Krüger, Lenel among the living, for to these all students of the Roman Law owe a heavy debt, but I must mention here my special obligations to Erman, Girard, Mandry, Salkowski and Sell, whose valuable monographs on branches of the Law of Slavery have been of the greatest possible service. Where it has been necessary to touch on

subjects not directly connected with Slavery I have made free use of Girard's "Manuel" and Roby's "Roman Private Law." I greatly regret that the second edition of Lenel's "Edictum Perpetuum" and the first volume of Mitteis' "Römisches Privatrecht" appeared too late to be utilised except in the later chapters of the book.

In dealing with the many problems of detail which have presented themselves, I have, of course, here and there, had occasion to differ from views expressed by one or other of these writers, whose authority is so much greater than my own. I have done so with extreme diffidence, mindful of a certain couplet which speaks of

> "What Tully wrote and what Justinian,
> And what was Pufendorf's opinion."

I have not dealt, except incidentally, with early law or with the law affecting *libertini*. The book is already too large, and only the severest compression has kept it within its present limits. To have included these topics would have made it unmanageable. It was my original intention not to deal with matter of procedure, but at an early stage I found this to be impracticable, and I fear that the only result of that intention is perfunctory treatment of very difficult questions.

Technical terms, necessarily of very frequent occurrence in a book of this kind, I have usually left in the original Latin, but I have not thought it necessary to be at any great pains to secure consistency in this matter. In one case, that of the terms *Iussum* and *Iussus*, I have felt great difficulty. I was not able to satisfy myself from the texts as to whether the difference of form did or did not express a difference of meaning. In order to avoid appearing to accept either view on the matter I have used only the form *Iussum*, but I am not sure that in so doing I may not seem to have implied an opinion on the very question I desired not to raise.

I have attempted no bibliography: for this purpose a list confined to books and articles dealing, *ex professo*, with slave law would be misleadingly incomplete, but anything more comprehensive could be little less than a bibliography of Roman Law in general. I have accordingly cited only such books as I have been able to use, with a very few clearly indicated exceptions.

To Mr H. J. Roby of St John's College, to Mr Henry Bond of Trinity Hall, to Mr P. Giles of Emmanuel College, and to Mr J. B. Moyle of New College, Oxford, I am much indebted for many valuable suggestions and criticisms. I desire to express my sincere thanks to the Syndics of the Cambridge University Press for their liberality in undertaking the publication of the book, to Mr R. T. Wright and Mr A. R. Waller, the Secretaries of the Syndicate, for their unfailing kindness, and to the Staff of the Press for the care which they have bestowed on the production of the book.

This book, begun at the suggestion of a beloved and revered Scholar, now dead, had, so long as he lived, his constant encouragement. I hope to be excused for quoting and applying to him some words which he wrote of another distinguished teacher: "What encouragement was like when it came from him his pupils are now sorrowfully remembering."

W. W. B.

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LIST OF PRINCIPAL ABBREVIATIONS

In. = Institutiones Iustiniani.
D. = Digesta „
C. = Codex „
N. = Novellae „
Numeral references with no initial letter are to the Digest.
C. Th. = Codex Theodosianus.
G. = Gai institutiones.
U. or Ulp. = Ulpiani Regulae.
P. = Pauli Sententiae.
Fr. D. or Fr. Dos. = Fragmenta Dositheiana.
Fr. V. or Fr. Vat. = „ Vaticana.
Coll. = Mosaicarum et Romanarum legum collatio.
Citations of the Corpus Iuris Civilis are from the stereotyped edition of Krüger, Mommsen, Schoell and Kroll.
Citations of the Codex Theodosianus are from Mommsen's edition.
Citations of earlier juristic writings are from the Collectio librorum iuris anteiustiniani.

Z.S.S. = Zeitschrift der Savigny Stiftung für Rechtsgeschichte.
N.R.H. = Nouvelle Revue Historique de Droit français et étranger.

PART I.

CONDITION OF THE SLAVE.

CHAPTER I.

DEFINITION AND GENERAL CHARACTERISTICS.

THE Institutes tell us that all men are either slaves or free[1], and both liberty and slavery are defined by Justinian in terms borrowed from Florentinus. "Libertas," he tells us, "est naturalis facultas eius quod cuique facere libet nisi si quid vi aut iure prohibetur[2]." No one has defined liberty well: of this definition, which, literally understood, would make everyone free, the only thing to be said at present for our purpose is that it assumes a state of liberty to be "natural."

"Servitus," he says, "est constitutio iuris gentium qua quis dominio alieno contra naturam subicitur[3]." Upon this definition two remarks may be made[4].

i. Slavery is the only case in which, in the extant sources of Roman law, a conflict is declared to exist between the *Ius Gentium* and the *Ius Naturale*. It is of course inconsistent with that universal equality of man which Roman speculations on the Law of Nature assume[5], and we are repeatedly told that it is a part of the *Ius Gentium*, since it originates in war[6]. Captives, it is said, may be slain: to make them slaves is to save their lives; hence they are called *servi, ut servati*[7], and thus both names, *servus* and *mancipium*, are derived from capture in war[8].

[1] In. 1. 3. *pr.* [2] In. 1. 3. 1; D. 1. 1. 4. *pr.*; 1. 5. 4. *pr.*
[3] In. 1. 3. 2; D. 1. 5. 4. 1; D. 12. 6. 64.
[4] Girard, Manuel, Bk 2, Ch. 1. gives an excellent account of these matters.
[5] See the texts cited in the previous notes. [6] In. 1. 5. *pr.*; D. 1. 1. 4; 1. 5. 4.
[7] 50. 16. 139. 1.
[8] 1. 5. 4. For the purpose of statement of the Roman view, the value of the historical, moral and etymological theories involved in these propositions is not material.

ii. The definition appears to regard subjection to a *dominus* as the essential fact in slavery. It is easy to shew that this conception of slavery is inaccurate, since Roman Law at various times recognised types of slaves without owners. Such were

(*a*) The slave abandoned by his owner. He was a *res nullius*. He could be acquired by *usucapio*, and freed by his new owner[1].

(*b*) *Servi Poenae*. Till Justinian's changes, convicts or some types of them were *servi*: they were strictly *sine domino*; neither *Populi* nor *Caesaris*[2].

(*c*) Slaves manumitted by their owner while some other person had a right in them[3].

(*d*) A freeman who allowed a usufruct of himself to be given by a fraudulent vendor to an innocent buyer. He was a *servus sine domino* while the usufruct lasted[4].

It would seem then that the distinguishing mark of slavery in Rome is something else, and modern writers have found it in rightlessness. A slave is a man without rights, i.e. without the power of setting the law in motion for his own protection[5]. It may be doubted whether this is any better, since, like the definition which it purports to replace, it does not exactly fit the facts. Indeed, it is still less exact. At the time when Florentinus wrote, Antoninus Pius had provided that slaves ill treated by their owner might lodge a complaint, and if this proved well founded, the magistrate must take certain protective steps[6]. So far as it goes, this is a right. *Servi publici Populi Romani* had very definite rights in relation to their *peculia*[7]. In fact this definition is not strictly true for any but *servi poenae*[8]. Nor does it serve, so far as our authorities go, to differentiate between slaves and alien enemies under arms. But even if it were true and distinctive, it would still be inadmissible, for it has a defect of the gravest kind. It looks at the institution from an entirely non-Roman point of view. The Roman law of slavery, as we know it, was developed by a succession of practical lawyers who were not great philosophers, and as the main purpose of our definition is to help in the elucidation of their writings, it seems unwise to base it on a highly abstract conception which they would hardly have understood and with which they certainly never worked[9]. Modern writers on jurisprudence usually make the conception of a right the basis of

[1] 41. 7. 8. [2] *Post*, Ch. XII.
[3] Fr. Dosith. 11; Ulp. 1. 19; C. 7. 15. 1. 2; *post*, Ch. XXV.
[4] 40. 12. 23. *pr.*; *post*, Ch. XVIII.
[5] Warnkoenig, Inst. Rom. Jur. priv. § 121; Moyle, *ad* Inst. 1. 3. 2; Accarias, Précis de Dr. Rom. I, p. 89.
[6] G. 1. 53; *post*, p. 37 where an earlier right of the same kind is mentioned.
[7] *Post*, Ch. XV.
[8] Other equivocal cases may be noted; 2. 4. 9; 5. 1. 53; 48. 10. 7.
[9] See however 50. 17. 32.

their arrangement of legal doctrines[1]. The Romans did not, though they were, of course, fully aware of the characteristic of a slave's position on which this definition rests. "Servile caput," says Paul, "nullum ius habet[2]." But they recognised another characteristic of the slave which was not less important. Over a wide range of law the slave was not only rightless, he was also dutiless. "In personam servilem nulla cadit obligatio[3]." Judgment against a slave was a nullity: it did not bind him or his master[4]. In the same spirit we are told that slavery is akin to death[5]. If a man be enslaved his debts cease to bind him, and his liability does not revive if he is manumitted[6]. The same thing is expressed in the saying that a slave is *pro nullo*[7]. All this is much better put in the Roman definition. The point which struck them, (and modern writers also do not fail to note it,) was that a slave was a *Res*, and, for the classical lawyers, the only human *Res*. This is the meaning of Florentinus' definition. *Dominus* and *dominium* are different words. The statement that slaves as such are subject to *dominium* does not imply that every slave is always owned[8]. Chattels are the subject of ownership: it is immaterial that a slave or other chattel is at the moment a *res nullius*[9].

From the fact that a slave is a *Res*, it is inferred, apparently as a necessary deduction[10], that he cannot be a person. Indeed the Roman slave did not possess the attributes which modern analysis regards as essential to personality. Of these, capacity for rights is one[11], and this the Roman slave had not, for though the shadowy rights already mentioned constitute one of several objections to the definition of slaves as "rightless men," it is true that rights could not in general vest in slaves. But many writers push the inference further, and lay it down that a slave was not regarded as a person by the Roman lawyers[12]. This view seems to rest on a misconception, not of the position of the slave, but of the meaning attached by the Roman lawyers to the word *persona*. Few legal terms retain their significance unchanged for ever, and this particular term certainly has not done so. All modern writers agree, it seems, in requiring capacity for right. The most recent philosophy seems indeed to go near divorcing the idea of personality from its human elements. For this is the effect of the theory which sees in the Corporation a real, and not a fictitious

[1] Hearn (Legal Duties and Rights) alone among recent English writers bases his scheme on Duties. But this is no better from the Roman point of view.
[2] 5. 3. 1. [3] 50. 17. 22. *pr.* [4] 5. 1. 44. 1.
[5] 50. 17. 209. Nov. 22. 9; G. 3. 101. [6] 44. 7. 30. [7] 28. 8. 1. *pr.*
[8] Justinian swept away nearly all the exceptional cases. C. 7. 15. 1. 2b; Nov. 22. 8; 22. 12.
[9] The objection, that slavery is an "absolute," not a "relative," status, is thus of no force against the Roman definition.
[10] Girard, Manuel, p. 92.
[11] Girard, *op. cit.* p. 90, "L'aptitude à être le sujet de droits et devoirs légaux."
[12] Girard, *loc. cit.*; Moyle, *op. cit.* Introd. to Bk 1; etc.

person[1]. If, now, we turn to the Roman texts, we find a very different conception. A large number of texts speak of slaves as persons[2]. There does not seem to be a single text in the whole Corpus Iuris Civilis, or in the Codex Theodosianus, or in the surviving classical legal literature which denies personality to a slave. It is clear that the Roman lawyers called a slave a person, and this means that, for them, "persona" meant human being[3].

It must however be borne in mind that the word has more than one meaning. Its primary meaning is not the man, but the part he plays, and thus a number of texts, including many of those above cited, speak not of the man, but of the *persona* of the man. The distinction is not material, but it may have suggested a further distinction made in modern books. It is the usage of some writers to speak of two senses in which the word is used: one technical, in which it means "man capable of rights"; the other wide, in which it means simply "man[4]." But if the texts be examined on which this distinction is based, it will be found that, so far as Roman law is concerned, this means no more than that in some texts the topic in question is such that rights are necessarily contemplated, while in others this is not the case.

A doctrine which purports to be really Roman law must necessarily be somehow rested on the texts. It is desirable to note what sort of authority has been found for the view that a slave was not a person for the Roman lawyers. One group of texts may be shortly disposed of: they are the texts which say that a slave is *pro nullo*, and that slavery is akin to death[5]. These are, as they profess to be, mere analogies: they shew, indeed, that from some points of view a slave was of no legal importance, but to treat them as shewing that *persona* means someone of legal importance is a plain begging of the question. The others are more serious. There is a text in the Novellae of Theodosius[6], (not reproduced in Justinian's Code,) which explains the slave's incapacity to take part in legal procedure

[1] See Maitland, Political Theories of the Middle Age (Gierke), Introd. p. xxxiv.

[2] G. 1. 120; 1. 121; 3. 189; 4. 135. Vat. Fr. 75. 2, 75. 5, 82 (drawing legal inferences from his personality); C. Th. 14. 7. 2 (rejected by Mommsen); C. 4. 36. 1. *pr.*; C. 7. 32. 121; Inst. 1. 8. *pr.*; 3. 17. 2; 4. 4. 7 (all independent of each other and of Gaius); D. 7. 1. 6. 2; 7. 2. 1. 1; 9. 4. 29; 11. 1. 20. *pr.*; 30. 86. 2 (twice); 31. 82. 2; 39. 6. 23; 45. 3. 1. 4; 47. 10. 15. 44; 47. 10. 17. 3; 48. 19. 10. *pr.*; 48. 19. 16. 3; 50. 16. 2. 215; 50. 17. 22. *pr.* See also Bas. 44. 1. 11, and Sell, Noxalrecht, p. 28, n. 2.

[3] It would not be surprising if there were some looseness, since a slave, while on the one hand an important conscious agent is on the other hand a mere thing. But the practice is unvarying. It is commonly said that the personality of the slave was gradually recognised in the course of the Empire. What were recognised were the claims of humanity, cp. 21. 1. 35. To call it a recognition of personality (Pernice, Labeo, 1. pp. 113 *sqq.*, and many others) is to use the word personality in yet another sense, for it still remained substantially true that the slave was incapable of legal rights.

[4] See Brissonius, De Verb. Sign., sub v. *persona*.

[5] nn. 4, 5, 6 on p. 3.

[6] Nov. Theod. 17. 1. 2: *quasi nec personam habentes.*

by the fact that he has no *persona*. This seems weighty, as it draws legal consequences from the absence of a *persona*. But it must be noted that similar language is elsewhere used about young people without curators[1], and the true significance of these words is shewn by a text which observes that a slave is not a *persona qui in ius vocari potest*[2]. A text in the Vatican Fragments (also in the Digest[3]) says that a *servus hereditarius* cannot stipulate for a usufruct because *ususfructus sine persona constitui non potest.* This is nearer to classical authority, but in fact does not deny personality to a slave. That is immaterial: the usufruct could never vest in him. The point is that a *hereditas iacens* is not a *persona*, though, for certain purposes, *personae vicem sustinet*[4]. Thus in another text the same language is used on similar facts, but the case put is that of *filius vel servus*[5]. A text of Cassiodorus[6] has exactly the same significance[7]. There are however two texts of Theophilus[8] (reproducing and commenting on texts of the Institutes) in which a slave is definitely denied a *persona*. He explains the fact that a slave has only a derivative power of contracting or of being instituted heir by the fact that he has no *persona*. The reason is his own: it shews that in the sixth century the modern technical meaning was developing. But to read it into the earlier sources is to misinterpret them: *persona*, standing alone, did not mean *persona civilis*[9].

Slavery has of course meant different things at different times and places[10]. In Rome it did not necessarily imply any difference of race or language. Any citizen might conceivably become a slave: almost any slave might become a citizen. Slaves were, it would seem, indistinguishable from freemen, except so far as some enactments of late date slightly restricted their liberty of dress[11]. The fact that all the civil degrees known to the law contained persons of the same speech, race, physical habit and language, caused a prominence of rules dealing with the results of errors of Status, such as would otherwise be unaccountable. Such are the rules as to *erroris causae probatio*[12], as to the freeman who lets himself be sold as a slave[13], as to error in status

[1] C. Th. 3. 17. 1; C. 5. 34. 11.

[2] 2. 7. 3. *pr.*

[3] 45. 3. 26; V. Fr. 55.

[4] 9. 2. 13. 2; In. 3. 17. *pr.*

[5] 36. 2. 9. It was only in case of legacy, not of stipulation, that the usufruct depended in any way on the life of the slave, *post*, Ch. VI.

[6] Var. 6. 8. 2.

[7] 36. 1. 57. 1 (Papinian) may be understood as denying personality, but it is really of the same type: *rescripsit non esse repraesentandam hereditatis restitutionem quando persona non est cui restitui potest.*

[8] *Ad* In. 2. 14. 2; 3. 17. *pr.*

[9] A correct decision on this matter is necessary before we can say what Gaius meant by *Ius quod ad personas pertinet.*

[10] Wallon, Histoire de l'Esclavage; Winter, Stellung der Sklaven bei d. Juden; Cobb, Slavery (in America).

[11] C. Th. 14. 10. 1; 14. 10. 4. As to the cautious abstention from such restrictions in earlier law, see Seneca, De Clementia, 1. 24; Lampridius, Alex. Severus, 27. 1.

[12] G. 1. 67–75; Ulp. 7. 4.

[13] In. 1. 3. 4, *post*, Ch. XVIII.

of the witness of a will[1], and other well known cases[2] There was also a rule that where a man, who afterwards turned out to be a slave, had given security *iudicatum solvi*, there was *restitutio in integrum*[3]. To the same cause are expressly set down the rules as to acquisition through a *liber homo bona fide serviens*[4], and the rule that the *bona fide* sale of a freeman as a slave was valid, as a contract, *quia difficile potest dignosci liber homo a servo*[5] The well-known rule that *error communis facit ius* had more striking illustrations than those already mentioned. Thus, though a slave could not validly be appointed to decide an arbitration[6], yet an arbitral decision by one apparently free was declared to be valid though he ultimately proved to be a slave[7] And where a fugitive slave was appointed Praetor, his official acts were declared by Ulpian to be valid[8]

Slavery did not necessarily mean manual labour the various services involved in the maintenance of an establishment in town or country were all rendered by troops of slaves, having their appropriate official names, derived from the nature of their service It is not necessary to recite these names numbers of them will be found in the texts dealing with the interpretation of legacies and contracts[9] A broad distinction is repeatedly drawn between Urban and Rustic slaves, as it was customary to make legacies of the one or the other class generally, probably with other property *Mancipia rustica* were, broadly, those engaged in the cultivation of land and other rural pursuits, *urbana* were those whom *pater familias circum se ipsius sui cultus causa habet*[10], elsewhere defined as *quae totius suppellectilis notitiam gerunt*[11] The cook and the philosopher were alike urban, the land-agent (*villicus*) and the labourer were alike rustic The distinction is founded partly on mode and place of maintenance, partly on nature of service, and partly on direct statement in the owner's register of slaves[12] Indeed in the construction of legacies, as the testator's intention was the point to be determined, this register was conclusive where it was available[13] Place of residence was not conclusive, *non loco sed usus genere dis-*

[1] In 2 10 7

[2] The person *de statu suo incertus* (Ulp 20 11 etc), institution of *servus alienus* as a freeman (the case of Parthenius) *post* Ch VI position of child of *ancilla* supposed to be free, *post* Ch XXVII There are other cases in the title *De iure dotium*, e g 23 3 59 2

[3] 2 8 8 2 [4] 40 3 34

[5] 18 1 4 5 6, 34 2 70 As often the rule was severer in stipulation Here the agreement was void for impossibility 44 7 1 9 40 1 83 5 103 In 18 2 14 3 we are told that sale to *servus alienus* thought free was valid while one to my own slave was in any case void *post*, Ch XXIX

[6] 4 8 9 *pr* [7] C 7 40 2 *Post*, p 84

[8] 1 14 3 This extreme view may be peculiar to Ulpian Cp Dio Cassius 48 34 In England analogous cases have needed express legislation See e g 51 & 52 Vict c 28

[9] 32 61, 33 7 8 12 *sqq*, P 3 6 35 *sqq*, Wallon *op cit* Bk 2 Ch III, Blan Slavery in Rome 131 [10] 32 60 1

[11] C 5 37 22 2 [12] 32 99 *pr* 33 7 27 1 [13] 50 16 166

inguuntur[1] Residence might be temporary a child put out to nurse in the country was not on that account rustic[2] Even nature of service was not conclusive Some forms of service were equivocal, e g those of *venatores* and *aucupes*[3], *agasones* or *muliones*[4], or even *dispensatores*, who, if they were managing town properties were urban, but if they were in charge of a farm were rustic, differing little from *villici*[5]

For many of their employments special skill and training were necessary, and a slave so trained (*arte praeditus*) acquired, of course, an added value, especially if he had several *artificia*[6] In some texts a distinction is drawn, in this connexion, between *officium* and *artificium*[7] The language of Marcian suggests, as do other applications of the word, that an *officium* was an occupation having reference to the person or personal enjoyments of the *dominus*[8] The distinction is not prominent and was probably of no legal importance, except in the construction of legacies and the like

Work of the most responsible kinds was left in the hands of slaves Among the more important functions may be mentioned those of *negotiator, librarius, medicus, actor, dispensator, villicus, paedagogus, actuarius*[9] They managed businesses of all kinds[10] We find a slave carrying on the trade of a banker without express orders[11] A slave rents a farm and cultivates it as tenant, not as a mere steward[12] Aulus Gellius[13] gives a list of philosophers who were slaves among the Greeks and Romans Broadly, it may be said that in private life there was scarcely an occupation in which a slave might not be employed almost any industry in which freemen are now engaged might be carried on in Rome by slaves It must however be remembered that all this is not true in the greater part of the Republican period In that period the evidence shews that slaves were relatively few and unimportant[14] And in the decline of the Empire there was a tendency to exclude slaves from responsible classes of employment, and to leave these in the hands of freemen[15]

It is obvious that slaves so differently endowed would differ greatly in value It is improbable that the increase in number involved any

[1] 33 7 12, 33 10 12 etc [2] 50 16 210 [3] 32 99 1, P 3 6 71

[4] 32 60 1 99 2, P 3 6 72 [5] 50 16 166

[6] 32 65 2 C 5 37 22 Teaching slaves *artes* was among *utiles impensae* for the purpose of *Dos* 25 1 6

[7] 32 65 1, 40 4 24, 50 15 4 5 etc

[8] 32 65 1 See Brissonius De Verb Sign sub v *officium*

[9] 9 2 22 32 64, 38 1 25 *h t* 49 40 5 41 6, 40 7 1 21 *pr* 40 12 44 2, P 3 6 70, G 1 19 39 etc

[10] 14 3 5 7 See Marquardt Vie privee des Romains, 1 Ch IV

[11] 2 13 4 3 [12] 33 7 12 3 20 1 Cp 33 7 18 4

[13] Noct Att 2 18 For further refs see Girard Manuel, 93 *sqq*

[14] For further details as to the number of slaves at different epochs and as to their varied and independent employments see Wallon, *op cit* II Ch III Sell Noxalrecht pp 129 *sqq*, Friedlaender Sittengesch II 228 (ed 7), Voigt Rom R G 1 118 *sqq*, Marquardt *loc cit*, Blair State of Slavery among the Romans Ch VI [15] *Post*, Ch XIV

diminution in exchange value of individual similarly qualified slaves, for it was accompanied by a great increase in quantity of other forms of convertible wealth. Changes in economic conditions and repeated alterations in the intrinsic value of coins called by a particular name, make the task of tracing the changes in value of slaves too difficult to be attempted here. It is clear however that they were of considerable value. In A.D. 139 a female child of six years of age was sold for 205 *denarii*[1]. This seems a high price, and the presence in the contract note of the unexplained expression, "sportellaria empta," leads Mommsen[2] to suppose that she was thrown in, "sportulae causa," in the purchase of her mother. But the price seems too low for this. In general, in classical times, the prices for ordinary slaves seem to have varied from 200 to 600 *denarii*[3]. These are ordinary commercial prices. Of course, for slaves with special gifts, very much higher prices might be given, and occasional enormous prices are recorded by the classical writers[4]. The prices in Justinian's time seem a little, but not much, higher. Two enactments of his fix judicial valuations, one for application in case of dispute where there is a joint legacy of *Optio Servi*, the other for the case of manumission of common slaves[5], and they are almost identical. The prices range from 10 *solidi* for ordinary children to 70 for slaves with special skill who were also eunuchs. From another enactment of his it appears that 15 *solidi* was a rather high price[6]. Other prices are recorded in the Digest[7], ranging from 2 to 100 *solidi*. But these are of little use: nearly all are imaginary cases, and even if we can regard them as rough approximations to value, we cannot tell whether the figures are of the age of Justinian or were in the original text. Another indication of price is contained in the fact that 20 *solidi* was taken as about the mean value of a slave by legislation of the classical age[8].

It may be well to make some mention of the more important terms which are used as equivalent to *servus*, or to describe particular classes of slaves, in the sources. *Servus* appears to be used generally, without reference to the point of view from which the man is regarded. *Mancipium* is usually confined to cases in which the slave is regarded as a chattel. Thus it is common in such titles as that on the Aedilician Edict[9], but not in such as that on the *Actio de peculio*[10]. *Ancilla* is

[1] Bruns, Fontes i. 289. [2] C. I. L. 3. 937.
[3] See the documents in Bruns, *op. cit.* 288. 29, 315—317, 325. See also Girard, Textes, 806 *sqq.* For the manumission of an adult woman 2200 *drachmae* were paid in Egypt in A.D. 221. Girard, *op. cit.* Append.
[4] Marquardt, Vie privée, i. Ch. IV. [5] C. 6. 43. 3; 7. 7. 1.
[6] C. 6. 47. 6. [7] See for some of them, Marquardt, *loc. cit.*
[8] For these and other details as to the price of slaves at various times, see Wallon, *op. cit.* Bk 2, Ch. IV.; Sell, Noxalrecht, 147.
[9] D. 21. 1. E.g., *h. t.* 51. *pr. mancipium vitiosum...servus emat.*
[10] 15. 1.

the usual term for an adult female slave, though *mulier* is of course found, and *serva* more rarely[1]. Children are called *puer* and *puella*. *Puer*, for an adult, though it is common in general literature, is found only occasionally in the legal texts[2]. *Puella* seems never to be used there without the implication of youth. A *verna* is a slave born and reared in the house of his master, and occupies a somewhat privileged position, but in law his position is not different from that of any other slave. A *novicius*[3] is an untrained slave, as opposed to a *veterator*, an experienced hand, or, more exactly, a man trained for a particular function. The edict of the Aediles contained a provision that a *veterator* was not to be sold as a *novicius*, the point apparently being that, at least for certain purchasers, a man not trained to a particular kind of work was more valuable, as being more readily trained to the work for which the purchaser wanted him. The provision seems to be mentioned only twice[4]: the surviving contract notes shew that it was not necessary to state which he was; indeed, in none of them is the slave's employment mentioned. It was a secondary provision of the edict[5]; in fact it seems to have been found necessary to declare that the statement that a man was untrained was a warranty, because, while it was plain that to sell, as a trained man, one who was untrained, was a fraud, it was not so obvious that any material wrong was done in the converse case.

The morality of slaves is not within our scope. It is clear on the literary tradition that they had notoriously a bad reputation. The special legislation which we shall have to notice will sufficiently shew the state of things at Rome. But we need not go into details to prove for Rome what is likely to be a concomitant of all slavery[6].

[1] E.g. P. 2. 24. 1; D. 11. 3. 1. *pr.* (the words of the Edict); 23. 3. 39; 48. 5. 6. *pr.* *Homo* is of course common. *Famulus* is rare in legal texts.
[2] E.g. 32. 81. *pr.*; 50. 16. 204. [3] Brissonius, *op. cit.* sub v. *Novicius.*
[4] 21. 1. 37; *h. t.* 65. 2. The latter text tells us that a liberal education did not necessarily make him a *veterator*. *Post*, p. 57. *Veteranus* in 39. 4. 16. 3 seems not to mean quite the same thing. For the purpose of *professio* (*post*, p. 38) *novicius* is one who has served for less than a year.
[5] Lenel, E. Perp., p. 443.
[6] See for instance, Wallon, *op. cit.* Bk 2, Ch. VII.; Winter, Stellung der Sklaven bei der Juden, pp. 59—61. Cobb, Slavery, pp. 49—52, takes a different view, as to negro slavery. He is a determined apologist of the "peculiar institution" in America. He says at the beginning of his introduction, "No organized government has been so barbarous as not to introduce it," (i.e. Slavery,) "among its customs."

CHAPTER II.

THE SLAVE AS *RES*.

THIS aspect of the Slave was necessarily prominent in the Law. He was the one human being who could be owned. There were men in many inferior positions which look almost like slavery: there were the *nexus*, the *auctoratus*, the *addictus*, and others. But none of these was, like the slave, a *Res*. *Potestatis verbo plura significantur: in persona magistratuum imperium...in persona servi dominium*[1]. The slave is a chattel, frequently paired off with money as a *res*[2]. Not only is he a chattel: he is treated constantly in the sources as the typical chattel. The Digest contains a vast number of texts which speak of the slave, but would be equally significant if they spoke of any other subject of property. With these we are not concerned: to discuss them would be to deal with the whole law of property, but we are to consider only those respects in which a slave as a chattel is distinguished in law from other chattels[3]. From their importance follows the natural result that the rules relating to slaves are stated with great fulness, a fulness also in part due to the complexity of the law affecting them. This special complexity arises mainly from five causes. (i) Their issue were neither *fructus* nor accessories, though they shared in the qualities of both. (ii) They were capable of having *fructus* of kinds not conceivable in connexion with other *res*, i.e. gifts and earnings. (iii) The fact that they were human forced upon the Romans of the Empire some merciful modifications of the ordinary rules of sale. (iv) They had mental and moral qualities, a fact which produced several special rules. (v) There existed in regard to them a special kind of *interitus rei*, i.e. Manumission[4].

Slaves were *res mancipi* and it does not appear that there was in their case any question of maturity or taming such as divided the schools, in relation to cattle, upon the point as to the moment at

[1] 50. 16. 215. [2] See 18. 1. 1. 1; C. 4. 5. 10; 4. 38. 6, 7; 4. 46. 3; 8. 53. 1.
[3] As to the right of preemption in the case of a new-born slave (C. Th. 5. 10. 1) see *post*, Ch. XVIII.
[4] The special rules as to possession of slaves are considered, *post*, Ch. XII.

which they became *res mancipi*[1]. No taming or educating process was necessary to give their owner control over them. Most of the few surviving records of actual sales in the classical age refer to slaves. The silence of the sources, on the use of the *actio* Publiciana by the "bonitary owner," makes it hard to say when *traditio* superseded *mancipatio*, in practice, for moveables, but this very silence, coupled with the fact that in nearly all these cases there was a *mancipatio*, leads to the conclusion that it was after the age of the classical lawyers; for most of these cases fall between A.D. 140 and A.D. 160[2]. On the other hand one of A.D. 166 was by *traditio*, but this was in Asia Minor, as also was one of A.D. 359[3]. There is, indeed, a record of a conveyance of *land* in Egypt by *traditio* as early as A.D. 154[4].

The slave, like any other chattel, might be the subject of all ordinary transactions[5], and these transactions gave rise to many questions owing to the special characteristics and powers of the slave. Most of these, however, result from the slave's powers of acquisition, of contracting, and of wrong-doing, and will therefore be most conveniently considered in the chapters which deal with the slave considered as a man. A few points may, however, be taken here.

The difficult questions concerning the liability for *Custodia*, and the various meanings of this obscure word in different connexions and at different epochs have no special connexion with slaves and may be omitted[6]. It is necessary, however, to note that certain texts deal specially with *custodia* in connexion with *commodatum* of a slave. They shew that a *commodatarius* of a slave might be liable *ex commodato*, if he was stolen[7]. But they shew also that this liability did not arise if the slave ran away[8], unless he was of such a kind that he needed special guarding (as might appear from his age, or his being handed over in chains), or there was a special agreement[9]. The texts bear marks of rehandling[10], but there is no reason to doubt that the rule they lay down is that of the classical law. It seems to be independent

[1] G. 1. 120; G. 2. 15.
[2] Bruns, Fontes, i. 288 *sqq.*; Girard, Textes, 806 *sqq.* In old Jewish law slaves were similarly grouped with land, Winter, Stellung der Sklaven, 25—26. The whole Talmudic law of slavery is much affected by Roman Law.
[3] Bruns, *op. cit.* 325; Girard, *op. cit.* 809.
[4] Bruns, *op. cit.* i. 322. The *emptio areae* on the same page is doubtful.
[5] 21. 1. *pass.*; 13. 6. 5. 13; C. 4. 23. 2; 4. 24. 2. In late law *servi aratores* might not be seized (by *pignoris captio*) under a judgment. C. Th. 2. 30. 1; C. 8. 16. 7.
[6] Lusignani (Studi sulla Responsibilità per *Custodia*, i. ii.) gives a full account of the texts affecting this matter in relation to sale and *locatio*. His introductory section gives an account of the views of Hasse, Baron, and Pernice. See also for discussion and references, Windscheid, Pand. § 264, n. 9.
[7] 47. 2. 14. 5. His right to sue implies the liability.
[8] 13. 6. 5. 13; 13. 6. 18. *pr.* [9] 13. 6. 5. 6; 6. 1. 21; 50. 17. 23 *in fin.*
[10] See especially 13. 6. 5. 13, *Cartilius ait periculum ad te respicere...quare culpam in eam quoque praestandam.* Can hardly be genuine, since if the risk is with a man his *culpa* is not material.

of the above-mentioned difficulties. If, or in the cases in which, the liability for *custodia* involves something more than liability for *culpa*, no breach of the obligation is committed by the slave's running away, though he is *fur sui*[1]. And such a flight is no proof of *culpa* in the *commodatarius*. Even an agreement for *custodia* would not impose this liability, unless expressly. All this turns on the fact that a slave is necessarily left at large, and thus it does not apply in the case of those who would not be left at large in any case by a careful man.

Like other chattels slaves were recoverable by *vindicatio* and by the *actio* Publiciana[2], and, in consequence of the equivocal character of their offspring, and of the fact that slaves could be the medium of acquisition, there were special rules as to what was recoverable in a *vindicatio* of a slave. Inasmuch as the rules of retention by the possessor will call for full discussion hereafter[3], the only point which need here be considered is the fate of those acquisitions which were made after *litis contestatio* in the real action.

The well-known rule is that the defendant must restore the thing itself *cum omni causa*, which is explained, by Gaius, as meaning everything the plaintiff would have had, if restitution had been made at *litis contestatio*[4]. It may be that defendant has usucapted the man *pendente lite*: in that case he must, besides restoring, give security against *dolus*, since it is possible that he may have pledged or freed him[5]. So too he must give up all acquisitions *post litem contestatam* except those *in re sua*, i.e. in connexion with the possessor's affairs. Thus he must give up inheritances, legacies and the like, the child of an *ancilla* who is being claimed, even though born after she was usucapted[6]. If, pending the action, he has become entitled to *fructus* which had been received by some other possessor, and has recovered them, these too must be accounted for[7]. If he has usucapted the man *pendente lite* he must cede any action which he may have acquired on his account, *e.g.* an *actio* Aquilia[8]. He must restore all *fructus*, which, in the case of a slave, means earnings and results of labour, such as, we are told, even an *impubes* may make[9]. Conversely, a *bonae fidei possessor* could make certain deductions, as even could a *malae fidei possessor*, so far as actual benefit had accrued to the thing[10]. He could

[1] Though he is still possessed, *post*, Ch. XII.
[2] 6. 1. 1; 6. 1. 5. 5; 6. 2. 11. [3] *Post*, Ch. XV. [4] 5. 1. 20. [5] 6. 1. 18. 21.
[6] 6. 1. 20. He must give, in respect of the child, the same security as in the case of the woman herself.
[7] 6. 1. 17. 1.
[8] *Ibid.*; 6. 1. 21. This cannot be needed in any other case, for though the possessor may have an *actio utilis*, the owner has an *actio* Aquilia on his own title.
[9] 6. 1. 20; 6. 1. 31.
[10] 5. 3. 38, 39. The form of these texts suggests that the right of a *malae fidei possessor* to make these deductions was of late origin.

not set off ordinary costs of education and maintenance, but for such expenditure, before *litis contestatio*, as was necessary to preserve the man, e.g. paying damages in a noxal action, he might claim allowance by an *exceptio doli*[1].

In relation to merely *utiles impensae*, there is a difficulty. The general rule was that the plaintiff had the alternative of paying for them or allowing the possessor to take away the result[2]. But this could not be applied to special training given to a slave. This could not be undone, and the strict rule was that no account was taken of it[3]. This harsh rule was subject, however, to three exceptions. (*a*) Allowance was made, *si venalem habeas et plus ex pretio eius consecuturus sis propter artificium*[4]. The plain meaning of this is that if the claimant proposes to sell him, and he has a higher market value, by reason of the teaching, the cost of it must be allowed. This has an unpractical look, though it is the usual explanation of the text. In another text, on another point, a plaintiff's claim is made to depend on his intention to sell, but here the proof is the other way, and it is not easy to see how the possessor could prove the claimant's intention[5]. In practice it probably meant little more than that, if the market price was increased, the training must be allowed for. (*b*) If the possessor, knowing that a claim was on foot, notified the intending claimant that he intended to incur this expense, it would have to be allowed, if the claimant did not at once take steps. (*c*) The cost of the training could in any case be deducted from the earnings made by it. A text of Modestinus[6] following that in which this is said, adds: *Quodsi artificem fecerit post vicesimum quintum annum eius qui artificium consecutus est impensae factae poterunt pensari.* These words seem to mean that by the time the man is twenty-five these costs will have been compensated for by earnings, and no account of them need be taken in any *vindicatio*[7].

We are told that if a slave is handed over, *post conventionem*, security must be given by a *bonae fidei possessor* against *dolus*, but by *malae fidei possessor* against *culpa* too, and that, after *litis contestatio*, a *bonae fidei possessor* is on the same footing so far as this is concerned[8]. This too is obscure: how can a man be guilty of *dolus* in respect of a thing which he regards as his own[9]? According to one view the *dolus*

[1] *Ibid.* 6. 1. 27. 5. The same is no doubt true of unusual medical expenses.
[2] 6. 1. 27. 5; Greg. Wisig. 6. 1 (Krüger).
[3] 6. 1. 27. 5. [4] 6. 1. 29. [5] 6. 1. 15. 3. [6] 6. 1. 30—32.
[7] It has been suggested that 25 is a misprint for 5, the meaning being that these expenses may be taken into account if the slave is 5—that being the age at which a slave's services are regarded as of some value. Pellat, de rei vindicatione *ad* 6. 1. 32, citing 7. 7. 6. 1. Justinian seems to regard 10 as the minimum age for an *artifex*. C. 6. 43. 32; 7. 7. 1.
[8] 6. 1. 45; 21. 2. 21. 3.
[9] It has been shewn that the text was written of the Interdict, *Quam Hereditate.n.* (Lenel, E. Perp. 363.) But this is immaterial since this interdict gave a remedy where the defendant refused the security required in a real action. Vat. Fr. 92.

contemplated is any misconduct of the possessor in relation to the slave[1], such as lessens his value and is plainly contrary to public morality. But this is extremely artificial Another view is that the text refers to one who, having been a *bonae fidei possessor*, has learnt that the thing belongs to another[2] But such a person is now a *malae fidei possessor*, and there is no reason to confine the rules of *malae fidei possessio* to the case of one who was so *ab initio*, a *praedo* But the true solution may be not far from this A *bonae fidei possessor* is one not proved to know that he was not entitled The formal notice of claim, involved in the word *conventio*[3], is not enough to saddle him with this knowledge, but it has definitely altered his position, and the rule seems to say that if a person so notified wilfully exposes the slave to dangers which result in damage he is not to be heard to say—"So far as I knew, it was my own slave, with whom, so far as you are concerned, I could do what I liked" It may be that a man would not readily expose to risk a slave he thought his own, but it is not so clear that he would not risk one as to whom his knowledge to the contrary was not yet proved And there are steps between belief that one is owner and knowledge that one is not

If the man die pending the action, without fault or *mora* of the possessor, his value is not due[4], but the case must still go on to judgment, on account of *fructus* and *partus*, and because on the question of title may depend the further question, whether either party has a claim on eviction against some third party[5] The defendant, if judgment goes against him, must account for fruits up to the death It may be impossible to tell what the actual earnings were, and they are therefore estimated so that for any period during which the man was so ill that he could earn nothing, nothing can be charged[6] If, now, the defendant was already in *mora* at the time of death, he must account, of course, for *omnis causa*, and for fruits up to the day on which judgment was given, estimated in the same way[7] It is not clear when a *bonae fidei possessor* is *in mora* The expression seems to belong to the law of *obligatio* and to be out of place in real actions Its use is further evidence of the insufficiency of the distinction between *bonae* and *malae fidei* possessors Pellat thinks he is *in mora* from the time when he knew or ought to have known that his title was bad[8] This is a rather indeterminable time and a person so convinced is a *malae fidei possessor* All that is certain is that it was not *litis contestatio*[9]

[1] Pellat *op cit ad* 6 1 45 [2] This view is as old as Azo
[3] Pellat, *loc cit* [4] 6 1 15 3, 6 1 27 2 [5] 6 1 16 *pr*, 46 7 11
[6] 6 1 79 [7] 6 1 17 1 [8] *Op cit ad h l*
[9] The possessor is not necessarily liable if the man die after *litis contestatio* See n 1 and 6 1 27 2 Savigny thinks that *bonae fidei possessor* is in *mora* only from the time of *pronuntiatio* which imposes an obligation in him The texts in the *Basilica* which seem to confirm this are shewn by Pellat to contemplate *mora* before the *pronuntiatio*, and there is usually no material delay between *pronuntiatio* and *condemnatio*

If the possessor lessens the value of the slave, *dolo*, during the action, he is of course liable, but if the slave is afterwards killed by some cause in no way imputable to him the effect is to end the plaintiff's interest, and, therefore the liability for the damage, in that action[1]

If the slave has run away, *pendente lite*, the *bonae fidei possessor* is free from liability, unless he has usucapted him, in which case he must cede his actions, or unless the slave was one of such a sort that he ought to have been carefully looked after, in which case his value is due In any case he must give security to hand over the man, if he recovers him[2]. If the possessor connived at the flight he is liable as if he still possessed[3], and on the same principle if he sell the man, *pendente lite*, and the vendee kill him, he must pay the value[4] In relation to all these rules it must be remembered that if the possessor was really owner before the action, he can proceed with his defence and get absolution. These rules suppose the claimant to prove his title

Most of these points have nothing to do specially with slaves. They are therefore very shortly treated, and many difficulties have been ignored, especially in relation to the liability of possessor for the value of the man if he cease to exist during the action It must, however, be noted that, to the ordinary cases of *interitus rei* which release the *bonae fidei possessor*, noxal surrender must be added[5]

In the *actio furti*, *condictio furtiva* and *actio* Aquilia on account of a slave, the only points which require notice, are, that the *interesse* included the value of an inheritance upon which, owing to the slave's death or absence, his entry had been prevented[6], and that the *condictio furtiva* was necessarily extinguished if from any cause he became free or was expropriated *domino solo competit.*

The case of legacy of a slave gives occasion for many rules, the development of which cannot well be made out, owing to the suppression by Justinian of the differences due to form[7] In the case of simple legacy, the heir must hand over with him any acquisitions through him, any earnings the legatee could have gained if the slave had been in his possession and, in the case of an *ancilla*, any *partus*[8]. It may be assumed that, if the legacy was conditional, the legatee was entitled to such profits only from *dies cedens*. This is sufficiently clear

[1] 6 1 27 2 *Actio* Aquilia *durat* [2] 6 1 21
[3] 6 1 22 Or if he fled through *culpa* of the possessor (21 2 21 3)
[4] 6 1 17 *pr* Though the claimant can in appropriate cases, (e g if the price is not paid,) take cession of actions instead
[5] 6 1 58
[6] G 3 212, Inst 4 3 10, D 13 1 3, 47 2 52 28
[7] The texts give no real help on the question whether, or how far, legacies *per vindicationem* and *per damnationem* were on the same footing, in the classical law, in relation to the questions now to be considered See for a discussion and references Pernice, Labeo 2 2 113
[8] 30 39, 30 86 2

on the texts[1], and the enactment of Justinian which gave the fulfilment a certain retrospective effect does not appear to have touched this point[2].

If a specific slave is left, in either form, he must be taken *talis qualis*[3], and any promise of quality the *heres* may make is void[4]. But if there is a general gift of "a slave," *per damnationem*, (and probably *per vindicationem*,) then, as it is the duty of the *heres* to give a good title, he must warrant the slave given to be free from noxal liability, though he need not promise that he is *sanus*, since he is not obliged to give one of good quality[5]. But he must not give one of the very worst quality, and thus, if he gave one whom he knew to be on the point of death, this would be a case of *Dolus*. Where he gave one whom he knew to be a thief, and the slave stole from the legatee, there was an *actio doli* by which he could be compelled to give another, and he must leave the bad slave *pro noxae dedito*[6].

If a *servus heredis*, or *alienus*, is legated, and has run away, Paul tells us that, if the flight were after the testator's death, the *heres* must give security for his production, and pay the expenses involved in his recovery, but not if the flight had been before the death[7]. Africanus lays down this latter rule for all slaves (left apparently in any form), giving the reason that the *heres* can only be bound to give him as the testator left him[8]. This seems to imply that Africanus would impose the duty of recovery on the *heres*, even though it were the slave of the testator, if the flight were after the death. Ulpian says that if the slave were in flight or at a distance the *heres* must *operam praestare*, in order that the slave be handed over, and adds that he, Julian and Africanus, are agreed that the expense must be borne by the *heres*[9]. As it stands the text gives no restriction as to the time of flight, the origin of the slave, or the form of the gift. In view of the texts just cited[10] it seems that this extreme generality must be an error, even for the time of Justinian, but, as to the liability of the *heres* to incur expense, if the flight is after the death, the texts are explicit. It must be noted that he is not liable for the value of the slave but only to incur reasonable expense in recovering him[11].

If a *servus alienus legatus* is freed by his owner, the *heres* is no

[1] *Arg.* 32. 3. 1; 6. 1. 66; 29. 5. 1. 4. For other texts see Bufnoir, Conditions, 379 *sqq.*
[2] C. 6. 43. 3. [3] 30. 45. 2.
[4] 30. 56. The same is presumably true of a *legatum optionis servi*.
[5] 36. 45. 1. [6] 30. 110. *Post*, Ch. v.
[7] 31. 8 *pr.*
[8] 30. 108. *pr.* [9] 30. 39. *pr.*
[10] And of the rules in other legacies 30. 47. *pr.*; 30. 108. 12.
[11] It might be urged on the one hand that the *heres* is in general only liable for *culpa* and on the other that he has a certain obligation and that difficulty is not impossibility. But the question is not of the imposition of a legal duty, but as to the testator's intention, and analogies from the law of obligation are of little use.

longer liable[1], unless he was already *in mora* or was in some way privy to the manumission, which is a case of *dolus*[2].

The same is true, *a fortiori*, if the slave was the property of the testator and was freed by him[3]. In one text Celsus tells us that if a *servus legatus* is freed *interim*, and becomes again a slave, the legacy is good[4]. *Interim* seems to mean during the testator's life, since the case is coupled with one in which the expression *medium tempus* is used; the ordinary term for the interval between the making of the will and the death. The reenslavement may, so far as the words go, have been either before or after the death, the manumission cannot have been by the *heres* or after alienation by him, for, as we shall see, this case was differently dealt with. But the rule given by Celsus seems very doubtful. If applied to a case in which both manumission and reenslavement occurred before the death, it is not in conflict with the principles of *legatum per vindicationem—media tempora non nocent.* But the manumission was a complete ademption[5]. In later law this was not necessarily so in case of sale[6] of the *res legata*, but manumission is on a different footing: a testator cannot be regarded as having contemplated reenslavement[7]. And the rule cannot be harmonised with the principle that a slave freed is a new man, and if reenslaved is a new man again[8].

For the case of a *servus alienus* it is certainly not the law. In these matters the rules as to promise of a slave can be applied to legacy[9], and elsewhere we learn that where a *servus alienus* was promised, and was freed by his owner, the promisor was released, and that, if the man again became a slave, the promise was not enforceable: the obligation once destroyed is gone for ever, and the new slave is another man. The text expressly repudiates the view, which it credits to Celsus, that the obligation was revived by reenslavement[10]. Our case differs, in that, since the manumission preceded the death, there was never an obligation on the *heres*, but this is not material, and it is evident that Celsus held views more favourable to the validity of such gifts than were generally current[11].

If the slave belonged to the *heres*, and he freed him, (or alienated him, and the new owner freed him,) he was liable to pay his value

[1] 30. 35.
[2] 46. 3. 92. *pr.*; In. 2. 20. 16. So if he has become a *statu liber*, the *heres* is discharged by handing him over as such.
[3] *Post*, Ch. xx. The texts there discussed deal only with manumission by will, but manumission *inter vivos* is a stronger case, since the gift cannot in any case have been adeemed.
[4] 32. 79. 3. [5] 33. 8. 1. [6] In. 2. 20. 12.
[7] 34. 4. 26. 1; 45. 1. 83. 5. [8] 46. 3. 98. 8. [9] 30. 46.
[10] 46. 3. 98. 8.
[11] He first expressed the view which Severus and Caracalla enacted and Justinian accepted that sale of the thing legated did not adeem the gift, unless so intended. Gaius was still in doubt (G. 2. 198; In. 2. 20. 12). See also an exceptional view of his, in 34. 7. 1. 2.

whatever the state of his knowledge, and the same rule applies no doubt to the case of a *servus hereditarius*[1]. His knowledge is immaterial because this is true in general of all obligations under an inheritance: he was not the less liable to pay a debt because he was not aware of its existence. Other circumstances not of his creating might make it impossible to deliver the slave, and so discharge him. Thus if the *servus legatus* gains his freedom by discovering the murderer of his master, the *heres* is released[2]. So if the slave is justly killed for crime, either under judicial process, or by the *heres*, or by a third person, or if he dies before the *heres* is *in mora*[3]. But if the *heres* induced him to commit the crime, and so is guilty of *dolus*, he is liable under the legacy[4]. If the *heres* noxally surrenders him he is not released, since he could have paid the damages and can redeem him: the liability to hand over the slave with a clear title being, as it were, a debt imposed upon him[5].

A legacy giving the legatee an absolute choice (*legatum optionis*[6]) was not confined to legacies of slaves, but this seems to be the commonest case[7]. Such a legacy is said by Justinian to have been conditional in earlier law; selection by the legatee being the fulfilment of the condition[8]. There are some signs of difference of opinion, and it may be doubted whether it is not more correct to say that to have been chosen by the *heres* was part of the definition of the slave, and thus that, if he did not choose, no slave satisfied the definition[9]. Nothing in the present connexion seems to turn on the distinction: the rules are in the main those of a conditional legacy. We are told that *optio servi* is an *actus legitimus*[10], and thus not susceptible of modalities. It is practically convenient that the choice should leave no doubt that one man has been finally chosen, since the moment of choice determines to whom he acquires. The principles of condition give the same result: a condition partially satisfied is not satisfied at all[11]. Conversely it follows that a conditional choice

[1] In. 2. 20. 16. So if he killed him without reason but not knowing of the gift, 36. 1. 26. 2; 45. 1. 91. 2.
[2] *Arg.* 29. 5. 3. 13.
[3] 29. 5. 3. 13; 30. 53. 3; 46. 3. 92. *pr.*
[4] 30. 53. 8. So though torture of the man under the *Sc.* Silanianum, by which he was destroyed, released the *heres* if it were lawfully done, it did not if he was not legally liable to it. 29. 5. 3. 13. So if *servus alienus legatus* is captured, apart from *dolus* of *heres*, but he will be liable if and when the slave returns. 30. 53. 9; 46. 3. 98. 8. This is the effect of *postliminium*.
[5] 30. 53. 4. As to the effect of a gift of "my slaves," see 32. 73.
[6] U. 24. 14; D. 33. 5. 2. *pr.* They varied in form (cp. 33. 5. 9. *pr.*). There might be *optio servorum*, which, so Pius decided, gave a right to choose three (33. 5. 1).
[7] 33. 5. *passim*. And see C. 6. 43. 3 in which Justinian after laying down a rule for all cases adds without comment a tariff applicable only to slaves.
[8] In. 2. 20. 23.
[9] *Post*, Ch. XXIV.
[10] 50. 17. 77. If indeed the words *Servi optio datio tutoris* were not originally *optio tutoris*. If the allusion is to exercise of the right we are considering, it is not easy to see why it is confined to *servi*. And *tutoris datio* could certainly be conditional and *ad diem*. In. 1. 14. 3; D. 26. 1. 14.
[11] 35. 1. 23.

would not bind the chooser[1]. So if the legatee choose a *servus alienus* or a *liber homo*, this is a nullity, and does not consume his right of choice[2]. If the legatee chose a man who had conditional liberty, Julian held that the testator must be understood not to have included him; the choice being a nullity was not exercised. If, however, the condition on the gift of liberty failed, then, says Julian, following Q. Mucius, he may be chosen: the exclusion is only for the event of his being free[3]. It follows that a real exercise of the option was decisive: in the case of gift *per vindicationem*, it vested the man in the legatee, and an act of his will could not substitute another for him.

The Institutes say that under the older law, if the legatee died without choosing, the gift could not take effect: the *heredes* could not choose[4]. This is confirmed by the authority of Labeo, Proculus and Gaius, in another case. They say that if a thing is left to X, "if he likes," and he does not himself accept, the right does not pass to his *heres—conditio personae injuncta videtur*[5]. Another text emphasises the need of personal choice by saying that the *curator* of a lunatic legatee could not choose[6].

All this puts the matter on the level of condition, but it is clear that there were doubts. Paul in one text gives the *heres* of legatee the right of choice[7], and Justinian in his constitution[8], in which he regulates the matter, tells us that the point was doubtful not only where the legatee was to choose, but where the choice was with a third party. He settles the matter by the decision that the right of choice may be exercised by the *heres* of a legatee directed to choose, and that, if a third party so directed died, or became incapable, or neglected to do it for a year, the legatee might choose. But since the third party was given the choice in order to choose fairly, the legatee must not choose the best.

In a joint legacy of *optio* there had also been doubts. Clearly the condition required actual agreement[9]. The doubt may have been whether, in case of failure to agree, the thing was void, or each was owner in part of the man he chose[10]. It is clear that the dominant view was that, till all had agreed, there was no choice. Thus if one chooses he is free to change his mind, but if, before he does so, the

[1] So, as in conditions involving an act, anticipatory choice was null: it must be after *aditio*. 33. 5. 16, cp. 35. 1. 11. 1. So the legatee's declaration that he will not choose a certain man does not bar him from doing so. 33. 5. 18.
[2] 33. 5. 2. 2.
[3] 33. 5. 9. 1, 2.
[4] In. 2. 20. 23.
[5] 35. 1. 69.
[6] 33. 5. 8. 2.
[7] 33. 5. 9, 19.
[8] C. 6. 43. 3, cp. In. 2. 20. 23.
[9] 33. 5. 8. 2. In Justinian's time at least *heredes* of a legatee of choice are in the same position. C. 4. 43. 3.
[10] 35. 1. 23; In. *loc. cit.*

other fixes on the same man, he is at once common. How if the first chooser has died or gone mad in the meantime? Pomponius decides that the man cannot become common as there can be no common consent. The compilers add that the humaner view is that he does become common, the original assent being regarded as continuing. Justinian also lays down the rule that in such gifts the choice is to be exercised by one chosen by lot: the man will be his and he must compensate the others on a scale varying with the kind of slave and following a tariff laid down by the constitution[1].

As in the case of *aditio*, the law fixed no limit of time for choice. To avoid inconvenience, the Praetor could fix a limit on the application of *heres*, or of a legatee who had a right subsequent to the right of choice, or even of a buyer of the *hereditas*[2]. The time would no doubt not exceed a year. If it were past, the *heres* was free to sell, free, or pledge the slave, and the acquisition of rights by third parties barred the legatee *pro tanto*. Apart from such transfer, his right was unaffected. But if some have been sold, while Pomponius thinks he may still choose among the rest, Paul thinks him barred, since to allow him to choose now that the *heres*, having disposed of those he did not need, has reorganised his household, would impose great inconvenience on him. No doubt the inconvenience would have to be proved. The passage of Paul is from his *Quaestiones*: it may be that the compilers have made a rule where he expressed a doubt[3].

The rules in the case of promise of a slave are much the same as in legacy. If a *servus alienus promissus* is freed by his *dominus* without *dolus* or *culpa* of the *promissor*, he is released, and the obligation is not revived by reenslavement. Paul points out on the authority of Julian, that *culpa* could not arise in such a case unless there was *mora*[4]. So too the *promissor* is released if any slave promised dies before there is *mora*, even though the death is caused by neglect, since the *promissor* is bound *ad dandum*, not *ad faciendum*[5]. So too if the slave become a *statu-liber*, without act or complicity of the *promissor*, he is released by handing him over as such[6]. If he was promised as a *statu-liber* and the condition is satisfied, the *promissor* is released[7]. So too if he was duly killed for wrongdoing, or by torture under the *Sc.* Silanianum, or earned liberty by discovering crime. But if the torture is wrongly inflicted, the *promissor* is still liable: it seems to be assumed that he could, and ought to, have prevented it[8]. If the man is *alienus* and is captured by the enemy,

[1] C. 6. 43. 3. 1, cp. In. *loc. cit.*
[2] 33. 5. 6, 8. *pr.*, 13. 1.
[3] 33. 5. 6, 7.
[4] 45. 1. 51; 46. 3. 92. *pr.*, 98. 8; 45. 1. 91. 1.
[5] 45. 1. 91. *pr.*; 46. 3. 92. *pr.*
[6] 46. 3. 92. 1.
[7] 45. 1. 91. 1.
[8] 29. 5. 3. 13; 45. 1. 96.

Paul says he can be sued for on his return[1]. Elsewhere, he seems to say that if it were the *promissor's* own slave who fell into enemy hands, he was not released. The case is put on a level with manumission by the *promissor*, and it seems that the very fact of not preventing capture is treated as *culpa*[2]. In one text, Paul raises, but does not answer, the question: what is the result if the *promissor* kill the slave, not under such circumstances as clearly release him, but in ignorance that he is the subject of the promise[3]? If the text lays down a rule, it is the same. In fact, it leaves the matter open[4].

A slave like any other *res* might have *fructus*, and, in his case, the *fructus* were of a very distinct kind. Not only did they include earnings[5], which might arise equally well in connexion with other things, but there might be gifts and profits on transactions, which are not exactly earnings, and could not arise in connexion with other chattels. Conversely it is important to observe that *partus* are not fruits[6]. Two reasons are given: *quia non temere ancillae eius rei causa comparantur ut pariant*[7], and that it is absurd to regard man as a fruit, since all things are made for him[8]. The first compares oddly with the rule that sterility might be a redhibitory defect[9], and still more oddly with the counsels of the writers on *res rusticae*[10]. The second must have seemed somewhat ironical to a slave. Both of them however express, somewhat obscurely, the real reason, which was respect for human dignity[11], rather than any legal principle. Nor were *partus* accessories. These distinctions had several important results. Thus a gift of an *ancilla cum natis* did not fail if she were dead, as would one of *servus cum peculio*[12]. They did not, like fruits, vest in the *bonae fidei possessor*[13]. *Partus* of dotal *ancillae* did not go to the *vir*, except where the *dos* was given at a valuation (*dos aestimata*), in which case only the agreed sum had to be returned[14]. Nevertheless they share in the qualities of fruits and accessories in many respects.

[1] 46. 3. 98. 8.
[2] 45. 1. 91. 1.
[3] 45. 1. 91. 2.
[4] Pernice, Labeo, 2. ii. 116, thinks he expressed the contrary view and the compilers have cut out his conclusion. These are really cases of a wider problem, beyond our scope: i.e. how far supervening impossibility discharged from liability to *condictio*, or, what is much the same thing, what is the theory of *culpa* in such cases? Pernice gives a full discussion and references.
[5] C. 6. 47. 1.
[6] 6. 1. 16. *pr.*, 17. 1; 23. 3. 10. 2, 3; 36. 1. 23. 3; 41. 3. 36. 1; 47. 2. 48. 6; C. 5. 13. 1. 9. In. 2. 1. 37; Cicero, de Fin. 1. 4. 12. It was not usual to call the children of *ancillae*, *liberi*. Sueton. Fragm. s.v. *liberi*.
[7] 5. 3. 27. *pr.*
[8] 22. 1. 28. In. 2. 1. 37.
[9] 21. 1. 14. 3. *Post*, p. 55.
[10] See Wallon, *op. cit.* 3, Ch. II.
[11] Accordingly it is late in developing. See Girard, Manuel, 247.
[12] 30. 62, 63.
[13] 47. 2. 48. 6; cp. 24. 1. 28. 5, 17. *pr.*; or in the fructuary, who had not even a usufruct of them. P. 3. 6. 19; D. 7. 1. 68 (where it is said to have been disputed among early lawyers); 22. 1. 28. 1; 41. 3. 36. 1. See also Cicero, *loc. cit.*
[14] Vat. Fr. 114; C. 5. 13. 1. 9; 5. 15. 1; D. 23. 3. 10. 2; *h. l.* 3; *h. t.* 69. 9; 24. 3. 31. 4; 31. 48. *pr.*

A *heres* handing over an *ancilla* to fidei-commissary or legatee after *mora* must hand over her *partus*[1], but not those born before *dies cedens* or even before *mora*[2]. And the beneficiary could get *missio in possessionem* as of fruits[3].

Where the sale of an *ancilla* was voidable as being in fraud of creditors, the transferee had a good title in the meantime, and thus, though she was recoverable, and *partus* born *post iudicium acceptum* were included as a matter of course, those born *medio tempore* were not recoverable, as they were never *in bonis venditoris*[4]. Proculus however held that if she were pregnant of them at the time of the transaction, they must be restored[5]. The materiality of conception before the transaction was one on which there were differences of opinion, as will be seen in relation to some of the more difficult cases now to be considered. If the child conceived be regarded as already existing, it must be considered (since it certainly passed by the sale[6]) as a sort of accessory. Further, it could be pledged, sold and even freed before it was born[7]. The first two cases prove nothing, since pledge and sale were possible of slaves not yet conceived[8]. In the last this is not so clear, since it is a gift to the child. But this case loses its significance, in view of the well-known principle that a child in the womb is regarded as already existing, so far as this makes to his benefit, but not for the advantage of others, nor to his own detriment[9]: *alii antequam nascatur nequaquam prosit*[10]; *aliis non prodest nisi natus*[11]. A modification of this in favour of the owner of the *ancilla* at the time of conception is not surprising, and we shall see other signs of this[12].

According to several texts[13], one of which is an enactment of A.D. 230[14], and assumes the rule as a standing one, children born to a pledged *ancilla* are included in the pledge, as future crops might be. In one of the Digest texts[15] it is Paul who tells us the same thing. But, in his

[1] 15. 1. 57. 2; 22. 1. 14; 30. 84. 10; 33. 8. 8. 8; 36. 1. 23. 3.

[2] 22. 1. 14; 33. 5. 21; 35. 2. 24. 1. Two texts seem to contradict this by saying that where the thing is to be handed over after a time, *partus* born in the meantime must be handed over as not being fruits; 36. 1. 23. 3, 60. 4. (Buhl, Salvius Julianus, p. 189). In 23. 3 the allusion is apparently interpolated, for it is out of place, but it does not clearly exclude *mora* in the sense of undue delay. 60. 4 is still more suspicious, as an authority on this point. It says of *fetus*, and seems to imply of *partus*, that they must be handed over only in so far as they have been *summissi*, i.e. used to replace those who have died. It may refer to a legacy of a whole *familia*.

[3] 36. 4. 5. 8. For further illustrations, see 4. 2. 12. *pr.*; 5. 3. 20. 3, 27. *pr.*; 6. 1. 16. *pr.*, 17. 1, 20; 12. 4. 7. 1, 12; 12. 6. 15. *pr.*, 65. 5; 30. 91. 7; 43. 26. 10.

[4] 42. 8. 10. 19—21; *h. t.* 25. 4. [5] 42. 8. 25. 5.

[6] 13. 7. 18. 2. [7] 20. 1. 15; 18. 1. 8. *pr.*; P. 4. 14. 1.

[8] The texts express no limitation. A child unborn is not in the *hereditas*, *pro Falcidia* 35. 2. 9. 1.

[9] 1. 5. 7; 1. 5. 26; 38. 17. 2. 3; 50. 16. 231. [10] 1. 5. 7.

[11] 50. 16. 231. It is however sometimes stated more generally, 1. 5. 26. But this expresses only the fact that the principle applies over a wide field.

[12] But *partus* conceived before the sale and born after went to the buyer, 13. 7. 18. 2; 41. 1. 66; C. 3. 32. 12.

[13] 20. 1. 29. 1; 43. 33. 1. *pr.* [14] C. 8. 24. 1. [15] 20 1. 29. 1.

Sententiae[1], he lays down the opposite rule, not as special to *partus*, but as applying to *fetus* also. Many attempts have been made to explain away this sharp conflict. Dernburg[2] thinks the rule of inclusion was introduced by the enactment of 230[3], after the *Sententiae* were written. But the enactment clearly treats the rule as well known. Huschke[4], observing that the MSS. give various readings, some of which agree with the general doctrine, and following the *interpretatio*, proposes to amend, so as to make Paul say, merely, that, though there was a right in a gratuitous lender, who had taken a pledge, to keep fruits in lieu of interest[5], this did not apply to *partus* and *fetus*. It should be noted that *fetus* and *partus* differ from ordinary fruits in that they bear a much less constant ratio in value to the thing itself: it is not so plainly fair that they might go in lieu of interest. Ordinary fruits, as we have seen, might often go to the creditor, and indeed it is far from certain that they were covered by the pledge[6]. The language of the enactment of Alexander[3] indicates that the inclusion of *partus* was not based on any notion of identity, but on a tacit convention which came to be presumed, and it may be that, as Dernburg[7] also suggests, this is all Paul means by his requirement of a *conventio*.

Acceptance of this rule does not end the difficulty. If a debtor sell the pledged thing, it is still subject to the pledge[8]. What is the position of *partus* born to the woman after the sale? A text which lays down the general rule of inclusion does not advert to any distinction[9]. One, from Julian[10], implies that they are not strictly pledged, but adds that there will be a *utile interdictum* to recover them. Another text, from Paul, lays it down that if the *partus* is born after the sale, it is not subject to the pledge[11]. The texts are sometimes[12] harmonised by the suggestion that, while Julian is dealing with a case in which the *partus* was conceived before the sale, Paul writes of one conceived after it. But as Vangerow says[13], this distinction is arbitrary and inconsistent with the language of the concluding part of Paul's text. He thinks the rule was that the *partus* (and *fetus*) were not included, if born *apud emptorem*, since a pledge can cover only property which is in, or grows into, the property

[1] P. 2. 5. 2. *Fetus vel partus eius rei quae pignori data est pignoris iure non retinetur nisi hoc inter contrahentes convenerit.*

[2] Dernburg, Pandekten i. § 273 n. 8. [3] C. 8. 24. 1.

[4] Huschke, Jurispr. Antejust. *ad* P. 2. 5. 2. [5] 20. 2. 8.

[6] Windscheid, Lehrbuch, § 226a, n. 10.

[7] Pfandrecht, 448, *cit.* Vangerow, Pandekten, § 370.

[8] 13. 7. 18. 2. [9] C. 8. 24. 1. [10] 43. 33. 1. *pr.*

[11] 20. 1. 29. 1. Another text of Paul, sometimes said to lay down the rule that such *partus* is pledged, is not in point: it merely says, allusively, that sale of an *ancilla* includes her unborn *partus*, 13. 7. 18. 2.

[12] Buhl, Salvius Julianus, 188. [13] Pandekten, § 370.

of the pledgor[1]. This does not explain why Julian[2] allows an interdict, even *utile*, in this case Vangerow[3] supposes it to be due to a special importance attaching to a pledge for rent It seems more probable that it is an individual view of Julian (who holds other individual views on connected topics[4]), that he held that *partus* were included, wherever born, but that the direct interdict applied only to the crops etc bound by tacit hypothec, and not to express hypothec[5]

Usucapio of *partus ancillae* gives rise to many conflicts of opinion in the texts which have been the subject of much discussion by commentators[6] The differences are not surprising, in view of the many questions of theory to which the possible facts may lead Is the child a part of the mother? If not, when does its existence begin, and is it acquired by the same *causa*? Is it affected by *vitium* in the mother? The matter is further complicated by the fact that the rules as to *bona fides* were not the same in all the *causae* *Emptio* had, and *donatio* may have had, special rules, and in the cases discussed this point is material And in some of the texts the transaction under which the mother is held was between a slave and his master, and there is the further question how far the latter is affected by the *mala fides* of the slave It will be convenient to deal first with the case in which the mother was capable of being usucapted, i e was not subject to any *vitium*

As we are told by Ulpian[7], the issue are not fruits, and so do not vest in the *bonae fidei possessor*, though some texts dealing with these matters group *partus* with *fetus*[8], which are in turn grouped with fruits, and declared to vest in the *bonae fidei possessor*[9] They are not a part of the mother[10] As they do not vest in the *possessor*, they must be usucapted independently If the mother is usucapted before the *partus* is born, no question arises, for as in the case of any other alienation, the new owner of the woman owns the child[11]. If it is born before that date it must be independently acquired, and possession of it does not begin till it is born[12] So far the texts agree. But there is disagreement as to the *titulus* or *causa* by which it is

[1] See the reff in Windscheid Lehrbuch, § *cit* n 7 [2] 43 33 1 *pr*
[3] *loc cit* Lenel has shewn ground for thinking that the passage was originally written of the *actio* Serviana (Ed Perp § 266)
[4] See next page
[5] This is Salvianum *utile* but not the *quasi* Salvianum which has been supposed to have existed
[6] See e g Buhl Salvius Julianus, 190—198, Appleton Propriete Pretorienne i 116 *sqq*, 250—277 318 *sqq*
[7] 41 2 48 6
[8] 41 3 4 5, *h t* 10 2, 47 2 48 5 [9] 41 1 48 2
[10] 18 2 4 1, 21 2 42, 41 3 10 2, 50 16 26 In one text we are told that till born the child is a *portio matris* (25 4 1 1), but this has no general bearing it means only that till the child has an independent existence the interdict *de liberis agnoscendis* has no application
[11] 41 1 66 [12] 41 3 4 16, *h t* 44 2

acquired According to Julian, and apparently Papinian, the *titulus* is the same as that of the mother[1] if the mother was being usucapted, *pro emptore*, so is the child According to Paul it is by an independent *titulus*, *pro suo*[2] The latter view necessarily leads to the rule that *bona fides* is necessary at the birth which is clearly the *initium possessionis* And so Paul lays it down[3] Papinian however holds that good faith at the time of acquisition of the mother is enough[4] This is perhaps, as Buhl says, an expression of Julian's view, but it goes beyond the logical implications of identity of *titulus* This of itself would not do away with the need for good faith when possession began Appleton regards it as treating the *partus* as an accessory, the destination of which is governed by that of the principal thing, subject only to the need for actual possession As we have seen, this is contrary to the general attitude of the law towards *partus* and there is no other textual authority for it Regarded as an expression of Julian's opinion[5] and resting on his rule that the *titulus* is the same, it may be related with his view that a *bonae fidei possessor* did not cease to acquire through the slave, by learning that he was not entitled supervening bad faith was, for Julian, immaterial[6] Other texts shew that this view did not prevail[7], and it would appear that, in our case too, the other view prevailed[8], so that in the case of an *ancilla non furtiva*, the conditions for *usucapio* of *partus* were the same as those for acquisition of fruits by a *bonae fidei possessor*. If that be so we get the result that the requirement of good faith at birth prevailed, while acquisition by the same *titulus* as that of the mother also prevailed It seems to be supposed, by Appleton[9], that if this part of Julian's view prevailed, the other must But there is no logical connexion Two things acquired by the same *titulus* may be first possessed at different times, and good faith be necessary for each at the time of taking It was only the conception of *partus* as an accessory that led to the view that good faith when the mother was received was sufficient[10]

The case is somewhat different where the mother has been stolen, and is thus an *ancilla furtiva* incapable of usucapion The first point

[1] 6 2 11 4 41 3 33 *pr* 30 82 4, cp 31 73
[2] 41 10 2 See Buhl *op cit* 191 Pomponius seems obscurely to express the same view (41 10 4), but it is not clear that he denies the possibility of claiming by the same *titulus* One who possesses by any title also possesses *pro suo*
[3] 41 3 4 18 Appleton (*op cit* § 139) discusses this text and cites the more important earlier literature upon it
[4] 41 3 44 2
[5] In view of his treatment of the case of *partus* born of *ancilla furtiva apud b f possessorem*, it may be doubted whether Julian held this view (*post*, p 27)
[6] 22 1 25 2 [7] 41 1 23 1, *h t* 48
[8] 6 2 7 17 (Ulp), 41 3 4 18 (Paul) [9] *op cit* i 263
[10] It hardly need be said that bad faith after the birth is not material 41 2. 6 *pr*, 40 2.

to notice is that the *partus* itself may be *vitiosus*, and thus incapable of *usucapio* by any one. If it is conceived before the theft or *apud furem*, it is *furtivus* wherever born: it is grouped in this respect with *fetus*[1]. There appears to be no disagreement as to the rule in the case in which the *ancilla* is pregnant when stolen; it is stated by Julian as an application of the rule that a child conceived is regarded as already existing[2]. It is an extension, for the benefit of the owner, of a rule in general applied only for the benefit of the slave.

As to *partus* conceived *apud furem*, there is more difficulty. Ulpian tells us in one text that this too is *furtivus*, wherever born[3]. Elsewhere he reports a view of Marcellus, that if conceived *apud furem* or *furis heredem*, and born *apud furis heredem*, it cannot be usucapted by a buyer from him. In the same text he reports Scaevola as holding that on such facts the *partus* could be usucapted, as basing the view that it could not, on the idea that the *partus* is part of the *ancilla*, and as shewing that this would lead to the view that it could not be usucapted even if born *apud bonae fidei possessorem*[4]. This Scaevola seems to regard as a *reductio ad absurdum*: it is however exactly the view at which, as we have seen, Ulpian himself arrived, in the case of conception *apud furem*[5]. It does not seem to rest on the notion that the *partus* is a part, but to follow necessarily from the view on which the *partus* conceived before the theft was treated as *furtiva*, i.e. that it was to be regarded as already existing. For the thief is still "contrecting," and therefore still committing theft.

The case is different with conception *apud heredem furis*, (assuming, as we must, that he is in good faith). Here the view of Marcellus, that it is *furtivus*, cannot rest on continued contrectation, nor is it clear that it rests, as Scaevola thinks, on the view that *partus* is a part of the *ancilla*[6]. It seems, indeed, to involve a confusion. The *heres* succeeds to the defects of his predecessor's possession, but he does not succeed to his guilt as a thief, yet this is what seems to underlie the view that *partus* conceived *apud heredem furis* is *furtivus*. He could acquire no more right in the thing than his predecessor could have acquired, but there is no reason why possession by him should affect the thing itself with any disability[7], and the language of Paul and Ulpian in other texts is inconsistent with any such notion[8]. They treat conception *apud heredem furis* as being *apud bonae fidei possessorem*, and only exclude *usucapio* by him because he inherits the defects of his predecessor's possession.

[1] 1. 5. 26; 41. 3. 10. 2; 47. 2. 48. 5. [2] 1. 5. 26. [3] 47. 2. 48. 5.
[4] 41. 3. 10. 2. [5] 41. 3. 10. 2; 50. 16. 26.
[6] It may be that the words *vel apud furis heredem* are inserted by the compilers.
[7] 6. 2. 11. 2; 41. 3. 4. 1.

If the child is conceived *apud bonae fidei possessorem* it is not *furtivus*, and can be usucapted by him on the same *titulus* as that of the mother[1]. It is clear on these texts that the possessor must have been in good faith at the time of conception. Some texts speak of good faith only at this time[2]. But none says that this is enough, and most of the texts say that good faith at the time of birth is necessary. It is noticeable that Julian takes this view[3]. Thus we arrive at the rule that good faith is necessary both at conception and birth, so that provided the child is not *furtivus* the fact that the mother was stolen makes little difference[4]. One text, indeed, from Pomponius, citing the opinion of Trebatius that bad faith supervening after the birth was immaterial, expresses disagreement, and says that, in such a case, there will be no *usucapio* unless the possessor either does or cannot give notice to the person entitled[5]. This view is so contrary to the general rule that any isolated text expressing it is suspicious. When we see that the opinion is based on the proposition that if he does not take steps his possession becomes clandestine our doubts are increased, for nothing can be clearer than that a possession *ab initio iusta* cannot become *clam*[6]. The text cannot represent the law.

The case is different where the *bonae fidei possessor* is a donee. Here we are told that he must continue in good faith up to the time of bringing the *actio* Publiciana[7], i.e. for the period of usucapion. Of this principle, that in *usucapio ex lucrativa causa* good faith must continue through the period, there are other scanty but unmistakeable traces[8].

In another text we are told that a *bonae fidei possessor* can bring the *actio* Publiciana, for the *partus* conceived *apud eum*, even though he never possessed it[9]. This has been explained[10] as meaning that not only was the *causa* of the mother extended to the child, but also the possession. This conflicts with the conclusions at which we have arrived above, and has no other text in its favour. It is argued by Appleton[11] that for recovery in the Publician it was not necessary, on the words of the Edict, to have possessed, but only to shew that your

[1] 6. 2. 11. 2; 41. 3. 33. *pr.*; 41. 10. 4. *pr.*; 41. 4. 9, 10; 47. 2. 48. 5; C. 7. 26. 3.
[2] 6. 2. 11. 2; C. 7. 26. 3.
[3] 41. 3. 33. *pr.* (and see 6. 2. 11. 3); 41. 10. 4. *pr.*; 47. 2. 48. 5.
[4] As to Paul's view in 41. 3. 4. 17, *post* p. 28.
[5] 41. 10. 4. pr. [6] 41. 2. 6. pr.; *h. t.* 40. [7] 6. 2. 11. 3.
[8] C. 7. 31. 1. 3a; C. 7. 33. 11; Bas. Heimb. Zach. p. 45, Sch. 14. For discussion of these texts see Pellat, La Propriété, *ad* 6. 2. 11. 3; Appleton, *op. cit.* § 182. References to suggested explanations and emendations will there be found. Pernice (Labeo, 2. i. 457) thinks that 6. 2. 11. 3 is interpolated, and rejects any inference from the texts in the Code for the classical law. He thinks that Justinian means only that a donee may claim *accessio possessionum*, as well as a buyer, and that knowledge acquired by the transferor after the transfer, that the thing was not his, shall not make it *furtiva*. But this requires that the word *ea* in the text shall not refer to the *detentio* which is under discussion, but to the possession of the successor which has not yet been mentioned.
[9] 6. 2. 11. 2. [10] Pellat, *op. cit.*, *ad h. l.* [11] Appleton, *op. cit.* § 134.

causa was such that if you had possessed you would have usucapted. This would certainly be the case in the supposed hypothesis, and it may be that this is the true solution of the difficulty[1].

Another text in the same extract says that the principle is the same in the case of *partus partus*, and in that in which the child is not born in the natural way, but is extracted from the body of the mother after her death, by Caesarian section. The first point is simple: the rules applied to the non-furtive *partus* are applicable to the issue of *partus furtivus*. The reason for the statement of the second proposition is not so clear. The principle which is declared to be applicable to this case too, is that of extension to the *partus* of the mother's *causa*. The remark may be intended to negative the conceivable doubt whether the connexity may not be excluded by the fact that the mother was non-existent for a certain interval of time[2]. But it may be merely that a doubt might arise as to whether a thing never actually born could be called *partus*[3].

Another group of texts raises a fresh hypothesis. It was common for a slave to provide another in lieu of himself, as the price of his freedom[4]. If the *ancilla* provided was only possessed in bad faith by the slave, we are told by Paul, on the authority of Celsus, that the master cannot usucapt her because *prima causa durat*[5]. The slave's acquisition was the master's: the intervening quasi-sale was immaterial. The slave's *vitium* would clearly affect the master. For the same reason it must be supposed that he could not usucapt *partus* even conceived *apud eum*. And so, for the case where the slave stole the *ancilla*, Paul tells us, on the authority of Sabinus and Cassius, and for the same reason[6]. But Julian appears as accepting another view of Urseius and Minicius, who say that the transaction between slave and master is tantamount to a sale, and is thus a *causa* under which the master as a *bonae fidei possessor* can usucapt *partus* conceived *apud eum*[7]. The effect of this is to avoid the difficulty that a master is affected by a *vitium* in his slave's possession. It can hardly be doubted that the other view represents the accepted law. In another text, adjoining that last cited from him[8], Paul applies the same rule even if the substitute were given by a third person for the freedom of the slave: the master cannot usucapt her *partus*. One would suppose the master was an ordinary *bonae fidei possessor* in such a case. The simplest explanation is to treat Paul as still dealing with the case of theft by the slave[9]. But the text gives little warrant for this, and its conclusion is that the same is true if

[1] We shall not consider the questions arising out of repeated and conflicting Publician claims.
[2] 6. 2. 11. 5; Appleton, *op. cit.* § 146.
[3] See 28. 2. 12; 38. 17. 1. 5; Macbeth, Act v, Sc. vii, ll. 40 *sqq.*
[4] *Post*, Ch. xxv.
[5] 41. 4. 2. 14.
[6] 41. 3. 4. 16.
[7] 41. 4. 9, 10.
[8] 41. 3. 4. 17.
[9] Appleton, *op. cit.* § 139. He cites other suggestions.

the stolen *ancilla* is handed to us in exchange, or by way of payment or as a gift. These cases can have no relation to the procuring of manumission, and the notion of a slave stealing an *ancilla* and giving it to a third person in order that he may make a present of it to the slave's master seems a little improbable: it is more likely that Paul contemplates the slave as knowing of the defect in title[1]. It may be remarked that a slave is *suis nummis emptus* for the purpose of manumission even though the price is actually provided by a third person[2], and it may be that Paul has in his mind this assimilation, and declares that for this purpose too the whole thing must be imputed to the slave.

For injuries to slaves delictal actions lay as for injury to other chattels. Thus there was an *actio* Aquilia for hurting or killing a slave, unlawfully, i.e. unless it were in self-defence, or the slave were caught in adultery or the like[3]. This action being available to the owner lay even where he had pledged the slave[4], and even though he were a buyer about to redhibit[5]. If he were freed after the wound and then died, the wounder was liable to the late owner, *de occiso*, the injury having been done while he was owner[6]. If on the same facts he had been freed and made heir by his late owner, he could presumably sue for the wounding, but if he died his heir could not sue *de occiso*, since an heir could not inherit an action which could not have belonged to the person he succeeded. If, however, the slave had been made part heir, and died, his co-heir could sue *ex* Aquilia[7]. Castrating a slave, and so increasing his value, did not give rise to an *actio* Aquilia, though it might to other proceedings[8].

The case of a slave injured twice and dying after the second injury gave rise to some interesting distinctions. The rules laid down in the texts appear to be the following:

(1) If he is mortally injured by A and afterwards dies of a certainly fatal stroke by B, B has killed, A has only wounded. This is laid down by Celsus, Marcellus, Ulpian and Julian[9].

(2) Julian lays down an analogous rule for the case in which having been mortally wounded by A he dies in a shipwreck or *ruina*[10].

(3) If having been wounded by several at once or at different times he dies and it is clear which killed him, that one alone is liable for killing, but if it is uncertain which killed him, all are liable. This is laid down by Julian (as an ancient rule) and by Ulpian[11].

[1] The remark perhaps only puts these transactions on a level with sale.
[2] 40. 1. 4. 1, *post*, Ch. xxvii.
[3] P. 1. 13a. 6; D. 9. 2. 3, 5. 3, 30. *pr.*; C. 3. 35. 3.
[4] 9. 2. 30. 1.
[5] 9. 2. 11. 7. On redhibiting he must cede his actions.
[6] 9. 2. 15. 1; *h. t.* 16; *h. t.* 36. 1.
[7] 9. 2. 36. 1.
[8] 9. 2. 27, 28, *post*, Ch. iv.
[9] 9. 2. 11. 3, 15. 1.
[10] 9. 2. 15. 1.
[11] 9. 2. 11. 2, 51. 1.

(4) If it is certain that A's blow would have killed, but not certain whether B's would or would not apart from A's, both are liable. So says Julian. *Ita vulneratus est servus ut eo ictu certum esset moriturum ...postea ab alio ictus decessit: quaero an cum utroque de occiso agi possit. respondit...igitur si quis servo mortiferum vulnus inflixerit eundemque alius ex intervallo ita percusserit ut maturius interficeretur quam ex priore vulnere moriturus fuerat, statuendum est utrumque eorum lege* Aquilia *teneri*[1].

(5) For the purpose of this last rule it is immaterial whether the death does or does not immediately follow the second injury. The fact that it follows at once does not prove that the second injury was of itself mortal. In the actual case the death occurred at once since Julian, while laying down the rule that the year, the highest value during which is payable, dates from the injury backward, says also that here it dates from the death[2]. The slightly adverse inference which might be drawn from the words *maturius interficeretur* is negatived by the use of a similar expression where the second event was *naufragium vel ruina*[3].

(6) Where two persons are thus liable, the damages may not be the same. In the case supposed the slave was instituted *heres* by someone between the two injuries. The loss resulting from his failure to enter is imputable to the second injurer, not to the first[4].

These texts have given rise to much controversy: it has been supposed that in 9. 2. 51. *pr.* Julian is in at least apparent conflict with Marcellus, Celsus, Ulpian and himself in 9. 2. 11. 3, 15. 1. This opinion seems to rest on the assumption that the cases in 11. 3. and 51. *pr.* are the same, i.e. that the words *alius postea exanimaverit, ex alio vulnere periit* (11. 3) mean the same as *ab alio ictus decessit, alius...ita percusserit ut maturius interficeretur*. It is plain that they do not: the latter formula leaves uncertain the question whether the second injury was itself mortal. It is noticeable that Julian expresses his rule as an inference from the old rule already laid down for the case where there was doubt as to the fatal character of both of the injuries[5]. Thus the contradiction, improbable in itself, appears to be non-existent. The discussions also contain the assumption that if the death follows immediately on the second injury, this shews that the second injury was mortal. In a certain sense it does so, but not in Julian's sense. It does not shew that it was mortal apart from the first[6].

[1] 9. 2. 51. *pr.* [2] Pacchioni, Law Quarterly Rev. 4. 180, *arg.* 9. 2. 51. 2.
[3] 9. 2. 11. 3. Pernice, Sachbeschädigungen, 180. [4] 9. 2. 51. *pr.*, 2.
[5] 9. 2. 51. 1. *Idque est consequens auctoritati veterum qui cum a pluribus idem servus ita vulneratus est ut non appareret cuius ictu perisset omnes teneri iudicaverunt.*
[6] It seems unnecessary to set out the various hypotheses which all start from one or both of these assumptions. The views of Vangerow, Pernice, Grueber and Ferrini are set out by Pacchioni (*loc. cit.*) who gives also an explanation of his own.

The title *De furtis* in the Digest[1] is full of cases of theft of slaves, but so far as it is merely theft, they give rise to few special questions. The rules as to *fugitivi* will be more conveniently treated at a later stage: here it may be remarked that a *fugitivus* was regarded as a thief of himself[2]. If, however, two slaves persuade each other to run away, they have not stolen each other[3]. The reason no doubt is that there is no contrectation, and theft at your mere suggestion is not *ope et consilio tuo*. This was certainly the law for Justinian[4]. *Consilium*, to make a man liable, must be more than advice to steal; it requires advice how to do it: it must be in some way helpful, though not necessarily in the nature of material help[5]. But it is not clear that early law took the same view. Its principles were not so strictly defined, and this very extract suggests a broader liability. Pomponius says, with Sabinus, (who is known to have taken a wide view of liability for theft,) that if the runaway took anything with him the man who advised the flight was liable for *furtum*[6]. If this is so he ought to be a thief in the simpler case of the *fur sui*. There was no doubt a change of view. Again, if I urge a slave to run away intending that he shall fall into the hands of a third person, this is *furtum* in me, for I have helped the thief. Here, too, Pomponius thinks that if he actually does fall into a thief's hands I am liable, though I did not intend this[7]. According to Gaius this was not theft, but gave rise to an *actio in factum* presumably for an indemnity[8].

It must be observed that, in relation to delict, it is impossible to ignore, absolutely, the human aspect of the slave. Some acts assume distinct characters according as they are done to a slave or to some other thing. Thus, killing a slave was not only a delict: it was also a crime[9]. The Twelve Tables impose, for breaking a slave's bone, a penalty half that in the case of a freeman[10]. The *Lex Cornelia*, which made it capital to kill a man, included slaves in the term *homo*[11]. The connexion of the slave with the wrong may be somewhat different. Thus goods in his custody may be stolen: whether they are or are not *peculiares* they are stolen from the master[12]. In the same way if a third person's property is stolen from the slave, the master has *actio furti*, if the slave's holding imposed on him the duty of *custodia*, as if stolen from himself. There was, however, one limitation: if the thing had come into the slave's custody through his contract, the master's

[1] 47. 2. [2] 47. 2. 61; C. 6. 1. 1; *post*, Ch. XII.
[3] 47. 2. 36. 3. [4] In. 4. 1. 11. [5] 47. 2. 50.
[6] Aul. Gell., Noct. Att. xi. 18; D. 11. 3. 11. 2; 47. 2. 36. 2. [7] 47. 2. 36. *pr.*
[8] G. 3. 202; cp. 47. 2. 50. 4. [9] G. 3. 213; In. 4. 3. 11.
[10] See Bruns, Fontes, i. 29.
[11] Coll. 1. 3. 2; D. 48. 8. 1. 2; C. 3. 35. 3. If the creditor prostituted a pledged slave, she was free of the pledge—a rule in the interest of the master, but in which that of the slave is also considered, 13. 7. 24. 3; 1. 12. 1. 8.
[12] *Arg.* 47. 8. 4. 13, 14.

liability on the contract would be only *de peculio*, and his *interesse*, being measured by his liability, would be similarly limited[1].

Some wrongs might be committed in relation to slaves, which were inconceivable in relation to other things. Thus, if my slave, falsely accused, was acquitted after torture, I had an action for double damages, apart from the remedy for *calumnia*[2]. Two cases require fuller statement.

Abduction of slaves, by force or by solicitation, was punishable by the *Lex* Fabia[3], apart from the civil remedy. Mere receiving of a runaway did not suffice: there must be complicity, and of course, there was no *plagium* if the owner consented[4]. It is described as consisting in chaining, hiding, buying or selling, *dolo malo*, inducing to flight from their master, or being in any way interested in such transactions[5]. We are told on the authority of a rescript of Hadrian, that *furtum* of a slave was not necessarily *plagium*[6]. Indeed many well known kinds of theft are such that it is impossible to suppose the heavy penalties of the *lex*, or the capital punishment of later law, to have applied to them[7]. To take away, and have intercourse with, an *ancilla aliena non meretrix* was *furtum* but not *plagium*, but, *si suppressit, poena legis Fabiae coercetur*[8]. Here there was concealment; in fact, *plagium* seems to be such a *furtum* as amounts to repudiation of the owner's right[9].

It required *dolus* and thus the act of hiring persons who were in fact *fugitivi* was not in itself *plagium* where they had been letting themselves out before[10]. But though bona fide claim of right was a defence, the mere allegation of ownership did not suffice, and if this point was raised it must be decided before the criminal charge was tried. Death of the abducted slave did not end the charge[11].

The *lex* fixed large money penalties payable to the treasury[12]. Mommsen thinks that in its first stage the proceeding was an *actio*

[1] 15. 1. 5. 1. [2] 3. 6. 9.

[3] C. 9. 20. *passim*; D. 48. 15. *passim*. This provision was in the second *caput* of the *lex*: the first dealt with abduction of freemen. Coll. 14. 3. 5. Mommsen thinks, on the authority of this text and Coll. 14. 2. 1, that the *lex* did not cover provincials and their slaves. (Strafrecht 780.) The restriction has disappeared in later law. The date of the *lex* Fabia is uncertain. It is mentioned by Cicero, Pro Rabirio 3. See Cuq, *op. cit.* 1. 587.

[4] C. 9. 20. 10, 14; D. 48. 15. 3. *pr.*

[5] Coll. 14. 2; 14. 3. 5; C. 9. 20. 9; D. 48. 15. 6. 2. Mommsen, *loc. cit.*, shews reason (see Suetonius, Aug. 32) for holding that the words *qui in eas res socius fuerit* (Coll. 14. 3. 4, 5; D. 48. 15. 6. 2) refer not to participation, but to forming part of unlawful organisations the object of which was the commission of these and similar offences.

[6] 48. 5. 6. *pr.*

[7] e.g. the act of a depositee who uses the slave, or the *commodatarius* who uses him in an unauthorised way, 47. 2. 40, 77.

[8] 47. 2. 39, 83. 2; 48. 15. 3. 5; C. 9. 20. 2.

[9] Mommsen (*op. cit.* 781) defines it as "Anmassung des Herrenrechts": it is clear that many thefts would not amount to this. He thinks *furtum usus* practically the only case which was not *plagium*, but the texts he cites shew only that *furtum servi* and *plagium* go commonly together (C. Th. 9. 20. 1; C. 9. 31. 1). It may be doubted whether any evidence can be produced for *furtum usus* as a definite category in the classical law. Monro, De Furtis, App. I.

[10] 48. 15. 6. 1.

[11] 48. 15. 3. 1, 5; C. 9. 20. 8. The proceedings were cumulative with *furti* and *servi corrupti*. C. 9. 20. 2 and see n. 9.

[12] P. 1. 6a. 2; Coll. 14. 3. 5; C. 9. 20. 6.

popularis, tried before the ordinary civil courts[1]. In the later empire it has become an ordinary criminal proceeding[2], a *iudicium publicum* tried by *Praefectus Urbi* in Rome, *Praefectus Praetorio* in Italy, *Praeses* in a province[3].

The punishment is capital, varying in form according as the criminal is *ingenuus, honestior, humilior, libertinus* or *servus*, the commonest punishment being apparently *in metallum datio*[4]. An enactment in the Code speaks of a penalty payable to the *fisc*, at least for dealing in fugitives[5]. The extreme penalty is thus reserved for the actual abductor[6], if we can assume that this text was originally written of the *lex* Fabia, but this is far from certain. There was much legislation on *fugitivi*, though it seems to be all based on the *lex*[7].

The exact date of the change is not known. It must be as early as Caracalla, if the Collatio is to be trusted, since he dealt with the jurisdiction in ways which shew that he is dealing with a *iudicium publicum*[8]. It cannot be much earlier since Ulpian and Paul both speak of money penalties[9]. It is noticeable that the same writers are made in the Collatio to treat it also as a *iudicium publicum*[10], which would mean that the change was made in their time, and the closing words of the title, in the Collatio[11], which deals with this matter, are, (the compiler being the authority,) that *novellae constitutiones* have made it capital, *quamvis et Paulus crucis et metalli huiusmodi reis inrogaverit poenam.* It is clear that there was legislation with this effect after Paul, and indeed the Code contains enactments of Diocletian which seem to lay down the capital and public nature of the proceeding as a new thing[12]. It may be that this was an extension of legislation which had not covered the whole field of the *Lex*, or that, till the time of this later legislation, the *actio popularis* was an admissible alternative, and was commonly used. It no doubt had the advantage of entitling the informer to a certain share of the penalty, though we do not know how much.

For certain forms of damage to a slave, the Edict provided a special remedy by an action called *iudicium de servo corrupto.* It was an *actio in factum*, for double damages. The Edict gives it against one who is shewn *servum(am) recepisse persuasisseve quid ei dolo malo quo eum(am) deteriorem faceret*[13]. The word *corruptio* is not in the Edict,

[1] *loc. cit.* [2] C. 9. 20. 13.

[3] Coll. 14. 2; 14. 3. 1; C. 9. 20. 4. *Procuratores Caesaris*, though they usurped the jurisdiction, had no right to it except when acting as *praeses*. After decision they carried out the sentence. Caracalla relaxed the rules. Coll. 14. 3; D. 1. 19. 3. *pr.*

[4] Coll. 14. 2. 2; C. Th. 9. 18. 1; C. 9. 20. 7, 16. [5] C. 9. 20. 6.

[6] Mommsen, *loc. cit.* [7] *Post*, Ch. XII.

[8] Coll. 14. 3. 3; Mommsen, *loc. cit.* [9] Coll. 14. 3. 5; P. 1. 6a. 2; 5. 6. 14.

[10] Coll. 14. 2. 2; 14. 3. 2. [11] Coll. 14. 3. 6. [12] C. 9. 20. 6, 13.

[13] 11. 3. 1. *pr.*

and was probably not in the *formula*[1]. The title dealing with the matter gives many instances of the kind of wrong which was met by it[2]. Knowingly receiving a *fugitivus* was enough, though mere charitable shelter with innocent intent was not. In general it was no defence that the man corrupted was thought to be free, (except, of course, in receiving a *fugitivus*, in which case this belief would negative the *dolus*,) for the necessary *dolus* is the intention to make him worse, which can be done to a free man[3]. The words of the Edict are very comprehensive, but it is clear from this list, and the language of some of the texts, that the harm contemplated is usually moral[4]. The facts may often, however, amount to another delict as well, and as the corruption of the slave is a distinct wrong, the two actions would be cumulative[5]. The action is in *duplum* even *contra fatentem, i.e.* for twice the damage to the slave and loss immediately consequent on the wrong[6]. Thus if a slave were incited to flight or taken away, it covered the value of anything he took with him, but not the loss and liability from subsequent thefts caused by the habit formed[7]. So if he was induced to destroy documents, the loss caused was chargeable, but not that from later similar acts[8]. This might lead to severity in some cases, for it was theft in the adviser as to what the man took with him, and the offender would thus be liable to pay twice the value for the *corruptio*, and twice or four times for the theft[9].

The death, alienation or manumission of the slave, or the return of the property does not extinguish the action[10]. Like other rights of action it passes to the *heres*, though the slave is legated[11], but, as it is penal, it does not lie against the *heres*[12]. Though it is Praetorian and penal, it is perpetual, a characteristic found in some other such actions[13].

[1] Lenel, Ed. Perp. § 62.

[2] 11. 3. Among them are receiving clandestinely the slave of another, making such a slave do anything which lessens his value, encouraging one, already badly inclined, to steal, corrupt others, commit *iniuria*, or ruin his *peculium* by debauchery or otherwise, leading him into vice, idleness, neglect of business, prodigality, flight, disobedience, contempt of his master, trickery or intrigue, inducing him to run to the statue of the Emperor to the shame of his master, inducing him to copy, alter or destroy private documents or contract notes. P. 1. 13a. 5; 2. 31. 33; D. 11. 3. 1, 2, 11. 2, 15; 47. 2. 52. 24; 47. 10. 26.

[3] 1. 3. 5. *pr.* 1.

[4] 11. 3. 15; C. 6. 2. 4.

[5] 11. 3. 11. 2; G. 3. 198. Thus to induce a man to run away was *furtum ope consilio*, in the adviser, if it was done with the intent that he should fall into the hands of a third person, and similar cases might arise under the *l.* Aquilia, 11. 3. 3, 4.

[6] 11. 3. 9. 2; *h. t.* 14. 5; *h. t.* 14. 8.

[7] 11. 3. 11. *pr.*

[8] 11. 3. 11. 1. It covered liability for any wrong or breach of contract he was induced to commit to third persons.

[9] 47. 2. 36. 2. As to theft in this case, *ante*, p. 31. As to the literature on cumulation, Dernburg, Pandekten, 1. § 135.

[10] 11. 3. 5. 4—7; *h. t.* 16.

[11] 11. 3. 8, 13. *pr.*

[12] 11. 3. 13. *pr.* Except as to actual profit.

[13] 11. 3. 13. *pr.* Contrary to the rule expressed in 44. 7. 35. *pr.* *Furti manifesti* is *perpetua*, but it is only a modification of a civil law liability. Our action is purely Praetorian. The *actio iniuriarum* was *annua* though not *contra ius civile* (C. 9. 35. 5). *Doli* though purely indemnificatory was *annua* (44. 7. 35; C. 2. 20. 3). *De rebus effusis* was *perpetua in duplum* (9. 3. 5. 5). Some were fourfold or twofold for a year and single after: *Calumnia*, 3. 6. 1; *damnum in turba*, 47. 8. 4. *pr.*; wrongs by *familia publicani*, 39. 4. 1; wrongs on occasion of *incendium, ruina* etc. 47. 9. 1. *pr.* *De sepulchro violato* was apparently *perpetua*, though praetorian and penal, 47. 12.

It may be noted that Ulpian says of our case, *haec actio perpetua est, non temporaria*[1], a pleonastic way of putting the matter which is unusual if not unique. It may be that this betrays a change and that, like some other of the actions[2], to which it is closely analogous, it was originally in *simplum* after a year.

The action was available to the owner, even though he had pledged the slave, and against anyone, even a usufructuary[3]. In strictness it was not available to anyone but the owner, but it was allowed in the case of corruption of a *servus hereditarius*, and, as an *actio utilis*, to the fructuary even against the owner[4]. It was not available either to or against the *bonae fidei possessor*[5].

The words of the Edict[6] are so wide as to include any kind of wrong done by persuasion, but we have seen that it was used, in practice, mainly in case of moral damage (often with material consequences), such as could not otherwise be reached by existing law. One case is peculiar: we are told, by Ulpian, that, if you persuaded a man, *dolo malo*, to a dangerous feat in which he suffered bodily harm, this action lay. Paul adds that an *actio utilis* Aquilia is better[7]. The case is clearly not within the *lex* Aquilia, and it is likely that our action was applied to such cases, (the Edict being an old one[8],) before the subsidiary actions analogous to the *actio* Aquilia were fully developed.

In general, actual damage had to be shewn: indeed to no other hypothesis could double damages be fitted. There was, however, a case in which there seem to have been doubts, hardly justified on logical grounds, but inspired by considerations of expediency. A tries to induce B's slave to steal from him. The slave tells B who, in order to catch A, tells the slave to do as A suggests. Was there any liability? Gaius is clear that there was no *furtum*, because of the consent, and no *iudicium servi corrupti* because the slave was not corrupted. He seems indeed, though his text is uncertain, to treat the doubt as obsolete. Justinian treats it as an open question, and, observing that there had been doubts, decides that both actions shall lie, to prevent a wicked act from going unpunished[9]. It is not to be supposed that there was any intention to do away with the general rule requiring actual deterioration.

One remarkable text attributed to Paul remains for discussion in connexion with this action[10]. It provides for a choice in the master, if

[1] 11. 3. 13. *pr.*; cp. 4. 9. 7. 6; 9. 3. 5. 5; 38. 5. 3. 1.

[2] See note 13, p. 34.

[3] 11. 3. 9. 1, 14. 3.

[4] *Ibid.* and *h. t.* 13. 1.

[5] 11. 3. 1. 1. So far the text is clear, but its form is obscure and its reasoning futile. Pernice, Labeo, 2. 1. 439.

[6] 11. 3. 1. 1.

[7] 11. 3. 3. 1, 4.

[8] It is commented by Alfenus Varus. See Cuq, Institutions Juridiques, 2. 478. Another text tells us (48. 5. 6. *pr.*) that seduction of an *ancilla* might give rise to *actio* Aquilia and to *servi corrupti*. Cp. In. 4. 1. 8. *fin.*

[9] G. 3. 198; C. 6. 2. 20; In. 4. 1. 8. In the Code Justinian treats *furtum* as admitted, the doubt being as to *servi corrupti*. In the Institutes doubt is stated as to *furti*: none are said to have allowed *servi corrupti*.

[10] 11. 3. 14. 9.

the slave *inutilis sit* (*? fit*) *ut non expediat eum habere*, either to keep the man with double damages for his deterioration, or to receive his original value and hand him over (or if the man is absent, his rights of action). The latter alternative is destroyed if the slave be dead or freed. The rule is no doubt Tribonian's[1]. On the assumption in the text that the slave is made worthless, the damage is his value, and the choice is absurd: it is a choice between value and double value. Indeed there is no case in which surrender and taking his original value would be as profitable a course as the other[2].

Even if the slave be regarded purely as a chattel, it does not follow, according to our modern ideas, that the owner's rights are quite unlimited, and this may excuse the treatment in this chapter of the restrictions which were imposed on the *dominus*.

During the Republic there was no legal limitation to the power of the *dominus*: *iure gentium* his rights were unrestricted[3]. It must not, however, be supposed that there was no effective protection. The number of slaves was relatively small, till late in that era, and the relation with the master far closer than it afterwards was. Moreover, the power of the Censor was available to check cruelty to slaves, as much as other misconduct. Altogether there is no reason to doubt that slaves were on the whole well treated, during the Republic[4]. But with the enormous increase of wealth and in number of slaves and the accompanying degeneracy of private life, which characterised the early empire, the case was changed. Legislation to prevent abuse of dominical power was inevitable, and the steps by which full protection for the slave was reached are fairly fully recorded[5].

As early as A.D. 20 rules were laid down by senatusconsult, as to trial of criminal slaves; the same procedure being ordered as in the case of freemen[6].

By a *lex* Petronia[7], supplemented by *senatus consulta*, masters were forbidden to punish their slaves by making them fight with beasts even when they were plainly guilty, unless the cause had been approved as sufficient by a magistrate. Rules of a kind similar to those of our *lex* were laid down, later, by Divi Fratres: perhaps only then was the rule applied to slaves whose guilt was manifest[8].

Claudius provided that if a master, to avoid the expense and trouble of cure, exposed sick slaves on the island of Aesculapius, the slaves, if

[1] Lenel, Palingenesia, *ad h. l.*
[2] *Iniuria* to a slave, *post*, p. 79.
[3] 1. 6. 1. 1; G. 1. 52; In. 1. 8. 1. The Jewish law was more favourable to slaves: a result of the "relative" nature of Jewish slavery. Winter, Stellung der Sklaven bei der Juden, 33.
[4] See Willems, Droit Public Romain, 288.
[5] See Blair, Slavery amongst the Romans, 83 *sqq.*
[6] 48. 2. 12. 3.
[7] 48. 8. 11. 1, 2; 12. 4. 15. As old as A.D. 79, since a record of it was found in Pompeii. There was a Consul, Petronius, in A.D. 6. Karlowa identifies the law with a *lex* Junia Petronia of A.D. 19, which provided that on equality of opinion in a *causa liberalis*, the claimant should be declared free. Rom. Rechtsg. 1. 624.
[8] 18. 1. 42.

they recovered, should be free and Latins. From the language of the Code and Digest, it seems that mere abandonment in sickness had, at least in later usage, the same effect. Suetonius adds that if he killed such a slave, he was liable *caedis crimine*. But he is not a very exact writer and may have antedated this legislation[1].

Domitian forbade the castration of slaves for commercial purposes, and seems to have lessened the temptation to infringe the law, by fixing a low maximum price for *spadones*[2]. Later events shew that this legislation was ineffective[3].

Hadrian appears to have dealt frequently with these matters. He punished by five years *relegatio* a woman who cruelly treated her slaves for slight faults. He forbade masters to kill their slaves except after judgment by a magistrate. He forbade the torture of slaves, for evidence, until there was some case against the accused, and limited torture under the *Sc.* Silanianum to those slaves who were near enough to have heard what was doing. He suppressed private prisons (*ergastula*) both for slaves and freemen. He forbade the sale of men or women to *lenones* or to *lanistae* (purveyors for gladiatorial shows), without cause. He increased the severity of the laws against castration, by bringing it under the *lex* Cornelia, with a penalty of *publicatio*. It was immaterial whether it was *libidinis* or *promercii causa*: consent was no defence and the slave might lodge the complaint. It was capital in the surgeon and the slave who consented. Emasculation by other means was put on the same level, to prevent what had probably been a common way of evading the earlier law[4].

Antoninus Pius provided that a master who killed his slave was as liable for homicide as if it had been a third person's, a rule which seems to state only existing law except that it defines the penalty more clearly[5]. On the occasion of a complaint of ill-treatment reported to him by the *praeses*, from the *familia* of one Iulus Sabinus, he laid down a general rule for such cases. If a slave complaining of ill-treatment fled to *fana deorum* or the statue of the Emperor for sanctuary, the complaint must be enquired into, and, if it were true the slave was to be sold so that he should not return to the old master[6]. The ground might be either cruelty or *infamis iniuria*, which probably means attempt to debauch an *ancilla*. It was to go before *Pr. Urbi*, *Pr. Praetorio* or *Praeses*, according to locality. The

[1] 40. 8. 2; C. 7. 6. 1. 3. Suetonius, Claudius, 25.
[2] Suetonius, Domitian, 7. The penalty was apparently forfeiture of half the offender's goods. See 48. 8. 6, as to a *Sc.* on the matter. Other references, Blair, *op. cit.* 87.
[3] See *post*, p. 80, for an edict of the Aediles as to castration. See also *post*, Ch. XXVI.
[4] P. 5. 23. 13; Coll. 3. 3. 4; D. 1. 6. 2; 48. 8. 3. 4, 4. 2, 5; 48. 18. 3, 4; Spartian, Hadrianus, 18; Seneca, De Ira, 3. 40. *Ergastula* reappeared. Gothofredus, *ad* C. Th. 7. 13. 8.
[5] G. 1. 53. Paul, commenting presumably on this law, says that it must be *dolo malo*: killing is not always imputable but *modum castigandi et in servorum coercitione placuit temperari*. Coll. 3. 2. 1; P. 5. 23. 6; cp. P. 5. 23. 13.
[6] *Bonis conditionibus*. Not clear whether sale by master or public officers.

complaint was not to be considered as an *accusatio* of the master[1], a rule which saved the master's reputation on the one hand, and on the other prevented the institution from being an exception to the rules that a slave cannot formally "accuse" anyone or be heard against his master[2]. The rules as to jurisdiction may be due to later legislation by Severus[3].

Alexander expressed the tendency of legislation by a rescript[4] which, in a case in which a master had in anger directed that a slave should be perpetually bound, provided that the *arbiter familiae erciscundae* was to ignore the provision, if the master could be shewn in any way to have repented.

Diocletian and Maximian issued a rescript, in itself unimportant, but suggesting that at that time (A.D. 285) immoderate chastisement was a ground of accusation[5]. Constantine declared the master not liable for killing in course of *bona fide* punishment, but guilty of homicide if the death was caused by a wantonly cruel mode of punishment, or the killing was merely wilful[6]. He also forbade the exposure of infant slaves[7].

The *Codex Theodosianus* contains several enactments of about the end of the fourth century, dealing with the right of sanctuary, and with abuses and misuses which had crept in. They shew that Christian churches had superseded *fana deorum* and also the statue of the Emperor for this purpose[8], and they systematise the procedure.

Leo forbade slaves to be made actors against their will, and Justinian forbade masters to prevent them from abandoning the stage if they wished to do so. It is clear from the language of the Institutes that the power of the master was in Justinian's time limited to reasonable castigation[9].

It is not necessary to give details as to the taxes to which slaves, as chattels, were subject[10].

[1] G. 1. 53; In. 1. 8. 2; D. 1. 6. 1, 2; Coll. 3. 3. 1, 2.

[2] *Post*, p. 85. Except in claims to liberty and the above case of castration, this was the only case in which a slave had access to the tribunals.

[3] 1. 12. 1. *pr.*, 1. 8. He also laid down rules against prostitution of slaves, *Ibid.* As to these and sales with proviso against prostitution and as to torture of slaves as witnesses, *post*, Chh. III *in fine*, XXVI. Prohibition of sale to go *ad bestias*, 18. 1. 42.

[4] C. 3. 36. 5. [5] Coll. 3. 4.

[6] C. Th. 9. 12, 1. *h. t.* 2; C. 9. 14. 1. There were also ecclesiastical penalties.

[7] C. Th. 5. 9. 1. Abrogated and superseded by Justinian, who enacts similar rules, C. 8. 51.

[8] C. Th. 9. 44. 1, modified in C. 1. 25. 1; C. Th. 9. 45. 3, 4; C. 1. 12. 3.

[9] C. 1. 4. 14, 33; In. 1. 8. 2.

[10] Marquardt, Organisation Financière, Part 3. The old *tributum* applied to them as long as it lasted. A similar *tributum* was exacted in the Empire from the provinces: there must be *professio* of slaves as of other taxable property. Failure to make it involved forfeiture: torture of slaves might be used to discover the truth. Forfeiture did not cover *peculia*, and a procurator or one who had committed offences against his master, was not forfeited, for plain but different reasons, but the Fisc took his value. The tax was due on those used in any business. The *professio* must state nation, age and employment, misdescription involving forfeiture. A minor was excused, and error might be compensated for by double tax (Caracalla, who also excused non report of a trade carried on unlawfully by the man *insciente domino*). Succession duty was payable on slaves as on other property. There were duties on sales, and on manumissions, and there were customs dues, imperial and provincial, import and export, full *professio* being needed with various exemptions. See 39. 4. *passim*; 50. 15. 4. 3, 5; 50. 16. 203; C. Th. 11. 3. 2; 13. 1. 18; 13. 4. 4; C. I. L. 8. 4508.

CHAPTER III.

THE SLAVE AS *RES* (CONT.). SALE OF SLAVES.

As Sale is, in practical life, the most frequent and important contract, it is not surprising that it figures largely in the texts in connexion with slaves, and is the subject, in that relation, of many special rules.

Slave-dealing was a recognised industry, carried on, apparently, by men of poor reputation[1]. It seems to have been on account of their tendency to fraud, which they may have shared with dealers in cattle and horses, that the Edict of the Aediles was introduced, with which we shall shortly deal. As being men, slaves were not included in the term *merces* and thus slave-dealers were not *mercatores*, but *venaliciarii*, their stock being called *venalicii*[2]. Where slaves were so numerous, the traffic in them must have been a most important industry[3]. There is indeed plenty of evidence of this, and of the fact that it was often carried on on a very large scale[4]. Wallon[5] gives a lively account of the usages of this trade, of the tricks of the dealers, of sale *de catasta*[6], and of other similar matters, too remotely connected with the law of the subject for mention here.

Such a business would require large capital, and thus it was frequently carried on by firms of partners. A text of Paul[7], speaking of the practice of these firms, says that *plerumque ita societatem coeunt ut quicquid agunt in commune videantur agere.* The sense of this is not altogether clear. Though expressed as an understanding among themselves, it seems from Paul's further language to have been treated as affecting outsiders[8]. The contract was to be construed as if they had

[1] 21. 1. 37; *h. t.* 44. 1.

[2] 14. 4. 1. 1; 50. 16. 207 (in some literary texts the dealer is called *venalicius*). The distinction is not important: the *actio tributoria* though it applied only to slaves who traded with *merx peculiaris* was extended to *omnes negotiationes*, including slave-dealing. 14. 4. 1. 1. It may be noted that a legacy of "my slaves" would not *prima facie* include stock-in-trade though it would slaves let on hire. 32. 73. 3. In 21. 1. 65. 2 and some literary texts *venalicium* occurs as a collective term.

[3] Blair, *op. cit.* 25, gives an account of the chief centres of the slave-trade.

[4] 17. 2. 60. 1. [5] Wallon, Histoire de l'esclavage, 2. 51 *sqq.*; Blair, *op. cit.* 144 *sqq.*

[6] *i.e.* of slaves exposed for sale on a platform or in a sort of open cage so that they might be thoroughly examined by intending buyers.

[7] 21. 1. 44. 1. [8] *ne cogeretur emptor cum multis litigare, etc.*

all made it, the effect being that the *actio ex empto* would lie, on the general principles of joint obligation, only *pro parte* against each partner[1]. It may be that, when introduced, this was of use to the buyer, for it may have antedated the *actio ad exemplum institoriae*, by which alone an ordinary mandator could be made directly liable[2]. Apparently the plan did not work very well, for the Aediles provided that, so far as the Edictal actions were concerned, a claimant might proceed *in solidum* against any partner whose share was as great as that of any other partner[3].

The rules as to *periculum rei venditae* were the same as in other cases[4]. There are, however, some cases of *interitus rei* which call for special treatment in connexion with slaves.

(*a*) Manumission of the slave. If he were a *servus alienus*, the manumission was presumably a discharge of the vendor, unless it was in some way due to him, in which case his *actio ex vendito* would be met by *exceptio doli*[5]. If the slave were the property of the vendor, the vendee could recover his value, and anything he would have acquired if the slave had been delivered. Thus if he had been sold, *cum peculio*, acquisitions and accretions to that fund could be claimed by the buyer. Julian adds that the vendor would have to give security to hand over whatever he might acquire from the *hereditas* of the *libertus*. Marcellus remarks that he need not hand over what he would not have acquired if the slave had not been freed[6]. As, in that case, there would clearly have been no *hereditas*, it has been said[7] that this correction or limitation by Marcellus of Julian's too general statement is meant to exclude, *inter alia*, the *hereditas*. Certainly Julian's rule would involve the reckoning of some property twice, since part of the *hereditas* would come from the *peculium* which was already charged. There seems to be some confusion. The right of succession as patron is independent of the gift of *peculium*, and thus if a claim to the *hereditas* exists at all, in the vendee, it exists whether the *peculium* were sold with the man or not. The vendor has made away with the slave, and is bound to account for any reversionary right in him. But this reversionary right would be deductible from the value of the slave, for which he was responsible. Difficulties would arise when the patron's share exceeded

[1] 21. 1. 44. 1.
[2] This action seems to date only from the time of Papinian (17. 1. 10. 5; 19. 1. 13. 25). See Accarias, Précis, § 637. It involved solidary liability, 14. 3. 13. 2.
[3] 21. 1. 44. 1. If he sued *ex empto*, the inconvenience, which Paul notes, of divided actions still continued. Paul gives as the reason of the exceptional rule the habitual sharp practice of these dealers.
[4] Death of slave after the contract was perfect released the vendor apart from *culpa*, but the price was due. But if the death resulted from his shewing less care than a *bonus paterfamilias* would, the vendor was liable. 18. 5. 5. 2. See Moyle, Law of Sale, 107.
[5] It may be that if the buyer did not know that the slave was a third person's this was enough to give him an *exceptio doli*.
[6] 19. 1. 23. [7] Mackintosh, Law of Sale, *ad h. l.*

the value of the slave. It is not easy to think this excess was claimable, but it may be that Julian is applying the rule that a vendor must hand over all acquisitions through what is sold.

(*b*) Noxal Surrender. This could ordinarily create no difficulty, for as we shall shortly see, the vendor was bound to warrant the slave not liable on any delict, and thus there was an obvious remedy[1]. If, on the other hand, he had expressly excluded this warranty, he would be liable, if he had known of the fact, and intentionally concealed it, on account of the fraud. If he did not know of it, there could be no liability, except under the Edictal rules which will be considered shortly.

(*c*) Flight or Theft of the slave. This is not exactly *interitus rei*, but, as it prevents delivery, it is analogous thereto. The mere fact of his running away would be no breach of the warranty that he was not given to doing so; that refers to the time of the contract; this was later, and did not shew that he had ever fled before[2]. But flight or theft of the man may be a breach of the duty of the vendor to keep him safely. Justinian tells us that, in such events, there is no liability in the vendor unless he has undertaken the duty of *custodia* till delivery[3]. This means, apparently, liability for all but *damnum fatale*, and thus does not render him liable if the man is seized by force, though he will have to cede his actions, as always when he is not liable[4]. Justinian applies this rule to all subjects of sale[5].

It is a general rule of sale that, apart from agreement, the vendor must hand over, with the thing sold, all its accessories existing at the time of sale[6]. In relation to slaves it is only necessary to say that this would not include children already born since they are not accessories[7]. On the other hand though the *peculium* was an accessory[8], it was said to be *exceptum*, and did not pass unless expressly agreed for; if the man took *res peculiares* with him, these could be recovered[9].

Acquisitions after the sale are on a somewhat different position. The general rule was that a vendor might not enrich himself through the man after the sale, whether delivery was due or not[10]. Hence, from that day, *fructus* of all kinds and *partus* must be given to the buyer[11]. Everything acquired by him must go, including rights of action for theft, *vi bonorum raptorum*, damage, and the like, and any actions

[1] *Post*, p. 56.
[2] 21. 1. 54, 58. 2; 21. 2. 3. But see Windscheid, Lehrbuch, § 389.
[3] In. 3. 23. 3.
[4] 19. 1. 31. *pr.*; 18. 1. 35, 4; 47. 2. 14. *pr.*; In. 3. 23. 3. Accarias, Précis, § 612.
[5] Cp. 19. 1. 31. *pr.* We have seen (p. 11) that in earlier law the limits of the duty of *custodia* where the subject of the transaction was a slave were not necessarily the same as in other cases. On the general rules as to the liability of the vendor for *custodia* see Windscheid, *op. cit.* § 389; Lusignani, Custodia, pt. II.
[6] 18. 1. 67. [7] 30. 62, 63. [8] *Ibid.*
[9] 18. 1. 29; 21. 2. 3. If the *peculium* did pass accessories to it passed as of course, 19. 1. 13. 13.
[10] 28. 5. 38. 5; V. Fr. 15. [11] P. 2. 17. 7.

relative to property which goes with him[1]. Anything the vendor has given him, since the sale, must go too, and legacies and inheritances which have fallen to him, irrespective of the question on whose account he was instituted[2]. If the *peculium* was sold with him, the buyer is entitled to all accessions to it[3]. On these points the only restrictions to note are, that, though acquisitions *ex operis* pass, that which is acquired *ex re venditoris* does not, and that an agreement might be made, where delivery was deferred, that the buyer should have no right to *fructus*, etc., accruing in the interval[4]. If a sale was conditional, the occurrence of the condition had a retrospective effect in relation to these profits[5].

Neratius tells us that the vendor must make good not only what he has received, but also what the buyer would have received through the man if he had been delivered[6]. As this seems to impose a penalty on the vendor, it is commonly understood as applying only to the case in which the vendor has made default in delivery[7], and must therefore account for the buyer's whole *interesse*, which would naturally cover what the slave might have acquired[8]. The limitation is probably correct, for though the text might be applied to the case of a vendor who, for instance, prevents the man from accepting a legacy, this seems to be sufficiently provided for by the general rule against *dolus*.

A somewhat complex case is discussed by Julian, Marcian and Marcellus[9]. A slave, having been sold, was instituted by the buyer, equally with X. The buyer died before the slave was delivered. The vendor made the slave enter, and X also entered. This would vest in X half the inheritance, including half the vendee's right to the slave and his acquisitions. The slave's entry makes the vendor owner of half the inheritance, and he is still owner of the slave. What is to be the ultimate adjustment? The solution reached is stated by Marcellus. As the vendor is bound to hand over all that he would not have acquired if the slave had been delivered, he must hand over the whole. Julian, however, after observing that the vendor may not enrich himself through such a slave, had added that he need only hand over the proportion for which X was instituted, *i.e.* as Marcian says, half the slave and a quarter of the *hereditas*, this being what X could claim through the right to half the slave which he acquired as heir. But this view ignores the

[1] 47. 2. 14. *pr.*; In. 3. 23. 3.
[2] 19. 1. 13. 18.
[3] 19. 1. 13. 13.
[4] *Ibid.*; *h. t.* 13. 18.
[5] 18. 3. 4. *pr.*, *h. t.* 6. *pr.* In two texts (19. 1. 13. 10; V. Fr. 15) we are told that fruits passed though they were ripe at the time of the contract. This would not cover earnings made but not paid to the *dominus* at the time of the sale. They were not attached to the slave as a crop is to the land. The right of action being already in the *dominus* there is no enrichment after the sale. Paul says the *operae* belong to the buyer after the sale. This cannot mean proceeds of earlier *operae*. P. 2. 17. 7.
[6] 19. 1. 31. 1.
[7] Mackintosh, Sale, *ad h. l.*
[8] 19. 1. 1. 1.
[9] 28. 5. 38. 5—40.

fact that if the slave had been delivered, his institution would have been void, and all would have gone to X[1].

The rule that he acquires to his *dominus* (though the acquisitions will have to be handed over to the buyer) was applied rigidly in cases in which another rule would have seemed simpler. If the buyer receives the slave but it is agreed that he shall hold him only as conductor till the price is paid, the man acquires to his *dominus* in the interval[2].

As the vendor has to hand over all *fructus*, he is entitled to deduct expenses. Thus he may charge such costs of training as the vendee would be likely to have incurred, and the cost of medical treatment[3]. Ordinary cost of maintenance he may not charge unless the non-delivery is imputable to the buyer[4].

Africanus discusses a case of debt from the slave to the master[5]. The slave has stolen something from the master. If he is not yet delivered and the *peculium* is included in the sale, the vendor may retain the value of the stolen thing, and, if the *peculium* has been handed over, he may recover it as paid in excess, the *peculium* having been *ipso facto* reduced by that amount. If there was no *peculium*, or it did not pass, there would be no debt, for that was essential to all debt between *dominus* and slave[6]. If the theft were after the slave was delivered, then, on general principle, the buyer would be liable to *condictio furtiva* only in so far as he or the *peculium* had received the thing[7].

Except as to eviction and the Aedilician actions[8], the texts do not lay down many principles, as to liability under the contract, which are peculiar to slaves, though there are illustrations of ordinary principle. Thus we know that the vendor must take care of the thing, and the question is raised whether he is liable if, after the sale, he orders the man to do some dangerous work by which he is injured. Labeo says that he is, if it is a thing he was not in the habit of doing. Paul points out that the vendor's previous treatment may have been negligent, and that the question is, whether the direction was negligent or dolose[9].

[1] The facts are insufficiently recorded, but the institution can hardly have been accompanied by a gift of liberty. The will may or may not have been made before the purchase. The difficulties are analogous to those in Jones *v.* Hensler, 19 Ch. D. 612.
[2] 18. 6. 17. It may be, though the text is not explicit, that such an agreement implied an understanding that the buyer was to have no right in these interim acquisitions.
[3] Cp. 19. 1. 13. 18. We are told that, if the slave die without fault of the vendor, the buyer may be charged with cost of funeral.
[4] 19. 1. 38. 1. In other cases he may be expected to set off this with the services he can still claim from the man. For though he must hand over *fructus*, it does not appear that he need charge himself with the value of services rendered to himself.
[5] 19. 1. 30. *pr.*
[6] *Post*, Ch. XXIX.
[7] 19. 1. 30. *pr.*
[8] The Edict of the Aediles may have contained a provision that on sale of a slave his dress passed, but not *ornamenta*. The chief text is 50. 16. 74, compared with 34. 2. 25. 10. Lenel, Paling. 2. 1177; Ed. Perp. § 293, 12 (Fr. Edit.). Bremer (Jurisp. Antehad. 2. 546) thinks the rule connected with a corresponding rule in Jewish law. The Jews were great slave-dealers. There was a somewhat similar rule in sales of cattle, 21. 1. 38. *pr.* Lenel cites also 34. 2. 23, 24, 25. 9; 15. 1. 25.
[9] 19. 1. 54. *pr.*

Apart from the Edict of the Aediles the vendor was not liable for defects unless he had warranted or was guilty of *dolus*[1]. Several texts illustrate this *dolus*. It was dolose to sell, knowing of a serious defect, of which the buyer was ignorant, *e.g.* that the man was *fur aut noxius*[2]. The text adds that the buyer can sue at once, though before he could sue on the *stipulatio duplae* actual damage must have occurred[3]. It was dolose to say recklessly of a man, who was in fact a thief, that he was worthy of entire confidence[4]. Liability is, in the text, based on the view that one who recklessly makes statements which are not true, is in much the same moral position as one who is silent as to defects of which he is aware. It would seem simpler to treat it as a binding *dictum*[5].

Where a vendor sold a *mulier* knowing that the buyer supposed the woman a *virgo*, this was *dolus*, a rule severer than that of English law[6].

One case is somewhat remarkable. Paul tells us that if a woman, whose *partus* is sold, is over 50, or is sterile, the vendor is liable *ex empto* if the buyer did not know that this was so[7]. Whether this is sale of a *spes* or of a *res sperata* the agreement is void, but it is not easy to see why the vendor should be under any liability unless he knew the facts, which is not stated, and is certainly not a matter of course. It may be that the price has been paid, and all that is meant is that he can recover this. For that, a *condictio indebiti* would suffice[8], and there is some contradiction in allowing *ex empto* when there is no contract. But this was allowed at least as early as Julian's time, in some other cases[9]. Even if the vendor knew the facts, there was no sale[10], so that in this case, too, the contradiction remains. But here the buyer could no doubt recover any expenses incurred.

It is clear on the evidence of many texts that at least some of the duties created by the Aediles, and therefore, strictly, enforceable only by the Aedilician actions, were nevertheless brought within the action *ex empto* in the classical law[11]. The course of ideas seems to have been that these edicts imposed certain duties and it was the duty of a vendor to act in good faith. It was not good faith to fail in duties which were

[1] Or perhaps if the defect was so great that the buyer would not have bought, if he had known of it. See 19. 1. 11. 3, 5. But these texts may be affected by the rules of the Edict. Cp. *post*, p. 45, and *h. t.* 13. *pr.*

[2] 19. 1. 4. *pr.* The words *fur* and *noxius* are usually understood to mean "under some present liability for delict." But they may well mean no more than that he is given to such things. Anything more is not necessary for the rule. In 19. 1. 13. 1, *fur* certainly means only given to stealing. *Post*, p. 45.

[3] Cf. 19. 1. 31.

[4] 19. 1. 13. 3. It is not obvious why there was doubt, unless on the ground that it was mere puffery not binding on the vendor (21. 1. 19. 3). But this is difficult to reconcile with the strong word *adseverare*.

[5] *Ibid.* [6] 19. 1. 11. 5. Smith *v.* Hughes, L.R. 6 Q. B. 597.

[7] 19. 1. 21. *pr.* [8] 12. 6. 37; *h. t.* 54; 18. 1. 57. *pr.*

[9] Pernice, Labeo, 2. 1. 181. [10] 18. 1. 57. 1.

[11] *e.g.* 19. 1. 11. 7. See Moyle, Sale, 191, 213.

notorious, and therefore, the action *ex empto* being *bonae fidei*, neglect of these duties was actionable therein[1]. When this step was taken is uncertain. It is at least as old as Neratius[2], and may be older, since a corresponding extension of the Aedilician actions to sales other than those contemplated in the Edict is held by some writers to be as old as Labeo[3]. The one extension does not imply the other: it is likely that the one with which we are concerned was the later, that it was a gradual development, and that it was never complete. It probably never went so far as to give redhibition in the *actio ex empto*, wherever the *actio redhibitoria* would have lain[4]. It is sometimes held, on logical grounds, that in these extended cases, the claim was subject to the short term of limitation prescribed by the Aediles[5]. In support of this view it may be noted that the vendor's liability, *ex empto*, for defects of which he was ignorant, was applied only to defects covered by the Edict[6]. But there is no direct evidence that the time-limit was the same.

The texts give us many cases of sales of slaves in which the Edictal liabilities are made the basis of the *actio ex empto*[7]. Neratius tells us that a vendor, even in good faith, is liable *ex empto* to deliver a slave who is not *fugitivus*[8], which here means *fugax*, not one who is at this moment a runaway from his master. This merely expresses the fact that this was one of the warranties required by the Aediles. In another text, of Ulpian, it is said that if one sells, in ignorance, a slave who is, in fact, given to stealing or running away, one is not liable *ex empto* for his stealing propensity, but is for his tendency to flight. The reason given by the text is that *fugitivum habere non licet et quasi evictionis nomine tenetur dominus*[9]. The reason is unintelligible, and is in fact omitted by the Basilica[10]. There is nothing like eviction. It is as lawful to have a slave who is in the habit of running away as any other slave. There is a confusion between a *fugax* and an actual runaway. The reasoning given is probably Tribonian's: the true explanation is that the Aediles gave a remedy where a slave sold was fugacious[11], but not, apart from special agreement, where he was addicted to theft[12].

The *actio ex empto* may be left with the remark that in such actions the plaintiff recovered *quanti interest*, and that in the case of slaves this might be damages of a kind not possible in other cases[13].

[1] 21. 1. 31. 20. For references to the extensive literature hereon, see Windscheid, *op. cit.* § 393, n. 1. [2] 19. 1. 11. 7, 8.

[3] Moyle, *op. cit.* 194. Also at p. 213, as to a text which seems to carry this extension back to Labeo.

[4] Moyle, *loc. cit.* [5] Windscheid, *op. cit.* § 393, n. 12.

[6] 21. 1. 1. 10 *fin.* is explained by *h. l.* 9. [7] *Post*, p. 63.

[8] 19. 1. 11. 7. In the next text he tells us that the vendor must give him *furtis noxiisque solutus*, being bound *ex empto*, even in the sale of a *servus alienus*, to give security covering this. The point is the same: the Aediles required a warranty.

[9] 19. 1. 13. 1. [10] Bas. 19. 8. 13. 1. [11] *Post*, p. 55.

[12] 21. 1. 1. 1, 17. 1, 17. 17, 52. See as to measure of damages, in these cases, *post*, p. 63.

[13] Thus it would cover costs and damages in a noxal action and the value of what he took with him and of others he induced to run away, 19. 1. 11. 12, 13. 2.

In connexion with eviction we shall consider in detail only those points which are of special importance in relation to slaves. The duty of a vendor, to give the buyer effective possession, implies a duty to compensate him, if the title proves defective. Before and after the development of the consensual contract of sale, it was the custom to guarantee this by a stipulation for twice the value (*stipulatio duplae*). This stipulation was from early times compulsory in all sales of importance, and, in the classical law, it was implied where it had been omitted[1]. The eviction contemplated in this liability is deprivation of the thing by one with a better title. The buyer is bound to give the vendor notice of the adverse claim, and to take all reasonable steps in defence of his right. Failure to satisfy these requirements will deprive him of his claim against the vendor.

In sale of slaves the *stipulatio duplae* in case of eviction was expressly required by the Edict of the Aediles[2]. This did not prevent its exclusion by agreement: it might be excluded altogether[3], or made for less or more than *duplum*[4], or limited to the acts of the vendor and those claiming under him[5]. A question of some difficulty arose where the eviction penalty was wholly or partly excluded. The liability to compensate, enforced by the *actio ex empto*, existed apart from the stipulation, *e.g.* in minor[6] sales. It is not clear whether it was excluded by the existence of the *stipulatio duplae*: but there seems no reason why they should not be alternatives[7]. If there was an agreement excluding the eviction penalty, or limiting it to eviction by the vendor, and eviction by a third person took place, there was disagreement whether anything could be claimed by the action *ex empto*[8]. Julian appeared to think the price must be refunded: the convention by which a man bound himself to pay, though he got nothing, being inconsistent with a *bonae fidei* transaction. But it is easy to see cases in which a buyer might take the risk, and Julian answers his own objection by citing the case of an *emptio spei*. Accordingly Ulpian decides that the *actio ex empto* will not lie, clearly the fairer view. For the risk was reckoned in the price, and there is no good faith in charging the vendor indirectly with what has been expressly excluded.

[1] On the history of the institution, see Moyle, Sale, 110—115; Mackintosh, Sale, Ed. 2, App. C; Lenel, Ed. Perp. (French Edition), 2. 288 *sqq.*; Girard, Manuel, 553, and articles there mentioned. As to eviction of a part or of a usufruct in the thing, *post*, p. 50.

[2] 21. 2. 37. 1. No *fideiussor* needed except by express agreement, 21. 2. 4; *h. t.* 37. As to apparent contradiction in 19. 1. 11. 9, see Accarias, Précis, § 606.

[3] 21. 2. 37. *pr.* [4] 21. 2. 56. *pr.*

[5] 19. 1. 11. 18. [6] C. 8. 44. 6.

[7] Cuq, *op. cit.* 2. 411, thinks the liability to action *ex empto* a gradual development. It seems essential to the conception of the consensual contract of Sale, 21. 2. 60; cp. 21. 1. 19. 2; C. 8. 44. 6, 8. See also 21. 2. 26 and *post*, p. 47, n. 9.

[8] 19. 1. 11. 15, 18. In 15 the agreement was to promise, if asked within 30 days, which was not demanded. Of course the vendor is liable for *dolus*, if he knew the slave was *alienus*.

The two actions differ in nature and effect in many ways[1]. Here it is enough to note a few points. The action on the stipulation could be brought only when eviction had actually occurred[2], while the *actio ex empto* might anticipate the interference[3]. The *actio* on the stipulation is for a certain sum, usually twice the price: that *ex empto* is for *quanti interest*. This will include *partus* born of an *ancilla*, a *hereditas* left to the slave and other accessions[4]. Moreover if the thing alters in value, its value at the time of the eviction is the measure of the *interesse*, whether it be more or less than the price[5].

We have seen that, to give a basis for the action on stipulation, an actual eviction must have occurred. This means, in general, that some person has substantiated a claim to take the slave from the buyer, and he has in some way satisfied the claim so that he is deprived of what he bargained for[6]. The usual case is that of adverse ownership, but, where the subject was a slave, eviction might occur in special ways. Thus, if a *statuliber* were sold without notice of his status, the occurrence of the condition would be an eviction[7]. So if the slave sold were one whom the vendor was under a *fideicommissum* to free[8]. So, if he proved to have been free at the time of the sale[9]. It might be supposed that a noxal claim was an eviction, and there is no doubt that it gave rise to an *actio ex empto* to recover the minimum sum by which the liability could be discharged[10]. The text adds that the same is true of the action *ex stipulatu*. This cannot refer to the *stipulatio* relative to eviction, since that was for a certain sum. The stipulation referred to is the action on the warranty against certain defects, of which noxal liability was one, which, as we shall shortly see, a buyer could exact. It seems therefore that, as the noxal claim did not necessarily lead to eviction, but involved damages of uncertain amount[11], it was the practice to proceed *ex empto*, or under the warranty last mentioned. This could not be done in the case of crime, for the Edict as to *noxae* did not cover crimes[12]. A somewhat similar state of things arose where the property

[1] Roby, Rom. Priv. Law, 2. 156 *sqq.*

[2] 21. 2. 16. 1; C. 8. 44. 3. [3] *Arg.* 19. 1. 4. *pr.*, 30. 1, 35. [4] 21. 2. 8.

[5] 19. 1. 45. If the value had greatly increased, *e.g.* a slave had been expensively trained, Paul thought a limit should be imposed, perhaps a *taxatio*, 19. 1. 43. Julian and Africanus had discussed the matter: Africanus is credited with the view that the maximum should be double the price, the result being thus brought into line with that of the action of stipulation. This does not seem to have been law till Justinian laid it down in a text which says there had been disputes. *h. t.* 45. *pr.*, *h. t.* 44; C. 7. 47. 1.

[6] Moyle, *op. cit.* 112. [7] 21. 2. 39. 4, 51. 1. Fuller treatment *post*, Ch. XIII.

[8] 21. 2. 26. *Post*, Chh. XIII, XXII. *Ex empto*, but perhaps no *actio duplae*, because the manumission though compelled was the buyer's own act.

[9] 21. 2. 19. 1; *h. t.* 39. 3, 69. *pr.*; C. 8. 44. 12, 18, 25. If the slave sold had been guilty of some capital offence, his condemnation would not be an eviction, but, whenever it occurred, it would entitle the buyer, under the *Sc.* Pisonianum, to a return of the price. 29. 5. 8. *pr.* As to sale of *statuliber*, *post*, Ch. XIII.

[10] 19. 1. 11. 12.

[11] *Post*, p. 98. Cf. 19. 1. 4. *pr.*, *antequam mihi quid abesset*.

[12] 21. 1. 17. 18, *post*, p. 99.

was taken by a pledge creditor, by an *actio* Serviana. Here, however, recovery was held to be eviction[1]. The difference is remarkable, since the creditor's action does not affect the buyer's ownership, and indeed we are told that, if the debtor pays the debt, since the buyer is now entitled to have the slave again, his action on eviction against his vendor, (the debtor,) will be met by an *exceptio doli*[2]. Thus the difference of treatment seems to be due to the fact that there is no liability on the buyer to pay, as there is in noxal cases. No doubt he could do so if he wished, and recover *ex empto*, up to the value of the slave.

It was essential to any claim that the buyer had taken proper steps to defend his title. Thus the right was lost if he had colluded with the claimant[3]. Moreover if the *condemnatio* was due to *iniuria iudicis* there was no claim against the vendor[4]. On the other hand, if there was no doubt about the justice of the claim, it does not appear to have been necessary to incur costs, in fighting the matter through: the buyer would not lose his right by admitting the plaintiff's claim[5]. Failure to recover the man from one who had taken him was equivalent to deprival[6]. If, however, he paid for the man, not under pressure of litigation, but buying him from the real owner, he has not been evicted and is thrown back on his remedy *ex empto*[7]. So also, if after the sale he acquires an independent title to the slave, there has technically been no eviction, and the only remedy is *ex empto*[8].

It has been pointed out that these requirements lead to odd results[9]. To claim, as a slave, a man you know to be free, is an *iniuria*, but if it be done to preserve an eviction claim this is a defence[10]. And while a promise to give a man who is in fact free is null[11], a promise to compensate for eviction on sale of one is good[12]. The reason seems to be that the rule of nullity, being *iuris civilis*, was not extended to collateral transactions connected with valid contracts. The sale being valid, the validity of the dependent obligation necessarily followed[13]. If, while

[1] 21. 2. 35.
[2] *Ibid.* The right of action is not destroyed: *semel commissa stipulatio resolvi non potest.*
[3] Vat. Fr. 8. Or neglected the defence (21. 2. 27) or failed to notify the vendor or his successors of the claim (21. 2. 51. 1, 53. 1) a reasonable time before the condemnation (21. 1. 29. 2). This text shews that the stipulation contained a proviso for notice. But as this is inconsistent with the rule that not to give notice was *dolus* and thus barred the claim (29. 2. 53. 1) it may be that the proviso was inserted in that particular case. For detail as to notice, Moyle, Sale, 117 *sqq.* Lenel thinks the Edict expressly required notice (Ed. Perp. § 296, Fr. Edit.). It applied equally in *ex empto*, C. 8. 44. 8, 20, 29.
[4] Vat. Fr. 8, 10; 21. 2. 51. *pr.*, etc.
[5] 19. 1. 11. 12. See however 47. 10. 12. Conversely the fact of his retaining the slave did not bar his claim if he paid damages in lieu of delivery 21. 2. 16. 1; *h. t.* 21. 2.
[6] 21. 2. 16. 1. [7] 21. 2. 29. *pr.*
[8] 19. 1. 13. 15; 21. 1. 41. 1. If the vendor himself acquire the title and sue on it, he can presumably be met by an *exceptio doli*, or the buyer can let judgment go and sue for *duplum* 21. 2. 17.
[9] Accarias, Précis, § 607 *bis.* [10] 47. 10. 12.
[11] In. 3. 19. 2. [12] *Ante*, p. 47, n. 9.
[13] Different reason, Accarias, *loc. cit.*

the claim against the buyer is pending, the slave runs away through his *culpa*, he will be condemned[1], but Ulpian quotes Julian to the effect that he cannot yet claim on eviction, for he lost the slave through his own fault. When he gets the fugitive back he can proceed, for it is now true that he has lost the value of the slave through defect of title.

Apart from agreement the liability for eviction is subject to no limit of time[2]. There are, however, certain circumstances which end it.

(*a*) After the buyer has usucapted the slave there can be no further liability for eviction so far as outstanding ownership is concerned[3], and if he has failed so to acquire the slave, when he could have done so, it is his own fault, and he has no claim against the vendor[4]. But, as we have seen, this was no protection against liability for eviction on other grounds, nor could it occur where the slave was *furtivus*.

(*b*) Death of the slave before eviction. Here Ulpian, following Julian, says that, as the loss is not due to the defect of title, the liability on the *stipulatio duplae* does not arise[5]. In fact there has been no eviction, and as no loss resulted from the defect of title, there could be no *actio ex empto* either. This appears from the concluding words of the text, which give *actio doli* if the vendor was in bad faith, implying that there was no other action[6]. There is damage in the sense in which this action requires it. The *actio ex empto* is to put the buyer so far as possible where he would be if the vendor had kept his contract. The *actio doli* puts him where he would be if the dolose act had not occurred: *i.e.*, he can recover the price. If the death occurs after *litis contestatio* in an action against the buyer, the action will proceed, and if the judgment is against the buyer, he will have the eviction claim[7].

(*c*) Manumission after the sale by the buyer. He cannot now claim on the stipulation, since he has abandoned his right to the slave, and so did not lose him by the eviction. So far the law is clear[8]. And the same result follows if the slave became free by any act of the buyer's, whether it was intended to have that effect or not[9]. There was disagreement as to whether the *actio ex empto* was still available. Paul quotes Ulpian's view that it was lost, but himself adopts that of Julian,

[1] 6. 1. 45. If the flight was not through his *culpa* and he was absolved on giving security, the right to claim would not arise till he had recovered the man and given him or damages instead, 21. 2. 21. 3.
[2] C. 8. 44. 21. If he has undertaken to promise *duplum*, he can be required to do so at any time, by the *actio ex empto*. So if the man sold was a *statuliber*, the liability for eviction arises however long it is before the condition is satisfied, 21. 2. 56; 21. 2. 39. 4.
[3] 21. 2. 54. *pr.* [4] 21. 2. 56. 3.
[5] 21. 2. 21; C. 8. 44. 26. [6] 4. 3. 1. 1.
[7] 6. 1. 16. *pr.* If the claim were one of liberty, Justinian allowed the buyer to call on the vendor to shew that the dead man was a slave: if he did not the eviction claim arose, C. 7. 17. 2. 3.
[8] 19. 1. 43; 21. 2. 25; 21. 1. 47. *pr.*
[9] *e.g.* where the sale was with a condition against prostitution (*post*, p. 70) and the buyer prostituted her, 21. 2. 34. We have seen that eviction did not always turn on defect of title.

i.e. that it was still available[1]. It may be that, as Paul elsewhere says, the remedy is still extant, but only so far as to enable the buyer to recover his *interesse* in the man as a *libertus*[2]. This he has in no way abandoned. It is hardly necessary to say that sale of the man does not destroy the right. If the original buyer is evicted after he has sold, he is liable for non-delivery, which is enough to entitle him[3]. On the other hand, abandonment of the man (*pro derelicto habere*) is abandonment of the right[4].

We have now to consider cases in which the eviction is not deprivation of ownership. If all that was sold was a right less than ownership, and this was evicted, the foregoing rules apply[5]. More detail is necessary where what is evicted is not the buyer's whole right. Several cases must be considered.

(i) Where a pledge creditor claims the slave, by *actio* Serviana (or presumably, by *actio quasi* Serviana). Here, as we have already seen, there was an eviction, and the action on the stipulation was available[6].

(ii) Where an outstanding usufruct is claimed from the buyer. Here, too, the texts make it clear that it was an ordinary case of eviction, giving the *actio ex stipulatione duplae*, with the ordinary requirement of notice[7]. Here, as in many parts of the law, usufruct and pledge are placed on the same level. The conditions are indeed much the same: though the deprival may not be permanent, there is for the time being a breach of the duty, *habere frui licere praestare*, out of which these rules as to eviction grew. The case of outstanding *Usus* is not discussed: on principle the decision should be the same[8]. It must be added that the amount recovered would be arrived at by considering what proportion of the total value would be represented by the usufruct, and doubling that proportion of the price[9].

(iii) Where, of several slaves sold, one is evicted. No difficulty arises: each is regarded as the subject of a separate stipulation[10]. We do not hear how the price is fixed if they had been sold at a lump price[11].

(iv) Where an undivided part is evicted. It seems clear on the texts that where a divided part of a piece of land sold was evicted the *actio ex stipulatione duplae* lay[12]. This rule looks rational, but it is not

[1] 19. 1. 43. [2] 21. 2. 26, read *ex empto*. [3] 21. 2. 33.
[4] 21. 2. 76. [5] 21. 2. 10; *h. t.* 46. 2. [6] 21. 2. 34. 2, 35. *Ante*, p. 48.
[7] 21. 2. 43, 46, 49, 62. 2. So where the existence of a usufruct was stated but the name of fructuary was wrongly given, 21. 2. 39. 5.
[8] It is a breach of the duty *habere licere praestare*. Accarias, Précis, § 608, thinks eviction of usufruct did not give rise to the action on stipulation as of course but only if specially agreed for.
[9] 21. 2. 15. 1. Mode of estimation 35. 2. 68; Roby, de usufructu, 188 *sqq*. If after this eviction there was an eviction of the ownership, the amount already recovered would be deducted, 21. 2. 48.
[10] 21. 2. 32. *pr.*, 72. [11] As to this, cp. p. 67.
[12] The amount recoverable would be double the part of the total price which the part represented, by division if sold at *per iugerum*, quality being taken into account in other cases, 21. 2. 1, 13, 53.

a necessary result of principle, and it may be a late development. All the texts which explicitly lay it down are from Paul, Ulpian, and Papinian[1]. It is possible on the language of a text from Callistratus that there may still have been doubts[2].

In the case of an undivided part, there is difficulty. Ulpian appears to put all and either kind of part on the same level[3]. Papinian gives the *actio duplae* on eviction of an undivided part[4]. Pomponius[5] says what comes to the same thing. A buys a slave. X brings *iudicium communi dividundo*, and the slave, proving common, is adjudicated to him. Pomponius gives A the *actio duplae*. It is clear that he has lost only a half; for he must have received an equivalent for the other half. Julian says that a liability for eviction arises, but it is possible that this refers only to *actio ex empto*[6], though in other parts of the text he is speaking of the *actio duplae*. On the other hand Paul expressly says that as eviction of an undivided part is not eviction of the man, it is necessary to provide expressly for eviction of the part[7]. It may be noticed that in all the mancipations of slaves by way of sale, of which a record has come down to us[8], the stipulation says *partemve*. It is clear that the case differs from that of a divided part in that there is no necessary loss of actual possession, and it is possible to harmonise the texts, by assuming that in all the cases in which *actio duplae* is here mentioned, the clause *partemve* was inserted. This may be regarded as partly borne out by the fact, otherwise surprising, that we have much earlier authority than in the other case: *i.e.* Pomponius, and perhaps Julian. But it must be admitted that nothing in the form of the texts suggests this. On the whole it seems more likely that the jurists were not agreed, and that their disagreement has been allowed to survive into the Digest.

(v) Accessories, fruits and *partus*. The rule seems to be that so far as they are expressly mentioned the ordinary liability arises. But, if they are not mentioned, there is no liability. Thus where a slave was sold *cum peculio*, and a *vicarius* was evicted, the buyer had no claim, since if he did not belong to the man he was not covered by the words *cum peculio*[9]. As to acquisitions and *partus* of the slave coming into existence *apud emptorem*, it is clear that the *stipulatio* can give no right if the slave is evicted, for no more than *duplum pretium* can be recovered by it in any case. But the question may arise where, for instance, the slave is dead

pr., 64. 3. Materials of a house in existence form an apparent exception: we are told that as they are not sold eviction of them is not *partis evictio* (21. 2. 36). This view of the house and the materials as distinct led to difficulty in other matters (In. 2. 1. 29 *sq.*). We are told elsewhere that *ex empto* is available (41. 3. 23. 1). This implies that they are sold and puts them on a level with those accessories that pass with a house (19. 1. 13, 31. 15).
[1] 21. 2. 1, 13, 14, 15, 53. *pr.*, 64. *H. t.* 45 is from Alfenus, epitomised and noted by Paul.
[2] 21. 2. 72. [3] 21. 2. 1. [4] 21. 1. 64. *pr.*
[5] 21. 2. 34. 1. [6] 21. 2. 39. 2. [7] 21. 2. 56. 2.
[8] Bruns, Fontes, i. 288 *sqq.*; Girard, Textes, 806 *sqq*. [9] 21. 2. 5.

or has been freed before the question of title crops up. It is clear, on Julian's authority, that eviction of later acquisitions gave a right of action *ex empto*, because the vendor was bound *praestare* what could be acquired through the slave. Julian applies this to *partus* and such things as *hereditas*[1]. No doubt it is equally true of earnings, for the vendor is bound to hand over all he has received[2]; and one whose delivery has been vitiated by eviction is as if he had not delivered at all[3]. He holds this view though Ulpian quotes him as not holding that the *partus* and *fructus* were sold[4]. We have seen, however, that for some purposes at least he puts them on the same level as if they were sold: for him and Papinian they are acquired by the same *titulus* both for usucapion and in relation to the rule in legacy as to *duae lucrativae causae*[5]. But it does not appear that either he or any other jurist allowed the *actio duplae* for *partus* and *fructus*; though it seems that some had taken the not very hopeful line that as eviction of *usus-fructus* gave the right, eviction of *fructus* ought to do so as well. But Julian observes that the word *fructus* here denotes not a right but a physical thing[6].

The law as to liability of the vendor for defects in the thing sold was completely remodelled by the Edict of the Aediles. The comprehensive enactments stated in the Digest were undoubtedly a gradual development. In its earliest known form the rule of the Edict was a much simpler matter. It was a direction that on sales of slaves an inscription should be affixed setting forth any *morbus* or *vitium* of the slave, and announcing the fact, if the slave was *fugitivus* or *erro* or *noxa non solutus*, allowing redhibition or *actio quanto minoris* according to circumstances[7]. It applied apparently only to sales in open market. As recorded by Ulpian, perhaps from Labeo[8], the Edict is not limited in application to sales in open market, and the requirement of inscription is replaced by one of declaration. Moreover it enumerates certain other kinds of defect and it makes the vendor equally liable for any express warranty whether it refers to one of

[1] 21. 2. 8. [2] *Ante*, pp. 41 *sqq*. [3] 19. 1. 3. *pr*.
[4] 18. 2. 4. 1. [5] 30. 82. 4; 31. 73. *Ante*, p. 24.
[6] 21. 2. 42, 43. In discussing eviction we have said nothing of its connexion with the *actio in duplum* against the *auctor*, the *actio auctoritatis* of commentators. The connexion is certain: the use of the stipulation spread from *traditio* to *mancipatio* (Varro, de Re Rust. 2. 10. 5). As Lenel shews (Ed. Perp. § 290), the *actio auctoritatis* survived into classical law, and several of the texts were originally written of it. But it seems to belong to an earlier state of the law: in all the classical mancipations by way of sale, of which we have a record, the stipulation was relied on. For the same reason we have said nothing of the *satisdatio secundum mancipium*. Bechmann, Kauf, 1. 123, 375 *sqq*. The rules of eviction were applied to transactions analogous to sale, *e.g.* giving *in solutum* (C. 8. 44. 4); satisfaction of *legatum generis* (21. 2. 58); *permutatio* (C. 8. 44. 29) etc. But not to mere *donatio*, apart from agreement (C. 8. 44. 2).
[7] Aul. Gell., Noct. Att. 4. 2.
[8] 21. 1. 1. 1. As to the development of this Edict: Karlowa, R.R.G. 2. 1290 *sqq*. Bechmann, Kauf, 1. 397.

the specified defects or not. It contains rules as to the conditions under which and the time within which the actions are available, and it ends with the statement that an action lies, *si quis adversus ea sciens dolo malo vendidisse dicetur*[1].

We are told that the vendor might be required to give a formal promise relative to all these matters, and that, if he refused, the *actio redhibitoria* could be brought against him within two months and the *actio quanto minoris* within six[2]. As, without the promise the actions were already available for longer terms, if any defect appeared, this is of no great value. It is possible that this may have been the original rule, and that when the other came into existence this was little more than a survival[3]. The promise gave a *strictum iudicium*, but there is no evidence that action under it differed in any other way from the action on the implied warranty. Probably it was subject to the same limit as to time[4].

The warranty could of course be expressly excluded, in part or completely[5], and Aulus Gellius tells us[6] that in sales in market overt it was customary for owners, who would not warrant, to sell the slave *pileatus, i.e.* with a cap on his head, a recognised sign that no warranty was given. Moreover the liability might always be avoided by pact, either *in continenti* or after[7]. We are told that there was no redhibition in *simplariae venditiones*[8]. This epithet is obscure: the Syro-Roman Law-book seems to shew that it refers not to trifling sales but to cases in which the buyer takes the slave, for good or ill, irrespective of his quality. Thus the text refers to these pacts, and means that agreements were usual under which the buyer could not redhibit though he could bring *quanto minoris*[9]. Of course he could expressly renounce both rights. These preliminary remarks may be concluded by the observations that no liability existed for defects which had no existence at the time of sale, whether they had ceased to exist[10], or had not yet come into existence[11], that it did not arise where the defect was one which was so obvious that the buyer ought to have seen it[12], or where in fact the buyer was aware of it[13], and that the actions did not arise

[1] The point of this may be that if there was *dolus* the damages were not limited as they may have been in the other case, but all damage was recoverable. But even this adds nothing to the liability under the *actio ex empto*. Pothier, *ad* 21. 1. 1. 1; C. 4. 58. 1. But the limitation is doubtful, *Post*, p. 63. Karlowa (*loc. cit.*) thinks it refers to fraud on the Edict, *post*, p. 59.
[2] 21. 1. 28. *i.e.* to compel him to promise and thus be liable *ex stipulatu*.
[3] It survived into the Digest, 19. 1. 11. 4; 21. 1. 28; C. 4. 49. 14. Some texts cited to shew this shew merely that such stipulations were made—a different matter, 21. 2. 31, 32. Some refer to the stipulation on eviction, 21. 1. 31. 20. Bechmann, *op. cit.* 1. 404, thinks it is the compilers who supersede this system.
[4] See however Accarias, *op. cit.* § 609 *bis*; Bechmann, *op. cit.* 1. 407.
[5] 21. 1. 14. 9; 2. 14. 31. He must conceal nothing. [6] Noct. Att. 7. 4.
[7] 2. 14. 31; 21. 1. 14. 9. [8] 21. 1. 48. 8.
[9] Bruns at pp. 207, 8 of his edition of the Syro-Roman Law-book.
[10] 21. 1. 16, 17. 17. [11] 21. 1. 54; C. 4. 58. 3. [12] 21. 1. 1. 6; *h. t.* 14. 10.
[13] *Ibid.*; *h. t.* 48. 4. The texts are not agreed as to whether even an express warranty was binding if the buyer knew the facts, 16. 1. 43. 1; 44. 4. 4. See Moyle, Sale, 197.

where the defect was not such as to affect the value of the slave[1]. On the other hand it was immaterial that the vendor had no knowledge of the defect[2], and thus the redhibitory actions do not necessarily exclude *ex empto*[3].

We have now to consider the defects and other matters non- or misstatement of which rendered the vendor liable to the Aedilician actions.

I. *Morbus* or *Vitium* in the slave. It is not necessary to go through the long list of diseases mentioned in the Digest, under this head: it will be enough to state the general principles and to discuss one or two disputed points. At first sight it might seem that *morbus* meant a case for the doctor, and *vitium* some permanent defect or deformity. But the actual nature of the distinction was unknown to the classical lawyers themselves. Aulus Gellius[4] remarks that it was an old matter of dispute, and that Caelius Sabinus (who wrote on these Edicts) reported Labeo as holding that *vitium* was a wider term, including *morbus*, and that *morbus* meant any *habitus corporis contra naturam*, by which its efficiency was lessened, either affecting the whole body (*e.g.* fever), or a part (*e.g.* blindness or lameness). Later on he quotes similar language from Masurius Sabinus[5]. The remark which Gellius describes Caelius as quoting from Labeo is credited by Ulpian to Sabinus himself[6]. It seems, however, that Labeo must have been using the word *vitium* in a very general sense, not confined to the cases covered by the Edict, for the illustrations given of *vitia*, which are not *morbi*, are those which appear not to have been contemplated by the Edict[7]. Aulus Gellius[8] gives another attempt to distinguish the meanings of the words. Some of the Veteres held, he says, that *morbus* was a disorder that came and went, while *vitium* was a permanent defect. This is a close approximation to what is suggested above as the most obvious meaning of the words, but Gellius notes that it would upset Labeo's view that blindness was a *morbus*. Ulpian remarks that it is useless to look for a distinction: the Aediles use the words side by side, and only in order to be perfectly comprehensive[9]. The texts do not usually distinguish: they say that a defect does or does not prevent a man from being *sanus*[10].

The ill must be such as to affect efficiency[11], and it must be serious, more than a trifling wound or a cold or toothache or a boil[12]. On the

[1] 21. 1. 1. 8, 4. 6, 6. 1, 10. 2, 10. 5, 12. 1, *etc.* [2] 21. 1. 1. 2.
[3] 21. 1. 19. 2. [4] Noct. Att. 4. 2. 2.
[5] *Id.* 4. 2. 15. [6] 21. 1. 1. 7.
[7] 21. 1. 1. 9 to 4. 1; *h. t.* 10. 5. Cf. Aul. Gell. *op. cit.* 4. 2. 5.
[8] *loc. cit.* [9] 21. 1. 1. 7.
[10] The expression *morbus sonticus* from the XII Tables is considered in two texts and its meaning discussed (see 21. 1. 65. 1; see also 42. 1. 60; 50. 16. 113). But as Ulpian and Pomponius say, the matter is one of procedure: it does not concern the Edict in which the word *sonticus* does not occur, 21. 1. 4. 5.
[11] 21. 1. 10. *pr.* [12] 21. 1. 1. 8; *h. t.* 4. 6.

other hand it need not be permanent[1]. Thus fevers and agues, gout or epilepsy are enough[2]. A mere difficulty or hesitation in speech was not a redhibitory defect[3], though incapacity to speak intelligibly was[4]. It is clear on these texts that the limits had been matter of dispute. Shortsightedness was another subject of dispute. A man who cannot see far is as sound, says Sabinus, as one who cannot run fast[5]. But some had held that it was always a redhibitory defect; others only if it was caused by disease[6]. Ulpian says that *myops* and *luscitiosus* might be redhibited[7]. No doubt it is a question of degree[8]. The defect must be physical[9]: mental and moral faults were not enough. Thus fanaticism, even amounting to permanent religious mania, and idle or lying habits were not enough[10]. This no doubt indicates the fact that the Edict only embodies the usual practice and that the word commonly employed, *i.e. sanus*, referred, in ordinary speech, only to bodily defects[11]. It is due to this limitation that *erro* and *fugitivus* are specially mentioned[12]. On the other hand, madness caused by bodily disease was redhibitory, as shewing a bodily *vitium*[13]. It should be added that some things might be *vitia* in a man which would not be in stock, and that defects not covered by the Edict might nevertheless give *actio ex empto* if the vendor knew, and was silent as to them[14].

II. *Fugitivus* and *Erro*. The vendor must declare if the slave has either of these defects[15]. *Fugitivus* here means one who has run away at least once from his master[16]. What is involved in "running away" will be considered when we are discussing *fugitivi* in detail[17]: here we must note that the case is not one of an actual present fugitive, but of one who has shewn that he is *fugax*—inclined to run away. An *erro* is one who is given to wandering about without cause and loitering on errands[18]. The practice has a certain similarity to flight, and Labeo defines them as greater and less degrees of the same offence[19]. So,

[1] 21. 1. 6. [2] 21. 1. 1. 7; *h. t.* 53.
[3] Aul. Gell. *op. cit.* 4. 2. 2; D. 21. 1. 10. 5.
[4] 21. 1. 9. [5] Aul. Gell. *op. cit.* 4. 2. 15.
[6] Aul. Gell. *loc. cit.* 11. [7] 21. 1. 10. 3, 4.
[8] Labeo held sterility in a woman always a redhibitory defect. But the view of Trebatius (quoted by Ulpian from Caelius Sabinus) prevailed: it was redhibitory only if resulting from disease (Aul. Gell. 4. 2. 9, 10; 21. 1. 14. 3). Servius held lack of a tooth redhibitory, but this was rejected, the reason being presumably that it is immaterial, though this is disguised under the odd proposition, that, if this were a defect, all babies and old men would be unsound. Labeo and Paul are responsible for this (Aul. Gell. 4. 2. 12; 21. 1. 11). To be a *castratus* or a *spado* was a *vitium* (21. 1. 6. 2, 7, 38. 7) though it might increase his value (9. 2. 2, 7. 28). See *ante*, p. 8.
[9] *Habitus corporis.* [10] 21. 1. 1. 9—10; *h. t.* 65. *pr.*
[11] Pomponius suggests that an utterly useless imbecile might be redhibited. Ulpian rejects this, 21. 1. 4. 3. Cf. *h. t.* 43. 6. *Post*, p. 59.
[12] 21. 1. 4. 3.
[13] 21. 1. 1. 9, 4. 1, 4. 4. In Aul. Gell. (4. 2. 15) Masurius Sabinus appears as holding that a *furiosus* is *morbosus*: it is presumably this last form of insanity he has in mind.
[14] 21. 1. 38. 7; *h. t.* 4. *pr.* As to eunuch and *castratus*, Karlowa, R.R.G. 2. 1301.
[15] 21. 1. 1.
[16] 21. 1. 17, *passim*; *h. t.* 48. 4, 54, 58. *pr.*; C. Th. 3. 4. 1 (C. 4. 58. 5); C. 4. 58. 3; C. 4. 49. 14.
[17] *Post*, Ch. XII. [18] 21. 1. 17. 14. [19] *Ibid.*

Arrius Menander, speaking of military discipline, says that to be an *erro* is a *levius delictum*, while to be a *fugitivus* is a *gravius*[1]. But there is something misleading in this: the attitude of mind is different[2].

III. *Noxa non solutus*[3]. The vendor must declare if the slave is subject to any present liability for delict, *i.e.* not any delict that the man has ever committed, but only those as to which the liability is still outstanding[4]. As we have seen, the word *noxa* refers to private delicts sounding in damages, not to criminal offences[5].

IV. *Quod dictum promissumve cum veniret fuisset*[6]. The vendor is bound, by liability to the Edictal actions, to make good any representations made at the time of sale. The position of this rule in the Edict suggests that it is a somewhat later development; but it must be as old as Labeo[7]. The difference between *dictum* and *promissum* is that the former is a purely unilateral declaration, while the latter is, or may be, an actionable contract, giving an *actio ex stipulatu* as well as the Edictal actions. The *dictum* need not be made at the moment of the sale: it will bind though it was made some days before, if it was substantially one transaction[8]. The preceding text seems to contemplate its being made after the sale.

Mere general words of commendation or "puffery" do not constitute binding *dicta*: it is therefore necessary to decide on the facts whether it really is a definite statement, intended to be binding[9]. Where it is binding it is to be construed reasonably and *secundum quid*. To say that a man is *constans* and *gravis* does not mean that he has the *constantia et gravitas* of a philosopher[10]. The *dictum* might be the denial of bad qualities, or the affirmation of good[11]. It might cover any sort of quality, and was obviously most useful in relation to mental and moral qualities[12]. Many *dicta* are mentioned in the title, besides those already instanced[13]. In one text we have the curious warranty that he was not a body-snatcher, due no doubt to temporary and local conditions[14]. In some of the recorded cases of actual sales, we find a warranty

[1] 49. 16. 4. 14.
[2] We are told by Ulpian that the crime of concealing *fugitivi* covers that of concealing *errones* (11. 4. 1. 5). But this is more intelligible: the attitude of mind of the offender is the same.
[3] 21. 1. 1. 1.
[4] 21. 1. 17. 17.
[5] *Ante*, p. 47; 21. 1. 17. 18. While the Edict says only *noxa*, express agreements usually said *furtis noxisque*. See the mancipations recorded in Bruns and Girard, *locc. citt.* There is indeed some evidence for it in the Edict, 21. 1. 46. *Post*, p. 98.
[6] 21. 1. 1. 1.
[7] 21. 1. 18. *pr.*
[8] 21. 1. 19. 2.
[9] 21. 1. 19. *pr.*, 3. If intended to deceive they might give *a. doli*.
[10] 21. 1. 18. *pr.*, where there are other illustrations. So also *cocus* does not mean a first class cook (*h. l.* 1). The statement that he has a *peculium* is satisfied however small the *peculium* may be (*h. l.* 2). An *artifex* is a trained man, not necessarily highly skilled (21. 1. 19. 4).
[11] 21. 1. 17. 20.
[12] 21. 1. 4. 4.
[13] Laborious, active, watchful, careful, saving, not a gambler, had never fled to the statue of the Emperor, not a *fur*, which means that he had never stolen even from his master, 21. 1. 18. *pr.*, 19. 1, 31. 1, 52.
[14] 21. 2. 31. Cp. Nov. Valent. xxiii.

that the slave is not epileptic[1], though there is an independent warranty against disease. We know that the ancients hardly regarded this as a bodily disorder. We see from these notes that it was usual to stipulate even as to the defects covered by the Edict[2]. In the sale of a girl of six, in A.D. 139, it is stipulated that she is *furtis noxisque soluta*, which looks as if it was "common form[3]."

V. *Si quod mancipium capitalem fraudem admiserit*[4]. This is one of a group which appear almost as an afterthought in the Edict. They are probably a later addition, but they too must be as old as the Empire, since, as Ulpian tells us, *fraus* in the general sense of offence is an old use[5]. There is little comment on this rule. Ulpian tells us that it involves *dolus* and wickedness and that, therefore, Pomponius says that the rule could not apply to *furiosi* and *impuberes*[6]. It may be remembered that, under the *Sc.* Pisonianum, the price could be recovered on conviction[7]. The two remedies overlap, but while the remedy under the Senatusconsult was perpetual, that under the Edict was temporary. On the other hand the latter gave the better redress while it existed[8].

VI. *Si mortis consciscendae causa quid fecerit.* Ulpian gives some obvious illustrations, and suggests as the reason of the rule, the view that the man is a bad slave, who is likely to try on other men's lives what he has attempted on his own[9]. It seems hardly necessary to go so far to find a reason for not wanting to give money for a slave who was likely to kill himself[10].

VII. One who had been sent into the arena to fight with beasts[11]. This does not seem to have been commented. The silence may mean only that the comment has been cut out, for masters had been long since forbidden to send their slaves into the arena, and condemnation *ad bestias* was obsolete[12].

VIII. One sold as a *novicius* who was in fact a *veterator*[13]. This case has already been considered[14]: here it is enough to say that the fact gave the Aedilician actions, and that this was in all probability laid down in a separate part of the Edict[15].

[1] *caducum*, Bruns, Fontes, i. 288; "ἱερὰ νόσος" *ib.* 326.
[2] See also 21. 2. 31, 32.
[3] Bruns, *op. cit.* 289. Girard, Textes, 807. But it is omitted in some sales of older persons. Girard, *op. cit.* 808, 809.
[4] 21. 1. 1. 1.
[5] 21. 1. 23. 2. Cicero, Pro Rab. 9. 26.
[6] 21. 1. 23. 2.
[7] 29. 5. 8. *pr.*
[8] It may have covered old offences which have been *e.g.* pardoned, since these equally affect the reliability of the slave, which is clearly the point in this warranty.
[9] 21. 1. 1. 1, 23. 3.
[10] Paul observes that attempted suicide on account of misconduct is within this rule, but not from bodily anguish, 21. 1. 43. 4.
[11] 21. 1. 1. 1.
[12] *Ante*, p. 37; *Post*, Ch. XII.
[13] 21. 1. 37.
[14] *Ante*, p. 9.
[15] Lenel, Ed. Perp. § 293.

We pass now to a group of cases of which it cannot be said with certainty that they were mentioned in the Edict, or even that they gave the Edictal actions. It is said that it is *aequissimum* to declare the facts, and in reference to one of them the Edict is mentioned[1]: it is commonly assumed that they were on the same footing as the others. They are:

IX. One who under existing law cannot be manumitted[2].

X. One who has either been sold previously, on the terms that he is to be kept in chains, or has been condemned to *vincula* by some competent authority[3].

XI. One who has been sold *ut exportetur*[4].

All these are facts which shew that the slave is undesirable, but they do not exhaust the list of bad qualities, and the principle of selection is not clear. It may be noted that they have the common quality that they involve more or less restriction on manumission owing to the fault of the man, and they may be all that is left in Justinian's time of a rule requiring declaration where there was such a restriction due to his fault. If that is so, it is in all probability a juristic development. In Justinian's law past *vincula* no longer restricted manumission[5], but the survival of this rule is not surprising.

XII. Nationality. The vendor must state the nationality of the slave, on pain of liability to the Aedilician actions[6]. The reason assigned in the text is that nationality has a good deal to do with the desirability of slaves. There is plenty of evidence that this was so[7]: it was, in particular, presumptive evidence of their fitness or unfitness for certain employments[8]. The requirement is no doubt connected with the rule that it was necessary to insert in the *professio* of your fortune, required during the Empire for revenue purposes, the nationality of your slaves[9]. It is assumed by Lenel[10] that the rule we are considering was expressly laid down in the Edict. But this is in no way proved: it may well have been a juristic development. In support of this view it may be remarked that this is the only one of the cases in which it was found necessary to assign reasons for the rule. In the other cases nothing is said as to reasons beyond the general proposition with which the whole discussion opens, that the Edict was for the protection of buyers[11].

[1] 21. 1. 48. 3. [2] *Post*, Ch. xxv; 21. 1. 17. 19.
[3] 21. 1. 48. 3, 4. [4] *Post*, p. 69.
[5] *Post*, Ch. xxv. [6] 21. 1. 31. 21. [7] Wallon, *op. cit.* 2. 61.
[8] Marquardt, Vie Privée, 1. 200. Many slaves were *captivi* and the possibility of *postliminium* might be important.
[9] 50. 15. 4. 5. In most of the recorded sales of slaves the nationality of the slave is stated. There is an exception in A.D. 139 (Bruns, *op. cit.* 288 *sqq.*, 325; Girard, Textes, 805 *sqq.*). The rules of *professio* were a gradual development, and may not have been fully developed at that time. It may be that at some date the nation had to be stated only in the case of *barbari*. Cf. C. Th. 13. 4. 4; 3. 4. 1.
[10] Ed. Perp. § 93. It is not clear whether he thinks the same of those last discussed.
[11] 21. 1. 1. 2.

In the foregoing statement it has been assumed that the sale was of one or more slaves as individuals. But this was not necessarily the form of the transaction. The slave might be sold with something else: a *hereditas*, a *fundus* with its *mancipia*, a slave with his *peculium* which included *vicarii*. Here if the main thing is redhibitable, so is the slave, though he be in no way defective[1]. But, for a defect in an accessory slave, the right of redhibition arises only if he was expressly mentioned, and not where he was included in a general expression such as *peculium* or *instrumentum* (sold with a *fundus*)[2]. So Ulpian, agreeing with Pomponius; and Gaius, in saying that if *omnia mancipia* are to go with a *fundus* they must be guaranteed[3], means only that this amounts to express mention. It is by reason of this rule that the Aediles provided that slaves might not be accessories to things of less value, lest a fraud be committed on the Edict[4]. Any thing however may accede to a man, *e.g.* the *vicarius* may be worth more than the principal slave[5]. Presumably where the right of redhibition did arise in respect of an accessory slave, it applied to him alone. It should be added that if a *peculium* was sold without a slave, similar rules applied as to slaves contained in it[6].

The Edict applied to other transactions resembling sale, *e.g. permutatio*[7], but not to *donationes* or *locationes*[8]. It did not apply to sales by the Fisc, by reason of privilege[9]. The text adds that it applied to sales of the property of persons under wardship[10], the point being, perhaps, that it might be doubted whether the liabilities should be imposed on an owner who was *incapax*.

The actions given by the Edict are the *actio redhibitoria*, and the *actio quanto minoris* (otherwise called *aestimatoria*)[11], the former involving return of the slave, owing its name to that fact, and available for six months; the latter, (which lay on the same defects and was in no way limited to minor cases,) claiming damages and being available for a year[12]. But if the slave were quite worthless, *e.g.* a hopeless imbecile, it was the duty of the *iudex* to order refund of the price and return of the man even in this case[13]. The actions are available, on the words of

[1] 21. 1. 33. 1. [2] *h. l. pr.* [3] 21. 1. 32. Existing defects to be mentioned.
[4] 21. 1. 44. *pr.* It hardly seems necessary to appeal, as Pedius does, to *dignitas hominum*. At the time when this rule was laid down the Edict probably dealt only with slaves.
[5] *Ibid.*
[6] 21. 1. 33. *pr.* As to the case of sale of several slaves together, *post*, p. 67.
[7] 21. 1. 19. 5.
[8] 21. 1. 62, 63. In the latter case apparently only because these transactions not being ordinarily carried out in open market had not come within the purview of the Aediles.
[9] 21. 1. 1. 3, 4. It applied to sales by municipalities. [10] 21. 1. 1. 5.
[11] For a hypothesis as to the early history of this action, Karlowa, R.R.G. 2. 1291 *sqq.*
[12] 21. 1. 21; P. 2. 17. 5; 21. 1. 18. *pr.* On these points a somewhat different rule was in operation in Asia Minor in the fifth century. Bruns, Syro-Roman Law-book, 206.
[13] 21. 1. 43. 6. The periods were *utiles*. According to one text the time runs from the sale, or in the case of express *dicta*, from any later time at which they were made, 21. 1. 19. 6, 20. But another corrects this so far as to make it run from the time at which the defect was or ought to have been discovered, 21. 1. 55.

the Edict, to the heirs and all universal successors, and, though they are in a sense penal, they lie against the heirs[1]. This is because they are purely contractual, (for they do not depend on any wrongdoing,) and for the same reason the action is *de peculio* if the vendor was a slave or person in *potestas* (the slave returned being reckoned in the *peculium* at his real value[2]).

On the *actio quanto minoris* there is not much to be said. It is not actually mentioned in the Edict as cited by Ulpian[3]. During the six months the buyer has his choice between the two actions; thereafter he is confined to *quanto minoris*, which leaves the contract standing, but entitles him to recover the difference between the price he paid, and what he would have given had he known the facts[4]. As we have seen above, this might be the whole price, in which case the *iudex* would order return of the man. There is a separate action on each defect, and it can therefore be repeated, care being taken that the buyer does not profit, by getting compensation twice over for the same wrong. In like manner, if there were an express warranty, it was regarded as so many stipulations as there were defects[5].

It was for the buyer to prove the defect[6]. In such a matter the evidence of the slave himself, taken in the ordinary way, by torture, was admissible[7], and if there were other evidence, even the slave's declaration made without torture in the presence of credible persons, might be used in confirmation[8]. As the *actio redhibitoria* was for return of the man, it would be needed ordinarily only once. But it might fail, and it was permitted to insert a *praescriptio* limiting it to the particular *vitium*, so that it could be brought again on another[9].

The action was not available so long as the contract was still conditional: the *iudex* could not set aside an obligation which did not yet exist. Indeed an action brought prematurely in this way was a nullity, and *litis contestatio* therein would in no way bar later action. Sometimes, even if the sale were *pura*, a condition of law might suspend the action. Thus if a slave in usufruct bought, no *actio redhibitoria* would lie, till it was known out of whose *res* the price would be paid, for in the meanwhile the *dominium* was in suspense[10].

[1] 21. 1. 19. 5, 23. 5, 48. 5.
[2] 21. 1. 23. 4, 57. 1. If a slave bought and his master brought *redhibitoria*, he had to perform *in solidum* what was required of the buyer in the action—an application of a wider rule, 21. 1. 57. *pr.* *Post*, Ch. IX.
[3] 21. 1. 1. 1. [4] P. 2. 17. 6; D. 21. 1. 48. 1, 48. 2, 61. See Lenel, Ed. Perp. § 293. 3.
[5] 21. 1. 31. 16; 21. 2. 32. 1.
[6] 22. 3. 4.
[7] P. 2. 17. 12; D. 21. 1. 58. 2; 22. 3. 7. All from Paul, who says that though he may not give evidence for or against his master, this is rather against himself. The case is one of proof of *fuga*, and it may be that the rule is no wider. It is *factum suum*. *Post*, p. 86.
[8] 21. 1. 58. 2. [9] 21. 1. 48. 7.
[10] 21. 1. 43. 9, 10. *Post*, Ch. XV.

The general effect of the action is to put an end to the transaction: the man is returned, and the price repaid, and thus it is spoken of in several texts as being a sort of *restitutio in integrum* on both sides[1]. Both parties, it is said, are to be in the position in which they would have been had there been no sale[2]. But this is subject to some limitations. It did not, in fact, make the sale as if it had never been, for it would not entitle the buyer to a noxal action for any theft done to him by the slave[3], nor could a redhibited slave ever give evidence against the buyer[4]. And, as we shall see in discussing the results of the action, the vendor might often be a serious loser, and the buyer a gainer. Moreover the restitution so far as it went was only between the parties: if, for instance, the buyer redhibited merely to defraud creditors, the vendor was liable to them on account of the slave[5].

In considering the working of the action it will be assumed, for the present, that there are one seller, one buyer and one slave, who is still in the possession of the buyer. The Edict expresses in outline the duties of the parties. It provides that the buyer must give back the slave and any acquisitions, accessions and products, and must account for any deteriorations caused by himself, his *familia* or *procurator*[6]. The duties are further detailed in the commenting texts. He must be able to restore the man, and therefore if he has pledged, alienated, or created a usufruct in him, these rights must be released before the vendor can be made to refund[7]. The duty to restore accessions covered all that went with him and all acquired since the transfer[8], including what, by negligence, the buyer had failed to receive; in general any acquisition not *ex re emptoris*[9]. Thus he must give up any damages he may have received for theft of the man, but not for *iniuria*. The reason for this exception is that the action on ordinary *iniuria* to a slave depended on intent to insult the master, and accordingly the text suggests with doubt that even these must be restored in those cases of extreme insult in which this intent was not necessary[10].

[1] 21. 1. 23. 7, 60. [2] 21. 1. 23. 1, 60.
[3] 47. 2. 17. 2. [4] 48. 18. 11.
[5] 21. 1. 43. 7. *Actio* Pauliana.
[6] 21. 1. 1. 1.
[7] 21. 1. 43. 8; C. Th. 3. 4. 1 (= C. 4. 58. 5). The text says the rule is to apply *non solum in barbaris sed etiam in provincialibus servis*. The doubt might have been the other way. Perhaps it had been expressly laid down for *barbari*, in consequence of doubts as to effect of *postliminium*, and it had been argued, *a silentio*, that it was not so with *provinciales*. He gives him back *talis qualis*: he need not warrant him *noxa solutus* except so far as he or those claiming under him had authorised the wrongful act, 21. 1. 46. *Post*, p. 66. It may be that if redemption was impossible he might give his value. Eck, Festgabe für Beseler, 169.
[8] 21. 1. 33. 1.
[9] 21. 1. 24. Instances are: earnings while in possession of buyer or recovered by him from some other possessor, legacies and *hereditates*, whether they could have been acquired by vendor or not and irrespective of the person in view of whom they were given, *partus*, usufructs which have fallen in, and *peculium* other than that given by the buyer, 21. 1. 23. 9, 31. 2, 3, 4.
[10] 21. 1. 43. 5, *post*, p. 80.

The deterioration for which he is to account must, by the Edict, be after delivery[1]. It may be physical or moral[2]. *Familia*, for this purpose, includes slaves, *bona fide servientes* and children[3], and no doubt, in classical times, persons *in mancipio*. *Procurator* means either a person with general authority or with authority in the matter in connexion with which the harm was done. It includes *tutor*, *curator* and any person having administration[4]. It is immaterial to the liability whether it were *dolo* or only *culpa*[5]. It might conceivably be something which would have happened equally if the sale had not occurred. In this case he was equally liable for his own act, as he would have been if there had been no sale, but if it were by a *procurator* he need only cede his actions, and if it were his slave he could surrender him noxally[6]. But if the man acquired the bad habit merely by imitation of the buyer's ill-conducted slaves, this was not so far done by them that there could be any question of noxal surrender[7]. He may have to give security for certain purposes, *e.g.* against liability on any charge he may have created, or on any wrong committed on his *iussum*, and, generally, against *dolus*[8], and for the handing over of anything receivable in future, *e.g.* damages in any pending action about the slave, whether he receive them, or, *dolo* or *culpa*, fail to do so[9].

The vendor must hand over to the buyer the price and any accessions to it, and all the properly incurred expenses of the purchase, though not any money wantonly spent; an instance of what may be recovered being overdue taxes which the buyer had to pay[10]. If the price is not yet paid he must release the buyer and his sureties. What is meant by accessions to the price is not clear, but they certainly cover interest, which he must in fairness pay, since he is recovering the *fructus* with the slave[11]. It may be conjectured that the word originally covered cases in which the price or part of it was not in money.

Other expenses are on rather a different footing. There is a right to receive all damages and expenses, such as the value of things the slave, now redhibited, had made away with, or taken with him on running away[12], expenses of medical treatment[13], cost of training[14], damages paid in a noxal action, and the value of any thing he had

[1] 21. 1. 1. 1, 25. *pr.*
[2] Debauching an *ancilla*, cruel treatment so that the man becomes a *fugitivus*, leading him into vicious courses, 21. 1. 23. *pr.*, 25. 6.
[3] 21. 1. 1. 1, 2, 31. 15. [4] 21. 1. 25. 3, 31. 14. [5] *h. t.* 25. 5, 31. 14.
[6] *h. t.* 25. 4. The rule is from Pedius. He does not expressly speak of *filiifamilias*. In later law they could not be surrendered: the *pater* would be liable *in solidum*, but in the conditions of that time might have an effective claim against the son.
[7] 21. 1. 25. 7. Must be expressly claimed if accrued before *litis contestatio*: if after, came in *officio iudicis*, 21. 1. 25. 8.
[8] 21. 1. 21. 1. [9] *h. t.* 21. 2. [10] 21. 1. 25. 9, 27.
[11] *h. t.* 29. 1, 2. [12] P. 2. 17. 11; D. 21. 1. 58. *pr.*
[13] 21. 1. 30. 1. [14] 21. 1. 1. 1. *Si quas accessiones ipse praestiterit ut recipiat.*

stolen from the buyer[1], but not the cost of maintenance, since he had the man's services in return for that[2]. But all this last group of claims the vendor can evade by refusing the slave and leaving him with the buyer by a sort of noxal surrender[3], being then liable only for the price and those things which are reckoned with it. If however he knew of the defect at the time of sale he is in any case liable *in solidum*[4].

The Aediles require the buyer to do his part first[5]: the render being made *in iudicio* and under the supervision of the *iudex*, who will issue no condemnation till it is done[6]. But since it might happen that the vendor could not fulfil his part, and the buyer would be left with a useless *actio iudicati*, the *iudex* might authorise the buyer to give security for his part of the render without actually paying it[7].

The general effect of the *actio redhibitoria* being to undo the transaction as far as possible, no prominence is given to the distinction between a vendor who knows and one who is ignorant[8]. In the *actio quanto minoris* the buyer recovers the difference between price and value at the time of sale[9]. It seems however that in classical law it was usual to enforce these Edictal duties in the *actio ex empto*, and the rule is expressed in the texts that the vendor if ignorant was liable only for the difference in value, while, if he knew, he was liable for the *interesse*. This is clearly Julian's view. In one text[10] there is no warranty, so that an innocent vendor would have been under no liability, apart from the Edict, and the defects mentioned are *morbus* and *vitium*. In another there certainly was a warranty: *tenetur ut aurum quod vendidit praestet*[11]. In another text Pomponius[12] makes the warranting vendor liable for the whole *interesse* whether he knew or not. And in the text last above cited[11], he is quoted as laying down the same rule with Labeo and Trebatius in opposition to Julian. The texts may be harmonised on the view that where the duty is entirely edictal, Julian's distinction applies. Where there was a warranty there was a liability *ex empto* for the *interesse*, apart from the Edict. In support of this it may be noted that in Marcian's text dealing with warranty, Julian's remark has rather the air of being out of place. In a text of Paul[13], the innocent vendor is made liable for the whole *interesse*, though

[1] 21. 1. 23. 8.
[2] 21. 1. 30. 1. These claims, as well as those expressly stated in the Edict, must appear in the *formula* if accrued at time of action: if later, they come in, *officio iudicis*.
[3] 21. 1. 23. 8, 29. 3, 31. *pr.*, 58. 1. This rule suggests that the whole of this later liability is a juristic development: the power of surrender seems to date from Julian.
[4] C. 4. 58. 1. Like the buyer he may be required to give security for possible future liabilities, *e.g.* damages in a pending noxal action on account of the slave. 21. 1. 21. 2, 30. *pr.*
[5] 21. 1. 25. 10. [6] 21. 1. 29. *pr.* [7] 21. 1. 26, 29. *pr.*
[8] See however, above *n.* 4 and *post*, p. 65.
[9] *Ante*, p. 60. Lenel, Ed. Perp. § 293. 3. [10] 19. 1. 13. *pr.* Ulp. citing Julian.
[11] 18. 1. 45. Marcian, citing Julian and others. As to the presence of a warranty in this case, see Vangerow, Pandekten, § 604. The text is obscure.
[12] 19. 1. 6. 4. [13] 19. 1. 21. 2.

warranty is not expressly stated: it is however suggested by the words, hardly otherwise explicable in relation to an innocent vendor, *venditor teneri debet quanti interest non esse deceptum*[1].

Another difficulty is more striking. We have seen that the general aim of the *actio redhibitoria* is to undo the transaction as far as possible. It may result in a loss to the vendor, as he has to indemnify, and the buyer may even gain, since he gets interest and he might not have invested the money. But in general it is an equal adjustment. One text, however, speaks of the actions as penal[2], though, so far, they are no more penal than other contractual actions. And while we are told in one text by Ulpian[3] that the vendor is condemned unless he pays what is ordered by the Edict, another, by Gaius[4], says that if he does not pay he is condemned *in duplum*, while if he does make the necessary payments and releases he is condemned *in simplum*. Lenel[5] accepts this text, and assumes that the action was always penal. In each case he will have to pay double, either before or after judgment. It has been pointed out[6] that this jars with the whole nature of the action as elsewhere recorded, and with the fact that the *stipulatio* as to *vitia* says nothing about *duplum*[7]. Moreover it is an absurd way of putting the matter. It is only a roundabout way of saying that the action was *in duplum*: of course he could pay part before judgment if he liked. And in the case where there was an agreement for redhibition at pleasure, we are told that the action was the same[8]. Yet it is incredible that if, when sued under such an agreement, he took the man back and paid the price and accessions he should still have been liable even *in simplum*[9].

Karlowa[10], starting from the view, probably correct, that the rule was originally one of police, and only gradually became contractual, fully accepts the penal character of the action, and the text of Gaius. But his argument is not convincing. He treats the expression *stipulatio duplae*, which of course recurs frequently in this connexion, as correctly used, and rejects the current view that its duplex character relates to eviction, and that it became merely a collective name for the obligations required by the Edict[11]. To reach this result, he repudiates the directly contrary evidence of the existing recorded sales[7], in all of which the undertaking as to defects is simple, while the stipulation on eviction is *in duplum* in all cases but one. He passes in silence the significant rubric of the title on eviction[12], (*de evictionibus et duplae stipulatione*),

[1] See on these texts Pernice, Labeo, 2. 2. 245 *sqq.*; Dernburg, Pandekten, 2. § 100.
[2] 21. 1. 23. 4. [3] 21. 1. 29. *pr.*, *si autem venditor ista non praestat, condemnabitur ei.*
[4] 21. 1. 45. [5] Ed. Perp. § 293.
[6] Eck, Festgabe für Beseler, 187 *sqq.*
[7] 21. 1. 28. See Bruns, Fontes, ii. Chh. 3, 8; Girard, Textes, 806 *sqq.*
[8] C. 4. 58. 4; cp. 21. 1. 31. 22 *sqq.*
[9] The *a. redhibitoria* is available against *heres*, 21. 1. 23. 5. [10] R.R.G. 2. 1293 *sqq.*
[11] See *e.g.* Girard, Manuel, 562. [12] 21. 1.

and the evidence from Varro[1] as to usage: indeed he holds that there is no reason to think the edict followed usage. He quotes two texts in which Ulpian[2] and Julian[3] say that, if the vendor refused to take back the man, he need pay no more than the price and accessions, as shewing that, if he did take him back, he would have to pay double, whereas what they mean is, as the context shews with certainty, that, if he took him back, he would have to pay both price and any *damna*.

Pernice[4] thinks that the concluding words of the text of Gaius[5] mean no more than that if he paid, under the judge's preliminary decision, this amounted to condemnation *in simplum*, and he paid no more, but, if he did not, he was condemned *in duplum*. But this does not explain the opening statement of Gaius that there is a *duplex condemnatio* and that *modo in duplum modo in simplum condemnatur venditor*. Here the word *condemnatio* must be used in a technical sense, while the explanation offered of the ending words is clearly untechnical. Accordingly he speaks with no confidence.

Probably the solution of the problem lies in some detail, as yet undetected, in the history of the actions. The suggestion lies ready to hand that in the classical law they were *in duplum* in case of actual fraud. This would account for the enigmatic words about fraud at the end of the Edict[6], the words *in duplum* having been struck out. It would also justify the statement that the actions were penal, and Gaius' *duplex condemnatio*. But it leaves the rest of his text unexplained, unless, here too, a reference to *dolus* has been dropped.

If the slave is handed back without action or before *iudicium acceptum*, there is no *actio redhibitoria*, but the buyer has an *actio in factum* to recover the price. The merits of the redhibition are not considered: the vendor has acknowledged the slave to be defective by taking him back[7]. It is essential that he have been actually taken back: a mere agreement for return is not enough[8]. Conversely the vendor can bring an ordinary action *ex vendito*, to recover any damage[9]. We are told that in the buyer's action he must have handed back all accessions before he could claim[10]. It is also said that the fact that the slave is redhibitable is a defence to any action for the price[11]. If there was an agreement for return on disapproval at any time or within a fixed time this was valid[12]. The claims are the same as in the ordinary *actio redhibitoria*[13]: indeed the action is called by that name[14].

[1] Varro, R.R. 2. 10. 5. [2] 21. 1. 29. 3. [3] 21. 1. 23. 8.
[4] Labeo, 2. 2. 249; Eck, *loc. cit.* [5] 21. 1. 45. [6] 21. 1. 1. 1 *in fine*.
[7] 21. 1. 31. 17. [8] *h. l.* 18. [9] 21. 1. 23. *pr.*
[10] 21. 1. 31. 19. [11] 21. 1. 59. *pr.*
[12] 21. 1. 31. 22. If no time was stated, there was an *actio in factum* within 60 days, which might be extended, *causa cognita*, if the vendor was in *mora* or there was no one to whom it could be returned or for other good cause, *h. l.* 23.
[13] 21. 1. 31. 24. [14] C. 4. 58. 4.

We have said that the buyer, desirous of recovering the price, must restore the slave[1]. But impossibility of this restoration may result from different causes, and the legal effect is not always the same. The case of the slave in actual present flight is not fully discussed: the starting point seems to be that as he must be restored there can ordinarily be no redhibition[2]. But the rule developed that if there was no *culpa* in the buyer, and the vendor had sold *sciens*, there might be an *actio redhibitoria*, the buyer giving security that he would take steps to recover the slave and hand him over[3]. Manumission of the slave by the buyer, says Paul, at once ended the aedilician actions[4]. This rule is remarkable and is elsewhere contradicted—such rights were not destroyed *ex post facto*[5]. It is commonly set down to the fact that he is now a freeman, incapable of estimation[6], but this did not destroy other such actions, *e.g.* the *Iudicium de servo corrupto*[7]. It might end the *a. redhibitoria*, as the buyer has wilfully put it out of his power to restore, but it ought not to affect the *a. quanto minoris* since there is no need to estimate his present value.

Another question arose where the slave was evicted. How, it is asked, could his defects matter if the buyer has no interest, having been evicted by a third person? But all the conditions of *actio redhibitoria* are present except the power of restoration, and as the absence of this is the vendor's fault, how should this release him? Unfortunately the texts do not really answer the question: they assume a stipulation and allow the action as not being destructible *ex post facto*. The buyer will recover his *interesse*, which is nothing if the eviction was before delivery, and will vary according to the time of actual use of the defective slave[8]. The rule as to the requirement of restoration may be more exactly stated in the form that the buyer cannot sue, *ex edicto*, unless he restore or the failure is without fault or privity of him or his[9].

Death of the man does not, as of course, destroy the actions. We are told that they survive[10] unless the death was due to *culpa* of the buyer, his *familia*, or *procurator*, etc., which means any *culpa* however slight, as by providing no doctor, or an inefficient one. If there is *culpa* we are told that it is as if he were alive, and all is to be handed over which would be handed over in that case[11]. The meaning of this statement is not

[1] *Ante*, p. 61. [2] 21 1 21. *pr*, C Th 3 4 1; C 4 58 5 See however Eck, *loc cit*
[3] 21 1 21 3. And that neither he nor his *heres* would do anything to prevent the vendor from having the slave, *h t*. 22
[4] 21. 1 47. *pr*, including claims on *dicta promissa*.
[5] 21 1 44. 2, 21 2 16 2. It will be remembered that though the action on the stipulation for eviction was lost by manumission, this was because there was in fact no eviction
[6] Eck, *op cit* 173. [7] *Ante*, p. 34.
[8] 21 1 44 2, 21 2 16 2 In which Pomponius states obscurely the view of Proculus and sums it up in the sense here indicated The rule may have been the same if there was no stipulation, for the rule that rights of action are not destroyed *ex post facto* has no necessary connexion with stipulation [9] *e.g* he has been robbed of the slave. 21 1. 43. 5
[10] 21. 1. 31 6, 31 24, 47 1. [11] 21. 1 31. 11, 12, 14, 48 *pr*

too clear. It is sometimes said that the rule is that he must give the value of the slave in his stead[1]. This is in itself rational and may be what is meant. But it is not precisely what the text says, and it is more favourable to the buyer than the rule in the case of flight, *culpa eius*, apart from *scientia* of the vendor[2].

We have hitherto assumed a single slave, buyer, and vendor. In each case more than one might be concerned, and the cases must be taken separately.

(*a*) More than one slave is sold. If all are defective no question arises. But there is a question how far, on the defect of one, he can be redhibited separately. It is clear that a right of redhibition arises on defect of only one: our question is: what are its limits? The fact that they were sold at a lump sum may have been the sole point for Labeo and Africanus[3] as it certainly was one of the first to be considered[4]. But it was not the decisive point in classical law. Africanus[5] himself observes that even where there were several prices the right to redhibit all may arise on defect of one, *e.g.* where they were of no use for their special function separately. Troupes of actors are mentioned and, for other reasons, persons related as parents, children or brothers[6]. Ulpian and Paul lay down the rule that sale in a lump sum does not exclude *redhibitio* of one, apart from these special cases[7]. Where one is redhibited in this way, his relative value is taken into account in fixing the price returnable, if there was a lump price, but not otherwise[8]. It may be added that if there was an express warranty that the slaves were *sanos*, and one was not, Labeo is reported as saying that there can be redhibition *de omnibus*, but these words are generally rejected[9].

(*b*) More than one person entitled as buyer. The case most discussed in the texts is that of a buyer who has left several heirs. The general rule is laid down by Pomponius, quoted by Ulpian, that there can be no redhibition unless all consent, lest the vendor find himself paying damages in *quanto minoris* to one, and part owner by redhibition from another. He adds that they ought to appoint the same *procurator ad agendum*[10]. If one of the heirs has done *damnum* he is of course liable *in solidum* for it, *arbitrio iudicis*, and if it has been paid by a

[1] Moyle, Sale, 206
[2] *Ante*, p 66 The Basilica treat the text as denying the right of action altogether Bas 19 10 43 If the death occurs after *litis contestatio* it is within the *officium iudicis* to decide whether it was by chance or *culpa*, 21 1 31 13.
[3] Dernburg, *loc cit* But the texts hardly justify this.
[4] 21 1 34 *pr*, 64 *pr* [5] 21 1 34 1.
[6] *Ibid* The text adds *contubernales*, but the change of case indicates that this is an addition of Justinian s, 21. 1. 35 Such persons could be legated separately, *post*, p. 77
[7] 21 1 38 14—40 [8] 21 1 36, 64 *pr*
[9] 21. 1 64 1 If one is redhibitable there is an *exceptio* if the price of all is sued for, but not in an action for the price of part, except where all are redhibitable for the defect of one, 21 1 59. 1
[10] 21 1. 31 5

common *procurator* there will be an adjustment by *iudicium familiae erciscundae*[1] The various things due to them from the vendor can be paid *pro rata*, except indivisibles, such as *partus ancillae*, which must be given *in solidum* in common[2]. Similar rules apply to an original purchase in common neither can redhibit alone[3]. To this, however, there are two obvious exceptions if the contract were solidary, any buyer could redhibit *in solidum*, and if there was nothing in common in the contract, but there were quite separate contracts for parts, each could redhibit as to his share[4]

(*c*) More than one person entitled as vendor. Here, if there are several heirs to the vendor, or there were common owners, there may be redhibition *pro rata*, and if the vendors were selling, separately, distinct shares, the rule is the same, so that there may be redhibition in respect of one, and *actio quanto minoris* in respect of another But if they were solidary vendors there may be redhibition *in solidum* against any[5]

Restrictive covenants are somewhat prominent in the sale of slaves. These are not conditions on the sale in the sense that breach of them avoids it they are, for the most part, directions as to what is to be done with the slave, breach of which does not produce in all cases the same effect, since some are imposed for the benefit of the slave, some for the protection of the late owner, and some by way of mere punishment. Some of them also present exceptions to the general rule that obligations could not be assigned, and that one could not attach permanent incidents to the holding of property, except within the conception of servitudes It is clearly laid down that a man cannot validly promise that another shall do or not do[6]. As in English law the inconvenience was felt, and one instructive text shews that the Romans took advantage of the rules of usufruct to lay down a rule which, within a very narrow field, presents a close analogy to the rule in Tulk *v* Moxhay[7] A held property, subject to restrictions, which he had bound himself under a penalty to observe On his death he left a usufruct of this to X X, who had notice, was bound to observe the restrictions, (which were purely negative,) not on the impossible ground of an assignment of the obligation, but because to disregard them was not enjoying the property *bono viri arbitratu*[8] The cases must be taken separately[9].

[1] 21 1 31 9 It seems from the language of this text which Ulpian gives on the authority of Pomponius that the single procurator was matter of convenience not of absolute rule
[2] 21 1 31 6
[3] 21 1 31 7, 8 Nor could one alone compel delivery the vendor has a lien till he is wholly paid
[4] 21 1 31 10 [5] *Ibid*
[6] 45 1 38 1 Stipulations are found in which the promisor undertakes for himself *et eos ad quos ea res pertinebit* (*e g* 32 37 3) The reference is to the *heres*
[7] Tulk *v* Moxhay 2 Ph 774
[8] 7 1 27 5 Probably even here the grantor to A could not have enforced it
[9] As to 'real effect, Ihering, Études Complém 8 62

I The slave sold *ut exportetur*, or the like. This condition was regarded as imposed entirely in the interest of the vendor, who could therefore remit it[1]. If a penalty was agreed on by stipulation, this was clearly enforceable, but only from the promisor, even though there was a second buyer who allowed him to be in the forbidden place[2]: it was the second sale, which was his act, that made this possible. He could of course impose a similar penalty on the buyer from him, and so protect himself.

If the agreement for a penalty had been informal, there was a difficulty The older lawyers could find no *interesse*. The mere desire to inflict a hardship on the slave was no *interesse* in enforcing this there was no *rei persecutio*, but a *poena* This could not figure in an *actio ex vendito* This is Papinian's earlier view[3], but in an adjoining text[4] he declares himself converted to the view of Sabinus, *i e.* that the lower price at which he was sold was a sufficient *interesse*. The result is convenient but not free from logical difficulty. The reduction in the price is *causa* rather than *interesse* The real *interesse* is the value to him of the man's absence[5]. If a vendor had himself promised a penalty, this would, on any view, be a sufficient *interesse*, for any agreement for a penalty, with a buyer from him: it would indeed form the measure of its enforceability[6]. One would have expected to find some necessary relation between the amount of the penalty in our case and the reduction in the price[7].

The penalty was not incurred at all in the case of a fugitive, or one who was in the place without leave of his master[8]: a slave could not impose liabilities on his master in that way.

The restriction was a bar to any manumission in the place before export such an act was therefore void[9] But it did not prevent manumission, *ante fidem ruptam*, elsewhere[10], and it appears that if the man returned after manumission, the Fisc seized and sold him into perpetual slavery under the same condition[11].

The mere imposition of a penalty gave the late owner no right to seize the slave he went to the Fisc[12] But it was usual to agree for a

[1] Vat Fr 6, D 18 7 1 [2] 18 7 9, C 4 55 1, 2
[3] 18 7 7 [4] 18 7 6
[5] The question of *interesse* gave rise to difficulties in case of will A testator directs that a slave be sold for export Who can enforce this? By what right? Ulpian says doubtfully that it will enter into the *officium iudicis* in *familiae erciscundae*, a rule which was reached in the case of a direction to keep a slave chained 10 2 18 2, C 3 36 5 But what if there were nothing else in dispute? In any case *affectionis ratione recte agetur*—a penalty informally agreed on was enforceable if the covenant was *ne exportaretur* or the like the benefit intended was enough, 18 7 7
[6] *Ibid* [7] Ihering (French trans), Œuvres choisies, 2 150
[8] 18 7 9, C 4 55 2 [9] C 4 55 3 [10] *h t* 1
[11] *Ibid* *Post*, Ch xxv The restriction was construed rather against the slave one sold to be out of his province might not go to Italy C 4 55 5 If the *pomerium* was barred, the town was barred, *a fortiori* But one sold to be out of Italy might be in any province not expressly barred, 18 7 2 5
[12] C 4 55 2 The vendor has *actio ex vendito*

power of seizure on return (*manus iniectio*): the right to seize arose on return by consent of owner, and could be remitted, as the penalty could[1]. It applied though the slave had been transferred to another person[2]; the incapacity and liability to seizure being impressed on the slave. But any buyer could manumit him elsewhere before breach of the condition, and, if he then returned, he was seized by the Fisc and dealt with as above[3]. Though the condition bound the slave in the hands of third parties the buyer selling would be liable, *ex empto*, if he did not communicate it. Thus it was usual to give notice on any resale. The resale might be subject to the same condition. If, in that case, he returned with the consent of his owner, it was the original vendor who had the right of seizure, as *auctor legis*. The intermediate owner's restriction was merely regarded as notice and for self-protection: he could not supersede his vendor's right of seizure[4].

II. An *ancilla* sold *ne prostituatur*. This restriction is imposed in the interest of morality, and of the *ancilla*, and is therefore somewhat different in its effects from the foregoing. Breach of the provision involved freedom of the woman, according to rules which varied from time to time, and will require full discussion hereafter[5]. The Digest tells us nothing as to the effect, in classical law, of a mere proviso, *ne prostituatur*, without more. After Marcus Aurelius the woman became free[6]. If there were an express agreement that she was to be free she became so, under earlier law, however informal the agreement was[7]: it was a quasi-manumission depriving the buyer of his rights on the sale[8]. The vendor was her patron[9]. The effect was the same, by a provision of Vespasian, even though she had been resold without notice of the proviso[10].

If there had been merely a stipulation for a penalty, then, apart from the question of liberty, this could always be recovered[11]. So could a penalty informally agreed for: there seems to have been no doubt as to the sufficiency of the *interesse*, where what was aimed at was benefit to the slave[12]. The penalty was recoverable only from the promisor, but it applied even where the actual wrongdoer was a second assignee, even without notice[13]. If a right of *manus iniectio* had been reserved, this was effective, at any rate after Hadrian, as against any owner of the *ancilla*[14]. If on a first sale the agreement was that she was to be free,

[1] 18. 7. 9; C. 4. 55. 2; Vat. Fr. 6. [2] C. 4. 55. 1; Vat. Fr. 6.
[3] C. 4. 55. 1.
[4] 18. 7. 9. He could recover a penalty if he had agreed for one, and was liable under any promise he might have made, since it was his sale which had led to the wrongful return.
[5] *Post*, Ch. xxv.
[6] 18. 7. 6. 1; 40. 8. 6. Prostitution under colour of service at an inn was a "fraud on the law." C. 4. 56. 3.
[7] C. 4. 56. 1. 2. [8] 21. 2. 34. *pr.* [9] 2. 4. 10. 1.
[10] 37. 14. 7. *pr.* [11] 18. 7. 6. [12] *h. l.* 1. [13] *Arg.* 37. 14. 7. *pr.*
[14] 18. 1. 56; C. 4. 56. 1. If the prostitution was by, or with the connivance of, the imposer,

and, on the second, for *manus iniectio*, or *vice versa*, she was always free. In the first case this is a necessary result of the fact that the second vendor could not undo the condition, but in the second case it is clear that to free the woman is to undo the condition imposed by the first vendor. Paulus explains the rule as a case of *favor libertatis*, which hardly justifies what is in effect an act of confiscation. Accordingly he supplements this, by saying that such a condition was in any case not imposed with a view of getting her back, but in her interest, which is equally served by giving her freedom[1]. It will be seen that in the case of a provision against prostitution there was no power to remit the condition: it was not imposed in the interest of the vendor[2].

III. One sold *ut manumittatur, ne alterius servitutem patiatur*, etc. As by a constitution of about A.D. 176, breach of this condition involved the slave's becoming free, *ipso facto*, it follows that it was never really broken, and a penalty, however formally agreed on, was never incurred[3]. Even if there was a condition of *manus iniectio* the result was the same: the slave was free; the right of seizure was only *auxilii causa*[4]. A text of Scaevola's seems at first sight in direct conflict with this principle[5]. A slave is given, with a declaration that it is with a view to manumission, and a stipulation for a penalty if he is not freed, *vindicta*. Scaevola says, giving as usual no reasons, that the penalty is recoverable, though the person liable can always evade it by freeing. He adds that if no action is taken liberty is still due. Nothing turns on its being a donation, for the rule that liberty took effect *ipso facto* applied equally there[6]. Nor is it likely that the fact, that the agreement was for manumission *vindicta*, has anything to do with it, though this would not strictly be satisfied by freedom acquired in another way. It is more probable that the text represents an earlier state of the law. Scaevola's Digest seems to have been written under Marcus Aurelius[7] at the end of whose reign the constitution mentioned was passed. The language shews that the writer contemplates liberty as not taking effect *ipso facto*, though it is clear that he considers the penalty as at once recoverable. He says, in the end of the text, that the liberty requires to be conferred. It is clear that this was the earlier state of the law. In one text[8] Hadrian appears as saying that in such cases the slave was not free until manumitted[9].

Hadrian required the magistrate to declare the woman free, the vendor being still her patron but with limited rights, 2. 4. 10. 1; C. 4. 56. 1. On similar principles Severus and Caracalla provided that, if a right of *manus iniectio* reserved were released, for money, the woman was free, 40. 8. 7.
[1] 18. 7. 9. [2] p. 70, n. 14.
[3] 40. 1. 20. 2; C. 4. 57. 6. *Post*, Ch. xxvii. [4] 40. 1. 20. 2.
[5] 45. 1. 122. 2. [6] C. 4. 57. 1.
[7] Roby, Introd. to Dig. clxxxvi. [8] 18. 7. 10.
[9] As to vendor's power of withdrawal, *post*, Ch. xxvii.

IV. One sold *ne manumittatur*[1]. As we shall see later, the effect of such a provision was to make the slave incapable of manumission[2]. As in the last case, therefore, the proviso cannot be disobeyed, and the penalty cannot be recoverable. And so Papinian, and Alexander in the Code, lay it down[3]. It seems, however, that Sabinus thought that, if the form were gone through, this was breach of the condition and entitled to the penalty. Others thought that the claim on such ground though formally correct should be met by an *exceptio doli*. But Papinian is clear that what the stipulator meant was actual manumission, not the form, and that thus there has not been even a formal breach of the condition[4].

[1] The rule covered gifts and devises, 29. 5. 3. 15; 40. 1. 9; C. 7. 12. 2, *etc.*

[2] *Post*, Ch. xxv. It "*cohaeret personae*," and cannot be removed by the holder, 40. 1. 9; 40. 9. 9. 2; C. 4. 57. 5.

[3] 18. 7. 6. 1; C. 4. 57. 5. 1.

[4] In another text, on another point it is said *quamvis si manumiserit nihil agat, tamen heres erit: verum est enim eum manumisisse*. But this is a case of satisfying a condition on institution: it was conditional on his freeing a *servus hereditarius*, 28. 7. 20. 1. Labeo is doubtless influenced by *favor libertatis*, and the desire to save an institution. The text continues: *Post aditionem, libertas...convalescit*. It may be doubted whether this is from Labeo.

CHAPTER IV.

THE SLAVE AS MAN. NON-COMMERCIAL RELATIONS.

In political life, it need hardly be said, the slave had no share. He could hold no office: he could sit in no public assembly. He might not serve in the legions: it was indeed a capital offence for him to enrol himself[1]. Such service was the duty and privilege of citizens, and though, in times of pressure, both during the Republic and late in the Empire, slaves were occasionally enrolled, the exceptional nature of the step was always indicated, and the slaves so enrolled were rewarded with liberty, if indeed they were not usually freed with a view to their enrolment[2]. In like manner they were excluded from the decurionate in any town, and it was criminal in a slave to aspire in any way to the position[3]. But though they never occupied the highest positions in the public service, they were largely employed in clerical and manual work in different departments, and even in work of a higher kind[4].

Both at civil and praetorian law, slaves *pro nullis habentur*[5]. This is not so at natural law, *quia quod ad ius naturale attinet omnes homines aequales sunt*[6]. We have already noted some results of this conception[7], and have now to consider some others.

The decay of the ancient Roman religion under the emperors makes it unnecessary to say more than a few words as to the position of the slave in relation thereto. The exclusion of slaves from many cults is not due to any denial of their claim to divine protection, but to the circumstance that the divinities, the worship of whom was most prominent, had special groups under their protection to which slaves did not belong. A slave did not belong to the *gens* of his master, and therefore had no share in its *sacra*, or in the united worship of *Iuno Quiris*, and similar propositions might be laid down as to other

[1] Pliny, Ep. Traj. 30.

[2] Livy, 22. 57; 24. 14; Iul. Capit., M. Anton. 21. 6, *volones*; Val. Max. v. 6 § 8; C. Th. 7. 13. 16. For other cases, J. Gothofredus *ad h. l.* See also Halkin, Esclaves Publics, 45. In general they volunteered and owners were compensated.

[3] C. 10. 33.

[4] 2. 11. 7; 50. 17. 211. As to this see *post*, Ch. xiv.

[5] *Ante*, p. 4; D. 28. 1. 20. 7; 28. 8. 1; 48. 10. 7.

[6] 50. 17. 32.

[7] Ch. i.

worships[1]. On the other hand slaves had a special cult of Diana. They figured prominently in the *Saturnalia* (a main feature of which was the recognition of their equality with other men[2]), and they shared in other observances. Within the household they shared in some degree in the observances connected with the *Lares* and the *Penates*, and there was even a cult of the *Manes serviles*[3]. Moreover slaves were of many races, each with its own cult or cults, and it need not be supposed that their enslavement took away from them the protection of their racial divinities[4]. When Christianity became the religion of the state, there could be no question of the exclusion of slaves from religious worship. There are indeed many Constitutions regulating the religion of slaves, some of which are referred to, later, in other connexions[5]. They are mainly directed against Judaism and heresy, and their dates and characteristics shew that they were enacted rather in the interest of the section of the Church that was then dominant, than in that of the slave[6].

Within the law itself, there are not wanting traces of this recognition of the fact that a slave was a man like any other, before the Gods. Though slaves could not be bound by contract, it was usual to impose an oath on them before manumission, in order that after the manumission they might be under a religious obligation to make a valid promise of *operae*[7], and they could offer, and take, effectively, a conventional extra-judicial oath[8].

Burial customs are closely related to religious life, and here the claims of the slave are fully recognised. Memorials to slaves are among the commonest of surviving inscriptions, and the place at which a slave was buried was *religiosum*[9]. Decent burial for a slave was regarded as a necessary. The *actio funeraria*, available to one who had reasonably spent money in burying a body, against the heir or other person on whom the duty of burial lay[10], was available even where the person buried was a *servus alienus*[11]. In this state of the law it is not surprising to find that slaves appear as members of burial clubs or *collegia*. With the general organisation of these and other *collegia* we are not concerned[12], but it is necessary to say something as to the connexion of

[1] See Marquardt, Culte, 1. 259. They were freely employed in the services of the various colleges of priests.
[2] As to the *Saturnalia*, Wallon, *op. cit.* 2. 231 *sqq.*
[3] On all these points, Sell, Aus der Noxalrecht der Römer, 31. n. 2; Blair, *op. cit.* 65 *sqq.* For Jewish practice, Winter, Stellung der Sklaven, 53.
[4] Tacitus, Ann. 14. 44. [5] *Post*, Ch. XXVI.
[6] See C. Th. 16. 4. 5; 16. 5. 40. 6, 52. 4, 54. 8, 65. 3, 4.
[7] 40. 12. 44. *pr.* Ulpian says, in the Digest, that they could contract by *votum* so as to bind their master if authorised by him. This was essentially a promise to the divinity. 50. 12. 2. 1. The allusion to slaves may be an addition of the compilers: how far was *votum* a living form of contract in Justinian's time?
[8] 12. 2. 23.
[9] 11. 7. 2. *pr.* Thus the Praetor speaking of unlawful burial says *ossa hominis*, not *liberi hominis*, 11. 7. 2. 2.
[10] 11. 7. 14. 6 *sqq.* [11] 11. 7. 31. 1.
[12] Daremberg et Saglio, Dictionnaire des Antiquités, *s.v. Lex Collegii.*

slaves with them. It was essential to a slave's entry into such a society that he have the authorisation of his master[1], who would then be bound by the *lex collegii*. Some of these *leges* have come down to us: one of them, the *lex collegii* Lanuvini[2] of A.D. 133, shews slaves as members.

In this case there was an entrance fee, (which included a bottle of good wine,) and a monthly subscription. Breaches of the statutes were penalised by fine, and in some cases by exclusion from the benefits. The members' rights were, mainly, to share in periodical banquets, and to the provision, out of the property of the college, of a fixed sum for the expenses of burial, out of which sum a certain proportion was distributed among the members present on the occasion of the funeral. There was a provision that if a slave member was freed he was to give the society a bottle of wine. If the deceased member had left no directions, the funeral was carried out by the officers of the society, but it was open to him to give directions as to the person who was to do it. The forms of the society were ordinarily modelled on those of a town. Thus the members were the *populus*, the directions were regarded as a will, and the person charged was looked on as a *heres*, in which character he took any part of the fixed sum which was not needed for the funeral. In the absence of any such claim, it seems to have remained with the society[3]. In the society at Lanuvium there was a rule, (and it may have been general,) that if the *dominus* would not hand over the slave's body for burial, and the man had left no *tabellae*, the rites were gone through without the body; *funus imaginarium fiet*[4]. The statutes of this *collegium* contain a provision that no creditor, patron or *dominus* is to have any claim on the funds of the college except as the *heres* of a member. This no doubt refers to the dispositions just mentioned, and seems to imply that the *dominus* could claim nothing, unless so made heir, and that if another person were named, it would go to him. There is nothing very surprising in this in view of the fact that all this needed initial authority of the *dominus*, and that very large powers of absolute alienation of *peculium* were commonly conferred on slaves. It must be presumed that any money received by the slave out of the funds was on the level of ordinary *peculium*[5].

Of protection to the morality of slaves there is in early law little or no trace. Probably it was not needed. But in the Empire, when it certainly was needed, it was slow to develop. We have already seen[6] that from the time of Domitian onwards there was legislation limiting

[1] 47. 22. 3. 2. [2] Printed in Bruns, Fontes, i. 345.
[3] Daremberg et Saglio, *loc. cit.*; Marquardt, Vie Privée, 1. 222.
[4] *Ibid.* In the Empire all these *collegia* were regulated by a *Sc.* which seems to have given them a corporate character, 3. 4. 1. *pr.* The funds were thus the property of the corporation.
[5] Bruns, *loc. cit.* 348; Wallon, *op. cit.* 3. 453. [6] *Ante*, p. 37.

the power of the *dominus* in the direction of protection of personal chastity. But it did not go very far. Not till A.D. 428 was it made penal for *lenones* to employ their slaves in prostitution, and Justinian confirmed this[1]. We have seen that the classical law regarded sale to a *leno* as a reasonable mode of punishment[2]. Debauching a man's *ancilla* was an *iniuria* to him, and might be *furtum*[3], but the injured woman does not seem to have been considered. The rules already discussed as to the effect of sale with a condition against prostitution[4] date from classical times, and do actually regard the woman herself, since the restriction could not be remitted, but the protection depends on the initial goodwill of the owner[5]. Rape of an *ancilla aliena* was made a capital offence by Justinian, but it did not involve forfeiture, as that of a freewoman did[6]. There is no penalty for seduction by the *dominus*. It is clear that, throughout, the morality of a slave woman was much less regarded than that of a freewoman[7].

Far more important in law and more fully recorded is the gradual recognition of servile cognation. In no other branch of law is the distinction so marked as here, between the rules of law and the practice of every day life. It is well-known, on the evidence of memorial inscriptions and lay literature[8], that slaves lived together in permanent union as man and wife, and were regarded, and regarded themselves, as married, and as sharing all the ordinary family relations.

But the law takes a very different view. In law, slaves were incapable of marriage[9]: any connexion between them, or between slave and free could be no more than *contubernium*[10], and thus enslavement of either party to a marriage ended it[11]. Accordingly, infidelity between slaves could not be adultery[12], and though a slave could be guilty of adultery with a married freewoman[13], it was not possible for an *ancilla* to commit the offence, or for it to be committed with her[14]. Nevertheless the names of legal relationship were freely applied to the parties to, and issue of, such connexions: we hear of *uxor*, *pater*, *filius*, *frater*, and so forth, even in legal texts[15], but Paul warns us that though these names, and the expression "cognation," are used, they are without

[1] C. Th. 15. 8. 2; C. 11. 41. 6. [2] *Ante*, p. 37.
[3] 47. 10. 9. 4; 47. 2. 83. 2. It might give rise to *actio* Aquilia and even *servi corrupti*, and both would lie in the same case, 48. 5. 6. *pr.*
[4] *Ante*, p. 70. [5] *Ibid.*
[6] C. 9. 13. 1e. In earlier law it was dealt with as *vis*, 48. 5. 30. 9.
[7] 47. 10. 15. 15.
[8] Wallon, *op. cit.* 2. 180; Marquardt, Vie Privée, 1. 205; Erman, Servus Vicarius, 442 *sqq.*
[9] Ulp. 5. 5. [10] P. 2. 19. 6; C. 9. 9. 23. *pr.*
[11] 23. 2. 45. 6; C. 5. 16. 27. As to *Captivi, post*, Ch. XIII. [12] C. 9. 9. 23. *pr.*
[13] 48. 2. 5; 48. 5. 34; C. 9. 9. 24.
[14] 48. 5. 6. *pr.*; C. Th. 9. 7. 1; C. 9. 9. 28. Adultery was essentially interference with a wife's chastity. Similarly corruption of an *ancilla* though called *stuprum* was not punishable as such, P. 2. 26. 16; C. 9. 9. 24.
[15] P. 3. 6. 38; D. 32. 41. 2; 33. 7. 12. 7, 12. 33; C. Th. 4. 6. 3 = C. 5. 27. 1; Nov. Marc. 4. 1.

significance for the law of succession[1]. So Ulpian tells us that the rules of cognatic succession apply to non-servile cognation, *nec enim facile ulla servilis videtur esse cognatio*[2]. Diocletian says shortly that *servus successores habere non potest*, and applies the principle in two cases[3]. So, even in late law, the title on legitimation makes it clear that an *ancilla* could not be a *concubina* for this purpose[4]. This is an enactment of Constantine, who had already made it severely punishable for *decuriones* to cohabit in any way with *ancillae*[5]: it was important that *decuriones* should have legitimate successors on whom the civic burden should descend. Both enactments were adopted by Justinian. Apart from this, cohabitation with slave women was not in any way punishable[6].

Even at law, however, these connexions between slaves were not a mere nullity. So long as all parties were slaves there was of course no great room for recognition, though it went some way; much further indeed than seems to have been the case in other systems[7]. In a legacy of *fundus cum instrumento* or *fundus instructus*, the slaves who worked it were included unless there was some special indication that the testator did not so intend[8]. Paul tells us that it must be understood to include the *uxores* of such slaves[9], and Ulpian lays down the same rule for wives and children on the ground that the testator cannot be supposed to have intended such a cruel separation[10]. It must be noted that all this turns on presumed intent. There was nothing to prevent the legacy of a single slave away from his connexions. Thus, where a business manager employed in town was legated, Paul saw no reason to suppose that the testator meant the legacy to include his wife and children[11]. And where a certain *ancilla* was left to a daughter, to be given to her on her marriage, Scaevola was clear that this did not entitle the legatee to claim a child, born to the *ancilla* before the marriage took place on which the gift was conditional[12].

There were, however, cases which had nothing to do with intent. Thus it can hardly be doubted that the rules we have already stated, according to which the issue of an *ancilla* do not belong as fruits to the

[1] 38. 10. 10. 5. [2] 38. 8. 1. 2.
[3] C. 6. 59. 4. The master of an *ancilla* can claim no right of succession to a freeman who cohabited with her; there is no doubt an underlying mistake as the effect of the *Sc.* Claudianum; *h. t.* 9; a child born of a freewoman and a slave is a *spurius* and cannot rank as his father's son, though the father be freed and become a *decurio*, C. 6. 55. 6.
[4] C. 5. 27. 1; C. Th. 4. 6. 3.
[5] C. Th. 12. 1. 6; C. 5. 5. 3.
[6] In A.D. 554 Justinian seems to be undoing, but without penalties, some unions between slaves and free which had been authorised by the invading "*tyranni.*" See Pragm. Const., C. I. C. (Berlin) 3. 801. The unions were to have no legal effects.
[7] Jews, Winter, *op. cit.* 44, 45; America, Cobb, Slavery, 245, 246.
[8] 33. 7. 18. 11. Even the *vilicus*, 33. 7. 18. 4. But not a slave who rented the land from his master, *h. t.* 20. 1.
[9] P. 3. 6. 38. [10] 33. 7. 12. 7, 12. 33. [11] 33. 7. 20. 4.
[12] 33. 5. 21.

bonae fidei possessor, or to the usufructuary, or, in the case of dotal slaves, to the *vir*, are largely based on recognition of the claims of nature[1]. So, too, it was laid down by Constantine that in *iudicium familiae erciscundae*, or *communi dividundo*, the slaves were to be so distributed that those related as parent and child, or brother and sister, or husband and wife were to be kept together[2]. It is noticeable that in nearly all these cases, the recognition extends to the tie of marriage as well as to that of blood. So, too, in the *actio redhibitoria* we have seen that if several were sold together who were related as parent or child or brother, they could be redhibited only together[3].

The same recognition is brought out in a very different connexion by Venuleius. He tells us that though the *lex* Pompeia *de parricidiis* applies on its terms to lawful relationships only, yet, *cum natura communis est, similiter animadvertetur*, in the case of slaves[4].

When the slave becomes free the question of the importance which the law will attach to these previous relations becomes more important. It should be noted that there are two distinct questions: how far do they restrict the man's liberty of action? How far can they create rights?

Restrictively the recognition was fairly complete. Labeo held, in opposition to Servius, that the rule forbidding *in ius vocatio* of a father, without leave of the Praetor, applied to fathers who were slaves at the time of the birth[5]. We are told by Paul that servile relationship was a bar to marriage—the cases mentioned being child, sister, and sister's child, and, though the parentage were doubtful, the rule applied on the father's side as well as on the mother's[6].

So far as giving rights is concerned, the classical law went no further than, in construing wills, to extend such words as *filius* to children born in slavery. The earliest case is that of a man who, having no son, but one who was born a slave, instituted him heir, (he having been freed,) and then said, "If I have no son who reaches full age, let D be free." Labeo took the strict view, that D was free. Trebatius held, and Javolenus accepted the view, that in such a case the intent being clear, the word *filius* must be held to denote this son[7]. Scaevola and Tryphoninus lay

[1] *Ante*, pp. 21 *sq.*

[2] C. Th. 2. 25. 1; C. 3. 38. 11. The text speaks of *agnatio*, but not of course in a technical sense. So also 33. 5. 21.

[3] 21. 1. 35, 39. Here too the rule is applied to *contubernales*: the form of the text suggests compiler's work, though the rule itself would not be out of place in classical law. A slave concubine and her child were not to be seized in *bonorum venditio*. P. 1. 13a. 1g; D. 42. 5. 38. *pr.*

[4] 48. 2. 12. 4. References to cases in which slaves were allowed a *de facto* power of testation within the *familia* are not illustrations of the present point: such wills had no legal force. See Marquardt, Vie Privée, 1. 222.

[5] 2. 4. 4. 3. Severus in the text, but Servius seems more probable. See however, Roby, Introd. to Digest, clviii.

[6] 23. 2. 14. 2. As to *affinitas* Paul is less clear. He says that in so doubtful a case it is best to abstain: this must be taken as law in the time of Justinian, 23. 2. 14. 3.

[7] 28. 8. 11.

down a similar rule in a case of which the facts are rather complex, but of which the gist, for our purpose, is that in construing wills *filius* includes such children: it does not seem to be thought material that there should be no other children[1].

Justinian took a more decided step. He observes that the rules of proximity in *bonorum possessio* do not apply to servile relationships, but that he, in adjusting the hitherto confused law of patronal relations, provides that if a slave has children by a slave or freewoman, or an *ancilla* has children by a slave or freeman, and he or she is or becomes free, the children shall succeed to the parents and to each other and to other children of the whole or half blood with themselves[2]. The enactment here referred to is in the Code, more shortly expressed, in the form that children are to exclude the patron whether freed before or after or with the father, or born after his manumission[3].

Later on, while preserving the rule that slavery and marriage are incompatible[4], he allows, by a series of Novels, a right of legitimation of children of a freeman by a slave, if he had freed her and them, and obtained for them the *ius regenerationis*[5]. Most of these provisions deal with *oblatio curiae*, and are part of the machinery for keeping the lists of *decuriones* full.

The fact that an *actio iniuriarum* may lie on account of insult to a slave is, again, a recognition of his human character. The matter presents some difficulties: the chief point to note is that though the action is necessarily acquired to the *dominus*, it is brought sometimes for the insult intended to the *dominus*, sometimes without reference thereto: it may be either *suo nomine* or *servi nomine*[6].

The Edict contained a provision that for *verberatio contra bonos mores* or for subjecting the man to *quaestio*, without the owner's consent, an action would lie in any case[7]. Even a municipal magistrate

[1] 31. 88. 12. At the time of the *fc.* in the text, donee is still a slave, but it is *post mortem legatarii*, and donee is to be freed by *heres*: she is thus free at *dies cedens* of the *fc.* The point of the allusion to the *l.* Falcidia is that if she claimed under the second will she would suffer a deduction of $\frac{1}{4}$, as this land was all the *heres* took.

[2] In. 3. 6. 10.

[3] C. 6. 4. 4. See also C. 6. 57. 6. This contemplates a quasimarital relation before manumission, and is not designed to give rights to those who would have been *spurii* had their parents been free. The enactment of Diocletian still held good (C. 6. 59. 4, *ante*, p. 77). But while the classical lawyers contemplated only interpretation of wills, Justinian gives rights on intestacy. And though he is discussing patronal rights, the words of the In. are wide enough to cover the case of *ingenui* cohabiting with slaves.

[4] Nov. 22. 9, 10.

[5] Nov. 18. 11, 38. 2. 1, 89. Details seem unnecessary. In 23. 3. 39. *pr.* we are told that if a quasi *dos* has been given by *ancilla* to *servus*, and being freed they continue together and *peculium* is not adeemed, the connexion is marriage and the fund a *dos*. This merely shews that if two free persons were living together the question—marriage or not—was one of fact: the facts stated are evidence of *affectio maritalis*.

[6] 47. 10. 15. 35.

[7] 6. 1. 15. *pr.*; 47. 1. 2. 4; 47. 10. 15. 34. Authorisation by *tutor curator* or *procurator* was enough, 47. 10. 17. 1. To exceed *iussum* was to act *iniussu*, *h. l.* 42.

might be liable if the flogging were excessive[1]. But any reasonable beating, *corrigendi vel emendandi animo*, was not *contra bonos mores*, and so was not within the Edict[2]. Intention to insult the owner was not needed: it is incorrect to say that it was presumed: it was not required. The action lay *servi nomine*[3]. It seems probable, however, that intention to insult the *dominus* might be alleged in the formula, and proved[4], with a view to increased damages.

There is more difficulty as soon as we pass to less definite forms of *iniuria*. The Edict continues: *Si quid aliud factum esse dicetur causa cognita iudicium dabo*[5], a provision which besides covering all other kinds of insult appears to include the contrivance of *verberatio* by a third person[6]. The system of rules of which this text is the origin is not easily to be made out. The texts give indications of conflict of opinion, but the matter may be simplified by striking out two classes of case in which a slave is concerned in an *iniuria*, but which are governed by principles independent of our present question. These are:

(1) Cases in which an insult is committed to the slave, but is actually expressed to be *in contumeliam domini*. Here the slave is merely the medium through which the wrong is done: the master's action is *suo nomine*, governed by the ordinary law of *iniuria*.

(2) Cases in which the *iniuria* does not take the form of an "insult," in the ordinary sense, but is a wilful infringement of right[7]. The wanton disregard of a man's proprietary and other rights is a form of *iniuria* too well known to need illustration. Such wanton wrongs might be committed in relation to a slave. But they have no relation to our problem, even where the wrong done was one which could not be done except to a human being.

The question remains: under what circumstances, apart from the Edict as to *Verberatio*, did an action lie for an insult to a slave, and was it in any way material that there should be intention to insult the *dominus*? It is clear that, if intention to insult the *dominus* was present, the action was *suo nomine* and not *servi nomine*, the latter action being available if there was no such intention. This is expressly stated in one text[8], and appears from others, which, comparing the case in which the person insulted is a slave with that in which he is a *liber homo bona fide serviens*, state that if there was no intention to insult the

[1] 47. 10. 15. 39. Details, *h. t.* 32. [2] 47. 10. 15. 38.
[3] 47. 10. 15. 35; C. Th. 12. 1. 39. Thus while a redhibiting buyer need not return ordinary damages for *iniuria*, since they were for the *iniuria* to him, he must where it was for *verberatio* or *quaestio*: it is, in relation to the slave, an acquisition through him, 21. 1. 43. 5; 47. 10. 29. *ante*, p. 61.
[4] *Arg.* 47. 10. 15. 35, 48; Coll. 2. 6. 5. [5] 47. 10. 15. 34. [6] 47. 10. 17. 2.
[7] *e.g.* castration of a slave, 9. 2. 27. 28. The Edict of the Aediles gave an alternative remedy, apparently *in quadruplum*. Lenel, Ed. Perp. § 293. 11.
[8] 47. 10. 15. 35.

dominus, he has no action at all in the latter case and none *suo nomine* in the other[1].

It was not, however, every insult to a slave which gave an *actio iniuriarum, servi nomine*. It must be something serious; not a mere *levis percussio* or *levis maledictio*, but real defamation or serious insult[2]. This restriction is part of the application of the words, *causa cognita*, in the Edict[3]. The quality of the slave would affect the question: to a common sort of slave or to one of bad fame, or careless, a greater insult would be needed to cause the Praetor to grant a formula, and perhaps it would be altogether refused (except in case of *verberatio*, etc.), where the slave was of a very low order. The matter was wholly in the hands of the Praetor[4].

If intention to insult the *dominus* were alleged, the words A^{i}. A^{i} *infamandi causa* were inserted in the *formula*[5]. It does not appear that any other legal result necessarily followed. The texts dealing with the matter seem to shew that no action lay *suo* or *servi nomine*, for *iniuria* to a slave, apart from the edict as to *verberatio*, unless the insult were *atrox* of a serious kind[6]. There are, however, some remarks to make on this.

(i) The granting of the *formula* being left by the Edict to the discretion of the Praetor, it is unlikely that *iniuria atrox* had in this connexion, (if anywhere,) a very precise meaning. On the other hand it is likely that where intention to insult the *dominus* was alleged in the *intentio*, and so made a condition of the *condemnatio*, the *formula* would be issued more readily than where no such intention was alleged, and damages would be on a higher scale.

(ii) The fact that an insult expressed to be an insult to the master need not be *atrox*, while one so intended, but not so expressed, must be, to give an action, is not surprising. In the former case the tendency to lessen the respect in which the insulted person is held appears directly from the facts: there can be no difference between different words but one of degree, sufficiently represented in the amount of damages awarded. In the latter case the difference may be one of kind. Contumelious treatment of a trusted steward may well have a defamatory effect on his master, and, if it be shewn to have been done with the intent of insulting him, will give rise to an action *suo* not *servi nomine*. But an abusive epithet thrown at a humble slave cannot really affect the respect in which his master is held, no

[1] 47. 10. 15. 45. *Si pro libero se gerentem...non caesurus eum si meum scisset, non posse eum quasi mihi iniuriam fecerit sic conveniri Mela scribit.* See also *h. l.* 48—if the slave is *bonae fidei* possessed, and there was no intent to insult any but the slave, the *dominus* has an *actio servi nomine*.
[2] 47. 10. 15. 44. [3] *h. l.* 43. See also C. Th. 12. 1. 39; C. 9. 35. 1, 8.
[4] 47. 10. 15. 44. The Inst. say *minuitur* in the case of these inferior slaves. In. 4. 4. 7.
[5] Lenel, Ed. Perp. § 194. [6] G. 3. 222; In. 4. 4. 3; C. 9. 35. 8.

matter what may have been the intention of the speaker It follows that the master will have no action *suo* or *servi nomine*

(iii) These considerations explain why the master had an action *servi nomine* when there was no intention to insult him, and why it was limited to the case of *atrox iniuria* There can be no ordinary *actio iniuriarum* under the general Edict, because there was no intention to insult[1] But under the large words of the special Edict there was plainly a power to give an action in the case, not so much on the general principles of the *actio iniuriarum*, as on the ground that injury is in fact caused to the plaintiff's reputation, and justice requires that compensation be given for the harm done There is no sign that the action was in any practical sense a recognition of the slave as having a reputation to lose it is the damage to the master that is considered[2] The case is different with *verberatio* and *quaestio* there, at least in the opinion of the later jurists, the feelings of the slave himself are considered[3] The difference in conception is probably an accidental result of the fact that under the special Edict the action was not given as a matter of course *causa cognita iudicium dabo*

(iv) The action *servi nomine* was the last to develop The Edict does not distinguish it Gaius shews no knowledge of two types of action resulting from insult to a slave[4] All the texts which expressly mention it are from Ulpian[5] It has all the marks of a purely juristic creation[6]

Of the slave's civil position it may almost be said that he had none In commerce he figures largely, partly on account of the *peculium*, and partly on account of his employment, as servant or agent His capacity here is almost purely derivative, and the texts speak of him as unqualified in nearly every branch of law They go indeed beyond the mark General propositions are laid down expressing his nullity and incapacity in ways that are misleading unless certain correctives are borne in mind We are told that he could have no *bona*, but the text itself reminds us that he could have *peculium*[7] The liability of slaves on their delicts was recognised at civil law[8] But we are told that they

[1] 47 10 *pass*
[2] 47 10 1 3 *spectat ad nos*, C 9 35 8 *damni haberi rationem* The action did not pass on alienation or manumission of the slave 47 10 29
[3] C Th 12 1 39 *iniuria corporis quod etiam in servis probrosum*, 47 10 15 35 *haec enim et servum sentire palam est*
[4] G 3 222, In 4 4 3 [5] *locc citt*
[6] Condemnation produced *infamia* even where the person directly insulted was a slave (C 2 11 10) If both insulter and insulted are slaves noxal liability and no *infamia* (47 10 18 1) The *actio iniuriarum* was in some cases concurrent with one under the *lex* Cornelia But this was not available where the wrong was done to a slave (47 10 5 6) As to the concurrence of the *actio iniuriarum* with one for *damnum*, there was dispute among the jurists See 47 10 15 46, 44 7 32 34 *pr* 41 1 53, 9 2 5 1, 19 5 14 1 48 5 6 *pr* etc The matter has no special connexion with the case of slaves See Girard, Manuel 396, Pernice, Labeo, 2 1 45 The dominant view seems to be that the actions were cumulative
50 16 182 [8] 44 7 14

could not be bound by contract, (*in personam servilem nulla cadit obligatio,*)[1] and that they could be neither creditors nor debtors if expressions contradictory of this are found (and they are common), the legal reference is to the *dominus*[2]. But this ignores the fact that they were capable of natural right and obligation and the true rule is expressed in a text which says *ex contractu civiliter non obligantur, sed naturaliter obligant et obligantur*[3]

The exclusion of slaves from a number of *actus legitimi* seems to rest rather on the absence of *civitas* than on their slavery Thus a slave could not be witness or *libripens* in mancipation such a person must be a *civis*[4] He could not be or have a tutor[5] He could make no will, and if he became free a will made in slavery was still void We are, however, told that slaves have *testamenti factio*[6] This means that they may be instituted, either for their masters, or, with a gift of liberty, on their own account But this employment of the expression *testamenti factio* puts the lawyers in some difficulty when they have to explain why a slave cannot witness a will They put it down to his not having *iuris civilis communionem in totum, nec praetoris quidem edicti*[7] This curiously guarded expression is no doubt due to the fact that the writer was face to face with the awkward fact that a slave could be *heres* But illogical compromises of this kind are inherent in the Roman conception of slavery

In relation to procedure the incapacity of slaves is strongly accentuated[8] They could not be in any way concerned in civil proceedings, which must be, from beginning to end, in the name of the master[9] As they could neither sue nor be sued, they could not validly stipulate or promise, in the procedural contracts *iudicio sisti* or *iudicatum solvi*, and so they could not bind a *fideiussor* by such a promise[10] Judgment against a slave was null and void it gave rise to no *actio iudicati de peculio*, since it was not a *negotium* of the slave In the same way absolution of a defendant, where the plaintiff was a slave, did not in any way bar his *dominus*[11] A slave's pact, *ne a se peteretur*, was in strictness void, though it might give the *dominus*, if he were sued,

[1] 44 7 43 50 17 22 *pr* [2] 15 1 41
[3] 44 7 14 12 6 13 *pr* The fact that the obligation was not *civilis* made it worthless in many cases A master's promise to free his slave meant nothing (C 7 16 36) A promise to give surety was not satisfied by offering a slave unless the circumstances made the master liable *in solidum* 46 1 3 *post* Chh IX XXIX
[4] G 1 119 [5] 26 1 14 15 [6] 28 1 16 19
[7] 28 1 20 7 This is subject to the rule already mentioned as to *error communis* (C 6 23 1) They could of course write the will at the testator's direction 28 1 28
[8] 2 11 13 4 5 7 2 49 1 28 *pr* G 3 179 [9] 2 8 8 2, 2 11 13, 50 17 107.
[10] 2 11 9 *pr* 13 If they did so promise when supposed to be free fresh security could be demanded it was no case for the rule *error communis facit ius* to make the master wholly liable was unfair to him To have a liability only *de peculio* was unfair to the other To make the slave liable was meaningless 2 8 8 2
[11] 5 1 44 1, C 3 41 5, C 3 1 6, 7 Similarly *compromissum* by *servus* is null, 15 1 3 8—11

an *exceptio doli*[1]. On the other hand if the pact had been *ne peteretur*, or *ne a domino peteretur*, then, whether the original transaction had been the slave's or not, the *pact* gave an *exceptio pacti conventi*[2]. The distinction is not unmeaning: whether there had or had not been a pact was a question of fact: whether there had been *dolus* or not left more to the *iudex*. They could not *interrogare in iure* or be interrogated to any purpose[3]. As they could not be parties, so they could not sit in judgment. We are told that they could not act as *iudices*, not, it is said, for lack of ability, but because, as in the case of women, *moribus receptum est*[4]. Similarly they could not be arbitrators: if a slave were appointed we are told that as a matter of convenience, if he became free before decision, the parties might agree to accept his decision. But this depends on his freedom, and is only a way of avoiding the trouble of a new appointment[5].

There were other less obvious cases. Slaves could not be *custodes ventris* against supposititious children[6], though they might accompany the person responsible. This is an express provision of the Edict: its reason is that such a *custos* is likely to be required to give evidence, and the evidence of slaves was not readily admitted. They could not *opus novum nuntiare*, their *nuntiatio* being a nullity. This seems to be due to the fact that the *nuntiatio* was a procedural act specially prescribed in the Edict as the first step in a process, aiming at an injunction[7]. On the other hand, *nuntiatio* could be made to a slave. The receipt of the notice was no formal act: we are indeed told that it may be made to anyone, provided it be *in re presenti operis* so that the *dominus* may hear of it[8].

There are some exceptions to this rule of exclusion, but they are only such as to throw the rule itself into relief, for the exceptional nature of the case is always either obvious, or expressly indicated. Thus though they could not be *custodes ventris*[9], yet, if a slave were instituted *si nemo natus erit*, he was allowed to take some of the formal precautions against supposititious children: the exception being expressly based on his potential freedom[10]. For similar reasons, though they could not have procurators in lawsuits, they might have *adsertores*

[1] 2. 14. 21. 1. [2] 2. 14. 17. 7—19, 21. 1.
[3] 11. 1. 9. 2. They could not have procurators for lawsuits as they could not be concerned therein, 3. 3. 33.
[4] 5. 1. 12. 2.
[5] 4. 8. 9. *pr.* As to error, *ante*, p. 6. So they could not consent to the choice of an arbitrator, and the decision of one so appointed was not binding on either party, 4. 8. 32. 8.
[6] 25. 4. 1. 10. [7] 39. 1. 5. 1.
[8] *Ibid.*, *h. t.* 5. 2. The trespasses mentioned by Cicero (Pro Caecina, 8. 11; Pro Tullio, 8) were mere trespasses, not procedural acts, though they had procedural effects.
[9] 25. 4. 1. 10.
[10] 25. 4. 1. 13. The act does not create obligation; thus no question arises of acts done in slavery profiting after liberty, *post*, Ch. XXIX.

(and later *procuratores*) in *causae liberales*[1]. One set of texts raises an apparent difficulty. A slave could offer, and take if it were offered to him, an extra-judicial oath, with the usual obligatory results, subject to some restrictions not here material[2]. There was nothing exceptional in this. But the extra-judicial oath, being purely matter of agreement, could always be refused, and one to whom it was offered had not the right, which existed in case of the judicial oath, to offer it back again: *iusiurandum quod ex conventione extra iudicium defertur referri non potest*[3]. Another text says: *si servus meus delato vel relato ei iureiurando iuravit.....puto dandam mihi actionem vel exceptionem propter conventionem*[4]. The last words shew that the reference is to an extra-judicial oath: the word *relato* is explained by the fact that the rule against *relatio* in such cases means only that if it were offered back, the offeree need not take it. The case supposed in the text is that the slave has offered an oath: the offeree has returned it and the slave has then voluntarily taken it.

As incapable of taking part in procedure slaves could not be formal *accusatores* in criminal charges[5]. It is no doubt partly on account of this exclusion that Hadrian enacted that complaints by slaves of ill-treatment by their masters were not to be regarded as accusations[6]. But it was in general as open to them as it was to freemen to "inform," *i.e.* to make *delationes* to the fisc of cases in which property is claimable by the fisc, and also of criminal offences. Both kinds of information are called *delatio*, though in legal texts the term is more commonly applied to fiscal cases[7], *i.e.* to notifications to the fisc of property to which it has a claim (such as *bona vacantia*), which someone is holding without right. The two classes may indeed overlap, since the right of the fisc may be due to the commission of a crime involving forfeiture. Informers were entitled to a reward, a fact which produced a class of professional *delatores*, the evil results compelling a number of enactments punishing false delations to the fisc, and, in some cases, true ones[7]. *Delatio* of crime was a form of blackmailing, which called for

[1] *Post*, Ch. XXVIII. A slave could formally begin proceedings for a *libellus* to the Emperor on murder of his master. The case is exceptional, and moreover, the denouncing slave could claim his liberty, C. 1. 19. 1. Slaves could not appeal on behalf of absent master, but where possession was held on behalf of an absentee, and was invaded by force, the case being urgent, the judges were to hear even his slaves, C. Th. 4. 22. 1 = C. 8. 5. 1; C. Th. 4. 22. 4 (396). Slaves could apply for *bonorum possessio* for the master, but this could be given without application, 37. 1. 7.
[2] 12. 2. 20—23. *Post*, Ch. IX. [3] 12. 2. 17. *pr.* [4] 12. 2. 25.
[5] This had advantages: one who accuses a will as *falsum* loses any gift, 34. 9. 5. A slave with a gift of liberty by *fc.* induced a *heres*, on whom his liberty was not charged, to attack the will as *falsum*. He failed and lost his gift: the *fc.* was not affected, the slave not being an *accusator*, 48. 10. 24.
[6] For cases of its application to criminal charges, see p. 86, n. 2. See however, Mommsen, Strafrecht, 879.
[7] General prohibitions, P. 5. 13. 1; False delations, 49. 14. 24, C. Th. 10. 10 *passim*, C. 10. 11. 5; True delations, 34. 9. 1, C. Th. 10. 10 *passim*, C. 10. 11. 5, 7. Rein, Criminalrecht, 824; Mommsen, Strafrecht, 877 *sqq*.

repression as early as A.D. 20[1], but an information, if proved, does not seem to have been punishable in ordinary cases[2]. But even for crimes slaves were forbidden to inform against their *domini*. It seems that Constantine allowed no exceptions, but ordered the slaves to be in all cases crucified unheard[3]. Several enactments toward the close of the century except *maiestas*[4], and Justinian's Code omits this prohibition in Constantine's enactment[5]. And the Digest, laying down the general prohibition as to fiscal causes, and crediting it to Severus[6], allows slaves to accuse their masters for *maiestas*, for suppressing wills giving them liberty, for frauds on the *annona publica*, for coining, regrating, and revenue offences[7].

The capacity of slaves as witnesses requires fuller treatment. As a rule their evidence was not admissible in civil cases[8]. But the exclusion of such evidence, besides being a sort of self-denying ordinance, must have led to miscarriages of justice. Accordingly, convenience suggested a number of exceptions. Of these the most important is that they might give evidence in matters in which they were concerned—*de suo facto*—in the absence of other modes of proof, *e.g.* in case of transactions with them without witnesses[9]. We have no limitative enumeration of the cases in which their evidence was admitted[10]. Justinian adverts to a distinction drawn by earlier *leges* in the case of *hereditas*, according as the question is of the *hereditas* itself or of *res* in it, and provides that, whatever the form of the action, slaves shall be put to question only as to *res corporales*, and only those slaves who had charge of the thing, but in that case even if they had freedom by the will. Probably the older law allowed no "examination" of slaves given freedom unless the will was disputed, and then allowed it freely[11]. A text in the Digest may be read as saying that slaves may be tortured in any *res pecuniaria* if the truth cannot otherwise be reached[12], but it probably means rather that it is not to be done in any *res pecuniaria* if the truth can otherwise be reached. If understood in the former sense, it would render meaningless the texts which speak of torture of slaves as admissible in certain

[1] Coll. 8. 7. 2, 3.
[2] Delation of crime, 34. 9. 1; 37. 14. 1, 5; C. Th. 9. 5. 1; 9. 7. 2; 9. 16. 1; 10. 10. 1, 2. Rein, *loc. cit.*; Mommsen, *op. cit.* 493 *sqq.* C. 10. 11. 4, *notissimum est eos solos exsecrabiles nuntiatores esse qui fisco defuerunt.*
[3] C. Th. 9. 5. 1. Bruns, *op. cit.* i. 249 for a fragment of the original of this *lex*. See also C. 10. 11. 8. 2.
[4] C. Th. 9. 6. 2, 3; C. 9. 1. 20; 10. 11. 6.
[5] C. 9. 8. 3; C. Th. 10. 10. 17. [6] 49. 14. 2. 6.
[7] P. 5. 13. 3; 48. 4. 7. 2; 48. 10. 7; 48. 12. 1; 5. 1. 53; C. 10. 11. 7, 8. 2. The rule as to suppression of wills dates from M. Aurelius. The rules are somewhat similar to those as to evidence of slaves against their masters.
[8] Nov. 90. 6. [9] P. 5. 16. 1, 2; D. 22. 5. 7; C. 9. 41. 15.
[10] Cases as to ownership of them (C. 3. 32. 10; 9. 41. 12), *tutela*, disputed *hereditas* (P. 5. 15. 6; 5. 16. 2; D. 34. 9. 5. 15; 48. 10. 24; C. 9. 41. 13), *edictum* Carbonianum (37. 10. 3. 5). Justinian allowed them to be examined as to the correctness of the inventory made by the *heres* (N. 1. 2).
[11] C. 9. 41. 18; *post*, Ch. xi. [12] 48. 18. 9. *pr.*, Pius and Severus.

urgent cases, and subject to the same restriction[1], and would be inconsistent with another text which implies that the evidence of slaves was admissible only in a limited class of cases[2].

In cases in which the evidence of slaves was admissible it was taken normally by torture[3]; indeed it appears that it could not be received in any other form[2]. It should be added that, while the evidence of slaves was not to be used except where proof was lacking, on the other hand recourse was not to be had to it, at least in later law[4], unless there was already some evidence[5].

In criminal matters also the examination of slaves was, normally, by torture[6]. But evidence so obtained is always doubtful: scorn of the torture and hope to placate the torturers were possibilities to be considered before it was applied[7]. It was therefore subject to some restrictions, in the framing of which no doubt humanity had some place[8]. There must be no torture unless there is on the one hand, need of further evidence, and on the other, at least, one witness, already[9]. As early as Augustus it was enacted that torture was not to be resorted to except in serious crime[10], and Hadrian provided that those slaves were first to be tortured who were most likely to be informed on the matter[11]. A third person's slaves could be tortured without his offering them, but only singly, and only when security or promise had been given for their value, with a double penalty if it were *per calumniam accusatoris*[12]. The value could be recovered by an action *praescriptis verbis* though the agreement were informal[13]. A slave manumitted to avoid the torture could still be tortured[14]. On the other hand slaves *ex domo accusatoris* were not to be too readily accepted for torture[15]. Slaves were not to be killed under torture, *ut salvi sint innocentiae aut supplicio*[16]. It is clear that the officer in charge of the *tormenta* had a very wide discretion. But the torture

[1] *e.g.* C. 9. 41. 12. [2] 23. 5. 21. 2.
[3] P. 5. 16. 2; C. 3. 32. 10; D. 48. 18. 9. *pr.*, 20. Mommsen, *op. cit.* 412 *sqq.*
[4] 22. 3. 7; P. 2. 17. 12, wrongful admission of it was ground of appeal, 48. 19. 20.
[5] 21. 1. 58. 2. [6] 48. 19. 1, 9. 1; C. 4. 20. 8.
[7] 48. 18. 1. 23, and adjoining texts. In one case torture was preferred to a cruel master, 48. 18. 1. 27. Similar case Val. Max. 8. 4. Mommsen, Strafrecht, 416, says that the object being to see if he changes his language under torture, there would be none if the facts were not contradicted. But the court might wish to satisfy itself. Cp. p. 96, n. 2.
[8] But a slave might be tortured many times: Val. Max. *loc. cit.* speaks of *octies tortus*.
[9] P. 5. 14. 4; C. 9. 41. 8; D. 48. 18. 1. 1, 2, 10. 3, 18. 3, 20. No judgment on sole evidence of a tortured slave.
[10] 48. 18. 8.
[11] 48. 18. 1. 2. Women to be tortured only in extreme cases and on suspicion: pregnant women not at all, D. 48. 19. 3; P. 1. 12. 4; C. 9. 41. 3. Pius seems to have laid down the same rule for children under 14, but the texts suggest that in later law the rule did not apply to *maiestas* and was not absolute, 48. 18. 10, 15. 1.
[12] C. 9. 41. 7; C. 9. 46. 6; P. 5. 16. 3; D. 48. 18. 13.
[13] 19. 5. 8. The text deals with a suspected slave, but the rule is probably general.
[14] 48. 18. 1. 13; P. 5. 16. 9; Coll. 4. 12. 8; the rule is attributed to Pius. *Post*, Ch. xxv. Slaves sometimes deposited with *sequester, ut quaestio habeatur*. 16. 3. 7. *pr.*
[15] 48. 18. 1. 3, 10. 4. [16] 48. 18. 7.

was to be in reason and this was for the judge to determine[1]. It seems indeed that the question whether a man should be tortured at all was always in the discretion of the court, and not of a party[2].

It is frequently laid down that a slave is not to be examined for[3] or against[4] his *dominus*, or one jointly owned for or against either master[5]. As to evidence against *domini* this is a very ancient rule. Tacitus, speaking of A.D. 16, alludes to it as based on *vetus senatus-consultum*[6]. According to Dio Cassius[7], Julius Caesar solemnly confirmed the rule. Cicero in several passages[8] refers to it, basing it not on the doubtfulness of the evidence, but on the reason that it exposes the master to an ignominy worse than death. Augustus and Tiberius evaded the rule (in *maiestas*), by ordering the slave to be sold to an *actor publicus*[9]. Tiberius even disregarded it altogether[10].

The exclusion of evidence on behalf of the master seems a much later notion. From the language of Tacitus it does not seem to have existed in A.D. 20[11]. A text from Papinian quotes Hadrian as holding such evidence admissible[12]. On the other hand Paul speaks of the evidence as excluded[13], and an enactment of A.D. 240 speaks of this as an old established rule[14]. It is plainly the settled rule of the Corpus Iuris.

The rule applied even though the master offered them or an outsider was willing to pay their price[15]. Ownership shewn as a fact, whatever its origin, barred the *quaestio*[16]. Nor could those who had formerly belonged to him be heard[17]. *Bonae fidei* possession equally barred the evidence[18]. It was not merely excluded: it was capitally punished, at least if volunteered[19], and it may be added that evidence without torture was equally inadmissible[20]. The exclusion applied also

[1] 48. 18. 10. 3.
[2] Mommsen, *op. cit.* 412: a slave witness is likely to become a defendant: the texts do not distinguish clearly.
[3] C. 4. 20. 8; C. 9. 41. 6, 7, 14.
[4] P. 1. 12. 3; 5. 13. 3; 5. 16. 4; C. 4. 20. 8; 9. 41. 6, 7; D. 1. 12. 1. 8; 48. 18. 1. 5, 9. 1, 15. 2, 18. 5, 6, 7.
[5] P. 5. 16. 6; C. 9. 41. 13; D. 48. 18. 3. In civil or criminal cases, P. 5. 16. 5.
[6] Ann. 2. 30. [7] Dio Cass. 57. 19.
[8] Pro Milone, 22; Pro Rege Deiotaro, 1.
[9] Taciti Ann. 2. 30; 3. 67; Dio C. 55. 5. [10] Dio C. 57. 19.
[11] Ann. 3. 14. [12] 48. 18. 17. 2.
[13] P. 2. 17. 12. He seems to admit it in D. 29. 5. 6. 2. But it was allowed in the case there dealt with. *Post*, p. 95.
[14] C. 9. 41. 6. [15] 48. 18. 1. 18, 18. 7.
[16] 48. 18. 18. 8; P. 5. 16. 8b. It was the first thing looked at. *Servus heredis* could not be tortured *in re hereditaria* though it was supposed he had been bought to bar his evidence, 48. 18. 1. 6.
[17] C. 9. 41. 14; *e.g.* a *servus poenae* formerly his, 48. 18. 17. 3, or one he had redhibited or sold (48. 18. 11, 18. 6; P. 5. 16. 8. Cp. 21. 1. 60; 47. 2. 17. 2; *ante*, p. 61).
[18] 48. 18. 1. 8. If ownership in litigation, he who gave security was owner for this purpose, *h. t.* 15. 2.
[19] Mommsen, *op. cit.* 415, citing C. Th. 9. 6. 3, 10. 10. 17 (C. 9. 1. 20; 10. 11. 6), C. 10. 11. 8. 2. Bruns, Fontes, i. 250.
[20] 48. 18. 1. 16, 9. 1.

to slaves owned by father, child, or ward, except, in the last case, in the *actio tutelae*[1].

On the other hand an ownership created after proceedings were begun was no bar, nor was apparent ownership under a transaction which was absolutely void[2]. The slave of a corporation could be heard against its members: they did not own him[3]. And *servi hereditarii* are not slaves of the claimants of the *hereditas*, at any rate in an action concerning it, involving an allegation that the will was forged[4]. The uncertainty of ownership is mentioned, but this might better have led to exclusion.

It was not only in relation to evidence on behalf of the *dominus* that the rules underwent change: it is clear that in many other points the rules of later law are the result of an evolution, the tendency being always in the direction of exclusion. Thus Paul allows torture of a slave, collusively purchased, the purchase being rescinded and the price returned[5]. The Digest appears to limit this to the case where the acquisition is after the case has begun[6]. So Paul says that a slave manumitted to avoid torture can still be tortured[7]. The Digest in an extract from a work of Ulpian lays down the same rule, attributing it to Pius, and adding, *dummodo in caput domini non torqueatur*[8]. If a slave under torture did incidentally reveal something against his master, it was laid down by Trajan that this was evidence[9], and Hadrian speaks, obscurely, in the same sense[10]. Elsewhere, however, Hadrian and Caracalla are credited with the contrary view[11], and we are told that the opinion of Trajan was departed from in many constitutions[12]. Severus and Caracalla say that such evidence is to be received only when there is no other proof[13]. Paul declares that it is not to be listened to at all[14]. In A.D. 240 this is declared to have been long settled[15], and, the enactment of Severus and Caracalla having been inserted in the Digest, in a somewhat altered form[16], this must be taken as the accepted view: the safety of owners is not to be in the hands of their slaves. What is demonstrated in these cases is highly probable in some others. Thus it is likely that the extensions from owner to *bonae fidei* possessors[17], and to slaves of near relatives and wards, are late[18]: the original rule having applied only to actual owners.

[1] *h. t.* 10. 2, even *castrensis peculii*, C. 9. 41. 2. [2] 48. 18. 1. 14. 15.
[3] 1. 8. 1; 48. 18. 1. 7.
[4] C. 9. 41. 10. D. 48. 18. 2 lays it down more generally.
[5] P. 5. 16. 7. [6] 48. 18. 1. 14. [7] P. 5. 16. 9.
[8] 48. 18. 1. 13. [9] 48. 18. 1. 19. [10] *h. t.* 1. 22.
[11] *h. t.* 1. 5. [12] *h. t.* 1. 19. [13] C. 9. 41. 1. 1.
[14] 48. 18. 18. 5; P. 5. 16. 4. [15] C. 9. 41. 6.
[16] 48. 18. 1. 16. Cf. C. 9. 41. 1. Wallon, *op. cit.* 3. App. 12 for some temporary cases.
[17] 48. 18. 1. 8.
[18] *Ante*, p. 88. So the rule that *servus damnati* can be tortured, *in caput eius*, may have been law always, but the assigned reason, *quia desierunt eius esse* (48. 18. 1. 12), squares ill with what has been said as to past ownership (p. 88) and suggests that the rule of exclusion was late.

There were some crimes to which the rule did not apply[1]. Cicero speaks of corruption of Vestal Virgins, and *coniuratio*[2] as exceptions. It is, however, remarked by Mommsen that these republican exceptions are political[3], and he thinks legal exceptions do not begin till Severus. It seems likely, however, that the exception, shortly to be mentioned, for the case of murder of a master was earlier. However this may be, Severus allowed the evidence in adultery, *maiestas* and fraud on the revenue[4]. These exceptions are constant (except for a short time under the Emperor Tacitus, who abolished them all[5]) and are repeatedly reaffirmed[6]. Other exceptions are mentioned. Several texts mention regrating, *i.e.* creating an artifical scarcity in food supplies[7]. Hermogenianus mentions coinage offences[8]. Constantine allowed the evidence where a woman cohabited with her slave[9], and also laid it down that a slave might be tortured, to discover if his *dominus* had prompted him to run away to a third person in order to involve him in the liability for receiving *fugitivi*[10]. The evidence was not admitted in ordinary crimes of violence[11]. Thus the texts of the Digest allowing the slave of common owners to be tortured in the case of murder of one of them, where the other is suspected[12], are the result of the *Sc.* Silanianum, and the complementary legislation[13].

Paul[14] tells us that if a slave, who has run away, says, on discovery, in the presence of trustworthy people, that he had previously run away from his master, this is evidence available in the *actio redhibitoria.* Elsewhere[15] he tells that in absence of proof of earlier flight, *servi responsioni credendum est: in se enim interrogari non pro domino aut in dominum videtur.* This text appears in the Digest with *quaestioni* instead of *responsioni.* The reason is bad and Paul is the only authority for the rule. In the Sententiae he expresses a rule that a slave's evidence in such a matter is admissible; the change of word in the Digest means little. But the other text, which may be the original statement, need mean no more than that the evidence of trustworthy people as to what the slave had been heard to say on such a matter, out of court and not under pressure, was admissible.

In relation to offences under the *Lex* Iulia *de adulteriis* elaborate provisions are laid down. Slaves could be examined against their

[1] 1. 12. 1. 8. [2] Pro Milone, 22; Part. Orat. 34. 118.
[3] *op. cit.* 414. [4] C. 9. 41. 1. [5] Flav. Vop., Tacitus 9. 4.
[6] C. Th. 9. 6. 2; C. 5. 17. 8. 6; 9. 8. 6; D. 5. 1. 53; 48. 4. 7. 2; 48. 18. 10. 1. Some of the texts deal with delation and accusation, but if this was allowed evidence was.
[7] 5. 1. 53; 48. 12. 1. All dealing with accusation. Cp. 48. 2. 13.
[8] 5. 1. 53. [9] C. Th. 9. 9. 1; C. 9. 11. 1. [10] C. 6. 1. 4. 4.
[11] Milo's manumissions are a precaution not so much against law, as against an uncontrollable administration.
[12] 29. 5. 6. 2; 48. 18. 17. 2. Hadrian.
[13] *Post*, p. 95. Thus when owner is killed, *servi hereditarii* may be tortured though *heres* is a *suus*, and the evidence implicates him. 29. 5. 6. 1.
[14] 21. 1. 58. 2. [15] P. 2. 17. 12; D. 22. 3. 7.

owners, whether the accuser were a relative or not[1]. It might be a slave of the accused or of the husband or wife of the accused[2]. The point seems to be not only that slaves may here be tortured against their master, but that this is the regular mode of procedure and that there need be no preliminary evidence, or any special reason to think this slave knows something about the matter. If a slave, liable to torture in such a case, is freed to avoid the torture, the manumission is null, a rule of Paul, somewhat stronger than that laid down by him in other cases[3]. The accuser and the accused must both be present[4]. After torture the slaves vest in the State, if and so far as the accused had any interest in them, in order that they may not fear to tell the truth[5]. Even if they deny, they still become public property, that they may not profit by any lie[6]. So also do slaves of the accuser, but not slaves of *extranei*, since in their case the reason does not exist[7]. If the accused is acquitted he or she can recover from the accuser, apart from *calumnia*, the estimated single value of the damage[8]. If he is condemned, the surviving slaves *publicantur*[9].

The general proposition that slaves were liable for crime needs no proof[10]. The master's right of punishment (which did not necessarily exclude the right of the public authority) was lost, as to serious crime, early in the Empire[11]. They must be tried where they had offended[12], and thus the *dominus*, (who could defend by himself or a procurator[13],) must defend there, and could not have the case removed to his own province[14]. The master's refusal to defend did not amount to a conviction, or to dereliction. He remained owner; the slave might be defended by anyone, and would in any case be tried, and if innocent acquitted[15]. Slaves might be tortured on suspicion, and there was an *actio ad exhibendum* for their production for this purpose[16]. They might

[1] 48. 18. 4, 5, 17. *pr.* not merely to give every protection, but because it could hardly have been done without knowledge of the slaves, Coll. 4. 12. 8. It was not allowed for *stuprum* (48. 18. 4, 17. 1) or incest unless adulterous 48. 5. 40. 8; 48. 18. 5. Val. Max. 6. 8.
[2] Coll. 4. 11. 1; 4. 12. 8; C. Th. 9. 7. 4; C. 5. 17. 8. 6; 9. 9. 3; D. 48. 18. 1. 11, or of ascendents or even strangers if employed by the accused, 48. 5. 28. 6, or one in whom he or she had a usufruct, or *b. f.* possession: it might be a *statuliber* or one to whom fideicommissary liberty was due, 48. 5. 28. 8—10. Macrobius, Sat. 1. 11. If the slave is declared by both parents to have been dear to the accused his evidence is to have little weight.
[3] P. 5. 16. 9; Coll. 4. 12. 8. [4] 48. 5. 28. 7.
[5] 48. 5. 28. 11, 12. [6] *h. l.* 13. [7] *h. l.* 14.
[8] 48. 5. 28. 15, 29, *Cond. ex lege.* If the slave is accused double his value may be payable, 48. 5. 28 *pr.*
[9] 48. 18. 6.
[10] From ante-Justinianian sources: *Plagium* (Coll. 14. 3; C. Th. 9. 18. 1); crimes of violence (P. 5. 18. 1; C. Th. 9. 10. 4; 9. 24. 2; 9. 45. 5). Fiscal offences and Delation (*ante*, p. 85). Coining (C. Th. 9. 21. 1). See also P. 5. 13. 3; Coll. 14. 2. 3; C. Th. 7. 18. 2; *h. t.* 9. 3; 9. 9. 1; 12. 1. 6, 50 etc. Cp. C. 1. 12. 4; 9. 24. 1; D. 2. 1. 7. 1; 47. 9. 1. *pr.*; 48. 8. 4. 2; 48. 10. 1. 13, etc.
[11] *Ante*, p. 36. [12] 48. 2. 7. 4.
[13] 48. 1. 11; C. 9. 2. 2; anyone in fact can defend, 48. 1. 9; 48. 19. 19.
[14] 48. 2. 7. 4.
[15] 48. 1. 9; 48. 19. 19. Though his ownership remained he could not free, *post*, Ch. xxv.
[16] 10. 4. 20.

not, however, be tortured till the accuser has signed the charge, and given the usual undertakings[1] One to whom fideicommissary liberty was due was not to be tortured till the confession of someone else had raised suspicion against him[2] *Servi hereditarii* left to a *heres* or *extraneus* might be tortured on suspicion of having made away with property, and need not be delivered till after this was done[3] So a slave might be tortured on suspicion of adultery with the wife, she being tried first to avoid *praeiudicium*[4]

In capital charges whoever was defending must give security *iudicio sisti*, otherwise the slave would be kept in chains[5] The rules of procedure and general principles are the same as when the accused is a free man[6], but it must be remembered that at no time was there a general criminal law There was a mass of criminal laws, and principle is not easy to find

It should be noticed that the rule that slaves cannot take part in judicial proceedings is applied even where they are the accused. We have seen that the master, or indeed anyone, may defend them, and that the defender is the real party is shewn by the fact that it is thought necessary to say that, after trial, it is the slave, not the defender, who is condemned[7]. If no one defends, the court will not sentence at once, but will try the issue[8], and in such a case the slave is allowed, *ex necessitate*, to plead his own cause—*ut ex vinculis causam dicat*[9] In like manner slaves could not appeal though others could for them Modestinus says that, if no one will, *ipsi servo auxilium sibi implorare non denegabimus*[10] The meaning of this is not very clear. in any case it seems probable that in earlier law the slave who could get no one to appeal was helpless The concession, whatever it amounts to, may be due to Justinian

The conditions of liability are not always the same Some crimes could be committed only by slaves Thus none but slaves could incur the penalties falling on *fugitivi*[11] It was capital for a slave knowingly

[1] C Th 9 1 14 C 9 2 13 Undertakings 48 2 7
[2] 48 18 19 The following notes give many references to torture on suspicion
[3] 30 67 *pr*, 10 2 18 *pr*
[4] 1 12 1 5 48 5 34 *pr* Pius One claiming torture of slave on suspicion of adultery or other crime must at judge's direction pay double his value to the person interested owner pledgee or *bona fide* buyer from non owner division being made between common owners and owner and fructuary 19 5 8, 48 5 28 *pr* –4 This is by way of security as in case of single value where torture of slave as witness is claimed, 48 5 28 16 In 12 4 15 a slave handed over for *quaestio* to be returned if innocent is handed to *Pr vigilum* as if caught in act and at once killed *Condictio* and if ownership did not pass, *furti* and *ad exhibendum*
[5] If *dominus* is away or has not at the moment the means, he can come in later without undue delay, 48 2 17, 48 3 2
[6] 48 2 12 3 (*Sc* Cottianum, A D 20) Those barred from accusing a freeman of adultery cannot accuse a slave But Domitian provided that general pardons on occasion of *feriae* did not apply to slaves who were undefended 48 3 2, 48 16 16 Minor differences, *e g* C 9 4 6 2, 3
[7] C 9 2 2 [8] 48 19 19 [9] 48 3 2, 29 5 25 1
[10] 49 1 15, 18 [11] *Post*, Ch XII

to offer himself for military service[1]. Slaves might be capitally punished for bringing claims at law against the Fisc, in certain cases[2] Slaves or *liberti* were punishable for aspiring to the decurionate[3] Slaves were capitally punished for cohabiting with their mistresses[4] In some cases delation was punishable in a slave where it would not have been so in a free man[5] Conversely there were crimes for which a slave could not be tried, owing to the punishment or to the definition Here the heterogeneous nature of the criminal law is brought into strong relief. Venuleius tells us that slaves can be accused under any law except those imposing money penalties, or punishments, like *relegatio*[6], not applicable to slaves, such as the *lex* Iulia *de vi privata*, which fixes only money penalties[7], or the *lex* Cornelia *iniuriarum*, for the same reason But in this last case he says *durior ei poena extra ordinem immanebit* He also tells us that the *lex* Pompeia *de parricidiis* does not, on its terms, apply to slaves since it speaks of relatives, but that, as *natura communis est*, it is extended to them[8] On the other hand we are told by Callistratus that *terminum motum*, for which the old law imposed a fine, was capital in a slave unless the master paid the *multa*, a rule akin to that applied in delict, and one which might have been expected to be generalised[9] For *sepulchri violatio* a freeman incurred a fine a slave was punished, *extra ordinem*[10]

In relation to punishment there were numerous differences In theft and similar cases the criminal liability was alternative with a noxal action[11] There was prescription in adultery but not if the accused was a slave[12]. The punishment might be different in the case of slaves, and in most cases was more severe[13] And though they had obtained freedom in the interval, they were to be punished as slaves[14] *Vincula perpetua* though always unlawful seem to have been occasionally imposed on slaves[15] A sturdy vagrant was given

[1] Pliny Epist Traj 30, but the Digest while excluding *damnati* of many kinds does not lay down this rule
[2] Nov Theod 17 1 Apparently temporary [3] C 10 33
[4] C Th 9 9 1, C 9 11 1 Extended to *liberti*, Nov Anthem 1 Elaborate rules as to punishment of woman
[5] *Ante* p 85 [6] But see *post*, p 94
[7] Forfeiture of ¼ of *bona* Though not personally liable they might be the *homines coacti*, 48 7 2 3
[8] 48 2 12 4 The *lex* Cornelia *de falsis* covered slaves who in a will wrote gifts of liberty to themselves and by interpretation those writing gifts to their *domini*, 48 10 10, 15 1
[9] 47 21 3 1 Hadrian substituted ordinary criminal punishments (*h t* 2) The similar change in *Plagium* may be due to the same cause, *ante*, p 33
[10] 47 12 3 11 [11] 47 2 93, C 3 41 3
[12] C 9 9 25 Here it was not time but condonation M Aurelius ordered a husband to prosecute the guilty slave, though the wife was protected by time 48 2 5 The *vir*, even a *filius familias* could kill a slave adulterous with his wife under circumstances which did not allow killing of other than base persons, 48 5 25
[13] 47 9 4 1, 48 19 16 3, 28 16 For list of punishments for slaves, shewing greater severity, 48 19 10 Wallon, *op cit* 2 198, Rein, *op cit* 913, Mommsen, Strafrecht, 1092
[14] 48 19 1 [15] C 9 47 6, 10, D 48 19 8 13

to anyone who denounced him, a right of action being reserved to his *dominus*[1]. *Furtum* ceased to be capital in slaves when the Edict made it a private delict in freemen[2]. Though condemnation as a *servus poenae* ended ownership, temporary punishment did not, and the *peculium* of any slave condemned was restored to his *dominus*[3].

A slave being bound to obey, the command of the *dominus*, or of his tutor or curator, might be a defence in matters *quae non habent atrocitatem facinoris vel sceleris*[4]. Where a slave wrote a gift of liberty to himself, at the order of his *dominus*, who did not subscribe it, but acknowledged it in letters, he was not free but was not liable under the *lex* Cornelia *de falsis*[5]. But command was no defence for murder, robbery, piracy, or any violent crime unless committed in the course of a *bona fide* claim of right[6]. It did not excuse for *occisio*, under the *lex* Cornelia *de sicariis*, though reasonable defence of the master would. Apparently it did not excuse for *iniuria*[7] or for *furtum*[8]. In some cases it reduced the penalty. Thus, for a slave who committed gross violence, death was the penalty, under the *lex* Iulia *de vi*, but if it were by his master's orders he was condemned *in metallum*[9]. So, for demolishing sepulchres the penalty was *metallum*, but, if it were done *iussu domini*, the penalty was *relegatio*[10]. We are told elsewhere that this punishment was not applicable to slaves[11]. Mommsen suggests[12] as the reason that their place of residence was not at their discretion. The reason is hardly conclusive, and we have here an exception. But these present enactments are somewhat haphazard: it is not clear that they express any real principle or policy.

The killing of masters by their slaves was the subject of special legislation. There was a tradition of an ancient usage for all the slaves in the house to be killed, if one had killed the master: Nero, in A.D. 56, obtained a *senatus* consult confirming this in general terms. The rule errs by excess and defect: it is needlessly cruel, and it requires prior proof that one of the slaves has actually killed. It does not appear in the later law[13].

[1] C. Th. 14. 18. 1; C. 11. 26. 1. For light offences, *flagellis verberati*, 48. 2. 6; plotting against life of *dominus*, burnt alive, 48. 19. 28. 11; *atrox iniuria*, condemned *in metallum*; ordinary cases, scourged and returned for temporary chains, P. 5. 4. 22; 47. 10. 45; similar rule for *abactores*, P. 5. 18. 1. As to return to *dominus*, Mommsen, *op. cit.* 898. If *dominus* would not receive them, sold if possible, if not, perpetual *opus publicum*, 48. 19. 10. *pr.*, *post*, Ch. XVII. For coining, killed, but no right of fisc arose: no forfeiture unless *dominus* knew. This rule was general, P. 5. 12. 12; C. 9. 12. 4.

[2] G. 3. 189. A slave who dug up a public way might be fustigated by anyone: a freeman would be fined, 43. 10. 2. Another case, 47. 9. 4. 1.

[3] Schol. Bas. (Heimbach) 60. 52. 12; C. 9. 49. 1.

[4] 43. 24. 11. 7; 50. 17. 157. *pr.* *Factum vi aut clam*, 43. 24. 11. 7, undertaking tacit *fideicommissum*, 35. 2. 13.

[5] C. 9. 23. 6, *post*, Ch. XXV. Effect of *subscriptio*, 48. 10. 1. 8, 14, 15. 3, 22. 9.

[6] 44. 7. 20. [7] 47. 10. 17. 8. [8] 25. 2. 21. 1.

[9] C. Th. 9. 10. 4; C. 9. 12. 8. [10] C. 9. 19. 2 (390).

[11] *Ante*, p. 93. But 40. 9. 2 also assumes its possibility. [12] Mommsen, *op. cit.* 968.

[13] Tac. Ann. 13. 32, 14. 42.

A *Sc.* Silanianum, apparently of the time of Augustus, confirmed by a *Sc.* Claudianum and a *Sc.* Pisonianum, and again by an *Oratio* M. Aurelii[1], provided for the torture of slaves if there was reason to think the master had been killed by them. After the truth had been discovered by torture the guilty slave might be executed[2]. The slaves who might thus be tortured were those under the same roof or hard by—all who were near enough to help the master and failed to do so[3]; not, for instance, slaves who were in a remote part of the property, or on another estate[4]. If it occurred on a journey, those with him, or who had fled, might be tortured, but if none was with him the *Scc.* did not apply[5]. Those partly his might be tortured unless at the time protecting another owner[6]. Slaves freed by the will might be tortured, but with caution[7]. Trajan added even *inter vivos liberti* with *ius anuli aurei*[8].

The power extended to slaves of children not in *potestas*, to slaves *castrensis peculii*, and, by a *Sc.* of Nero, to those of wife or husband[9]. It applied also on the death of a child, actual or adopted, living with the *paterfamilias*, whether in *potestas* or not (though the latter case was doubted by Marcellus), even if the *paterfamilias* were at the moment *cum hostibus* or even dead, if his *hereditas* were not yet entered on[10]. But it did not apply to slaves of the mother where a child was killed[11], nor of *socer* where *vir* or *uxor* was killed[12]. Where a son, instituted by his father, was killed before entry, a slave legated or freed by the father's will might be tortured, the gift failing by the torture[13]. The difficulty is that he is not and never would be the heir's. Scaevola decides that the *Sc.* applies, probably because the slave is the property of the *hereditas*, which represents the deceased father[14]. If it were a disinherited son, Paul holds that the slaves of the father could not be tortured till it was seen if the *hereditas* was entered on: if not, they could be tortured, for they would be his; if it was, they were *alieni*[15].

[1] 29. 5; *h. t.* 8; C. 6. 35. 11. Exact relation of these laws uncertain.

[2] P. 3. 5. 6.

[3] P. 3. 5. 3; D. 29. 5. 1. 27, 28; C. 6. 35. 12. Hadrian laid down the restriction clearly, Spartian, Hadrian, 18. 11.

[4] Except suspects on other grounds, 29. 5. 1. 26, 30; P. 3. 5. 7.

[5] P. 3. 5. 3, 6, 8; D. 29. 5. 1. 31.

[6] 29. 5. 3. 4. So might those subject to pledge or usufruct, or *statuliberi*, or those conditionally legated. But no torture of those to whom *fc.* of liberty was due unless suspected, nor of those held in usufruct or *bonae fidei* possessed by deceased, 29. 5. 1. 2—5. The *Sc.* speaks of *domini*.

[7] 29. 5. 3. 16; C. 9. 41. 5. [8] 29. 5. 10. 11.

[9] 29. 5. 1. 14, 15; P. 3. 5. 5. [10] 29. 5. 1. 7—9, 12, not those given in adoption.

[11] 29. 5. 1. 11.

[12] And killing of foster-child did not bring the *Sc.* into operation, 29. 5. 1. 10, 16.

[13] 29. 5. 1. 13.

[14] The reason in the text cannot be right (*quia exstinctum legatum et libertas est*). The will might not fail: there might be other *heredes*.

[15] 29. 5. 10.

The basis of the liability was that they did not render help, *armis, manu, clamore et obiectu corporis*[1]. The torture was not punishment: it was a preliminary to the *supplicium* which awaited the guilty person. Not doing his best to save the *dominus* sufficed to justify torture: more than this would of course be needed to conviction of the murder. Though it were clear who killed, the *quaestio* must continue, to discover any prompters[2]. The *lex* Cornelia gave a money reward for revealing the guilty slave[3]. Though the heir was accused the slaves might still be tortured[4]. The *Sc.* applied only to open killing, not to poisoning and secret killing, which the slaves could not have prevented[7]: it must be certain that he was killed violently[5]. If the owner killed himself, only those might be tortured who were present, able to prevent, and failing to do so; in that case they were liable not merely to torture, but to punishment[6].

Fear of personal harm was no defence, if they took no steps in protection: they must prefer, says Hadrian, their master's safety to their own[7]. But as failure to help was the ground of liability there were several excuses. Thus, unless circumstances shewed them to be *doli capaces*[8], child slaves might not be tortured, though they might be threatened[9]. Nor could those be tortured who did their best though they failed to save[10]. If the master lived some time and did not complain of the slaves, or if, as Commodus ruled, he expressly absolved them, they were not to be tortured[11]. If the husband killed the wife in adultery, there was no torture, and if either killed the other, slaves were not to be tortured without proof that they heard the cries and did not respond[12]. It should be added that even the master's dying accusation was not proof entitling the authorities to proceed at once to *supplicium* without further evidence[13].

These provisions are merely ancillary to the main provisions of the *Sc.* Silanianum, the object of which was to secure that the death should be avenged, by preventing beneficiaries of the estate from taking it, and therefore freed slaves from getting freedom so that they could not be tortured, till steps had been taken to bring the slayer to justice. It

[1] *h. t.* 19. [2] *h. t.* 6. *pr.*, 17; P. 3. 5. 12.
[3] 29. 5. 29. *pr.*, and conversely, punished one who concealed a slave liable under the *Sc.*, *h. t.* 3. 12.
[4] 29. 5. 6. 1; P. 3. 5. 9.
[5] 29. 5. 6. 3, 1. 17—21, 24; P. seems to hold that there might be torture in case of poisoning, P. 3. 5. 2. This refers to the other provisions of the *Sc.*, *i.e.* the exclusion of the *heres* who does not seek the murderer.
[6] P. 3. 5. 4; D. 29. 5. 1. 22, 23. The text observes that the *Sc.* does not apply.
[7] 29. 5. 1. 28, 29. [8] *h. t.* 14. [9] *h. t.* 1. 32, 33.
[10] *h. l.* 34, 35. Mere pretence at help was no defence, *h. l.* 36, 37. Other excuses were sickness, helpless age, blindness, lunacy, dumbness so that they could not call, deafness so that they could not hear, shut up or chained so that they could not help, at the time protecting wife or husband of the owner, *h. t.* 3. 5, 11.
[11] *h. t.* 1. 38, 2. [12] *h. t.* 3. 2, 3.
[13] *h. t.* 3. 1. Slave so handed for *supplicium* was not in the *hereditas pro Falcidia*, 35. 2. 3. 39.

provided that the will should not be opened till the *quaestio* had been held (*i.e.* all necessary enquiry made), with a penalty of forfeiture to the Fisc, and a further fine[1]. The will was not to be opened, no *aditio* was to be made, or *bonorum possessio* demanded, till the *quaestio*[2], the time for claims of *bonorum possessio* being prolonged accordingly, except in case of poisoning, where as there would be no *quaestio* there need be no delay[3]. There was an *actio popularis* (half the penalty going to the informer) against any who opened the will before the *quaestio* had been held[4]. If some slaves ran away and the will was opened and they were freed by it they could still be tortured[5].

[1] P. 3. 5. 1; C. 6. 35. 3. Other enquiry may be needed besides torture of slaves, 29. 5. 1. 25. By *Sc.* Taurianum penalties not enforceable after five years, save in parricide, when they are perpetual, 29. 5. 13.
[2] 29. 5. 3. 18, 29; P. 3. 5. 1.
[3] 29. 5. 21. *pr.* It appears that in later law similar delays might be ordered where other offences were supposed to have been committed by slaves. Dareste, N. R. H. 18. 583.
[4] 29. 5. 25. 2.
[5] *h. t.* 3. 17, *h. t.* 25. 1. Justinian provided for a doubt left by this legislation as to the date at which, in such cases, the liberty took effect, C. 6. 35. 11. Many details of these matters are omitted, and see *post*, Ch. xxv.

CHAPTER V.

THE SLAVE AS MAN. NON-COMMERCIAL RELATIONS (CONT.). DELICTS BY SLAVES.

WE have now to consider the rights and liabilities which may be created when a delict is committed by a slave. The general rule is that upon such a delict a noxal action lies against the *dominus*, under which he must either pay the damages ordinarily due for such a wrong, or hand over the slave to the injured person. We are not directly concerned with the historical origin of this liability: it is enough to say that it has been shewn[1] that the system originated in private vengeance: the money payment, originally an agreed composition, develops into a payment due as of right, with the alternative of surrender: the pecuniary aspect of the liability becomes more and more prominent, till the surrender of the slave loses all trace of its original vindictive purpose, and is regarded as mere emolument, and the money composition comes to be regarded by some of the jurists as the primary liability[2]. But the system as we know it was elaborated by the classical jurists, who give no sign of knowledge of the historical origin of the institution, and whose determinations do not depend thereon[3].

The XII Tables distinguish between *Furtum* and *Noxa*[4]. *Furtum* here means *furtum nec manifestum*, (the more serious case was capitally punishable,) and *Noxa* no doubt refers to the other wrongs—mainly forms of physical damage—for which the Tables gave a money penalty[5]. The provisions of the Tables as to most of these other matters were early superseded, but the verbal distinction between *furtum* and *noxa* was long retained in the transactions of everyday life. Varro, in

[1] Holmes, Common Law, 9 *sqq.*; Ihering, Geist. d. R. R. § 11 a; Girard, N. R. H. 12. 31 *sqq.* But see Cuq, Institutions Juridiques, 1. 368.

[2] G. 4. 75; In. 4. 8. *pr.*; 4. 17. 1; D. 5. 3. 20. 5; 9. 4. 1; 42. 1. 6. 1.

[3] The texts give the reason for the alternative mode of discharge as being the injustice of making the owner pay more than the value of the slave for his wrongdoing, the point apparently being that as he has not been guilty of *culpa*, there is no logical reason why he should suffer at all. See texts in last note and 47. 2. 62. 5.

[4] Bruns, Fontes, i. 38.

[5] Some said *Noxia* meant the harm done, *noxa* the slave, and that this was the origin of the name—noxal actions, 9. 3. 1. 8; 9. 4. 1. In. 4. 8. 1. On the verbal point, Roby, de usufructu, 132; Mommsen, Strafrecht, 7.

his forms of security on sale, uses the formula, *furtis noxisque*[1], and the same distinction is made in the contract notes of the second century of the Empire[2]. It is clear that the expression *noxa* covered *furtum* in the classical law[3], so that the distinction is not necessary. The Edict as recorded by Justinian speaks only of *noxa*[4], and though Pomponius speaks of a duty to promise *furtis noxisque solutum esse*[5], it is likely that he is merely reflecting persistent usage.

It may almost be said that there was no general theory of noxal actions. We are told that they originated for some cases in the XII Tables, for another case in the *lex* Aquilia, and for others (*rapina* and *iniuria*) in the Edict[6]. In *damnum* the special rules under the *lex* Aquilia seem to be of a very striking kind, and in the case of those interdicts which were really delictal, we shall see that there were yet other differences[7].

The system of noxal actions applies essentially to delict, *i.e.* to cases of civil injury, involving a liability to money damages: it does not apply to claims on contract or quasi-contract, or to criminal proceedings of any kind, or to proceedings for *multae*[8]. This limitation is laid down in many texts. In the case of *multae* the *dominus* was sometimes held directly liable for a penalty for the act of his slave[9]. It has been urged on the evidence of two texts, that, at least in those cases where a punishment was imposed on private suit (as opposed to *iudicia publica*), *e.g. furtum manifestum* under the XII Tables, noxal surrender was allowed. But it has been shewn[10] that while one of these texts[11] refers to the *actio doli*, which was certainly noxal in appropriate cases, the other[12] though it refers both to criminal proceedings and to noxal actions does not suggest that they are overlapping classes[13].

The system applies to the four chief delicts, and to the various wrongs which were assimilated to them by *actiones utiles*, etc.[14] But it applies also to a very wide class of wrongs independent of these. Where a slave, without his master's knowledge, carried off an *in ius vocatus*, there was a noxal action[15]. If my slave built a structure which caused rain to injure your property, my duty to remove it was noxal[16]. There

[1] Bruns, *op. cit.* ii. 65. [2] *Id.* i. 288 *sqq.*

[3] 9. 4. *passim*, where most of the concrete cases handled are of *furtum*.

[4] 21. 1. 1. 1. [5] 21. 1. 46.

[6] G. 4. 76; In. 4. 8. 4.

[7] *Post*, p. 128.

[8] G. 4. 75; In. 4. 8. *pr.*; D. 21. 1. 17. 18; 21. 2. 11. 1; 50. 16. 200, 238. 3.

[9] See *l.* Quinctia (Bruns, *op. cit.* i. 116), *Si servus fecerit dominus eius HS centum milia populo Romano dare damnas esto.*

[10] Sell, Noxalrecht, 112 *sqq.* [11] 4. 4. 24. 3. [12] 2. 9. 5.

[13] For *terminum motum* there was something analogous to noxal surrender: *dominus* must pay the *multa* or hand over the slave for capital punishment, 47. 21. 3. 1.

[14] G. and In. *locc. citt.*; P. 5. 20. 4; Coll. 12. 7. 6—9; D. 9. 4. 38. 3; 47. 8. 2. 16; 47. 10. 17. 4, but not for *damnum in turba factum*, 47. 8. 4. 15.

[15] 2. 7. 1; 2. 10. 2.

[16] 39. 3. 6. 7. So generally for *opus novum*, 43. 1. 5; 43. 16. 1. 11—16; 43. 24. 14.

was a *popularis actio sepulchri violati* if B's slave lived, or built, in A's sepulchre he was punished, *extra ordinem* if he only resorted to it, A had the above action in a noxal form[1] The action under the *lex* Plaetoria for overreaching minors appears to have been noxal[2]. We are told that the *actio doli* was noxal, if the matter in which the *dolus* occurred was of the kind which gives rise to noxal actions, but *de peculio*, if it was a matter which ordinarily gives rise to the *actio de peculio*[3]. Although *iniuria* was an ordinary delict, and thus gave rise to a noxal action, it does not seem that this was the usual course Probably the damages in *iniuria* by a slave were ordinarily so small that there would be no question of noxal surrender[4], and another course commonly taken was to hand over the slave to receive a thrashing and be handed back again[5] This alternative punishment depended on the common consent of the *dominus*, the *iudex* and the complainant[6] once duly carried out it barred further action by the injured person[7]

Though in principle it is clear that noxal surrender is not applicable in cases of contract or crime, there are some cases that create difficulty Delict may occur in connexion with contract, and the questions to which these cases give rise will require attention later[8] As to crime there is no real difficulty, but it is observed by Cujas that in relation to a number of cases, mostly of *actiones populares*, it is difficult to find any principle He remarks[9] that in some such cases there is noxal liability, *e g* for *deiecta et effusa*, where the slave is identified[10] in others, such as *Albi corruptio* there is no noxal surrender, but there is punishment of the slave[11], *extra ordinem*, apart from criminal liability[12] This punishment, *extra ordinem*, is sometimes called action *in servum* it arises also as we shall see in some cases of *deiecta et effusa*[13] It arises in some private delicts, *e g damnum in turba, incendium, iniuria*[14] The *actio popularis sepulchri violati* was ordinarily *in servum*, but, as we have

[1] 47 12 3 11

[2] Fr ad form Fabian See Collectio librorum iuris anteiust p 300 D 4 4 24 3 puts the case on the level of *iniuria*—see below Other cases are *metus* (4 2 16 1), *servi corruptio* (11 3 14 3) *arborum furtim caesarum* (47 7 7 5—7) wrongful measurement by slave of *mensor* (11 6 3 6) refusal to allow entry of a *missus in possessionem* (39 2 17 *pr*) and disobedience to certain interdicts *Post* p 128

[3] 4 3 9 4 4 4 24 3 Thus if a slave *dolo malo* ceased to possess a thing the master was no longer liable to *ad exhibendum* but he was noxally liable for *dolus* or *furtum* (10 4 16) In a matter arising out of contract the *actio doli* was *de peculio* 47 7 49

[4] Under the *lex* Plaetoria where there was a similar alternative the harmful transaction was set aside so that there might be no damage

[5] 2 9 5, 47 10 45 One text suggests that this was the proper course (47 10 9 3) though we are told elsewhere (*h t* 17 3) that what might be a light matter if done by a freeman might be serious if done by a slave *crescit contumelia ex persona*

[6] 47 10 17 4 C Th 13 3 1 (321) provides that if a slave insult a professor his master must flog him in the presence of the professor or pay a fine The slave might be held as a pledge but it is not said that surrender released In the Const as it appears in the Code (C 10 53 6), these provisions are omitted

[7] 47 10 17 6

[8] *Post* pp 122 sqq

[9] Cujas Observ xxii 40.

[10] 9 3 1 *pr* *h t* 5 6

[11] 2 1 7 P 1 13a 3, Lenel, Ed Perp § 7

[12] 48 10 32 *pr* , P 5 25 5

[13] 9 3 1 8

[14] 47 8 4 15, 47 9 1 *pr*

seen, it might be noxal[1] Under the *lex* Plaetoria there was, in the action developed by the Praetor, as in *iniuria*, the alternative[2] Cujas discusses[3] some of these inconsistencies, and explains them on the ground that no action is noxal except by express enactment by *lex* or edict, and that all these inconsistencies occur in the edict, the Praetor deciding whether the proceeding shall be noxal or not by considerations, apparently rather arbitrary, of the kind and magnitude of the offence

Noxal liability is only for the actual wrongdoing of the slave If my slave occupies a house from which something is thrown, he is the occupier and, if he were a freeman, he would be liable But I shall not be noxally liable it is not his delict Ulpian thinks that as the thing ought not to go unpunished, the only thing to do is to deal with the slave *extra ordinem*[4]. So where a slave is *exercitor* and goods are wilfully destroyed by an employee, the master's liability will not be noxal, if the employee is not his slave[5] If he is, there will be a noxal action, and if he is a *vicarius* of the *exercitor* this action will be limited to the *peculium* of the *exercitor*[6]

The person primarily liable to be sued on the slave's delict is his *dominus* The proceedings might begin, if necessary, with an *actio ad exhibendum*, for the production of the slave, but since the action might proceed in his absence, this would be needed only where there was doubt as to the identity of the slave who had done the harm In that case there might be *actio ad exhibendum* for production of the *familia*, and the plaintiff could then point out the one on account of whom he wished to proceed[8] The liability depends not on the mere fact of ownership but on *potestas*, which is defined as *praesentis corporis copiam facultatemque*[9] and again as *facultatem et potestatem exhibendi eius*[10] These explanations are not too clear, but it seems most probable that the word refers to a physical state of things and has no relation to right[11] A slave in flight, or even away on a journey, *peregre*, is not in *potestas*[12] On the other hand a slave merely lent or deposited is still so[13] The same rule is laid down for one pledged, it is remarked that the holder has not *potestas* in these cases, and the owner has, if he has the means to redeem the man[14] But though we are

[1] 47 12 3 11

[2] 4 4 24 3

[3] *loc cit*

[4] 9 3 1 8 So also a noxal action is denied for the case of things suspended over a public way 44 7 5 5

[5] 47 2 42 *p*

[6] *Post* Ch x

[7] Exceptional cases later

[8] 10 4 3 7

[9] 50 16 215

[10] 9 4 21 3

[11] Lenel *op cit* § 58 This seems to follow from the structure of 50 16 215 The contrary opinion of Girard is due to his view as to the nature of the *interrogatio* shortly to be considered

[12] 9 4 21 3, 47 2 17 3

[13] 9 4 22 *pr*

[14] 9 4 22 1 2

told that an owner has not *potestas* over a pledged slave whom he has not the means to redeem, it hardly follows that the holder has, and, even if he has, it must be remembered that the liability does not depend on *potestas* alone. A pledge creditor was not directly liable, though, as we shall shortly see, he could in the long run be deprived of the slave.

The parties being before the Praetor the proceedings begin, or may begin, with an *interrogatio* of the defendant, as to his position with regard to the slave. Upon the exact content of the *interrogatio* there has been much controversy[1]. Many texts speak of it as being, *an eius sit, i.e.* on the question of ownership[2]. There are others which assume it to be, *an in potestate habeat*[3]. And there is at least one which may be read as implying that they mean the same thing[4]. The most probable view seems to be that now adopted by Lenel[5]. He holds that there were two interrogations, for different cases. The procedure was certainly different according as the slave was present or absent. Only an owner could defend an absent slave, but anyone could defend a present slave if the owner were away[6]. In Lenel's view the point is that defence by the third party is in the interest of the owner, not of the slave, but this interest exists only where the slave, since he is present, is liable to *ductio*. Many texts shew that the Edict, *Si negabit*, giving alternative courses where *potestas* is denied, refers only to absent slaves[7]. And Ulpian in a very important place, (probably the beginning of his comment,) emphasises the importance of the question, whether the slave is present or absent[8]. If the slave were there, the question as to *potestas* would be absurd: the only question would be whether the ownership was admitted or denied. If it were denied there was a right of *ductio*, but if the plaintiff thought he could prove ownership he might do so, since he had then a right to a proper conveyance of the slave: hence the question, *an eius sit*[9]. But if the slave were absent, the defendant, who admitted ownership, might deny *potestas*. There would be an *interrogatio* as to this, and it is to this alone that the edict refers which gives the plaintiff, in the case of denial, a choice between the oath and a *iudicium sine deditione*. This edict does not deal with the case where it is admitted; here, clearly, the defendant must defend, or give security for noxal surrender. In stating this view of Lenel's, it has been necessary to anticipate some of the details which

[1] Girard, Nouv. Rev. Hist. 11. 429; Kipp, Z. S. S. 10. 399; Lenel, Z. S. S. 20. 9; *Id.*, Ed. Perp. (French Edition) 1. 180.
[2] 9. 4. 26. 3, 27. 1, 39. 1; 11. 1. 13. 1, 14. *pr.*, 20. *pr.*
[3] 9. 4. 24. 11. 1. 5, 16. *pr.* [4] 11. 1. 17. [5] *loc. cit.*
[6] Or a *bonae fidei possessor*.
[7] 2. 9. 2. 1; 9. 4. 21. 1.
[8] 9. 4. 21. 1, 21. 4, 22. 3, 26. 5. [9] See, however, *post*, p. 103.

will have to be stated in the systematic account of the action which must now be given[1].

The *dominus* who has admitted his title may "defend" the slave. This involves giving security that the slave shall be present at the hearing—*cautio iudicio sisti*. There were differences of opinion as to what was implied in this promise. Labeo held that the defendant must not do anything to lessen his right in the slave meanwhile, or use delays till the action was extinct: he must do nothing to make the plaintiff's position worse[2]. Any alienation of him to a person out of jurisdiction or to a *potentior* whom it might be difficult to bring before the court, was a breach of this undertaking[3]. Noxal surrender was not, (though Ofilius thought otherwise,) for the liability still attached to the man, on the principle, *noxa caput sequitur*[4]. (It must be noted that in all these cases the security is only *donec iudicium accipiatur*[5], so that there is no question of an intervening *litis contestatio*: the action can be simply transferred.) To produce, free, one who had been a *statuliber* before, satisfied the promise, since the possibility of his becoming free was to have been reckoned upon[6].

If, admitting his title, the *dominus* is not inclined to defend the slave, his proper course is to surrender him to the plaintiff, making according to the Digest a formal transfer of him[7]. If he does this he is absolutely released, though there exist minor rights in the man[8]. In the classical law it seems likely that simple abandonment, that the slave might be *ductus*, sufficed, since the master's mere presence would not impose a duty on him which he could have avoided by staying away; and in absence of the master *ductio* released[9]. Thus an outstanding usufruct is no bar, and the usufructuary cannot recover him without paying *litis aestimatio* to the surrenderee, provided the surrender was in good faith[10]. The effect of the transfer is to make the transferee owner[11]. Thus if it be to the usufructuary the usufruct is ended by *confusio*[12]. The fact that the slave dies after surrender is of course not material[13].

[1] The effect of silence of deft. on the enquiry is not stated. Lenel thinks an answer could be compelled, citing an analogous case (25. 4. 1. 3). But as the text shews, in the special case there handled the needs of the parties could not otherwise be met. This is not so in our case, and it has been suggested that here, as in some other cases, silence was treated as contumacy equivalent to denial. Naber, Mnemosyne, 30. 176. The person interrogated may ask for delay, since his answer may have serious results, 11. 1. 8.
[2] 2. 9. 1. 1. [3] *Ibid.* [4] 2. 9. 1. 2. [5] 2. 9. 1. *pr.*
[6] 2. 9. 6. The same was true in other cases of freedom: he could still be sued. This did not hold in *iniuria* since the fact that he was free would prevent the corporal punishment which here ordinarily replaced damages or surrender, 2. 9. 5. *Ante*, p. 100.
[7] 50. 16. 215; 9. 4. 21. *pr.*, 33. 29, which Eisele thinks interpolated (Z. S. S. 13. 124). *H. t.* 32 (which he also thinks interpolated) says that *dominus* handing him over must *de dolo promittere*, *i.e.* that he has not made his right in him worse in any way, 9. 4. 14. 1.
[8] 9. 4. 15; In. 4. 8. 3. [9] Cp. 6. 2. 6; 9. 4. 29. See also *post*, pp. 104, 106.
[10] 7. 1. 17. 2; 9. 4. 27. *pr.* So where the slave was pledged, 4. 3. 9. 4. As to these texts, *post*, p. 117.
[11] In. 4. 8. 3. [12] 7. 4. 27.
[13] The Institutes say (4. 8. 3) that the slave was entitled to freedom, *auxilio praetoris invito domino*, when he had wiped out by earnings the damage done—an extension to slaves of the rule applied to noxal surrender of sons, obsolete in Justinian's time. It is not in the Digest or Code.

If the *dominus* will neither surrender nor defend he is liable to an *actio in solidum* with no power of surrender[1].

If the defendant is present and the slave absent, and the defendant denies *potestas*, the plaintiff has alternative courses. He may offer an oath on the question of *potestas*[2]. If this is refused condemnation follows, with the alternative of surrender[3]. If it is taken, the action is lost[4], but this does not bar a future action based on a new *potestas*, beginning after the oath was taken[5]. The alternative course is to take an action, *sine noxae deditione*, there and then[6], which imposes obligation *in solidum*, but is lost unless actual present *potestas* be proved or loss of it, *dolo malo*[7]. This action on denial of *potestas* may of course be avoided by withdrawing the denial before *litis contestatio*[8], and as it has a certain penal character it is not available against the *heres* of the denier[9]. If the defendant did not deny *potestas*, Vindius held that he could be compelled either to appear with the slave to accept a *iudicium*, (*iudicio sisti promittere*,) or, if he would not defend, to give security to produce the man, whenever it should be possible[10]. But it appears that the action could not be brought and defended in the absence of the slave, if there was any doubt as to the defendant's being a person liable for him, *i.e.* owner or *bonae fidei possessor*. Where he has given such security he will be free from liability if, whenever it is possible, he conveys him to the plaintiff.

If the *dominus* is absent from the proceedings *in iure*, and the slave is present, he may be taken off (*ductus*) by the claimant, *iussu praetoris*[11]. This releases the defendant[12], and as in the case of an *indefensus*, gives the holder the *actio* Publiciana[13]. But on the return of the *dominus*, the Praetor may, for cause shewn, give him leave to defend[14]. The slave must then be produced by the plaintiff. A difficulty arose from the fact that the praetor's order had put the man in the *bona* of the plaintiff, and a man cannot have a noxal action on account of his own slave, but the Praetor made an order restoring the extinguished action[15]. Moreover, in the absence of the *dominus*, anyone interested, for instance a pledgee or usufructuary[16], might defend the slave for him, and would have an *actio negotiorum gestorum* against him[17]. And such persons, like the owner, might, if they were absent in good faith, come in later and defend[18].

[1] 9. 4. 21. 4, 22. 3. [2] 9. 4. 21. 2. [3] *h. l.* 4.
[4] *h. l.* 6. The oath might be taken on his behalf by tutor or curator, but not by procurator, *h. l.* 5.
[5] *h. l.* 6; *h. t.* 23. Neratius points out that in the new *potestas* there might even be an action *sine deditione*, if the circumstances give rise to it, although on the existing *potestas* the oath was alternative to and thus exclusive of such an action.
[6] 2. 9. 2. 1; 9. 4. 21. 2. [7] 2. 9. 2. 1; 9. 4. 22. 4.
[8] 9. 4. 26. 5, or later if deft. a minor. [9] *Ibid.* [10] 2. 9. 2. 1.
[11] *Ibid.* [12] 9. 4. 39. 3, *exceptio doli*. [13] 6. 2. 6.
[14] 2. 9. 2. 1. So if *dominus* who refuses to defend is entitled to *restitutio in integrum*.
[15] 2. 9. 2. 1. [16] 2. 9. 2. 1; 9. 4. 26. 6.
[17] 3. 5. 40. [18] 9. 4. 26. 6, 30.

But the case of one who defends for an absent master must be distinguished from that of one who, not being *dominus*, has, upon *interrogatio*, admitted his responsibility as such. A person who has thus admitted *potestas*, is noxally liable, and if he is sued the *dominus* is released[1]. His liability is as great as that of the *dominus*[2], but he must give security *iudicatum solvi* as he is not the real principal[3]. Payment by him before *litis contestatio* would release the *dominus*, as well as payment under the judgment[4]. As the mere surrender by a person who is not owner does not pass *dominium*, the release is not *ipso iure*, but, in fact, it is effective. If the *dominus* sues for the slave he will be met by the *exceptio doli*, unless he tenders the damages[5]. The receiver by the surrender acquires the *actio* Publiciana, and if the *dominus* replies by an *exceptio iusti dominii*, he has a *replicatio doli*[6].

If the wrong is to two people, the damages will be divisible, and each must sue for his share. But if one sues the surrender will have to be *in solidum* to him, as it does not admit of division. He will be liable to the other by *iudicium communi dividundo, i.e.* if it is damage to some common thing. And if both sue together the judge may order surrender to both[7], in common.

The *intentio* of the formula in noxal actions states the duty as being either to pay or surrender, and these may be described, provisionally, as alternative obligations. The *condemnatio* leaves the same choice, but now the primary duty is to pay; surrender has become a merely "facultative" mode of release. Thus a judgment simply ordering surrender is null[8]. It follows that the *actio iudicati* is only for the money: if this is defended the right of surrender is lost[9]. But surrender after *condemnatio* does not release, if there are any outstanding rights in the man, such as usufruct[10], and the plaintiff can sue by *actio iudicati*, without waiting for actual eviction, unless the outstanding right is extinguished[11].

The typical defendant is the owner having *potestas*, but the Praetor extended the liability to one who would have had *potestas* but for his

[1] 11. 1. 8, 20 or the future *dominus* in case of *servus hereditarius*, *h.t.* 15. *pr.*
[2] 11. 1. 14. *pr.*, 15. 1, 16. 1, 20. *pr.*
[3] *causa cognita*, *i.e.* if it appears that he is not owner. A non-owner sued need not, as he did not assume the position, 9. 4. 39. 1.
[4] 9. 4. 26. 3. Such confessions bind only if they can conceivably be true, *e.g.* not in any case in which admitter could not possibly be owner. But the Roman juristic doctrines as to the nature and effect of impossibility are imperfectly worked out, 11. 1. 16. 1, 14. 1.
[5] 9. 4. 27. 1, 28. *pr.* [6] 9. 4. 28.
[7] 9. 2. 27. 2; 9. 4. 19. *pr.* These rules apply only where there is such a common interest: if the damage was to distinct things of different owners, there were two distinct delicts.
[8] 42. 1. 6. 1.
[9] 5. 3. 20. 5. If before judgment he has promised to pay or surrender, the action on his promise of course allows him both alternatives.
[10] 42. 1. 4. 8.
[11] 46. 3. 69. Perhaps surrender of him as *statuliber* sufficed, but it is not clear that the text which says this (9. 4. 15) refers to surrender after condemnation.

fraud[1]. The rules are in the main as in ordinary noxal actions, but as he is treated as if he still had *potestas*, and he has, in the ordinary way, denied *potestas*, he is liable *in solidum*[2]. The action lies, whether some other person is liable or not, *e.g.* when the slave was simply told to run away[3]. But if there is a new owner ready to take the defence, or the slave, having been freed, presents himself to do so, with security, the old master has an *exceptio*[4] and the plaintiff who has elected to take one liability cannot fall back on the other[5]. In one text we are told that if after *litis contestatio* in this praetorian action based on *dolus*, the slave appears, and is then *ductus* for lack of defence, the *dominus* is entitled to absolution, *exceptione doli posita*[6]. The hypothesis seems to be that the plaintiff, having brought this praetorian action, elects on the appearance of the slave, to treat the refusal to admit *potestas*, as having been a refusal to defend. Though there has been *litis contestatio* in the action, he may do this, but the defendant will be absolved. This is an application of the principle, *omnia iudicia absolutoria esse*[7], since as we have seen this *ductio* of an *indefensus* would have released, had it been done before *litis contestatio*[8].

The principle, *Noxa caput sequitur*, which underlies these rules is simple. The owner with present *potestas* is liable, whether he was owner at the time of the wrong or not. Thus a buyer even about to redhibit is noxally liable, and, as he might have surrendered, he can recover from the vendor no more than the price[9]. This minimal cost of surrender he can recover, whether he actually defended the slave, or surrendered him on a clear case[10]. It is enough that he is present owner: the fact that the sale is voidable as being in fraud of creditors, or that he is liable to eviction by the vendor's pledgee, or that the vendor is entitled to *restitutio in integrum*—all these are immaterial[11]. As the master's liability depends on *potestas*, it is determined, (subject to what has been said as to *dolus*,) by death, alienation or manumission of the slave before *litis contestatio*[12]: a mere claim of liberty does not destroy the noxal action, but suspends it so that if the man proves a slave it will go on: if he proves free it is null[13]. A *bona fide*

[1] 9. 4. 12, 21; 47. 2. 42. 1. The action is often opposed to the "direct" noxal action, 9. 4. 24, 26. 2.
[2] 9. 4. 16, 22. 4, 39. [3] 9. 4. 24. [4] 9. 4. 24, 25, 39. 2.
[5] 9. 4. 26. *pr.*; 47. 2. 42. 1. [6] 9. 4. 39. 3. [7] In. 4. 12. 2.
[8] *Ante*, p. 103. As in this action the *intentio* said nothing about surrender, the *ductio* is not *ipso iure* a discharge. Hence the *exceptio doli*.
[9] 21. 1. 23. 8. [10] 19. 1. 11. 12.
[11] 9. 4. 36. Where A's slave was stolen by B and stole from B we are told that A when he got the man back was noxally liable to B (47. 2. 68. 4). This absurd-looking rule is said to be based on public grounds: it conflicts with principle. One noxally liable for a man cannot have a noxal action for his act (C. 6. 2. 21. 1). A *malae fidei possessor* is noxally liable (9. 4. 13), and if the slave has been, since the act, in such a position that the action could not arise it cannot arise later (G. 4. 78; D. 9. 4. 37, *etc.*, *post*, p. 107).
[12] 9. 4. 5. 1, 6, 7. *pr.*, 14. *pr.* Even after action begun, 47. 2. 41. 2, 42. 1.
[13] 9. 4. 42. *pr.*

abandonment releases the master, but the slave himself will be liable, if alive and free, (assuming the master not to have been sued,) and cannot surrender himself[1], and so will anyone who takes possession of him[2]. If a *servus noxius* is captured by the enemy, the right of action revives on his return[3]. If a *civis* becomes a slave after committing a wrong his *dominus* is liable[4].

There is an important rule, that there can be no noxal liability between master and slave, and thus, whatever changes of position take place, an act by the slave against his *dominus* having *potestas* can never create an action either against another owner or against the slave if freed[5]. Moreover, it is finally extinguished if the slave comes into the hands of one with whom the action could not have begun[6]: where the injured person acquires the slave the action will not revive on sale or manumission. This is the Sabinian view which clearly prevailed in later law[7]. It is immaterial how temporary or defeasible the *confusio* may be. A buyer redhibiting, either by agreement, or by the *actio redhibitoria*, has no noxal action for what the slave has stolen while his[8], though as we have seen there is a right of indemnification, with the alternative of leaving the slave with the buyer, *noxae nomine*[9]. Even though the sale be annulled, the slave being *inemptus*, there can be no *actio furti*[10].

The case of legacy of the slave gives rise to some distinctions. Gaius, dealing with *legatum per damnationem*, in which the property is for the time being in the *heres*, says that, if the slave has stolen from him either before or after *aditio*, he is entitled, not to a noxal action, but to an indemnity, before he need hand over the slave[11]. Julian, dealing no doubt with a *legatum per vindicationem*, says that in a case of theft before *aditio*, there is an ordinary noxal action[12]. What is said of *legatum per damnationem* is no doubt true of any case in which the ownership is for the time in the *heres*. He is noxally liable for such slaves: Africanus[13] tells us that if he is noxally defending such

[1] G. 4. 77; In. 4. 8. 5; 47. 8. 3; C. 4. 14. 4.
[2] *Ibid.*; 9. 4. 7. *pr.*; 13, 21. 1; 47. 2. 65; P. 2. 31. 8. It avails against *heres*, but *iure dominii*, 9. 4. 42. 2. This is all that the word *perpetua* seems to mean. *Donatio mortis causa* of a *servus noxius* was a gift only of what he was worth as such, 39. 6. 18. 3.
[3] 13. 6. 21. 1; 47. 2. 41. 3. [4] In. 4. 8. 5; G. 4. 77; cp. P. 2. 31. 7, 8, 9.
[5] Unless he "contrect" afterwards, 47. 2. 17. *pr.*, 1; G. 4. 78; In. 4. 8. 6; C. 3. 41. 1; 4. 14. 6. For the restriction to the case in which he is actually in *potestas*, see 47. 2. 17. 3. The stolen property could be recovered from any holder, C. 4. 14. 1.
[6] 47. 2. 18.
[7] *Ib.*; 9. 4. 37; G. 4. 78; In. 4. 8. 6. Gaius tells us that the Proculians had held that the action revived when the confusion ceased—a rule which would have most inequitable results.
[8] 47. 2. 17. 2; *h. t.* 62. 2. [9] *Ante*, p. 62; D. 21. 1. 31. 1, 52, 58; 47. 2. 62. 2.
[10] 47. 2. 68. 3. [11] 30. 70. *pr.*, 3.
[12] 9. 4. 40, *a fortiori* if it was after *aditio*. In 47. 2. 65 Neratius gives the rule and the reason.
[13] 47. 2. 62. 9. A rule which Ulpian expresses with perhaps more regard for principle when he says there was, in such a case, absolution, *officio iudicis*, 9. 4. 14. 1. As to heir's duty of warranty as to *noxa*, *ante*, p. 16.

a slave who is a *statuliber*, and the condition is satisfied during the *iudicium*, he is entitled to absolution.

If the *confusio* arises only after *litis contestatio*, the vendor is not released, any more than he would be in the same case, by selling to a third person, or by freeing the slave, and here, as there, since he has deprived himself of the power of surrender, he must pay in full[1].

These rules give rise to a difficulty, at least apparent. If the event which divests the ownership of the defendant occurs before *litis contestatio*, a new action can of course be brought against the new owner. If it occurs after *litis contestatio* it might seem that any fresh action might be met by an *exceptio rei in iudicium deductae*. It is clear however that, at least in the case in which the slave became free, this was not the case: it was the duty of the Praetor to order the transfer of the *iudicium* to him[2]. This way of putting the matter shews that the action was one and the same: it was only the *iudicium* that was transferred—the intervention of the Praetor being needed to make the necessary changes in the formula[3]. In like manner the ordinary noxal action and that *sine noxae deditione* against *dominus sciens* were really one and the same, so that the plaintiff could pass freely, *pendente iudicio*, from either to the other[4]. The act was done by the slave; the obligation centred in him, and the action, in all its forms, is really one. Hence it seems that if the case were one of transfer of ownership the pending *iudicium* would simply be transferred to the new owner in the same way. It may be noticed that, in those cases in which the renewal of the action is declared to be impossible, the fact that the action is already decided is expressly emphasised. In one case it is because *res finita est*[5]. In another it is *quasi decisum sit*[6]. *Translatio iudicii* was a recognised incident of procedure, though there are few texts which deal with it expressly.

Leaving out of account the difficulties of this *translatio iudicii*[7], and the cases in which there is no release because the fact which divested the ownership was caused by the defendant, we must consider some of the cases of transfer. The texts which deal with the case of *statuliber* lay down clear rules but have been abridged, at least, by the compilers, and shew that there were disputes among the earlier lawyers[8]. It is laid down, on the authority of Sabinus, Cassius and Octavenus, that the *heres*, noxally sued, may surrender the *statuliber*, and is thereby released, as having transferred all his right[9], being required, however,

[1] 6. 1. 58; 9. 4. 14. 1, 15, 37, 38. *pr.* [2] 9. 4. 15.
[3] In 3. 2. 14 the slave made *heres* is noxally liable as *heres*, since there was a pending action. The text does not illustrate the present point.
[4] 9. 4. 4. 3. [5] 9. 4. 3. 3. [6] 47. 2. 42. 1; 47. 8. 3. Cp. 9. 4. 14, 15.
[7] Koschaker, Translatio Iudicii. See also Girard, Manuel, 1006, and *post*, App. II.
[8] Koschaker, *op. cit.* 199 *sqq.* [9] 9. 4. 15; 40. 7. 9. 2.

to give security against any act of his, whereby the man may become free[1]. The doubt which existed may have been due to the fact that as the man passes into the *potestas* of the injured person the remedy is for ever destroyed, while the condition may immediately supervene and release the offending slave[2]. On the Proculian view, which allowed revival of noxal claims when the *confusio* ceased[3], the difficulty would not have arisen, at least, if the surrender had been without judgment. If the condition arrived, pending the noxal action, the possibility of surrender was at an end and we are told that the defendant was released[4] (the *heres* having however to hand over to the injured person any moneys he had received under the condition, in so far as they were not paid out of the *peculium*, which belonged to him[5]). This rule has been remarked on as exceptional, as, in other cases in which the ownership passes, the defendant is not released from his obligation to pay the damages[6]. This seems to be the law in the case of death[7], and it is clearly laid down for the case in which the slave is evicted, while the noxal action is pending[8], and for that in which a slave is noxally surrendered while another noxal action is pending[9]. On the other hand, where a fideicommissary gift takes effect, or the condition on a legacy of the slave arrives, before judgment in the noxal action, Ulpian treats the case as on the same level with that which we are discussing, as he does also that of one declared free in an *adsertio libertatis* while a noxal action is pending: he says that the noxal *iudicium* becomes *inutile*[10].

The difference is rather formal than important. Though the owner of the dead slave is still liable he is released in classical law by handing over the corpse, or part of it[11]. And the evicted defendant need not hand over the man to the successful claimant till security is given for the damages in the noxal action[12]. And in the case in which he is noxally surrendered to A while B's noxal action is pending, though judgment will go for B, there is no *actio iudicati*[13]. It is probable that the original starting-point is that of continued liability, if the divesting fact occur after *litis contestatio*. The inequitable effect of this led to modification, arrived at, in a hesitating way, by the help of a gradually increasing freedom in the conception of *translatio iudicii*. In the case of the *statuliber*, the supposed slave declared free, the slave freed by *fideicommissum*, there was absolute release

[1] 9. 4. 14. 1. [2] 40. 7. 9. *pr.* Cp. 47. 2. 62. 9.
[3] *Ante*, p. 107. [4] 9. 4. 14. 1—16.
[5] 47. 2. 62. 9, *post*, Ch. XXI. [6] Koschaker, *loc. cit.*
[7] *Post*, p. 111. [8] 6. 1. 58. [9] 9. 4. 14. *pr.*; cp. 9. 4. 28.
[10] 9. 4. 14. 1, 42. *pr.*; cf. 40. 12. 24. 4. The *absolutio* is however *officio iudicis* in the case of satisfaction of the condition (9. 4. 14. 1). In the other case eviction does not mean that he was never liable: a *b. f. possessor* is liable. As to the case of *adsertio*, *post*, Ch. XXVIII.
[11] *Post*, p. 111. [12] 6. 1. 58. [13] 9. 4. 14. *pr.*

with *translatio iudicii* In the case of death where this was inconceivable, there was no release, but from early times surrender of the corpse sufficed In the case of eviction there was no release, but the man need not be handed over without security for the damages in the forthcoming noxal judgment It is not clear why this case was not grouped with those of *statuliber*, etc, since here *translatio* was quite feasible It is true that in case of eviction there has, in strictness, been no divesting fact, the legal ownership is unchanged, but this is equally true of the case of the slave declared free in *adsertio libertatis* In the case of noxal surrender the solution was not release, but refusal of *actio iudicati* No doubt it is possible to find distinctions in these cases, but it seems more rational to regard the rules as a gradual development, in which the Sabinians took the progressive side, but which was hardly complete even in the time of Ulpian

Some details are necessary to complete the general account of the action It must be defended where the wrong was done[1] *Compensatio* is allowed, at least in Justinian's time[2] Upon surrender the surrenderee normally becomes owner, but not if the surrenderer was not owner, or the slave was *ductus* because the *dominus* was absent or refused to defend or surrender In such a case the surrenderee *iuste possidet*, and has the Publician action[3], whether he knew, or not, that the person sued was not the owner[4]

There is a curious text[5] dealing with the *exceptio doli*, in which Ulpian, after observing that a vendee is not liable for his vendor's *dolus*, and therefore if he has need to vindicate the *res*, cannot be met by an exception based on fraud of his vendor, adds that this is true of other transactions such as *permutatio* which resemble sale, but quotes a view of Pomponius that it is not true in case of noxal surrender This is hard to justify[6] It is clear that the noxal claimant could have recovered the slave from the person aggrieved by the *dolus*, if he had still held him, and there seems no reason why the *dolus* of the intermediate possessor should affect the matter The rule seems in conflict with the general priority assigned to the noxal claim, which has already been noted and is illustrated by the treatment of cases where the noxal claim and a claim of ownership are competing If the possessor is sued by A for the slave, and by B on a *noxa*, and judgment on the *vindicatio* comes first, the slave need not be handed over till security is given for what may have to be paid on the noxal claim[7], while if judgment in the

[1] 9 4 43 [2] 16 2 10 2 [3] 6 2 5 6
[4] *Ante* p 105 nn 5 6 [5] 44 4 4 31
[6] The reason in the text *i e* that it was a *lucrativa adquisitio* can hardly apply to this case, which often had nothing *lucrativa* about it
[7] 6 1 58

noxal action comes first and the slave is surrendered the surrenderer is not liable for failure to deliver under the *arbitrium iudicis*[1]

It may be convenient to group together the rules as to the effect of death of the slave during the proceedings If the slave died before the action was brought, or before *litis contestatio*, the *dominus* was released, even though he had *dolo malo* ceased to possess, at the time of the death, unless indeed he were already *in mora* in accepting the *iudicium*[2] If the death occurred after *condemnatio*, the primary obligation is as we have seen for a sum of money surrender is now only a facultative mode of discharge[3] It appears therefore that death of the slave would not release An imperfect text of Gaius seems to discuss this case, and the question whether the surrender of the slave dead would suffice[4] The Autun commentary[5] on Gaius carries the matter further It declares that after condemnation, the death does not release but the *dominus* may surrender the body or part of it, though in the case of animals this could not be done The text mentions a doubt, whether hair and nails were a part for this purpose, perhaps because they could not be identified, and so, as Mommsen says, would be no check on a false statement that the slave was dead[6] The text is very imperfect, but it apparently goes on to discuss, without determining, the question whether this right existed if the death was caused by *culpa* of the *dominus*, or in lawful exercise of his power of punishment It must be noted that all this refers only to death after *condemnatio*, and that no trace of these rules survives into Justinian's law The questions therefore remain what was the rule in Justinian's time as to death after *condemnatio*, and what was the rule in case of death, *pendente iudicio*? It seems to be universally assumed that death after *condemnatio* did not in any way release the defendant, in Justinian's law This solution, consistent with the subordinate position of surrender after condemnation[7], is probably correct But it cannot be deduced with certainty from anything said in the sources, and it represents an increased burden on the *dominus* As to death after *litis contestatio*, but before judgment, it may be assumed that the rule was no severer in classical law, and that thus a corpse might be

[1] 5 3 20 5, 6 1 58 The complications of 9 4 38 2 and 47 2 35 1 do not concern us The *dominus* is liable for any proceeds of the wrong which reach him *e g* by *cond furtiva*, 13 1 4 We are told that there is *conductio* to the extent of profit with a power of surrender, *in residuum* This is an allusion to *a fu ti* a confusion of language not uncommon in the texts Cp C 3 41 4 D 4 2 16 1 47 1 2 3
[2] 9 1 1 13, 9 4 5 1 7 *pr* 26 4 39 4 [3] *Ante* p 105
[4] G 4 81 [5] §§ 82—87 See Ed 4 of Krueger and Studemund's Gaius
[6] Z S S 20 236 M seems to hold that in case of animals there was no liability at all But it is clear on the text that the right to surrender the corpse was a privilege not a further liability He links the rule with expiatory surrender for breach of *foedus* Liv 8 39
[7] Girard *loc cit*

surrendered, and the view is most widely held that in later law death did not release[1]. This view rests on the following considerations:

(i) It is clear that death of the offending animal at this stage did not release the *dominus* in the *actio de pauperie*[2]. Analogy suggests the application of the same rule to the case of slaves, though the actions were not identical in all respects.

(ii) In one text[3] it is said that one who has accepted a *iudicium*, on account of a slave already dead, ought to be absolved, *quia desiit verum esse propter eum dare oportere*. This would hardly be said if death after *litis contestatio* discharged the liability.

(iii) Several texts dealing with one who has *dolo malo* ceased to possess, make it clear that, in that case, death after *litis contestatio* did not discharge[4], and one of them uses words which may be read to imply that the conditions of this action are, in this respect, the same as those of the ordinary noxal action[5]. But these texts lose much of their force in view of the well-known rule that *dolus pro possessione est*[6].

(iv) The formula expresses payment and surrender as alternatives, and in alternative obligations the impossibility of one alternative did not release from the duty of performing the other[7]. But as we shall shortly see the obligation differed in certain ways from an ordinary alternative obligation[8].

There has been much discussion among commentators as to the essential character of noxal liability as contemplated by the classical lawyers[9]. Is the master's liability personal or is he merely defending, as representative of the slave, primarily liable? That a slave is in theory civilly liable for his delicts is shewn by a text which says that he is liable, and *remanet obligatus* after manumission[10]. It is certain however that he could not himself be sued. This has led some writers to hold that the master's liability is as *defensor* of a person who cannot defend himself, an opinion which finds indirect support in the texts[11]. Thus there are texts which shew that the action against the slave after manumission is the same as the noxal action, merely transferred to him[12]. Other texts expressly describe the action as *defensio servi*[13].

[1] Girard, *loc. cit.*, and N. R. H. 11. 435.
[2] The owner can recover, *ex* Aquilia, the amount he will have to pay owing to inability to surrender and can cede his actions in lieu of surrender, 9. 2. 37. 1; 9. 1. 1. 16. So we are told that *de pauperie* is extinct if the animal die before *litis contestatio*—which implies that it was not ended by death after, 9. 1. 1. 13.
[3] 9. 4. 42. 1. [4] 9. 4. 16, 26. 4, 39. 4. [5] 9. 4. 26. 4.
[6] 50. 17. 131, 150, 157. Lenel, Ed. Perp. § 90.
[7] Windscheid, Lehrbuch, § 255. [8] *Post*, p. 113.
[9] Girard, N. R. H. 12. 31 *sqq.*; Kipp, reviewing foregoing, Z. S. S. 10. 397 *sqq.*; Sell, Noxalrecht, 23—96 *etc.*
[10] 44. 7. 14. [11] Sell, *loc. cit.*
[12] *Ante*, p. 108. [13] 9. 4. 33; Sell, *op. cit.* 76.

The expression is of course also applied to defence of property against claims[1], but one text is cited to shew that this could not be its meaning here, since in the case of a son, failure to defend him noxally would not involve loss of him[2]. Similar inferences are drawn from the use of the expressions *pro servo, servi nomine*, and the like[3]. Moreover, it did not imply *culpa* in the *dominus*: such an idea is inconsistent with the rule, *noxa caput sequitur*, with the rule that an *impubes dominus* was liable[4], and perhaps with the power of surrender.

On the other hand the *defensio* cannot be understood in any procedural sense. It has none of the ordinary attributes of representation. The *vocatio in ius*, the formula, the judgment, the *actio iudicati* all deal with the *dominus*, and though he cannot be compelled to defend the slave, we have seen that he can be compelled to produce him as if he were being sued for a piece of property[5]. Nor can much stress be laid on the use of the word *defensor*, since, while the liability of a *defensor* was exactly the same as that of the person defended[6], the master's liability differed from that of the man himself, as the latter had no power of surrender. And though primitive law does admit guilt in animals, the owner's liability can hardly have been representative: Justinian indeed calls the owner the *reus*[7], and the actions are closely analogous. Moreover when noxal actions were introduced it is doubtful whether either son or slave could be civilly liable, and there was then no representation in lawsuits. If we refer the idea to classical times it is no longer true that a son could not defend himself. And the common use of such expressions as *rem defendere*, and *pro fundo*[8], destroys the force of such terms applied to slaves.

The fact seems to be that noxal liability is entirely *sui generis*: its form is due to its descent from ransom from vengeance. It has points of similarity with both direct and representative liability, and expressions are used implying one or the other according to the needs of the moment[9].

Another question which has divided commentators is that whether the right of surrender is alternative or facultative[10]. It is clear that, after *condemnatio*, which is primarily for a sum of money, the surrender is merely facultative, *in solutione*[11]. Apart from the state of things after condemnation, there are many texts which treat the payment as the primary, the surrender as a subsidiary, liability[12], and several which put

[1] 6. 1. 54; 44. 2. 9. 1. Sell, *loc. cit.* [2] 9. 4. 33.
[3] 9. 4. 39. 1; 2. 9. 2. 1. [4] 47. 8. 2. 19. Girard, *loc. cit.*
[5] *Ante*, p. 101. [6] Roby, Roman Private Law, 2. 48.
[7] In. 4. 9. *pr.* [8] 39. 2. 9. *pr.*, 9. 4. 38. 2, *etc.*; Girard, N. R. H. 12. 31 *sqq.*
[9] Nothing turned on the distinction: it may have been more readily regarded as representative as there was no logical ground for personal liability.
[10] Former view, Girard, N. R. H. 11. 440; latter, Sell, *op. cit.* 11 *sqq.* It is an old topic. Haenel, Dissensiones Dominorum, 188.
[11] 42. 1. 6. 1. *Ante*, p. 105. [12] 9. 4. 1; 42. 1. 6. 1; 47. 2. 62. 5, *etc.*

surrender in the forefront, and treat payment as subordinate[1]. But the view that surrender is facultative, (*in solutione*,) cannot now be held, for Lenel has shewn that the *intentio* sets forth the payment and surrender as alternatives[2]. Girard infers that it is a case of alternative obligation and cites several texts as stating it so[3]. But since impossibility of one alternative did not release from the duty of satisfying the other[4], and death of the slave did release the *dominus*, he considers that it was only after *litis contestatio*, when death did not release, that it became alternative. To this it has been objected that the *intentio* cannot express any kind of obligation different from that which was due before, and that in a true alternative obligation the *iudex* would estimate the value of the creditor's right, and fix the *condemnatio* accordingly, so that the *ea res*, the money condemnation, would not exceed the value of the slave[5]. In our case it might do so: it was the *litis aestimatio* which a freeman would have to pay for the wrong[6].

In fact, here too, the character of the obligation is determined by its history: it is *sui generis*, and cannot be fitted into the normal moulds. In nothing is this more clearly shewn than in the retention of the power of surrender in the *condemnatio*. It has been said that this is *arbitrium*, and the *actio* an *actio arbitraria*. This view is based on a text of the Institutes[7], which, however, as Girard points out, says merely that an *actio arbitraria* may result in a noxal surrender[8]. The power of surrender is in fact very different from *arbitrium*: here the discretion is with the defendant; there it is with the *iudex*.

The master's freedom from personal liability depended on a total absence of complicity. If he was ignorant or forbade the act his liability was noxal[9]: if he took part, or aided, or connived, his liability was personal and *in solidum*[10]. There is a good deal of information as to the state of mind which entailed this liability *in solidum*. Of course, *iussum* sufficed[11]. But failure to prohibit, knowing, and having the power, is enough, and this is implied in the word *sciens* in the Edict[12].

[1] 2. 10. 2; 9. 4. 2. *pr.*, *etc.*

[2] Ed. Perp. 155. He shews that the intention is set forth in 9. 1. 1. 11, in words which, seeming to be the end of a comment, are in fact the words commented on in the following text.

[3] *loc. cit.* *Lex* Rubria, 22; D. 9. 1. 1. *pr.*; G. 4. 75; In. 4. 8. *pr.*

[4] Dernburg, Pand., 2. 79; Savigny, Oblig. § 38; Van Wetter, Oblig. 1. 208.

[5] Kipp, Z. S. S. 10. 397 *sqq.*, reviewing Girard.

[6] 9. 4. 1, 2. *pr.*, *etc.* [7] In. 4. 6. 31.

[8] *loc. cit.* He cites 5. 3. 40. 4. Other cases, *post*, p. 123. Sell, *op. cit.* 160. Accarias, Précis, § 886, thinks them *arbitrariae* in special sense, and cites two texts (9. 4. 14. 1, 19. *pr.*) which shew only that in some cases there was room for *officium iudicis*. *Ante*, p. 107.

[9] 9. 4. *pass.*; C. 3. 41. 2.

[10] P. 2. 31. 28; C. 3. 41. 4; 9. 4. 2, 3, 5, *etc.* As to *cond. furtiva*, C. 3. 41. 5. In *rapina*, fully liable for men *coacti* by him, 47. 8. 2. 4. So under L. Cornelia where slaves to his knowledge took up arms to seize a property by force, 48. 8. 3. 4. The rules penalising writing gifts to yourself covered dictating them to a slave, 48. 10. 15. *pr.* *Positum* to danger of passers is hardly an instance, 9. 3. 5. 10.

[11] 47. 10. 17. 7. [12] 9. 4. 3; 47. 6. 1. 1; 47. 10. 9. 3.

If the slave refused to obey or was out of reach or was *proclamans in libertatem*[1], the master was not personally liable[2], nor was he where, whatever his state of mind, he was not *dominus* at the time of the delict[3]. Where the *dominus* was liable *in solidum*, death, sale or manumission of the slave did not release him[4], but, as in all delict, the *heres* was not liable[5]. The personal liability and the noxal liability were essentially one[6], and thus one liable *in solidum* could be sued noxally[7], and the plaintiff could at any time before judgment change from one to the other. And one action excluded the other and thus one sued *in solidum*, and absolved as not *sciens*, could not afterwards be sued noxally[8]. If the slave was alienated before action the buyer became noxally liable, while the vendor was still liable *in solidum*[9]. If the former was sued, Ulpian cites Pomponius as holding that the vendor was released[10]. Though the obligation is one the parties are different[11]. If the slave was freed there is some difficulty as to his liability. If he had obeyed his master's *iussum*, he was excused as being bound to obey[12], unless the thing was so serious that even a *dominus* ought not to be obeyed therein[13]. Celsus thought that if it were a case of personal liability, it could not be noxal, (a view clearly negatived above[14],) and that thus if the *dominus* was personally liable the slave was not (so that absence of prohibition would serve to excuse him), but that, as the XII Tables speak generally of delicts by a slave as noxal, the liability in the case of failure to prohibit would survive against the slave in that case, but not in the case of the later *leges*, *e.g.* the *lex* Aquilia. But Ulpian, who tells us these views of Celsus, remarks that mere absence of prohibition was no excuse in any case[15], and that the opinion generally held was that due to Julian, *i.e.* that the rule of the XII Tables, and the words *noxiam noxit*, applied to the later *leges* as well, and thus in all delicts, if the owner's participation was short of absolute *iussum*, the slave was liable and remained so after manumission. The *obligatio in solidum* burdens the *dominus*, but does not release the slave[16]. It must be noted that *iussum* here means command, not, as in many places, authorisation.

[1] In which case *dominus* has no power over him, *post*, Ch. XXVIII.

[2] 9. 4. 4. *pr.*, 1. [3] 9. 4. 2. 1, 4. 1. [4] 9. 4. 2. 1, 2.

[5] 9. 4. 5. 1. So where the action was *in solidum* on any ground, 9. 4. 16.

[6] As in case of noxal liability of *dominus* and personal liability of slave, *ante*, p. 108.

[7] Sell, *op. cit.* 148—155; 9. 4. 4. 2. [8] 9. 2. 4. 3; *ante*, p. 108.

[9] 9. 4. 7. [10] 9. 4. 7. 1.

[11] The texts suggest that *litis contestatio* barred, but it is not clear, and analogy suggests that the bar only arose after judgment (Sell, *op. cit.* 169—172), while 9. 4. 17. *pr.* treats this as the civil law rule, relieved against by the Praetor.

[12] 9. 4. 2. 1.

[13] *Atrox iniuria* or killing not in defence of *dominus*, 47. 10. 17. 7, 8; 48. 24. 11. 7. Similar rule in criminal law, *ante*, p. 94.

[14] 9. 4. 4. 2, 3.

[15] 9. 4. 2. 1. The reasoning of Celsus does not distinguish clearly between command and non-prohibition.

[16] *Ib.*; 9. 4. 6. Marcellus and Julian: it was not a conflict of the Schools. As the damages would be the same and there could be no surrender it may be assumed that action against one left no action surviving against the other even in Justinian's time.

If a slave has committed several delicts against the same or different persons, the master is released by delivering him under the first judgment[1], *e.g.* where he stole a man and then killed him[2]. This seems to lead, from the rules already stated[3], to the conclusion that the last of several plaintiffs will keep the slave, for all the others in turn will be noxally liable. This squares well enough with the idea of vengeance[4], and though it looks odd in later law, it is not irrational[5].

The case of existence of minor rights in the slave has already been mentioned: it will be convenient to set forth the rules in a connected form. We are told that a *dominus* has *potestas* over a pledged slave, if he has the means to redeem him[6], and that in no case is the pledgee (or *precario tenens*) noxally liable[7]. The question arises: what is the state of the law where the debtor cannot redeem him? As we have seen, if the noxal claimant has brought the slave before the court, then, if the *dominus* is absent, or refuses to defend, the man can be *ductus*, unless the pledge creditor will take up the defence. But this does not meet the very possible case of the slave's being kept out of the way by the pledge creditor. It seems that there must have been some machinery for bringing him before the court. The same question arises in relation to usufruct, which is in general placed on the same level, in this connexion, with pledge[8].

Apart from this matter, the rules are in the main simple. Usufructuary is not noxally liable, and has therefore, in accordance with principle, a noxal action against the *dominus*[9], surrender by whom, even before condemnation, releases him, and ends the lesser right by *confusio*[10]. If an owner, sued noxally by a third person, is condemned, we have seen that he is released only by paying or handing over the unrestricted ownership. If there is an outstanding usufruct, he can apply to the Praetor, on the opening of proceedings in an *actio iudicati*, to compel the usufructuary to pay the value of the usufruct, or cede the right itself, *i.e.* to the *dominus*[11]. If on such facts the owner, instead of defending, hands over the slave, he is released from liability[12]. But lest his *dolus* or *culpa* should injure the fructuary the latter is allowed, there and then, if present, later, if absent, to undertake the defence of

[1] 9. 4. 14, 20. [2] 47. 1. 2. 3. [3] 2. 9. 1, 2.
[4] Girard, N. R. H. 12. 49.
[5] An owner holds subject to liability for delicts past and future: such surrender could hardly be a *dolo malo* ceasing to possess, even where it was for a minor delict.
[6] 9. 4. 22. 2.
[7] *h. l.* 1; any more than a *commodatarius* or depositee would be, *h. l. pr.*; 11. 3. 14. 4.
[8] If *dominus* has hired the slave from fructuary, he is liable to action with noxal surrender. The fact that he is conductor does not alter the fact that he is owner: he is liable precisely because, being owner, he now has the *de facto* control of the slave. This agrees with the rule that the owner was not liable unless he had the means of getting the man from the holder of the lesser right, 9. 4. 19. 1. See Naber, Mnemosyne, 30 (N. S.) 171. Cp. as to pledge, 9. 4. 36.
[9] 9. 4. 18; 11. 3. 14. 3; 47. 2. 43. 12; 47. 10. 17. 9.
[10] 7. 1. 17. 2; 7. 4. 27; 9. 4. 18. [11] 9. 4. 17. 1. [12] *Ante*, p. 103.

the slave[1]. If he will not, his right is barred, unless he is willing to pay the *litis aestimatio*[2]. If he hands him over he is not liable to the *dominus*[3]. These texts agree with the common sense view that, as the owner is released by the surrender, justice requires that the holders of outstanding rights should also be barred. The case is different where the action against the *dominus* has reached *condemnatio*. There is now a judgment standing against him for a sum of money in first instance: *deditio* is now merely facultative. This is a personal liability of his[4]. He can still be released by handing over the slave, but this is not a result of the rule *noxa caput sequitur*; the judgment is against him personally and this rule has now no application: the release is the result of an express statement to that effect in the *condemnatio*, and it requires transfer of complete ownership. Since the injured person has his remedy against the old owner so long as unencumbered ownership is not given to him, justice requires that the holders of minor rights should not be barred, as there is now no question of undertaking the defence. They could therefore enforce their claim at once, and whether they did so or not, the plaintiff, as soon as he knew of the existence of their right, could bring *actio iudicati* against the old owner, at once, without waiting for actual eviction[5].

Three texts create difficulties in the application of this coherent scheme. One seems to give an action against the fructuary in the first instance[6]. The facts seem to be that an action has been brought against him as owner: he denies the fact. It then transpires that he is usufructuary, and he is invited to take up the defence. If he refuses his right is barred. Looked at in this way the text says nothing exceptional[7]. A second text[8] seems to subject the owner's right to surrender one, in whom there is a usufruct, to the condition that the surrender is *sine dolo malo*. This however is not what the text really means. The absence of *dolus* is not a condition on his right of surrender, but on his freedom from liability to the fructuary for any damage to his interests that the surrender may cause[9]. The third text is a more serious matter. It observes that if an owner hands over a pledged slave *per iudicem*, and so is *absolutus*, he is liable, *de dolo*, if it shall appear that the man was given in pledge, and this *actio doli* will be noxal[10]. This is a surrender between *litis contestatio* and *condemnatio*.

[1] 9. 4. 17. 1, 26. 6, 30. [2] 9. 4. 17. 1, 27. *pr.*
[3] 9. 4. 17. 1. The text looks corrupt: in its original form it may have thrown light on the case in which there are several delicts.
[4] *Ante*, p. 105.
[5] 9. 4. 14. 1; 42. 1. 4. 8; 46. 3. 69. If outstanding right be extinguished, liberation of old owner follows. For different views, see Koschaker, Translatio Iudicii, 209, and Elvers, Servitutenlehre, 517.
[6] 2. 9. 3. [7] Elvers, *op. cit.* 515. [8] 7. 1. 17. 2.
[9] See 9. 4. 26. 6. [10] 4. 3. 9. 4.

It seems clear that the liability is to the surrenderee. But he does not suffer since on such facts the pledgee could not claim the slave without paying the claim[1]. It is a possible conjecture that the surrender was after *condemnatio*; the word *absolutus* having been wrongly used for *officio iudicis liberatus*[2]. The hypothesis would be that, after condemnation, the man has been handed over, and the judge, thinking unencumbered ownership has been given, declares the defendant free from liability. But in all probability the text is corrupt or interpolated or both[3,4].

If a delict is committed by several persons, each is wholly liable: judgment and execution against one do not bar action on the delict against the others[5]. The rule was different, at least in some cases, where the wrong was done by several of a man's slaves. Here the Praetor limited the claim to as much as would be due, if the wrong had been done by a single freeman, with restitution in appropriate cases[6]. The rule did not apply to all delicts, and may have gradually extended from the case of *furtum*. The privilege seems to have applied to cases under the Edict as to *bona vi rapta* and to *damnum hominibus coactis*[7]. There was certainly a noxal action, expressly mentioned in the Edict where the wrong was done by the *familia*[8], and one text says that, in noxal cases, the amount that could be claimed was limited to fourfold[9]. The form of the text shews that this was not an express provision of the Edict. The adjoining text[10] observes that the noxal surrender will be only of those who are shewn *dolo fecisse*; not, that is, of slaves among the *homines coacti* who may have been acting innocently[11].

As to ordinary *damnum iniuria datum*, Paul thought the restriction had no application, since each piece of damage was a separate wrong: there were *plura facta* not *unum* as in *furtum*[12]. On the other hand Ulpian allowed it on equitable grounds, if the damage had been done merely *culpa*[13]. And Gaius allowed it generally, because it might be

[1] *Ante*, p. 117, n. 2. [2] See 5. 3. 20. 5.

[3] The next part of the extract is corrupt: the preceding part is treated by Gradenwitz as interpolated (Interp. 144). Our text is incorrect in the Florentine. See also Pernice, Labeo, 2. 1. 202. As the fraud is that of *dominus* the noxal character of the *actio* needs explaining. The point is that the *actio doli* is merely indemnificatory (4. 3. 17) and that complete transfer of the slave, since it would have satisfied the original liability, is all that can be asked for. The words referring to noxal character are not in the Basilica.

[4] Several texts put pledgee on the same level as fructuary, giving him no liability but a right to defend. The only notable difference is that if he refuses and so is barred, his pledge is ended (*nullum enim est pignus cuius persecutio denegatur*), while usufruct, as a substantive *ius*, continues technically till it is destroyed by non-use, 9. 4. 22. 1, 26. 6, 27, 30.

[5] 9. 2. 11. 2. [6] 9. 4. 31; 47. 6. 1, 2. [7] 47. 8.

[8] Cicero, Pro Tullio, 3. 7; 13. 31; D. 47. 8. 2. 14; 50. 16. 40 (which is from that book of Ulpian's Commentary which deals with this matter), 50. 16. 195. 3. Lenel, Ed. Perp. § 187. Cp. P. 5. 6. 3.

[9] 47. 8. 2. 15. [10] *h. l.* 16.

[11] For *damnum in turba factum*, the action lay, it is said, *in familiam*. But it was not noxal and there is no sign that the present rule applied, 47. 8. 4. 15.

[12] 2. 1. 9. No doubt he contemplates distinguishable traces of damage.

[13] 47. 6. 1. 2.

culpa, in any given case[1]. It is clear that there was no Edict as to this, and the varying voices suggest a late development. For *iniuria* it was never allowed: here there were as many delicts as there were slaves—*plura facta*[2]. There was no such provision in *albi corruptio*, partly it seems because of *contempta maiestas Praetoris*, partly as it contained *plura facta*. This seems to have been the operative reason, since Octavenus and Pomponius agreed that it might apply, if they procured an outsider to do it, for here there was only *unum factum*[3]. Whatever be thought of the reasoning it is clear that it ignores the argument drawn from the contempt of the Praetor involved in the act.

The rules are laid down in detail for *furtum*[4]. If the *dominus* is being sued noxally for one, the action as to the others is suspended, so long as the minimum amount is recoverable[5]: when that has been recovered, all actions cease against any owner or any slave manumitted[6], and it is immaterial, (so Sabinus and Cassius held, and Pomponius agreed,) whether the amount was made up in money or in the value of surrendered slaves[7]. Even if the *dominus* has *dolo malo* ceased to possess, and is condemned on that ground, he still has this protection[8]. And, since the value of all the slaves may be less than the fourfold penalty, he is entitled to absolution if he hand over all the slaves who were in the mischief, having pointed them out himself, not the whole *familia*[9]. But previous recovery from a *manumissus* does not protect the *dominus*, who still has the *familia*, as it cannot be said to have been paid *familiae nomine*[10]. The point is that the whole rule is rather an inroad on the rights of the injured person, and to protect the *dominus* in this case would be to exempt him from liability. For the converse reason, if the buyer of a slave has paid, action against the vendor is barred, for the vendee can recover the amount from him under the ordinary warranty, that he was *noxa solutus*[11]. And since legatee or donee of the slave could not so fall back on the old owner, action against them did not bar a claim from the owner of the others[12].

The fact that the rule is a great restriction on the common law liability of the *dominus* led apparently to a very literal interpretation of the Edict. It provides that the *actor* can recover only what would be due from a single offender[13]. If now the injured person had died leaving two *heredes*, Labeo held that each of these, suing, would be

[1] 9. 2. 32. [2] 2. 1. 9; 47. 10. 34. [3] 2. 1. 9.

[4] 47. 6. [5] 47. 6. 1. 3; 47. 8. 2. 15. [6] 47. 6. 3. *pr.*

[7] 9. 4. 31.

[8] 47. 6. 3. 2. In reckoning the amount due, the *condictio furtiva* would come into account, so that he must surrender, or permit to be *ducti*, enough slaves to cover the damages in this as well as in the penal action, 9. 4. 31.

[9] 47. 6. 1. *pr.*; 47. 8. 2. 16. [10] 47. 6. 3. *pr.* [11] *Ib.*

[12] *h. l.* 1. The liability did not of course apply to slaves acquired after the offence, 9. 4. 31.

[13] 9. 4. 31.

actor and could recover the whole of the limited amount, not being barred by action by the other, provided of course that the common law liability was not overstepped[1]. Cervidius Scaevola repudiates this, on the ground that it would be unfair, and a fraud on the Edict, to allow the *heredes* to recover more than their ancestor could[2]. In the same way if the deceased had recovered only part, each of the heirs could recover all that was still due. Scaevola confines them to their share[3].

There were special rules in the case of *Publicani*. Two separate Edicts dealt with their liability for acts of employees[4], but the compilers of the Digest have so confused them in statement, that it is not possible to make out, with certainty, the original content of each. As they appear, they overlap, but it is now generally agreed that one of them dealt with *ademptio vi* and *damnum*, done in the course of collecting the revenue, by the *publicanus*, or his employees, and the other with *furtum*, not necessarily in the actual course of collection[5]. Whatever differences there may have been between the two sets of provisions, the compilers seem to have designed to assimilate them, and they have carried over words from each Edict to the other, so that they are both made to refer both to *furtum* and *damnum*. As to the actual content of the liability, Karlowa[6] detects many differences between the actions, but the evidence for most of them is unconvincing. He is probably right in holding that the Edict dealing with *ademptio* did not apply to the provinces. He infers from a comparison of some texts, really inconclusive[7], that the *familia* in the Edict as to *furtum* included only slaves, or apparent slaves, of the *publicanus* sued, while it is clear that in the other case, it covered all persons employed on the business[8]. He thinks that the action under the Edict as to *ademptio* was not penal, but the whole content of it as recorded is opposed to this view. He thinks that, in the case of *furtum*, the action *sine noxae deditione* was only against the owner, while in the other it was certainly against any of the *publicani*[9].

The rules as to the case of *ademptio vi* are fairly fully recorded. To guard against forcible seizure by the *publicani* or their men, they were made liable for any such seizure or damage, by themselves or their staff[10], in the course of the collection, any *socius vectigalis* being

[1] *i.e.* his share of what the late owner could have recovered apart from this Edict.
[2] 47. 6. 6.
[3] *Ib.* It must be added that the whole rule applied only where the master was innocent: if he was *sciens*, he could be sued, *suo nomine*, and noxally for each of the slaves, 47. 6. 1. 1. No doubt the liabilities are alternative.
[4] 39. 4. 1. *pr.*; *h. t.* 12.
[5] Lenel, Ed. Perp. (French ed.) § 138; Karlowa, R. R. G. 2. 35.
[6] *loc. cit.* [7] 39. 4. 1. 5; 39. 4. 13. 2; 50. 16. 195. 3.
[8] He points out that in the few words on the Edict as to theft, nothing is said as to free employees, 39. 4. 12. 2; cp. 39. 4. 1. 5.
[9] This rests merely on the use of *dominus* in the singular, 39. 4. 12. 1, Lenel, *loc. cit.*
[10] 39. 4. 1. Under colour of the abolished *pignoris capio*.

liable[1]. The action was for twofold within a year, *in simplum* after a year[2], and, as in the last case, the employer was released by payment of what would have been due if the wrong had been done by one freeman[3]. Though the term *familia* usually covers all slaves, it applied in this case only to persons employed in the collection[4]. There must be a demand for the production of the slave or slaves, or of all the slaves, so that the actual wrongdoer could be pointed out[5]. They might not be defended in their absence[6], but if they were produced there would be an ordinary noxal action[7]. If they were not produced there was a *iudicium sine noxae deditione*, whether the defendant could not or would not produce them, and though they were no longer in his *potestas*[8].

The action, though severe in some respects, was mild in others, since the penalty was only twofold, and this included the *res*, while by the ordinary action it would be in some cases fourfold. Accordingly the injured person, if he could prove the identity of the slave, might proceed by the ordinary action instead[9]. How far these rules may be extended to the Edict as to *furta* is uncertain. That it was an independent Edict is shewn by the fact that Gaius discusses it in his commentary on the Provincial edict, and Ulpian in the part of his commentary which dealt with theft: the other Edict was treated under the heading *de publicanis*[10]. It provides for an action *sine noxae deditione*, in the case of *furtum* by the *familia publicani*, if the wrongdoer is not produced, whether it was in the collection or not[11]. It is probable from the allusion to *publicanorum factiones*[12] that it applied whether they were slave or free. It can hardly fail to have been penal[13], and probably the penalties were those of *furtum*. The *publicanus* remained liable though he sold or freed the slave, and even if the slave ran away[14]. The text adds that if the slave is dead the *publicanus* is freed, since he has not the *facultas dedendi*, and has not been guilty of *dolus*[15].

Other cases of exceptional liability may be shortly stated. The special liabilities of *exercitor navis, caupo* and *stabularius* included a

[1] *h. t.* 3. 1.
[2] 39. 4. 1. *pr.* Restitution before *litis contestatio* ended the claim, 39. 4. 1. *pr.*, 5. *pr.* The text adds that it will discharge even after *litis contestatio*. This is not an application of the rule *omnia iudicia absolutoria*: restitution is less than the action would give. Probably Tribonian.
[3] 39. 4. 3. 3. [4] 39. 4. 1. 5; 50. 16. 195. 3. See 21. 1. 1. 1; *h. t.* 25. 2, *etc.*
[5] 39. 4. 3. 2. [6] 39. 4. 2. [7] 39. 4. 3. *pr.*
[8] 39. 4. 1. 6. The action being penal lay against *heres* only to extent of his profit, 39. 4. 4. *pr.* If several *publicani*, liable only *pro parte*, and, so enacted Severus and Caracalla, for any deficit not recoverable from the others, 39. 4. 6.
[9] 39. 4. 1. 3—4. [10] Lenel and Karlowa, *locc. citt.*
[11] 39. 4. 12. 1. As to corruption and interpolation, Lenel, *loc. cit.*
[12] 39. 4. 12. *pr.* Cp. *h. t.* 13. 2.
[13] Lenel, *loc. cit.* Karlowa contra, *loc. cit.* He cites the rule that it was perpetual (39. 4. 13. 4), but so were many penal actions. See *ante*, p. 34, and *post*, p. 122. And the rule here may be a Tribonianism. Gaius would hardly say: *hanc actionem dabimus*.
[14] 39. 4. 13. 2.
[15] *h. l.* 3. The remark would apply equally to the case of a runaway: the rule seems to be the settlement of a dispute and may be due to Tribonian.

liability *in solidum* for what they had received, *salvum fore*, without reference to such *dolus* or *culpa* as an ordinary contractual action would have required[1]. Thus even if the thing were stolen by a *servus exercitoris* there was no *actio furti noxalis*, since the *exercitor* was liable personally in full, under this special Edict[2]. The action was not delictal or penal: it was perpetual and available against the *heres*[3]. A still more striking result of its character is that it was available though the injured person were the owner of the slave, and thus would be noxally liable for him[4]. But there was a further liability which more nearly concerns us. There was an action *in factum* against such persons, for any theft or[5] *damnum* committed by their employees in the course of the business, beyond their liability for goods they had insured[6]. The action was delictal: it involved proof of the theft or *damnum*, and it was *in duplum*[7]. It was *perpetua* and availed to but not against the *heres*[8]. Death of the wrongdoer did not release the principal, if it was a *servus alienus*, for as he was definitely hired for the work, the liability was *in solidum*[9]. If it was his own slave, the liability was noxal, and thus it may be presumed that death released[10].

We have now to discuss the questions which arise where the facts which raise a noxal claim occur in connexion with a *negotium* between the parties, so that there is, or might conceivably be, an action *ex contractu*. It will be convenient to consider two distinct cases:

(i) Where there is a contract between the parties, and the slave of one of them commits a delict, in relation to its subject-matter.

(ii) Where the slave himself is the subject of the *negotium*.

(i) If in the carrying out of a contract between two persons, one of the parties commits an act which is both a breach of the contract and a delict, it is clear[11] that in the classical law the person injured could proceed in either way. But the case was different if the person who actually did the wrong was the slave of the party. Here the slave has

[1] 4. 9. 1. *pr.*, 3. 1—2; 47. 5. 1. 4. [2] 4. 9. 3. 3.
[3] *h. l.* 4. [4] 4. 9. 6. 1.
[5] As to theft there was a special Edict (47. 5): as to *damnum* the action followed the same rule, but there may have been no Edict, Lenel, *op. cit.* § 78.
[6] 47. 5. 1. *pr.*, 4. [7] 4. 9. 7. 1; 47. 5. 1. 2; In. 4. 5. 3.
[8] 4. 9. 7. 6; In. 4. 5. 3.
[9] 4. 9. 7. 4; 47. 5. 1. 5. The reason of its being noxal is in one case said to be that one using his own slaves must use such as he has, while one who hires must use care in selection (4. 9. 7. 4). In the other it is said that some consideration is due to one afflicted with a bad slave (47. 5. 1. 5). It is in fact an application of what seems to have been accepted as a first principle, that a man cannot be liable for his slave's act beyond his value. Lenel however (Ed. Perp. § 136) attributes the restriction to an express provision of the Edict, being led to his view by the form of Ulpian's remarks.
[10] Theft severely dealt with because of the circumstances, *e.g.* theft from wreck, was still so where the wrongdoer was a slave (47. 9. 1. *pr.*). Conversely the rule that *Vi bonorum raptorum* was *annalis* applied where it was noxal, so that a freed slave could not be sued after the year, though the master had not been: the actions were the same, 47. 8. 3. See *ante*, p. 115.
[11] Reff.: Accarias, Précis, § 856. We are not here concerned with the barring effect of one action on the other. Girard, Manuel, 397.

committed a wrong for which a noxal action will lie. It was not the slave's *negotium* and there can be no question of *actio de peculio*[1]. On the other hand the master who made the contract has personally committed no breach of it. Hence there arose a difference of opinion, mainly expressed in relation to the case where slaves of *colonus* or *inquilinus* negligently burnt the property. Sabinus held that their *dominus* could not be sued *ex locato*, though he could, *ex* Aquilia, noxally. Proculus however, of the other school, held that he could be sued *ex locato*, subject to the provision, (due to the idea that a man ought not to be liable for a slave's act beyond the value of the slave[2],) that he would be free from liability on handing over the slave[3]. This is the view that prevailed[4]. If however there was any *culpa* in the actual party, *e.g.* in choosing, for the care of a fire, unsuitable persons, then he was personally liable *in solidum*[5]. The same principle no doubt applied in other cases, but there seems no authority even on the obvious case of a thing deposited, injured by a slave of the depositee. As he was not liable for his own *culpa* he can hardly have been for his slave's. As he was liable for *dolus*, it is likely that the rule in that case was as in *locatio*.

Where the delict was *furtum* a difference is created by the fact that the holder may be liable for *custodia*, and as he is liable for the thing, on the contract, the owner has, on a well-known principle, no *interesse* and thus no *actio furti*[6]. Thus where the slave of the *commodatarius* stole the thing the owner had no *actio furti*[7]. If the commodator's slave stole it, the *commodatarius* was liable *ex commodato*, and had therefore an *interesse*, giving him *actio furti* against the commodator[8]. Paul quotes this from Sabinus with a further remark to the effect that if the *actio commodati* is remitted or the damages are refunded the action on theft "*evanescit*[9]." The reason of this last rule is not obvious. Many facts, such as release and satisfaction, put an end to rights of action, but this is not one of them[10].

The explanation seems to be this. Persons who held a mere *ius in personam* in a thing might have an *actio furti* in respect of it, but only in virtue of their liability, not on account of the advantage they lost:

[1] *Post*, Ch. IX. [2] 47. 2. 62. 5. [3] Coll. 12. 7. 9; D. 47. 1. 2. 3.
[4] 9. 2. 27. 11; as to contractual liability, *post*, p. 162.
[5] Coll. 12. 7. 7; D. 9. 2. 27. 9, 11; 19. 2. 11. *pr.* Paul notes that where slaves let with a house commit a delict against the tenant the owner is liable noxally but not *ex contractu*. Their act is no breach of the contract, 19. 2. 45. *pr.*
[6] G. 3. 205—7.
[7] Apart from Justinian's changes of which the text takes no note, 47. 2. 54. 2. The text does not discuss insolvency of the *commodatarius*.
[8] 13. 6. 21. 1; 47. 2. 54. 1. If depositor was the thief there was no *actio furti*: as he could not enforce the duty of *custodia*, P. 2. 31. 21.
[9] 47. 2. 54. 1.
[10] Monro, De furtis, 75 assumes the claims to be equal. There seems no warranty for this.

their right was not considered[1]. The whole theory of this *interesse* of a person with no *ius in rem* is a juristic development. It is abnormal: it is not thoroughly worked out, and this is not the only point at which its logic breaks down. We know from Gaius, and the Digest[2], that an insolvent borrower had not the *actio furti*, (though Justinian speaks of ancient doubts[3],) yet he technically had the liability. His insolvency did not release the debt: he might be sued on it later. Moreover the texts excluding action by the insolvent refer to insolvency in the present, not at the time of the theft[4]. The abnormal right was allowed only if and in so far as its denial would operate unjustly, and it is clear that in the case of supervening insolvency, and in that with which we are directly concerned, the real interest of the borrower has substantially ceased[5].

(ii) The case is more complex where the slave is, himself, the subject of the *negotium*. We have seen that the existence of a contractual obligation is no bar to that of a delictal. A general view of the texts, dealing with our present topic, suggests that if a slave, the subject of a *negotium*, committed a delict against his holder, the latter had no delictal action against the *dominus*, but only the contractual action subject to that right of quasi-noxal surrender which we have just noted as appearing in such actions. But this is not the case, though the rules as given present a somewhat misleading approximation to that state of things. How this arises may perhaps best be shewn by dealing first with the case of the man who is now owner of the slave, but is entitled to hand him back, or is bound to hand him on. Such a person can have no noxal action for what occurred while he was owner[6]. Justice however may require that he should have compensation, and the sources discuss several such cases. Thus the *vir*, being owner of dotal slaves, can have no noxal action, against his wife, for what they do[7]. But in any action for recovery of the *dos*, account is taken of the theft up to the value of the slave, and if the wife knew of his quality, *in solidum*[8]. So a redhibiting buyer is noxally liable for the man[9], and thus cannot bring a noxal action, but he has a claim to compensation

[1] 47. 2. 12. *pr.*, 14. 12—15. The holder *in precario* lost advantages by the theft but he had no *actio furti*, 47. 2. 14. 11.
[2] 47. 2. 54. 1; G. 3. 205. [3] C. 6. 2. 22.
[4] *e.g.* 47. 2. 12. *pr. si solvendo non est ad dominum actio redit*; In. 4. 1. 15; D. 47. 2. 54. 1, *rem subripuerit et solvendo sit, sqq.* A positive *interesse* need exist only at the time of the theft, 47. 2. 46. *pr.*
[5] If the *negotium* did not impose a liability for *custodia* (*e.g.* deposit) the holder had no *actio furti*, G. 3. 207; In. 4. 1. 17. If it were stolen by slave of depositee an ordinary noxal action arose.
[6] *Ante*, p. 107; 21. 1. 52.
[7] The fact that no delictal actions lie directly between them is no bar to an action *servi nomine*.
[8] 25. 2. 21. 2. [9] 19. 1. 11, 12; 21. 1. 23. 8; *ante*, p. 107.

subject to *pro noxae deditione*[1]. The right of indemnity covered any theft from him whenever committed and any thefts from third persons to whom the buyer had had to pay damages[2].

Legacies afford an instructive contrast. Where a *servus legatus* stole from the future heir, before entry, Julian allowed the *heres* an *actio furti noxalis* against the legatee, *qui legatum agnoverit*[3]. The case contemplated is one of a *legatum per vindicationem*. On the other hand Gaius tells us that the *heres* need not hand over a *servus legatus* unless an indemnity, (not a penalty,) not exceeding the value of the slave, is given to him, and this whether the theft was before or after entry[4]. It is clear from the language and the context that Gaius is speaking of a *legatum per damnationem*, in which the *heres* was owner for a time. The compilers have extended it to all legacies, though, for Justinian's law, Julian's rule would seem the most logical. This is a transference of the kind which seems to lie at the bottom of most of the cases we shall have to discuss.

The texts dealing with theft by a pledged slave are few, all from the same section of the same book of Africanus. They lay down the rule that, in such a case, the creditor can recover, (by the *actio pigneratitia contraria*,) an indemnity, subject to a right of *pro noxae deditione*, where the owner was not aware of the quality of the slave: otherwise he is liable *in solidum*. There is no hint of *furti noxalis*[5]. Of the texts on which this rule is based one is claimed, by Lenel, as relating to the *actio fiduciae*[6]. As, of the others, one merely repeats this, and all are from the same place, it seems probable that all were written of *fiducia*, in which, as ownership passed to the creditor, there could be no noxal action, and that this is simply a hasty transfer to *pignus* of rules which developed in *fiducia*[7].

Mandate gives similar texts of more various origin. It is laid down that if A buys a slave under mandate from B, and the slave steals from A, and A is not *in culpa*, he need not hand over the slave till account is taken of the theft, in an *actio mandati*[8]. Nothing is said of an *actio furti*. If the mandator knew his quality the liability is *in solidum*: Africanus indeed suggests that it should be so in any case, since, reasonable as it is that one should not be liable for a slave's act beyond the value of the slave, it is still more reasonable that a man's unpaid

[1] 21. 1. 58. *pr.* Though the fact that the man stole was not itself a ground for redhibition, 21. 1. 52.
[2] 30. 70. 2; 47. 2. 62. 2. His claim would not exceed the value of the man unless the vendor had warranted him not a thief, in which case he was entitled *in solidum* at least as to thefts from himself, 21. 1. 31. 1; 47. 2. 62. 4.
[3] 9. 4. 40. [4] 30. 70. *pr.*, 3; cp. 47. 2. 65.
[5] 13. 7. 31; 47. 2. 62. 1.
[6] 13. 7. 31; Lenel, Palingen., 1. 30; Heck, Z. S. S. 10. 125.
[7] Other cases, Lenel, Z. S. S. 3. 104 *sqq.*; Girard, Manuel, 518.
[8] 17. 1. 26. 7; 30. 70. 2; 47. 2. 62. 5—7.

service should not be an expense to him[1]. If the *mandatarius* was careless in trusting him unduly, this was *culpa* and barred his remedy[2]. These are the views of Neratius, Africanus, Gaius and Paulus. Most of the texts are contexted with the case of the redhibiting buyer. A slave was a *res mancipi*, and *mancipatio*, which was at the time of these writers still the usual mode of conveyance of such things, necessarily left the *dominium* for the time being in the agent. Even by *traditio*, there could be, at that time, no question of a direct acquisition by the employer. Gaius and Paul are clear on the point[3]. Here too we have rules laid down for the case where the victim of the theft was for the moment owner, and applied to conditions in which this was no longer the case.

Similar rules are found in deposit, Africanus, citing Julian, being apparently the only authority. The rules are as in mandate, but Julian is not cited as holding the extreme view, that compensation should be *in solidum* because the service was gratuitous[4]. As in *pignus*, these texts are from the same part of the same work. One is referred by Lenel[5] to the *actio fiduciae*, the other set come from the group of texts already handled, dealing with ownership. It can hardly be doubted that the texts were originally written of *fiducia cum amico*, which seems to have lasted up to the third century, side by side with the later form of deposit[6].

In the case of *commodatum*, there is difficulty. Africanus lays down the rule that, for theft from the borrower by the commodated slave, the commodator is liable by the *contrarium iudicium commodati*, up to the slave's value, but if guilty of *dolus*, then *in solidum*. We have seen reason to think that this text[7] dealt originally with *fiducia cum amico*, in which the holder was owner. The same rule is also laid down by the same writer in a text which, as we have seen, Lenel attributes to *fiducia*[8]. But Paul, in another text[9], after remarking that it is doubted (*quaeritur*) whether, on such facts, the *contraria actio* suffices, and whether there ought not to be *actio furti noxalis*, adds that, *procul dubio*, the *commodatarius* has *furti noxalis*, and that the commodator is liable *in solidum* if he knew the character of the slave. Gradenwitz, discussing another point, has no difficulty in shewing that this text has been altered[10]. In Paul's time *fiducia cum amico*, if not gone, was rare, and Paul doubts whether the rule of *fiducia* ought to be applied to the

[1] 47. 2. 62. 5.
[2] *h. l.* 7. The liability could hardly be *in solidum* where it was a general mandate: to buy such a man under such a mandate was rather like *culpa*.
[3] They, and Neratius, admit acquisition of possession by a procurator, but that is a different matter, 41. 3. 41; G. 2. 95; P. 5. 2. 2.
[4] 13. 7. 31; 47. 2. 62. 5, 7.
[5] 13. 7. 31. Lenel, Paling., 1. 30.
[6] Girard, Manuel, 520.
[7] 47. 2. 62. 6.
[8] 13. 7. 31.
[9] 13. 6. 22.
[10] Gradenwitz, Interpolationen, 120.

newer method. The compilers put into his mouth a reasonable solution for their own times. It is not however clear why they did not deal in the same comparatively rational way, with mandate pledge and deposit. It may be, since their work was done hastily, because no jurist, writing after the decay of *fiducia cum amico*, hints a doubt, in the other cases. Paul, whose question led to the solution of the problem here, does not suggest a doubt in mandate[1], in which case indeed the double conveyance was still necessary in his day, and he is not cited as discussing the other cases[2].

In *locatio*, which had not the same historical associations with ownership in the temporary holder, there is no difficulty. The injured conductor has *actio furti noxalis*, and has no *actio conducti*. There has indeed been no breach of contract. If the locator was guilty of *dolus* there was no right of surrender[3].

Two texts only seem to deal with the case where the thieving slave had made the contract, as to himself. They relate to cases under the Edict as to *nautae, caupones, etc.*, and the special rules there applied destroy the significance of the texts in the present connexion. But they are noticeable on other grounds. In one of them[4] it is said that an ordinary noxal action lay for a delict, by the *vicarius* of a slave *exercitor*, to which the *exercitor* was privy. This only illustrates the rule that contractual relation did not exclude delictal. The other, also from Paul[5], deals with a slave, *exercitor sine voluntate domini*, on whose ship something perishes, the liability here being independent of *culpa* and thus not necessarily delictal. If the loss is caused by the slave *exercitor*, there is a right to noxal surrender, if the *actio exercitoria* is brought against the *dominus*. This is a normal application of the principle that a man ought not to be liable on a slave's act beyond his value[6]. But some cases arising out of the common case of a free *exercitor* do not seem quite logical. We have seen that an *exercitor* was liable for *furtum* or *damnum* by slaves employed in the ship[7], but that in the case of his own slave the liability was noxal[8]. This agrees with the foregoing principle but hardly with the basis of the whole liability expressed in the same text, *i.e.* that it was his own *culpa* for putting such slaves on such business[9].

[1] 17. 1. 26. 7.
[2] Analogous case of common ownership, *post*, Ch. XVI.
[3] 19. 2. 45. *pr.*, 47. 2. 62. 6. Not *actio furti* with no right of surrender, but *actio ex conducto*, for complete indemnity. The *dolus* is not privity, but knowledge that the man is a rascal.
[4] 9. 4. 19. 2. Discussion of this text and its difficulties, *post*, Ch. X.
[5] 47. 2. 42. *pr.*
[6] The text shews that as there was no authority, there would also be a limitation to the *peculium*.
[7] *Ante*, p. 122.
[8] 4. 9. 7. 4; 47. 5. 1. 1—5.
[9] 47. 5. 1. 5. The text notes the difficulty: the explanation it gives is not adequate: *ante*, p. 122.

Some interdicts have their interest from the point of view of noxal surrender. Possessory interdicts are not delictal. Those dealing with public rights are not noxal: for interference with public ways and the like, a slave, it is said, was to be flogged by any who detected him[1]. But there are two interdicts which are expressly described as *interdicta noxalia*. They are *Unde vi* and *Quod vi aut clam*[2]. They have peculiarities of detail, but no real departure from ordinary principles. The interdict *unde vi* speaks of *deiectio* by the defendant or the *familia*[3], which covers one or more slaves[4] or persons actually held as slaves[5]. If it were *ex voluntate domini*, or ratified by him, it was his *deiectio*[6]. Apart from this his liability for slaves is not *in solidum*, though the Edict specially mentions them: it is a case for noxal surrender, for though the facts are criminal under the *lex* Iulia, the interdict is merely penal[7]. If he will not surrender he must pay in full, and he must in any case refund what he has received[8].

In the case of *opus vi aut clam factum*, the rules are more complex. The interdict is to secure the undoing, with necessary compensation, of any *opus*, done *vi aut clam*, on the plaintiff's property: it does not expressly mention slaves[9]. If it were *iussu domini* it was his act[10], unless he ordered it not intending secrecy, and the slave, knowing the other party would object, did it secretly. Here it was noxal[11]. The liability is either (i) to put the matter right, or (ii) to let it be put right and surrender the slave, or (iii) to pay the cost of putting it right[12]. If the slave has been alienated or freed, or has died, the master is only bound to let it be put right, the freed slave being liable to pay the cost, and a buyer of the slave being similarly liable with a right of surrender[13]. If the master will not let it be undone he is as liable as if he had done it himself[14]. One important point remains. The noxal liability of the slave's owner arises only if the act was done in his name, or on his account, or *mero motu* by the slave. If it was done for a temporary employer it is against him that the interdict should go[15], and he has not the privilege of surrender. If the owner of the slave or any buyer has made full compensation there can be no proceedings against the *dominus operis*, but if only *noxae deditio* has been made, the interdict may still go against the *dominus operis*, for compensation, no doubt, less the value

[1] 43. 10. 1. 2. If the *dominus* was privy, no doubt he also was liable.
[2] 43. 1. 5. [3] 43. 16. 1. *pr.*, 11, 16. [4] 43. 16. 1. 17.
[5] *h. l.* 18. [6] 43. 16. 1. 12, 15 *h. t.* 3. 11.
[7] Thus not available against *heres* except to extent of profit, 43. 16. 1. 48.
[8] 43. 16. 1. 15, 19. Similar rules in *De vi armata*, 43. 16. 3. 11.
[9] 43. 24. 1. The word *opus* is used in a very wide sense.
[10] 43. 24. 5. 14. It is in fact punishable in the slave, but not if under *iussum*: it is not an *atrox facinus* and he must obey, *h. t.* 11. 7. *Iussum* by guardian of a *dominus incapax* left it noxal, 43. 24. 11. 6.
[11] *h. t.* 21. 1. [12] 43. 1. 5; 43. 24. 7. 1. [13] 43. 24. 7. 1, 14.
[14] 43. 1. 5. [15] 43. 24. 5. 11.

of the slave[1]. The absence of liability for what the slave does at the behest or on account of a third person is due to a juristic inference from the fact that that other is liable, and this in turn is due, says Labeo[2], to the fact that the interdict says *quod factum est*, and not *quod feceris*.

We know that there were noxal provisions in the XII Tables, in the *lex* Aquilia and in the Edict[3]. As rules of law are constantly built up on the words of enactments we might expect differences. We have seen some differences in detail, but there remains at least one important distinction in principle between the rules in *furtum* and those in *damnum*. Celsus observes that the XII Tables declare the *dominus* liable *servi nomine* for the slave's wrong, whether privy or not[4]. Hence the liability is noxal, and follows the slave. But in the case of the *lex* Aquilia, if *sciente domino*, it is a direct liability of the master and the slave is not liable. But Julian, Marcellus and Ulpian are agreed that there is no difference: the words *noxiam noxit* and the rest, in the old law, apply to later *leges* as well, so that both master and slave are liable. The difference is thus overridden, but it is important to notice who the jurists are who observe the difference and see a way out of it[5].

Another difference is more striking and important, for it remained. Ulpian tells us that if a slave is *in fuga*, the *dominus* has *furti noxalis* against a *bonae fidei possessor*, for since he has not *potestas* he is not noxally liable for him[6]. He cites Julian in support, and Paul also holds the owner not liable[7]. And the liability of the *bonae fidei possessor* is laid down in many texts which seem conclusive[8], though one text of Justinian in his Code hints a doubt[9]. It so happens that an opposite rule is laid down for *damnum* on both points, by Julian, Marcellus and Ulpian[10]. If a slave *occidit*, the owner is liable and the *bonae fidei possessor* is not, and the *dominus* is liable for the slave *in fuga*. What is the cause of these distinctions? They are so sharp and rest on such circumstantially stated authority that it is difficult to dispute their genuineness, and they are so connected that it is *a priori* probable that they rest on a real distinction of principle. This impression is strengthened by the fact that the jurists who support these distinctions are those whom we saw considering another possible distinction of principle between the XII Tables and later legislation. Yet attempts to explain away the texts have been made persistently even so far back as in the Basilica. Most of these attempted explanations have been reviewed and shewn to

[1] 43. 24. 7. 1. Why does *dominus* surrender if the *dominus operis* is the person really liable? Perhaps A's slave, *mero motu*, secretly does, on B's land, work which injures C.
[2] 43. 24. 5. 13.
[3] *G.* 4. 76; *In.* 4. 8. 4; *D.* 9. 4. 2. 1; 47. 1. 1. 2. There were also the interdictal cases just discussed.
[4] 9. 4. 2. 1, 6. [5] *Ante*, p. 115. [6] 9. 4. 11, 21. 3; 47. 2. 17. 3.
[7] P. 2. 31. 37. [8] 9. 4. 12, 13, 28; 47. 2. 54. 4.
[9] C. 6. 2. 21, *pr.*, *post*, Ch. xv. [10] 9. 2. 27. 3.

be unsatisfactory by Girard, and they need not be stated in detail here[1]. Among the older explanations are those of the Basilica, (shared as to the case of *fuga* by the *lex* Romana Burgundionum[2], and formerly by Lenel, who now admits its insufficiency[3],) the framers of which are plainly dissatisfied with them, Cujas (shared by Pothier as to the case of *fuga*) and Voet. Pernice[4] holds that the rule as to *fuga*, in *damnum*[5], is a mistake of Ulpian's, but Girard observes that Julian is in the mistake on both points, and the same may be said of Marcellus[6]. Grueber[7] thinks no satisfactory explanation of the difference between *damnum* and *furtum* has been given. He does not notice the difference, in the case of *fuga*, and seems to regard the rule that a *bonae fidei* holder is not liable[8], as the normal one, and the texts laying down the other rule for *furtum* as needing explanation. He ignores the whole theory of *Potestas*.

Girard considers that there is a difference of principle. He traces it to the wording of the formula, based no doubt on that of the *lex*. The whole theory of *potestas* is the work of the Jurists. It was readily applied to the fluid words of the Edict and to the not very precise language of the XII Tables, but no existing text applies it to cases under the *lex* Aquilia. Something in the *lex* made it impossible. This he conjectures to have been an energetic reference to the *dominus* as the person noxally liable, as in the converse rule: *ero, id est domino, competit*[9]. In support of his view he cites the words (applying them to the *lex*), *verba efficiunt ut cum noxae deditione damnetur*[9]. He points out that while several texts[10] say that one who, on *interrogatio in iure*, says that another's slave is his, is noxally liable, one which says the same for *damnum*[11] adds, *quasi dominus*, as if this needed emphasis here. It may be further noted that in one text[12] the difference between *furti aut damni* in one line, and *furti* alone later on seems to turn on this distinction, or at least to make it clear that, in Mela's opinion, the *actio noxalis* Aquilia did not lie against a mere possessor, while other noxal actions did. Moreover exactly the same point is made on the same verbal ground in connexion with the *Sc.* Silanianum[13].

Upon all the evidence Girard's theory seems to earn acceptance. It is not generally adopted, but it has not been refuted[14].

[1] Nouv. Rev. Hist. 11. 430 *sqq*. Those explanations which do not regard the divergence as simple error explain the two rules in *damnum* independently, though it seems obvious that they are connected.
[2] Bas. (Heimb.) 5. 289; Lex Rom. Burg. 15. 1.
[3] Ed. Perp. (French Ed.) 1. 180.
[4] Akad. d. Wissens. Berlin, Sitz. 1885, p. 454.
[5] 9. 2. 27. 3.
[6] Accarias (Précis 2. 1048) gives another explanation. The slave is the instrument. The *bona-fide* possessor has not handled. How can he be liable? The *dominus* is made liable in order that some one shall be. Apart from its speculative nature, this assumes the delict to be the employer's, which it is not, though the liability may be.
[7] *Lex* Aquilia, 82.
[8] 9. 2. 11. 6.
[9] 9. 4. 19. 1.
[10] 9. 4. 26. 3, 27. 1; 11. 1. 16. 1.
[11] 11. 1. 8.
[12] 40. 12. 24. 4.
[13] 29. 5. 1. 1, 2.
[14] Lenel declares it inacceptable (*loc. cit.* n. 3). Kipp rejects it for inherent improbability, Z. S. S. 10. 399 *sqq*. (a review of Girard's essay).

CHAPTER VI.

THE SLAVE AS MAN. COMMERCIAL RELATIONS, APART FROM *PECULIUM*. ACQUISITIONS.

IT is hardly an exaggeration to say that, in the age of the classical lawyers, Roman commerce was mainly in the hands of slaves. The commercial importance of different slaves would of course vary greatly. The body-servant, the farm labourer, the coachman, have no importance in this connexion, and there were many degrees between their position, and that of a *dispensator* or steward, who seems often to have been allowed almost a free hand[1]. The Digest gives us several striking instances. A slave might carry on a bank, with or without orders, the master's rights varying according as it was or was not with the *peculium*[2]. A slave might be a member of a firm[3], and his master's notice to him, without notice to the other party, would not end the partnership[4]. Even sale of the slave would not, in fact, end the firm: the new master would acquire the rights from the date of transfer, though as a slave's faculty is purely derivative the firm would be technically a new one[5].

A *dominus* can acquire or continue possession through a *servus* or *ancilla*[6]. But possession differs from other rights in that it has an element of consciousness. A man may begin to own without knowing it, but he cannot ordinarily so acquire possession. Accordingly we learn that (apart from *peculium*) a man does not possess what his slave has received, unless and until he knows of it. When he learns the fact he possesses, and he is said to possess by his own *animus*[7] and the slave's *corpus*[8]. Hence it may be loosely said that the slave provides the physical, and the master the mental element in possession, but this is not quite exact. One simple limitation is that for the later classical

[1] See for a doubtless exaggerated instance, Petronius, Sat. 53.
[2] 2. 13. 4. 3.
[3] 17. 2. 63. 2.
[4] 17. 2. 18.
[5] 17. 2. 58. 3. More striking instances later in connexion with *peculium*, Ch. VIII.
[6] G. 2. 89; In. 2. 9. 3; D. 41. 1. 10. 2; 41. 2. 1. 12, 48; 41. 3. 44. 7.
[7] As to what is involved in *scientia*, *post*, p. 135.
[8] 41. 2. 1. 5, 3. 12, 8. 24, 44. 1, 44. 2; P. 5. 2. 1.

lawyers it was clear that previous *iussum* was as good as actual knowledge[1]. Another point is more important: the taking of possession is necessarily a conscious act, and the slave must be regarded as contributing to the mental part in that he must be a person capable of understanding the nature of his act. Thus a man cannot acquire possession through an insane slave[2], or through an *infans*[3]. What the *dominus* contributes, so far as we are here concerned, (for we need not consider difficulties as to the nature of the *animus* necessary to possession,) is intelligent consciousness of the act done. It follows that, if either slave or master is of defective capacity, there is no possession. It is clear that this would create great practical difficulties: the texts shew that these were felt, and that considerations of convenience triumphed over strict logic. Thus Paul tells us that an *infans* can acquire possession with the *auctoritas* of his *tutor, utilitatis causa*[4], and that an *infans* can possess through a slave *peculiari causa*. Pomponius had already, it seems, laid down a more sweeping rule, to the effect that if delivery was made to the slave of an *infans* or a *furiosus*, the *dominus* could usucapt[5]. But it is said elsewhere that an *infans* acquires possession only *tutore auctore*, while another *pupillus* does not need *auctoritas*[6]. This is plainly a departure from ordinary principles: according to these if an *infans* needs *auctoritas*, so does any other *pupillus*. But the fact is this is not a case for *auctoritas*: the pupil incurs no obligation. The requirement is added in the case of the *infans* to get rid of the difficulty arising from his lack of capacity. In other words, here, quite exceptionally, the *tutor* makes up not, as in ordinary cases, a defective *iudicium*, but a lacking *intellectus*[7].

It must be observed that we are concerned only with the acquisition of possession: a possession which has begun is not lost merely by the slave's becoming insane, any more than it would be by his going to sleep[8].

A text of Ulpian[9] lays down a general rule that a slave of ours can acquire possession for us without our knowledge. Ulpian bases this view on a statement of Celsus to the effect that a *servus alienus* in the possession of no one acquires possession for me if he takes the thing, *meo nomine*. As it stands, this remark is no authority for Ulpian's proposition. Celsus says nothing about ignorance, and is arguing from

[1] 41. 2. 1. 13, 19; 41. 3. 31. 3 (Paul); 41. 2. 34. 2 (Ulp.); 41. 2. 48 (Papin.).
[2] 41. 2. 1. 9, 10.
[3] *Arg.* 41. 2. 1. 5. An older *impubes* may of course have the necessary *intellectus*, 41. 2. 1. 11.
[4] 41. 2. 32. 2: cp. C. 8. 53. 26. [5] 41. 3. 28.
[6] 41. 2. 1. 13, 32. 2. Other texts seem to require *auctoritas tutoris* for the case of any *pupillus*, *h. t.* 1. 11, 13. As to a possible case of liability, *post*, p. 134.
[7] An *infans* was not ordinarily capable of acting with *auctoritas*. Cp. the somewhat analogous case of captive slave or master, in which there was no possession, *post*, Ch. XIII.
[8] 41. 3. 31. 3. [9] 41. 2. 34. 2.

the newly developed rule that possession can be acquired through a procurator. If so, why not through a *servus alienus*, provided he is not in the possession of anyone else, to whom he could acquire[1]? When we remember that *nominatio* and *iussum* were almost equiparated in later classical law, for the purpose of transactions by a slave possessed in good faith or held in usufruct[2], it seems likely that Ulpian is doing the same thing here, and holding that you acquire possession through your slave if you know it, or have authorised it, or the possession is taken in your name. But the cases are not on the same plane. In the case of *bonae fidei possessio* the equalisation of *iussum* and *nominatio* is to determine the destination of an acquisition, not its possibility. They equally exclude the *dominus*, but no text, applying the rule to the acquisition of possession, says that if there was *nominatio*, the requirement of *scientia* in the *bonae fidei possessor* did not exist.

Another remarkable text is credited to Paul. He holds that we do not acquire possession through our slaves unless they intend to acquire to us, and he takes the case of *iussum* by the owner A, the slave taking with the intention to benefit B. There is, he says, no possession[3] in A. It is generally agreed that this text, making the effect depend on the will of the slave, is not good law for the classical age[4].

The notion that one could not acquire possession through one he did not possess[5], though it was set aside, as an absolutely general rule, in the classical law, survived for some purposes up to the time of Justinian. It was still true that a *dominus* could not ordinarily acquire possession, through his slave whom he did not possess. But it must be remembered that such a case could not ordinarily arise, except where the slave was *in libertate*, or in the adverse possession of some other person, and in such cases it is hardly conceivable that a *dominus* could be supposed to acquire possession through him. If he was *in libertate* no one acquired possession through him[6]. Where any inconvenience did arise the rule was readily set aside[7]. It is of course clear that, the slave's power being purely derivative, he could acquire nothing for himself, and this principle has its corollary[8] in the rule, that a man in apparent slavery could acquire nothing for himself.

[1] See Salkowski, Sklavenerwerb, 166. In 41. 3. 31. 2 it is said, perhaps by Tribonian, that a slave *in libertate* can acquire possession for anyone in whose name he takes. In 41. 1. 53 it is said that we can acquire possession through anyone, if we intend to possess.
[2] *Post*, Ch. XV. [3] 41. 2. 1. 19.
[4] Ihering, Besitzwille, 287; Gradenwitz, Interpolationen, 220; Salkowski, *op. cit.* 46. They disagree as to whether it is an error of Paul or an interpolation: the latter seems most probable. See Gradenwitz. Note also the plural *diximus*. In other parts of the text Paul says *puto*.
[5] G. 2. 94, 95. [6] 41. 3. 31. 2.
[7] Where a *causa liberalis* is pending the man is *in libertate*; yet, if he is really a slave, what is given to him vests in his master, even, says Gaius, possession, though it is clear there had been doubt. He justifies the rule by the case of the *fugitivus*, but this is not sound. The *fugitivus* is still possessed and his case provides not the reason, but the excuse, 40. 12. 25. 2; *post*, Ch. XXVIII.
[8] 50. 17. 18.

Where the possession has not yet, *e.g.* for lack of knowledge, vested in the *dominus*, it may nevertheless be legally important to him. If the act of taking was a delict, he will be liable to a noxal action: in some other cases he may be liable to an *actio de peculio*. When it has vested in him, the effect is in general as if he had himself received the thing. Thus, where a slave buys, the *dominus* has possession *pro empto* or *pro suo*[1]. If a slave is *deiectus*, the master, though he knew nothing of the expulsion, has the interdict *de vi*[2].

The mere possession may in some cases impose liability. Thus a master is liable to *hereditatis petitio* for things which a slave has taken, if he possesses them or their price, or has an action for their price[3]. So in general an action lies against the master for things detained by the slave[4]. But there are some difficulties. Any person sued must take care of the thing: what is the position of the *dominus*, whose slave, holding the thing, disappears between *litis contestatio* and judgment? What is the position of an *impubes* whose slave acquires possession of a thing in some way which creates liability? A *malae fidei possessor* is liable for the safety of the thing: what is the position of the *dominus* who knows of the possession, but not of the *mala fides*? We are told, in the case of the defendant whose slave has disappeared with the thing, at the time when judgment is to be given, that the judge must either postpone judgment, or allow the defendant to satisfy it by giving security for the restoration of the thing when he gets it[5]. But the case of actual litigation is on a different footing from the others. It may be permissible to argue from an analogous case. A husband is under a duty to take care of *dos*. If his slave receive a thing as *dos* it vests in him, but he is not under this duty until he has ratified the act[6]. A similar rule may well have applied here, and no doubt in the case of an *impubes* this ratification would not be valid without the *auctoritas* of the tutor. In all these cases there would be *actio de peculio* so far as the damage resulted from a *negotium* of the slave[7].

In close connexion with this topic comes, necessarily, that of acquisition of *dominium* by *usucapio*. In general the possession will lead to *usucapio*, subject to the ordinary rules. Some points must,

[1] 41. 10. 5. A slave cannot possess *pro herede* (41. 3. 4. 4). This does not mean that he cannot be the vehicle of such a possession, but that if a slave, thinking he is *heres* or that a thing belongs to a *hereditas* to which he has a claim, takes it while still a slave, he does not possess *pro herede*.

[2] 43. 16. 1. 22.

[3] 5. 3. 34, 35. If a slave fraudulently makes away with a thing to the knowledge of his master, the latter is liable to *A. ad exhibendum*: if he did not know of the wrongdoing, only noxally, 10. 4. 16. If the slave holds someone's will, the master is liable to the interdict *de tabulis exhibendis*, 43. 5. 3. 4.

[4] C. 3. 32. 20. [5] 6. 1. 27. 4. [6] 23. 3. 46.

[7] Another illustration 43. 26. 13. *Post*, p. 157, as to the question how far knowledge of the slave is imputed to the master.

however, be noted[1]. The slave's power, being purely derivative, cannot increase that of the *dominus*. Thus if the master is absolutely incapable of *usucapio* he cannot usucapt through his slave[2].

There is somewhat more difficulty in relation to *bona fides*. Apart from *peculium* the rule seems to have been, (Paul, quoting Celsus, is our authority, but the text is inconclusive,) that both master and slave must have been in good faith—the slave when he took the thing—the master when he knew of the taking. It is not clear whether the slave must be in good faith at that time, but this seems the more logical view, since that is the *initium possessionis*. Pomponius is quoted to the effect that if the acquisition is *domini nomine* the master's state of mind is the material one, but in view of the language quoted by Paul from Celsus in the same text this is commonly understood to mean, "is primarily considered[3]." The language of Pomponius, and the general drift of the text, however, appear to express the view that, if the acquisition was *domini nomine*, the state of mind of the slave was immaterial, but the other view is more in harmony with the rules arrived at in other cases[4]. It must be remembered that *usucapio* results from possession[5], and that in acquiring possession the master and the slave cooperate. It is difficult to say what the master's *scientia* involved. It was something that the slave could not contribute[6], and probably it included the *animus sibi habendi*, of which the slave, who could not *habere*, was clearly incapable. As we have seen that he also cooperated mentally, since he must have intelligence for taking[7], it is natural that the *bona fides* of both parties should have been necessary. And this is the rule that Papinian lays down for the analogous case of sons[8]. As will be seen later, the rules in acquisitions to the *peculium* are different: here it is enough to say that where the acquisition is *peculii causa*, and the slave was in bad faith, if the thing ceases to be *in peculio*, *e.g.* by ademption of the *peculium*, or by its being paid by the slave to the master, *e.g.* for his liberty, this is not a new possession in the master, and the thing cannot be usucapted: *causa possessionis durat*[9].

Apart from these considerations there is no great difficulty in the law of acquisition of property, *inter vivos*, by a slave for his master. The slave though he can have nothing of his own[10] acquires for him in nearly every way, and without his knowledge or consent[11]. Things

[1] Among the cases in which "putative *causa*" was allowed by some jurists, was that in which your slave alleged that he had bought the thing: a man may reasonably be in error as to the act of another, 41. 4. 11; 41. 10. 5; cp. 23. 3. 67. But this controversy has little to do with slavery.

[2] 41. 3. 8. 1. *Eum qui suo nomine nihil usucapere potest ne per servum posse Pedius ait.*

[3] 41. 4. 2. 11, 12. Pothier, Pand. 17. 193. [4] 6. 2. 7. 13; 41. 3. 43. 1.

[5] G. 2. 89; In. 2. 9. 3; D. 41. 2. 3. 3. [6] See *ante*, pp. 131 *sq.*

[7] 41. 2. 1. 10, *etc.* [8] 41. 3. 43. [9] 41. 4. 2. 12, 14.

[10] G. 2. 87; In. 2. 9. 3; D. 41. 1. 10. 1.

[11] In. 2. 9. 3; D. 41. 1. 32. If a slave buys, his master has the Publician, 6. 2. 7. 10. If he finds treasure it is as if the master had found it, 41. 1. 63, *pr.*

delivered to him are acquired to his master unless the slave was intended to act as a mere messenger: in that case the acquisition is not complete till the thing reaches the master[1]. A slave can acquire by formal means, *e.g.* by *mancipatio*, but not by *adiudicatio* or *cessio in iure*[2], since he can take no part in a judicial process. If the ownership of the slave is in suspense, the question in whom any acquisition takes effect will also be in suspense; *e.g.* where a slave is given by husband to wife, by way of *mortis causa donatio*[3], or where the slave is *legatus* and the legatee has not yet accepted[4]. The slave acquires to his bonitary, not his quiritary owner[5]. We are told by Paul that a slave, mancipated *metu*, acquires for his old master[6]. The point is that, though *mancipatio* transfers *dominium* even in this case, the former *dominus* still has the slave *in bonis*[7].

Was it necessary that the slave should intend to acquire to the master? We have seen[8] traces of a view that this was essential (at least for late law) in the case of possession, but so was knowledge of the *dominus*, and both these might seem material where the question was whether the *dominus* had acquired the substance of control. But in the present case it is clearly and repeatedly laid down in the Sources[9] that knowledge of the *dominus* is not necessary. (The view that the slave must consent seems to rest on a false definition of tradition, as transfer of *dominium* by transfer of possession, itself based on texts which speak of acquisition of possession and through it of ownership[10].) *A priori*, one would not expect the *voluntas* of the slave to be considered in such a matter, and the law seems to have disregarded it[11]. But there is one text sometimes cited as proving the contrary[12]: the case is, however, one of a common slave and of a *donatio*, both material circumstances[13].

A case which might have created difficulty is that in which the transferor hands over the thing, intending to transfer ownership, but to transfer it to X, who is not, but whom he supposes to be, the slave's master. If he said nothing of his intent the gift would take effect in the slave's master, though, on general principle, the donor would have a *condictio*. If he expressly said that he intended to convey the thing to

[1] 39. 5. 10; C. 4. 27. 1. [2] G. 2. 87; 2. 96; 3. 167; U. 19. 18.
[3] 24. 1. 20. [4] 30. 86. 2.
[5] G. 2. 88. What a *servus peculii castrensis* acquires is the son's, not the father's, 49. 17. 19. 1. See also 18. 6. 16; 19. 1. 13. 18. *Ante*, pp. 42, 43.
[6] P. 1. 7. 6.
[7] 4. 2. 9. 6. See Huschke *ad* P. 1. 7. 6. As to the actual form used by the slave in *mancipatio*, see *post*, App. III.
[8] *Ante*, p. 133.
[9] See the texts cited by Salkowski, Sklavenerwerb, 34—40.
[10] *e.g.* 41. 1. 20. 2. [11] 39. 5. 13. [12] 41. 1. 37. 6.
[13] *Post*, Ch. XVI. The inconveniences which might result from acquisition without consent could be in part avoided by abandonment, but a more effective protection was found in a rule that the liabilities which might result did not attach till ratification, *post*, p. 155.

X, it seems that ownership would not pass to anybody, though possession would as soon as the master knew of the receipt[1].

The law in the case of the institution of a slave is more complex. A man may institute his own slave or a *servus alienus*; in either case *pure* or conditionally[2]. But an institution of his own slave, *cum liber erit*, or *sine libertate*, is a mere nullity[3]. A *servus alienus* would, however, ordinarily be instituted without liberty, and the words *cum liber erit* may be added: the words *sine libertate* or *cum libertate* are mere surplusage[4]. The institution of a *servus proprius* remains valid though he be alienated or freed: in the former case he acquires to his new master[5], in the latter to himself.

Institution of a *servus alienus* is for most purposes institution of his master[6]. Thus the master must have *testamenti factio* with the testator[7], has the right to the *spatium deliberandi*[8], can get *bonorum possessio*[9], and may be burdened with *fideicommissa*[10]. These are due from him only if he acquires through the slave. If he frees before acceptance neither he nor the slave is strictly liable (for the latter was not *rogatus*), but this is met by a rule that an *actio utilis* lies against him who got the *emolumentum hereditatis*[11]. If the owner sell the slave before acceptance, he remains liable for the *fideicommissum* as having the value in the price, and the buyer is not liable unless the vendor is insolvent[12]. This rule is an equitable compromise: the buyer is strictly *heres* and liable. There seems no authority for the case of gift of the slave. Probably the donee is liable if he accepts the *hereditas*. There are many illustrations of this fact that a gift to a slave is essentially one to his master. If a slave is instituted, a legacy, *poenae causa*, to annoy his master is void[13]. If a man prevents the revocation of a will in which his slave is instituted, he can take nothing[14]. Writing a gift to your slave is penalised under the *lex* Cornelia *de falsis*, as writing a gift to yourself[15]. If a *libertinus* institutes his child's slave this bars the patron as if it had been the child himself[16].

[1] Not expressly discussed, except where on the facts there were other persons to whom the slave might possibly acquire, *post*, Ch. XV.
[2] 28. 5. 3, 31.
[3] U. 22. 7, 11, 12; D. 28. 7. 21, 22. It was treated as shewing no real intent to give.
[4] 28. 5. 3. *pr.*; P. 3. 4 b. 7.
[5] G. 2. 185, 188; Ulp. 22. 12. D. 31. 83 is a case of construction raising some of these points.
[6] As to the difference of personality, *post*, p. 140.
[7] Ulp. 22. 9; D. 28. 5. 31; *h. t.* 53; 36. 1. 67. *pr.* [8] 28. 8. 1.
[9] 37. 11. 2. 9. If alienated while time is running the new *dominus* has only the rest of the time, 38. 15. 5. 2.
[10] Even in favour of the slave himself, *cum liber erit*, 36. 1. 26. 1. As to operation of *Sc.* Pegasianum, D. 30. 11.
[11] 31. 62. [12] 30. 11, 94. 1. [13] 34. 6. 1.
[14] 29. 6. 1. 1; 38. 13. 1. Nor can the slave if freed, or children, even not in *potestas*. They are "within the mischief" of the rule.
[15] Or striking out a gift of liberty to a slave left to you. But writing a gift to a slave *cum liber erit*, or one of liberty to your own slave was not enough, 48. 10. 15. 4, 22. *passim*.
[16] At any rate if the child acquires, 37. 14. 21. 3.

The gift is to the master whose the slave is at the time of entry: intervening alienations are immaterial[1]. Where a *servus alienus* was instituted, afterwards conveyed to a *servus hereditarius* and then usucapted by an *extraneus*, the institution was still good—*media tempora non nocent*[2]. Where a slave of one without *ius capiendi* was instituted and was freed, or sold, *sine fraude legis*, before any steps were taken, though after the death, the gift stood[3]. This was originally written when, and of a case in which, the man without *ius capiendi* was not *incapax*, but, though he had *testamenti factio*, was barred, by reason, *e.g.* of celibacy, from taking. The general rule was that we could institute the slave of one with *testamenti factio*, and no other[4]. But in Justinian's time a man without *ius capiendi* was an *incapax*. It may be, then, that in his day the institution of the slave of one without *testamenti factio* (*e.g. intestabilis*) was good if he was alienated. It cannot have been so for classical law.

The owner of the slave is the person to benefit, whatever the intent of the testator[5], even though he have to hand over the succession to some other person. Thus if a *heres* is under a *fideicommissum* to hand over the *hereditas*, and a *servus hereditarius* has an inheritance left to him, the *heres* can order him to enter. Like other acquisitions made after entry, this will not have to be handed over, unless there was an express provision, in the will, that even such things were to go[6].

As a *hereditas* may involve liabilities the slave cannot effectively enter without the authorisation (*iussum*) of the owner[7]. We have a good deal of detail about this *iussum*. It must precede the entry: ratification did not suffice[8]. This is due to the fact that *aditio* is an *actus legitimus*, and does not admit of what is in effect a suspensive condition[9]. The *iussum* must *durare*: the authorisation of the master must be still existing at the time of the entry. Thus if he become insane before the entry, there is no *iussum*: *furiosi nulla est voluntas*[10]. So, if the slave is alienated before the entry, the new master is not bound by the old *iussum*[11]. It may be in any form, *e.g.* by letter or messenger. It may even be *nutu*, in the case of a dumb, but not mentally defective, *dominus*[12].

[1] In. 2. 14. 1. *Ambulat cum dominio*, 37. 11. 2. 9.
[2] 28. 5. 6. 2. As to *h. t.* 50. *pr.*, see *post*, Ch. xx.
[3] 29. 2. 82. [4] Ulp. 21. 9; D. 28. 5. 31.
[5] G. 2. 89; Ulp. 22. 13; C. 6. 27. 3.
[6] 36. 1 28. 1; *h. t.* 65. 4 (last clause Tribonian).
[7] Ulp. 19. 19; 22. 13; C. 6. 27. 3; D. 41. 1. 10. 1, *etc.* [8] 29. 2. 25. 4; 36. 1. 67. *pr.*
[9] 29. 2. 51. 2; 50. 17. 77. No entry before *iussum*, but a condition on the institution can be so satisfied, *quia eo facto nemo fraudatur*. The satisfaction is no part of the entry, 35. 1. 5. 1.
[10] 29. 2. 47. Or an authorising *tutor* die before the entry, *h. t.* 50. If the *iussor* change his mind, or is adrogated, there can be no entry under the old *iussum*, *h. t.* 25. 14, 15.
[11] 29. 2. 62. 1. [12] 29. 2. 25. 4, 93. 1.

The *iussum* must refer to that particular *hereditas*[1], and there can be no *iussum* to enter on the *hereditas* of one not yet dead, though it is not essential that the master be certain either that the man is dead or that the slave is *heres*. Paul, indeed, observes that the *paterfamilias* must know whether it is *ex asse* or *ex parte*, by institution or substitution, on intestacy or by will[2]. Ulpian says, more exactly, that if the *iussor* thinks it is *ex asse* and it is *ex parte*, or *ab intestato* and it is by will, the entry does not bind him because such entry would, or might, put him in a worse position than he contemplated. If the error is the other way, it is a good entry, and error as to whether it was institution or substitution is equally immaterial[3]. A *iussum* may be conditional or dependent on someone's consent[4], and this must be given before the entry. Where the *institutus* reported that he thought the inheritance good, the *paterfamilias* replied that he had heard rumours to the contrary, and that he authorised the *institutus* to enter, if after careful investigation he was satisfied that the estate was solvent. He entered at once, and Africanus held that this entry did not bind the *paterfamilias*[5]. The *iussum* might be more or less explicit, and after disputes it was settled that authorisation to take *bonorum possessio*, or *pro herede gerere*, justified entry by the slave[6].

Fideicommissariae hereditates and *bonorum possessio* are on the same level, so far as the substance of the right is concerned, but there are some differences of rule which need explanation. As the acceptance of *fideicommissa*, or of *bonorum possessio*, is not an *actus legitimus*, the necessary consent of the *dominus* may be by ratification[7]. We know that a *dominus* cannot enter for a slave, though he can depute a slave to enter for him[8]. We are told, indeed, not only that the slave must himself make *aditio*, but that he must give a real consent, and thus if an apparent consent is obtained under threats, and so is unreal, there is no sufficient *aditio*[9]. The line between this and a real consent obtained by command, which appears in some texts, must have been rather narrow[10]. It should be observed that the *dominus* can *pro herede gerere*, by consent of the slave[11], and that Pius enacted that if the

[1] 29. 2. 25. 5. If the slave is alienated before *bonorum possessio* is obtained, the buyer has only the residue of the time, 38. 15. 5. 2.
[2] 29. 2. 93. *pr.*
[3] 29. 2. 25. 11. Paul's dictum must be understood of pupillary substitution, involving possible liability for debts of the *pupillus*. Ulpian says (*h. l.* 12, 13) that *iussum* to enter under the will of X does not authorise entry as a substitute of an *impubes* unless the words of authorisation cover this, and shew that it was contemplated.
[4] 29. 2. 25. 10. [5] 29. 2. 51. 1.
[6] 29. 2. 25. 7. See *h. l.* 8, 9 as to what is a sufficient *iussum*. Though a dumb slave cannot make formal *aditio* by speech he can of course *pro herede gerere* (29. 2. 93. 2). *Mutus heres* could not make a formal acceptance, but might depute a slave (29. 2. 5, 26). There seems no reason to doubt that a slave could make *cretio* for his master. It is somewhat on the same footing as *mancipatio*.
[7] 29. 2. 6. 1, 48; 36. 1. 31. 2, 42, 67. *pr.* [8] 29. 2. 26, 36.
[9] 29. 2. 6. 7. [10] 29. 4. 1. 3; C. 6. 24. 3. 2. *in fin.*
[11] C. 6. 30. 4.

dominus continued long in enjoyment, in any case, this should be a valid *gestio*: a somewhat untruthlike presumption of the consent of the slave[1]. The rule in *fideicommissa* is different: the *dominus* himself can accept[2]. *Bonorum possessio* may be applied for by anyone for anyone[3], and thus, no doubt by the *dominus*. But, we are told, the consent of the slave is needed as in *aditio*[4]. This may be because the words of the Edict, declaring that a grant will be made to him, imply his personal assent. It seems likely, though there is no conclusive text[5], that a *dominus* cannot himself repudiate the slave's institution: it is clear that he cannot repudiate a *fideicommissum*[6]. On the other hand he can repudiate a *bonorum possessio* to which the slave has a claim[7]. This is surprising in view of the rule that the slave's consent is necessary to *bonorum possessio* and of the maxim, *Is potest repudiare qui et acquirere potest*[8].

The slave and his master are distinct persons, and are so regarded for many purposes in this connexion. It is difficult, however, to lay down any general principle which will cover all the cases. They are not treated as independent persons where this would defeat the purpose of some rule of law[9]. Where A was instituted, and his slave, S, substituted, and A ordered S to enter, as substitute, in order to avoid legacies, all are due, subject to the Falcidian fourth[10]. But they are not lumped together: those charged on A are paid first, and then those charged on S, so far as the *lex* Falcidia allows[11]. This preference is applied in all such cases where a man obtains a *hereditas, omissa causa testamenti*[12]. But in our present case it is a recognition of duality, for a man cannot be simply substituted to himself[13].

Where A and his slave S are instituted, in unequal shares, and less than three-fourths are left away from the share of S, Paul tells us that the difference is added to the share of A, for the benefit of legatees claiming from him. This prevents the unfair treatment of legatees by a misapplication of the rule that the Falcidia is, in the case of distinct charges on different heirs, reckoned separately for each heir[14]. Here too duality is disregarded only so far as is necessary to prevent the evasion. If they were treated as two absolutely, no such account would be taken. If as one the Falcidian deduction would be spread over all. It will be observed that this is not the rule of *confusio* which causes so much discussion in the case of an *institutus* who acquires also as *substitutus*[15].

[1] 29. 2. 6. 3. [2] 36. 1. 67. *pr.* [3] 37. 4. 7.
[4] 36. 1. 67. *pr.* [5] 29. 2. 13. 3, 18. [6] 31. 34. 2. [7] 38. 9. 1. 3.
[8] 29. 2. 18; 38. 9. 1. 1. Lenel thinks the general provisions as to repudiation were in the Edict (Ed. Perp. § 165). The point of the present rule seems to be that, as the cooperation of both is needed to acquisition, the repudiation by the master is enough to shew that this is impossible.
[9] See *ante*, p. 137, for some illustrations of this.
[10] 29. 4. 25. [11] 35. 2. 22. 2. [12] 29. 4. 6. *pr.*
[13] 28. 6. 10. 7. [14] 35. 2. 21. 1.
[15] See *e.g.* Vangerow, Pand. § 535; Windscheid, Lehrb. § 653, n. 8.

There, if *confusio* occurs at all, the legacies are grouped together and all suffer equally. Here there is no relief to the legatees from the *dominus* except so far as there is a surplus over the *quarta* Falcidia in the share of the slave. The same rule applies in the case of a father and son[1]. Paul's rule deals only with the case in which the legacies charged on the *dominus* are in excess, not with the case in which those charged on the slave are so. In the case of institution and substitution it seems clear on the authority of Paul[2] that there was no *confusio* in favour of legacies, charged on the *heres* who failed to take, in so far as they were chargeable on the substituted *coheres*. In our present text[3], Paul goes on to say something, which is commonly interpreted as meaning, that, here too, there was no relief in the case in which it was the legacies charged on the slave which were in excess. But the wording is so corrupt that it is impossible to be sure as to its meaning.

Where X whose slave was *heres* by will, and who was himself *heres ab intestato*, directed his slave to enter, and the slave did not do so, it was as if X had praetermitted. He should have made the man enter[4]. It is not easy to see the necessary *dolus malus* on these facts[5]. Where a slave is made heir there can be no legacies from the master, though there may be *fideicommissa*, and in such a case the legacies are first reckoned with any deduction for the *lex* Falcidia, and the *fideicommissum* is payable on the rest[6].

Where a slave is instituted *pure* for part and conditionally for another part, and there is a coheir, and the slave duly enters for the first part, Paul tell us he must enter again for the second, and it will pass with him if he is freed or alienated before entry[7]. This is one of a group of texts which have given rise to much controversy[8]. If X is instituted *pure* for one part, and conditionally for another, then, apart from controversy as to what happens if he dies, he is at once *heres ex asse*, if there is no substitute to the conditional part[9]. No fresh entry is needed even if there is a coheir[10]. In our case[11], where it is a slave, Paul justifies his different view on the ground that in order that all may be acquired by the one entry, it is necessary that all remain in the same state: the rule, that one entry suffices, does not, moreover, according to him, apply where the *hereditas* is acquired through another person[12]. That it should vest in the new owner seems consistent with principle. The conditional share is certainly not acquired till the

[1] 35. 2. 25. *pr.* [2] 35. 2. 1. 13. Vangerow, *loc. cit.*
[3] 35. 2. 21. 1. [4] 29. 4. 1. 3.
[5] *h. l.* 4 adds that if *dominus* does not know, and himself enters *ab intestato*, he is not liable under the Edict, *nisi si fingit ignorantiam*. This last remark is Tribonian, but it is clear that the master's liability depends on his *dolus*, not on that of the slave.
[6] Ulp. 24. 21; D. 35. 2. 22. 1. [7] 29. 2. 80. 2.
[8] Salkowski, *op. cit.* 10. [9] 28. 5. 33; 29. 2. 35. *pr.*, 53. *pr.*, 81.
[10] 28. 5. 60. 6. [11] 29. 2. 80. 2. [12] 29. 2. 80. 3.

condition is satisfied[1] and at that time the old owner is no longer owner. Since nothing remains even momentarily in the slave[2], another entry must be necessary. The view that, even if there is no change, fresh entry is necessary, is a natural result. But there is a text of Ulpian[3] which applies the rule that entry for one share is entry for all, and declares, as it is commonly understood[4], that if the slave has once entered, though he be sold, a substituted share which falls in will go to his old master, as being a mere appendix. The text is obscure: it may indeed be read as agreeing with Paul's view. Its form is, however, opposed to this, and elsewhere Ulpian and Modestinus decide a case in terms which suggest that the common interpretation is the right one. They say that if one substitutes to an *impubes* "Whoever shall be my heir," this means *heres scriptus*, and thus if a man has taken a share through a slave he cannot claim under this substitution, if the slave is no longer his, because he is not personally the *heres scriptus*[5]. They treat this as the fact which bars: if they had taken Paul's view the the question could not possibly have arisen[6].

According to the view almost universally held by the classical lawyers, an unconditional legacy to the slave of the *heres* was void *ab initio*, by the *regula* Catoniana. But the rule was different in the converse case of a legacy to the *dominus* of an instituted slave. Such a legacy was good *ab initio*, though it would "evanesce," if the *dominus* became *heres* through the slave[7]. The reason assigned in the texts is that it is not true that if the testator died at once the gift could have no force: the legacy would cede at once in the *dominus*, but he might transfer the slave before ordering entry.

There are other illustrations, of a different type, of this principle that the slave is a distinct person, and that his *persona* is considered rather than that of the *dominus*, except in relation to capacity to take[8]. If the terms refer expressly to the slave, it is he who must do any act rendered necessary. A slave, being in a manner an instrument of his master, can enter for him. But the master cannot so enter for the slave. Thus if X and his slave are instituted, the slave entering at X's order acquires all for him, but if X enters, he acquires only his share: the slave must still enter for the other[9]. Where knowledge is

[1] 29. 2. 13. *pr.* [2] 29. 2. 79. [3] 29. 2. 35. *pr.*
[4] Salkowski, *loc. cit.* [5] 28. 6, 3, 8. 1.
[6] A patron's son has a right to *operae* promised, and to *iura in bonis*, if he is his father's *heres*, but not if having been emancipated or disinherited, he acquires his father's *hereditas* only through the institution of his slave, 38. 1. 22. 1; 38. 2. 13.
[7] G. 2. 245; In. 2. 20. 33; D. 35. 2. 20; 36. 2. 17. Cp. 30. 25, 91. *pr.* See Machelard, Dissertations, 500.
[8] See, *e.g.* 31. 82. 2.
[9] 29. 2. 26, 36. A *furiosus* could not accept a *hereditas* or direct his slave to enter, nor could his curator authorise his entry, 29. 2. 63, 90. *pr.* As to the ways in which this difficulty

material it is the knowledge of the *servus institutus* and not of his *dominus* which is considered. Thus where a slave is instituted, *vulgari cretione*, it is the state of his knowledge which determines the time allowed[1]. An *institutus* can enter if he is sure that an alleged posthumous child does not exist, but not otherwise. If he is a slave and he is sure, but the *dominus* has his doubts, the entry is valid[2].

We have also to consider the case of a slave instituted by one who thought he was free. This is really a case of a wider problem: what is the effect of error on an *institutio*? Vangerow[3] thinks the rule to have been, that, if the error were such that the institution would not have been made in knowledge of the facts, it was absolutely void, and he treats any departures from this as exceptional. There is no doubt of the rule for legacies[4], but in view of the dislike of intestacy it would not be surprising if a different rule were applied here. Of the texts he cites, one[5] says that where a child instituted proved to be *suppositus*, the inheritance was taken away, *quasi indigno*. This really makes against Vangerow's view, for it implies that such an institution was *prima facie* valid. The same case is discussed in an enactment of Gordian[6], who on the authority of Severus and Caracalla, uses similar language—*auferendam ei successionem*. His other cases are of exheredations declared null on the ground of error. They are cases in which a false reason is expressly assigned for exheredation[7] and thus are mere illustrations of *falsa causa* treated as condition, and of little weight in the present connexion[8]. On the whole the view of Savigny[9] seems preferable, that these institutions under error were valid, the cases in which they were set aside being exceptional. The same conclusion can be drawn from two cases which directly concern us. One[10] is the well-known case of Tiberius' slave, Parthenius. A slave is instituted under the impression that he is a *paterfamilias*, and X is substituted to him *si heres non erit*. Tiberius decides that he and X shall divide. This is justified by Julian[11] on the ground that the words, *si heres non erit*, when spoken of a man supposed to be free, mean "if neither he, nor anyone to whom he shall *hereafter* become subject, becomes heir." This condition[12] is satisfied on the facts and the substitute is admitted. But there is nothing to exclude the *institutus*, and thus they share[13]. The reasoning requires

was met, see, *e.g.* Accarias, §§ 349, 465. But if the slave were instituted, he could enter, no doubt with consent of *curator*, 29. 2. 63. If a beneficiary has been directed to pay money to a slave *heres*, it may not be paid to his master, 35. 1. 44. *pr.*
[1] G. 2. 190. [2] 29. 2. 30. 7. [3] Lehrb. § 431.
[4] 32. 11. 16. [5] 49. 14. 46. *pr.* [6] C. 6. 24. 4.
[7] 28. 2. 14. 2, 15.
[8] 35. 1. 72. 6. In fact a contrary inference might be drawn from them.
[9] System, 3. 377, *cit.* Vangerow, *loc. cit.* [10] In. 2. 15. 4. [11] 28. 5. 41.
[12] A substitution is essentially a conditional institution.
[13] The decision is exactly similar to that given by Gaius (2. 177) in the case of *cretio imperfecta*.

that error shall not vitiate an institution, and is strictly logical, if the interpretation given to the words, *si heres non erit*, be accepted. It is a strong case of interpretation according to intent, the ordinary rule in testaments[1], but the decision does not deserve the severe language which is sometimes used of it[2].

The case may be compared with one considered by Severus[3]. A, a *miles*, institutes J, *ut libertum suum*, and adds, "if he will not or cannot enter from any cause, I substitute V." J proves to be a common slave of A and Z. Severus says that the result is a question of intent. If A thought J his own sole *libertus*, and did not mean any other person to acquire through him, the condition of the substitution has arisen, and V can take the inheritance. If, however, the words were used in the ordinary sense, and J entered at the command of Z, V has no claim[4]. There can be no question of sharing, for if J takes anything at all, he does *adire*, and the substitute V is excluded. Here the interpretation by intent resembles that in the last case, but it is more forced: the word *adire* has not the ambiguity which, with a little good will, can be seen in the expression *si heres non erit*, and J is here allowed to shew that the testator gave the words a meaning that they cannot possibly bear. The fact that the testator is a *miles* is emphasised, and it may be that this accounts for the liberal interpretation[5].

The main principles in the case of legacies and *fideicommissa singularum rerum* are much the same[6]. A legacy *sine libertate* to the testator's own slave is invalid[7]. A gift to A and one to his slave, though they are distinct legacies, are one for the purpose of the *lex* Falcidia[8]. Gifts to *servi alieni* depend on the *testamenti factio* of the master, and are in the main equivalent to gifts to him[9]. The rules as to the admissibility and construction of gifts *cum* or *sine libertate* are, in classical law, as in institutions[10]. A legacy to a *servus alienus* is void if the testator buys him, as it is now *in ea causa in qua incipere non poterat*[11]. A legacy without liberty to the testator's slave, not legated, is void, and ademption of the liberty is ademption of the legacy[12]. Acceptance of a legacy to his slave bars the *dominus*

[1] 50. 17. 12; see 28. 5. 2, 52. 1; 28. 6. 4. 2, 24; 50. 16. 116, 243; 50. 17. 17.
[2] *e.g.* Vangerow, *loc. cit.*; Girard, Manuel, 826.
[3] C. 6. 24. 3.
[4] The text is applying the rule that if one of co-owners institutes the slave, all goes to the others, *post*, Ch. XVI.
[5] As to error in legacies, *post*, p. 151.
[6] 28. 1. 16; 30. 53. 2.
[7] 30. 34. 9.
[8] 30. 53. 2; 35. 2. 56. 4. Compare the rule in the converse case, *ante*, p. 140.
[9] 28. 1. 16; 30. 12. 2; 41. 1. 19. 1. A *fideicommissum* (and *a fortiori* a legacy) to a slave of a *deportatus* went to the Fisc, 32. 7. The *dominus* might be burdened with *fideicommissa*, 30. 11.
[10] 34. 4. 20. See *ante*, p. 137.
[11] 34. 8. 3. 2.
[12] 30. 34. 9, 102; 34. 4. 32. 1. Money was left to X with a *fideicommissum* to a slave of testator. Both were void, 31. 88. 13.

from attacking the will[1], and, if he does attack it, he loses any benefit[2].

If a legacy is left to two of my slaves independently, or to me and one of my slaves, or to my slave in the will, and to me in a codicil, and I refuse on one gift, I can take all on the other[3]. This is the law of Justinian: in classical times it would have depended on the form of the gift. Thus in *legatum per damnationem*, apart from the *leges caducariae*, one of the shares would have gone, on this hypothesis, to the *heres*.

The ownership of the slave at the time of *dies cedens* determines the fate of the legacy[4], assuming initial validity, and thus if he is alienated or freed before that date, the right will pass to his new owner or himself as the case may be[5]. It must be noticed that, in legacies to a slave, the time of *dies cedens* is postponed. Thus if there is a legacy to a slave also freed, it does not cede till *aditio*, since otherwise it must fail as he is not qualified to take till the heir enters[6]. It is similarly postponed in the case of a slave who is himself *legatus*, so that the rule applies to all possible legacies to a slave of the testator[7]. The text adds that if the slave has been freed after the will is made he can take the legacy himself, the fact that he was a slave of the testator being no bar, since, even if the testator had died at the time of making the will, the benefit and burden of it would never have been on the same person. These rules are simple: they are applied in the texts to the solution of many complex cases.

Where A was legatee of an *optio servi*, and there was a legacy to a slave of the testator, without liberty, then, if before any heir entered he became the only slave of the testator, he was a *servus legatus* and the legacy to him was good. But if he did not become the sole slave, or in any case if there was a *heres necessarius*, the legacy to the *servus proprius* would fail[8]. The case does not conflict with the *regula* Catoniana. Since it is always possible for this diminution to occur, so that he becomes a *servus legatus*, whose gift does not cede till *aditio*, it is not true that if the testator had died at once the benefit and burden must have been in the same person. If the *heres* were a *necessarius* it would be bad, for though the diminution might occur before the death, it still remains true that, had the testator died at once, the gift must have failed. If the legacy to the slave was simple, and that of the slave was conditional, the former must fail unless the condition of the latter is satisfied before *dies cedit* for the former. This is the form in which

[1] 38. 2. 8. 2; cp. *h. t.* 45, 50. *pr.*; 37. 4. 3. 15.
[2] 34. 9. 5. 3, 4; P. 5. 12. 3.
[3] 30. 101; 31. 59.
[4] 30. 91. 6; 36. 2. 5. 7, 14. 3.
[5] 30. 91. 2, 3, 114. 10.
[6] 35. 2. 1. 4, *post*, Ch. XX.
[7] 36. 2. 7. 6, 8, 17. Otherwise it would fail, as the slave is the property of the *hereditas*. If the legacy of him takes effect, the gift to him goes to the legatee, 30. 69. *pr.*
[8] 33. 5. 13.

the foregoing case would, it seems, have presented itself to the jurists who held that *legatum optionis* was conditional[1]. Justinian's change did not affect the matter, since the ownership of the slave did not pass even now till a choice was made, so that if there were still several slaves, the ownership of the slave legated would still be in the *heres*, at the time when the legacy to him vested. It may be noticed further that as this choice could not be made till after *aditio*, the fact that the legatee did in fact choose the same slave would not save the legacy to him[2].

A simple legacy to a slave of the *heres* is bad *ab initio* by the *regula* Catoniana[3]. It is in substance a gift to the *heres*, and it is not saved by the considerations we have been discussing. The coming of *dies cedens* fixes the legacy on the *heres*, and benefit and burden must therefore be on the same person. If other heirs enter, then, whether he enter or not, the legacy will be good so far and so far only as it is chargeable on the other heirs[4]. There had been disagreement as to these rules. Servius declared all such gifts valid, perhaps ignoring altogether the *regula* Catoniana, but said that it would "evanesce," if at *dies cedens* he was still in *potestas*. This suggests that he is treating the *dies cedens*, rather than the making of the will, as the *initium*. The Proculians in general held that all such gifts were bad, because, says Gaius, we can no more owe conditionally, than we can simply, to one in our *potestas*, a reason which is little more than begging the question. The Sabinians took the view which Justinian ultimately adopted, limiting the rule to simple gifts, so that a conditional legacy would fail only if, at *dies cedens*, the legatee was still in *potestas* of the *heres*[5].

Another text raises new hypotheses[6]. A legacy adeemed under a condition is regarded as given under the contrary condition[7]. If it was originally given *pure*, this makes it a conditional gift. Does this exempt from the *regula* a legacy originally given *pure*? Florentinus tells us that it does not: ademption is to take away, not to confirm a legatee's right[8]. A testator who intended to remove the difficulty would hardly put the alteration in that form. The decision turns on that point: how will it stand if, in a codicil, he gives the legacy subject to a condition, clearly *corrigendi animo*? Here it is not so clear that he does not mean to benefit the legatee: it may be that the gift would be regarded

[1] *Ante*, p. 18; Machelard, Dissertations, 525.
[2] 33. 5. 15. A slave, S, is left to X, a legacy to S, and *optio servi* to Y. Y chooses S. X takes the gift to S as being his owner when *dies cedit*, 33. 5. 11.
[3] 34. 4. 14. *pr.*; G. 2. 244; In. 2. 20. 32.
[4] Machelard, *op. cit.* 504.
[5] *Dies incertus* is a condition in wills, 30. 30. 4, and, further, no security could be exacted by the slave for such a legacy. If however he became free *pendente conditione*, personal security, with a hypothec, could be taken as a compromise between the claims of *obsequium* and the rights of ordinary legatees, 36. 3. 7.
[6] Machelard, *op. cit.* 514.
[7] 34. 4. 10. *pr.*
[8] *h. t.* 14. *pr.*

as conditional *ab initio*, and so free from the rule. As a correction it would supersede the earlier gift and the legacy would be good[1]. How if a gift, originally conditional, becomes simple by satisfaction of the condition, *vivo testatore*? May we not say that the rule should not apply, and the legacy should stand, if the slave is not the property of the *heres* at *dies cedens*? For it would not have failed if the testator had died when he made the will, which is the test of Celsus[2].

The case of a legacy of A's property to A's slave has been supposed to create a difficulty. We are told that such a legacy is valid[3]. It has been said however that, as it would be null, if the testator died at once, it infringes the *regula* and might be expected to be void. Several attempts to explain the rule have been made on these assumptions[4]. But the text says not a word about the *regula* Catoniana, and it is clear, on an unbiassed reading of it, that Paul is talking of a legacy which he regards as absolutely valid[5], and in no way dependent on alienation or manumission of the slave. It is a strong expression of the slave's individuality: *cum enim*, says the text, *servo alieno aliquid testamento damus, domini persona ad hoc tantum inspicitur ut sit cum eo testamenti factio, ceterum ex persona servi constitit legatum.* The heir must give the *dominus* the value of the thing. The case is thus easily distinguished from that of legacy to a slave of the *heres*, which must be meaningless, if the testator die at once, since the *heres* would have to pay himself, and from that of a legacy to A of his own property, which would be valid only if there were a condition, *si vivo testatore id alienaveris*, or the like[6].

Doubtless this recognition of the slave's individuality is progressive, but here as in institutions, it may be said that the rule, in the later classical law, was that the full effect of duality was allowed, except where it amounted to an evasion of some restrictive law[7]. An interesting case somewhat analogous to that which we have been discussing is considered by Africanus. A legacy is left by X to A. B makes a *donatio* of the same thing to A's slave. The master can still sue *ex testamento*, notwithstanding the rule as to *duae lucrativae causae*. This is not covered by Paul's rule, since a *donatio* is not a testamentary gift, and Paul's general proposition applies only to these. But Africanus[8], writing earlier than Paul, though probably as late as Valens, does not rest his decision on this principle, but on a rather more subtle idea. He says that if the gift had been a discharge of the legacy, so would a similar gift from the *heres* of X. This he says is inadmissible, since a debt to

[1] 35. 1. 89.
[2] 34. 7. 1. *pr.* *media tempora non nocent*, 28. 5. 6. 2. The principle if not the maxim applies to matters other than institutions. See, *e.g.* G. 2. 196.
[3] 31. 82. 2. Paul, quoting Valens.
[4] Machelard, *op. cit.* 506 *sqq.*
[5] Pellat, Revue Historique de Droit, 9. 224.
[6] 34. 7. 1. 2; In. 2. 20. 10.
[7] *Ante*, p. 140.
[8] 30. 108. 1.

the *dominus* is not discharged by a payment, *invito eo*, to the slave[1]. This is indeed a recognition of individuality, but of a very different kind: it expresses the principle that a slave cannot bind his *dominus*[2].

A legacy to a slave, *post mortem domini*, is valid, says Gaius[3]. It goes to the *heres* even though the slave is freed by his master's will, since *dies cedit* on the death, and the liberty is not operative till later. If however the *heres* is a *necessarius*, the text says doubtfully that it will go to the slave, as both events occur at the same time. A text which is a model of ambiguity seems to discuss a converse case[4]. If a slave is legated and the will contains a gift to him *cum morietur ipse servus*, this is valid. It is not obvious why there was any doubt. The text adds by way of reason: *propterea quod moriente servo, id quod ipsi legatum erit ad eum cui ipse legatus fuerit perventurum sit.* There may have been doubt as to whether this was not a conditional legacy, which might fail because it did not vest in the life, of the legatee, but Papinian and Ulpian[5] are clear that there is no condition.

Where a will was upset by *bonorum possessio contra tabulas*, legacies to a slave were not saved though the *dominus* was one of those persons, legacies to whom were still good: we are not to enquire who benefits, but whom it was intended to honour[6].

One text, of Julian, gives an odd illustration of the duality we are discussing. A slave is left, *generaliter*, to P the slave of T. After *dies cedens*, T frees P. If T chooses a slave, *extinguitur Pamphili legatum, quia non esset in hereditate qui optari possit.* But if T repudiates P can choose. For though by the manumission two distinct *personae* are established, yet there is an alternative legacy of one thing between them, so that if T vindicates, the option is at an end, but if he repudiates P can choose. The text[7] lays down strange doctrine. The case is one of *legatum generis*, for *dies cedit* before choice, and T "vindicates" the man he chooses. But, as we have seen, *dies cedens* fixes the legacy on T, and P's manumission after that date can give him no right: if T repudiates the *heres* should benefit[8]. The text may have been altered[9], but, even so, it is difficult either to restore the

[1] C. 8. 42. 19.
[2] *Post*, p. 163. The text adds, after the statement that the legacy is still valid, the words, *et maxime si ignorem meam factum esse.* If this is limitative, it destroys the rule, for the *heres* will see that the legatee is informed. The grammar is doubtful, and there is corruption: the words are probably interpolated.
[3] 30. 68. 1. Conversely a legacy of a usufruct to a slave *post mortem suam* is bad. V. Fr. 57. Whether, in classical law, an ordinary legacy to him *post mortem suam* was bad is not stated. It is hardly 'within the mischief' of the rule.
[4] 30. 107. 1. [5] 36. 2. 4; 35. 1. 79. *pr.*
[6] 37. 5. 3. 2. The existence of *fideicommissa tacita* involved forfeiture: Trajan provided that the beneficiary could keep half if he informed the Fisc, but he could not avail himself of this if the *fideicommissum* were to his slave, 49. 14. 13. 8. [7] 33. 5. 10.
[8] *Ante*, p. 145. Even if we treat it as *l. optionis*, it is no better: the text makes T capable of making the legacy vest in his favour after he has freed P, a thing impossible.
[9] Note the expression *dies cesserit*, the absurd reason given for the fact that, if T chooses, P is barred, and the accumulation of hypotheses. See Eisele, Z. S. S. 7. 19 *sqq*.

original form, or to say what principle it expresses for Justinian's time. As it stands it interprets the gift as if it were "to T and if T refuses then to P." It is a sort of substitution, and the alternative legacy to P does not cede till he is freed, so that he can take it. This interpretation is suggested by the words *inter eas vertitur*[1] and by the fact that T's vindication or repudiation is supposed to occur after the manumission: if it occurred before, the case would be that discussed elsewhere by Julian himself[2] of a gift to A and another gift of the same thing to A's slave. If A refuses the gift to himself he can still claim under the gift to the slave.

The law as to Ademption of legacies gives rise to several points of interest. If a legacy is left to a slave, the inference is that, no matter who ultimately benefits, the slave is the person the testator had in mind, and thus it can be adeemed only from him and not from his *dominus*[3]. There are more striking results. If a slave is legated and there is a legacy to him, and he is sold or freed, this may be, and usually is, ademption of the legacy of him[4]. But intent to deprive the donee of the slave is not necessarily intent to revoke the gift to the slave, and thus we are told, by Julian, that if on such facts the slave is sold or freed, the legacy to the slave is due to his buyer or to himself[5]. So too there may be a legacy to a freed slave, and alienation of the slave is an ademption of the gift of liberty[6]. Express ademption of the gift of liberty destroys the legacy to him[7], for the legacy has come into a position in which it could not have begun[8]. But it does not seem that sale of him would necessarily do so, at all events in late classical law. Thus Paul[9] deals with a case in which there was a legacy with liberty to a slave. The slave was sold and the liberty thereafter expressly adeemed. The ademption he says is strictly ineffective, since as the slave is now *alienus* the liberty is already gone. Yet as the slave might be rebought the *ademptio* is not a mere nullity, and thus it has its indirect effect of adeeming the legacy to him, which will not go to his buyer[10]. If he had been freed, instead of sold, the ademption must be an absolute nullity, and therefore says Paul, (though there had been disputes,) it will not destroy any legacy, which the will gave him with his liberty: *supervacua scriptura non nocet legato*[11]. The distinction between the two cases is that while you can contemplate repurchase you cannot contemplate reenslavement, *nec enim fas est eiusmodi casus exspectari*[12]. If he is reenslaved, he is a new man. This distinction

[1] So also by the words *si T vindicaverit, extinguitur Pamphili legatum.*
[2] 30. 10. 1. [3] 34. 4. 21; 37. 5. 3. 2.
[4] 34. 4. 18; In. 2. 20. 12. [5] 30. 91. 2, 3, 5.
[6] *Post*, Ch. xx. [7] 34. 4. 32. 1; *post*, Ch. xx.
[8] It is a simple legacy to a slave of the testator, 34. 8. 3. 2. [9] 34. 4. 26. *pr.*
[10] 34. 4. 26. *pr.* [11] *h. l.* 1. [12] 18. 1. 6. *pr.*, 34. 2; 45. 1. 83. 5.

is overlooked by Salkowski, who regards the distinction drawn as sophistical[1]. He seems indeed to consider these cases as in some sort evasions of the *regula* Catoniana. But neither of them seems to conflict in any way with that rule. Even if we consider dates between the making and the death to come into account, which is far from certain, there is no moment in which a legacy to that slave would be necessarily bad[2].

In the adjoining text Paul deals with the analogous case of a slave legated with a legacy to him. One would expect the same decision, for if ademption of his liberty by alienation or freeing does not adeem a gift to him, neither certainly will ademption of a gift of him in the same ways. But the text presents some difficulty. It remarks that if a slave, *legatus* with a legacy to him, is sold and the legacy to him is adeemed the ademption is good. This is clear, but Paul adds the reason, *quia et legatum potest procedere si redimatur*[3]. This implies that *ademptio*, by sale, of the gift of him adeemed the gift to him, for, unless the allusion is to the revival of *both* gifts by the repurchase, it is not to the point. This part of the text is, so far as its reasoning goes, (but no further,) in conflict with accepted doctrine[4]. Cujas explains it by supposing the legacy given *contemplatione legatarii cui servus relictus est*[5], but he gives no authority germane to the matter, and the text is quite general. The simplest solution is to suppose it one of the not uncommon cases in which Paul gives a correct rule, with a wrong reason[6].

From the principle that the personality of the slave is considered in relation to every thing but *testamenti factio*, it follows that if the slave be dead at the time of *dies cedens*, the gift will fail[7]. A more striking application of the same principle is found in the rule laid down, by Julian, Papinian and Paul, that no legacy could be made to a *servus alienus* unless the gift would have been valid if left to him when free[8]. The only illustration we have is that of a legacy of a praedial servitude to a slave: such a gift is bad, though he could stipulate quite effectively for it, provided the *dominus* owned the land to which it was to attach[9]. A text of Maecianus says: *servitus servo praedium habenti recte legatur*[10], which seems to mean that the rule did not apply if the *fundus* were in

[1] Sklavenerwerb, 32, n. 59.

[2] A simple ademption, leaving the slave in the possession of the testator, would destroy the legacy (28. 5. 38. 4), not however by reason of the *regula* Catoniana. Gifts to a slave of the testator are bad whether simple or conditional (28. 5. 77; 30. 102; C. 6. 37. 4), and the *regula* does not affect conditional gifts, 34. 7. 3.

[3] 34. 4. 27. *pr.*

[4] The text then says that if a slave legated is freed *inter vivos*, an ademption of the legacy of him is a nullity, and *therefore* he will take any legacy to him. The reason is that he is if reenslaved a new man (34. 4. 27. 1). Here too is the idea that ademption of a gift of him adeems a gift to him, but this is clear: it is a case of direct ademption. It implies also that manumission though it adeems the legacy of him does not affect the gift to him.

[5] Cujas, cited Pothier *ad h. l.*

[6] See *post*, Ch. xx.

[7] 31. 59; 36. 2. 16. 1.

[8] 31. 82. 2; 33. 3. 5.

[9] 33. 3. 5; 45. 3. 17; V. Fr. 56.

[10] 32. 17. 1.

the slave's *peculium*. Mommsen[1] disbelieves the text and amends it so as to destroy its application to slaves. This may be because a slave cannot strictly be said *habere*. But the word was freely used in a loose sense in the case of slaves[2], and the text is in harmony with the whole tendency of the law, since it is no doubt from the notion of *peculium* that the recognition of the slave's individuality started[3]. A converse case is considered by Ulpian[4]. A legacy is made, to a slave, of a *militia*, *i.e.* an office of the kind which had become vendible. A slave could not hold such an office. The master was not the donee. But the slave could have held it if free. Accordingly the gift is good, the master getting the value of the office[5]. We learn incidentally, from this text, that, if the testator supposes a slave legatee to be free, the gift is not good, at any rate if the thing is one he would not knowingly have left to a slave[6].

It is stated by Paul[7] that the *dominus* can repudiate a legacy to his slave. It is equally clearly stated, by Modestinus, that he cannot so repudiate a *fideicommissum* to him[8]. The reason why legacy was put on this footing seems to be that *is repudiare potest qui et acquirere potest*[9], and a legacy to a slave, according to the doctrine which prevailed[10], vests in the legatee, with no act, immediately on *aditio*. As it cannot vest in the slave it is in the master, and it is therefore for him *agnoscere* or *repudiare*. In *fideicommissa*, there is no such transition of ownership: the property passes only on *restitutio*. The probable reason why, though the *dominus* can accept, he cannot repudiate is that the conception of repudiation is not applicable at all to *fideicommissa*, and indeed our text does not say that the *dominus* cannot repudiate, but that a *fideicommissum* cannot be repudiated. All that the beneficiary has is a sort of obligation, which can of course be released in certain formal ways, like other obligations. As the text goes on to say, an informal act could at most give rise to an *exceptio doli*.

If a gift be made to a slave, *mortis causa*, it is a question of intent whether it is his death or that of his master, *vivo donatore*, which gives rise to a *condictio* for recovery[11].

As to the acquisition of *iura in re aliena*, the only cases as to which we have any authority are those of *ususfructus* and the like. We have

[1] *ad h. l.*

[2] *e.g.* 45. 1. 38. 6, 9. *Post*, p. 156. There is a further difficulty since the gift would be of a *ius* (*eundi, etc.*), which cannot attach to a slave. In its present form the rule is probably late.

[3] Pernice, Labeo, 1. 139, *post*, p. 187. See however, V. Fr. 56.

[4] 32. 11. 16.

[5] In legacy of *militia*, *aestimatio videtur legata*, 31. 49. 1. Vangerow, Pand. § 525.

[6] Gift to slave may be conditional, and the slave may fulfil the condition without *iussum*, 35. 1. 5. 1, cp. *ante*, p. 138.

[7] 30. 7. The allusion is no doubt to *l. per vindicationem*.

[8] 31. 34. 2. He can repudiate *bonorum possessio*, but perhaps not institution, *ante*, p. 140.

[9] 29. 2. 18.

[10] G. 2. 195.

[11] The right vests in the master immediately on the death (39. 6. 44) and thus if the slave is freed between death and entry of a *heres*, he does not take the gift with him. As to legacy of *cibaria, etc.*, to a slave see *post*, Chh. xiii, xx.

seen that, except in case of *peculium*, a slave cannot acquire a praedial servitude by will[1]. He can acquire it *inter vivos*, and *ususfructus*, *usus*, *habitatio*, and *operae servorum* can be acquired by him in all the ordinary ways[2]. As a slave's possession is his master's, so is his enjoyment of a servitude[3]. It is in connexion with these rights that we get the most striking illustrations of the principle that in gifts by will the personality of the slave is most considered, that of the master being material only so far as *testamenti factio* is concerned. A legacy of usufruct, whether to a slave or not, vests only when the heir enters[4]. The reason, credited by Ulpian to Julian, is: *tunc enim constituitur ususfructus cum quis iam frui potest*[5]. If the slave were dead at that time, the gift would of course fail[6]. But, in the classical law, the usufruct failed at once whenever the slave died, if it had been left *pure*, *per vindicationem*[7]. And since the right has taken effect in the master, but still attaches to the individuality of the slave, the same effect is produced if the slave be alienated or freed[8]. If it was created *inter vivos*, the slave's individuality is not considered, and thus it is not affected by these facts. Moreover though, as we have seen, a legacy to a slave, *post mortem suam*, must fail, he can validly stipulate for a usufruct in this form[9].

What is true of creation *inter vivos* is no doubt also true of creation by *legatum per damnationem*, or by *fideicommissum*, which have to be completed *inter vivos*. One text suggests the question whether, in the case of a conditional legacy, the usufruct is constituted *ex persona servi*. The text says that if two slaves are instituted and there is a simple legacy of land to X, *deducto usufructu*, the usufruct is based on the *persona* of the slave, but that if the legacy of the land was conditional, it is *ex persona domini*[10]. Here the usufruct is regarded not as a part of the *dominium*, but as a distinct thing, which does not exist till the condition occurs and the land passes[11]. The land then passes directly from the master, leaving the usufruct in him: the slaves do not appear in the matter. If the legacy of land had been simple, the usufruct would have sprung into existence at *aditio*, and would have been a normal acquisition *ex testamento*, through the slaves. But the same point would not arise in a direct legacy of usufruct. The

[1] *Ante*, p. 151.
[2] 7. 1. 6. 2, 3; 7. 8. 17; 36. 2. 9; V. Fr. 82. If a slave demands a *precarium*, *ratihabente aut auctore domino*, the *dominus* has it, and is liable to the interdict. If he did not consent there is only *de peculio*, or *de in rem verso*, 43. 26. 13. See *ante*, p. 134.
[3] 43. 19. 3. 4. [4] 7. 3. 1. 2; V. Fr. 60.
[5] Labeo had held a different opinion, *i.e.* that they ceded like other legacies (V. Fr. 60). But the chief advantage, that of transmissibility, did not arise here.
[6] 36. 2. 16. 1. [7] V. Fr. 57. [8] *Ib.*; C. 3. 33. 17.
[9] V. Fr. 57. Creation of usufruct in a slave in whom you have a usufruct does not affect it, 7. 4. 5. 1.
[10] V. Fr. 82.
[11] 46. 4. 13. 2. It was looked at in both ways. Roby, de usufructu, 42.

usufruct, even where it is left conditionally, comes to the master directly through the slave. And the principal text is quite general[1].

Several texts discuss difficulties arising in the application of these principles, in cases, like the foregoing, where the gift is to two, the question being usually as to the existence of *ius accrescendi*. Justinian[2] tells us that if one of two slaves through whom, or part of the slave through whom, the usufruct was acquired, were alienated, there had been doubt as to the effect on the usufruct. Some held it wholly destroyed; some *pro parte* lost; others, including Julian, held that it remained unaffected. This view Justinian adopted, before he passed the enactment sweeping away the importance of the continued ownership in all cases[3]. This is a case of *ius accrescendi*; it is so explained by Julian and Pomponius, cited by Ulpian, in the analogous cases of death of one of the slaves, or repudiation of the gift so far as it was acquired through one of them[4]. These and similar matters were the subject of much discussion, the doctrines being ultimately settled by Julian.

In order to state them, as far as they are known, it is necessary to examine some questions of more general kind among the many to which the thorny topic of legacy of usufruct gives rise.

It is clear that there is *ius accrescendi* between fructuaries, if the thing is left *per vindicationem coniunctim*, or *disiunctim*, but not where it is left separately to two in parts[5]. And though there is *ius accrescendi* similarly in a legacy of property, there is the difference that in that case it occurs only if the gift never really takes effect in one of them: here it arises, even in case of subsequent failure[6]. Accordingly if it is left to two of a man's slaves, the owner has *ius accrescendi*, as we have just seen[7]. How if it is left to a common slave, and one master loses or repudiates it? Ulpian quotes an array of jurists on this point—himself adopting Julian's view that in such a case the other holder gets all. To the objection that there ought to be no more accrual here than there would be, *e.g.*, where the holder of a usufruct loses by nonuse the usufruct of a divided part of it, he replies that it is not a question of *ius accrescendi*, but that so long as the slave whose *persona* is considered is his, no part ought to perish. The objection thus met seems to rest on the notion that the acquisition to the common owners is *ab initio* in parts, and the reply emphasises the individuality of the slave and also expresses the idea of continuous acquisition[8]. In the legacy of a usufruct to a slave however owned the acquisition is a single one made by him. Thus if it

[1] V. Fr. 57. [2] C. 3. 33. 15. [3] *h. t.* 17. [4] V. Fr. 82.
[5] V. Fr. 75. 1 (D. 7. 2. 1. *pr.*). V. Fr. 77 (D. 7. 2. 1. 3). Vindius differed on the last point.
[6] V. Fr. 77; D. 7. 2. 1. 3. The idea at the bottom of this is that *ususfructus* is not acquired, like *dominium*, once for all, but *cotidie constituitur*.
[7] V. Fr. 82. [8] V. Fr. 75; D. 7. 2. 1. *pr.*

were left to a common slave and T, then on lapse of the share of one common owner, all goes to the other, not to T[1]. The case is contrasted with that in which two heirs are instituted, and land is left to X, *deducto usufructu*. Here all are agreed that the heirs will have no *ius accrescendi*. Julian assigns as the reason: *videri usumfructum constitutum non per concursum divisum*—an obscure expression which must mean "originally created in *partes*[2]," since it is added that this agrees with the view of Celsus, that there is *ius accrescendi* only where it was divided *concursu, in duobus qui solidum habuerunt*[3]. Celsus and Neratius apply the same rule in the case of common owners who mancipate, *deducto usufructu*[4]. There is no accrual. Consistently with this it is said by Ulpian, on the authority of Julian, Pomponius and Neratius, that if two slaves are instituted and there is a legacy of land, *deducto usufructu*, there is no *ius accrescendi* on lapse of the part acquired by either slave, but the legatee of the land gets the benefit[5]. The case of a common slave instituted, with the same gift to an *extraneus*, is not considered: presumably in such a case the co-owner would benefit by a lapse, on the principle laid down by Ulpian in the case of legacy[6]: it is not exactly *ius accrescendi*. But this question is bound up with that whether the institution of a common slave was one institution or two—a matter which will call for discussion later[7].

A principle running through all these cases is, that where two persons receive a gift by institution, they are regarded as taking distinct parts *ab initio*, while in a case of joint legacy, each is *prima facie* entitled to the whole: it is the accident that there are two of them which compels division[8].

Justinian[9] provided that however a usufruct was acquired through a slave, it was not to be affected by death, alienation, or manumission of him. This enactment lessened the possible cases of lapse and so far simplified the law. But it does not involve any general alteration of the way in which gifts were affected by the fact that they were acquired through slaves. And thus most of these rules pass into the Digest[10].

In relation to *iura in personam*, the governing principle, that a slave can better our position but cannot deteriorate it[11], has many obvious illustrations. The slave has the power of stipulating *ex persona domini*

[1] V. Fr. 76; D. 7. 2. 1. 2. [2] Mommsen *ad h. l.*
[3] V. Fr. 78, 79; D. 7. 2. 1. 4; 7. 2. 3. *pr.*
[4] 7. 2. 3. 1; V. Fr. 80, 81. [5] V. Fr. 82.
[6] V. Fr. 75. 5. See above. [7] *Post*, Ch. XVI.
[8] See for an illustration, 7. 2. 11. The distinction may be connected with the fact that in ordinary joint legacies nothing was said of shares, while in joint institutions they were usually mentioned: the right of one to take all in case of lapse being a result of the rule: *nemo pro parte testatus*.
[9] C. 3. 33. 17; A.D. 531.
[10] D. 7. 2. [11] 50. 17. 133.

and the right vests in the *dominus*[1]. He acquires *invito*, even *vetante, domino*, even where it is an acquisition involving liabilities[2]. But here the risk is not with the *dominus* until he knows and assents, nor, till then, can he be guilty of *culpa* in relation to the matter. Thus, we are told, in a case of such a promise of *Dos*, that, as it is an unfair acquisition, the other party has a right to a *condictio* for repayment, or release, as the case may be[3]. As a stipulation derives its force *ex praesenti*, the *dominus* acquires the right even though its operation be postponed, by condition or otherwise, till after alienation or manumission[4]. It is indifferent whether the slave names himself or his master or a fellow-slave or no one[5]. His stipulation, *domino aut extraneo*, is valid: his master alone can sue, but the *extraneus* being regarded as *solutionis causa adjectus*, payment can be made to him[6]. On similar principles an *acceptilatio* taken by a slave on his transaction, or his master's, bars action against the latter[7]. A slave's capacity for stipulation being purely derivative, there are many limitations on it. Thus one who has no owner, a derelict, cannot stipulate[8], and a slave cannot make a stipulation which would not be good in substance if made by his master[9]. He cannot stipulate for a praedial servitude, unless the master has the *praedium* to which it is to attach[10]. As a slave derives his capacity from his master, it might be supposed that he could not have more than the master had. But this would have involved inconvenience, and it is clear that for a master incapable of contracting from mental or physical defect, the slave could stipulate[11]. The rule seems illogical, but its illogicality is concealed by the fact that a slave's stipulation, as we have seen, did not require the consent or knowledge of the master.

The difference of individuality has many marked effects in this connexion. A slave could not be *adstipulator*, this form of obligation being essentially personal[12]. A slave's contract is, for the purpose of jurisdiction, made at his domicile, rather than his master's[13]. There is a very important rule that *quae facti sunt non transeunt ad dominum*[14]. This means in effect that the terms of the stipulation are to be literally interpreted, and thus where the stipulation involves any act to be done

[1] 41. 1. 10. 1; 45. 1. 38. 17; In. 3. 17. *pr.*; G. 3. 114; 4. 134, 5. As to *filius miles*, 49. 17. 15. 3.
[2] 12. 1. 31. 1; 45. 1. 62. [3] 23. 3. 46. [4] 45. 3. 40.
[5] 45. 1. 45. *pr.*; 45. 3. 1. *pr.*—3, 15. Just as a *dominus* stipulating for his slave acquires to himself, 45. 1. 39, 40, 56. 3, 130; 45. 3. 28. 2; C. 8. 37. 2. Slave's stipulation for an *extraneus nominatim* is of course void, 45. 3. 1. 3, 30; C. 8. 38. 14.
[6] 45. 3. 13. His stipulation *domino et extraneo* gave rise no doubt to the same questions as did that of a freeman *sibi et Titio*. As to common slaves, *post*, Ch. XVI.
[7] 46. 4. 11. *pr.*
[8] 45. 3. 36. Or one in a derelict *hereditas*, 45. 1. 73. 1.
[9] Thus he cannot stipulate for a freeman or a *praedium litigiosum* (16. 1. 27. 1) or for what is his master's (45. 3. 9. *pr.*) or *post mortem domini*, In. 3. 19. 13.
[10] 45. 3. 7. 1; V. Fr. 56. [11] *Arg.* 27. 8. 1. 15.
[12] G. 3. 114. [13] 5. 1. 19. 3. At least if he was lawfully there.
[14] 35. 1. 44. *pr.*

by or to the slave, it cannot be done by or to the master, though it is he who will enforce the contract if need be. Thus if a slave stipulates that he may be allowed to cross a field it is he who may do so, not his master[1]. If he stipulates for this thing or that, as he shall choose, the choice is personal. But no question of *dies cedens* arises as in legacy, and if the slave dies before choosing, the right to choose passes to the master[2]. If A promises to pay to me "or to the slave of T," it is no discharge to pay the money to T: he is not the *solutionis causa adiectus*[3]. But the maxim, *quae facti sunt non transeunt*, does not adequately express the rule. It is wider: nothing which is expressed to be done to the slave, or had by him, *transit ad dominum*, whether it be expressed as a matter of fact, or as a legal right. This leads to difficulties. If he simply stipulates for a right the matter is clear. But if he stipulates that he is to have that right, there is the obstacle that a slave is incapable of a right. He cannot acquire the right to himself, and the mention of himself excludes the *dominus*. Julian thought that even such expressions as *sibi habere licere* and *possidere licere*, *prima facie* express a right, and so vitiate the stipulation. But Ulpian found a more reasonable way. Such words, he says, admit of being understood otherwise, as expressing merely detention, of which a slave is capable, and the accepted rule of the Digest is that where a slave so contracts, the words are to be so construed[4]. The result is that his master has a different right from that which would have been created if the word *mihi* had not been used[5]. There is no trace of the further step of ignoring that word. If the stipulation refer to something that does not admit of such an interpretation as excludes the question of right, it is void, even under Justinian. Thus if a slave of the patron stipulates with a *libertus* that *operae* shall be rendered to him this is void, though if he does not say *mihi* it is quite good. This is laid down by Pomponius and Celsus, and similar rules are expressed by Ulpian and Papinian[6]. This hidebound logic seems out of place in the law of Justinian. The recognition of the slave's individuality was due to considerations of convenience, and common sense, which might have led to its being disregarded in this case[7].

Justinian's enactments as to *cautiones* shew that the same principles were applied in the case of other unilateral contracts[8].

[1] In. 3. 17. 2. [2] 45. 1. 76. *pr.*, 141 *pr.*

[3] 35. 1. 44. 1. So in stipulation to pay to a slave, 46. 3. 95. 7. A slave, to be free on paying to a *servus heres*, could not pay to the *dominus* except with consent of the *servus*, 35. 1. 44. *pr.*, 1, 2; 46. 3. 95. 7. Converse rules where the payment was to be to the *dominus*, though *versio in rem domini* sufficed, 35. 1. 44. 3, 46. 3. 9, 95. 7, *post*, Ch. XXI.

[4] 45. 1. 38. 3—9. [5] *e.g.* 45. 1. 130.

[6] 38. 1. 10. *pr.*; 45. 3. 2, 18. 1, 38.

[7] The logical difficulty in this playing fast and loose may have seemed too great.

[8] C. 8. 37. 14.

In relation to bilateral contracts the matter is more complex. The general rule is that the slave binds the other party to his master, but not *vice versa*, apart from cases within the special praetorian remedies to be later discussed. But it is easy to state cases in which this rule would operate unjustly. Accordingly while the principle that the *dominus* could not be sued on his slave's contract remained intact, his enforcement of his rights thereunder was made subject to his satisfying the claim of the other party. If he sued on his slave's contract, *compensatio* would be *in solidum*, though he could have been sued only *de peculio*[1]. Where a slave bought, the master had an *actio ex empto* against the vendor[2], but to entitle himself to sue he must pay the whole price[3]. Where A buys B's slave S from a thief and S buys a man V, B acquires the *actio ex empto* against the seller of V, subject to his paying all that would have been due had V been bought by a free man[4].

But here too the individuality of the slave is material in many ways. It was penal to buy a *res litigiosa* knowingly. If a slave bought, knowingly, the penalty attached, unless it was under special mandate: in that case the master's knowledge, and his alone, was material[5]. In the *actio redhibitoria* the same principle applied: it was the slave's *scientia* which barred the action unless it was under special mandate, in which case the master's knowledge was material[6]. The text remarks that good faith requires that deception of the slave should not hurt the master, while deception by him should[7].

If the buyer from a slave is evicted he must give notice to the slave himself if he is alive[8]. If a slave is to be free on paying to the heir there was a rule that if alienated he must pay it to the buyer[9]. But if a slave were the buyer, the payment must be made, apart from *peculium*, not to him but to his *dominus*, notwithstanding this principle[10]. This provision is probably due to the wording of the original rule in the XII Tables, where the word used was *emptor*, which means not buyer but acquirer[11]. This is not the slave but his master.

There is less authority in relation to other contracts, but the principles are the same. The *dominus* can avail himself of a mandate by or to the slave even given against his will[12]. If my slave commodates

[1] 16. 2. 9. *pr.* [2] 21. 2. 39. 1.

[3] 21. 1. 57. *pr.* Where a slave bought and his master brought the *actio redhibitoria*, the counter claim, if any, was *in solidum*, not confined to *peculium*, though, if the slave had sold, the *actio redhibitoria* against his *dominus* would have been so limited, 21. 1. 57.

[4] 12. 1. 31. 1. [5] 44. 6. 2. Julian.

[6] 21. 1. 51, Africanus; see also 18. 1. 12. 13. In 21. 1. 51 he says, disagreeing with Julian, that even in special mandate the knowledge of the slave might bar action. The text is from the Quaestiones. It was no doubt disputed.

[7] For puzzling texts as to effect of *dolus* of a slave, see *post*, p. 163. In general his *dolus* is imputable to his master, but only in relation to the transaction in which it occurred, 44. 4. 4. 17 *h. t.* 5. 3.

[8] 21. 2. 39. 1. [9] *Post*, Ch. XXI. [10] 40. 7. 6. 6.

[11] 40. 7. 29. 1. 6. 3 Ulp. 2. 4. [12] 17. 1. 22. 8; C. 6. 2. 1.

against my will I can sue the *commodatarius*[1]. In the same way a *constitutum* may be made to a slave and he acquires the right to his master though the agreement be to pay the money to him[2].

Some contractual rights are acquired only as the result of an alienation. We shall see later that these require authorisation as the alienation does. Thus if a slave lends money without authority, there is no *actio ex mutuo*, but the money can be vindicated[3]. If he pay under a *fideiussio* duly authorised, the owner will have *actio mandati*[4]. But if there was no authority to alienate the money, there can be no such action[5].

If in order to benefit me, X paid under a *fideiussio* I had undertaken, I was entitled to recover the money from the principal debtor: it was as if I had paid[6]. If the *fideiussio* had been by my son or slave, and the intent was to benefit him and not me, I had, says Ulpian, quoting Marcellus[7], no *actio mandati* against the principal debtor, though he is released. It is presumably the expressed intent not to benefit the *dominus* which excludes him; but one would have expected the action to be allowed, the proceeds being *in peculio*[8].

Rights *ex delicto* are acquired in the same way. Thus the master has *actio furti* for what is stolen from his slave[9]. If it was a thing borrowed by the slave the master is entitled to *actio furti* so far as he is liable *de peculio*[10]. If my slaves are ejected I am entitled to the interdict *de vi*[11]. Work done against my slaves' opposition or concealed from them entitles me to the interdict *quod vi aut clam*[12]. It may be added that delictal actions and *condictio furtiva* acquired through the slave are not lost by alienation or manumission of him[13].

In general the recognition of the slave's individuality is the satisfaction of an obvious practical need, and the restrictions on it, though sometimes compelled by the words of an enactment, are for the most part inspired by considerations of the same kind. The texts provide a simple illustration of this. We are told that a master cannot get *restitutio in integrum* on the transaction of a minor slave. The point is that as no such transaction can bind the master unless he has in some way authorised it, he has himself to blame—*sibi debebit imputare, cur rem minori commisit*[14].

[1] 13. 6. 14. If the latter knew that the slave had no business to do it, there would be *furti* as well. Where on similar facts the *commodatarius* pledged the thing, the pledgee refused to restore it till he was paid. The text discusses the circumstances under which the money could be recovered, but assumes the validity of the *commodatum*, 12. 6. 36.

[2] 13. 5. 10. A master does not lose his action of deposit acquired through the slave by the alienation or manumission of the slave, 16. 3. 1. 17, 30.

[3] 12. 1. 11. 2. See p. 159. [4] 17. 1. 12. 3.

[5] 46. 1. 19. As to difficulties where he has *administratio peculii*, *post*, Ch. VIII.

[6] 17. 1. 12. 1. [7] *h. l.* 2.

[8] The allusion to the slave may be interpolated: it is not carried through the text. Under many circumstances the son might have *actio mandati*.

[9] P. 2. 31. 20. [10] 47. 2. 52. 9. [11] 43. 16. 1. 22.

[12] 43. 24. 3. *pr.* [13] 44. 7. 56. [14] 4. 4. 3. 11, 23.

CHAPTER VII.

THE SLAVE AS MAN. COMMERCIAL RELATIONS APART FROM *PECULIUM*. LIABILITIES.

To alienation of the master's property his consent was always necessary[1]. With that consent, which might be by ratification[2], or by a general authorisation if wide enough in its terms[3], the slave could alienate anything[4]. He could not of course make a *cessio in iure*, because this was in form litigation[5], but apart from that the form is immaterial. There is indeed little authority for *mancipatio* by a slave, but what little there is is in favour[6]. Julian[7] contemplates the transfer of *proprietas* in a slave, by a slave with authority, but it is possible that the text, which speaks of *traditio*, may have been originally so written, so that the reference would be only to Praetorian ownership. Of course the *dominus* could not authorise the slave to do what would have been unlawful had he done it himself. Thus a slave could not validly make a *donatio* to his owner's wife[8]. Without authority, the slave was powerless: he could not transfer *dominium*[9]. If he sold and delivered, possession passed but no more, and the taker, if he knew that there was no authority, could not prescribe, and was indeed a *fur*[10]. Money lent, *citra voluntatem*, could be vindicated[11], as could money paid by a fugitive slave for the concealment of himself or his theft[12].

Similar rules applied where, having authority, he exceeded it[13]. Where A owed B 10 *ex fideicommisso* and 10 on an independent *obligatio naturalis*, and a generally authorised slave paid 10 expressly towards the whole debt, 5 could be vindicated, as a general authority

[1] 21. 2. 39. 1. No requirement of form: an endorsement of the *cautio* sufficed, 45. 1. 126. 2.

[2] 43. 26. 19. 1. [3] 15. 1. 46; 46. 3. 94. 3.

[4] 6. 1. 41. 1. He could pledge all his master's goods, himself included, or give himself in *precarium*, 12. 6. 13. *pr.*; 20. 1. 29. 3; 43. 26. 19. 1. Delivery with authority would give the buyer *accessio temporis*, 41. 2. 14. *pr.*; 44. 3. 15. 3.

[5] *Ante*, p. 83. [6] Cic. Att. 13. 50. 2. See Roby, Roman Private Law, 1. 432.

[7] 21. 2. 39. 1. [8] 24. 1. 3. 3.

[9] C. Th. 2. 30. 2; 2. 31. 1; D. 12. 6. 53; 21. 2. 39. 1.

[10] 13. 6. 14; C. 4. 26. 10. An *ancilla* without authority gave money purporting to be her *dos*: the master could vindicate, subject to a possibility of *usucapio*, 23. 3. 67, cp. C. 4. 26. 6.

[11] 12. 1. 11. 2; 46. 1. 19. [12] 12. 5. 4. 4, 5. *Condicere, quasi furi.*

[13] If being authorised to pay 8 he paid 10, the owner could vindicate 2. D. 15. 1. 37. 1.

to pay is not held to apply to natural obligations[1] There must be real authority a mere *bona fide* belief, however reasonable, did not suffice[2]

There is some difficulty as to the loss of possession by the act of the slave Before discussing the texts it must be pointed out that, from the present point of view, it is immaterial whether the possession was originally acquired by the slave or not in either case he is now a *detentor* through whom the possession is realised Moreover we are told that the rules are the same whether it is a slave, a *procurator* or a *colonus*[3], the slave's lack of capacity does not enter into the question, and thus there is no room for the maxim that a slave cannot make his master's position worse. It is indeed mentioned in this connexion, but only in an enactment of Justinian's[4] in which he excels himself in obscurity It is the fact that possession is on a very different level from other rights, that is at the bottom of the whole difficulty.

If a slave possessed by his master still held the thing, it might be supposed that, however he attempted to exclude the master, the latter would still possess, as the slave's possession is his And so the rule is laid down by Africanus for the case where the slave of a pledgee turns his master out of pledged land[5] But Paul lays down a different rule for moveables If my slave takes my property I do not possess it till he restores it[6] In the next text[7] he cites Labeo and Pomponius in support of the view that, for this purpose, adding it to his *peculium* is not restoration, unless it was in the *peculium* before, or the owner assents to its being there The difference may turn on the fact that, the land being immoveable, no change has occurred in the relation of the *dominus* thereto, while this would not be the case in regard to the moveables But the solution is more likely to be found in considering the case as one of a *fugitivus* The view that his owner still possessed a fugitive was slowly accepted, and not all those who accepted it agreed that there could be possession through him[8]

If a slave is deprived of the thing of course the master loses possession. Thus if a slave occupying land is *dejectus*, the *dominus* has the

[1] 46 3 94 3 Eisele suggests (Z S S 26 66 *sqq*) that where acquisition depended on alienation, as in purchase, no authority was needed This is inconsistent with 15 1 37 1 and with the rules as to *mutuum* (*ante* p 159) and has no support in the texts That in connexion with which Eisele applies this principle does not on its face, express such a rule and admits of a different explanation *Post* Ch xv and App III

[2] 12 6 53 So, it would seem, of an expired authority, whatever the belief of the receiver (*Arg* 12 1 11 2)

[3] 41 2 25 1 [4] C 7 32 12

[5] 41 2 40 *pr* Labeo remarks that where the *heres* of a *colonus* takes possession thinking the *colonus* was owner, the true owner still possesses 19 2 60 1

[6] 41 3 4 8 Nor even then if I knew of the theft, till I know of the return

[7] 41 3 4 9

[8] *Post*, Ch xii There are signs of a school controversy in which the Proculians, including Pomponius, took the view that it was impossible The rule that a holder cannot *causam possessionis mutare* is sometimes used to explain the rule in the case of land Ihering, Besitzwille, 347 *sqq* He appears to hold that the rule applies to a *detentor* attempting to convert his holding into possession

Interdict *unde vi*, whether he know of it or not[1]. Conversely, if his slaves are left in possession of the land, the owner has not been *dejectus*, even though he himself has been expelled, unless indeed they have passed into the possession of the *dejector*, as would result from their being bound or acting at his orders[2]

Mere momentary absence with no intention to abandon is of course immaterial[3] The same appears to be true of death or insanity of the slave It is true that he cannot any longer be holding consciously for the owner but it is clear on the texts that the possession is not lost till a third person has taken the thing or the master has neglected to get actual control of it The slave is a mere instrument his death and, *a fortiori*, his insanity, do not of themselves affect the master's relation to the thing[4] But in the case of intentional abandonment there was a conflict[5] Pomponius and Africanus tell us that possession is lost[6] Paul and Papinian hold that it is not lost till a third party has entered[7]. The dissidence cannot turn on anything peculiar to slaves, for both Paul and Papinian speak of slaves or *coloni*, though it chances that the texts which declare possession lost speak only of *coloni* It seems to be no more than a difference of opinion as to what is substantial loss of control Justinian decides, as it seems, that possession is not lost[8].

If the possession has passed to an adverse possessor the texts are agreed that possession is lost[9] Justinian, however, in the enactment just mentioned, in which he appears to lay down the opposite rule for this case also, says that here too there had been dispute It is sometimes said that this is a mere mistake of his[10] But it is at least possible that the dispute was whether the entry of the third party ended the possession, till it was known to the person concerned[11] Thus Papinian tells us that knowledge was not required[12], while he says that, of *saltus hiberni*, which are possessed only *animo*, the possession is not lost till knowledge, since, till then, the *animus* exists[13] It may well be that some lawyers thought the same rule ought to apply where the slave had abandoned possession, for, if possession is retained, it can be only *animo*.

We shall have shortly to consider how far a slave's contract can bind his master But there is a difficult topic, which must first be

[1] 43 16 1 22 [2] *h l* 45 46 [3] 41 2 3 1

[4] 41 2 3 8, 25 1, 40 1 So if he lets the land to another—the possession is still in the master The texts apply to land but the principle should apply to moveables

[5] See Windscheid, Lehrb § 157, Dernburg Pand 1 § 183, Girard, Manuel, p 274

[6] 41 2 31 40 1

[7] 41 2 3 8 44 2 Proculus may be of this opinion, but he may mean only that the facts he gives do not amount to abandonment, 4 3 31

[8] C 7 32 12 His enactment is so obscure that a dispute as to its meaning begun by the Glossators (Haenel, Diss Domm 5) still rages See the refs in n 5 The Digest texts are not much guide towards his meaning Ihering holds that the meaning is merely that he can recover possession by interdict—an extended *Unde vi* Grund d Besitzessch 114 See also C 7 32 5

[9] 41 2 40 1 44 2 [10] Girard, *loc cit* [11] Windscheid, *loc cit*

[12] 41 2 44 2 [13] 41 2 46

considered. How far is a master bound by the unauthorised acts of his slave in transactions, essentially not the slave's, but the master's? It is obvious that, in a great number of transactions, the actual carrying out of the contract will be left to slaves, and it is of importance to note how far it is material that the performance, or the breach, is not the act of the contracting master himself. The story told by the texts is not consistent at all points, but in general the principle is that a man is not, apart from his own privity or neglect, liable for conduct of his slave in relation to a contract not made by the slave[1]. Where a slave, being directed by his master to point out the limits of a property sold points them out wrongly the land sold is that agreed by the master, not that pointed out[2]. A redhibiting buyer is indeed liable for damage done by his *familia*, but this is by virtue of an express rule of the Aedilician Edict[3].

The rule protecting the master is laid down in general terms by Ulpian, who says: *neque enim esse aequum servi dolum amplius domino nocere quam in quo opera eius esset usus*[4]. But this lacks precision: so far at least as *culpa* is concerned the employment contemplated is employment in making the contract. Alfenus, in the case of a house set on fire by the vendor's slaves[5], and Labeo in that of a mule killed by the negligence of a slave let on hire[6], lay down the same rule: a man is not liable, *ex contractu*, on his own contract for the *culpa* of his slave. A little later there appears a difference of opinion. Oddly enough it is Sabinus of the other school who lays down the rule as it was stated by Labeo (and his teacher Alfenus), and Proculus who holds that the master is liable on the contract, subject to a right of abandoning the slave instead of paying damages[7]. This text is in the Collatio[8]. As inserted in the Digest[9], it gives as law the view of Proculus and omits that of Sabinus. On the other hand Paul[10] dealing with the case of slaves, let with a property, who steal from the tenant, says that the *locator* is not liable *ex contractu*, but only *ex delicto*, noxally. Neratius, a Proculian[11], gives a view which, though in form intermediate, is in essence the view of Sabinus. He says the master is liable *ex contractu* on such facts, if he was negligent in employing such slaves. This of course is personal *culpa* in the master. Ulpian expresses the same rule in a text which is not above suspicion of interpolation[12]. Another text, by Paul and Ulpian[13], says that, where slaves are employed under a contract, damage done by them may create a claim *ex contractu*

[1] It is not necessarily enough to put a man in *mora* that notice was given to his slave, though circumstances may make it so: *mora* or not is a question of fact, 22. 1. 32. *pr.*
[2] 18. 1. 18. 1. The slave might be liable if freed, cp. 4. 3. 7. *pr.*
[3] 21. 1. 25. 1. [4] 44. 4. 4. 17. [5] 18. 6. 12.
[6] 19. 2. 60. 7. [7] *Ante*, p. 123. [8] Coll. 12. 7. 9.
[9] 9. 2. 27. 11. [10] 19. 2. 45. *pr.* [11] Coll. 12. 7. 7; D. 9. 2. 27. 9.
[12] 9. 2. 11. *pr.* [13] 13. 6. 10. 1—12.

against the master *qui non tam idoneum hominem elegerit*. And Julian says[1] that, if the man chosen to return a thing lent is one who might properly be trusted, the master is under no liability. On the whole, this rule that he is liable, if he has shewn *culpa in eligendo*[2], must be taken to be that of the classical lawyers. But some texts suggest that some jurists were inclined to hold that *res ipsa loquitur*, and a man who employs negligent slaves is himself negligent[3]. Such a theory is more likely to be of the sixth century than of the second. It appears in the Institutes[4] in connexion with the special liabilities of *caupo*, etc., and similar language is used in texts[5] in the Digest dealing with the same cases. But it may be doubted if the reasoning is that of the original text: the rules are a direct creation of the Edict[6]: they are rather cases of insurance and there is no need to resort to the hypothesis of *culpa*[7].

The principles that a slave has no authority to make his master's position worse, and that liability through him ought to be limited, are reflected in the texts dealing with his *dolus*. *Dolus* is a delict, and we are told that if a slave's *dolus* arises in connexion with an affair which gives an *actio de peculio*, the *actio doli* is *de peculio*, but otherwise it is noxal[8]. A master suing can be met by an *exceptio doli* for what his slave did, but only if the transaction, in which it was done, was that now sued on, and was one in which the slave was employed. If indeed it was a *peculiare negotium* then it is immaterial when or in what connexion the *dolus* was committed[9], and the same is true if the slave was his master's *actor*, i.e. one who had a general authority to act on his behalf[10]. We are also told that we may have an *exceptio doli* for the act of our own slave, (so far is he from binding us,) *et de eorum dolo quibus adquiritur*[11].

A few other illustrations may be given of the principle that the slave's intervention in a transaction, which was not his, does not bind his master. Money lent by a slave can be validly repaid to him[12], even though it was *dominica pecunia*, provided that in this case the loan was authorised[13], as otherwise there would have been no alienation of the money[14]. The same rule is laid down for the case of deposit by the slave, or of sale by him. But here it is observed, on the authority of Sabinus, that this is true only if the other party has no reason to think

[1] 13. 6. 20.
[2] As to this and the literature, Windscheid, Lehrb. § 401, n. 5.
[3] See especially 13. 6. 10. 1—11. [4] In. 4. 5. 3.
[5] 4. 9. 7. 4; 47. 5. 1. 5. [6] Lenel, Ed. Perp. §§ 49, 136.
[7] In *societas*, owing to its confidential nature (17. 2. 63. *pr.*; C. 4. 37. 3) a master who was a *socius* was fully liable for negligence of his slaves, authorised to act, 17. 2. 23. 1.
[8] 4. 3. 9. 4a. [9] 44. 4. 4. 17. [10] 44. 4. 5. 3.
[11] 44. 4. 4. 17. This is obscure: the *dolus* must proceed *ex parte actoris* (*h. t.* 2. 2), and the case must be that of a slave in whom other persons have such rights that they can acquire through him, and who is contracting for them with his master.
[12] 44. 7. 14. [13] 46. 3. 35. [14] *Ante*, p. 158.

the *dominus* would not assent to such redelivery[1], and doubtless this must be generalised. Payment to a slave is not satisfaction of a condition of payment to the master unless the latter consent[2]. A similar idea governs the rule that if A owes B a *res* under a will, and C gives B's slave the thing, the right under the will is unaffected. There is here, however, another point: *alioquin consequens erit ut etiam si tu ipse servo meo eam donaveris, invito me libereris. quod nullo modo recipiendum est, quando ne solutione quidem invito me facto libereris*[3]. There is no *solutio* without consent of the person entitled[4]: he may be in *mora* for refusing a proper tender, but till he has accepted it there is no *solutio*.

There is not much authority as to acknowledgements and receipts given by slaves apart from *peculium*. We learn that they can novate, by order or with ratification[5], but not without any authority: in that case they acquire a new right to the master, without, *ipso iure*, destroying the old[6]. This is so, whether it was the slave's or the master's contract: in the former case one might have thought that as *solutio* could be made to him, so might *novatio*. But *novatio* is not in fact *solutio* and it requires that the obligation should be in some way altered, and this would be to bind the master, and might prejudice him. Conversely we are told by Gaius that if a slave promises, *novandi animo*, this is a mere nullity: it is as if the stipulation had been *a nullo* and the old obligation is unaffected[7]. This is said quite generally and seems to exclude even the case of *iussum*, and the titles in the Digest and Code[8] dealing with novation do not mention a novatory promise by a slave. The explanation is to be found in the character attributed to promises by slaves, shortly to be considered[9]. In a similar way, though he can take an *acceptilatio*[10], he cannot give one, even *iussu domini*[11].

A slave can give a good receipt for money paid to him[12], at least if he lent the money under authority both to lend and to receive[13], and we may assume, in view of the texts above cited, that the first implies the second, unless the contrary appears.

Thus, apart from special authority, a slave cannot release or vary in any way an obligation he has acquired to his master: *a fortiori*, an obligation not acquired through him[14]. A gave B's slave a mandate to

[1] 16. 3. 11.
[2] 35. 1. 44. *pr.*—3. If a man undertakes to pay to A or the slave of T, the payment may not be to T. So a condition of payment to the *heres* is not satisfied by paying his master.
[3] 30. 108. 1. [4] *Ibid.*; C. 8. 42. 19. [5] P. 5. 8.
[6] 46. 2. 16. [7] G. 3. 176, 9; In. 3. 29. 3. [8] 46. 3; C. 8. 41.
[9] *Post*, p. 165. [10] 46. 4. 11. 1. [11] 46. 4. 22.
[12] 46. 3. 102. 2. [13] C. 8. 42. 19.
[14] Where A's slave, B, made a contract of maritime loan with X, and X desired a release from some of the obligations, a release or variation agreed to by C, another slave of A, who was to be with X on the voyage, having certain duties, but no contractual powers, was a mere nullity, 45. 1. 122. 1.

pay money which A owed to B. He borrowed it from X. In B's accounts the slave put it down as received from A. X had not lent the money with any special reference to A. A was not released and B had not acquired an *actio mandati* against A through the slave. If it had been expressly lent for the purpose of paying A's debt A would have been released, but would have been liable *ex mandato*[1]. The point is that if the loan was not in pursuance of the mandate it can give no *actio mandati*. At the time the money was attributed to A's debt, it was already the property of the creditor, and though the transaction be, as this probably was, within the slave's general authority, this does not entitle him to give what is essentially a fictitious receipt.

Under what circumstances did a slave's contract bind his master, apart from *peculium*? Obligation was a personal matter. Agency in the modern sense was unknown to the civil law. We know that at civil and praetorian law a slave was *pro nullo*, but that *iure naturali* he was a man like another[2]. Hence the rule: *servi ex contractu civiliter non obligantur, naturaliter obligant et obligantur*[3]. Thus his promise creates a *naturalis obligatio*, but this *obligatio* which, as we shall see later, survives manumission, affects only himself, not his master[4]. Here we are concerned only with the master's liability to action.

Broadly the slave's contract did not bind the master apart from the *peculium* unless it came within certain categories for which the Praetor established actions, *i.e.* unless it was made under *iussum*, or as *magister navis*, or as *institor*, or the master profited. There were, however, some exceptions at least apparent.

(i) In all *bonae fidei* transactions, of the slave, the master was liable *in solidum* for his own personal *dolus*[5]. The rule in *stricti iuris* transactions is not easily made out, owing to the comparative rarity of references to promises by slaves: there is some obscurity as to the effect of *dolus* of the promisor, in general. It is sometimes said that a promise by a slave could not have any specifically civil law effects, and was thus in no way different, at least as far as civil law was concerned, from a mere pact[6]. Upon the texts it seems that, in classical law, the only remedy for *dolus* by the master in such a case was an *actio doli*, the point being that it was the slave's contract and another man's misconduct. In later law an *actio utilis* was, it seems, given against the master[7].

[1] 17. 1. 22. 8.
[2] *Ante*, p. 73. Their nullity at praetorian law is only as to their own capacity for right.
[3] 44. 7. 14. [4] *Post*, Ch. XXIX.
[5] 15. 1. 36; 13. 6. 3. 5. Lenel shews that this did not need a special clause in ordinary *bonae fidei* actions, though it did in *actio fiduciae*. Ed. Perp. § 107.
[6] Accarias, Précis, § 506.
[7] 4. 3. 20. *pr.* (*hortatu tuo* is not *iussu tuo*); 45. 1. 49. *pr.* The present point is not noted by Lenel in his remarks on this *utilis actio*. Ed. Perp. § 102.

(ii) Ulpian tells us that if a slave *quasi tutor egerit*, Severus provided that a *iudicium utile* lay against the *dominus*[1], a variant of the *actio negotiorum gestorum contraria*. The text expresses no limit. But it does not say that the liability was *in solidum*, and it was probably limited, like the other actions on a slave's transactions, to the *peculium*, etc. It may be objected that, if so, it would not have been *utilis*: it would have been simply an *actio protutelae de peculio*, on the analogy of *negotiorum gestio*[2]. The explanation seems to be this. The *actio protutelae* was *fictitia*, though we do not know the exact form[3]. A slave, though capable of ordinary quasi-contractual relations, could not conceivably be a tutor. Thus the fiction which would suffice for a freeman would not serve for the case of a slave. Hence a double fiction and the designation of the action as *utilis*[4].

We pass now to the four actions above mentioned.

A. *Actio Quod Iussu.*

By the Praetor's Edict[5] the *dominus* was liable *in solidum* on an undertaking of his slave of either sex[6], made *iussu eius*[7]. No special form of authorisation was needed: it might be general or special[8], by mandate[9] or by ratification[10]. There is indeed one text which seems to suggest that ratification was not enough[11], but it does not say so and another text shews that ratification sufficed[12]. Endorsing the slave's *chirographum* sufficed, and this looks like ratification[13]. The *iussum* is not a command but an authorisation[14], and the majority of the texts speak of it as an authorisation to the third party, not to the slave[15]. There are a few that do not make this presumption, but none expressly contradicts it. It is now almost universally held[16] that a communication to the slave can never suffice to create the liability, unless it involves

[1] 27. 5. 1. 2. Called in the texts *actio protutelae*, *h. t.* 1. *pr.*, 6, 8. Ulpian.
[2] 3. 5. 13. [3] See, however, Lenel, Ed. Perp. § 126.
[4] Cp. Lenel on *A. institoria utilis*. Ed. Perp. § 102.
[5] 15. 4; 16. 1. 25; C. 4. 26. 13; C. Th. 2. 31. 1.
[6] 15. 1. 27. *pr.*; 15. 4. 2. 1.
[7] G. 4. 70; P. 1. 4. 6; In. 4. 7. 1; D. 15. 3. 5. 2; 15. 4. *pass.*; 16. 1. 25; any contract, even *votum*, 50. 12. 2. 1. See Sell, Noxalrecht 31. n. 2.
[8] 15. 4. 1. 1. Thus *mutus* or *surdus* could authorise, 45. 1. 1. *pr.*
[9] 15. 4. 1. 3.
[10] 15. 4. 1. 6. The language of the text is suspicious: *si quis ratum habuerit...in eos datur.*
[11] 15. 3. 5. 2.
[12] Drechsler (Actio quod iussu, 63 *sq.*) seeks to reconcile these texts, both from the same part of the same book of Ulpian. He notes that it is not exactly said that ratification is insufficient. But it is clear that this is what the writer means. It is more likely, in view of the *si quidem...sin vero.. si quidem...si vero*, that the words are due to the compilers (see Eisele, Z. S. S. 7. 19 *sqq.*).
[13] 15. 4. 1. 4.
[14] No attempt is here made to fix on the word *iussum* a precise meaning which it shall bear in all its many applications. See hereon Mandry, Familiengüterrecht, 2. 554 *sqq.*; Roby, Rom. Pr. Law, 2. 122; Drechsel, *op. cit.* 17 *sqq.* It is not necessarily a mandate, for this implies a desire in *mandator*.
[15] 15. 4. *pass.* and others cited by Windscheid, Lehrb. § 482 n. 6.
[16] Windscheid, *loc. cit.*; Karlowa, R. R. G. 2. 1165.

an indirect communication to the other party. It may be remarked that this requirement of communication to the third party is nowhere expressly asserted[1]. Gaius indeed observes that the third party contracts with a view to the liability of the *dominus*[2]. But it has been pointed out that similar language is used in the case of the *actio de peculio* where knowledge that a *peculium* exists is not necessary[3]. Moreover this communication could not have occurred where the *actio quod iussu* was made possible only by ratification[4]. Such expressions as *iussu domini cum servo contractum est*[5] are common and imply that the authorisation is communicated to the third party. But elsewhere the action is given *si voluntate domini servus emit*[6], and this suggests the other view. The fact that communication occurs in most of the texts shews that this is the usual case but not that it is essential. As this additional liability would hardly be undertaken except as an inducement to the other party to contract, it seems obvious to communicate it to him, but not that this should be essential to liability. In some of the texts which speak of *iussum* to the slave, and are disposed of by Windscheid as implying indirect communication to the third party[7], there is no sign of any such step and their plain sense seems to exclude it.

It may be pointed out by way of analogy that where a *filius familias* or slave acted as a *nauta*, the *paterfamilias* was, by the Edict, liable in *solidum* for his *receptum*, if he received *voluntate eius*[8]. Nothing is said of communication to the *extraneus*. Thus there is nothing improbable in the idea that *quod iussu* was subject to the same rule. And the *deceptio* mentioned in one text was not likely if the *iussum* had been communicated to the third party[9].

The general result is that while the texts leave doubt as to the earlier law, they are clear that, under Justinian, the contractor has the right to *actio quod iussu* if a *iussum* exists whether he know it or not[10]. It would seem to follow that it is not essential that it be known even to the slave[11]. Whether the *iussum* might be a general authorisation to any one to contract, or must have reference to a specific person cannot be said from the texts.

[1] Windscheid, *loc. cit.*, cites many texts in the form *iussu domini contractum est*, but this impersonal form proves nothing. Honorius (C. Th. 2. 31. 1 = C. 4. 26. 13) declares, for the case of loans to slaves administering estates away from their master, that there must be express *iussum* to the lender. But this besides being a special case is understood by the *interpretatio* as laying down a new rule. And it is clear that what it is intended to exclude is pretended *iussum* based on words which do not amount to authorisation.
[2] G. 4. 70. [3] Schlossmann, Kieler Festgabe für Ihering, 229; D. 15. 1. 19. 1, 32. *pr.*
[4] 15. 4. 1. 4, 6. [5] 15. 4. 4. [6] 15. 3. 5. 2.
[7] *e.g.* 15. 3. 5. 2; 46. 1. 10. 2; 18. 1. 63. *pr.*; see also 17. 1. 5. 4.
[8] 4. 9. 3. 3. [9] 14. 5. 4. 5.
[10] The two main texts against the requirement (15. 4. 1. 6; 15. 3. 5. 2) are both suspicious, 15. 4. 1. 4 is not conclusive. The Glossators favoured on the whole the view that communication to the third party was not needed. Haenel, Diss. Domm. 524.
[11] Vangerow thinks (Pand. § 240) that the use of the word *iussum* shews that communication to the slave is what is meant. Drechsler thinks the *iussum* might be to the slave, but the third person must have heard of it. *Op. cit.* 56, 59, 110. *Post*, App. I.

The liability applies only to contracts of his own slave[1], and not of those acquired after the transaction[2], and it is to be supposed that as previous *iussum* is useless here, so is ratification: the reasoning in the text would certainly cover it. There must be express words of authorisation: mere words of confidence and the like do not suffice[3]. Thus becoming surety for the slave did not suffice: this was acting as a stranger, and if the *fideiussio* should be unenforceable, *quod iussu* would not lie[4]. A pupil requires his tutor's *auctoritas*. According to Paul the tutor himself can give a *iussum*, and the action will be given, *quod iussit tutor*, but only if the transaction was for the benefit of the *pupillus*[5]. The reason for the restriction is not clear, in view of the fact that, according to Labeo, the *iussum* of a *curator* of a *prodigus, furiosus* or *minor*, and even that of a *procurator*, suffices without this restriction[6]. In the case of *actio institoria*, *curator* and *tutor* are on the same level[7]. Paul's view may be an expression of the idea that the contract must have relation to the affairs of the person to be made liable. It is indeed held by some writers[8] that this is the case, but there is little support for this in the texts, this passage not being usually cited in support of it. On the whole it seems probable that it is merely a personal doctrine of Paul.

The *iussum* is revocable in all cases up to the time when the contract is actually made[9]. It does not exclude the *actio de peculio* though *quod iussu* is always better[10]. Like other contractual actions it is available against the *heres*[11], though the *iussum* itself is revoked by the death of *iussor*[12].

The *iussum* must be exactly followed. Thus if a slave, authorised to sell to A, sells to B, the master is not bound[13]. But an act in excess of instructions does not wholly vitiate the transaction: it is valid so far as the authority goes. If a slave, authorised to borrow at 6 %, borrowed at a higher rate, the master owed 6 %[14]. If a slave, authorised to sell for 10 sold for 8, the master could vindicate the thing and there was no *exceptio*, without indemnification[15]. These texts shew no trace of the dispute which existed on similar points in relation to mandate[16],

[1] 15. 3. 5. 2. [2] 15. 4. 2. 2. [3] C. Th. 2. 31. 1.
[4] 15. 4. 1. 5. [5] 15. 4. 1. 7, 2. *pr.*
[6] 15. 4. 1. 9. Not a *procurator voluntarius*. [7] 14. 3. 5. 18.
[8] *e.g.* Dernburg, *op. cit.* 2. § 14. See Windscheid, *op. cit.* § 482; Mandry, *op. cit.* 2. 553. Drechsler (*op. cit.* 70, 76, 84) holds that there must be a reference to the concerns of *dominus*; he relies on 15. 4. 1. 5, which however only means, as it says, that *fideiussio* is not *iussio*. He seems to regard the action as excluded *because* the *fideiussio* is void: the exclusion is *although* it is void. The objection is that the state of mind is different; there is no intent to adopt the contract as his own.
[9] 15. 4. 1. 2. [10] G. 4. 74; In. 4. 7. 5. [11] C. 4. 35. 8.
[12] 46. 3. 32. *in fin.* We are not told the effect of insanity. Probably the analogy of mandate sufficed.
[13] 18. 1. 63. *pr.* Nor by a pledge in an authorised contract, unless this too was authorised, 15. 4. 3.
[14] *Ibid.* [15] 17. 1. 5. 4. [16] G. 3. 161; In. 3. 26. 8.

though the reasoning which guided those, who there took the view that it was void, would apply equally here: *nam qui excessit aliud quid facere videtur*[1]. Here the dispute is between the principal and the third party, while in mandate it is between the principal and his agent: the matter is not mentioned in the few texts we have dealing with the action *ad exemplum institoriae*, brought by the third party against the principal[2]. This, however, scarcely seems material, and the difference, so far as it goes, supports the view that the *iussum* need not be known to the third party. His state of mind is not material: what matters is that the *dominus* has declared his willingness to accept a certain obligation[3].

The transaction must be by the slave: a *dominus* borrowing and directing the money to be paid to a slave is liable directly and not *quod iussu*[4]. In one text the separate individuality of the slave is very clearly brought out[5]. If he is in partnership, *iussu domini*, the latter's liability is *quod iussu* with no limitation to *quod facere potest*. He is not the partner, and this defence is not available to anyone else, even heirs or other successors. It is however indifferent[6] whether the transaction be in the master's affairs or connected with the *peculium*[7].

B. *Actio Institoria.*

This action is given by the Edict[8] against a *dominus* or *domina* who appoints a person of either sex, slave or free[9], to manage a business[10]. It applies to all transactions of the business, and is *in solidum, quasi iussu*[11]. The *institor* may be a *servus alienus*[12], but, if he is, the liability is not accompanied, as in the case of *servus proprius*, by acquisition of all the rights also. These vest in the true *dominus* and the transfer of them, or their results, can be obtained by an *actio negotiorum gestorum contraria*[13]. Thus where A appoints B's slave, A will be liable to the present action and B will, or may, be liable to the *actio de peculio*[14]. The liability rests on the *voluntas* of the *dominus*[15], and thus if a son or slave appoints an *institor* without actual consent of the *paterfamilias*, the latter is liable only to an *actio institoria de peculio*[16]. The liability is perpetual and extends to the *heres*[17].

[1] 17. 1. 5. *pr.*
[2] *e.g.* 3. 5. 30. *pr.*; 14. 3. 5. 8, 16, 19. *pr.*; 17. 1. 10. 5; 19. 1. 13. 25.
[3] Cp. 4. 3. 20. *pr.* where there was no such declaration. Mandry, *op. cit.* 2. 565 *sqq.*, takes a different view.
[4] 15. 4. 5. [5] 17. 2. 63. 2.
[6] *Ib.*; 15. 3. 5. 2; 15. 4. 1. 1, 5; 16. 1. 25, mostly cited Vangerow, Pand. § 240.
[7] As to formulation, *post*, App. II. [8] 14. 3. [9] 14. 3. 7. 1, 8.
[10] 14. 3. 1: as to different sorts of *institores*, 14. 3. 5, 16; P. 2. 8. 2. See also Mayer, Actions *Exercitoria* et *Institoria*, 25—32.
[11] 12. 1. 29; P. 2. 8. 1. [12] P. 2. 8. 2.
[13] 14. 3. 1. For a case in which he is the slave of the other party, see 14. 3. 11. 8.
[14] 14. 3. 7. 1, 17. 1. [15] 14. 1. 1. 20; C. 4. 26. 1, 6. [16] 14. 1. 1. 20.
[17] 14. 3. 15. It is not affected by freeing the slave: if he continues to manage the business, no new appointment is needed, 14. 3. 19. 1.

A *pupillus dominus* is liable if he appointed *auctoritate tutoris*, or if *locupletior factus*, the liability in that case having an obvious limit. Apparently on such points the rules are as in the *actio quod iussu*[1]. On the death of the appointer, the *heres* is liable, and will be liable, if he allow him to continue his management, for future transactions[2]. As to transactions, *vacante hereditate*, the *heres*, even *impubes* or insane, is liable to any creditor who did not know of the death[3], and, according to one text, even if the creditor did know[4]; the reason assigned being *propter utilitatem promiscui usus*. The fact that *actio institoria* is available does not bar other actions to which the transaction may give a right, *e.g. redhibitoria*[5]. But if rightly brought it necessarily excludes the *actio tributoria* since, while that refers necessarily to *res peculiares*, this refers to *dominica merx*[6].

The liability is only on those transactions connected with the business to which the man was appointed[7]. This rule plainly leads to a number of distinctions. Thus one appointed to buy cannot so bind his master by selling, and *vice versa*[8]. But a loan, for the purpose, to one appointed to buy, was enough, and if the creditor knew that the loan was for the purpose of the business, he need not see that the money is so spent[9]. A loan of oil to one appointed to deal in oil is good[10], and, generally, if a transaction is within the scope of the employment a pledge or security in connexion with it is good and imposes on the master the liabilities of a pledgee[11]. Where A was appointed to two distinct functions, to trade in oil, and to borrow money, and X lent him money in view of the first business, but it was not received for that purpose, X sued on the assumption that it had been so received, but failed as being unable to prove this point[12]. Novation of the obligation destroys the *actio institoria*, the *obligatio* being no longer that contemplated by the appointment[13].

The liability may be limited in various ways. Thus a number of *institores* may be required to act together[14], or dealing with a particular person may be prohibited by notice to that person[15], or they may be required to contract only with security[16]. But the exception based on such prohibitions may be met by a *replicatio doli*, if the defendant do not offer what might have been recovered by the *actio de peculio et in rem verso*[17]. Any other conditions imposed on the power

[1] 14. 3. 5. 18, 6, 9, 10, 17. 2. [2] 14. 3. 17. 2.
[3] 14. 3. 5. 17, 17. 2. [4] *h. t.* 17. 3. [5] *h. l. pr.*
[6] 14. 3. 11. 7. *Post*, App. II.
[7] 14. 3. 5. 9—11; G. 4. 71; In. 4. 7. 2, not confined to operations in any one place, 14. 3. 18.
[8] 14. 3. 5. 12. [9] 14. 1. 7. 2; 14. 3. 5. 13. [10] 14. 3. 5. 14.
[11] If *arrha* was taken and not returned by an *institor* to sell, the master was liable, *h. t.* 5. 15, 16. An *institor* appointed to lend does not necessarily bind his master by becoming surety, but if instead of lending money to A he promises it to A's creditor, this is good, *h. t.* 19. 3.
[12] 14. 3. 13. *pr.* As to the point of *litis consumptio* raised by the text, see *post*, App. II.
[13] 14. 3. 13. 1. [14] *h. t.* 11. 5. [15] *Ib.*; *h. t.* 17. 1.
[16] *h. t.* 11. 5. [17] *h. t.* 17. 4.

of contracting must be observed: just as they might be barred from contracting with a person or class, so their contracts might be limited to dealings with a person or class. If these restrictions are repeatedly changed, in such a way that contractors are deceived, they do not protect[1]. In like manner the liability may be limited, or barred, by notice over the shop door[2]. This must be plain and in a conspicuous place, and couched in a language locally known[3]. But if it is duly set up it is immaterial that a contracting person did not see it[4].

The liability of the *institor* does not concern us. Of the master's right against a third party it is enough to say that in late law the principal acquires rights of action against the other party to the contract, though the *institor* be not his own slave, or even not a slave at all, provided there is no other way of recovering[5]. But he always has an action of mandate, or *negotiorum gestorum*, against the *institor* for cession of his actions and against his master if he was a slave. In this case it may be only *de peculio* if the slave offered his own services. If he should be the slave of the other party, the *dominus* is not directly liable, since the contract is made with his own slave. But he can be sued *de peculio*, as on the mandate given to his slave, or *de in rem verso*, for the price which he owes to his own slave[6].

Lenel[7] holds that the action for the case where the *institor* is a slave is properly called *utilis*: the primary action being that for the contract of a *liber homo*. He accounts for the fact that it is not so called in the Digest on the ground that it was the commonest case, and he shews a text of Julian, in which the word *utilis* does survive[8]. This case is however exceptional on other grounds: the *institor* is the slave of the other party. Lenel sees in this not the original cause of the epithet *utilis*, but the cause of its retention in the Digest. The point is not very material in substantive law, but the fact that the *dominus* is acquiring by his contract with his own slave, a right against a third person, is, as Lenel himself notes, a reason for hesitating as to whether the action was the normal *actio institoria*. He observes however that Ulpian tells us that it is a sale[9], and thus would satisfy the Edict, which gave the action on actual legal transactions alone. But he does not note that this question was in dispute. Paul, and even Ulpian himself in the case of a son, say definitely that such a transaction was not a sale[10]. They are writing long after Julian. It is thus easy to see why

[1] *h. t.* 11. 5. [2] 15. 1. 47. *pr.*; 14. 3. 11. 2.
[3] 14. 3. 11. 3. If illegible from any cause, or removed by principal or anyone so that it could not be seen, the action was not barred, *h. l.* 4.
[4] *h. l.* 3. [5] 14. 3. 1, 2.
[6] 14. 3. 11. 8, 12. It is a *vicarius* who is appointed. As to the resulting questions see 14. 1. 5. *pr.* The matter is fully discussed, *post*, Ch. X.
[7] Ed. Perp. § 102. [8] 14. 3. 12. [9] 14. 3. 11. 8.
[10] 18. 1. 2; 18. 2. 14. 3.

he calls the action in this case *utilis*. In the next text[1] another exceptional case is considered, and there too Julian is cited as holding that, though on the facts the *actio institoria* was excluded by consumption, an *actio utilis* lay. Here too the *institor* was a slave. This is hardly a likely form, if the action lost had also been an *actio utilis*, and the explanation which Lenel offers for the other text, (this one he does not note,) namely that Julian's language has been freely altered, seems hardly sufficient. On general principles it seems unlikely that the action which was primary in importance, and in all probability first in time[2], would be called *utilis*. Nor does the fact, probable in itself, that the *actio* was *fictitia* require that it should be called an *actio utilis*.

So far the rules of the action are fairly simple, but there is one point which has been the subject of much controversy. It is the question whether, and if so, how far, the fact of the appointment, and the pertinence of the contract to the business, must be known to the other contracting party[3]. It is clear that if the fact of the appointment and the relevance of the contract are known, the action lies in the absence of special restrictions, proper steps to secure the publication of which must have been taken[4]. But no text anywhere hints that it is an essential of liability that the third party know of the appointment, and when it is remembered that the rules relate to continuous commercial enterprises, it seems far more probable that there was no such requirement, but that the setting up of a man in trade, and so inviting people to deal with him, imposed on the principal the Edictal liability. This is confirmed by the words of Ulpian upon the *actio exercitoria* which is governed by the same principles: *igitur praepositio certam legem dat contrahentibus*[5]. It is the appointment, not notice, which creates the situation contemplated by the Edict. Moreover, unless the *praepositio* bound, without express notice, it is difficult to see how Ulpian should have thought it worth while to say: *Conditio autem praepositionis servanda est: quid enim si certa lege vel interventu cuiusdam personae vel sub pignore voluit cum eo contrahi vel ad certam rem? Aequissimum erit id servari in quo praepositus est*[6]. On the whole the better view seems to be that the agency need not be communicated.

But the attention of commentators has been mostly turned to the other part of the question: was it necessary to the liability that the

[1] 14. 3. 13. *pr.* [2] See the opening words of 14. 3. Mayer, *op. cit.* 36.
[3] See Karlowa, R. R. G. 2. 1128; Schlossmann, Kieler Festgabe für Ihering, 217 *sqq.*
[4] *Ante*, p. 171. [5] 14. 1. 1. 12. See also 4. 4. 4.
[6] 14. 3. 11. 5. The same result follows from another remark of Ulpian's, that the *actio institoria* is less necessary than the *exercitoria*, since in the former case the customer has always time to make any enquiry he thinks fit as to the status of the other party, and contract accordingly, while in dealing with shipmasters he has often to act in haste without inquiry. 14. 1. 1. *pr.* See also 14. 3. 5. 13, C. 4. 25. 5.

third party should have known that the contract related to the business to which the *institor* was appointed? The dominant view is that this too was necessary, that it was not enough that it had to do with the business, but the parties must have also contemplated this. Karlowa[1] supports this view, partly on the ground that the words, *si eius rei gratia cui praepositus fuerit contractum est*[2], must grammatically mean "with a view to," and not merely "within the scope of." He adds that any other view would make the principal liable if the *institor* contracted only on his own account. The intent of the *institor* to act for the business is thus necessary, and this could have no meaning unless it were communicated. All this is of doubtful force when it is a question of a piece of positive legislation. Mandry[3], taking the contrary view, denies that *eius rei gratia, nomine, causa*, need bear the meaning for which Karlowa contends, but rests his case mainly on the texts. Those that have played a part in the controversy are set forth by Schlossmann[4]. They are not conclusive either way. He observes of the texts[5], that one[6] has no relation to the action, that the force of another depends on taking *lex* to mean a condition of which notice is given, which it does not imply[7], that of another the force depends on understanding *permisit* to mean "expressly authorised," which it need not mean[8], that in another[9] there was in fact no existing authority, and that in the others the transaction is of an ambiguous nature[10]. Of the texts cited in reply[11] one shews that there was no communication of the agency, and that this of itself is plainly not regarded as fatal to the action[12].

It may be observed that the arguments, in favour of the view that the agency must be communicated, seem to confuse two things; intent to contract in view of the agency and intent to contract in relation to the business to which the agent was appointed. Thus Karlowa[13] infers from *eius rei gratia* that the contract must have been made with the *institor*, as such. But the *res* is the *negotiatio*, not the *praepositio*, and even on his own narrow interpretation of the words, they can mean no more than that it was with a view to that trade and they need mean no more than that the matter must be connected with the business. Thus the text lends no support to Karlowa's thesis. It should also be noted that the two principal texts[14] relied on by the supporters of this view go no further. They both speak of dealing with express reference to the *negotiatio*: they say nothing of the *praepositio*. The right conclusion seems to be that it was necessary to shew that the transaction

[1] *Op. cit.* 2. 1128, 9. [2] 14. 3. 5. 11. [3] *loc. cit.*
[4] Kieler Festgabe für Ihering, 219 *sqq.* [5] As to G. 4. 70, *ante*, p. 167.
[6] C. 5. 39. 3. [7] 13. 1. 1. 12. It seems to mean the contrary.
[8] 14. 3. 5. 9. Nor is the impersonal form conclusive. [9] *h. t.* 5. 17.
[10] 14. 1. 1. 9; 14. 1. 7. *pr.* [11] 14. 1. 1. 7; 14. 3. 5. 16—7. *pr.*, 13. *pr.*, 19. *pr.*
[12] 14. 3. 13. *pr.* [13] R. R. G. 2. 1128, 9. [14] 14. 1. 1. 9; 14. 1. 7. *pr.*

was with reference to the business to which he was in fact *praepositus*. In most cases this needed no proof—*res ipsa loquitur*. But some transactions were ambiguous: a loan of money to a shopkeeper may not be meant for any purpose connected with the shop. For the lender to be entitled to the *actio institoria* he must be able to shew that it was. This he may do by shewing that it has been applied to shop purposes or that its application thereto was expressly contemplated[1].

C. *Actio Exercitoria.*

On nearly all points of principle which concern us, this action is on the same footing as that we have been discussing. It is a praetorian remedy modelled on the *actio institoria*, and therefore later, though it is described as even more necessary[2]. The general principle is that the person who is receiving the profits of a ship, (whether the owner or not,) called the *exercitor*[3], is liable *in solidum* on the contracts of the person placed in command of the ship, (who is called the *magister navis*,)[4] if the ship was to serve a commercial purpose and the contract was within those purposes for which he was appointed[5]. The purposes covered money lent for the purposes of the ship, even though not so used, if the creditor took care to see that it was reasonably necessary, and proportionate to the needs[6]. Authority is the limit of liability. *Voluntas* of the *exercitor* must be shewn, not merely *scientia*[7]. Thus if the ship carried goods of an unauthorised class, or was otherwise used for an unauthorised purpose, or was let, without authority, the action was not available[8]. If the borrower of money did not say it was for the ship, and meant fraud *ab initio*, there was no remedy against the *exercitor*[9].

A *magister* must be in command of the whole ship[10]. If, however, there are several with undivided functions, the contract of any binds the *exercitor*: if they are of divided functions, *e.g.* one to buy and one to sell, each binds only within his scope[11]. Their power may be so limited that all must act together[12]. A contract by one of the sailors does not give rise to this action: they are not authorised to contract[13]. The liability covered, however, *ex utilitate navigantium*, the contracts of a deputy appointed by the *magister*, even though the *exercitor* had

[1] 14. 3. 17. 3. So substantially Schlossmann, *loc. cit.* For similar case, *post*, p. 183. The Edict as restored by Lenel says nothing of notice (Ed. Perp. § 102), but elsewhere L. argues in favour of the existence of this requirement. See *post*, App. I.
[2] 14. 1. 1. *pr.*; C. 4. 25. 4. But the relative dates of introduction of the aedilician actions are very uncertain. Mayer, *op. cit.* 18—25.
[3] 14. 1. 1. 15. [4] 14. 1. 1. 1.
[5] 14. 1. 1. 3, 7. *Magister* might be male or female, slave or free, *proprius* or *alienus*, even an *impubes*, D. 14. 1. 1. 4.
[6] 14. 1. 1. 7, 9. Or a loan to pay a debt incurred for such a purpose, *h. l.* 11.
[7] 14. 1. 1. 20, 6. *pr.* [8] 14. 1. 1. 12. [9] 14. 1. 1. 9—10.
[10] 14. 1. 1. 1. [11] *h. l.* 13. [12] *h. l.* 14.
[13] *h. l.* 2. In delict the rule was different. *Ib.*; 4. 9. 7. 3; *ante*, p. 122.

forbidden this, or any, deputy. In this point this action differs from the *actio institoria*[1], but the rule shews how little agency in the modern sense had to do with the matter.

The action is *perpetua*, is available to and against the *heres*, and is not lost by death or alienation of the slave[2]. The case of my slave who is your *magister* gave rise to questions as in the *actio institoria*. I have an action against you if he contracts with me. But the *exercitor* has no direct action against one who contracts with his *magister*, who is not his slave. We saw that in the *institoria* this was allowed only as a last resort[3]: here it exists only, *extra ordinem*, at the discretion of the *praeses*[4]. His remedy is to claim cession from his *magister*, by action *ex conducto*, or *ex mandato*, according as the man was paid or not, and in the case of a *servus alienus* this will be limited to the *peculium* unless the master was privy to the appointment[5].

The *exercitor* himself may be man or woman, *pater* or *filius*, slave or free[6]. If he be a slave or *filius familias* the *paterfamilias* is liable *in solidum*, if the *exercitio* is *voluntate eius*[7]. There is mention of a difference between this, and the rule in *institoria*, due to the greater importance of the present case. But in fact the text[8] lays down the same rule for both, *i.e.* that if it is *voluntate*, the liability is *in solidum*, but if only *sciente domino*, it is either *tributoria* or *de peculio et in rem verso*[9]. If such an *exercitor* is alienated or dies, the liability continues as in the case of a *magister*[10], and is not subject to an annual limit, as *de peculio* is[11], but this rule applies only where it is not in fact itself an *actio de peculio*, as we have seen it may be[12].

A further complication arises if my slave is *exercitor* and I contract with his *magister*. I can have no *actio exercitoria*, but if the *magister* is free I can sue him[13], and, if he is a *servus alienus*, his owner. In like manner if a *filius familias* appoints a *servus peculiaris*, or a slave a *vicarius*, as *exercitor*, the *paterfamilias* is liable only *de peculio* unless he approve, in which case he is liable *in solidum* whether the contract is with *exercitor* or *magister*, the *filius* who appointed being also liable[14]. The liability on contracts of the *exercitor* also in such a case is insisted on, though the Edict speaks only of the *magister*. What this action on the contract of the *exercitor* would be is not clear. It is not stated as an equitable extension of the *exercitoria*: it seems more probable that it

[1] 14. 1. 1. 5. [2] 14. 1. 4. 4.
[3] *Ante*, p. 171. [4] 14. 1. 1. 18.
[5] 14. 1. 5. *pr.*; *h. t.* 1. 18; 14. 3. 1, 11. 8, 12.
[6] If a free *pupillus*, enrichment or *auctoritas tutoris* is needed, 14. 1. 1. 16, 19, 21.
[7] *Ibid.*; 4. 9. 7. 6. [8] 14. 1. 1. 20.
[9] 14. 1. 6. *pr.*; 14. 1. 1. 22; and see n. 6. [10] 14. 1. 4. 3.
[11] 14. 1. 4. 4. [12] 4. 9. 7. 6.
[13] 14. 1. 5. 1. The case of his being appointed *exercitor* by another is not considered.
[14] 14. 1. 1. 22, 23; 14. 1. 6. *pr.* *Tributoria* if *sciens* but not *volens*.

was an ordinary *actio quod iussu*, and that the text supports the view that knowledge of the authority was not necessary in that action[1].

D. *ACTIO DE IN REM VERSO.*

This, as we know it, is not strictly an independent action. It is always found combined with the limitation to the *peculium*, and is thus a clause by way of *taxatio* inserted in the *condemnatio* of the action, whatever it may be. It expresses the rule that, on a slave's transaction, a master is liable, even beyond the *peculium*, to the extent to which he has profited. But as the liability has its own rules it can be conveniently considered by itself.

The general principle is that a *dominus* is liable on the contract of a *servus* so far as the proceeds have been applied to his purposes[2], irrespectively of consent or even knowledge[3]. The action is not subject to an annual limit, on the death of the slave, and is available against the *heres*[4] of the *dominus*. It is regarded as the owner's personal liability, and it is considered in the action before the question of *peculium*[5].

The main question is: what is *versio*? We are told that a *versum* is what is handed to the master or spent on purposes necessary or useful to him or ratified by him[6], or disposed of at his orders however wastefully[7], or, generally, used in such a way as would give a *procurator* a right of action[8]. The texts give us many illustrations[9]. To spend the money in a normal way on the master's property is a *versio*, but not useless and unauthorised ornamentation of his house[10]. Money paid to a creditor of the *dominus* is a *versum*[11], even, it seems, where the creditor is the slave himself, since a debt due from the master to the *peculium* is, in the developed law, a burden on the *peculium*[12]. An acquisition may be in part *versum*, and so subject the *dominus* to this liability only in part[13]. Thus, if unnecessary slaves are bought as necessary, they are

[1] Of several *exercitores*, each is liable *in solidum* (14. 1. 1. 25; *h. t.* 2, 3), whether one is *magister* (*h. t.* 4. *pr.* 1) or they have appointed another, slave or free, 14. 1. 1. 25, 4. 2, 6. 1 (and thus if one of them contracts as customer with the *magister*, he has *actio exercitoria* against the others, 14. 1. 5. *pr.*, perhaps *utilis*, *arg.* 14. 3. 11. 8, 12). But if they are actually working the ship together each is liable only *pro rata*. Where each is liable *in solidum*, there is adjustment by *pro socio*.

[2] 15. 1. 1. 3, or *ancilla*. 15. 3. 1. *pr.*, 7. 4; C. 4. 25. 1, 2; In. 4. 7. 4; P. 2. 9. 1.

[3] 15. 3. 5. 1; C. 4. 26. 3; Greg. Wis. 9. 1.

[4] 15. 2. 1. 10; C. 4. 26. 7.

[5] 15. 3. 1. *pr.*; In. 4. 7. 4. No liability for interest, apart from promise.

[6] 15. 3. 5. 2, 7. 1.

[7] *h. t.* 3. 6.

[8] *h. t.* 3. 2

[9] 15. 3. *pass.*; In. 4. 7. 4; P. 2. 9.

[10] 15. 3. 3. 2, 4. In the last case the creditor may take the things away so far as is possible without damage. Money used about the household, perfumes used by the slave in a funeral in which the *dominus* was interested, these are *versa*; *h. t.* 3. 1, 3, 7. 3, In. 4. 7. 4. If your slave sells me an inheritance belonging to you and you take it away after I have paid a creditor, I can recover the amount as a *versum*, 15. 3. 7. 4.

[11] *h. t.* 3. 1, 10. *pr.* In. 4. 7. 4, even a supposed creditor, if it is recoverable by *condictio indebiti h. t.* 3. 1.

[12] *e.g.*, *h. t.* 7. 1.

[13] *h. t.* 10. 4; In. 4. 7. 4.

versi for value, but not for price[1]. A let a farm to his slave, and gave him oxen. These being unfit, he told him to sell them and buy others. The slave sold and bought, but did not pay, having wasted the price received. The new oxen being in the possession of the *dominus*, the vendor had the *actio de in rem verso* for the difference between the value of the new oxen and the price paid for the old[2]. A slave owing his master money borrows and hands the money to his master: this is a *versum* so far as it exceeds the debt. So far as it does not exceed the debt it is not a *versum* whatever else it may be, even though borrowed at the master's advice[3].

The money would usually be received under express contract[4], but this is not essential: *negotii gestio* is enough[5], and even *condictio furtiva* lies for what a slave has stolen, so far as it is *versum*[6]. The fact that there is another remedy is no bar: money is lent to the slave of a *pupillus* by the slave of one who is absent *reipublicae causa*, the tutor signs and makes himself personally responsible. Nevertheless if the money has been devoted to *res pupillares*, this action lies[7].

It is essential that there actually have been a *versio*. The slave's statement that he is going to apply the thing to his master's purposes does not make the latter liable: the creditor should see that it is so applied, or rather, not applied to anything else[8]. You gave silver to my slave, and he was to make you a cup, not necessarily out of that silver. He made a cup out of my silver, gave it to you and died. Clearly I could vindicate the cup. Nor was there any *versio*. So far as appears the silver you gave had been devoted to no purpose of mine. Mela was of a different opinion, because, it seems, of the right to vindicate the cup. But this could give only an *actio de peculio* on the slave's contract[9].

It is essential that the property remain *versum*. All that this means is that payment to the master may cease to be *versum*, if it be handed back to the slave's *peculium*[10]. It has no relation to the actual preservation of the thing: though that be lost by accident, it is still *versum*[11]. A slave borrows money to buy clothes: the price being paid, the lender has *de in rem verso* though the clothes perish. If the price is not paid,

[1] *h. t.* 5. *pr.* See also *h. t.* 12.

[2] *h. t.* 16. See also 14. 3. 12; 5. 3. 36. *pr.* If I buy a *hereditas* from your slave, the price to be set off against his debt to me, whatever of the *hereditas* reaches you is *versum*, 15. 3. 7. 4; see *post*, p. 183, and Mandry, *op. cit.* 2. 497. If my slave pays me money, borrowed, and so induces me to free him any excess in the money over his value is *versum*, 15. 3. 2, 3. *pr.*

[3] 15. 3. 10. 7; 4. 3. 20. *pr.*

[4] *e.g.* 15. 1. 36.

[5] 3. 5. 5. 8.

[6] 13. 1. 4. If a slave cheated a minor, *domini causa*, and the minor obtained *restitutio in int.*, there was *de i. r. v.* 4. 4. 24. 3.

[7] 15. 3. 20. 1.

[8] 15. 3. 3. 9.

[9] *h. t.* 7. 2.

[10] *h. t.* 10. 6.

[11] 15. 3. 3. 7, 8. A slave borrowed for his master, not for the *peculium*. The money was lost in the slave's hands, it was still *versum*, 15. 3. 17. *pr.* See, however, Dernburg, Pand. § 14, n. 8.

and the money is lost, and the clothes are in use in the family, both creditors have the action, as also if both money and clothes have perished[1]. This is Ulpian's view, and in accord with principle: for the time being, both were *versa*, and the destruction of one or both makes no difference. But, in the next text, Gaius[2] says the *dominus* is not liable to both; the first person who sues gets the benefit, on some obscure principle of fairness. This application of the rule, "first come, first served," is isolated: it disturbs the principle that the loss should lie where it falls, and that destruction of the *versum* is immaterial[3].

The rule that the *versio* ceases if the thing return to the *peculium* is illustrated in several texts. If the master hand back the money to the slave it is no *versum*, even though the slave lose it, and do not pay the creditor, and even though the master knew this to be the likely result, though here there would be *actio doli*[4]. If the *dominus* pay the *versum* to a creditor it is still a *versum*, unless it were to a creditor of the *peculium*[5]. A slave who had borrowed on his master's account lent the money to X, also on his master's account: it was still *versum*. But the *dominus* can free himself by ceding his claim against X, since the *nomen* against X is the form the *versum* now has[6]. If the *versio* has once ceased by any form of merger in the slave's counter debt, it does not revive, if that debt is paid[7]. Conversely it must be noted that some forms of *versio* are in their nature indestructible[8].

It is usually said that *versio* is enrichment[9], but this needs some limitation or explanation. An addition to the *peculium* is an enrichment of the master, but it is not a *versio*[10]. The law regards the *peculium* as distinct from the master's property: that only is a *versio* which increases the latter fund[11]. The expression, *locupletior factus*, is commonly used to express the condition of liability resulting from enrichment[12]. It is not used in this case in the formal statement of the obligation[13], though it is incidentally[14]. Moreover the case differs from ordinary cases of liability resulting from enrichment, in that destruction or loss by accident does not destroy the right to recover[15], as it does in other cases[16]. When

[1] 15. 3. 3. 10. [2] *h. t.* 4.
[3] It must be remembered that the whole theory starts from the single word *versum*. It is probable that the words from Gaius are misapplied by the compilers.
[4] 15. 3. 10. 6. The payment to the slave must have been to repay him: a casual gift even of the same amount would not destroy the *versio*, *h. l.* 7.
[5] 15. 3. 1. 2.
[6] *h. t.* 3. 5. If the master has a *versum* through a particular slave, who is or becomes indebted to him, the *versum* is reduced by the amount of the debt, though there be in the *peculium* enough to meet it, *h. t.* 10. 7, 8.
[7] *h. l.* 9.
[8] *e.g.* money paid to creditor, or in perishables which are consumed, *h. t.* 3. 1, 3. 6—10, 17. *pr. etc.*
[9] Windscheid, Lehrb. § 483; Dernburg, Pand. 2. § 14; Mandry, *op. cit.* 2. 467 *sqq.*, *etc.*
[10] 14. 3. 17. 4; 15. 3. 2, 5. 3, 6.
[11] *h. t.* 3. 5, 11. Some texts confuse this distinction, but raise no real difficulty. See *h. t.* 1. 1, 19.
[12] 3. 5. 36. *pr.*; 12. 6. 14; 50. 17. 206. [13] 15. 3. 1. *pr.* [14] *e.g.* 14. 3. 17. 4.
[15] *Ante*, p. 177. [16] 3. 5. 36. *pr.*; 5. 3. 36. 4, 40. *pr.*; 11. 5. 4. 1.

it is remembered that the principles of this action are developed by the jurists from the scanty words of the Edict[1], and are governed by those words, it will not seem strange that its rules should not exactly square with those of the *iure civili* remedy for causeless enrichment.

So far the matter seems fairly plain. We have now to consider some controversial points.

We have seen that if a slave has expended money in a way which would give an *extraneus* an action on *negotia gesta*, this is a *versio*[2]. This may be read as expressing a limit: it is very widely held that it does, and that the principle governing the action is that it lies, then, and then only, when a free person would have an *actio* on the *negotium gestum*[3]. But this idea seems to have been struck out to explain one or two awkward texts, which can, however, be far better explained without this doctrine, which raises more difficulties than it settles, so that on the whole the modified theory of enrichment, which also has many supporters[4], is to be preferred. But strictly it is not possible to fit in the texts with the theory appropriate to any other remedy or claim. *Versio* is a conception by itself: in the hands of the jurists, it seems to have meant embodiment in the *patrimonium* as opposed to the *peculium*. The *gestio* theory fails in conciliating the texts: the enrichment theory nearly succeeds. The chief texts are the following. A slave makes a present to his master, out of the *peculium*. This is not a *versio*. So says Ulpian[5], and this text is taken as an authority for the *gestio* theory. But the context shews that the reason why it is not a *versio* is that, in the writer's opinion, the *dominus* is not enriched. It seems to mean that the thing is still a *res peculiaris*, and that the transaction is on the same footing as the case where the master sells a *res peculiaris* and keeps the price. This is a *dolo malo* removal from *peculium*, and so leaves its amount unaltered as against creditors[6]. In the immediately following text a slave borrows money from an *extraneus* and pays it to the master *donandi animo*, not intending him to be a debtor to the *peculium*. This is a *versio*. This is irreconcilable with the *gestio* theory, and also with the text just cited, if it is explained in terms of that theory. But the texts adjoin and are from the same pen. The point is that the present transaction is wholly independent of the *peculium*[7].

[1] Lenel, Ed. Perp. § 104. [2] 15. 3. 3. 2, 5. 3, 17. *pr.*
[3] See the literature cited by Windscheid, *loc. cit.* n. 5; Karlowa, R. R. G. 2. 1156; Von Tuhr, *Actio de in rem verso*, holds a variant of this view. *Post*, p. 185. Similar words in 47. 8. 2. 23 clearly do not express a limit, cp. *h. l.* 24.
[4] *e.g.* Mandry, who cites (p. 454) the earlier literature; Dernburg, Windscheid, *locc. citt.*
[5] 15. 3. 7. *pr.*
[6] The text expresses the mutual independence of *peculium* and *patrimonium*. A slave, even with *administratio*, could not reduce his *peculium* by *donatio*. *Post*, p. 204. As an act of the slave the gift is null: as an act of the master it is a dolose withdrawal; in either view it is still in the *peculium* and so not *versum*.
[7] 15. 3. 7. 1. Von Tuhr, *op. cit.* 198, explains it on the ground that the *animus donandi* supervenes after the acquisition, and holds that this does not affect the creditor's right.

A slave borrows money to procure his freedom. He pays it to his master and is freed. There is a *versio* as to any excess in the loan over his value. This is clear apart from the *gestio* theory, but cannot be reconciled with it[1]. A slave pays a master's debt with money he has borrowed, he himself being indebted to the master at the time. There is a *versio* of the difference. If he was not indebted to the master, and the latter reimburses him, the *versio* ceases, but if the master's payment to him were not by way of reimbursement, but independent gift, the *versio* is not affected[2]. The text is a long one and discusses the reasons: it speaks of nothing but enrichment.

One text raises a difficulty. A father owes money: the *son* promises it and is sued. This is a *versio*, so that if the son does not pay the father can still be sued, "unless the son in taking over the obligation intended a gift to the father." This is exactly in point, for it makes the right depend on the son's having a claim as *negotiorum gestor*. But the words are in a *nisi* clause, of suspicious form[3], and it must be remembered that in Justinian's time a son's finances constituted for practical purposes a distinct estate. If he gave *donandi animo*, it was as if a stranger had done so.

The fact that the jurists do repeatedly refer to the principle of *gestio* is explained when we note that, as Windscheid observes[4], the text which states it[5] most fully is considering what amounts to the necessary enrichment. From this point of view the use of the conception of *gestio* is clear. A man has the *actio de in rem verso* when there would have been an *actio mandati* or on *negotia gesta*, if it had been done by one acting with the intent needed for those actions: whether in the actual case it was done with that *animus* is immaterial. There, as here, the action lies, though the benefit conferred is destroyed by accident. There, as here, the action does not lie if the expenditure is of a useless nature, with whatever intent it was made[6].

Mandry[7] distinguishes between "direct" *versio*, where the thing was never *in peculio*, and "indirect" *versio*, where the thing, having been *in peculio*, is transferred in some way to the *patrimonium*. He observes that in several cases of such transfer there is no *versio*[8], and holds that here, (though not in direct *versio*,) there is no claim unless the transfer would have given rise to an action on *negotium gestum*, or the like.

[1] 15. 3. 2, 3. *pr.* (considered by Von Tuhr, *op. cit.* 78 *sqq.*). Your slave lets to me a *vicarius*: I make him *institor*, and in that capacity he sells to you. There is a *versio*. But there has been no *gestio* on your behalf, 14. 3. 11. 8, 12. If I give notice to you not to give credit to a certain slave, my *institor*, and you do so, your *actio institoria* against me is barred. But if I have received the thing and do not return it there is a *replicatio doli*, *i.e.* I am liable for the *versio*, though there is no real *gestio*, 14. 3. 17. 4; cp. 3. 5. 7. 3.

[2] 15. 3. 10. 7.

[3] 15. 3. 10. 2. *nisi si donare patri filius voluit dum se obligat.* In this and the adjoining texts some cases of *versio* are discussed which could not arise in the case of a slave. See Mandry, *op. cit.* 2. 502.

[4] *loc. cit.*

[5] 15. 3. 3. 2.

[6] 3. 5. 9 *etc.* *Ante*, pp. 176, 7.

[7] *op. cit.* 2. 522 *sqq.*

[8] 15. 3. 5. 3, 6, 7. *pr. etc.*

His reasoning seems to be that the right results from the act of the slave—the slave himself would have no claim except in such a case—and the relation of the master to the third party must be governed by the same principle as that with his slave, on pain of "inner contradiction." Apart from this rather doubtful principle, the author finds support in those texts which speak of *gestio* as a basis[1]. But these apply equally to direct *versio*, and there the author admits that they do not set a limit. He relies also on a text[2] which says that if the master adeem the *peculium* or sell it or part of it and keep the price, there is no *actio de in rem verso*. This text is one of those which must be considered later[3], in connexion with difficult questions as to the effect, on the liability *de peculio*, of ademption and sale of the *peculium*. The text following it in the Digest[4] rests the exclusion on the ground that there has been no enrichment. From this and some other texts, it seems likely that all these facts are viewed as not affecting the liability *de peculio* at all: the things are still regarded as in the *peculium*, and the *dominus* is in no way enriched. Thus the text which Mandry cites shews merely that it is difficult to frame a case of indirect *versio* in which there was no debt to the *peculium*.

We have seen that there must be a *negotium* and a *versio*. What is the connexion between the two? It is sometimes said on the authority of the *gestio* texts, that the *versio* must be an act of the slave's, and it is clear that in the majority of cases it was so, for direct *versio* by the third party, under a contract with the slave, is substantially the same thing. But there is nothing in the form of the edict or the formula so far as we know them[5], requiring or stating any such limitation. And there is one text[6] which gives the action where the master himself applies the thing, and the circumstances shew that it was impossible for the actual acquirer of it, (in the case, a son,) to have been privy[7]. Not a few writers require however a great deal more than this. They hold that there must have been, between the original *negotium* and the ultimate *versio*, what may be called a causal *nexus*. There seems a close connexion between this and what has been called above the *gestio* theory. But in fact it is held by some who reject that theory, and rejected by some who accept it. Karlowa[8], who adopts the *gestio* theory, thinks there was a difference of opinion on the present point.

[1] 15. 3. 3. 2, 5. 3, 17. *pr.*

[2] 15. 3. 5. 3.

[3] *Post*, p. 219.

[4] 15. 3. 3. 6. But the course of thought may not be that of the original writers.

[5] Lenel, Ed. Perp. § 104.

[6] 15. 3. 19.

[7] He was dead. But the text is compatible with the view that the claim rested on right to compensation.

[8] In favour of the requirement, P. 2. 9. 1. Against, 15. 3. 3. 1, 5. 3, 10. 10. Dernburg, *op. cit.* 2. § 14, rejects *gestio* as a requirement but requires causal *nexus*. Windscheid (*gestio*), *op. cit.* § 403, thinks causal connexion not necessary in general. Von Tuhr, *op. cit.* 193, holding a special form of the *gestio* theory, thinks causal *nexus* needed, but the texts inconclusive.

If the *versio* is direct there is no difficulty[1]. It is only where the thing has been for a time in the *peculium* that the question arises. In relation to this the idea that the creditor must have contemplated the *versio, ab initio*, has little, *a priori*, to recommend it. The claim is a remedy for unfair enrichment and the intent of the third party seems rather immaterial. The Roman law was, perhaps, not liberal in remedies in cases of this kind[2], but here the remedy does exist and there is no obvious reason why it should be so limited.

On the texts however the question is not without difficulty. The majority of them are opposed to the requirement, though it is nowhere expressly denied. In one text Paul quotes from Neratius[3] (in a passage which can hardly be interpolated) the case of a son who bought a *toga*. The son died, and his father applied the *toga*, thinking it was his own, to the purposes of the funeral. The text adds that if the circumstances were such that the *pater* was under a duty to buy a *toga* for the son, the *versio* dates from the purchase; if not, from the funeral. It is clear that this was in the beginning a "peculiar" transaction, and the intent of the creditor was not material. In another group of texts Paul and Ulpian[4], citing and limiting the views of Mela and Pomponius, discuss the case of a son who, having borrowed money, applies it to the *dos* of his daughter or sister. This is a *versio in rem patris*, so far as the father was going to give a *dos*, provided the application was with a view to carrying out a *negotium* of the father but not otherwise. Nothing is said of the intent with which the money was lent: the point of the text is that it might equally well on such facts be a *negotium* of the son's. The text then lays down the same rule for the case of a slave. The form of the addition is against any causal connexion, but the remark may be compilers' work. In many texts, Ulpian in discussing the nature of a *versio*, uses language which seems to exclude the materiality of the creditor's intent[5]. It may be added that the Institutes, which explain the action at some length, say nothing of any such requirement[6]. Less direct evidence is afforded against the need of causal connexion in the texts which make the *versio* destructible, by the fact that the slave becomes indebted to the *dominus*[7]. Such a rule makes the intent of the creditor a very unsafe protection.

But there are texts the other way. In his Sentences, Paul definitely[8] subjects the right to bring the action to the condition that the money

[1] See *e.g.* 15. 3. 7. 4.
[2] Notwithstanding the well-known text: *iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*, 50. 17. 206.
[3] 15. 3. 19. [4] *h. t.* 7. 5—9.
[5] 15. 3. 3. *pr.*, 3. 1, 5. 2, 5. 3, 7. 3, and especially *h. t.* 10. 10. See also C. 4. 26. 3, 7, 12.
[6] In. 4. 7. 3, 5. See also Greg. Wis. 3. 7. 1, which, like the text in the Institutes, implies that if the facts would give *de peculio*, any later *versio* would give *de in rem verso*.
[7] *e.g.* 15. 3. 10. 6 *sqq.* [8] P. 2. 9. 1.

was given for the purpose of the *versio*. In the Digest[1] he gives it in a case in which he speaks of the contract as made with this object, as if that were a material factor. These might pass as mere expressions of Paul's preference for subjective tests[2], but there are texts independent of Paul. Ulpian[3], in a case of loan of money, says that there is an *actio de in rem verso* if the money was lent for the purpose. In the immediately preceding text[4] he seems to lay down a similar rule in a case of acquisition of goods. But all that he is there discussing is the question whether, if it is not applied to the master's purposes, the fact that it was given for that purpose suffices to give the action, and he decides that it does not. In another text[5] Africanus seems, though not very clearly, to require it in a case of loan of money. In the next text[6] Neratius discusses a case in which goods have been bought expressly for the *dominus*, and A has become surety for the price. He holds that A has no *actio de in rem verso*, though he pay the price. The actual decision does not here concern us: the point for us is that the intent of A is clearly regarded as material. If now we examine the texts which really treat the intent of the third party as material[7], we shall see that they are, as it seems without exception, cases in which the claimant of the action has paid money. This circumstance seems significant and enough to explain them. What is needed in this action is, as Neratius says[6], identity of what was received with what was *versum*. A payment of money was in itself a colourless thing. It was no easy matter to follow and prove the application of the actual coins, and accordingly some lawyers lay down the rule, (and none deny it,) that if money is lent for the purpose of a *versio*, and the *versio* follows, the identity of the money received with that *versa* is assumed. This view is confirmed by the fact that in the case[8] where the question is whether the lender of money to buy goods, and the supplier of the goods, have both in certain events the *actio de in rem verso*, the text emphasises the need of privity in the case of the lender, but does not mention it in the case of the vendor.

The question of the relation of this action to the *actio de peculio* is one of some difficulty. As described to us, it is not so much an independent action as a clause in the formula of the *actio de peculio*[9], and the question arises whether it had an independent existence; whether

[1] 14. 6. 17.
[2] As where he says that if a slave borrows, *ut creditori suo solveret*, this is no *versio* though the *dominus* is released from an *actio de peculio*. The objective fact that it is not applied to any patrimonial purpose is enough to exclude *de in rem verso*, 15. 3. 11.
[3] 15. 3. 3. 10. [4] 15. 3. 3. 9.
[5] *h. t.* 17. *pr.* [6] *h. t.* 18.
[7] P. 2. 9. 1; D. 14. 6. 17; 15. 3. 3. 10; *h. t.* 17. *pr.*; *h. t.* 18. Doubtful: 12. 1. 12; 14. 3. 17. 4. See also 15. 3. 7. 4.
[8] 15. 3. 3. 10. [9] *e.g.*, In. 4. 7. 4 b.

there was such an action which contained in its formula no reference to a *peculium*, and, in any case, whether it could be brought if there were no *peculium*. Von Tuhr[1] holds, as an outcome of his special theory as to the basis of our action, that there could be no *de in rem verso* if there were no *peculium*. He considers its purpose to be to provide for the case where the liability of the *dominus* to the slave is to release him from an obligation, not to pay money. This duty does not admit of exact estimation and so cannot be treated in the ordinary way as an addition to the *peculium*. As there can be no natural obligation to the slave, unless there is a *peculium*, it follows that there can be no *actio de in rem verso*. We shall shortly consider his general theory: here it is enough to say that he has to treat the texts with some violence in order to support this minor part of it[2]. He explains[3] the perpetuity of the action, notwithstanding the ending of "peculiar" liability, apparently by the principle that the liability to the creditor is the primary liability and that subsists: the liability to the slave was little more than a *facultas solvendi*, and that is ended. But it cannot be both an obligation and a *facultas solvendi*, and the rule is in fact in conflict with his general theory[4]. On the whole evidence it seems likely that this action could be brought independently. It is clear that it lay when there was nothing in the *peculium*, for even the *actio de peculio* did[5]. It is also clear that it could be brought when *de peculio* no longer existed, because either the *peculium* had been adeemed without *dolus*, or the slave had ceased to be the defendant's and the year had passed[6]. There are of course many texts which give it without mention of *peculium*, but there is none which unequivocally gives it where there has never been a *peculium*. But all that this shews is that an *extraneus* would not ordinarily trust a slave who had neither a *peculium* nor authority from his master. It may also be remarked that the use of the formula referring to the *peculium*, as well as to the *versio*, no more shews that an actual *peculium* was necessary than it shews that *de peculio* would not lie unless there was also a *versio*. It must not be forgotten that *de in rem verso* appears as the primary liability.

The *peculium*, as described in the Digest, includes not only

[1] *op. cit.* 238 *sqq.*
[2] He cites Baron as holding the same view. See Bekker, Z. S. S. 4. 101.
[3] *op. cit.* 236.
[4] Karlowa thinks there was an independent *de in rem verso*, introduced later than *de peculio*, arguing from the introductory words of D. 15. 1 and 15. 3 (R. R. G. 2. 1154). Mandry takes the same view, *de in rem verso* having a separate basis in enrichment (*op. cit.* 2. 456). Lenel dealing with the question shews that the Edict gave only the one formula (Ed. Perp. § 104). See also Windscheid, *op. cit.* § 483.
[5] 15. 1. 30. *pr.* But this is not to say that it lay when there was no *peculium*.
[6] 15. 3. 1. 1, 2, 14, as to which last, *post*, Ch. XVI.

corporeal things, but also debts due to the *peculium* from the master. As the subject of an *actio de in rem verso* is also usually the subject of such a claim from the master, and is thus already covered by the *actio de peculio*[1], the question arises: what purpose is served by the *actio de in rem verso*? The point is raised in the title, and it is answered by reference to certain circumstances under which it gives a remedy where there is no *actio de peculio*. Thus it is said that our action is available, though that *de peculio* is extinct, owing to ademption of the *peculium sine dolo*, or death or alienation of the slave, and expiration of the *annus utilis*[2]. But it cannot be supposed that these exceptional cases were the cause of introduction of the action, and indeed the texts shew clearly that this was not so. It is contemplated that, in the normal case, the actions are brought together—the question of *versio* being first considered[3], and it is clear that the *actio de in rem verso* is regarded as giving the plaintiff more than he could have recovered by *de peculio* alone—*proficere ei cuius pecunia in rem versa est debet, ut ipse uberiorem actionem habeat*[4].

The elements of a solution may be found in the answer to certain historical questions. The natural obligation between slave and master is of later introduction than the *actio de peculio*[5], and the *actio de peculio* did not at first cover anything but the corporeal things in the *peculium*. At that stage the *actio de in rem verso* would have the obvious advantage of giving the particular creditor a better claim[6]. When the *peculium* is extended to cover debts to it, this utility is lost, and[7] the subsidiary advantage of perpetuity alone remains. This view is confirmed by the fact that the classical jurists see little use in this action, and, in explaining it, fall back on these subsidiary cases. Von Tuhr, however, while he notes these changes[8], is not satisfied with this explanation. He holds that when debts were included in the *peculium*, the *actio de in rem verso* changed its basis. Instead of resting on enrichment, it came to rest on a liability of the master to the slave, of a kind which could not be added to the *peculium*, because it could not be exactly assessed in money[9]. The case he has in mind is that in which the master's obligation is, not to pay money, but to release the slave from some obligation he has undertaken. This may be done by other means than payment, and at less expense. It cannot be added to the *peculium*, and thus becomes the special subject of the *actio de in rem verso*, available only to the creditor whose property has been *versum*. The application of this theory to the texts, in which it is nowhere

[1] *e.g.* 15. 3. 19 *in fin.*
[2] *Ib.*; 15. 3. 1. 1, 2. See *post*, p. 227.
[3] In. 4. 7. 4.
[4] 15. 3. 1. 2.
[5] Pernice, Labeo, 1. 152 *sqq.* *Post*, Ch. XXIX.
[6] 15. 3. 1. 2.
[7] For expression and citation of contrary views, Mandry, *op. cit.* 2. 31, 32.
[8] *op. cit.* 259 *sqq.*
[9] *op. cit.* 82.

indicated, and with a number of which it is irreconcilable, involves a great number of emendations and insertions.

The foregoing pages are an attempt to explain the rules of the *actio de in rem verso*, as set forth in the Digest. But even if they be regarded as doing this, it must be admitted that they do not account for all the language of the texts. Thus, to take a single instance, though we have not accepted the *gestio* theory, it is clear that the language of many texts is coloured by it. It is easy to account for this. The task of the lawyers was to define the meaning of the expression *versio in rem* of the Edict. To this end the existing institutions of the civil law, while they gave no sure guide, provided many analogies. These different analogies have coloured the language of the lawyers. The title shews indeed that there were differences of opinion as to the actual rules. How far these differences went, in particular, how far specific views can be associated with individual jurists, is a question too speculative to be here considered. Attempts to answer it have not been lacking, the writer in some cases going into very exact detail[1].

A text in the Institutes[2] tells us that what could be recovered by any of these four actions could also be recovered by direct condiction. This proposition, which has no equivalent in Gaius, has a little support from two texts in the Digest[3], one at least of which has a *prima facie* look of genuineness[4]. As the substantive rights of the parties are not affected, the topic is of small importance to us, though it is of great interest in connexion with the general theory of *condictio*. The text has been the starting-point of a great mass of controversy[5]. Here it is enough to express a doubt as to the classical character of the rule, notwithstanding the reference in one of the texts to Julian[6].

[1] See, *e.g.* Von Tuhr, *op. cit.* 287, n. 47.
[2] In. 4. 7. 8.
[3] 12. 1. 29; 14. 3. 17. 4, 5.
[4] 12. 1. 29.
[5] See Mandry, *op. cit.* 2. 326. He cites the earlier literature. See also Girard, **Manuel, 668.**
[6] 12. 1. 29.

CHAPTER VIII.

THE SLAVE AS MAN. COMMERCIAL RELATIONS. *PECULIUM.* ACQUISITIONS, ALIENATIONS, ETC.

THE foregoing statement of the slave's various activities, apart from *peculium*, would be very misleading unless it were borne in mind that a slave, in any way engaged in commerce, had, as a matter almost of course, a *peculium*: it was the existence of this which made it more or less safe to deal with him[1]. In essence the *peculium* was a fund which masters allowed slaves to hold and, within limits, to deal with as owners. It was distinct from the master's ordinary property—the *patrimonium*, and though in law the property of the master, it is constantly spoken of as, *de facto*, the property of the slave[2]. It is an aggregate of *res peculiares*[3], which belong to the master[4], and of which the slave is administrator. It is described as *pusillum patrimonium*, and *velut patrimonium proprium*[5]. We are concerned with it as it was in classical and later law, but it may be well to premise a few remarks as to its earlier history[6].

(1) At first it seems to have been unimportant and to have consisted merely of small savings on allowances, and unexpended balances on authorised transactions. But by the beginning of the Empire, it might be of great value, and of any form. It might include other slaves, (one in the *peculium* of another slave being called a *vicarius*,) and the *peculia* of *vicarii* (even *vicarii vicariorum*), land, inheritances, obligations and so forth[7]. The *vicarius* might indeed be more valuable than the principal slave[8]. It might thus reach a very large amount[9].

[1] As early as Plautus it seems to have been a mark of bad character not to be so far trusted. Pernice, Labeo, 1. 123.
[2] *Rem peculiarem tenere possunt, habere possidere non possunt, quia possessio non tantum corporis sed iuris est*, 41. 2. 49. 1; 41. 1. 10. *pr.*, 1; G. 2. 86; In. 2. 9. *pr.* For Talmudic Law, Winter, *op. cit.* p. 51.
[3] 6. 1 56; *peculiaris* ordinarily means belonging to the *peculium*. In 33. 6. 9. 3 it means "for the use of slaves."
[4] 18. 1. 40. 5.
[5] 15. 1. 5. 3, 39; In. 4. 6. 10.
[6] The following observations on this matter are from Pernice, Labeo, 1. 123 *sqq.*; Mandry, *op. cit.* 2. 22 *sqq.*
[7] 15. 1. 7. 1—5, 57; 33. 8. 6, 25.
[8] 21. 1. 44. *pr.*
[9] As to the origin of the word, Festus, *s. v. Peculium*, Bruns, Fontes, ii. 23.

(2) Even after it had become possible for the *peculium* to be of great value, it was still employed under the eye of the master: the slave pursued his craft as a journeyman, the master supervising all. But, here too, the manners of the Empire produced a change: slaves are set up in business for themselves. A *peculium* may consist of a stock in trade, *e.g.* of slaves. Commercially the slave appears as quite distinct from his master, with whom he frequently enters into legal relations. We hear of a slave owning a slave in common with his master[1], cultivating a farm of his, *non fide dominica, sed mercede ut extranei coloni solent*[2]. A master leaves to his slave "the money I owe him," and this is valid, being construed *naturaliter*[3].

(3) There remained another development. If a slave contracted, the right of action was in the master, and was not at first regarded as part of the *peculium*. Gradually however such rights, *in re peculiari*, were regarded as part of the *peculium* for certain purposes, though their realisation would require the cooperation of the master. On the other hand, the slave's debts to third parties were not treated as deductions from the *peculium*, but this turned on considerations connected with the *actio de peculio*, to be considered later. In the same way debts due from the master himself were included, though it is clear that this was a later development[4]. On the other hand, debts due to the master were deducted as against other creditors, for reasons also to be considered later. These debts from slave to master, and from master to slave[5], constituted, when they were recognised, a very important factor in the *peculium*[6]. To say money is owed to or by a slave is in strictness an inaccurate mode of expression: it is the master who can sue, and with certain limitations, be sued. But the usual form of words expresses the fact, with its legal consequences, that the obligation is contracted *servi nomine*[7].

As we shall see later, *peculium* is a collective term: it covers physical things and obligations, and is liable to deductions on account of claims due from it. Thus it has a significance other than that of the specific things which make it up. Moreover it is the whole "property" (*de facto*) of the slave, and thus has at least in form the character of a *universitas*, even, as Mandry says[8], of a *universitas iuris*. But, as he

[1] 33. 8. 22. 1. [2] 33. 7. 20. 1. [3] 35. 1. 40. 3.

[4] Pernice, *loc. cit.*; Von Tuhr, Actio de in rem verso, 260 *sqq*.

[5] 12. 6. 64; D. 15. 1 has many illustrations. The slave might pay a dominical debt: the master might receive payment of a debt due to the *peculium*, 15. 1. 7. 6.

[6] 15. 1. 7. 7. Debt between slave and fellow slave, 14. 4. 5. 1. Debt between slave and *vicarius*, 33. 8. 9. *pr*.

[7] So far as the slave is contemplated as the party, such debts can be only *obligationes naturales*. G. 3. 119a; D. 35. 1. 40. 3. *Post*, Ch. XXIX.

[8] *op. cit.* p. 18 15. 1. 39, 40; 31. 65. *pr*.

remarks, this conception serves little purpose in this connexion. It is not necessary to the explanation of any of the rules, and indeed the various *universitates* differ so much, *inter se*, that few principles can be drawn from the identification. Nevertheless, in discussing the rules, we shall come upon several cases in which the possibility of a *peculium*, in what may be called an ideal, or potential, form, is material.

The detachment of the fund from the master and establishment of it as a sort of property of the slave, is expressed in a host of rules, some of which may be mentioned here by way of illustration.

Slaves might have procurators to manage affairs of the *peculium*[1]. In the case of claim of a slave, if the slave died, the action must continue, to determine whose was the *peculium*[2]. A stolen *res peculiaris* ceased to be *furtiva* on getting back to the *peculium*, and conversely, if a slave handled his *res peculiares* with fraudulent intent, they did not become *furtivae* till they reached a third person[3]. Upon manumission of a slave, *inter vivos*, whether *vindicta* or informally, he took his *peculium*, unless it was expressly reserved[4]. What passed on such a manumission was merely the physical things: there was no question of universal succession, and thus rights of action did not pass, *nisi mandatis...actionibus*[5]. It does not appear that cession could be claimed as of right, for in one text, in which the point arose, an express but informal gift of the rights of action was ineffective[6]. The principle seems to have been that the presumption applied only to those things of which the slave was in actual enjoyment. As to these it was apparently treated as a case of *donatio inter vivos*, completed by the slave's possession after freedom. In other cases of transfer, however, the *peculium* did not pass except expressly[7]. Even in manumission on death, it did not pass unless it was expressly given; whether it was so, or not, being a question of construction[8]. Thus a gift of liberty with an exemption from rendering accounts was not a gift of the *peculium*. The slave had still to return what he held: he was merely excused from very careful enquiry as to waste, though not as to fraud[9], and he was not

[1] 3. 3. 33. [2] C. 7. 66. 5. [3] 47. 2. 57. 2, 3.

[4] 15. 1. 53; 23. 3. 39. *pr*.; In. 2. 20. 20; C. 7. 23; V. Fr. 261. Very little sufficed for a reservation. Where a slave on manumission was ordered to give in a list of properties in his possession nothing was tacitly given, 23. 8. 19. *pr*. In 10. 2. 39. 4 the *peculium* must have been expressly reserved. The general rule is attributed to Severus and Caracalla, but they were probably confirming a long-standing practice. Pernice, Labeo, 1. 148.

[5] 15. 1. 53.

[6] 39. 5. 35. *pr*. See Schirmer, Z. S. S. 12. 24. As to actions the manumission could be no more than a pact to give. According to the Syro-Roman Law-book (Bruns and Sachau, 196) the presumptive gift was good only against the manumitter: the *peculium* could be claimed by the *heres*. This rule seems to be credited to Theodosius (*ibid.* 89): it does not seem to have been a law of the Empire as a whole. It is connected with Greek law (Mitteis, Reichsrecht und Volksrecht 372—4; 382—4). Diocletian had found it necessary to declare that for no purpose was it necessary that a son of the manumitter should sign the *instrumenta*, C. 7. 16. 32.

[7] As to sale and legacy, 18. 1. 29; 21. 2. 3; 33. 8. 24.

[8] 33. 8. 8. 7; 34. 3. 28. 7; C. 4. 14. 2; 7. 23. [9] 30. 119; 34. 3. 31. 1.

released from debts due to the *dominus*[1]. But if he were to be free on rendering accounts, and paying the heir 10, this was a gift of the *peculium*, less that sum[2]. A sum so ordered to be paid as a condition on a gift of freedom, could be paid out of the *peculium* without any direction to that effect, even though the heir had in the meantime sold the man *sine peculio*[3].

The reason for the distinction between the two cases, a distinction of old standing[4], is not stated. The *peculium* is *res hereditaria*[5], and perhaps the governing idea is that the *heres* is not to be deprived by a too easy presumption. In accordance with this is the above rule of the Syro-Roman[6] Law-book: in the place and time at which that rule was law, the presumption, even in manumission *inter vivos*, was only of intent to deprive himself.

It is noticeable that if on such a manumission there was a gift of the *peculium*, the *libertus* had a right to claim transfer of actions, as debts due to the *peculium* were a part of it[7].

There are a number of special rules to consider in the case of a legacy of the *peculium*, either to the slave or to an *extraneus*[8]. *Peculium* is a word with a recognised denotation, and in general means the same whether it is being defined in view of a slave legatee or an *extraneus* legatee or a creditor having claims on it[9]. But as a gift of the *peculium* is a voluntary benefit, the donor can vary, enlarge or restrict it, as he pleases, whereas, when he is being sued on it, there is need of an exact definition of the *peculium*, so that neither party can vary it as against the other[10]. As we have seen, the *peculium* is to a certain extent regarded as a *universitas*: it is conceived of as a whole. Thus a legatee of it might not accept part and reject part[11]. On the other hand, in his action to recover it, he must vindicate the specific things: there was no general action like *hereditatis petitio*, nor indeed a *vindicatio* of the *peculium* as such, as there was in a *legatum gregis*[12]. Again, as in all legacies, its extent is, in part, a matter of construction. Some rules are stated as expressing what is presumed to be the testator's intention. On the other hand, some appear as resulting from the legal conception

[1] 33. 8. 23. 2, 3. [2] 33. 8. 8. 3, 7; In. 2. 20. 20.
[3] 35. 1. 57; 40. 7. 3. 1, 3. 7, 31. 1, 39; C. 4. 6. 9. As to difficulties in connexion with these payments, *post*, Ch. XXI.
[4] C. 7. 23. [5] 5. 3. 13. 6. [6] See p. 189, n. 6.
[7] 33. 8. 19. 1. The legacy is a completed gift. If ordered to restore *peculium* he must give everything, not deducting anything for debts due to the master though these *ipso facto* reduce the *peculium*, 40. 5. 41. 8.
[8] Mandry, *op. cit.* 2. 182 *sqq.*; Karlowa, *op. cit.* 2. 1137 *sqq.*
[9] Whether a legatee is claiming or a creditor is suing in respect of it, debts to *dominus* are deducted from the apparent mass, 33. 8. 6. *pr.*
[10] Karlowa observes (*loc. cit.*) that the frequency and form of references to legacy of *peculium* shew that it was common and of scientific interest. In fact the rules in the Digest are a compromise among conflicting tendencies.
[11] 31. 2, 6. [12] 6. 1. 56; cp. In. 2. 20. 18.

of a *peculium*, even where the result is in conflict with expressed intention.

A legacy of the *peculium* to the slave himself includes all acquisitions up to the time of *dies cedens*, while, if it is left to an *extraneus*, nothing goes to the legatee which has accrued since the death, except ordinary accretions to the *peculiares res*[1]. This distinction is repeatedly credited to Julian, whose influence may be supposed to have converted a common rule of construction into one of law. He regards it as carrying into effect the presumed intention of the testator[2], and thus as liable to be set aside on proof of contrary intent. It does not seem at first sight necessary to appeal to intent, or to the authority of Julian, since in each case the content of the legacy seems to be fixed as it is on *dies cedens*, (which in the case of the slave is the entry of the heir,) and this is the ordinary rule[3]. The text of the Institutes above cited[4] gives this as the reason in the case of the slave. But the case is exceptional. The general rule is designed for specific things, while the *peculium* is a collection, subject to constant variations, of diverse things[5]. Julian's decision amounts to the view that the testator must be regarded as contemplating the *peculium* as a whole, and not the specific things which made it up, at the time when the will was made. The rule he gives then follows, except that it may still be asked: what was the rule when the legacy was subject to a condition so that *dies cedens* was still later? Was the heir, or was the legatee, entitled to additions other than accretions after the death, or entry of the heir, as the case might be? No answer is given, but consistency seems to require that they should go to the legatee, at least in the case of the slave. At the time when Julian wrote, *dies cedit*, in the other case, not at death, but at the opening of the will. If his text has not been altered, the content of the legacy does not depend so far as the *extraneus* is concerned on *dies cedens* at all, and, even though that be postponed, the legatee will not get later additions.

The question arises whether a legacy of *peculium* can be made, by anticipation, at a time when no *peculium* yet exists. The single text[6] says that it is immaterial that there be at the moment *nihil in peculio*. This implies an existing *peculium*, but one either overburdened with debts, or such that at the moment it is without assets, but the text continues *non enim tantum praesens sed etiam futurum peculium legari potest*. This may mean that it is immaterial whether there is any

[1] Not, *e.g.*, acquisitions *ex operis*, or *ex aliena re*, gifts, *etc.* 15. 1. 57. 1, 2; 33. 8. 8. 8; In. 2. 20. 20.
[2] *Ibid.* Mandry seems to treat this as Ulpian's gloss, but both Tryphoninus and Ulpian speak of Julian as so accounting for the rule.
[3] 36. 2. 8; In. 2. 20. 17, 20. [4] In. 2. 20. 20.
[5] Even a *grex*, to which the general rule applied, has a unity very different from that of a *peculium*, In. 2. 20. 18. [6] 33. 8. 11; cp. 32. 17. *pr.*

peculium at the time, and it is probable that this was the case. We hear of legacies of "all my slaves with their *peculia*[1]," and it is unlikely that a distinction would be drawn excluding those *peculia* which had been created after the will was made. But here another question arises. Legacies of *peculium* seem usually to have been made *per vindicationem*[2], though there are cases recorded of gifts by *fideicommissum*[3]. Principle requires that what is left, *per vindicationem*, shall belong to the testator at the time of testation, and so far as we are expressly told this was departed from only in the case of "fungibles[4]." Accordingly Karlowa[5] holds that a legacy *per vindicationem* of a *peculium* would have failed, before the *Sc.* Neronianum, as to after acquired things, since the texts give no hint of any relaxation in the case of *peculium*. Thus the testator if he wished to ensure the full efficacy of his gift would have to fall back on the form *per damnationem*[6]. Mandry[7], on the other hand, holds that the restriction did not apply, that the *peculium* was considered as a unity, distinct from its content, and that this view, settled in early times, was adhered to in later ages, on grounds of convenience, whatever logical objections might be made to it[8].

In all these rules the conception of the *peculium* as a unity has played a part; but this conception is entirely disregarded when the legatee sues for the property. He cannot bring a general action, but must sue for the specific things[9]. This is easily understood. The unity of the *peculium* is not intrinsic: it depends on its existence as a separate fund in the hands of the slave. When that separation has ceased, as it has in the typical case where the slave is the legatee, it differs in no way from other possessions of the person who has it. This excludes such an action as the *vindicatio gregis*[10], but not an action analogous to *hereditatis petitio*. Such an action would however be an express creation, and apart from the less importance of the case, the analogy is defective. The *hereditatis petitio* was primarily aimed at adverse assertors of the same title[11], a restriction which would make the action meaningless here. And whereas the *heres*, by *aditio*, has become seised of all the rights in the *hereditas*, we know that the legatee of *peculium* has not acquired the rights of action: he cannot "intend"

[1] See *e.g.* 30. 52. *pr.* As to contemplation of a future *peculium*, 15. 1. 7. 7.
[2] Mandry and Karlowa, *locc. citt.* [3] 33. 8. 23. *pr.*
[4] G. 2. 196. [5] *loc. cit.*
[6] This is the form Karlowa supposes to be presumed in the texts which make the *heres* and not the legatee liable *de peculio*, *loc. cit.* *Post*, p. 231.
[7] *loc. cit.*
[8] The principle itself is no obstacle to a legacy *per vindicationem* of a *peculium*, not yet existing, since its content may have been the property of the testator. But if the strict rule applied, we should have expected the resulting difficulties to have left some mark on the texts, notwithstanding the *Sc.* Neronianum.
[9] 6. 1. 56. [10] 6. 1. 1. 3. [11] 5. 3. 9.

that the *peculium* is his as the heir can say the *hereditas* is his, and the possibility of this assertion is the theoretical basis of the *hereditatis petitio*[1].

We have now to consider how debts due to the *peculium*, and from it, are dealt with. Such debts are of several kinds. There may be debts due from the master, as the result of *negotia* between him and the slave; there may be debts due from him as having recovered from third persons debts due to the *peculium*; there may be debts due from outsiders, not yet recovered. On the other hand there may be debts due to the *dominus* and to other persons in the family, and there may also be debts to outsiders. On each of these cases there are some remarks to be made.

Apart from special questions of construction resulting from exceptional facts, or from the use of exceptional words, a gift of *peculium* means, in general, a gift of the nett *peculium*, *i.e.* the fund which would be available to a creditor *de peculio*. The extent of this will be considered in the next chapter: here it is enough to state the general principle. Debts due to the *dominus* are deducted[2], as also are those due to the *heres*[3], even though, owing to the fact that the gift of liberty was unconditional, he was never *dominus*[4]. In like manner debts to fellow slaves are deducted[5], but not, for obvious reasons, those due to a *vicarius* of the slave[6]. Debts will ordinarily result from *negotia*, but they may not. Thus if a slave has stolen or damaged property of his master, *e.g.* a fellow slave, the damage may be deducted, but only *in simplum*[7].

As the vindication is only of specific things, and the debts are chargeable *pro rata*, the legatee, where there are debts, will be entitled only to a part of the thing sued for. Accordingly we are told that he has a *vindicatio incertae partis*[8], since it cannot be known with certainty, beforehand, how much must be deducted[9]. It follows that before any judgment can be given in this *vindicatio* it must be made clear what the total fund and burdens are, and this difficulty has led to the view that all can be vindicated at once, *i.e.* in one *formula*. But, as Mandry observes[10], trial of all by one *iudex* would serve the same purpose[11].

As in the *actio de peculio*, debts to third persons are not deducted[12]. But inasmuch as the legatee is not always liable as such, the *heres* is not bound to hand over the *peculiares res* till security is given for

[1] Mandry and Karlowa, *locc. citt.* [2] 33. 8. 6. 1, 5. [3] 33. 8. 6. 5.
[4] 33. 8. 8. 1. Even money lent after the death but before the liberty took effect, *h. t.* 8. *pr.*
[5] 15. 1. 9. 3; 33. 8. 8. 2. [6] 33. 8. 9. *pr.*
[7] 33. 8. 9. 1. No deduction if he damaged himself or diminished his own value, 15. 1. 9. 7; 33. 8. 9. 2, *post*, p. 223.
[8] 10. 3. 8. 1. [9] 33. 8. 6. *pr.* [10] *loc. cit.*
[11] 33. 8. 6. *pr.* If the debts were paid the *vindicatio* would be *in solidum*, 33. 8. 22. *pr.*
[12] 33. 8. 6. *pr.*, 1, 5, 8. 1, 22. *pr.*

debts to *extranei* on contract, or the like, and even on *noxae* which are already *in iudicio*[1].

No right to sue debtors to the *peculium* passes *ipso facto* by the legacy: obligations cannot pass without express cession of actions. It is clear that the legatee can require the *heres* to cede to him the right of action against debtors to the *peculium*, and to pay over to him anything recovered in any such action, and anything he himself owes[2], though the debt accrued after the death of the testator[3]. The texts say nothing of the possible case of natural obligations to the *peculium*, but it must be assumed that if they are in any way paid to the *heres*, he must hand over the money received.

As to debts due from the master there is some difficulty. It is clear that a mere acknowledgment of indebtedness does not create a debt, and gives no right to claim[4]. Severus and Caracalla go further and lay it down that a legacy of *peculium* does not of itself entitle the legatee to claim to have money returned to him which he has expended out of the *peculium* on the master's affairs[5]. This appears to be a rule of construction, resting on no general principle. Accordingly Ulpian observes[4] that there is no reason why he should not have it, if the testator so intended, and he adds that, in any case, he is entitled to set off such a claim against debts due to the *dominus*. And Scaevola appears as holding, in a case in which a slave set up such a claim, and it was proved that it was the settled practice of the testator to refund such payments, that the slave was entitled to recover the money[6]. Here too the decision seems to be one of construction, resting on the proved custom. But Scaevola was writing before the date of the rescript, and it is possible to doubt whether the text is a mere survival, or is preserved by the compilers as expressing a limitation of the rescript on the lines suggested by Ulpian.

In any case, the concluding words of this text, coupled with the fact that the *heres* must pay over what he owes, and what he has received from debtors to the *peculium*[7], shew that other debts due from the *dominus*, *e.g.* those resulting from receipt of debts to the *peculium*, can be claimed. The same inference can be drawn from the rule laid down in the above cited case of father and daughter, but it is remarkable that it should not be more clearly expressed[8]. The rule cannot safely be inferred from the general principle that *peculium* is the same, whether

[1] 33. 8. 17, 18, *post*, p. 222. Not on delict not yet before the court: *noxa caput sequitur*.
[2] 33. 8. 5, 19. 1, 23. *pr*.
[3] If a thing *in peculio* were sold to the *heres* the price would presumably be *in peculio*.
[4] Where a father had been in the habit of allowing his daughter money, and had not paid it on a certain occasion, the fact that he had entered it as due did not give the daughter, legatee of her *peculium*, the right to claim it, 33. 8. 6. 4.
[5] *Ib.*; In. 2. 20. 20. *in fin.* [6] 33. 8. 23. 1. [7] See n. 2.
[8] n. 6. See Mandry, *op. cit.* 2. 188 *sqq*.

it be the subject of a legacy or of an action, for it is precisely in relation to these additions to the "peculiar" fund that the resemblance is not complete[1]. There were many circumstances, under which the removal of a thing, from the *peculium* to the *patrimonium*, was a dead loss to the legatee, merely because on the facts there could be no suggestion of a debt[2]. As it is said by Papinian: *id peculium ad legatarium pertinet quod in ea causa moriente patre inveniatur*[3].

The conception of *peculium*, as meaning, not exactly the *peculiares res*, but the nett *peculium*; *i.e.* that proportion of each thing which is left when deductible debts are allowed for, finds expression in a text of Ulpian[4]. He considers the effect of a legacy of *peculium non deducto aere alieno*. He says that such an addition is contrary to the nature of the legacy, and might almost be supposed to nullify it, but that the better view is that the gift is good, the addition adding nothing to it: *nec enim potest crescere vindicatio peculii per hanc adiectionem*. The point is that as the legacy is a gift of the *peculium*, which is in fact a certain proportion of each *peculiaris res*, *i.e.* that left when debts are allowed for, it can give no more. The addition is meaningless, for there are no debts to deduct from this, and it might be treated as contradictory, since, if the *adiectio* is given any meaning at all, the gift is to be one both with and without deductions. It is observed by Mandry[5] that this shews the conception of *peculium* as nett *peculium* to be not a mere interpretation of the testator's wish, otherwise the obvious will of the testator would be allowed effect. And this also appears from Ulpian's further observation[6], that if the legatee happens to get possession of the whole of a thing, he can meet the heir's *vindicatio* with an *exceptio doli*, since his holding is in accord with the testator's wish[7]. The case will be different, as Ulpian notes, if instead of adding those words, the testator has expressly remitted all debts or has released the debt, as he could, by a mere admission that there were no debts. Here there will be no debts to deduct and the legacy will take effect on the gross *peculium*. The same result would be attained by a legacy of all the *peculiares res*[8]. Conversely, notwithstanding this rigid interpretation of the word *peculium*, if the *heres* is forbidden to sue a particular debtor thereto, he will have no right of action to cede and the *peculium* will be so much the less[9].

[1] In legacy there could be no imputations for *dolus*.
[2] A slave was to be free on paying 10 and to have his *peculium*. The 10 were not *in peculio*. A man agreed with a slave to free him for 10. 8 having been paid he freed him by will, *cum peculio*. The 8 were not *in peculio*, 33. 88. 5.
[3] 33. 8. 19. 2. [4] 33. 8. 6. 1. [5] *op. cit.* 2. 193. [6] 33. 8. 6. 1.
[7] He does not discuss the case in which the legatee, having received so many things as amount in value to the nett *peculium*, sues the *heres* for the *incerta pars* of another thing. Apparently, as there is a legacy of that, he can recover, subject to *exceptio doli*.
[8] 33. 8. 10.
[9] 33. 8. 8. 6. Where the *peculium* was left to the slave, and there was a gift to wife of "all my *ancillae*," one in the *peculium* went to the slave, 33. 8. 15. Cp. *h. t.* 21; 32. 73. 5. As to

It may be added that, as a matter of construction, a legacy of *servum cum peculio* failed if the slave died, or was freed or alienated before it took effect: the *peculium* being a mere accessory, the gift of it depends on the principal gift, and fails if that does. The case is contrasted with that of a gift of *servos cum vicariis*, or of *ancillas cum natis*. Here the death, etc., of the principal thing will not bar the gift of the others, as they are more than mere accessories. The rule could be evaded by the use of apt words: all that the text says is that the expression *servum cum peculio* is not enough[1].

Any slave may conceivably have a *peculium*, even an *impubes* or a *furiosus*[2]. But on a well-known principle, no liabilities arise on the transactions of *impubes*, save so far as the *peculium* is enriched, and the same is no doubt true in the case of a *furiosus*[3].

It is essential that the *peculium* have been assented to by the *dominus*[4], and thus, though the slave of a pupil or of a madman may have a *peculium*[5], it must be in the first case the result of a concession by the father, and in the second of a grant during sanity[6]; neither the death nor the insanity of the master suffices of itself to destroy the *peculium* if it remains in the hand of the slave. A tutor cannot authorise the grant of a *peculium*[7], or grant one himself by way of *administratio* (the second rule not being expressly stated, but seeming to follow from the language of the texts[8]). This is surprising since the tutor can give *administratio peculii*, *iussum*, and such authorisation as will give the *actio institoria*, while his knowledge suffices for the *actio tributoria*[9]. Mandry[10] is inclined, doubtfully, to rest the rule on the fact that the concession is in the nature of a gift, and a tutor cannot make or authorise this. He notes that this does not harmonise with the rule that a slave even without *administratio* can give his *vicarius* a *peculium*[11], but adds that the Romans may not have felt this difficulty since they rest the right on a circuitous grant by the *dominus*. The cases of *iussum* and so forth may be distinguished on the ground that they are all interpretations simply of the Edict, while the question whether there is a *peculium* is one of civil law, which, in view of legacies of *peculium*, had its importance apart from the *actio de peculio*, and

these and connected texts, *post*, Ch. x. In. 33. 8. 14. Alfenus considers a gift: *servus meus peculium suum cum moriar sibi habeto liberque esto*. He is asked whether the legacy is good since the slave is to have it before he is free. His answer, that the order is immaterial and the legacy good, seems, at least in form, to miss the point. The words *cum moriar*, which can apply only to the legacy, must be ignored to make the gift good. *Post*, Ch. xx.

[1] 10. 2. 39. 4; 33. 8. 1, 2, 3. 4; In. 2. 20. 17.
[2] 13. 6. 3. 4; 15. 1. 1. 3, 7. 3, 27. *pr.*
[3] 15. 1. 1. 4. Immaterial whether owner male or female, *h. t.* 3. 2.
[4] 15. 1. 5. 4. [5] 15. 1. 3. 4. [6] *h. l.* 4; *h. t.* 7. 1.
[7] 15. 1. 3. 3, 7. 1. [8] Mandry, *op. cit.* 2. 73.
[9] *e.g.* 14. 3. 5. 18, 9; 15. 4. 1. 7, 2. [10] *loc. cit.*; Pothier *ad* 15. 1. 1. 3.
[11] 15. 1. 6.

even before that existed. There still remains a difficulty in regarding the *concessio peculii* as a gift, in view of the restrictions which existed on the slave's power of binding the *peculium* gratuitously[1]. The origin of the rule may perhaps be looked for at a time when such a *concessio* created no obligation, so that there would be no case for *tutoris auctoritas*, when such a thing could not enter into the narrow field of *administratio*, as yet non-obligatory[2], and when the *impubes* as an *incapax* could not be supposed to know whether a slave did or did not deserve the favour.

The concession may be tacit[3]. But there must be more than intent to create a *peculium*: there must be an actual placing of the thing at the disposal of the slave in some way: *desiderat enim res naturalem dationem*[4]. Most of the texts dealing with this matter are concerned with increase of the *peculium* rather than with its establishment, but they may safely, so far, be applied to this. So far as *res corporales* are concerned there is little difficulty. There must be something in the nature of an act of dedication[5], though it may be tacit, as by leaving the things in the hands of a slave, in an inheritance to which one has succeeded[6], the point being that the slave must have control: it must be *re non verbis*[7]. Naturally, not every case in which things are left with a slave amounts to *peculii concessio*. But general knowledge and assent to the *peculium* is enough: if it is the sort of thing the *dominus* commonly allows to be in the *peculium* it is so without his express knowledge in each case[8].

The *peculium* will thus cover not only what the master has given expressly, but also savings out of allowances, trading acquisitions, and gifts by outsiders intended to benefit the *peculium*[9]. It will include the *peculium* of a *vicarius*, which itself may come from many sources[10]. On the other hand, nothing acquired by a *maleficium*, committed against the *dominus* or another, can possibly found, or be in, a *peculium*[11]. And it is important to note that a slave is not, for any purpose, in his own *peculium*[12]. Obviously it may often be a difficult question of fact whether a *res* is or is not in the *peculium*, and whether there is a *peculium* or not[13]. Thus a gift of necessary clothing to a slave does not amount to a grant of a *peculium*, though apparently a gift of clothing, in excess of needs, might be so interpreted. On the other hand, when a slave has a *peculium* his ordinary clothing will be a part of it, but

[1] *Post*, pp. 204, 214. [2] See Cuq, Institutions, 1. 325.
[3] 15. 1. 6, 7. 1. Karlowa, *op. cit.* 2. 1133. Mandry shews (*op. cit.* 2. 82) that the slave's consent was not needed.
[4] 15. 1. 8. [5] 15. 1. 4. [6] 15. 1. 7. 1.
[7] 15. 1. 4. 1. It must be clear that the slave is to hold it on his own account, not as caretaker or as managing his master's business, *h. t.* 5. 4. It would not cover things deposited with him and vindicable by their owners, or things pledged with him even on a debt to the *peculium*, 13. 7. 28. 1; 14. 4. 5. 18.
[8] 15. 1. 49. *pr.*; *h. t.* 7. 2. [9] 15. 1. 39. [10] 15. 1. 4. 6; *h. t.* 17.
[11] 15. 1. 4. 2; 41. 2. 24; cp. 41. 3. 4. 7. [12] 15. 1. 11. *pr.*, 38. 2.
[13] *e.g.* 15. 3. 16.

not such clothing as is merely handed to him to be worn on state occasions or when attending on his master[1].

But a *peculium* may consist of claims as well as of *res corporales*, and it may be created by a gift of *nomina* and nothing more[2]. That these can be only claims from third parties is not absolutely certain on the texts, but Mandry[3] supposes this limitation. Assuming it confined to debts from third persons, the question remains: what is the act of dedication? How do they become so transferred as to be in the *peculium*? Mandry gives the answer, that it is as soon as facts have occurred which would make a payment of the debt or interest to the slave a valid *solutio*[4]. He cites a text shewing that the fact that the transaction was in the slave's name suffices[5].

We have now to consider the conditions under which a thing acquired vests in the *peculium*. From many texts we learn that things are acquired to it, if the acquisition is *ex peculio*, or *ex* (or *in*) *peculiari re* or *peculiari causa*, or if it is *peculii nomine*[6]. These terms seem all to mean much the same thing, but we nowhere have any explanation of their significance. We have therefore to find on the evidence of the texts what the conditions are under which a thing acquired vests in the *peculium*. It may be assumed that the expressed intent of the *dominus* is overruling: if he says it is to be *in peculio*, it is: if he says the contrary, it is not[7]. But apart from this there has been much discussion as to what are the decisive considerations[8]. It is desirable to consider two distinct cases.

(i) Cases of acquisition through a transaction creative of obligation—an "onerous transaction." Here if the thing is acquired through the application of a *res peculii*[9], or earned by labour, and the slave's earnings are to be in his *peculium*, there can be no doubt that the *peculium* is increased by it[10], *i.e.* by the debt so long as it is unpaid, the thing when it is delivered. The same rule applies to acquisitions from actions on delict affecting *res peculiares*[11]. It is held by some writers[12] that the intention of the slave is material. This view seems to rest mainly on the use of the expression, *peculii nomine*, which occurs frequently[13]. Both Mandry and Karlowa are clear that though this intent is necessary it need not be expressed to the third party, though the latter holds

[1] 15. 1. 25, 40. [2] 15. 1. 16. *in fin.*
[3] *op. cit.* 2. 65 *sqq.* He remarks that obligation between slave and master implies *peculium*, that, apart from existing *obligatio* the debt would be unreal, and would consist in mere *verba*, not as principle requires, in *res*, and that this would certainly not suffice to increase an existing *peculium*, 15. 1. 4. 1, 49. 2.
[4] If a slave *expromisit* for a debtor to *dominus*, and the master deducts this in *de peculio*, the debt becomes a *nomen peculiare*, 15. 1. 56.
[5] 33. 8. 26, *post*, p. 199.
[6] For illustrative texts, Mandry, *op. cit.* 2. 118. [7] 15. 1. 8.
[8] Mandry, *loc. cit.*; Karlowa, *op. cit.* 2. 1134, 5; Pernice, Labeo, 1. 139 *sqq.*
[9] *e.g.* by sale or hire of it, or if it has provided the capital of a *societas*.
[10] *e.g.* 41. 3. 44. 7. [11] 15. 1. 7. 4, 5.
[12] Mandry, Karlowa, *locc. citt.* [13] *e.g.* 21. 1. 51; 41. 3. 31. 3; 41. 4. 2. 12.

that it must have been possible for him to know it. Both hold that objective connexion will cause the intent to be presumed. As the *dominus* need know nothing of the matter, the only meaning that the rule can have, is that if the slave selling a thing, for example, in any way announced his intent that the price should be patrimonial, it would not be in the *peculium*. But for this there is no authority, and it is hard to reconcile it with the rule, laid down by Mandry himself[1], that a thing was in *peculio*, if it was so intended to be by the *dominus*, and it was in fact at the slave's disposal whatever his intent. The true result of such a state of things is that the property is still in the *peculium*, but the slave has declared his intent to make a *donatio* of it to his master[2].

(ii) Cases of "lucrative" acquisition. Under what circumstances is a *donatio* or a legacy or a *hereditas* given by another person to the slave, in his *peculium*[3]? It is certain that such a thing might be in the *peculium*[4], and it is a fair inference from some of the texts that in the ordinary case it would be so. Thus we are told that legacies and inheritances are in the *peculium*[5], and that what *officio meruit a quolibet sibi donari* is in *peculio*[6]. A similar inference may be drawn from the texts dealing with gifts by one of common owners to the slave, where it seems to go as of course, though this is not expressly stated[7]. Where a slave receives from an *ancilla* a quasi *dos* this seems to be an effective transfer from one *peculium* to the other[8]. Again we are told that a dotal slave may have a *peculium, duplici iuris*, and the illustration given is of a *hereditas* left to him, *respectu mariti*[9]. The rule may be brought into harmony with principle by a text which observes that the *peculium* includes not only that to which the *dominus* has assented, but that to which he would assent if he knew of it[10]. But we are also told that, if a *legatum purum* is left to a slave, and he is freed after *dies cedens* he leaves the legacy with the *dominus*[11]. In view of this text, and since a slave freed *inter vivos* takes his *peculium* with him unless it is expressly reserved, Mandry[12] holds that such things are not normally *in peculio* though they may be. But this text is not conclusive, since this tacit passing of the *peculium* is not a rule of law, but only a presumption of intent of the master to disseise himself. And though the

[1] See *ante*, p. 197. 15. 1. 4. *pr.* Cp. 15. 3. 3. 1. *in fin.*
[2] Mandry thinks (*loc. cit.*) that the fact that the thing was acquired by a transaction out of which an *actio de peculio* arose, satisfied the requirement of objective connexion. As he says, in view of the wide range of that obligation, this covers any case of non-lucrative acquisition. The proposition seems to have little real content, since if the master knew nothing of it, his consent would not exist, unless the case were within *peculiaris causa* in the narrower sense. If he did consent it would be within the *peculium*, whatever its origin.
[3] Mandry, *op. cit.* 2. 123 *sqq.*; Karlowa, *op. cit.* 2. 1135; Pernice, *op. cit.* 1. 149 *sqq.*
[4] 15. 1. 7. 5, 19. 1, 39; 23. 3. 39. *pr.* [5] 15. 1. 7. 5.
[6] 15. 1. 39. [7] 15. 1. 16; 41. 1. 37. 1, 2, 49. [8] 23. 3. 39. *pr.*
[9] 15. 1. 19. 1. *Dos* given to a *filius familias* by an *extraneus* is *in peculio*, 24. 3. 22. 12, 25. *pr.*
[10] 15. 1. 49. [11] 36. 2. 5. 7. [12] *loc. cit.*

expression, *apud dominum...relinquet*, points to *inter vivos* manumission, the writer no doubt has all cases of manumission in his mind, and in manumission on death the *peculium* does not pass except expressly. On the whole the true view seems to be that such things are in the *peculium* unless the contrary appears.

Apart from these questions as to the nature of the *peculium*, it is necessary to consider some points relative to acquisition and alienation of *peculiares res*. In relation to the *peculium* a slave is allowed, *iure singulari, utilitatis causa*, to acquire possession for the *dominus* without the latter's knowledge[1]. Possession so acquired gives the same right to the master as if it had been acquired by him, at least so far as *usucapio* is concerned: there is no authority as to Interdict. Thus the master has the Publician[2], and, conversely, any *vitium* in the slave's possession affects the master, even ignorant of the possession, and even though the *peculium* have been adeemed[3]. Thus a man cannot usucapt a thing his slave has taken in bad faith[4]. But as the slave's power is purely derivative, it is essential that the *dominus* have the power to acquire; if this is present the *usucapio* is complete without his knowledge[5]. If a *res peculiaris* is stolen from my slave, I reacquire possession as soon as he gets it back, though I do not know it, unless I had in the meantime determined that it was not to be in the *peculium*: in that case as it is not in *peculium*, I do not reacquire possession till I know[6]. The text adds that if my slave lose a (non-peculiar) thing and regain it, I do not repossess till I know. If my slave steal a thing from me and keep it *in peculio*, it is not really a part of the *peculium*: it is a *res furtiva*, and I do not possess it till I begin to hold it as I did before, or, knowing the facts, allow him to keep it in the *peculium*[7].

As to *iura in re aliena*, there is a slight difficulty. We have seen[8] that a legacy to a slave is valid only if it is such that it could take effect if he were free. But we are told that, if a slave had a *fundus* in his

[1] 41. 2. 1. 5, 24, 34. 2, 44. 1. D. 41. 2. 34. 2 does not mention *peculium*, but the restriction is implied. 41. 3. 31. 3 implies that there might be cases in which he might possess *meo nomine ignorante me*. This merely means that *iussum* is as good as knowledge, *ante*, p. 132. (The *peculium* did not include acquisitions from delict so that the rule did not cover these, 41. 2. 24.) The rule is one of mere convenience, though Paul rests it on the idea that previous authorisation (*i.e.* to have a *peculium*) is as good as knowledge (*i.e.* that he has that thing), 41. 2. 1. 5. But that principle applies only where the authority and knowledge apply to the same thing. *Ante*, p. 132.

[2] 6. 2. 7. 10.

[3] 41. 4. 2. 11, 12. Paul, resting on Celsus, says that even *in re peculiari*, if the *dominus* knows that the thing is *aliena* when the slave takes possession, there is no *usucapio* (*h. l.* 13). Thus *dominus* need not know, but if he does his bad faith is material. The rule may not have been accepted by the Sabinians who first admitted possession of *res peculiares* without knowledge by *dominus* (41. 2. 1. 5). See *ante*, p. 132.

[4] 41. 4. 2. 10. Though it had been conveyed to the master in a transaction with the slave: *causa durat*, 41. 4. 2. 14.

[5] 41. 3. 8. *pr.* So a buyer from a slave can add the vendor's time to his own, for *usucapio*, *in re peculiari*, 44. 3. 15. 3.

[6] 41. 3. 4. 7; 47. 2. 57. 2. [7] 41. 3. 4. 9. [8] *Ante*, p. 150.

peculium, he could acquire a right of way to it even by legacy[1]. The case has already been discussed[2]: it is enough to say that this is only one of a large number of exceptional rules applied *utilitatis causa*[3].

We pass to the law as to alienation of things in the *peculium*. The mere possession of a *peculium* did not in itself increase the slave's power of alienation: the *voluntas* of the *dominus* was still necessary[4]. But the expression of this *voluntas* might take the form of a grant of *plena* or *libera administratio*, which did away with the need of special authorisation in each case[5]. The gift of *administratio* might be expressly enlarged beyond its ordinary limits, or it might be expressly limited, and its extent, in any case, was a question of fact[6]. Apart from such variations the general rule was that *administratio* was necessary for any alienation or pledge[7] of property, and that of itself it did not validate alienations by way of gift[8]. It authorised payment of a debt of the *peculium*, with the effect of transferring the property, discharging the debt and so releasing any surety[9]. Any alienation without, or in excess of, authority was void: it did not give *iusta possessio*, to one who knew of the defect[10]: such a person might indeed be liable for theft[11]. Even a receiver in good faith, though he could usucapt, had no *accessio temporis*[12].

Similar principles apply to matters other than alienation and pledge. A slave's pact that he would not sue was null for obvious reasons. But he could effectively make such a *pactum in rem*, if it were *in re peculiari*, and he had *administratio*, but not *donandi animo*[13]. He could make a valid compromise with a thief, *bona fide*, in the interest of the *dominus*[14]. He could "delegate" his debtor[15], while, as we have seen, without this power he could neither delegate nor novate[16]. He could offer an extra-judicial oath, the taking of which would give the other party an *actio de peculio*[17]. He could himself take the contrary oath, originally offered, or offered back, to him[18].

Some cases need special discussion.

[1] 32. 17. 1. [2] *Ante*, p. 156.

[3] As to contract, it may be added that the rights of action enure to his master, and that, as he does not cease to be a slave by having a *peculium*, he cannot adstipulate, even *in re peculiari*, 15. 1. 41; G. 3. 114. As to *dolus* by slave *in re peculiari* see *ante*, p. 163.

[4] 6. 1. 41. 1; Lex Rom. Burg. 14. 6 (C. Herm. 16. 1).

[5] 15. 1. 46. The expression *libera* adds nothing to the meaning, Mandry, *op. cit.* 2. 103 *sqq.*

[6] 20. 3. 1. 1. [7] 12. 6. 13. *pr.*; 13. 7. 18. 4.

[8] Even with *administratio* he could not gratuitously pledge a thing for a third person, or release a pledge, or give away anything of the *peculium*, or acceptilate, 20. 3. 1. 1; 20. 6. 8. 5; 46. 4. 22. Of course he could not manumit. C. 7. 11. 2.

[9] 12. 6. 13; 46. 3. 84.

[10] C. 4. 26. 10. The *dominus* could vindicate, 12. 6. 53. [11] See n. 4.

[12] 41. 2. 14; 41. 3. 34; 44. 3. 15. 3. [13] 2. 14. 28. 2.

[14] 47. 2. 52. 26. [15] 15. 1. 48. 1. [16] 46. 3. 19.

[17] 12. 2. 20, 22, 23. [18] 12. 2. 25, *ante*, p. 84.

(*a*) Payment of debt. It is clear that this needs authority[1], though, as Mandry points out[2], many texts say nothing of the requirement. But there is a difficulty on one point. In general, if the alienation is not within authority, it is void, and the property, even money, can be vindicated[3]. But in the case of payment of a putative debt by a slave who has *administratio*, but not a power of making gifts, the texts are in conflict. Ulpian, in two texts, discusses the case of a *filiusfamilias* who has repaid money borrowed in contravention of the *Sc.* Macedonianum. In one case the money is vindicable[4]: in the other there is a *condictio*. But the argument leads plainly to a *vindicatio*[5], and the *condictio*, contradicting what the text has said, is probably an interpolation. Another case is more difficult. A slave pays *ex peculio* on a surety, in a matter which was no concern of the *peculium*. Papinian, whose hypothesis shews that the slave had some authority to alienate, gives the master a *vindicatio*[6]. Julian gives *condictio*[7]. He does not speak of authority, but other parts of the passage shew that this is assumed. Julian held that alienation needed *administratio*[8], and that *administratio* did not give an unlimited right: he adverts elsewhere to the well-known limit[9]. Mandry[10] distinguishes the texts by the view that *administratio* gave an unlimited right of *solutio ex peculio*. There was a *naturalis obligatio* on the slave[11], and we know, further, that *usucapio pro soluto* did not require a real debt[12]. But this still leaves it an individual view of Julian's since the case in Papinian's text is the same. Moreover Julian arrives at the same conclusion where a slave bribes a man not to inform of a theft by him. On the authority of Proculus he gives no *vindicatio* to the *dominus* but a *condictio*[13]. This is not a *solutio*. Pernice, accepting Mandry's view[14], but observing that the opinion is special to Julian, thinks it is a survival of an old rule that a slave could alienate *res peculiares* without *administratio*, a rule which he thinks may have been cut down by Proculus[15]. He does not advert to the text just cited[13] in which Proculus is playing the opposite part, or to the fact that in the texts of Papinian and Julian there was authority, the only question being as to its extent. The better view seems to be that Julian while excluding *donatio*, contemplates *animus donandi*. This was not necessarily present in either of his two texts[16]. And though he gives a *vindicatio* where a son has lent money, contrary to the *Sc.* Macedonianum[17], it is likely that here there was such an *animus*.

[1] *Ante*, p. 201. [2] *op. cit.* p. 95.
[3] *e.g.* 12. 1. 11. 2; 14. 6. 3. 2; 42. 8. 12; C. 4. 26. 10. [4] 12. 1. 14.
[5] 14. 6. 9. 1. [6] 46. 3. 94. 3.
[7] 46. 1. 19. The recovery is from the payee, *h. t.* 20. Even if *dominus* had paid, it could have been recovered as an *indebitum*.
[8] *e.g.* 14. 6. 3. 2. [9] 14. 6. 3. 2. [10] *op. cit.* 2. 114. [11] *Post*, Ch. XXIX.
[12] See Esmein, Mélanges, 204. [13] 12. 5. 5. [14] Labeo, 1. 135.
[15] He cites 46. 3. 84. [16] 12. 5. 5; 46. 1. 19; cp. 46. 2. 34. *pr.* [17] 14. 6. 3. 2.

(*b*) Receipt of payment. The receipt of payment has the effect of discharging the debtor, and so of destroying a right of action. It is accordingly held, by some writers[1], that such a receipt requires *administratio*. Logically there is much to be said for this view, but the texts are adverse to it. It is true that Gaius, in a short phrase[2] inserted between two texts of Paul, dealing with an analogous topic, observes that debts may be paid to one who has *administratio*. But this is far from shewing that that is the only condition on which payment can be made to him. Other texts shew that it is not. Where the contract was one which the slave could not have made without *administratio*, texts, referring to *solutio*, refer also to *administratio*[3]. But even here and in the text of Gaius (taken with its context) the point made is that the loan must have been with due authority, not the *solutio*[4]. On the other hand it is clear on several texts that any contract which has been validly made with a slave can be validly performed to him, and not one of these texts speaks of *administratio*. Ulpian says that any "peculiar" debtor can pay to the slave[5], and, elsewhere[6], that a slave's deposit can be returned to him[7]. Thus the true rule is that any contract which the slave could validly make can be performed to him[8]. Some of these contracts need authority, while others do not, but this is material only on the question whether the contract is valid or not. The rule is stated as one of good faith[9], and thus, on the one hand, it does not apply where the person bound has reason to think the *dominus* does not wish the payment to be so made, and, on the other, it does apply in the absence of such knowledge, even though, by manumission of the slave, or otherwise, the whole situation has in fact changed[10].

(*c*) Novation. It is clear on the general tendency of the texts that a slave with *administratio* can novate debts, but not without it[11]. He cannot of his own authority destroy an obligation, and therefore, if he has no *administratio*, his stipulation, while it will on ordinary principles create a new obligation, will leave the old one unaffected[12]. But though the rule is clear, the texts call for some remarks. A novation may be effected in various ways. The texts consider the cases of a stipulation by the slave himself and of *delegatio crediti*. If the

[1] Mandry, *op. cit.* 2. 93; Karlowa, *op. cit.* 2. 1132. [2] 12. 2. 21.
[3] 23. 3. 24; C. 8. 42. 3, *mutuum*. [4] Cp. 2. 14. 27. *pr.*; 44. 7. 14; 46. 3. 32.
[5] 12. 6. 26. 8. [6] 16. 3. 11.
[7] So Alfenus (46. 3. 35) and Pomponius (23. 3. 24).
[8] This does not mean that the slave's receipt was good, though the debt was not fully paid, but that the payment was a *solutio*, though made to the slave.
[9] 16. 3. 11.
[10] 12. 6. 26. 8; 16. 3. 11; 46. 3. 32, 35; C. 8. 42. 3. *Post*, p. 205. Mandry recognises the rule (*loc. cit.*) but remarks that it rests on principles independent of the *peculium*. This is true, but it leaves no room for his contrary rule. See above, n. 1. One to whom payment can be made can novate (2. 14. 27. *pr.*; 46. 2. 10). Among exceptions Celsus, Paul and Pomponius mention contracting slaves (2. 14. 27. *pr.*; 46. 2. 25; 46. 3. 19). Since if they have *administratio* they can novate, it is clear that *administratio* is not needed to acceptance of *solutio*.
[11] 12. 2. 21; 46. 2. 25 (*per se*), P. 5. 8, *etc.* Cp. 46. 2. 20. [12] 46. 2. 16.

"peculiar" debtor promises to a third party, to whom the *peculium* is indebted, the effect is no doubt a *novatio* of the debt to the *peculium*[1]. But if the person to whom he promises is not a creditor of the *peculium*, Gaius tells us that there is no novation, if it was done *donandi animo*, but only if the slave authorised the stipulation as an act of *gestio* for him, so that the *peculium* acquires an *actio mandati*[2]. In the case of a new *stipulatio* by the slave himself, he says that there is a *novatio*, *maxime si etiam meliorem suam condicionem eo modo faciunt.* The use of the word *maxime* makes it uncertain what is the rule the text is intended to state. But it can hardly be that the novatory effect depended on the goodness of the bargain driven by the slave, and the grammar of the clause suggests interpolation[3].

It is clear that *administratio* did not allow *donatio*[4]. Many things are in effect gifts which are not so expressed, and it is not quite easy to tell what was the real principle. There is no reason to think an alienation was bad merely because it was an unwise bargain, or because it became in effect a total loss. But where the transaction was foredoomed to be a loss, because the law forbad recovery, it seems clear from texts already considered[5] that the intent of the slave was not material[6]. As the extent of *administratio* was a question of fact, it might be so wide as to cover *donatio*, and we are told that such an extension did not authorise *mortis causa donatio*[7]. It must also be remarked that *administratio* did not authorise alienation in fraud of creditors[8]. The text, which refers to *filiifamilias* but must apply equally to slaves, is solitary and has some obscurity. The reference is certainly to creditors of the son: we learn that if authority has been given, to do even this, it is as if the father had done it, and action against him is enough, as the creditors of the son are his creditors *de peculio*. The point of the text seems to be that any such alienation (*i.e.* detrimental and fraudulent in intent) was not merely voidable under the Paulian edict, but was void as not within the limits of *administratio*.

The power of alienation does not depend on solvency of the *peculium*. Even though its debts exceed its assets, so that there is *nihil in peculio*, its property is still *res peculiares*, and the foregoing rules apply[9].

[1] 15. 1. 48. 1. [2] 46. 2. 34. *pr.*
[3] The rule presumably is that there was no novation if the terms of the new stipulation clearly involved loss to the *peculium*.
[4] The rule in 39. 5. 7. 3 can hardly have applied to slaves.
[5] *Ante*, p. 202. [6] See however, Mandry, *op. cit.* 2. 109.
[7] 39. 5. 7. 2, 5; 42. 8. 12. See Mandry, *op. cit.* 2. 110. The rule as to *m. c. donatio* can hardly apply to slaves.
[8] 42. 8. 12.
[9] 15. 1. 4. 5. Alienation under contract may give rise to counter obligations: so far as these are enforceable by action this will be *de peculio*, 21. 1. 23. 4, 57. 1.

The rules as to gift and ademption of *administratio* are not fully stated: it seems that the statement would be but a repetition of the rules in *iussum*. Thus we are told that *tutor* and *curator furiosi* could give or deny (and therefore adeem) it to a slave[1]. From the texts dealing with payment to a slave who has lent, with *administratio*[2], it may perhaps be inferred that death ended the power. Probably the rules of mandate applied.

As we have already seen, a transaction duly entered on by a slave was essentially the slave's transaction whether it was *in re peculiari*, or *in re dominica, iussu domini*. The rules of *administratio* illustrate this, but add no new principle. Thus if a slave had acquired a right, payment, *ex contractu*, to him discharged, whether he had *administratio* or not[3]. Such a repayment could be validly made to him till the *peculium* was adeemed and the payer knew this[4]. It might be done though the master were dead, or the slave sold or freed, unless, in the case of death of the master, his death was known to the payer (the case being similar to mandate), or, in the other case, there were circumstances known to the payer shewing that such payment would be contrary to intent. Such circumstances would be that the slave had been freed *sine peculio*, or that his new master did not wish it[5]. We are however told that if a debtor to the *peculium* paid the slave *fraudulenter*, he was not released. From the context this seems to mean "if he knew the slave was going to commit malversation[6]." It should be added that a stolen or fugitive slave, or one as to whom it is uncertain whether he is alive or dead, did not retain administration[7]. It may be presumed that knowledge of either of these states of fact would invalidate a payment to the credit of the slave.

It remains to consider how a *peculium* may cease to exist. To the existence of it, both intent of the master, and *de facto* control of the slave are necessary[8]. If the one or the other do not exist, there can be no *peculium*. Thus if the master takes a thing away, or expresses his determination that it is not to be *in peculio*, it ceases to be so[9]. And a similar mere expression of intent will suffice to adeem the *peculium* as a whole[10]. It should be noted that ademption does not require that the thing be removed from the custody of the slave.

[1] 15. 1. 7. 1, 24. [2] 46. 3. 32, 35. [3] *Ante*, p. 203. Cp. 40. 7. 6. 6.
[4] C. 8. 42. 3. [5] 46. 3. 32, 35. As in case of *iussum*.
[6] 15. 3. 10. 6. *Actio doli* seems more applicable. [7] 15. 1. 48. *pr.*
[8] *Ante*, p. 196. [9] 15. 1. 7. 6; 41. 3. 4. 7.
[10] 15. 1. 8. We shall see (*post*, p. 218) that in the *actio de peculio* this is less important than it seems.

If a thing ceases to exist it is, of course, no longer in the *peculium*. If its destruction gave a right of action, this right is. But if it was by accident, the *peculium* is simply by so much the poorer. Mandry[1] discusses a question which arises from this. If everything in the *peculium* ceases to exist in such a way, has the *peculium* ceased? Many texts speak of a state of things in which *nihil est in peculio*, but, as Mandry shews, this means no more than that the debts exceed the value of the property. If a *peculium* is no more than a mass of *res peculiares*, it can have no real existence, in the absence of any *res*. The correct analysis of the situation would seem to be (and this is substantially Mandry's view), that there is no more than a *concessio* which will be realised as soon as the slave has possession of anything within its terms. Thus, if I tell my slave he may keep his future earnings as *peculium*, he has no *peculium* until, and unless, he has some earnings. The rules of the *actio de peculio* deprive the question of any practical importance in that connexion: it may however have some significance in relation to *legatum peculii*[2].

It may be remarked, then, by way of conclusion, that the *peculium* does not alter the slave's legal character: it implies certain authorities and makes others possible. But he is still a slave, and his faculties are still derivative. No legal process which is closed to the slave with no *peculium* is open to him if he has one, for it must be remembered that novation and delegation are not special processes, but processes devoted to a special purpose. So far as he can take part in a *mancipatio* with a *peculium*, he can without it: it is merely a question of authority[3].

[1] *op. cit.* 2. 9 *sqq.*; 163 *sqq.*
[2] *Ante*, p. 191. That a potential future *peculium* could be regarded as existing is clear from 15. 1. 7. 7, at least for later law.
[3] *Ante*, pp. 136, 159. The effect on *peculium* of death of either party or sale or manumission of the slave, is considered in connexion with the *actio de peculio*, *post*, pp. 227 *sqq.*

CHAPTER IX.

THE SLAVE AS MAN. IN COMMERCE. *ACTIO DE PECULIO. ACTIO TRIBUTORIA.*

A. *Actio de Peculio.*

We have seen that the *actio de in rem verso* was one with the *actio de peculio*; *i.e.* that a creditor suing on a slave's contract could claim to be paid out of what had been devoted to the purposes of the master, and, if that did not suffice, out of the *peculium* of the slave in question[1]. The *actio de peculio* can, however, be treated as an independent action of which we can now state, by way of preliminary, the general principles. We know that the *dominus* is liable so far as the *peculium* will go, upon the slave's *negotia*[2], that the action is based on the Edict[3], and that, in point of form, an important characteristic is that the *formula* contains, probably in the *condemnatio*, a limitation or *taxatio*, in the words *dumtaxat de peculio*, or the like.

The liability is in a sense not of the master but of the *peculium*[4]. Though, in view of legacies of it, the term *peculium* must have already had a legal meaning, there can be no doubt that the introduction of this action gave precision to the conception, since the liability is based on the existence and independence of the *peculium*. The practical meaning of this proposition is that it is essential to the claim that there be a *peculium*: if there be none there is no action[5]. It does not depend on *voluntas domini*, and thus it is not barred by the master's prohibition to trade[6], or by the fact that he is a *pupillus*[7]. On the other hand, if there is a *peculium*, the fact that, at the moment, *nihil est in peculio*, does not bar the action: all that is necessary is that there be something at the time of judgment[8]. Other results of the view that it is a liability dependent on the *peculium* may be noted. A *fideiussor* for a *dominus*

[1] 15. 3. 5. 2. [2] In. 4. 6. 10; 4. 6. 36; 4. 7. 4; G. 4. 73; C. 4. 26. 12; C. Th. 2. 32. 1.
[3] C. 4. 26. 12.
[4] Or rather of the *dominus* as holder of the *peculium*. *Ib.*; Greg. Wis. 9. 1. Pernice has shewn (Labeo, 1. 125 *sqq.*) that the development of the action shews that it is not a case of representation: the slave is dealing on his own account.
[5] 21. 1. 57. 1. Apart from *dolus*. [6] 15. 1. 29. 1, 15. 1. 47. *pr.*
[7] 42. 4. 3. 1. It does not depend on *potestas*, in the sense in which noxal actions do: the only *interrogatio* is, if any, *an peculium apud eum sit*, 11. 1. 9. 8.
[8] 15. 1. 30. *pr.*; 34. 3. 5. 2.

on a liability *de peculio* was liable only *de peculio*[1]. A *dominus* who handed over the *peculium*, without fraud or delay, was entitled to release from a pending *actio de peculio*[2]. But this view of the liability was attained, like most juristic developments, only gradually. Thus a text on *interrogatio*[3] has evidently been handled by the compilers, and that on the liability, though there be nothing in the *peculium*[4], records a doubt. We are told[5] that a creditor *de peculio* cannot get *missio in possessionem rei servandae causa*, if there is nothing in the *peculium*, where a *dominus latitat*, since he cannot be doing so fraudulently as, if the action were tried, he would be entitled to absolution. The case is compared with that of a debtor *sub conditione*, as to whom the same rule is laid down, though he may be afterwards condemned, *iniuria iudicis*. This parallel of Papinian's seems to ignore the rule that the *actio de peculio* lies though there is nothing *in peculio*: it puts on the same level two cases, in one of which the condemnation is lawful, while in the other it is not. The true rule, at least for later law, is that laid down by Ulpian[6], which allows *missio* in such a case, precisely because the question whether there is anything *in peculio* is material only at judgment.

The liability of the master is distinct from the *obligatio naturalis* of the slave himself[7]. Hence arises an important distinction. Apart from questions of fraud, and the like, any transaction of the slave might impose an *obligatio naturalis* on him[8], but it was not every transaction, by which a slave purported to bind himself, that imposed an *obligatio de peculio* on his master. This fact leads some writers to hold that the whole theory of the liability of the master rests on representation of him by the slave. But the texts do not justify this view. A liability which arises, as we have seen, even though this transaction or all transactions were prohibited, can hardly be regarded as representative[9]. No doubt the limits on the master's liability were gradually defined by the jurists, who, reasoning from the scanty words of the Edict, interpreted them in the light of current theories as to the basis of the obligation. The notion of representation had its share in settling the rule that the master was not to be liable on transactions in which neither he nor the slave had any economic interest, but it is not possible to be more precise than this, and there is danger in pressing, beyond the texts, the operation of any one theory, to the exclusion of potential rivals. The needs of trade were more important than any theory[10].

[1] 46. 1. 35. [2] 10. 3. 9. [3] 11. 1. 9. 8. See p. 207, n. 7.
[4] 15. 1. 30. *pr.*; cp. 34. 3. 5. 2. [5] 15. 1. 50. *pr.*
[6] 42. 4. 7. 15; cp. 15. 1. 30. *pr.*; 34. 3. 5. 2. Similar questions arise as to the *consumptio* of the *naturalis obligatio* by *litis contestatio* in this action. *Post*, Ch. XXIX.
[7] 15. 1. 50. 2. [8] *Post*, Ch. XXIX. [9] See Pernice, Labeo, 1. 125, 129.
[10] Papinian reflects this way of thought: *verius et utilius videtur Praetorem de huiusmodi contractibus non cogitasse*, 17. 1. 54. *pr.*

The transaction giving rise to the *actio de peculio* must be a *negotium*[1]: this action is not the proper remedy for a delict. If a slave inhabits a house from which something is thrown, there is no *actio de peculio*, though, unless the throwing is by the slave himself, there is no noxal action either[2]. But this must be looked at carefully. A delict may give rise to a liability apart from that *ex delicto*, and this, if it is contractual or quasi-contractual[3], gives an *actio de peculio*[4]. It is held by Mandry[5] that the contractual or quasi-contractual character of the obligation constitutes the test of the possibility of the *actio de peculio*. He discusses several apparent exceptions and shews that they have no bearing on the law of this action[6]. But there are some cases which raise difficulty. In one text we are told[7] that where a slave received property in fraud of the payer's creditors without his master's knowledge: *ait Labeo hactenus eum teneri ut restituat quod ad se pervenit aut dumtaxat de peculio damnetur vel si quid in rem eius versum est.* This is delictal: the words *quod ad se pervenit* make the allusion to *de peculio et in rem verso* look like an interpolation[8]. Another text[9], raising the same question, where a slave has received from a *libertus, in fraudem patroni*, remarks: *et mihi videtur sufficere adversus me patremque arbitrioque iudicis contineri tam id quod in rem versum est condemnandi quam id quod in peculio.* Here too the text is corrupt, and contains, in all probability, a new rule of the compilers.

In these cases, where this action is given, but there is no contract, or the like, between the parties, there is a further limitation to the extent to which the defendant *dominus* has benefited[10]. This is, as Mandry shews[11], a mere application of a general rule applicable to all cases in which A is liable to make restitution on what is, in essence, a delict, not his own. It is however immaterial whether the enrichment be to the patrimony or to the *peculium*[12].

If the liability arises out of a *negotium*, the fact that it involves a delict does not of itself exclude the *actio de peculio*, and thus similar facts may give rise to *actio noxalis*, or *de peculio*, according to circumstances. Thus an *actio doli, servi nomine*, will be *de peculio* if the relation in which it arises is one which gives rise to that action, while if the transaction is such as gives rise to a noxal action, the *actio doli* will itself be noxal[13].

[1] 15. 1. 1. 2. [2] 9. 3. 1. 8, *ante*, p. 100. [3] Mandry, *op. cit.* 2. 234 *sqq.*
[4] For slaves the chief case is *condictio furtiva*, 13. 1. 4, 19; 15. 1. 3. 12; 19. 1. 30. *pr.* As to its quasi-contractual nature, Monro, De furtis, App. 1. There was *de peculio* on a judgment for a son's delict, based on the contractual view of *litis contestatio*, 9. 4. 35; 15. 3. 11. For this and another case, Koschaker, Translatio Iudicii, pp. 189, 194.
[5] *loc. cit.* [6] 4. 2. 16. 1; 43. 16. 16. [7] 42. 8. 6. 12.
[8] Mandry, *loc. cit.*, gives another explanation.
[9] 38. 5. 1. 22. Mandry does not discuss this text in this connexion.
[10] See n. 4. [11] *op. cit.* 2. 239 *sqq.* [12] 15. 1. 3. 12; 19. 1. 30. *pr.*
[13] 4. 3. 9. 4. As to this text see *ante*, p. 118. Further illustration, 4. 9. 3. 3; 47. 2. 42. *pr.* *Ante*, p. 100.

Some cases give rise to an alternative between our action and noxal surrender, on principles which are not altogether clear. Ulpian[1] cites Pomponius as saying that the action *in factum* against a *mensor* is, in the case of his slave, *magis noxalis*, although the *actio de peculio* is also available. This seems to be a compromise due to the doubtful nature of the relation between the *mensor* and other party, the former being an official, at least in later law, and the relation being not strictly contractual, since the *mensor* is not civilly liable, and there is no *locatio*[2]. Misconduct is in essence delictal, since the action lies only for fraud[3]. It is to be noted that the text gives the choice to the injured party. In another case in which a slave *circumscripsit* a minor and Praetorian *restitutio in integrum* is claimed, Pomponius says[4] that the *dominus* must give back what he received and, *ex peculio*, anything more. If this does not satisfy the claim and the slave was guilty of *dolus* he must be flogged or surrendered. This last clause has rather the look of an addition by the compilers. The case is one of a *negotium* and thus would give an *actio de peculio* but for the fact that the remedy is not an *actio* at all, but a praetorian *cognitio*[5]. The essence of *restitutio* is that each party is to be restored to his original position[6], and the jurist's rule arrives at this, so far as it is consistent with the overriding principle that a slave is not to make his master's position worse[7].

Pomponius mentions a case[8] in which a slave of the *heres* steals a *res legata*, and sells it, and he gives the opinion of Atilicinus that there is an *actio in factum* against the master, claiming either noxal surrender or payment, *ex peculio*, of what has been received on the sale. Here the theft was before entry, otherwise the legatee would have had *actio furti noxalis* and *condictio furtiva de peculio*. The mention of sale is made to exclude the possibility of any contrectation after entry[9]. There is thus no *actio furti* or *condictio furtiva*, since the legatee is not owner, and it is a *res hereditaria*[10]. At the time of the theft there is no contractual or quasi-contractual relation between the legatee and the heir or the slave, so that there is no *actio de peculio*. There is no *crimen expilatae hereditatis*, since the injured person is not the *heres*[11]. The decision is thus a juristic expedient, not very logical, to provide for a *casus omissus* in the law of *expilatio*: it gives the legatee the same compensation, apart from *delict*, as he would have had had he been owner, subject to the further restriction, due to the delictal air of the facts, that the master is not to be liable beyond the value of the slave[12].

[1] 11. 6. 3. 6. [2] Though a wage be paid, 11. 6. 1.
[3] *Ib.* [4] 4. 4. 24. 3. [5] *h. l.* 5. [6] *h. l.* 4.
[7] C. 2. 3. 3 *etc.* There is not necessarily any delict in the matter, 4. 4. 16. *pr.*, 24. 1.
[8] 30. 48. *pr.* [9] Cp. 47. 2. 57. *pr.* [10] 47. 2. 69; 47. 19. 3. [11] 47. 19. 3.
[12] Cp. the case of *iniuria*, *ante*, p. 100. The option is with the owner of the slave: the writer has present to his mind the analogy of a delict by a slave acting under his master's contract. (*Ante*, p. 114.) But here there is no contract by the master, but only a subsequently

As a slave of an *impubes* may have a *peculium*, and the *actio de peculio* does not depend on authority, it may lie against an *impubes*. On the other hand, if the slave is an *impubes*, the action is limited to the extent of enrichment[1], as it would be in the case of contract without *auctoritas* by an *impubes paterfamilias*, and the same rule seems to have applied in the case of an *ancilla* so long as *tutela* of women survived[2].

The ordinary quasi-contractual relations give rise to this action[3]. A man gave his daughter in marriage to a slave, with a *dos* and agreement for its return, as if it had been a deposit, on the death of the slave, the point being that he knew there could be no real *dos*. The money was recoverable by *actio depositi de peculio*, by the daughter, who was her father's heir[4]. This is pure contract, but where a freewoman married a slave thinking him free she could condict the *dos*, *de peculio*[5]. The *dominus* is liable to refund, *de peculio*, what the slave has won in a gambling house: it is not noxal, *quia ex negotio gesto agitur*[6].

Any ordinary *negotium* gives the action[7], but it must be a *negotium* of the slave. This is illustrated in many texts[8] and expressly laid down in the Edict, in the words: *quod cum eo qui in alterius potestate esset negotium gestum erit*[9].

In general the obligation is what that of the slave would be, if he were a freeman[10], and thus[11] it is affected by his acts after the making of the bargain. This would follow from the ordinarily accepted *formula* of the action, which expresses the obligation as that of the subordinate[12], and this seems a sufficient basis, itself resting on the Edict. But Mandry, observing that the same character recurs in other accessory obligations where the *formula* is not so expressed, prefers to rest it on the accessory nature of the obligation[13], the *dominus* being in fact a *defensor*, whose obligation is necessarily the same as that of the principal debtor. As, however, the slave cannot be attacked in any way it is difficult to see *defensio*, and Mandry[14] finds *defensio* not of the slave, but of the *negotium*. But this is fanciful[15]. The obligation starts from the

arising quasi-contractual relation: hence a further limitation to the *peculium*, as a slave may not make his master's position worse.
[1] 15. 1. 1. 4. [2] C. 4. 26. 11. Cp. 15. 1. 1. 3, 27. *pr.*; Mandry, *op. cit.* 1. 346 *sqq.*
[3] *Negotiorum gestio* by a slave, or, *in re peculiari*, for a slave, 3. 5. 5. 8; P. 1. 4. 5. A slave acting as tutor, 27. 5. 1. 2; 15. 1. 52. *pr.*, as to which case, *post*, p. 217.
[4] 16. 3. 27. [5] C. 5. 18. 3. [6] 11. 5. 4. 1.
[7] Sale, 21. 1. 23. 4, 57. 1; 21. 2. 39. 1; 42. 8. 6. 12. *Locatio*, 14. 3. 12; 19. 2. 60. 7. Deposit, 15. 1. 5. *pr.*; 16. 3. 1. 17, 42. *Commodatum*, 13. 6. 3. 4. *Mutuum*, 4. 3. 20; 15. 1. 50. 3; In. 4. 7. 4. (C. 4. 26. 13 negatives only *quod iussu*, on the facts. Haenel, Dissens. Dom. 198.) *Constitutum* by slave, 13. 5. 1. 3 (as to *constitutum* by master, 13. 5. 19. 2). Pledge or *precarium* to him, 15. 1. 5. 1, 36; 43. 26. 13. *Societas*, 16. 2. 9. *pr.* Contract by slave *exercitor*, 4. 9. 7. 6; 14. 1. 1. 20.
[8] 13. 6. 21. 1; 47. 2. 54. 1, where there would be no difficulty if *de peculio* were available. See also *ante*, p. 207.
[9] 15. 1. 1. 2; In. 4. 7, Rub. [10] 15. 1. 1. 4; 19. 1. 24. 2.
[11] *op. cit.* 2. 303 *sqq.* He illustrates by cases of *dolus* (4. 3. 9. 4; 13. 6. 3. 5; 16. 3. 1. 42), *culpa* (47. 2. 14. 10, 52. 9), *mora* (22. 1. 32. 3; 45. 1. 49), and destruction of the thing (45. 1. 91. 5).
[12] *Post*, App. II. [13] 45. 1. 91. 4, 5. [14] *op. cit.* 2. 277.
[15] And it cannot be reconciled with the limitation to the *peculium*.

words of the Edict and its nature is determined thereby. That the Praetor was guided by the idea of *defensio* is unlikely: he saw that the better class of men honoured the contracts of their slaves by allowing them to fulfil them *ex peculio*, and he voiced popular morality by enforcing this as a legal duty[1].

Logically, acts of the *dominus* ought to be immaterial to the obligation *de peculio*. There is no authority in the case of slaves. In the case of sons the rule is so expressed, and there are evidences of an attempt to get rid of the injustice which must result, if the act of the *dominus* was in any way wrongful[2]. But as the son is liable to an action, the conditions are different from those in the case of a slave. No doubt in an appropriate case there would be an *actio doli*[3]. For *mora*, causing discharge of the obligation, the *actio utilis* would suffice[4], and there seems no reason for imposing any liability at all in respect of *culpa*[5]. The case of father and son is one of solidary obligation: two are liable for the same debt. As it is primarily the debt of the son, the father's liability is accessory, akin to surety[6]. But the slave is not liable to action: the master is not answerable for another's debt: there is no solidarity. No doubt the principles in one case may react on the other, but it is doubtful if the conception of solidarity is of any help in this connexion[7].

The action lies, generally speaking, on any contract of the slave: it need not have been in any close relation to the *peculium*, and on the other hand it need not have had any reference to the *dominus*[8]. This follows indeed from the usually adopted formulation of the action, according to which the master is liable, so far as the *peculium* will go, to the extent to which the slave would have been liable, if he had been free. With this agree the rule that prohibition of this, or all contract, by the *dominus* does not bar the action[9], and the rules as to liability of the alienee, *ex ante gestis*[10]. It would seem also to lead to a liability *de peculio* on contracts made before there was a *peculium*, since in that case too the slave if free would have been liable. On the other hand the conception of the liability, as based on the creation of a *peculium*, is

[1] Cp. the discussion in connexion with noxal actions, *ante*, p. 113. No doubt *defensio* is one of the analogies present to the minds of the Jurists who interpret the Edict.

[2] An *actio utilis* is given against him where his *mora* has allowed the obligation to be discharged, *e.g.* by destruction of the thing due (45. 1. 49. *pr.*), and there is analogy for *restitutio actionis*, 46. 3. 38. 4. Fully discussed by Mandry, *op. cit.* 2. 305 *sqq.*

[3] *Arg.* 4. 3. 18. 5—20. [4] See n. 2; 45. 1. 49. *pr.*

[5] M. holds that there was a remedy here too but the texts do not bear this out, *op. cit.* 2. 309 *sq.* As to *dolus* in relation to the fund available, *post*, p. 218, and as to another special case, *post*, p. 219.

[6] Machelard, Obl. Solid. 416; Van Wetter, Obligations, 1. 260 *sqq.*; Mandry, *op. cit.* 2. 288 *sqq.* The point is important in relation to release of one by act of the other.

[7] A slave with authority, but not without, could discharge a debt by payment (*ante*, p. 159) and a slave could take an *acceptilatio* (*ante*, p. 155). His pact, *ne peteretur*, whether *in rem* or in the name of *dominus* was a good defence to an *actio de peculio* (2. 14. 17. 7, 18, 21. 5). And with authority he could *delegare debitorem*, 15. 1. 48. 1. As to novation of his liability, see *post*, p. 216.

[8] 3. 5. 5. 8, 13; 15. 1. 27. 8. [9] 15. 1. 29. 1, 47. *pr.* [10] *Post*, p. 229.

somewhat opposed to this. Only three texts[1] seem to raise the point. One says[2] that an adrogator is liable *de peculio quamvis Sabinus et Cassius ex ante gesto de peculio actionem dandam non esse existimant.* If this refers to contracts by the *adrogatus* it is conclusive for later law, since a *civis sui iuris* cannot have a *peculium*. But it is in direct conflict with the Edict on the matter, which runs: *Quod cum eo qui in alterius potestate esset negotium gestum erit*[3]. This would not cover the case of the *adrogatus*, and the opposition of Sabinus would have rested on more definite grounds. Moreover, one would have expected an analogous rule in the case of a freeman enslaved, *i.e.* that there was a general liability *de peculio*. But what we do find, and we find it in the case of *adrogatus* too, is that the new *dominus* or *pater* is liable to the extent of the *bona* he receives, and there is no word of *actio de peculio*[4]. It appears then that the rule laid down and opposed by Sabinus and Cassius is that if the *adrogatus* had a slave the *adrogator* is liable *de peculio* on his contracts made before the adrogation. This is the rule of the Digest for all cases of alienation, but understood in this sense the text says nothing as to the need of a *peculium* at the time the contract was made. In another text a slave living as a freeman acts as tutor[5]: there is no *actio de peculio*. But this text is so obscure as to be quite inconclusive[6]. The third[7] contemplates a debt from a fellow-slave who acquires a *peculium* only after the *negotium*. But the words *vel prout habebit* are probably an addition by the compilers. On the whole it seems probable, though far from certain, that in view of the form of the Edict, coupled with the fact that there is no text throwing doubt on the inference from it, there need not have been any *peculium* at the time of the *negotium*[8]. If this is so, it must follow that there need be no knowledge that there is a *peculium*. This is indeed clear on other grounds. For though there are several texts which speak of the creditor as contracting in view of the *peculium*[9], there are others the facts of which are such as to exclude this knowledge, and this is not made an objection[10]. And it is impossible to apply the notion of reliance on the *peculium* to the case of *condictio furtiva*[11].

There remains another difficulty to be met in deducing the rules of this action from the words of the Edict. These would lead to the

[1] In 15. 1. 47. *pr.*, sometimes cited, there is nothing to shew that the slave had no *peculium*.

[2] 15. 1. 42. [3] 15. 1. 1. 2.

[4] *Post*, Ch. XVIII. But Mandry understands the text in this sense. *Op. cit.* 2. 133.

[5] 15. 1. 52. *pr.* [6] See *post*, p. 217, and for a different view, Pothier *ad h. l.*

[7] 15. 1. 7. 7.

[8] See also 15. 1. 27. 2, *cit.* Mandry, *loc. cit.* In 15. 1. 27. 8 Julian may seem to contradict this. But his meaning, as appears from 34. 3. 5. 2, is merely that even if a man cannot recover what he has paid in excess of *peculium*, it does not follow that a co-owner can so pay and charge it against him. See p. 217.

[9] 15. 1. 19. 1, 32. *pr.* [10] 15. 1. 3. 8, 38. *pr.*

[11] Or where the action is given, *nomine filii*, on *iudicatum* on a claim not enforceable by *actio de peculio*, 15. 1. 3. 11. As to 2. 14. 30. 1, *post*, p. 216.

allowance of the action in every case which satisfied the foregoing conditions, but it is clear that in many cases, in most of which the slave's intervention is essentially *donandi animo*, the action is refused, the cases closely approximating to those which were not covered by a grant of *administratio*. The exclusion is a piece of juristic work, resting for the most part on grounds of equity, not in all cases the same. It was reasonable to protect the master from liability for what were in effect gifts, but it was clear to the lawyers that the Edict did not always protect where protection was needed and a way out was found in such phrases as *verius...videtur praetorem de huiusmodi contractibus servorum non cogitasse*[1]. Other exclusions may be explained as turning on the point that there must be an actual *negotium*, and thus if what is done is a nullity, if done by a slave, there is no *actio de peculio*, even though it would have been valid if done by a freeman. The chief cases are the following:

(*a*) Transactions involving alienation. The slave's act is void unless it was in some way authorised, and thus the subsidiary rights, such as the *actio de peculio*, will not arise. Thus the action does not lie on unauthorised pledge or *precarium* by a slave[2].

(*b*) Judicial and quasi-judicial proceedings. As a slave cannot take part in such matters[3], he cannot consent to a reference; any decision on it is null and gives no *actio de peculio*. That this is due to the procedural aspect of the matter appears from the fact that, even though the decision is the other way, the master acquires no right[4]. A similar point arises in connexion with the offer of an oath to the adversary. Either party may, during the procedure, with certain preliminaries, offer an oath to the other party, who will lose the action unless he either takes the oath or offers it back,—*relatio iurisiurandi*. This is called *iusiurandum necessarium* and a slave can have no part in it[5]. But, before litigation, either party can offer an oath to the other, who may take it or leave it, but cannot offer it back in any binding way. If taken, it gives either *exceptio iurisiurandi*, or as the case may be, an action in which the issue is only the taking of the oath. This is *iusiurandum voluntarium*. As it is extra-judicial, there is no clear reason why it cannot be taken or offered by a slave. But it is similar to the other in effect: it is described as being almost equivalent to *res iudicata*[6], and there may therefore be doubt as to whether a slave can take any part in it. It is clear, however, that if a slave takes such an oath, the master has the benefit, so that no procedural objection is felt[7]. Ulpian however holds that if he offer

[1] 17. 1. 54. *pr.* [2] 13. 7. 18. 4; 16. 3. 33. See *ante*, p. 160 and *post*, App. III.
[3] *Ante*, p. 83. [4] 4. 8. 32. 8; 15. 1. 3. 8. [5] *Ante*, p. 84.
[6] 44. 5. 1. *pr.*; C. 4. 1. 8. [7] 12. 2. 20, 23, 25.

an oath and it is sworn there is no *actio de peculio*, as there would be in the case of a son[1]. If the money is not due it is in effect a gift. Paul hints doubtfully at a contrary view. *Quidam et de peculio actionem dandam in dominum si actori detulerat servus iusiurandum. eadem de filiofamilias dicenda erunt*[2]. This, being merely obligatory, would not depend on *administratio*. Again he says: *Servus quod detulit vel iuravit servetur, si peculii administrationem habuit*[3]. The way in which the text is continued from Gaius suggests that Paul did not write it as it stands. There can be no doubt that Ulpian's is the rational view[4].

(*c*) Promises by slaves. There is difficulty in this case, since texts dealing with such *promissiones* are few. But so far as primary obligations are concerned (*i.e.* apart from surety and *expromissio*) there are several texts which shew that they can be made by slaves, so as to give an *actio de peculio*[5], subject to the ordinary restrictions on stipulation[6]. As they have a power derived from the *dominus* they can even promise in the form: *Spondeo*[7], but as their *sponsis* is void at civil law and gives only a praetorian right of action it is doubted by Gaius[8] whether it can be guaranteed by *sponsor* or *fidepromissor*. But from what has been seen in the case of alienations, and will shortly be seen in the case of surety, it is likely that a promise by a slave made gratuitously, or *donandi animo*, is simply void[9], though this is not expressly stated.

(*d*) Surety and the like. In the case of *fideiussio*, by the slave, the rule is simple: the transaction creates liability *de peculio*, only if it is *in re domini* or *peculiari*[10], not if it is given in a matter in which neither he nor *dominus* has any interest. There must be a *iusta causa interveniendi*[11]. So also in the case of mandate operating as surety. Any ordinary mandate gives *actio de peculio*[12]. But, in *mandatum qualificatum*, there will be *actio mandati de peculio* if the transaction affects the *peculium*[13], but not for an independent voluntary act of surety[14].

The same principle applies to *expromissio*—a promise by the slave to pay the debt of a third person. This is valid and gives *actio de peculio*, if there is a *iusta causa interveniendi*[15]—otherwise it is a mere

[1] 15. 1. 5. 2. [2] 12. 2. 22. [3] 12. 2. 20.
[4] In 2. 8. 8. 2 a slave, thought free, gave security *iudicatum solvi*. This was *ante litem acceptam*. If he had been a party to the suit the whole thing would be null: here it is clearly regarded as capable of giving rise to *de peculio*.
[5] 2. 14. 30. 1; 45. 1. 118; 45. 2. 12. 1; 46. 1. 56. 1; 46. 4. 8. 4.
[6] Thus in the case in 12. 5. 5, they would be void. [7] 45. 2. 12. 1.
[8] G. 3. 119. [9] 2. 14. 30. 1; 20. 6. 8. 5.
[10] 2. 14. 30. 1; 15. 1. 3. 5, 3. 6, 47. 1; 46. 1. 19—21. 2.
[11] Not so in case of son: his *fideiussio* always bound his *paterfamilias*, *de peculio*, 15. 1. 3. 9. The slave, says Ulpian, has no power of contract independent of his master: the son has. Thus we do not look behind his contract; we do in case of slave, to see whether it was within his power, 15. 1. 3. 10.
[12] *e.g.* 14. 3. 12. As to mandate to buy himself, *post*, p. 216.
[13] *e.g.* where he gives X a mandate to pay on behalf of a creditor of the *peculium*.
[14] 15. 1. 3. 5—7. [15] 2. 14. 30. 1.

nullity. But in no case can it produce the usual effect of *expromissio*: it can never novate the existing debt[1]. This is because the slave's promise is at civil law no more than a mere pact: it is not a contract *verbis*, such as novation requires[2], and though it gives an *actio de peculio*, this is because it would have been a contract *verbis* if he had been free[3]. Sabinus[4] seems to have held that the form of words was the material point, and that if they were gone through with a slave, *novandi animo*, the old obligation was ended, whether a new one was created or not. But the other is clearly the better view. However, though it does not novate, it is at least a pact, giving an *exceptio pacti conventi*, if the circumstances are such that an *actio de peculio* is available, since the creditor evidently means to accept this liability instead of that of the debtor[5]. The text adds that the plea is not allowed if he thought the slave free, but this is not because there is no *actio de peculio*, for there may be[6], but because his agreement contemplated a liability in full and this he has not got.

(*e*) Slave's mandate to third person to buy him. Papinian[7] tells us that a slave's unauthorised mandate, for this purpose, is null, and gives no *actio de peculio*. The reason is that the Praetor cannot be supposed to have contemplated contracts of this kind *quo se ipsi mala ratione dominis auferrent*. Diocletian[8] gives a different reason for the rule. He says that it cannot be good *ex persona servi*, since, if he were free, his mandate to buy him would be null, nor *ex persona domini*, since a man's mandate to buy what is his already is bad. Nevertheless, he observes, the resulting sale will be good, and will give the master a right of action, thus presumably subjecting him to *de peculio*. But he is clearly contemplating an underlying purpose of manumission, in connexion with which topic, these texts belong to a group which give great trouble[9]. Ulpian cites Pomponius[10] as discussing the effect of a mandate to buy himself on the understanding that he is to be repurchased. He lays it down that the sale is good if it takes place, but that no action will lie on the mandate to secure either the sale or the repurchase: as to the last case he says: *esse iniquissimum ex facto servi mei cogi me servum recipere quem in perpetuum alienari volueram.*

There are a few texts which suggest that a master is not liable *de peculio* on the contracts of a fugitive who is acting as a free man. The rule would presumably be juristic—based on such considerations

[1] G. 3. 176, 179; In. 3. 29. 3; D. 15. 1. 56.
[2] See Machelard, Oblig. Naturelles, 165 *sqq*.
[3] Gaius, in saying that his promise no more novates than if it had been stipulated *a nullo* (G. 3. 179), or by *sponsio* from a peregrine, does not mean that it is a nullity but that it is a nullity for this purpose.
[4] G. 3. 179. [5] 2. 14. 30. 1. [6] See below. [7] 17. 1. 54. *pr.*
[8] C. 4. 36. 1. [9] *Post*, Ch. XXVII. [10] 17. 1. 19.

as exclude the action in the class of cases last discussed[1]. But in fact the rule can hardly be so. It is clear that the owner acquires through such slaves[2], and the observation, *aequum Praetori visum est sicut commoda sentimus....ita etiam obligari*, seems to require the liability. In one text liability *de peculio* is clearly contemplated on such facts[3]. The unfavourable texts can be otherwise explained. One has just been considered[4]. In another the action would have been refused in any case: the apparent freedom is mentioned only to explain the events[5]. In the third the action is not refused, but declared useless because on the facts there is *nihil in peculio*[6].

It must be borne in mind that the Edictal liability of the master is distinct from the "natural" liability of the slave. Many circumstances might end the one without affecting the other[7]. Thus we are told that a surety may be validly taken for the slave's obligation, after an *actio de peculio* has been begun against the master, since the *naturalis obligatio* has not been put in issue[8]. These points will recur later[9]. Here it must be noted that, though distinct, they have the same objĕct, and that thus, as in solidary obligations, discharge of one will destroy the other, if it amount to real or fictitious satisfaction. Thus *acceptilatio* to a slave bars the *actio de peculio*[10]. We are told by Ulpian that payment by the master in excess of the *peculium* cannot be recovered[11]. The reason of this is not clear[12]. It may be said that, as the limitation, *de peculio*, is placed, as is commonly held[13], not in the *intentio* but in the *condemnatio*, the master's obligation covers the whole debt, and thus it cannot be said that the money was not due. But the Edict expresses the limitation to the *peculium*. The point may be that there is an actual pending action, in which the obligation is stated generally, as we have said, and thus it cannot be said not to be due[14]. Although the action is essentially one in which the liability is limited to the *peculium*, the actual loss may in fact exceed this. Thus if the *dominus* sues on the transaction the defendant may set off a claim in full, though any action by him would have been limited to the *peculium*[15]. So, if a slave has bought, the *dominus*, if he wishes to redhibit, must give back all

[1] The fact that the *peculium* is not relied on is immaterial. [2] 46. 3. 19, 34. 5.
[3] 14. 3. 1. *pr.*; 2. 8. 8. 2. [4] 2. 14. 30. 1. [5] 15. 1. 3. 8. *Ante*, p. 214.
[6] 15. 1. 52. *pr.* *Ante*, pp. 211, 213. Cp. 27. 5. 1. 2. [7] *Post*, Ch. XXIX.
[8] 15. 1. 50. 2. [9] *Post*, Ch. XXIX. [10] 46. 4. 11. 1. [11] 12. 6. 11.
[12] Machelard, *op. cit.* 286, sets it down to the natural obligation of a father to pay his son's debts. But it is not confined to sons, and there is no obvious natural obligation to pay a debt the contracting of which may have been prohibited.
[13] *Post*, App. II.
[14] 15. 1. 47. 2 marks off *de peculio* from another case, precisely because in the latter, the debtor *universum debet*, though it speaks of all as due even here. Vangerow, Pand. § 625, treats the rule of 12. 6. 11 as an application of the rule that if the money is due, it cannot be recovered, though it be paid by the wrong person (12. 6. 44) if it is paid in satisfaction of that debt. He assumes that it was paid on account of the slave's liability, which is inconsistent with the words *per imprudentiam*. In 34. 3. 5. 2 where Julian forbids recovery, Ulpian and Marcellus allow it, the money not being due. Here there is no pending action. See p. 213.
[15] 16. 2. 9. *pr.*

accessories *in solidum*, and he cannot sue *ex empto* without having paid the price[1]. Thus the *dominus* cannot benefit by bringing his action when there is nothing in the *peculium*.

More important are the imputations to the *peculium* on account of *dolus*. The Edict contains an express provision[2] that the liability is to cover not only the actual *peculium*, but also anything which would have been in the *peculium* but for the *dolus* of the defendant. Such *dolus* may take various forms[3]. But payment to another creditor is not *dolus*, as the principle of the action is that there are no priorities[4]. It need not be the master's own fraud: it is enough if it be that of his *tutor*, *curator* or *procurator*, but here the liability is limited to what he has received, and is made dependent on the solvency of the tutor[5]. The rule is Ulpian's. Elsewhere he lays down a similar rule without special reference to this action, but there he does not require solvency of the tutor, and does require actual enrichment of the pupil[6]. Thus the rule is that he is liable so far as he is enriched, and, even though what he has received has not enriched him[7], if the tutor is solvent so that he can recover from him. The act must have been done fraudulently, *i.e.* with knowledge that it was detrimental to persons who were likely to claim: for this purpose, knowledge that there is a debt is enough[8].

The effect is not to make the act done void: the thing is not *in peculio*, but its value *peculio imputatur*[9]. As such an imputation is made only if the creditor's claim cannot otherwise be met, the same money cannot be imputed twice, having been in fact paid away[10].

As *dolus* is a delict, this imputation has a delictal character, and is therefore subject to the limit that it cannot be made more than an *annus utilis* after the right arose[11]. It is curious to find this rule in what is essentially a contractual action[12]. But in fact the *dolus* has nothing to do with the obligation. It is not mentioned or involved in the *intentio*, which expresses a liability to pay a certain debt. There are subsidiary instructions to the *iudex* as to the fund available, and this includes property obtained by *dolus*. It is a natural analogy, and no more, to limit the claim in the way in which it would be limited, if this money were the direct object of the action[13].

[1] 21. 1. 57. *pr.* [2] 15. 2. 1. *pr.* Lenel, Ed. Perp. § 104. 1.
[3] *e.g.* adeeming the *peculium* or part, conniving at the slave's so dealing with the *peculium* as to damage the prospects of creditors, destroying the property or putting it to non-peculiar uses, or any similar act by which the fund is lessened, 15. 1. 9. 4, 21. *pr.*; 15. 3. 19.
[4] 15. 1. 21. *pr.*
[5] 15. 1. 21. 1, 2. The same rule is applied to the *dolus* of anyone under whom he holds.
[6] 4. 3. 15; 44. 4. 4. 23. [7] *Ante*, p. 178.
[8] 15. 1. 21. *pr.* [9] 15. 1. 21. *pr.* See Mandry, *op. cit.* 2. 403.
[10] 15. 1. 26. So if instead of being paid to a creditor, it is set off against claims from the slave.
[11] 15. 1. 30. 6. [12] Mandry, *op. cit.* 2. 404.
[13] As the amount of the *peculium* is not in issue, *litis contestatio* in no way fixes it: the *iudex* must take into account *dolus* after that date, 15. 1. 21. 2.

These rules raise the question what is to happen if the *dominus* convert property *ex peculio* to his own use, *sine dolo malo*. The answer to this question takes us back to the *actio de in rem verso*. In the later state of the law there can be no doubt that, in such a case, the *actio perpetua de in rem verso* was available. We are so told in one text[1], and the case in which there had been such a conversion of *res* from the *peculium* is that discussed in the text immediately following[2]: *Si plures agant de peculio, proficere hoc ei cuius pecunia in rem versa est debet, ut ipse uberiorem actionem habeat.* This is consistent with the conception of the *actio de in rem verso* which we have adopted, though not with others discussed. We are told indeed in one text that *ademptio* is not a *versio*[3]. But on the broad meaning given to the notion of *dolus*, it is clear that dolose ademption was the normal case. It is dolose ademption which is here in view, as in another text which says: *dolum malum accipere debemus si ademit peculium*[4]. There is involved in this matter a historical development[5]. At one time, before the imputation for *dolus* was introduced, and before debts to the slave were included in the *peculium*, the *actio de in rem verso* lay in all cases of *ademptio* and the like, being indeed a very necessary supplement to the rather ineffective *actio de peculio*. The successive introduction of these two extensions of the "peculiar" claim improved the position of the ordinary creditor *de peculio*, at the possible cost of the creditor *de in rem verso*, from whom specific things had been received. At that stage the utility of *de in rem verso* is confined to the rare case of *ademptio sine dolo malo*[6], and that of expiration of the *actio de peculio*, so that it became possible to doubt, as it was doubted, according to Ulpian, whether the *actio de in rem verso* was of much use[7].

There exists, in certain cases, a still further liability for *dolus* of the *dominus*. Ulpian tells us[8] that where *dos* has been paid to a son, and *actio de peculio* is brought there is a liability, *si quid dolo malo patris capta fraudataque est mulier*, as when, having the property, he will not restore it. He cites Pomponius as saying that this was expressed in the case of pledge, and applies equally to all *bonae fidei iudicia*[9]. So stated this looks like a sweeping exception to the rule that *dolus* of the *dominus* (apart from dolose withdrawal) is immaterial[10]. But it is shewn by

[1] 15. 3. 1. 1. [2] 15. 3. 1. 2. [3] 15. 3. 5. 3.
[4] 15. 1. 21. *pr.* Mandry, *op. cit.* 2. 402.
[5] *Ante*, p. 185. [6] See 15. 3. 14.
[7] 15. 3. 1. 1. As to date of introduction of these two factors, there is no certainty. The *dolus* clause is likely to be the older, as involving a less abstract conception, as not involving natural right or obligation in the slave, as being expressed in the Edict, and as having been known to the Augustan jurists. The inclusion of debts cannot be traced earlier than Pomponius, 15. 1. 4. 1, 21. *pr.*, 49. 2; 15. 3. 1. 1. See Von Tuhr, Actio de in rem verso, 275.
[8] 15. 1. 36.
[9] Other texts: deposit, 15. 1. 5. *pr.*; 16. 3. 1. 42; 2. 13. 4. 3; *Commodatum*, Pledge, 13. 6. 3. 5; *Dos*, 15. 1. 36. See *post*, p. 224.
[10] *Ante*, p. 212.

Lenel that the citation from Pomponius referred originally to *fiducia*, in the formula of which action he finds other evidence of the existence of such a clause[1]. Its utility here was plain, since the *dominus* would be owner of the thing. It was carried over, naturally, to *pignus*, and thence by juristic interpretation to other *bonae fidei* actions in which restitution was desired. Here it was not so necessary since the injured party could vindicate the thing, or bring the *actio ad exhibendum*. This indeed is what Africanus tells him to do[2]. Apart from *fiducia* the liability is not expressed in the *formula*: it results from juristic interpretation[3]. Thus, notwithstanding the general words of the main text[4], it applies only to *dolus* taking the form of non-restitution, and only to the actions in which that point arises[5].

We have seen that the *peculium* may consist not only of *peculiares res*, but also of debts to it[6]. It must be noted that these are not merely imputed to the *peculium* for the purpose of the *actio de peculio*, but are an integral part of it[7], and thus are, *e.g.*, included in a legacy of it[8]. Such debts may be either from outsiders or from the *dominus* himself. Claims against outsiders, on delict, contract or any other *causa*, are in the *peculium*[9], but not necessarily at their face value: allowance is to be made for cost of recovery and risk[10]. Debts from the master, on contract and quasi-contract, are in the *peculium* unless the master has decided that they shall not be. For, as we have seen that the whole *peculium* can be destroyed by his mere wish, so we learn that he can release himself from any debts[11], though he cannot thus make himself a debtor. For this result there must be what would be a debt *in causa civili*: a mere acknowledgment *sine causa* will not suffice[12]. This does not mean that they must be such as would be actionable if the parties were independent, but that they must be such as would in that case create some legal obligation[13].

Such debts must be connected with the *peculium*[14], but they may be from the *dominus* himself, or from any fellow-slave who has a *peculium*[15], and, in the last case, it is immaterial whether they are from delict or

[1] Ed. Perp. § 107; Cicero, de Off. 3. 17; D. 13. 6. 3. 5.
[2] 15. 1. 38. This may give an indication of date. Julian gives it in *pignus*, in an uninterpolated text (13. 6. 3. 5; Lenel, *loc. cit.*). Africanus ignores it in deposit. Ulpian allows it in all this group of actions, 15. 1. 5. *pr.*, 36; 16. 3. 1. 42 (where the reference to Julian hardly justifies the view that he allowed it in deposit); 13. 6. 3. 5; 2. 13. 4. 3; 24. 3. 22. 12. He is following Pomponius who is of the same date as Africanus.
[3] 13. 6. 3. 5. [4] 15. 1. 36.
[5] See as to this Lenel, *loc. cit.*; Karlowa, *op. cit.* 2. 1146, 7; Mandry, *op. cit.* 2. 407.
[6] *Ante*, pp. 193, *sqq.* [7] 15. 1. 7. 6.
[8] *Ante*, p. 194. [9] 15. 1. 7. 4, 5.
[10] 15. 1. 51. If creditor claims to reckon them in full he must accept cession of actions as payment.
[11] 15. 1. 7. 6. [12] 15. 1. 4. 1.
[13] 15. 1. 49. 2. *Post*, Ch. XXIX. It may be doubted if Justinian's validation of *pactum donationis* (C. 8. 53. 35. 5) made such pacts create a debt to the *peculium*.
[14] *Post*, Ch. XXIX. [15] 15. 1. 7. 7.

contract[1]. The adjoining text[2], however, says: *Si damnum servo dominus dederit, in peculium hoc non imputabitur, non magis quam si subripuerit.* The context suggests that what is contemplated is damage to or theft from the *peculium*. But such acts would amount to dolose removal, except in case of negligent damage: the text must be understood of acts affecting the slave himself, who is not in his own *peculium*. Presumably there is no liability for mere negligent damage to a *res peculiaris*[3].

In arriving at the nett *peculium* there is another important step to be taken. The *dominus* may deduct all debts due to him[4]. No such deduction is made for debts due to third persons: the principle of the action is, *occupantis melior solet esse condicio*[5]. But he may deduct debts due to persons in his *potestas*, since such debts are, on ordinary principles, acquired to him[6]. He may deduct also debts due to persons whose *tutor*, *curator* or *procurator* he is. This is subject to the provision that he may not do it fraudulently, which seems to mean that he may not so deduct if there is a sufficient remedy for his *pupillus* otherwise[7].

Debts so deductible may have the most various origins. Any form of contract which was open to slaves might base such a deduction[8]. A case which recurs in several texts is that of money promised for manumission, which is deductible, as soon as the manumission has taken place[9]. One text is considered by Mandry[10] to raise a difficulty in this connexion. A slave agrees by pact for a sum to be paid for manumission, and then finds a *reus* to promise it to the *dominus*[11]. Mandry regards this as a case of *expromissio* novating the natural obligation of the slave. This would make a pact capable in itself of creating a natural obligation. But the contract of the *reus* is not contemplated as secondary: it is primary, and the *pacisci* of the slave is no more than an understanding with the master as to the terms which he will accept. It is not in the least obligatory. As to quasi-contract (apart from matters connected with delict), there are some points of interest. There may be a claim on *negotiorum gestio* by the slave, or, conversely, on account of *gestio* by the *dominus*[12]. Payments made on behalf of

[1] 15. 1. 9. 1. [2] 15. 1. 9. *pr.*
[3] He is liable, like any third person, for such proceeds of a theft by one of the slaves as he may have received, 15. 1. 9. 1. As to debts between slave and *vicarius*, *post*, pp. 244 *sqq.*
[4] 15. 1. 5. 4; G. 4. 73; *etc.* [5] 15. 1. 52. *pr.*
[6] 15. 1. 9. 3; 33. 8. 6. *pr.*; G. 4. 73; In. 4. 7. 4. Not debts to their *vicarii*. Nor of course debts due to *servi castrensis peculii* of a son, 49. 17. 10.
[7] 15. 1. 9. 4. See *post*, p. 224. Machelard has observed (*op. cit.* 174) that this may operate detrimentally to himself. For while the privilege of *dominus* takes priority (15. 1. 52. *pr.*) the debts it covers take priority by date. If there is a debt to the pupil older than that to *dominus* and there is not enough to pay both, the pupil has first claim.
[8] 15. 1. 9. 6, 56. [9] 15. 1. 11. 1. [10] *op. cit.* 1. 378.
[11] 45. 1. 104. [12] 15. 1. 9. 7, 8, 49. 1.

the slave are deductible if they would have created obligation apart from the slavery[1]. There are, however, some difficulties, if he has bound himself for the slave, *e.g.* by becoming surety for him, or by giving a mandate for a loan of money to him[2]. It was thought by some jurists that the sum could be deducted before payment, but the view which prevailed was that no such deduction should be made, but that security should be taken from the creditor suing, to refund if the *dominus* were ultimately called on to pay. The chief practical difference is that the creditor has the use of the money in the meantime. What is true of his own liability is true of obligations *de peculio*. If he has rightly paid under such an obligation, he can deduct. If he has been condemned he can deduct before payment. But he cannot deduct for a claim which is pending or threatened, since *melior est condicio occupantis*, and it is only the judgment which definitely gives priority[3].

We are told that the *dominus* is not entitled to deduct the cost of curing the slave, in illness, because *rem suam potius egit*[4]. This hardly seems a sufficient reason, since the slave certainly has an interest in his own health, and the presence of personal interest in the *gestor* does not bar the action[5]. The fact that the slave is not in his own *peculium* is not material, for it is clear that the debts on account of which a deduction may be made have no necessary connexion with the *peculium*, as is shewn by the rules as to compensation for wrongs done by the slave, shortly to be considered[6].

For delictal penalties in respect of wrongs to the *dominus* no deductions can be made[7]: we know that no action can ever lie on account of such wrongs, and the master's power of correction does away with the need of such penalties[8]. On the other hand, if the slave or his *vicarius* commits a delict against a third person, and the master pays damages in lieu of surrender, these may be deducted[9]. It is the more surprising to find that if he surrenders the slave he may not, in any *actio de peculio*, deduct the value of the slave[10]. If it were a *vicarius* this is obvious, since the man is no longer in the *peculium*, and such a surrender is not *dolus*, and thus, assuming the values equal, the fund for the creditor will be the same as if he had paid and deducted the damages. But, in the case of the principal slave, as

[1] 15. 1. 9. 8, 11. 1. [2] 15. 1. 11. 1.
[3] 15. 1. 9. 8, 10. Money received by *servus* on behalf of *dominus* may be deducted if *dominus* ratify: if not it is an *indebitum* and the debtor may condict, 15. 1. 11. 2.
[4] 15. 1. 9. 7.
[5] 3. 5. 5. 5. See however, Windscheid, Pand. § 431; Van Wetter, Oblig. 3. 305.
[6] If the sick slave were a *vicarius* of the slave whose contract is the subject of suit, the cost would probably be deductible, not because he is in the *peculium*, but because it is *potius res servi*.
[7] Mandry, *op. cit.* 1. 355. [8] *Ibid.*; Karlowa, *op. cit.* 2. 1144.
[9] 15. 1. 11. *pr.*, 23; 33. 8. 16. So could payments to avoid *missio in possessionem* of *aedes peculiares* which threatened adjoining property—a matter closely akin to noxal liability, 15. 1. 22, 23.
[10] 15. 1. 11. *pr.*

he is not in his own *peculium*, the creditor will have a less fund, if the master pay and deduct, than if he surrender. The theoretical justification is that surrender of the slave cannot by any process be brought within the notion of *negotiorum gestio* on his behalf, or any other form of quasi-contractual obligation.

Though there is no claim for penalties in respect of theft of, or damage to, the master's property[1], there is a claim, *in simplum*, in the nature of *condictio furtiva*[2], and also for the damage[3]. An illustration given of this is damage to a fellow-slave[4], but we are told that if a slave kill or injure himself, there is no deduction[5]. The text gives the grotesque reason that a slave has a perfect right to knock himself about. The truth underlying this curious statement is that the whole conception of debts between master and slave assumes their independence *pro tanto* from an economic point of view. From this standpoint an act of the slave, taking effect entirely in himself, cannot be regarded as creating an obligation to the *dominus*. If the master spends money in treatment of a slave who has so injured himself, we are told that this can be deducted[6]. Like medical treatment of a sick slave, it is the master's own affair, but it is an expense to him caused by the slave's act[7].

Just as the *actio de peculio* will lie *ex ante gestis*, so, too, debts may be deducted, though they arose before ownership of the slave began[8]. Thus the *heres* may deduct for debts due to himself before he became owner of the slave[9]. Mandry remarks that these texts shew that the jurists, before Julian, doubted whether this rule would apply where, owing to the slave's being *pure legatus*, the *heres* never was actually *dominus*. He suggests that this is due to the standing expression, *deducto eo quod domino debetur*[10]. It was agreed, however, that if the *heres* did become owner he could deduct for damage done, by the slave, to the *hereditas iacens*[11].

The owner of a slave may become *heres* to a creditor *de peculio*. No doubt, in such a case, he may deduct the amount of that debt as against his own creditors *de peculio*. But if he sells the inheritance he must account for that debt, *i.e.* the vendee can claim what he would have had if the *hereditas* had been in other hands[12], just as he could if the master himself had been the debtor[13]. On the same facts it was settled after some doubts that the *peculium* was to be taken as it was at the death, for the purpose of determining the amount of the *hereditas*,

[1] *Ante*, p. 222. [2] 15. 1. 4. 3, 4, 9. 6; 19. 1. 30. *pr.* [3] 15. 1. 4. 3.
[4] 33. 8. 9. 1. [5] 15. 1. 9. 7. [6] *Ibid.*
[7] Delict to ward of *dominus* is not discussed: the tutor being noxally liable, the case is presumably on the level of delict to third person.
[8] 15. 1. 11. 8, 52. *pr.* [9] 15. 1. 9. 5; 33. 8. 6. 5—8. 1.
[10] *op. cit.* 2. 385; 15. 1. 5. 4, 9. 2. [11] 15. 1. 27. 1.
[12] 18. 4. 2. 6. [13] 18. 4. 20.

in view of the *lex* Falcidia[1]. But this is only a minimum, as in other cases, and thus if the *peculium* increases, so that a greater part of the debt can be paid, the *hereditas* is increased, *ex post facto*[2].

Ulpian tells us that the right of deduction is to be applied only, *si non hoc aliunde consequi potuit*[3]. Mandry[4] shews that this must not be taken as putting the right of deduction in a subordinate position. He cites several cases in which the rule was not applied[5], and concludes that it operated only where deduction would be a fraud on the "peculiar" creditor. He illustrates this by the remark of Ulpian, that the *dominus* may deduct for debts due to his ward, *dummodo dolo careat*[6]. It may also be pointed out that the word *potuit*[3] limits the rule to the case in which he has in the past had an opportunity of getting in the money and has neglected to do so, and that this was precisely the case in the only hypothesis of fact to which the rule is applied[7]. The other texts shew that the mere fact that he might have brought an action is not such an opportunity[5].

It is important to notice that the effect of a deduction is merely to determine what is the fund available for the creditor. If the *peculium* is solvent there is no question of deduction, and where a deduction has to be made its effect is merely the striking of an authoritative balance. It is not in any sense payment to the *dominus*[8]. Hence it follows that if nothing is actually taken from the *peculium*, by the *dominus*, the debt to him still exists, and consequently the deduction can be made again if an action is brought[9].

We have seen that debts to the *dominus* take precedence of all others, that, in fact, debts to him are deducted as a preliminary in determining what the *peculium* is. Hence *nullum privilegium domino praeponi potest*. This does not affect the existence of privileges *inter se* among other creditors[10], and we have an illustration of privilege in the claim of *dos*[11]. But there is a text[12] which seems to put the claimant of *dos* in a better position. It observes that the wife has a privilege in an action for recovery of *dos*, over other creditors, and adds, *et si forte domino aliquid debeat servus, non praeferatur mulier, nisi in his tantum rebus, quae vel in dotem datae sunt vel ex dote comparatae, quasi et hae*

[1] 15. 1. 50. 1; 35. 2. 56. *pr.*
[2] 35. 2. 56. 1. If there are two debts of 10, one to the deceased and one to X, and the *peculiares res* are 10, the whole 10 are in the *hereditas*. For the debt to *dominus* removes the 10 from the *peculium*, and, as it is acquired by *hereditas*, it is included therein. This may operate adversely to *heres*, for it increases the *hereditas* for the benefit of legatees, and he may yet have to pay the debt to X, 35. 2. 56. 2.
[3] 15. 1. 11. 6. [4] *op. cit.* 2. 387. [5] 15. 1. 11. 8, 47. 4, 56 *etc.*
[6] 15. 1. 9. 4. [7] 15. 1. 11. 7, on authority of Julian. [8] *Post*, Ch. XXIX.
[9] 15. 1. 11. 3. Where a sum was due to *dominus*, he "deducted" a *vicarius* of that value, but left him in the apparent *peculium*. The *vicarius* died. Another creditor sues *de peculio*. The sum can still be deducted. Mere deduction without removal did not alter the fact that he was a *peculiaris res*. What was due to *dominus* was a debt, 15. 1. 11. 4.
[10] 15. 1. 52. *pr.* [11] *h. l.* 1. [12] 24. 3. 22. 13.

dotales sint. This text has been supposed to raise a difficulty[1], since a privilege in any person is inconsistent with the principle on which rests the deduction of the debts of the slave to *dominus*, *i.e.*, that the available fund does not include them. But the language of the text shews that it contemplates something narrower than the ordinary privilege. It confines the claim to specific *res dotales*, and is thus merely an application of the rule, as to plaintiffs *capti et fraudati* by refusal to return specific extant things, which we have discussed and seen to apply to the case of *dos*[2].

What is the juristic basis on which the right of deduction rests? Why is it that debts to the *dominus* are regarded as standing subtractions from the apparent *peculium*[3]? It must be noted first, that it is independent of the Edict and *formula*, neither of which contains any words so limiting the idea of *peculium*. It is involved in the very definition of the fund[4]. This conception is the result of practice, and, probably, apart from the *actio de peculio*, and before its introduction, masters who were in the habit of honouring their slave's transactions had refused to consider as *peculium* any more than the nett fund left after their claims were deducted[5]. This might be merely a juristic construction, but it is probably the true explanation: the jurists adopt the definition accepted in practice. A somewhat different point is mentioned by Ulpian[6] (as if it were the same), as the reason why he can also deduct for debts to his ward: since he is treated as having first sued on his own account, he ought to do the same for his ward. This gives a similar result, since as we shall see[7], it is the giving of judgment which determines priority among creditors, though the judgment be still unsatisfied. But it is, in fact, no explanation, for it does not shew why he is supposed *praevenisse*. The same explanation occurs in the same text in a still more questionable form. It is supposed that the *dominus* not only *egit* but *exegit*. Of itself this might mean no more, but the words which follow are quite inadmissible: *defendendum igitur erit quasi sibi eum solvere cum quis de peculio agere conabitur*[8]. We have, however, seen that *deductio* is in no sense a *solutio*, and the words have rather a Byzantine look about them. The

[1] Mandry, *op. cit.* 2. 393, and the literature there cited.
[2] *Ante*, p. 219; Demangeat, Fonds Dotal, 147; Bechmann, Dotalrecht, 2. 464.
[3] Mandry, *op. cit.* 2. 394 *sqq.*; Pernice, *op. cit.* 1. 129 *sqq.*
[4] 15. 1. 5. 4; G. 4. 73 *etc.*
[5] 15. 1. 9. 4. This does not imply any legal force in such debts. It is the view of Pedius, described by Ulpian as *elegans: ideo hoc minus in peculio est quod...domino debetur, quoniam non est verisimile dominum id concedere servo in peculium habere quod sibi debetur*. The deduction is no doubt as old as the action.
[6] 15. 1. 9. 4. See also *h. t.* 9. 2, 5. [7] *Post*, p. 226.
[8] 15. 1. 9. 4.

real origin was forgotten in the later classical time: these are mere constructions.

The *actio de peculio* is always *in personam*[1], and therefore[2] the *dominus* is bound *litem defendere*, with all that that implies. If the plaintiff has a right *in rem*, or a possessory right, he can of course proceed by *vindicatio* or other appropriate remedy, and has no need to appeal to any fund[3]. The action *meliorem facit causam occupantis*[4], priority being determined not by date of *litis contestatio*, but by that of judgment. Thus if two actions are pending at once, the amount of the first *condemnatio* is deducted from the fund available for what may be due under the second[5]. On the other hand, the priority so gained yields to any legal privilege, attaching to any other debt, as to which there seem to be no rules peculiar to this action[6]. The *intentio* of the action brings into issue the whole obligation, but the terms of the *condemnatio* limit the liability to the present amount of the *peculium*, which is considered as it is at *condemnatio*, the action being regarded as exhausting the creditor's right to its then content[7]. But judgment or payment releases, in effect, only *pro tanto*: the creditor may renew his action till complete satisfaction[8]. If the debt is not fully paid under the action no security can be exacted for the remainder. The text contrasts this case with that of *pro socio*. In that case we are told that such security can be required, *quia socius universum debet*[9].

A few rather complex cases may be taken from the texts as illustrations of these rules. A, in good faith, buys B's slave from C, who has stolen him. The slave, with *peculium* which belongs to B, buys, from D, a man who is conveyed to A[10]. B can condict the man from A, while A can sue B for any loss he incurs on the transaction by the slave, *ex negotio gesto*[11]. On the other hand, B, as owner of the slave, may, as an alternative, bring *actio ex empto* on the contract made by his slave, provided he pay the price *in solidum*, and C can condict the man from A. Or the *peculium*, being still B's, can be vindicated by him, and if he does this he is liable *de peculio* for the price of the man bought by his slave. If, however, the *res peculiares* have been consumed in the hands of the vendor, D, they cannot be vindicated, and there is no *actio de*

[1] In. 4. 6. 8. [2] 15. 1. 21. 3. [3] 15. 1. 23, 52. *pr.*
[4] 14. 4. 6; 15. 1. 52. *pr.* [5] 15. 1. 10. [6] 15. 1. 36.
[7] 15. 1. 32. 1. Hence a difficulty in the law of legacy. A creditor left a legacy of *liberatio* to a debtor *de peculio*, and there was then nothing *in peculio*. Is the gift null? Tryphoninus suggests diffidently (34. 3. 27) that it is in suspense till there is something *in peculio* on the analogy of *legatum spei*. Julian treats the state of the fund as immaterial: *securitatem enim pater per hoc legatum consequitur*, 34. 3. 5. 2.
[8] If he paid more than was in the fund, *per imprudentiam*, it could not be recovered as an *indebitum*, 12. 1. 11, *ante*, p. 217, and *post*, App. II.
[9] 15. 1. 47. 2. Cp. 17. 2. 63. 4. As to renewal of *de peculio*, *post*, App. II.
[10] 12. 1. 31. 1. The text is obscure.
[11] Presumably *de peculio*.

peculio for the price against B, since it has been paid. And if the vendor, D, has paid them away to a *bonae fidei possessor* he is entitled to absolution in the vindication, on ceding any actions he may have against him, and in that case there is no *actio de peculio*.

Hereditatis petitio is brought against A, who possesses, *inter alia*, the price of goods belonging to the inheritance, which have been sold by slaves who still hold the money[1]. The action will not be *de peculio*, since *hereditatis petitio* is an *actio in rem*. If however the ground of claim is not sale of any goods, but the fact that one of the slaves is a debtor to the *hereditas* (and the defendant claims to be *heres*)[2], the action will be limited as if it were *de peculio*[3].

If a slave sells, the *actio redhibitoria* is *de peculio*. The text adds: *in peculio autem et causa redhibitionis continebitur*[4], and goes on to explain this obscure expression in terms which shew that *causa redhibitionis* means either the difference between the value and the price, or the actual value of the man sold. As the former meaning is insignificant, since the whole price is in the *peculium*, the latter is to be preferred, so that the *peculium* will contain not only the apparent *res peculiares*, but also the value of the man whom the vendor will receive back, if steps are taken by the buyer[5]. It follows that the limitation to the *peculium* is not likely to be detrimental to the buyer, though the text goes on to observe that it is possible even then for the *peculium* to be so overburdened with debt to the *dominus* that the buyer may not get back his price.

We have hitherto assumed that the relation between the various parties has not altered since the date of the *negotium*: we must now consider the effect of death of the *dominus* and death, manumission or alienation of the slave.

The *peculium*, in strictness, ceases to exist if from any cause the *dominus* ceases to have the slave[6]. It is plain that this might lead to injustice, and accordingly a rule was introduced, by a special Edict, that an owner liable *de peculio* remained so liable for one *annus utilis* from the death, alienation or manumission of the slave[7]. It is not a juristic extension but a separate provision[8]. This is not without importance. A creditor *de peculio*, who thinks the contracting son dead, brings this *actio annalis*. He is repelled by evidence that the son has been dead

[1] 5. 3. 36. *pr.* [2] 5. 3. 9.
[3] So if in the case of sale the slave who held the money has consumed it.
[4] 21. 1. 57. 1.
[5] So Pothier, *ad h. l.* But see Otto and Schilling *ad h. l.*
[6] 15. 1. 3; 15. 2. 3.
[7] 4. 9. 7. 6; 14. 1. 4. 4; 15. 1. 14. 1, 32. *pr.*, 15. 2. 1. *pr.*, 15. 3. 1. 1; C. 4. **26. 7, 11.**
[8] 15. 2. 1. *pr.* Itself juristically extended to, *e.g.*, the cesser of a usufruct, **15. 2. 1. 9.**

more than a year. The son is not really dead at all. There is nothing to prevent him from bringing the ordinary *actio de peculio*, for his right under this edict has not been in issue, and is not consumed[1].

The year runs, according to the Edict, from the time *quo primum de ea re experiundi potestas erit*[2]. On its terms this seems to cut down the action to what might be less than one year from the death, but it is explained as running only from the death[3], and then only if the claim is already actionable[4]. The liability is essentially *de peculio*[5], and thus there must have been an unadeemed *peculium* at the time of the death[6], etc., and it must have remained with the former owner[7]. It covers this, and what has been fraudulently removed therefrom[8]. It is subject to the ordinary additions and deductions for debt, except that the defendant cannot deduct for debts incurred since the alienation[9]. So long as the liability exists the fund is regarded as capable of increase by accretion, and of loss by any diminution in value, or destruction[10], but as it has lost its objective separateness, it is probable that there can be no dolose removal after the slave is gone[11]. The condemnation is, as in all cases, limited to the content of the fund at judgment[12]. The liability applies only to obligations entered into before the sale[13], etc., but with that restriction it covers all cases of "peculiar" liability[14].

Though it is brought under a different Edict the action is in general the same in form and in essence as the ordinary *actio de peculio*[15]. Thus the *intentio* says nothing as to the limit of a year: this point is raised by *exceptio*[16]. As the defendant may not have the *peculium* it has been thought that the *formula* contained words expressing this requirement[17]. But this is nowhere stated, and it may have been regarded as *officio iudicis*. Indeed if they are wanted here they are wanted in every action, since even where a sole owner is sued, there may be a *peculium* in the hands of a *bonae fidei possessor* or usufructuary[18].

So far the matter is clear, but there are difficulties which can best be considered by taking the various cases of transfer one by one.

[1] 15. 2. 1. 10. *Post*, App. II. [2] 15. 2. 1. *pr.* [3] *h. t.* 1. 1.
[4] Thus in conditional obligations, the year ran from satisfaction. As it was a limit and not an extension, some actions might be barred earlier, *e.g.*, *redhibitoria*, 15. 2. 1. 2; 15. 2. 2. *pr.*
[5] 15. 2. 1. 3, *obligationem produci*. [6] 15. 3. 1. 1.
[7] 15. 1. 33–35, 37. 2; 15. 2. 1. 7. As to this, *post*, p. 232.
[8] 15. 1. 26; 15. 2. 1. *pr.* [9] 15. 1. 38. 3. [10] 15. 2. 3.
[11] Hence Karlowa (*op. cit.* 2. 1153) prefers the *est* of the vulgate to the *fuerit* of Lenel and Mommsen. Cp. 15. 1. 47. 5.
[12] 15. 2. 3. [13] *Post*, p. 229.
[14] *e.g. condictio furtiva* (47. 2. 42), and alienation in fraud of patron (38. 5. 1. 25). The allusion, in Frag. Fab. 5, to perpetuity, probably means only that there was a remedy independent of *de peculio*. The Edict covers all modes of alienation (15. 2. 1. 5, 6), but only alienation before the action. If the deft. alienates *pendente lite*, he will be liable to extent of all *peculium* in his or the buyer's possession, since it is his fault that he has it not, 15. 1. 43.
[15] 15. 2. 1. 3. [16] 15. 2. 1. 10.
[17] *e.g.* Karlowa, *loc. cit.*; Lenel, *op. cit.* § 104.
[18] See, however, Lenel, Ed. Perp. § 104.

(*a*) Transfer of the slave, *inter vivos*, by sale or gift. All alienations are on the same footing[1]: both alienor and alienee are liable, the former for a year, the latter, like any other owner, *in perpetuum*. Each is liable to the extent of the *peculium* he holds[2]. The liabilities are distinct. Thus the alienee is not accountable for *dolus* by the alienor[3], while, on the other hand, he is liable to the extent of all the *peculium* in his hands, whether it came from the alienor or not[4]. There can, however, be no *actio de peculio* against him, unless the fund in his hand is really a *peculium*, *i.e.* unless he has made a tacit or express *concessio*[5]. Neither, if sued, can deduct any debt due to the other[6], though the alienee can deduct debts due to himself, even before the acquisition, on which he has *de peculio* against the old owner[7]. He is in fact choosing deduction instead of action. If he prefers to sue the old owner *intra annum* he may do so, but in such a case he must allow for any *peculium* the slave has with him[8]. On the other hand, the vendor may have the *actio de peculio* against the vendee, for claims accruing after the sale, even within the year, and he need not allow for *peculium* in his possession[9]. But he has no *actio de peculio* in respect of a contract before the sale, either with himself or with another slave, even though it were before he (the vendor) became owner[10].

Action against one does not, in practice, bar action against the other for any balance due, no matter who was sued first[11]. According to Proculus, Ulpian and Paul, the plaintiff may choose which he will sue, but cannot sue both at once: he must rest on his right to sue again for any balance[12], there being moreover a rule, that, if he was met in his first action (*i.e.* against the vendor) by any *exceptio* except the *annua exceptio*, he cannot sue for what, but for the defence raised, he might have received from that *peculium*[13]. But a text of Gaius says: *Illud quoque placuit, quod et Iulianus probat, omnimodo permittendum creditoribus vel in partes cum singulis agere, vel cum uno in solidum*[14]. As the adjoining texts both deal with sale, this is sometimes held[15] to be a conflicting view. If so, it is an extremely direct conflict, for the opposite rule is expressed in equally strong terms: *potest eligere*[16], *non*

[1] 15. 1. 47. 6; 15. 2. 1. 6. [2] 15. 1. 11. 8.
[3] 15. 1. 21. 2. [4] 15. 1. 27. 2, 32. 1.
[5] 15. 1. 27. 2. If knowing of the debt he has taken the fund away, this is dolose ademption: without knowledge—a *versio*, at any rate as to traceable property. *Ante*, p. 219.
[6] 15. 1. 13. [7] 15. 1. 11. 8.
[8] 15. 1. 27. 6, 47. 4. [9] 15. 1. 38. 3.
[10] 15. 1. 27. 4—7. The restriction, due to Julian, rests on good faith. They could have been deducted and can be recovered, 15. 1. 11. 7, *post*, p. 230. If the *peculium* has not passed there is no reason why the late master should acquire rights against the new fund. The end of 15. 1. 11. 7 seems to mean (it is obscure), that if there was a debt conditionally due to the *peculium*, at time of sale, and the condition arrives, the old owner can claim out of this, though it is in fact added to the *peculium* after the sale.
[11] *Restitutio actionis*, 15. 1. 11. 8, 32. 1, 37. 2, 47. 3. *Post*, App. II.
[12] 15. 1. 11. 8, 30. 5, 47. 3. [13] 15. 1. 30. 5.
[14] 15. 1. 27. 3; cp. *h. t.* 37. 2. [15] Karlowa, *op. cit.* 1. 1150. [16] 15. 1. 11. 8.

esse permittendum actori dividere actionem[1]. But the text seems to refer to another matter. Its language is inappropriate to the present case. *Cum singulis, cum uno,* are not appropriate words for persons standing in the relation of vendor and purchaser. They denote a group in the same position. And what *partes* can be meant? It seems most likely that, as Mommsen assumes, this text deals with a case in which there are several heirs[2].

We have seen that the vendor is liable so far as he retains the *peculium.* But what is retention of the *peculium*? If the man is sold, *sine peculio,* there is no difficulty. If a price is fixed for the *peculium,* that and not the *peculiares res* is the *peculium*[3]. But if no separate price is reserved for it, Ulpian tells us that the vendor is not regarded as retaining it: the price of the slave is not *peculium*[4]. This is a rather unguarded statement, since some of it is clearly the price of the *peculium.* No doubt, what the rule means, in practice, is, that if the *peculium* were of any importance, and went with the man, it was not allowed to pass as a mere accessory, but an express price was put on it. If the vendor is liable *de peculio,* because he has transferred the man *cum peculio,* with a special price for the latter, he cannot deduct for debts due to him[5]. If the vendor is liable *de peculio,* because the man was sold without it, he can deduct only for debts which accrued before the sale: those subsequent have no relation to his position as owner: his remedy is *de peculio*[6].

(*b*) Manumission *inter vivos.* If the *peculium* is retained, the old owner is liable to the *actio annalis*[7]. If it passes, the question whether the new *libertus* can be sued is perhaps to be answered as in the case of manumission by will *cum peculio*[8]. But the cases are not quite the same: there is *dolus* in the *dominus* who hands over the *peculium,* and he may be liable on that account. The case is not discussed[9].

(*c*) Transfer on death[10]. Under this head there is some difficulty, and, as it seems, some historical development. There are several cases, which must be taken separately.

If the heirs succeed to both the slave and the *peculium,* the liability *de peculio* is, as in the case of other hereditary debts, divided, *ipso iure,*

[1] 15. 1. 47. 3. [2] Of the vendor? *Post,* p. 231.
[3] 15. 1. 33, 34. [4] 15. 1. 32. 2.
[5] He could have deducted before delivery, and can recover by *cond. indeb.* and *ex vendito* so far as *peculium* will go. If now allowed to deduct he would unduly profit, as he has received the full value of the *res peculiares,* and the creditor cannot proceed against the buyer at least on account of the old *peculium.*
[6] 15. 1. 38. 3, 47. 5. A gift of the slave, *cum peculio,* creates the same liability as sale without a price for it, the new owner is liable to the ordinary *a. de peculio*; the old owner is not liable at all, 15. 2. 1. 6, 7. If it were *sine peculio,* the new owner is not liable, the old one is liable to the *actio annalis.*
[7] 15. 2. 1. 7. [8] *Post,* p. 231.
[9] See, however, C. Th. 2. 32. 1 (C. 4. 26. 13. 4).
[10] Death of the slave leaves the *actio annalis* and nothing more, 15. 2. 1. *pr.* As to the special edict for emancipated sons *etc.*, see Lenel, Ed. Perp. § 104.

quite apart from any division of *res hereditariae*[1]. But though as heirs they are liable *pro parte,* they are also common owners, and thus, like other common owners, they are liable *in solidum*[2]. Accordingly a creditor may choose in which way he will proceed. He may sue the heirs, as such, *pro parte,* in which case the right of deduction will also be divided, or he may sue any one as being one of common owners, *in solidum.* This seems to be the true meaning of a citation from Julian, which has already been mentioned as being misplaced and maltreated by Ulpian or Tribonian[3]. *Illud quoque placuit, quod et Iulianus probat, omnimodo permittendum creditoribus vel in partes cum singulis agere, vel cum uno in solidum.* Mommsen refers the text to heirs of a vendor, liable to the *actio annalis.* But Julian himself elsewhere denies the right to sue one of the heirs by the *actio annalis in solidum*[4].

If the heirs succeed to the *peculium* without the slave, because he died, or was freed *inter vivos,* or sold, by the deceased, or freed or legated by the will, they are liable to the *actio annalis* for the year or the unexpired part of it[5]. Each heir is liable only *pro parte*[6] and can deduct only what is due to him[7]. Each is liable for *dolus* so far as he has profited, and absolutely for his own[8]. Action against one releases all, but, as this would operate unjustly in view of the limitation just mentioned, the creditor can get *restitutio actionis* on equitable grounds[9]. Here, too, any of the heirs may be creditors, but, as they are not common owners they may have *de peculio inter se*[10]. Such a creditor must, presumably, allow for the *peculium* which has come to him[11]. It may be added that the slave himself, if he is a *heres,* is liable *de peculio*[12]. There can be no personal liability in the freedman: his contracts do not become actionable against him by his manumission[13]. The legatee of the slave will be his owner and liable as such.

But difficulties arise where the slave is freed or legated, with the *peculium.* Here it is clear that views changed, and conflicting opinions are retained by Justinian[14]. In the case of *manumissus* it might be supposed that the *actio de peculio* was inapplicable to him, since it presupposes

[1] C. 3. 36. 6; D. 11. 1. 18. [2] 10. 3. 8. 4 etc., *post,* Ch. XVI.
[3] 15. 1. 27. 3. *Ante,* p. 230.
[4] 15. 1. 14 (where they are not common owners). If one of the heirs is a creditor, it is no doubt treated as a case of common ownership: there is no question of *de peculio,* the matter being adjusted by *familiae erciscundae* (*arg.* 15. 1. 14). Where one of the *heredes* was praelegatee of a slave *cum peculio,* the other *heredes* had no *de peculio* against him for what the slave owed to *dominus,* says Scaevola (15. 1. 54, 58). What he owed need not have been handed over and must be allowed for in *familiae erciscundae.*
[5] 15. 1. 14; 15. 2. 1. 4, 7. Though penalties for delicts to *dominus* could not be deducted (*ante,* p. 222) the heir might claim to deduct for damage to the *hereditas* before *aditio,* 15. 1. 27. 1.
[6] 14. 3. 14; 15. 1. 14, 30. 1, 32. *pr.* Paul (14. 3. 14) gives the unnecessary reason that there is no *communi dividundo.*
[7] 15. 1. 14. [8] 15. 1. 30. 7, 31. [9] 15. 1. 32. *pr.*
[10] 15. 1. 29. *pr.* [11] *Arg.* 15. 1. 27. 6, 47. 4.
[12] 15. 1. 30. 2. [13] *Post,* Ch. XXIX.
[14] Pernice, Labeo, 1. 151 *sqq.*; Mandry, *op. cit.* 2. 194 *sqq.*; Karlowa, R. R. G. 2. 1159.

potestas[1], but Labeo, Julian, Javolenus[2], and Caracalla in the Code[3] all make him liable, and the *heres* exempt. On the other hand, Pomponius, Caecilius, Ulpian (remarking that there had been doubts), and Marcian (very decidedly), take the view that the *heres* is liable, the action not lying against the *manumissus*[4]. There is a similar conflict in the analogous case of legacy to a third person *cum peculio*: the cases are grouped together and are, no doubt, governed by the same principle. It seems clear that the older view was that of Labeo, that the *heres* was not liable, and that while this view is held by some as late as Paul, the view that has by this time really triumphed is that the *heres* is liable and that he must protect himself by taking security from the legatee, before handing over the *peculium*. If he has so guarded himself he is not liable[5]. This way of looking at the matter, coupled with the fact that Julian[6] is clearly talking of a legacy *per damnationem*, leads Karlowa[7] to think that the dispute applied only to this form of legacy, that the legatee was always liable in legacy *per vindicationem*, and that, after doubts, it was settled that, in legacy *per damnationem*, the *heres* was liable, even after transfer. This conjecture is more or less confirmed by the fact that the texts in question speak of a duty on the heir to hand over the *peculium*. But the language of Ulpian in discussing the doubt seems inconsistent with this limitation[8]. Moreover the duty to transfer the *peculium* does not imply a duty to transfer ownership: such language is used where it is clearly a legacy, *per vindicationem*. Thus Ulpian cites Labeo as exempting the *heres, quia neque ad eum pervenerit*, which must refer to *vindicatio*, and Pomponius says that in this very case he must take security before handing over[9].

What is the difference of principle underlying these doubts[10]? All are agreed that possession of the *peculium* is essential to the liability: indeed Javolenus seems to hold that of itself enough, for in a case in which the *peculium* alone is left, he regards the liability as passing in all except pending actions[11]. There is, however, the difficulty, that the *actio annalis* is, as the form of the Edict shews[12], intended for use against the former master[13]. Accordingly the jurists seek to make the

[1] Lenel, Ed. Perp. § 104. But that is not really material.
[2] 14. 4. 9. 2; 15. 1. 35; 15. 2. 1. 8; 33. 4. 1. 10. In 3. 5. 17 Proculus, Pegasus, Neratius and Paul may be expressing the same view, but they are probably considering only the case of a *gestio* begun before manumission and continued after.
[3] C. 4. 14. 2. [4] 14. 4. 9. 2; 15. 2. 1. 7; 33. 8. 18.
[5] 15. 1. 35; 15. 2. 1. 7. *I.e.* he can avoid liability by ceding his rights against donee of *peculium*. *Arg.* 15. 1. 51.
[6] 33. 4. 1. 10. [7] *loc. cit.*
[8] 15. 2. 1. 7. *Si cum peculio...liberum esse iussit.*
[9] 14. 4. 9. 2. A gift of *peculium* is not always a gift of the *peculiares res* but only of a *pars incerta* (*ante*, p. 193), so that the question might arise in *leg. per vindicationem*.
[10] The question is of the *annalis actio*: if legatee makes a *concessio* of the same fund as *peculium*, he is liable on old debts on ordinary principles.
[11] 15. 1. 35; 33. 8. 17. [12] 15. 2. 1. *pr.*
[13] Or his heirs, Mandry, *op. cit.* 2. 376.

heir liable, by an artificial view as to what is retention of the *peculium*, analogous to that taken in the case of sale, with which Paul associates this case[1]. Caecilius holds that he retains it by handing it over, since he is thereby released from his obligation to do so, and is thus so much the better off[2]. This is subterfuge: if the economic or "beneficial" state of things is to be decisive, the *peculium* was never his at all[3].

B. *Actio Tributoria*[4].

The general principle of the liability enforced by this action, (which, like the others, is Edictal,) is that if a slave trades with the *peculium* or part of it to the knowledge of his *dominus*, (though not necessarily with his consent,) the *dominus* is liable so far as that part of the *peculium* will go, its proceeds and profits being included, the master having no right to deduct what is due to himself, but ranking as an ordinary creditor, the fund being distributed among the creditors *pro rata*[5]. The actual *actio tributoria* is only the last stage in a rather elaborate procedure, set forth in the Edict. It contains a rule that any creditor of the class stated, can call on the *dominus* to distribute the *merces*, according to the above-mentioned principle—*vocatio in tributum*[6]. The distribution is done by the master unless he prefers to hand over the fund as a whole, in which case the Praetor will appoint an *arbiter* to carry out the distribution[7]. The Edict then lays down the rule that if the *dominus* fails to make proper *tributio*, then, and then only, the actual *actio tributoria* can be brought[8]. Of the procedure in the *vocatio*, the texts tell us little or nothing. The *vocatio* is generally held to proceed from the Praetor; mainly, it seems, on the grounds that the word *vocatio* is used so often that it must be Edictal[9], and that, as the *dominus* and the other creditors are *vocati*[10], the summoner must be the Praetor[11]. The acceptance of this view raises another question. If the *vocatio* is by the Praetor, is it contained in the Edict (set in operation by a creditor), as Lenel seems to hold in his conjectural restoration[12], or does it require a subsequent act, a *decretum* of the Praetor, as is held by some writers[13]? The *Corpus Iuris* contains no evidence of any such *decretum*[14], but it is very faintly suggested by the language of Theophilus,

[1] 15. 1. 47. 6. [2] 15. 2. 1. 7.
[3] Other jurists hold that to hand it over without taking security is *dolus*, so that the amount is still imputable, 14. 4. 9. 2; 15. 2. 1. 7.
[4] Mandry, *op. cit.* 2. 424 *sqq.*; Karlowa, *op. cit.* 2. 1159.
[5] 14. 4. 1. *pr.*—3, 5. *pr.*, 5. 6, 5. 11; G. 4. 72; In. 4. 7. 3.
[6] 14. 4. 1. *pr.*, 5. 6. [7] 14. 4. 7. 1. [8] 14. 4. 7, 8, 12.
[9] 14. 4. 1. *pr.*, 5. 6, 5. 15, 5. 18, 7. 1. Lenel, Ed. Perp. § 103. [10] 14. 4. 5. 15, 18.
[11] Karlowa, *op. cit.* 2. 1159.
[12] Lenel, *loc. cit.* The *vocatio* is however not *edicto*, but *ex edicto*, 14. 4. 1. *pr.* Karlowa, *loc. cit.*
[13] Karlowa, *loc. cit.* For others see Mandry, *op. cit.* 2. 439, himself disagreeing.
[14] It is not to be inferred from occasional use of the expression *actio tributoria* to cover the whole procedure, 14. 4. 5. 5.

commenting on the text of the Institutes[1] in which this action is treated, and still more faintly by the corresponding *scholia* in the Basilica[2]. But, in fact, the assumption that the *vocatio* issues from the Praetor is somewhat hasty. It is nowhere said that the Praetor *vocat*: the impersonal form is always used. It does not follow from acceptance of the view that the word stood in the Edict. It does not follow from the fact that creditors are *vocati*. The simplest and most obvious view, entirely consistent with the texts, is that the creditor or creditors, who *desiderant tribui*, by that act *vocant ad tributum* the *dominus* and the other creditors[3]. In any case a creditor applies, and the Edict authorises the *dominus* to conduct the distribution[4].

It is essential that the slave have been engaged in trade. Though the word *merx* is used, the Edict covers all kinds of business[5], handicrafts as well as dealing[6]. But it must be a *negotiatio*, *i.e.* a continuous course of trading, something more than an isolated *negotium*[7]. The trading must have been with the *peculium* or part of it[8], and the master must have known of the matter, though not necessarily of the individual transaction[9]. The texts make it clear that mere knowledge suffices: it is not necessary that he approve. He need not *velle*; *non nolle* is enough, *patientia*, not *voluntas*. An attitude of indifference, *non protestari et contradicere*, satisfies the Edict[10]. Nothing could be more explicit, and this same distinction is also brought out in other connexions[11]. Yet Mandry[12] regards *scientia* as involving *voluntas*, on account of the rule that *scientia pupilli domini* does not suffice[13], a rule that he considers to depend on the fact that such a person is not *willensfähig*, which implies in turn that *scire* is, in this connexion, an act of the will, *i.e. voluntas*. But apart from other objections, the real point of this text is that the effect of the state of mind, whatever it be, is to impose an obligation, and a *pupillus* cannot bind himself[14]. The *scientia* of a *pupillus* does not suffice[15]: that of his tutor, or of the curator of a *furiosus*[16], or of a general procurator does[17].

The right to demand *tributio*, and, therefore, to share in it, applies only to creditors of the trade, and in respect of debts due in connexion

[1] In. 4. 7. 3 "*ἀναγκάζει τὸν δεσπότην*."

[2] Bas. XVIII. 2. 1. n. f. The *ita ius dicit* of G. 4. 72 in no way implies that the *vocatio* is by the Praetor.

[3] Cp. the similar language where there is a composition with creditors and they are *vocati* by the tutor who made the agreement, 2. 14. 44 (=26. 7. 59).

[4] 14. 4. 5. 19, 7. 1. If he prefers to leave it to an arbitrator, there is no reason to think he loses his right to share, as is sometimes said on the authority of a dissidence among the Byzantine scholiasts, 14. 4. 7. 4. Cp. Mandry, *op. cit.* 2. 437.

[5] Including slave trading though slaves are not *merces*, *ante*, p. 39. [6] 14. 4. 1. 1.

[7] See 14. 1. 1. 20, and the constant use of the word *negotiatio*. [8] 14. 4. 1. *pr.*, 5. 11.

[9] *Si scierit servum peculiari merce negotiari*, 14. 4. 1. *pr.* [10] 14. 4. 1. 3.

[11] 14. 1. 1. 20; 9. 4. 2. 1; 50. 16. 209. [12] *op. cit.* 2. 427, 8. [13] 14. 4. 3. 2.

[14] Effect of death or supervening insanity of *dominus* on later transactions is not discussed, and analogy does not help; there is similar lack of authority in other cases under these edicts. *Ante*, pp. 168, 170; Mandry, *op. cit.* 2. 428.

[15] 14. 4. 3. 2; 50. 17. 110. 2. [16] 14. 4. 3. 1. [17] 14. 4. 5. *pr.*

with it[1]. It is possible on the words *eius rei causa*, and *nomine*, that the creditor must, as he naturally would, be aware of the connexion of his contract with the trade[2]. This is denied by Mandry, who thinks objective connexion enough[3], but he hardly seems to distinguish between knowledge of the business, and knowledge of the master's *scientia*. Nothing in any text justifies the view that any knowledge of this last kind was needed[4]. The contract need not have been made with the slave himself: it might be with his *institor*, or if he were an *exercitor*, with his *magister navis*, provided that the *exercitio* were to the master's knowledge[5]. We are told that the *dominus* comes in *velut extraneus creditor*[6], and that debts due to him, or to a person in his *potestas*[7], or to any master if there are several[8], are brought into account. But there is one important distinction: these persons are not, like other creditors, confined to debts connected with the business. All debts due to them can be proved, of any kind, and even if they accrued before the trade existed. The rule is somewhat illogical, and seems to have been developed by the jurists on some ground of justice. Labeo accounts for it by saying, *sufficere enim quod privilegium deductionis perdidit*[9].

If a slave has several businesses of the same or different kinds, the *tributio* is made separately for each one, and thus a creditor will be confined to the trade or trades, in connexion with which his contract was made[10]. The rule, no doubt juristic, is explained by Ulpian as based on the fact that credit was given to that particular business, which, if the slave had two businesses of the same kind, is not certainly true. He adds that the other rule might cause loss to one who dealt with a solvent business, for the benefit of those who had trusted an insolvent one[11]. The fund available for distribution covers not only stock and its proceeds, but tools of trade, *vicarii* employed in the business, and debts due to it[12]. Obviously it does not cover goods entrusted to the slave for sale: these and goods deposited for custody and the like can be vindicated by their owner[13]. In the same way a creditor with a pledge can enforce it against the other creditors[14]. The division of the fund is *pro rata* among the creditors who have proved their claim, and so far as the texts go, there is no indication of any

[1] 14. 4. 5. 4, 15, 18; G. 4. 72; In. 4. 7. 3.

[2] On this view a casual transaction with one who afterwards turned out to be managing such a business would not suffice.

[3] *op. cit.* 2. 429. See *post*, App. I.

[4] Ulpian speaks of creditors giving credit to the *merx*: he does not speak of the *dominus*, 14. 4. 5. 15.

[5] 14. 4. 5. 3; 14. 1. 1. 20, 6. *pr.* It is called *quasi tributoria*, *exemplo tributoriae*. This is because the contract is not the slave's.

[6] 14. 4. 1. *pr.* [7] *h. t.* 5. 9. [8] *h. t.* 5. 10. [9] *h. t.* 5. 7. [10] *h. t.* 5. 15, 16.

[11] How in such a case debts due to the master not attaching to any business were dealt with does not appear: perhaps charged *pro rata*. Mandry, *op. cit.* 2. 433.

[12] 14. 4. 5. 12—14. [13] *h. t.* 5. 18.

[14] There must be an actual pledge: the mere fact that all the stock had been bought from one creditor and he was unpaid gave him no priority, *h. t.* 5. 8, 17.

privilege for particular debts. It does not appear whether the *merx* is sold or distributed in kind. Two texts do, indeed, suggest sale of it[1], and no doubt this would usually be the most convenient course, but there is no indication that this was necessary, nor are we told of any rules as to the conduct of the sale. But there is not here, as there is in the *actio de peculio*, any preference for first comers[2]. The demand of one creditor does not compel others to come in[3]: it merely authorises them to do so, and thus, if less than the whole number appear and divide the fund, they must give security for a refund on account of other claims by outstanding creditors, and for any debts, due to the *dominus*, which may not then be reckonable[4]. It may be presumed that if the *dominus* or a creditor who has come in has deliberately refrained from proving any liquid debt, he cannot avail himself of the security[5].

It is in carrying out the distribution that the *dominus* may incur liability to the actual *actio tributoria*[6]. Mere failure to carry out his duty properly is not enough: there must have been *dolus*[7]. Liability does not arise if the act were done by mistake and not persisted in after discovery of the error[8]. Of course *dolus* may take many forms[9]. One text on the nature of the necessary *dolus* raises a curious point. Labeo, deciding a doubtful point[10], observes that if the *dominus* denies, *cuiquam deberi*, this is such *dolus* as justifies the action, for which view he, or Ulpian, gives the reason *alioquin expediet domino negare*. No one can have doubted that refusal to satisfy a liquid and known claim was *dolus*: this cannot have been the doubtful point. The real question is: if a creditor claims *tributio*, and the master says there are no debts, and there is therefore no *tributio*, can this be said to be *dolus in tribuendo*? Yes! says Labeo, otherwise a master need never be liable to the action.

Dolus must on general principle be proved by the plaintiff, and in its absence the defendant is entitled to absolution[11].

If the slave of an *impubes* or *furiosus* trades, *sciente tutore vel curatore*, we have seen that there may be *tributio*. But he is not to profit or lose by his guardian's *dolus*, and we are told that he is liable only so far as he has profited. Pomponius thinks he is liable, but

[1] *h. t.* 7. 3, 12. The language negatives the hypothesis that the method was similar to that in *bonorum venditio*.
[2] *h. t.* 6. [3] Mandry, *op. cit.* 2. 437.
[4] See, *e.g.*, *h. t.* 5. 19, 7. *pr.* Probably security for possible refund was always taken.
[5] The case was not likely to arise. Though the *tributio* exhausted the claim to that particular fund, it had, so far, no novatory effect: the creditor might still sue *de peculio* for any unpaid balance.
[6] *h. t.* 7. 2. [7] *h. t.* 12. [8] *h. t.* 7. 3.
[9] Paying himself too much, paying another too little, not paying the right amount into the fund, wasting the assets, not enforcing debts *etc.*, *h. t.* 7. 2—4.
[10] *h. t.* 7. 4.
[11] Hence a difficulty. If the action was brought, *e.g.* on account of denial of the debt, and it appeared that the money was due but the *dominus* had acted in good faith, what was the result? If it was made clear before the action, to persist in the refusal was *dolus* (*h. t.* 7. 2), but what if the explanation were after *litis contestatio*?

will be discharged by cession of the actions which the facts have given him against his guardian. Ulpian agrees that at any rate he must cede those actions[1]. But if the *incapax*, during or after the incapacity, but while he is *doli capax*, is himself guilty of *dolus*, he is liable: the guardian's *scientia* is needed to bring the Edict into operation, but the ward's *dolus* suffices[2].

The action is *perpetua* though the slave be dead[3], and it lies against the *heres*, or other successor, only in so far as he has received anything. Hence if the slave is freed by will, and his *peculium* is left to him, Labeo says the *heres* is not liable, since he has not received the *peculium*, and has committed no fraud. But we have seen that it is his right and duty to take security for *peculiares actiones*[4], at least according to the view which prevailed, and, accordingly, Pomponius here observes that if he has failed to do this or to deduct, he is liable, since this is practically *dolus* in him[5].

It is clear that these last rules have a very delictal look, and it is commonly held that the action is essentially delictal[6], partly on the evidence of these rules, and partly on that of the use of the expression, *dolum malum coercet domini*[7]. But we are told by Julian[8] that the action, *non de dolo est, sed rei persecutionem continet*, from which fact he deduces the further rule that it is *perpetua* against the *heres*, though the slave be dead, *quamvis non aliter quam dolo interveniente competat.* This language seems to negative delictal character, and Mandry[9] holds that the action is contractual, and grouped with the other *actiones adiectitiae qualitatis*. He observes that there were other *actiones* based on *dolus*, but contractual, *e.g.*, *depositi*, and it may be added that the rule that *heres* was liable only so far as he profited applied there too[10]. He points out that if a *vicarius* traded *sciente ordinario*, the master was liable *de peculio ordinarii*, and the debts due to *ordinarius* were not deducted[11]: this he regards as an *actio tributoria de peculio*, and as negativing the delictal character of our action, since *de peculio* does not lie on delict. Karlowa[12] contends that this action is not *tributoria* at all, but an ordinary *actio de peculio*, given on the *peculium* of the *ordinarius* for contract by *vicarius* made with his knowledge. But such an *actio de peculio* is inadmissible: there is no way of harmonising this text with ordinary principle except by treating it as a *tributoria de peculio*[13]. It may be said, further, that the place of our action in the Edict[14], and its treatment in the Institutes[15] indicate that it is an

[1] 14. 4. 3. 1. The rule differs in form, though perhaps no more, from that laid down in *de peculio, ante*, p. 218.
[2] 14. 4. 3. 2, 4. [3] *h. t.* 7. 5, 8. [4] 33. 8. 18; *ante*, p. 232. [5] 14. 4. 9. 2.
[6] See the literature cited, Mandry, *op. cit.* 2. 450.
[7] 14. 4. 7. 2. Karlowa, *op. cit.* 2. 1162. [8] *h. t.* 8. [9] *op. cit.* 2. 450.
[10] 16. 3. 1. 47. [11] 14. 4. 5. 1. [12] *op. cit.* 2. 1163. [13] *Post.* pp. 243 *sq.*
[14] Lenel, Ed. Perp. § 103. [15] In. 4. 7. 3.

ordinary *actio adiectitiae qualitatis*, of like nature with the rest, and this seems the better view[1].

Between this action and that *de peculio* the creditor must choose, for having sued by one, he cannot fall back on the other[2]. Mere *vocatio in tributum* will not bar *actio de peculio*: the facts thus ascertained will determine his choice, since, in the absence of the actions by which he can recover *in solidum*, the *actio de peculio* may be, on the facts, the best. There is no need to prove *dolus*, and though the *dominus* can deduct, the fund may be so much increased as will more than counterbalance this[3]. On the assumption that the action is contractual, there is no reason to see, in this rule of choice, anything more than the ordinary consumptive effect of *litis contestatio*. But those who think the action delictal cannot accept this view, for it would then seem that, on the analogy of the concurrence of *actio* Aquilia and a contractual action, the one does not necessarily bar the other, as to any excess recoverable by it[4].

Presumably the action exhausts the claim to the then existing *merx*, and presumably also, there may be a renewed *vocatio* for later additions, to the same extent as there might be renewal of the *actio de peculio*.

There is little authority as to the relation of this action with the other Edictal actions. We are told that, as the facts which would base *institoria* (or *exercitoria*) cannot base *tributoria*, the bringing of the former has no effect on the right to bring the latter, and probably the converse is true[5].

[1] Nothing important turns on the point, as it does not help us to reconstruct the formula of which we know nothing. Lenel, Ed. Perp. § 103. The action has a certain penal character. The defendant must account for all that he would have handed over apart from *dolus*, 14. 4. 7. 2. He may thus have to pay more than the *peculium* now contains, since it may have been diminished by accident.

[2] 14. 4. 9. 1.

[3] *h. t.* 11; G. 4. 74 a; In. 4. 7. 5. Where one creditor had brought *de peculio* and another *tributoria*, the owner could deduct, in *de peculio*, any sum he had unduly paid to himself, in the distribution, in payment of debt due from the slave, since, as he would have to refund it, it was still due from the slave, *h. t.* 12.

[4] Thus Karlowa holds (*op. cit.* 2. 1164) that he is compelled to choose on grounds of fairness, as against other creditors and the *dominus*. Choice of this action did not of course bar *de peculio* for any other debt, *h. t.* 9. 1.

[5] As to these points see App. II. As to the procedural relations of the various actions see G. 4. 74; In. 4. 7. 5; D. 14. 5. 4. 5 *etc.*

CHAPTER X.

SPECIAL CASES. SERVUS VICARIUS. S. FILIIFAMILIAS. S. IN BONIS. S. LATINI.

WE are told in the Sources that *servorum una est condicio*[1]. This proposition expresses, in an inaccurate way, a fact; *i.e.* that in general all slaves are in the same position, in that their faculties are derivative. The slave, as such, has scarcely anything that can be called a right, and the liabilities of most slaves are much alike. But whatever Justinian and his authorities may mean, there is no evident sense of the phrase in which it is exact. In social standing there is the widest difference between different slaves. In legal capacity they differ, if not so widely, at least considerably. These differences are however for the most part not due to any peculiarities in the slave, but result from something affecting the holder, or his title, or from something in the authorisation conferred on the slave. A slave with *peculium* is the same kind of slave as one without. So in the case of a derelict slave, or one *pendente usufructu manumissus*. But there are some cases which cannot be so explained away. Such are that of the *statuliber*, who has a sort of incapacity to be jurally injured, though he is still a slave, and those of *servi publici populi Romani*, *servi fiscales*, and, possibly, *servi municipii*, who have privileges not distinguishable from property rights[2].

Real or apparent, inherent or resulting from their special relations with other persons, these distinctions need discussion: accordingly we shall consider the special cases in which the position of the slave causes exceptional results to flow from his acts, or from acts affecting him. As the cases are for the most part quite distinct, no attempt is made at anything more than rough grouping.

I. *SERVUS VICARIUS.*

The *servus vicarius*, in the sense in which the expression is here used, is one who forms part of another slave's *peculium*. Erman[3] traces

[1] 1. 5. 5. *pr.*; In. 1. 3. 4; Theoph. 1. 5.

[2] The slave informally freed before the *lex* Iunia, and the *servus poenae*. And see C. Th. 4. 12. 5.

[3] Erman, Servus Vicarius, ch. 1, § 4. This valuable monograph has been much used in the preparation of the following remarks. It has a good list of texts and inscriptions. The author deals largely with the "Family Law" of the matter.

the name to the practice of allowing slaves to procure others to serve as deputies for them, in their special services to the master, but, as we know him in the Sources, the *vicarius* is not an agent or deputy for the principal slave, except in the same degree and way in which a *servus ordinarius* may be said to be a deputy for his master. Legal texts dealing with *vicarii* are few, a circumstance which proves not that they were few, but that they were not legally important. Thus of the existing texts a large proportion deal with them only as chattels, and there seems to be only one[1] which refers to the acquisition of property by a *vicarius*, though others mention *vicarii vicarii*[2]. On the other hand there are several which deal with contractual liabilities incurred *nomine vicarii*, a fact which suggests that they usually belong to persons like *dispensatores* and *institores*, acting indeed as clerks to these[3]. The value of the principal slave bears no necessary relation to that of his *vicarius*, which may be much greater, especially in the case of an old slave who has amassed a large *peculium*[4].

As the *peculium* is *de facto* the property of the slave, so, necessarily, is his *vicarius*. This conception is allowed to determine points of construction in wills in a striking way. Ulpian quotes Pomponius as saying that a gift of *servi mei* will not include *vicarii*[5]. But it is clear that this could not always be so: there must have been some circumstance raising a presumption that all slaves were not included. Other texts go in the same direction, but there is always something to raise a presumption. Alfenus says that if his *peculium* is left to a freed slave, and the will also contains a gift to X of *omnes ancillas meas*, this last does not cover *ancillae* in the *peculium*[6]. Here the rule really is that the specific gift takes precedence of the more general[7]. Where a slave and his *vicarius* were freed and given their *peculia*, a *vicarius vicarii* did not become common, a rule expressly based on *voluntas testatoris*, which would hardly have been necessary if, as a matter of law, a *vicarius* was not regarded as the property of his master's owner[8]. All these, being constructions of wills, shew only what was the common mode of speech which the testator was likely to have used, and the rule goes no further. Erman[9] indeed seems inclined to consider it as more

[1] 15. 1. 31. [2] *e.g.* 33. 8. 6. 3; 33. 8. 25.
[3] Erman, *op. cit.* §§ 4, 5. He comes to this conclusion largely on the evidence of inscriptions.
[4] 21. 1. 44. *pr.* It must not be inferred from the word *accedit* that *vicarius* was an accessory. In a legacy of *servus cum vicariis*, the legacy of *vicarii* is good, though *servus* be dead. In. 2. 20. 17; D. 33. 8. 4. If the slaves on a farm are pledged, *vicarii* not employed there are not included, 20. 1. 32.
[5] 32. 73. 5. [6] 33. 8. 15.
[7] 50. 17. 80. A *peculium* including a *vicarius* was left; there was a gift of liberty to the *vicarius*: it took effect on that ground, 40. 4. 10. *pr.*
[8] 33. 8. 6. 3. Where "all the slaves dwelling on a farm" were left, Ulpian quotes Celsus as holding that this did not cover *vicarii eorum* (33. 7. 12. 44; cp. 20. 1. 32), a rule which is somewhat obscure.
[9] *op. cit.* 450.

important, and cites a text dealing with construction of an agreement, as laying down the same rule. But it does not: the construction there applied excludes all slaves only momentarily on the farm, whether *vicarii* or not[1]. In one text[2], *dominus* (D) and slave (S) have a common slave, V. D, by will, frees S, *cum peculio*, and also leaves V to S and L. Labeo and Trebatius agree that L gets only a quarter. That is, the special gift is not contemplated as destroying the general gift: each covers half. Pothier[3] considers this to be due to the fact that, as the special gift covers something not in the general gift, it can be given a meaning without infringing on the latter, and is therefore so interpreted. But it is at least equally likely, since the authors are early, that it expresses a logical rule on which the principle of construction by *voluntas* has not made, as yet, much inroad.

Two texts are difficult. A slave, S, is freed, *cum peculio*, and his *vicarius*, V, is left to T. Julian says, *teste* Scaevola, that what is *ipso iure* deducted from the legacy of *peculium* on account of debt to *dominus*, goes to T, the legatee of the *vicarius*[4]. This obscure text may perhaps mean that Julian does not here apply the rule that a specific supersedes a general legacy. There are thus two legacies of V. But that to S is only of a part of V, since part of him is not *in peculio*, by reason of debts[5]. That part of V which S does not take goes to T, who thus will take more than half. They are in fact *re coniuncti* as to a certain part of V. This they divide. T takes the rest[6].

Another text says that a legacy of *vicarius* includes one of his *peculium*[7]. This is so contrary to principle, and to express texts[8], that it gives rise to doubts. The opening and concluding clauses are regarded by Gradenwitz as interpolated[9]. This of itself would throw doubt on the rest which though short is the most important part. But this looks as doubtful as the other parts: Ulpian is as little likely to have said *putamus* as to have described himself as a slave[10].

Except for one unimportant chance allusion[11], the texts seem to be silent as to acquisition and alienation by *vicarii*. This is probably due to absence, or rarity, of practice. The *vicarius* is the lowest class of slave and probably rarely acts independently. As a clerk he contracts, and there are difficult questions to answer, as to the effect of his contracts. It is easy to see that similar difficulties might arise in connexion with *iura in rem*, and rarity seems the only explanation of the silence of the

[1] 20. 1. 32. It implies that if definitely employed on the farm *vicarii* were included.
[2] 33. 8. 22. 1. [3] *ad h. l.* [4] 33. 8. 21. [5] *Ante*, p. 225.
[6] Other explanations: Pernice, Labeo, 1. 383 (somewhat similar); Mandry, Familiengüterrecht, 1. 193; Pothier, *ad h. l.*
[7] 33. 8. 6. 2. [8] *e.g.* 33. 8. 24. [9] Gradenwitz, Interpol. 215.
[10] To complete the account of him as a chattel it should be said that the ordinary warranty of soundness exists on sale of *vicarius*. But, apart from express warranty, *vicarii*, included in a *peculium* sold, are sold *tales quales*, 21. 1. 33. *pr.*
[11] 18. 1. 31.

texts. It is not desirable to occupy much space with speculation: it must suffice to suggest a few of the questions which arise. In general it is clear that he acquires to the *servus ordinarius*, his acquisitions forming part of the *peculium*; but it is also not to be doubted that he can acquire, directly, to the *dominus*[1]. This would result from *iussum*, and perhaps, though this is not so clear, from acquisition *nominatim* to him. The ordinary results of his *operae* will go to *servus ordinarius*[2]. But will acquisitions *ex re domini* go to the *dominus* directly or into the *peculium*? At first the former seems obvious, but it cannot be called certain. There is more or less of a relation of joint ownership between *dominus* and *ordinarius*, but we cannot apply the rules of common ownership: these would make such acquisitions common[3], but so they would acquisitions *ex operis*. The relation is more like that of usufructuary and owner, but even this analogy is imperfect since a legacy to the *vicarius* would probably go to the *ordinarius*. On the other hand it is not like the case of a *servus peculii castrensis*[4], since the *dominus* certainly has a real right in the slave. We know that for acquisition of possession *in re peculiari*[5], the knowledge of *dominus* is not needed, and no doubt an analogous rule applies here. The difficulties which arise in connexion with *bona fides*, and similar matters, in relation hereto, can be judged from those which arise in the case of an ordinary slave[6]. In relation to the acquisition of a usufruct by will, it is not possible to say how far the life of *vicarius* or *ordinarius* set a limit of duration[7].

It is surprising that there is not a single text dealing with a claim by the master on a contract by *vicarius*, though there are many texts dealing with liability on his contracts. Of course the right must vest in the master; the distribution of any proceeds of action being determined by the rules of acquisition as between the master and the *ordinarius*, of which we have had to admit ignorance.

It is not possible to consider the further complications which result in all these cases if the *vicarius* has himself a *peculium*. But since we shall have to deal with the liabilities resulting from his acts, and are not in this case left so much in the dark by the texts, it is important to say a word or two about his *peculium*. We are told that gift of a *peculium* to a slave is a gift of one to his *vicarius*[8], which no doubt means that *ordinarius* can give him one without further authorisation from the *dominus*. As the *peculium* of *vicarius* is part of that of

[1] Erman, *op. cit.* 452—455. [2] 18. 1. 31. [3] *Post*, Ch. XVI.; cp. 33. 8. 22. 1.
[4] 49. 17. *pass.* [5] *Ante*, p. 200. [6] *Ante*, p. 135.
[7] *Ante*, p. 152. So, in institutions, the question for whom he acquired was probably decided on principles similar to those applied between owner and fructuary (*post*, Ch. XV.). No doubt owner must assent, and it was the knowledge of *vicarius* which was material for *cretio*, *ante*, p. 143.
[8] 15. 1. 6.

ordinarius this is enabling another person to pledge the owner's credit, to the extent at least of part of the *peculium*. It does not follow from this that a slave with *libera administratio* can confer a similar right on his *vicarius*: indeed the absence of texts dealing with alienations by *vicarius* suggests that this is not so[1]. The principles of *concessio peculii* were fixed, as we have seen[2], early, and not in view of any resulting obligation. But a gift of *administratio* is a later idea and definitely authorises alienation. It is by no means obvious that a delegation of this power should proceed as a matter of course. It is to be remembered also that, so long as a *peculium* exists, contracts, even if prohibited, bind the master[3], but this is not true of specific alienations under an existing *administratio*[4].

The *peculium* may consist wholly or in part of property given by the owner of the *ordinarius*[5]. In arriving at the actual content of the *peculium*, complications result from the existence of debts between *ordinarius* and *vicarius*. Thus a debt of *ordinarius* to *vicarius* is not deducted in a legacy of *peculium ordinarii*[6], for obvious reasons, though it is in strictness a debt to a *conservus*, while conversely a debt of *vicarius* to *ordinarius* will be deducted from a legacy of *peculium vicarii*.

Upon the liabilities created by the contracts of *vicarius*, there is a good deal of authority, not all of a very intelligible kind. The chief difficulty is due to the fact that, besides the liability of the master to the extent of the *peculium vicarii*, which certainly exists, however it may be enforced, there is, or may be, also, a secondary liability limited to the *peculium* of the *ordinarius*, for acts done under his authority, or with his knowledge, such that, if done by the *ordinarius*, under the authority, or with the knowledge, of the *dominus*, they would impose a special liability on the latter.

Before entering on the difficulties of the texts, it is necessary to face an important question. We have seen that the *vicarius* is the slave of the *ordinarius*, and only secondarily the slave of the *dominus*. But this notion can be pushed too far. One critic[7] goes so far as to say that as *vicarius* was not directly the slave of the *dominus*, no direct *actio de peculio, etc.*, could be brought against the *dominus* on his account, but that all such actions took the form of an *actio de peculio ordinarii, vicarii nomine*, a view which leads Affolter to such awkward forms as *actio de peculio ordinarii de in rem verso vicarii nomine*, and *actio de*

[1] See, however, Erman, *op. cit.* 477. [2] *Ante*, pp. 187, 196.
[3] *Ante*, p. 212. [4] *Ante*, p. 204.
[5] 15. 1. 4. 6. As to what was in his *peculium*, no doubt rules analogous to those as between owner and *ordinarius* were applied. He and his *peculium* were in that of *ordinarius*, but of course he was not in his own *peculium*, 15. 1. 7. 4, 38. 2; 33. 8. 16. 1.
[6] 33. 8. 9. *pr.*
[7] Affolter, Kr. Viert. 42, p. 351; Z. S. S. 23, p. 61.

peculio ordinarii quod iussu vicarii nomine. This view is rested mainly on principle, reinforced by the consideration that the direct action cannot be made out from the texts, while this indirect form is often mentioned. But the facts are otherwise. An *actio de peculio vicarii* is mentioned at least three times[1], and, for Affolter's form, he gives no reference, and search has not revealed any instance. We have seen the *dominus* giving money to *vicarius* for his *peculium*[2], authorising *exercitio* by the *vicarius*[3], having knowledge of his trading[4], and benefiting by *versio in rem eius* of his acquisitions[5]. The evidence is overwhelming in favour of a direct *actio de peculio* on contracts by *vicarius*.

The rules as to deductions from the *peculium vicarii* present little difficulty. In an action *de peculio ordinarii*, debts due from *vicarius* to *dominus* or a *conservus* can be deducted, but only from the *peculium* of *vicarius*, since outside that they have no existence[6]. The next text[7] applies this principle to legacy of *peculium ordinarii*, and elsewhere[8] Africanus points out that they cannot be deducted, even to the value of the *vicarius* himself, since he is not a part of his own *peculium*. Debts due from the *ordinarius* to him are not deducted though he is a *conservus*, since this would only mean removal of the sum from one part of the available *peculium* to another[9]. Conversely debts due from *dominus* to *vicarius* would be *in peculio ordinarii*, while debts due from *vicarius* to *ordinarius* would be neglected. In an *actio de peculio vicarii*, debts due to the *dominus* or *ordinarius* are deducted[10], and, conversely, debts from them are added so far, in the case of *ordinarius*, as his *peculium* will go. Erman points out[11] that this may practically have much the same effect as if *vicarius* were in his own *peculium*. A creditor of *peculium vicarii*, enforcing a claim against *ordinarius*, might have the right to claim *vicarius*, or his value, as a part of *peculium ordinarii*[12].

It is also held by Erman[13] that debts due to *dominus* from *ordinarius* can be deducted in an *actio de peculio vicarii*, since he is entitled to pay himself out of any part of the *peculium* of *ordinarius* at any time. He regards the right as subject to the limitation that such a payment might be dolose removal from the *peculium*, if the rest of the *peculium ordinarii* would suffice to pay it. The same result would be reached by the rule that deduction can be made only, *si non hoc aliunde consequi potuit*[14]. It may be doubted indeed whether it could be *dolus* to pay

[1] 14. 3. 12; 15. 1. 19. *pr.*; 15. 3. 17. 1.
[2] Pomponius treats it as the normal case, 15. 1. 4. 6.
[3] 14. 1. 1. 22.
[4] 14. 4. 5. 1.
[5] 15. 3. 17. 1.
[6] 15. 1. 17, 38. 2.
[7] 15. 1. 18, 38. 2.
[8] 33. 8. 16. 1.
[9] In. 4. 7. 4; G. 4. 73; D. 15. 1. 17. In 33. 8. 9 the same principle is applied to legacies.
[10] 15. 1. 17.
[11] *op. cit.* 475, 6.
[12] 15. 1. 38. 2. This is all Erman means, though he once speaks of *vicarius* as actually in his own *peculium* (p. 475). Affolter seems to treat this as Erman's real view, Z. S. S. *loc. cit.*
[13] *op. cit.* 475, 479.
[14] 15. 1. 11. 6.

yourself with your own money, and, moreover, any debt deductible at all is, *ipso facto*, not in the *peculium*: there can be no question of removal[1]. This circumstance destroys the force of the analogy set up by Erman between this case and that of a man who pays his own debts with the *peculium* of a slave, to the prejudice of the creditors of the latter[2]. But it is not clear that the right of deduction for such debts exists at all, even so limited. It seems to be asserted in one text[3], but, as Affolter remarks[4], the allusion is, on the face of it, to an *actio de peculio ordinarii*. And there is a text which throws doubt on it. Africanus tells us[5] that if under a contract by *vicarius*, something is *versum in peculium ordinarii*, the creditor has an *actio de in rem verso, de peculio ordinarii*, and therefore subject to deductions for debts due to the *dominus* from that *peculium*. But if it is *versum in rem domini* there is no deduction for debts of the *ordinarius*. There will certainly be a deduction for debts due to the *dominus* from the *vicarius*[6], since such debt, on general principle, destroys a *versum*[7]. But if Erman's view is correct, debts due from *ordinarius* ought to be deducted too, for they would be covered by the rule that a *dominus* can set off against a *versum* what he may claim from the *peculium* of the slave who made the *versio*.

One text dealing with *actio de peculio* is difficult. We are told that if an *actio de peculio ordinarii* has been brought there can be no further *actio de peculio vicarii*, but that if an *actio de peculio vicarii* has been brought, there may be an *actio de peculio ordinarii*[8]. Leaving out of consideration the question of *consumptio litis*[9], the difficulty remains that, as it is a transaction of the *ordinarius* which gives *de peculio ordinarii*, and one of the *vicarius* which gives *de peculio vicarii*, it is not easy to see what this transaction is, which may give rise to either. We might of course suppose a transaction in which they both took part, but it is more likely that the case is one in which the *vicarius* made the contract with such privity of *ordinarius* as, if it had been of *dominus*, would have given an *actio in solidum*. We shall have shortly to consider such cases.

There is little authority as to the *actio de in rem verso*. So far as the *versio* is *in rem domini* the ordinary principles apply: the *versio* is liable to cancellation for debts of the *vicarius*, but, as the text says, not for those of *ordinarius*[10]. But, if it is *in peculium ordinarii*, the action is subject to another limit. It is practically *de peculio ordinarii*, and like any other such action is temporary, (not, as an ordinary *actio de in rem verso* is, perpetual,) and liable to be limited, by the death of the

[1] It is in no sense *solutio*. This is brought out in two texts dealing with *vicarii*. 15. 1. 11. 4, 5 has already been considered (*ante*, p. 224). See also 10. 3. 25. This principle is not affected by the rule that in some cases deduction is allowed only *si dolo careat*, 15. 1. 9. 4. This has no connexion with the rules as to dolose removal.
[2] *op. cit.* p. 479.
[3] 15. 1. 17.
[4] Krit. Viertel., *loc. cit.*
[5] 15. 3. 17. 1.
[6] Affolter, *loc. cit.*, denies this.
[7] 15. 3. 10. 7, 8.
[8] 15. 1. 19. *pr.*
[9] *Post*, App. II.
[10] 15. 3. 17. 1. It does not mention debt of *vicarius*.

ordinarius, to an *annus utilis*, and to be cancelled by his debt to the *dominus*. Africanus observes that the *actio de peculio et in rem verso* is here brought on the *peculium vicarii*, and that it may seem odd that it should be affected by the death of the *ordinarius*. But, he adds, *ea res* cannot be in the *peculium vicarii*, except so long as the *peculium ordinarii* exists. The *ea res* is the *versum*, the reason being, as is said above, that the liability only arises by the intervention of the *ordinarius*, and is therefore subject to the limitation attaching to other obligations established by him. It does not mean, as the glossators supposed[1], that the *peculium vicarii*, and therefore all liability on his contract, ended with the *peculium ordinarii*. Whether that endured after the death of the *ordinarius* depended on the action of *dominus*: if he left it, it was still *peculium*. All that is needed is that he does not take it away[2]. There seems no reason to think Africanus adopted the form *ea res non est in peculio vicarii* when he meant "there is no *peculium vicarii*[3]."

The meagreness of the textual authority[4] strongly suggests that these cases were rare, and it may be that the discussion is mainly academic. An impression of the same sort is left by the one text[5] which deals with *actio tributoria*. It leaves so many practical points undecided that the general result is not very informing. If the trading was with the knowledge of *dominus* but not of *ordinarius*, there is a direct *actio tributoria*[6]. The effect is that debts due to the master come into *tributio*, but those to *ordinarius* do not, but are deducted in full, notwithstanding the rule that debts due to *conservi* come into *tributio*[7]. If the *ordinarius* alone knew, the text says there is an *actio de peculio ordinarii*, such that what is due from *vicarius* to *dominus* is deducted, but not what is due to the *ordinarius*. The text expressly contrasts this with *actio tributoria*, and this seems to imply that it is not itself such an action. But, as Erman remarks[8], it is incredible that the whole *peculium* of *ordinarius* should be liable on such a contract, not of his making or authorisation. It would be to put the case on the same level as that in which the *ordinarius* has given *iussum* for the contract. The "*inelegantia*" of this is obvious. If it is *tributoria*, the fund available is the *merx peculiaris vicarii*, as in the direct *actio tributoria*, but the present one has the disadvantage of being liable to extinction by the cesser of *peculium ordinarii* from any cause, and, further, that debts due to *dominus* are deducted *in solidum*, while in the other they come

[1] Erman, *op. cit.* 481 *sq.* [2] 15. 1. 7. 1.
[3] 15. 3. 17. 1. This text contains the only allusion to *quod iussu, nomine vicarii*. Apparently the rules were the same.
[4] 14. 3. 12 also contains a reference to *de in rem verso, post*, p. 248.
[5] 14. 4. 5. 1.
[6] Affolter, Krit. Viertel., 1900, who denies any such direct action, does not deal with this text.
[7] 14. 4. 5. 9. [8] *op. cit.* 488.

into *tributio*. But as debts to *ordinarius* are probably commoner, and as to these the rule is reversed, this may be rather an advantage. The general result is more rational, and is not wholly excluded by the fact that the action is expressly contrasted with *actio tributoria*. Such an action cannot be, properly speaking, *tributoria*, since the *negotium* is not *sciente eo cuius in potestate est*, as the Edict requires[1]. It can be only an *actio utilis* or *ad exemplum tributoriae*.

There is a still further difficulty. If both knew, we are told that the creditor has the choice of these two actions, *sic tamen ut utrumque tribuatur*. If this applies to both actions, it is difficult to see the meaning of the option, so long as there is any choice, (*i.e.* so long as *peculium ordinarii* subsists,) since the *merx* available is the same, the claims are the same, and the same debts are brought into *tributio*. If the words quoted apply only to the direct *actio tributoria*, as Erman seems to hold[2], then this must always be the best, since the debts due to *dominus* would be deducted *in solidum* in the other. It is difficult to suppose, as Erman does, that the option is mentioned only with a view to symmetry. The option indeed suggests that the action which is not *tributoria* is the ordinary *de peculio ordinarii*, in which the fund would be different. We have seen above that this leads to an inadmissible result. It is difficult to avoid the impression that the whole thing is an unconsidered dealing, either by Ulpian or by Tribonian, with a topic which did not arise in practice, and that impression is strengthened by the omissions[3].

If a *vicarius* acts as *magister navis* or *institor* for the *dominus*, the ordinary rules apply[4], these actions having indeed no necessary connexion with the household relation. In relation to *actio exercitoria*, we are told that if *vicarius exercet* by authority of *ordinarius*, the *dominus* is liable *de peculio ordinarii*, a plain application of principle, and if *ordinarius* himself is *exercitor* without authority, and *vicarius* is his *magister navis*, the same result of course follows[5]. The only text dealing with the *actio institoria* in this connexion[6] deals with a *vicarius* who is hired from the *ordinarius* and made *institor* by the third party, in which capacity he sells to his own *dominus*. The text observes that this is a sale, for, though the master is not liable to his slave, yet he can possess *pro emptore*, and usucapt. The owner has *institoria utilis* against the hirer. Its *utilis* character may be due to the fact that the transaction was between a man and his own slave[7]. The remedy the

[1] Lenel, Ed. Perp. § 103. [2] *op. cit.* pp. 489, 490.
[3] Did *ordinarius* carry out the *tributio*? He could not unless he had *administratio peculii*, since it involved alienation (*ante*, p. 201). If he did not, did the *dominus*? If so, it is, or may be, his *dolus* which bases the action, and the distinction between the two cases becomes unreal.
[4] 14. 1. 1. 22, *in fin* [5] 14. 1. 1. 22, 23. [6] 14. 3. 11. 8, 12.
[7] In 14. 1. 5, where D contracts with his own slave acting as *magister navis* for X, Paul avoids giving the action a name.

other way is, for analogous reasons, a little indirect[1]. The *vicarius* has no right of action to cede to his principal. Accordingly the text gives the employer an *actio de peculio ordinarii* on the contract of hire of *vicarius*, and *de peculio vicarii* on the mandate to him to sell. It then adds: *pretiumque quo emisti in rem tuam versum videri poterit eo quod debitor servi tui factus esses.* Apparently Julian's point is that as the contract was with his own slave it is not directly enforceable, so that in a sense the rights acquired by him under it are clear profit[2].

The law as to noxal liability for a *vicarius* is not quite clear. Africanus tells us[3] that if a *dominus* has defended a *vicarius* noxally, and has paid the damages, and afterwards freed the *ordinarius, cum peculio*, he may deduct from the *peculium* of the *vicarius* what he paid, since it was *pro capite vicarii*, and so made him a debtor. If there is not enough in that *peculium*, he can deduct from the rest of the *peculium* of the *ordinarius*, but, in that case, only up to the value of the *vicarius*, this being all for which *ordinarius* could have been liable. This text leaves open the question whether the liability is limited to the *peculium ordinarii*. Any such limitation seems unfair to the injured person, and, on the view of them which we have taken, is in no way compelled by the relations between *vicarius* and *dominus*. Pomponius lays down the rule in accordance with this view of the matter. He says[4] the *dominus* is liable either to pay *in solidum* or to surrender. It is the more surprising to find that Paul takes, or seems to take, a contrary view. He is dealing with the case of a *servus exercitor* whose *vicarius* does damage, and he says[5] that *dominus* is liable, *ac si is exercitor liber et hic vicarius servus eius esset ut de peculio servi tui ad noxam dedere vicarium damneris*, with a further remark that if your *ordinarius* was privy to the *damnum*, you are noxally liable on his account. The words, *de peculio ...ad noxam dedere*, look doubtful, since they set up no alternative such as is usually found in noxal actions, and, instead, limit even the surrender to what may be less than the value of the *vicarius*. Accordingly it has been proposed[6] to read *aut noxae dedere*, which avoids that difficulty, explains the language of our text, and has some authority. But this leaves the contradiction absolute. If the text was written as it stands, by Paul, which is not certain[7], it is not clear that there is a contradiction. The text is dealing with the *actio in factum* against *exercitor* for damage by persons employed on the ship[8], which, as Lenel

[1] Lenel, who holds that the *actio institoria* was always *utilis* where *institor* was a slave (Ed. Perp. § 102), thinks the exceptional circumstances account not for the use of the word, but for its retention by the compilers.

[2] For other explanations see von Tuhr, De in rem verso, 260 *sqq.* It may be noted that the text is another authority for direct actions on account of *vicarius*.

[3] 33. 8. 16. *pr.* [4] 15. 1. 23. [5] 9. 4. 19. 2. [6] See Mommsen's text.

[7] The part we have considered is oddly expressed, and the final clause besides being corrupt mere repetition.

[8] *Ante*, p. 122.

says[1], may not have had any special edict, but, in any case, makes the *exercitor* personally liable, and not merely indirectly and vicariously, as in the case of ordinary liability for slaves. That this distinction is real appears from the fact that though, if the wrong-doer is his own slave, he is released by noxal surrender, the jurist finds it necessary to justify this by special reasons[2], instead of letting it go as a matter of course. As the liability is personal to the *exercitor*, it is, of necessity, *de peculio*, if he is an unauthorised slave, for it is not a delict of his. And the power of noxal surrender, being a special privilege, could not increase his liability. Hence the duty of *dominus* is to pay *de peculio* or surrender.

II. *Servus Filiifamilias.*

Of this slave there is little to be said. So far as we are here concerned the *servus castrensis peculii* is the slave of his immediate master[3]. No doubt the same is true for *servus quasi castrensis*, but authority is lacking.

On the other hand, slaves of a *peculium profectitium* are in much the same position as *vicarii*. The few differences are indicated by Erman[4], the most important one being that the various actions *adiectitiae qualitatis* may be brought against the *filiusfamilias*. But here some difficulties arise. It is a matter on which the texts are absolutely silent, and the commentators have made it their own. There is a controversy, on which we will not enter, as to what actions could be brought against a *filiusfamilias*: it is clear that the solution affects the present question. Thus it is said that no action attributing property could be brought against a *filiusfamilias*. Hence the actions which rest on command or authorisation, such as *quod iussu, exercitoria, institoria*, would be available, while *de peculio* and *tributoria* were not, and must be brought against the *pater*. This leads to the odd result[5], that a *filiusfamilias* might be sued *de peculio* for what he had fraudulently removed from the *peculium*, but though the action was the same, the *iudex* must ignore what is still in the *peculium*. This seems most unlikely, and indeed there is nothing in these edicts, so far as they are known, requiring *dominium* of the *peculium* in the defendant. On the other hand there is in the *actiones quod iussu, de peculio, de in rem verso*, and *tributoria* a requirement that defendant have *potestas* over the slave[6].

[1] *op. cit.* § 78.

[2] 4. 9. 7. 4. And it explains the language of our text. Cp. 47. 5. 1. 5. In simple delict the personality of the *ordinarius* would not appear at all.

[3] For the texts, Erman, *op. cit.* 518 *sqq.* [4] *loc. cit.*

[5] Erman accepts it, *op. cit.* 521.

[6] Lenel, Ed. Perp. *ad haec.* The difficulties would be readily met by *actiones utiles*, but we have no information. Whether, on condemnation, he could pay *ex peculio* without *administratio* is disputed. See the authors cited, Erman, *op. cit.* 522. There is no evidence.

There is another case in which texts are equally lacking, and are much to be desired, since it is one which calls for clear distinctions. It is that of *servus bonorum adventitiorum*, of *materna bona* and the like. We are left in the dark. The fact is not surprising since the whole institution is post-classical. According to the main statutes which governed the matter up to the time of Justinian[1], the father had for the time being, a usufruct, but such that he could neither alienate nor pledge[2] the property, but must, on the other hand, bring and defend all actions, and, generally, administer as if he were full *dominus*. This state of things is very anomalous[3], and we cannot tell what it may have meant in our subject. Justinian legislates on the matter with amazing verbosity[4], but he does not help us much. He gives the father certain powers of alienation, in case of need, and emphasises his independence in his administration: he is not to be interfered with in any way by the son. It is clear that he is in a very different position from that of an ordinary usufructuary: it seems likely that he is for all legal purposes owner, subject to such express restrictions as are placed on his powers, and to a general duty to account to the son.

III. *Servus in bonis.*

This case could not occur under Justinian, and accordingly is not discussed in his compilations, our chief source of information. We have therefore no details as to these slaves. Broadly, the *nudum ius quiritium* counted for nothing, except for *tutela*. The *lex* Iunia[5] expressly enacts that the *tutor* of a *latinus impubes manumissus* shall be he who had *ius quiritium* before the *manumissio*, so that *tutela legitima* and right to *bona* would be separated. All that a slave so held acquired he acquired to his owner *in bonis*[6]. The quiritary owner could not free him[7]. On the other hand the bonitary owner could not make him a *necessarius heres*, because the manumission would make him only a Latin, and Latins could not take inheritances[8]. Perhaps he could be instituted as a *servus alienus* could, and then if the ownership had ripened, he would be *necessarius heres*. If he were instituted with other heirs it seems that he would become a Latin, if, and when, some other heir entered[9].

[1] C. Th. 8. 18; C. 6. 60.
[2] C. Th. 8. 18. 7; C. 6. 60. 2.
[3] See Gothofredus *ad* C. Th. 8. 18. 3. He points out a conflict with 28. 8. 7. 2 *in fin.*
[4] C. 6. 61. 6, 8.
[5] Ulp. 1. 19; G. 1. 167.
[6] Ulp. 19. 20; G. 1. 54; 2. 88; 3. 166. Even, so some taught, though he stipulated or received by mancipation in the name of the Quiritary owner, but Gaius declares this a nullity.
[7] C. 4. 49. 11; 7. 10. 5.
[8] Ulp. 22. 8.
[9] If the object were merely to benefit the Latin, this could be done by directing the *heres* to free and hand over the property when the ownership had ripened.

IV. *Servus Latini.*

This case could not occur under Justinian, and we have little information. Latins of all kinds had *commercium*, so that over a large field the ordinary law applies. Colonary Latins could make wills, and thus what was said of the last case applies to a certain extent here. Junian Latins could not make wills, and thus that class of question could not arise in connexion with them. The slave of a colonary Latin could acquire legacies and inheritances for his master: those of a Junian Latin could not, though the legacy or institution was not void but depended on the acquisition of citizenship by the Latin, before it was too late to claim[1]. This at least seems the natural inference from the texts dealing with gifts to the Latin himself[2].

V. *Servus Peregrini.*

Though foreigners were still peregrines, it is practically true to say that, for legal purposes, the class of peregrines had ceased to exist under the law of Justinian. Here too we know but little. A peregrine had no *commercium*. Thus a slave could not acquire for him by *mancipatio*, or by direct testamentary gift[3]. Manumission could make him no more than a peregrine. Subject to such absolute restrictions as that a slave could not take part in any judicial proceeding, or in witnessing a will, he could do by derivation from the peregrine any commercial act that the peregrine could himself do. As a peregrine could himself sue or be sued[4], on the fiction that he was a *civis*, it may be assumed that noxal actions were possible by means of analogous contrivances. *Mutatis mutandis* the same may be said of the actions *de peculio etc.*

[1] G. 1. 23, 24; 2. 110; 2. 275.
[2] Arg. Ulp. 17. 1; 20. 8; 22. 3 *etc.*
[3] G. 1. 25; 2. 218 *etc.*
[4] G. 4. 37.

CHAPTER XI.

SPECIAL CASES (*cont.*). S. HEREDITARIUS. S. DOTALIS. S. DEPOSITUS, COMMODATUS, LOCATUS, IN PRECARIO.

VI. *Servus Hereditarius.*

THE slave who forms part of an inheritance on which an *extraneus heres* has not yet entered, owes his prominence in the texts to the importance of the *hereditas iacens* whose mouthpiece or agent he is. The *hereditas iacens* cannot exist where there is no interval between the death and the succession, for instance in the case of institution of a *suus heres*. Even the development of *ius abstinendi* does not affect this, and the rules as to the acts of slaves, where there is a *suus heres* whose taking is still doubtful, are nowhere fully dealt with[1].

Most of the doubts and difficulties in connexion with *servus hereditarius* are the outcome of differences of opinion as to the nature of the *hereditas iacens*. We cannot deal with this in detail, but a few points may be noted. The *hereditas* is, not exactly a *persona ficta*, for the Romans never use this conception, but a sort of representation or symbol of the *dominus*. It is pointed out in several texts that it is not strictly a *dominus*[2], but *domini loco habetur*[3]; *sustinet personam domini*[4]. In three texts it is actually described as *dominus*. But of these one says, *dominus ergo hereditas habebitur*[5], after having said, *cum dominus nullus sit huius servi*; in the second[6] the words, *hoc est dominae*, are, evidently, an insertion; the third[7], which contains the words *hereditatem dominam esse*, is as it stands unintelligible: it is clear that they are all interpolated. The *hereditas* does not however represent the *dominus* for all purposes: *in multis partibus iuris pro domino habetur; in plerisque personam domini sustinet*[8]. These expressions are sufficiently accounted for by the restrictions, soon to be discussed, on the powers of *servus hereditarius*, and by the obvious fact that many rights and duties failed at death. But they may be connected with another question: if

[1] The cases of conditional *institutio* of a slave of the testator, of the existence of a *suus captivus*, and of a *postumus omissus* may have been similarly dealt with, but there is no authority for applying the theory of the *hereditas iacens* to them. See Pernice, Labeo, 1. 358 *sqq*. As to *peculium castrense*, *post*, p. 258.

[2] 47. 19. 6; 48. 18. 2. [3] 11. 1. 15. *pr*. [4] C. 4. 34. 9. [5] 9. 2. 13. 2.
[6] 47. 4. 1. 1. [7] 28. 5. 31. 1. [8] 41. 1. 61. *pr*.; In. 3. 17. *pr*.

hereditas sustinet personam domini, who is this *dominus*? The heir or the deceased? There was an old opinion that it was the heir: *transit ad heredem, cuius personam interim hereditas sustinet*[1]; *heres et hereditas unius personae vice funguntur*[2]. This view is supported by a number of texts, which make the entry of the *heres* date back to the death[3]. But, notwithstanding traces of dispute in the Digest[4], there can be no doubt that the general rule of later law is that it represents the deceased and not the heir[5]. Thus it is said that where a *servus hereditarius* stipulates or acquires by *traditio*, the act *ex persona defuncti vires accipit*[6].

The *servus hereditarius* is a part of the *hereditas*. As, in strictness, the *hereditas* is not his master[7], we should expect that he might be tortured *in re hereditaria*. And so Ulpian says, holding that so long as it is uncertain to whom the *bona* belong, he cannot be said to be tortured *in re domini*[8]. Several other texts discuss the matter, but do not distinguish clearly between the case where the *hereditas* is still *iacens*, and that in which it is not, or may not be, so. Thus Papinian allows torture of such slaves where it is a question of a supposititious child, or where one claimant is alleged not to be really a member of the family. He allows it because it is not *contra dominos ceteros filios*, but *pro successione*[9]. Clearly he is laying down a limitation to the rule that a slave cannot be tortured *in re domini*. So Paul says[10] that a judge who cannot decide *de fide generis* may torture *servi hereditarii*, the allusion appearing to be to a claim of relationship, irrespective of the question whether there has been *aditio* or not. In fact, where there has been an *aditio*, and the question is whether it is valid or not, it cannot be told till after the event, whether the *hereditas* was actually *iacens* or not.

There was a good deal of legislation on this matter, after classical times. Diocletian declared it settled law[11] that *servi hereditarii* could be tortured, where the allegation was that a will was forged, even though the slaves were freed by it, and also[12] that it was allowed in any claim of the *hereditas*, the reason here assigned being that ownership is doubtful. There was evidently other legislation, for Justinian alludes to past legislation and distinctions, which he abrogates, and he enacts that slaves of the *hereditas*, including those freed by the will, may be tortured, but only if the question is as to specific things and not claims of the *hereditas*, and only if they have the care of these things, and the applicant for

[1] 46. 2. 24. *Eius* may have dropped out before *cuius*. [2] 41. 3. 22.
[3] 29. 2. 54; 45. 3. 28. 4; 50. 17. 138. See Accarias (Précis § 347) as to a possible non-juristic origin of this view. Cicero, de legg. 2. 22. D. 45. 3. 28. 4.
[4] *e.g.* as to stipulation by slave in name of future *heres*. *Post*, p. 260.
[5] 28. 5. 31; 30. 116. 3; 31. 55. 1; 41. 1. 34; C. 4. 34. 9; In. 2. 14. 2; Theoph. *ad h. l.*
[6] This view, and that *testantis personam spectandam esse*, Ulpian in his Disputationes credits to Julian. Such a work was mainly occupied with old *cruces*, 41. 1. 33. 2.
[7] 9. 2. 13. 2; 1. 8. 1. *pr*. [8] 48. 18. 2, *ante*, p. 86.
[9] 48. 18. 17. 2. [10] *h. t.* 18. 4.
[11] C. 9. 41. 10. [12] C. 9. 41. 13.

their torture has taken an oath of good faith[1]. But they cannot be tortured against one who, having given security, has obtained possession of the *hereditas*: *domini loco habetur*[2].

The rules applied in case of damage to a *servus hereditarius* seem, rather illogically, to treat the *heres* as if he was the owner, *i.e.*, to apply the notion that the *hereditas* represents the *heres*, so far, at least, as is necessary to do justice. Thus, though the *actio* Aquilia is available only to the *dominus*[3], and does not pass to a new *dominus*, except by cession[4], we are told that if a *servus hereditarius* is killed or injured, the *heres* has the action on *aditio*, for though no one was owner, *hereditas dominus habebitur*[5]. Unless it can be said to be inherited[6], this seems to make the *hereditas* represent the *heres*. This inadequate justification is eked out by another. We are told[7] that the *lex* does not mean, by the word *dominus*, him who was owner at the time of the injury. There is little doubt, however, that that is what it does mean[8], and in fact the explanation will do only for damage, not for destruction, unless the *lex* means by "owner," one who never was owner[9]. If the slave be the subject of a legacy or *fideicommissum*, and the *heres* kill him before *aditio*, there is no *actio* Aquilia, or *de dolo*, as the *dolus* would give a claim *ex testamento*[10]. If he is killed by another person, similarly, we are told, the legatee can have no action, though the heir has. But if it was merely damage, the legatee on acquiring the slave can call on the heir to cede the action[11]. For theft of the slave no doubt the ordinary rules of *expilatio hereditatis* are applied[12]. For *iniuria* to the slave the *heres* has the *actio iniuriarum*, and in the case of *verberatio* it remains with him, even though the slave be freed by the will[13]. The same rule would apply, *a fortiori*, to other forms of *iniuria*, for *verberatio* was precisely the one in which the feelings of the slave were considered[14]. But that belongs to later law: the present text is from Labeo.

As to wrongs done by the slave to outsiders, the ordinary rules apply, except that, for the moment, there is no one who can be sued. If,

[1] C. 2. 58. 1. 1; 9. 41. 18.
[2] 48. 18. 15. 2.
[3] 9. 2. 11. 6.
[4] 9. 2. 11. 7.
[5] 9. 2. 13. 2. In 5. 3. 36. 2 the point is the same: has the possessor validly entered?
[6] See 36. 1. 68. 2, and 47. 10. 1. 6.
[7] 9. 2. 43.
[8] Monro, Lex Aquilia, *ad h. l.*
[9] The text observes that any other rule would cause intolerable injustice. But an *actio in factum* might have sufficed.
[10] 4. 3. 7. 5; 30. 47. 4, 5. *Ante*, p. 18. If it were after entry, he might be liable to legatee *ex* Aquilia, 9. 2. 14.
[11] 9. 2. 15. *pr.* The case seems to be treated *pro tanto* as one of principal and accessory, 33. 8. 2. Paul says (36. 1. 68. 2) that if there were a *fc. hereditatis*, and a slave was damaged, the action did not pass to *fideicommissarius*, as it was not *in bonis defuncti*. As Pernice remarks (Sachbeschäd. 189) this denies merely the *ipso facto* passing of the action. He thinks the text refers to damage after *aditio*, but this is far from clear and does not seem material. So far as the heir's right is concerned, the same rule applied to *servi corruptio*, 11. 3. 13. 1. For an analogous case see 36. 1. 75. *pr.*
[12] 47. 19. The exceptional cases in which *furti* lay have no special relation to slaves, 47. 2. 69—71.
[13] 47. 10. 1. 6, 7.
[14] *Ante*, pp. 79, 80.

being *pure legatus*, he steals from the legatee, no question arises. If he steals, or damages, property of the future heir, then, in the same case, the legatee will be liable to noxal action, since the man never belonged to the heir[1]. Analogous rules apply if the slave, freed *pure*, does the act before the entry of any heir[2]. If he is freed conditionally, special rules apply which will be considered later[3]. If he is left conditionally *per vindicationem*, there will be no action on the Sabinian view that in the meantime he belongs to the heir: on the other view the heir will have his remedy. The Sabinian view appears to have prevailed, though the matter is not absolutely clear[4]. If such a slave steals from one of coheirs before *aditio*, there can be no *actio furti*, but the matter is adjusted in the *iudicium familiae erciscundae*, the simple value, or in the alternative the slave, being allowed[5]. If he is left *per damnationem*, he belongs for a time to the heir, who can thus have no *actio furti*[6].

If a *servus hereditarius* takes *res hereditatis*, since these cannot be stolen, there can be no noxal *actio furti*, though there may be *actio ad exhibendum*[7]. If he is *legatus* in such a way that for a time he is the heir's, there can be no such remedy, any more than if he were to stay in the *hereditas*. If he is freed there is no civil remedy, but there is a special edictal procedure. It is provided that if a slave, freed by the will, damages the interest of the *heres* in any way, *dolo malo*, before *aditio*, he is liable to an action for double damages within an *annus utilis*[8]. The reason assigned for the creation of this action is that there can be no civil remedy, and he knows he is in no danger of being punished as a slave. Provided his act was dolose, for negligence is not enough, the nature of the wrong is immaterial[9]. The action is available to other successors as well as the heir, and if a *pupillus* is heir, and dies, the right arises in the interval, before the entry of the substitute, if the slave is to be free only in that event[10]. Even if the liberty is fideicommissary, and unconditional, this action lies, as the man cannot be treated as a slave[11]. But it does not lie if there is any other delictal remedy, though it may coexist with a *vindicatio*, or other action *ad rem persequendam*[12]. If the slave is freed only conditionally, since he can in the meantime be punished as a slave,

[1] 9. 4. 40; 47. 2. 65.
[2] 9. 2. 48; 47. 2. 44. 2.
[3] *Post*, Ch. XXI.
[4] See texts cited by Huschke, *ad* G. 2. 195, 200. Cp. Girard, Manuel, 922, and C. 6. 43. 3. 3.
[5] 10. 2. 16. 6.
[6] 30. 70. *pr.*, 2; *ante*, p. 125.
[7] 9. 4. 40.
[8] 47. 4. 1. *pr.* Several concerned could be sued together: payment by one did not release the others, *h. l.* 19.
[9] 47. 4. 1. 1, 2, 14. If it was theft the *res* need not have been the property of the testator, if its safety concerned the *hereditas*, *e.g.* things lent or pledged to the deceased, or held in good faith by him, and *fructus*, *fetus* and *partus* born after death, *h. l.* 10, 11, 13.
[10] *h. l.* 9. In this case it covered acquisitions by *impubes*, *h. l.* 12. These rules as to *impubes* are possibly due to Tribonian. Cp. Eisele, Z. S. S. 7. 18.
[11] *h. l.* 7. A juristic extension.
[12] *h. l.* 16, 17.

the action does not lie[1], even though the *heres* does not know of the wrong till he is free[2], though Ulpian is cited as quoting Labeo to the effect that if the condition supervenes suddenly on the act, the action lies, since there was no practical chance of punishing him[3]. The absence of any civil remedy, as we are told, caused the introduction of the action, and this absence was due to the conception of the *hereditas* as at least representing the *dominus*[4], so that the *crimen expilatae hereditatis* is barred.

All this would apply equally well to the case of a slave *pure legatus*, but the Edict[5] deals only with the freed slave. There is, however, a text which says that the action is available if the slave is *pure legatus*, and adds that it lies if the ownership in him is changed[6]. This is obscure, but it is clear that the case is not within the actual words of the Edict—*hanc actionem indulgendam*. As extant, the text says the action is to lie if ownership is changed or lost, or liberty is gained *post intervallum modicum aditae hereditatis*. The form and content of this text suggest that it may be a pure insertion of the compilers. However this may be, it is certain that its sweeping generality cannot represent the law, for it gives the action where liberty is not attained. Mommsen[7] corrects by omitting *vel libertas competit*, so that the acquisition of liberty is implied in all the cases it deals with, but this alteration makes the words *post intervallum modicum, etc.*, apply to the transfer of ownership. This is inconsistent with what has been said, and moreover would make the rule apply where the *heres* himself sold the slave[8]. The alteration of *vel* into *et* before *libertas competit* brings the new rule into exact line with the principle of the Edict, and the scribe's error would be a very likely one in view of the two preceding expressions with *vel*.

The *hereditas* being *pro domino*, the slave can acquire for it[9]: his acquisitions of whatever kind belong to it, and therefore go to the *heres postea factus*[10], even though the slave is *legatus*[11]. What he acquires is reckoned in *iudicium familiae erciscundae*, and can be recovered by *hereditatis petitio*[12]. As to his acquisition of possession, there were disputes. In one text it is said[13] that if such a slave buys, and acquires possession, and then loses it again, the *heres* on entry has the Publician, *quasi ipse possedisset*, whether the dealing was *peculiari*

[1] *h. l.* 3. [2] 47. 4. 2. [3] 47. 4. 1. 4, 3.
[4] 47. 4. 1. 1, 15. [5] 47. 4. 1. *pr.*; Lenel, Ed. Perp. § 135.
[6] 47. 4. 1. 5, 6. [7] *ad h. l.*
[8] The action cannot lie against legatee, for if it is a debt purely due from *peculium* (15. 1. 27. 1), *heres* should have deducted and can now condict (*ante*, p. 229). If it be regarded as noxal it is excluded as the *crimen expilatae hereditatis* is.
[9] 41. 1. 61. *pr.*; 45. 3. 16; 49. 15. 29.
[10] In. 2. 22. 2; 3. 17. *pr.* [11] 31. 38.
[12] 10. 2. 12. 1. [13] 6. 2. 9. 6, 10.

nomine or not. In view of the controversy as to whether legal possession was needed for the Publician or not, the text does not prove that his possession is the heir's: it rather suggests that it is not, except *in re peculiari*. It is clear that such a slave can continue and complete *usucapio* already begun, but this is of little importance, since all that is needed for that, in the case of a *hereditas*, is that there be no adverse possession[1]. Apart from this, even *in re peculiari*, the matter is not clear. In two texts of Paul and Julian in which the power is asserted the language is obscure and the remark may be compilers' work[2]. Papinian tells us, in one text[3], that if such a slave begins *tenere peculiari causa, usucapio* does not begin till *aditio*, for how, he asks, can that be usucapted, which the deceased never possessed? In another text[4] he tells us that if such a slave *comparat, usucapio* begins to run, but this is *singulari iure*. This is so like Papinian's own way of looking at acquisition of possession *peculii causa*, as allowed on utilitarian grounds, and not based on principle[5], that it seems necessary to understand this text only of "peculiar" acquisition. It then contradicts the other. Mommsen suggests that a *nisi* has dropped out of the text first mentioned[6], so that the denial would apply only to extra-peculiar acquisition[7].

Legacies and *institutiones* can be made to a *servus hereditarius*, owing to the rule that *servi persona inspicienda est et in testamentis*[8]. But though he can be instituted, he cannot enter[9]. *In quibus factum personae operaeve substantia desideratur nihil hereditati adquiri potest*, and therefore, *quia adire jubentis domini persona desideratur, heres exspectandus est*[10]. It follows that he never really acquires a *hereditas* to the *hereditas*, but only to the *heres*. Thus it does not form part of the *hereditas*[11]. The *institutio* depends for its validity on the *testamenti factio* of the deceased, whom the *hereditas* represents, not on that of the *heres*, though, of course, the *heres* will not get it unless qualified to take, or beyond the proportion he is qualified to take[12].

A *miles filiusfamilias* can make a will. This creates a sort of quasi-inheritance, the existence of which depends on entry. If no one enters it is *peculium* and belongs to the *paterfamilias*[13]. Hence arise some difficult cases. Acquisitions by legacy or stipulation, by a

[1] 41. 3. 20, 31. 5, 40. [2] 41. 2. 1. 5; 44. 7. 16. [3] 41. 3. 45. 1.
[4] 41. 3. 44. 3. [5] 41. 2. 44. 1. [6] *ad* 41. 3. 35. 1.
[7] It is surprising that the titles dealing with possessory interdicts do not discuss dispossession of *servi hereditarii*.
[8] 28. 5. 31. 1, 65; 30. 116. 3; 31. 82. 2.
[9] 28. 5. 6. 2, 21. 1, 53. [10] 41. 1. 61. *pr.*
[11] Where a *heres coactus*, on entry, ordered a *servus hereditarius* to enter on a *hereditas* left to the slave, he acquired and need not hand it on to the *fideicommissarius*, 36. 1. 28. 1.
[12] 28. 5. 53; 31. 55. 1. [13] 49. 17. 14. *pr.*

servus castrensis where there is a will, but no one has yet accepted, go like those of *servus hereditarius*, if an heir enters, but if not, they go to the *pater* Thus if a usufruct is left to him it takes effect for *heres* or father The event does not transfer it from one to the other[1] it vests in one or the other[2] according to the event So if a thing is stolen from the slave the *heres* if he enters has no *actio furti*, for *furtum hereditati non fit*, but if he does not enter the father has the action[3]. There were clearly some doubts, but the result of this way of looking at the matter is that the father has no interest in the meantime Thus where a slave, common to X and a *peculium castrense*, stipulates after the death of the *miles*, and before the heir has accepted, X acquires the whole For, the text says, there is no real *hereditas*, but only, by imperial constitutions, a right of testation, which becomes a *hereditas*, then and then only when the *heres* has accepted Accordingly it cannot be acquired to the *hereditas* the fact that no right is allowed to the father, to take half, expresses the view that in the meantime he has nothing in the property[4] But this reasoning would lead to the view that all transactions of a *servus castrensis peculii* in the interval are void, if the devise is not accepted Papinian, in fact, raises this question, in relation to stipulation and *traditio*, and decides that notwithstanding the father's interim lack of interest *paterna verecundia* compels the view that such things are acquired to him[5] The text adds that if a legacy is left to such a slave, though, *propter incertum*, it is for the time being acquired to no one, it vests in the father if the will does not operate[6] Another text, of Tryphoninus[7], discusses the case of a legacy to a *servus castrensis peculii* vesting during the heir's deliberation, the legacy being under the will of a person in relation to whom the father was an *incapax* Certainly, says the writer, it will go to the *heres* the point of the observation being, apparently, that here there can be no question of its having vested in the father in the meantime, and only shifting at entry of the heir He has already remarked that the *imago successionis* has prevented the father's ownership of the slave from existing in the interval He uses the same case to exclude the notion of a pendency of *dominium*, but it only proves that the gift to the *heres* can take effect though there be no pendency. the real objection to the notion is that the very idea of *hereditas* implies

[1] *h t* 19 5
[2] 41 1 33 *pr* Ulpian, adopting views of Scaevola and Marcellus
[3] 41 1 33 1 [4] 45 3 18 *pr*
[5] 49 17 14 1 The text does not expressly connect the rule with the principle that stipulation *ex praesenti vires accipit*
[6] 49 17 14 2 The text adds—*cum si fuisset exemplo hereditatis peculio adquisitum, ius patris hodie non considerabatur* The words are as they stand unintelligible See the notes in Otto and Schilling's translation See also Pothier, *ad h l*
[7] 49 17 19 5

that in the meantime the property does not belong to anyone, which is inconsistent with the notion of pendency, as applied elsewhere[1]

Gifts of usufruct to *servus hereditarius* create difficulties They cannot be completely acquired because *ususfructus sine persona constitui non potest*[2] For the same reason, such a slave cannot stipulate for one, even conditionally[3]. But there may be a legacy of usufruct to him, and as the *persona* is necessary, *heres exspectandus est* it does not cede till entry of the heir, so that there can be no question of its failing then, *quasi mutato domino*[4] The *aditio* here mentioned is that on the *hereditas* to which the slave belongs the rule is independent of the fact that legacy of usufruct never cedes till entry under the will by which it is created In a certain will a slave is legated Before *aditio*, another inheritance, under which a legacy of usufruct is left to this slave, is entered on The legacy does not cede until the inheritance, in which he is, is entered on, and will fail if he dies in the meantime On entry it will go to the then owner of the slave[5]

Before leaving this branch of the subject, it is necessary to consider a group of texts, the gist of which is that the *heres* cannot acquire, by a *servus hereditarius*, what is part of the *hereditas*. At first sight these texts seem merely to lay down the truism that as *heres* is not owner till entry, the acquisition of things by *servi hereditarii* cannot be acquisition to him And this is the only obvious meaning which can be given to the texts which apply the rule to acquisition of the *hereditas* or part of it[6] But another text[7], dealing purely with possession, speaks of the rule as having been laid down by the ancients (*veteres putaverunt*), an expression not likely to have been used about so obvious a rule And the text is followed by remarks which shew the case contemplated to be that of acquisition of *res hereditariae* after entry, *i e* solely a question of possession since ownership in such things is acquired by the fact of entry, the slave having of course ceased to be a *servus hereditarius* in the technical sense Other texts, which shew that the rule is applied only to slaves acquired by the strictly hereditary title, deal also expressly with possession Thus of slaves legated to us we can acquire the possession of all by one, as well as if they had been given or sold

[1] See Otto and Schilling *ad h l* See also *post*, Ch XVI [2] 41 1 61 1
[3] Vat Fr 55, 60, D 45 3 26, *ex praesenti vires accipit stipulatio quamvis petitio ex ea suspensa sit*
[4] *Ib* 7 3 1 2 7 4 18, *i e* in the slave the remark is belated in the Digest *Ante*, p 152
[5] *i e* the legatee If the slave had not been legated it would have belonged to the *heres* Text doubtful but this seems to be the sense There was another difficulty Acquisitio is by *servi hereditarii* were divided among coheirs (*post* Ch XVI) But no part of this a usufruct could be separated from the person to whom it was given,—*nec a personis discedere potest* It could not be divided by the *iudex* in *familiae erciscundae* if the heirs would not hold it in common, he must arrange for enjoyment and compensation with security 10 2 15, 16 *pr* Text doubtful
[6] 29 2 43, 41 1 18 As to common slaves, *post*, Ch XVI [7] 41 2 1 16

to us[1]. And where A is *heres pro parte* and a slave is legated to him, he can, on *aditio*, acquire by that slave possession of a *fundus hereditarius*[2] And where A has sold a slave to B, or owes him a slave in any way, and delivers him after B's death to B's heir, the heir can acquire possession of *res hereditariae* through him, precisely because he was not acquired *iure hereditario*[3] When it is remembered first that the rule is an ancient one[4], so ancient indeed that the classical jurists give no reason for it and treat it as a technicality to be confined within as narrow limits as possible, secondly, that every text which does not apply it to the *hereditas* or part of it applies it expressly to possession, and, thirdly, that *hereditas* was susceptible of possession and usucapion in early law[5], it seems safe to regard the rule as applying properly to acquisition of possession alone[6]

Even so limited, what is the *rationale* of the rule? No doubt difficult questions might arise in the absence of such a rule[7], but the same difficulties would arise in the case, for instance, of the slave *legatus* to the heir Moreover, the rule has a technical look about it, and is hardly likely to rest on a purely utilitarian basis The rule contemplates things possessed by the deceased, which, as we know are not possessed by the *heres* till he has actually taken them[8] It appears to rest on the unity of the inheritance a taking by one of the slaves (whether authorised or not) of a thing in the possession of the *dominus* or of another slave would have effected no change in possession during the life of the ancestor, or while the *hereditas* was *iacens* The same act is not allowed to produce a different effect merely because the ownership of the *hereditas* has changed

We have anticipated some of the rules as to contract by a *servus hereditarius* It is laid down that he cannot contract in the name of his late owner there is no such person[9] The question whether he can stipulate in the name of the future heir is much debated, the decision really turning on the question already considered whether, and how far, the *hereditas* can be said to represent the future heir[10] Cassius, Gaius and Modestinus are reported as holding that he can do so, on the ground, in the case of the first two, that *aditio* relates back[11] But the weight of authority is the other way we may take the rule

[1] 41 2 1 16 [2] 41 2 1 17 [3] 41 2 38 2
[4] 41 2 1 16 [5] G 2 54
[6] The texts are concerned only with acts of acquisition by the slave they do not for instance mean that if I acquire possession of one of the slaves I do not thereby acquire possession of his *peculium* which he possesses It would perhaps but this is less probable not require an independent act of acquisition of even *res non peculiares* which the slave now possessed by me had acquired to his late owner and held through the interval
[7] *e g* if *heres* gave a general *iussum* to all the slaves to take possession
[8] 41 2 23 *pr*
[9] 12 1 41 45 3 18 2, In 3 17 1 [10] *Ante*, pp 252 3
[11] 45 3 28 4 35

as being that he cannot[1] Of course he can make a stipulation or pact *in rem*[2], or in the name of a fellow slave, or of the *hereditas*, or with no name at all[3] So in bilateral transactions If he grants a *commodatum* or a *depositum*, the *heres* can recover the thing, and has the ordinary rights of action[4]

The *hereditas* is released by an *acceptilatio* to such a slave on a promise by his deceased master[5]

Promises in certain forms by way of surety are subject to special time limits If a promise is made to a *servus hereditarius* and security taken by way of *fideiussio*, it is not clear when time begins to run Javolenus holds[6] that it ought to begin at once, since a plaintiff's incapacity to sue, for which the surety is in no way responsible, ought not to increase the latter's liability Venuleius[7] records a doubt, and cites the contrary view of Cassius that in such a case, time runs only from the day when action became possible The form of the hypothesis suggests that the texts were originally written of *fidepromissores*, who were released in two years, by the *lex* Furia This is an express release by statute for a particular case It is not necessarily governed by the general rules of prescription of actions hence the doubt

The *heres* is liable *de peculio* on transactions by *servus hereditarius*, *e g* sale[8] though he may deduct, as a debt due to the *dominus*, any damage done to the *hereditas*[9] In *quod iussu*, analogy suggests that a contract made after the death of a *dominus* on his *iussum*, does not bind the *heres in solidum*, as *iussum*, like mandate is in most cases revoked by death, at least as against one who knew[10] The same question arises in connexion with *actio institoria* Ulpian says[11] that if a man has appointed his slave *institor*, and died, the *heres* is liable on contracts made with him after the death, by one who did not know of it This expresses the same rule, but Paul says[12], very explicitly, that the action lies, even though the other party knew of the death, and the *heres* was mad so that there could be no question of his having authorised it He cites Pomponius, who says that a creditor who contracted with a going concern ought not to be defeated by knowledge that the *dominus* was dead This way of looking at the matter makes the *hereditas* represent

[1] 2 14 27 10 45 3 16 18 2 28 4 [2] 2 14 27 10
[3] In 3 17 *p* D 45 3 18 2 45 3 30
[4] 16 3 1 29 C 4 34 9 *S he editarius* lent money and took a pledge and handed the pledge back to the debtor in *precarium* The *precarium* was valid *i e* the thing could not be usucapted by the debtor 44 7 16 This has a meaning as it stands as the thing might not have been his own (see however Gradenwitz Interp 38) but it was originally written of *fiducia* in which the ownership passed He could not reacquire it by *usureceptio* As it stands in the Digest the rule is confined to *res peculiares* of which alone the slave could have acquired possession The limitation is added presumably by the compilers it would not be needed in the other case
[5] 46 4 11 2 [6] 44 3 4 [7] 45 3 25
[8] 15 1 3 *pr*, 18 5 8 [9] 15 1 27 1 Also in *de in rem verso* See 15 1 3 1
[10] See Roby Rom Priv Law, 2 122
[11] 14 3 5 17 [12] 14 3 17 3

the deceased, but emphasises the fact that credit is given to the business rather than to the owner, and avoids the paralysis of business which would result from adoption of the view that death ended the liability.

Africanus discusses the case[1] of a man freed and *ex parte heres* who, not knowing his status, goes on with his dealings. He is not a *servus hereditarius*, but on the facts he is a *bona fide serviens* of the other heirs, and the case is dealt with on those lines. What would have been the result if the heirs had known? So far as contractual rights and liabilities are concerned, it seems that the *heredes* could not be liable except so far as the facts could be brought within the field of *actio institoria*. And they would have the *actio negotiorum gestorum contraria* against him, since there is nothing on the facts involving any disqualifying fraud. But, directly, they would acquire nothing through him[2].

All rights resulting from transactions of *servus hereditarius* depend on the entry of the heir. They are in a sense conditional, and fall to the ground if there be no *heres*[3]. But any *heres* suffices. A slave who was *heres* under a substitution which took effect was liable *de peculio et in rem verso* on his contracts made in the interim[4].

As to the actual result where no heir enters, we have no information. The property will pass to the fisc, subject to the rights of creditors. The fisc can vindicate what the man has purported to convey, and must give back what has been given to him. But this will not do justice in all cases. The slave may have done damage, for which a noxal action would have lain against the heir. Goods handed over, under one of his contracts, may have been consumed. Is the fisc liable in this and similar cases[5]? We are not told, and, indeed, except in regard to freedom of slaves, we are told very little as to the obligations of the fisc in such cases, though there is some detail about its rights. Of course if no heir enters, it is usually because there is no profit in it, and nothing will go to the fisc, but this would not always be so—there must be cases in which no heir is discoverable[6].

VII. *Servus Dotalis.*

The special rules relative to *servi dotales* are due mainly to the peculiar double ownership in *dos*[7]. We know that the *vir* is owner,

[1] 12. 1. 41. See *post*, p. 332.
[2] In any case payment to him in good faith on previous transactions discharged the debtors, and gave the other heirs a claim on *negotia gesta*. The man not having received the money as *heres*, *familiae erciscundae* was not available. If in the meantime the man had purported to lend money, the property did not pass and it could be vindicated.
[3] 45. 1. 73. 1. [4] 15. 1. 3. 1.
[5] Probably not on the contract, but on the delict: *noxa caput sequitur*.
[6] Forfeiture (34. 9) might bring the rules into operation.
[7] The wife's interest is a statutory limitation, not based on principle. See Windscheid, Lehrb. §§ 492, 496. 3.

subject to a duty of return, in certain events, at the end of the marriage. Thus a slave given in *dos* is alienated, for the purpose of making *annalis* the *actio de peculio*[1]. On the other hand, the wife has a definite though postponed interest in the *dos*: *quamvis in bonis mariti dos sit, tamen mulieris est*[2]. But this does not exactly state the case: in fact it cannot be stated in terms of any other situation. The rules are, to a great extent, the product of compromises. The *vir* has more than bonitary right: he has *vindicatio*, even from the wife[3], and thus, though he somewhat resembles a usufructuary, his rights are really much greater. But the wife's interest is not absolutely postponed: there are several texts which shew that she can take steps to protect it.

The law of noxal liability might be expected to provide problems arising from this state of things. Yet the Sources yield apparently only one text dealing with the matter: it tells us[4] that if a dotal slave steals from the husband, the wife is liable to compensate, with a right, if she did not know his quality, to surrender the slave. We have already seen[5] that this is not really noxal liability, and we must not infer that the *vir*, having this claim, is not noxally liable. Certainly the slave is not *in potestate uxoris*. The *vir* has the ordinary powers of owner, and thus can manumit, and becomes the patron of the *libertus*[6]. The *lex* Julia, prohibiting alienation of land, says nothing of slaves; they may thus be alienated, their price being part of the *dos*, and the *vir* being accountable for wasteful dealing. In the same way the wife's interest in the slave leads to the rule that the *vir* is liable for illtreatment of him, even though he habitually illtreats his own slaves[7].

As to acquisitions the general rule is that the *vir* is entitled to fruits without accounting and to what is acquired *ex operis*, or *ex re mariti*, but other acquisitions are part of the *dos*[8]. *Partus ancillarum* are not fruits[9], and thus are dotal and do not belong absolutely to the *vir*[10]. But if, as is often the case, the slaves have been received at a valuation, and their value is to be returned, this is looked at as a sort of sale, and as the risk is with the *vir*, he may keep *partus* and other accidental accretions[11], the rule applying equally if the wife has the choice between the slaves and their value[12]. If the *vir* manumits a slave the *iura in bonis*

[1] 15. 2. 1. 6. [2] 23. 3. 75; 24. 3. 24. 5, *alienos*. See Windscheid, *op. cit.* § 496. 3.
[3] 25. 2. 24. She has no such right, C. 3. 32. 9; 7. 8. 7.
[4] 25. 2. 21. 2. [5] *Ante*, p. 124.
[6] C. 7. 8. 7; D. 38. 16. 3. 2. There is a duty to account. *Post*, Ch. xxv.
[7] 24. 3. 24. 5. His liability for this wrongful conduct is not affected by the rule that he need shew in relation to *res dotales* only *diligentia quam suis*.
[8] 15. 1. 19. 1; 24. 3. 67. As to what is *ex operis*, *post*, p. 342.
[9] *Ante*, p. 21.
[10] 23. 3. 10. 2; *h. t.* 69. 9, which remarks that a pact varying this and making them common, would be void as a gift between *vir* and *uxor*.
[11] 23. 3. 18, 10. 4; 24. 3. 66. 3. As to the history of this notion of sale, Bechmann, Dotalrecht, 2. 188. [12] Vat. Fr. 114.

will normally form part of the *dos*[1]. This is inevitably so, if the manumission is without consent of the wife[2]: but there are other possibilities. If the wife assents, and intends a gift to her husband, then, since gifts between them are allowed *manumittendi causa*[3], the slave is in fact the husband's and the *dos* has no claim on the *iura patronatus*[4].

The husband's right to fruits depends on the existence of the marriage, and thus everything which is acquired by a slave, given in *dos*, before the marriage takes place, or after its end, is part of the *dos*[5]. As to legacy, *hereditas*, and, probably, other gifts, acquired during the marriage, there is an apparent divergence of opinion. We are told by Julian[6] that as *aditio hereditatis* is not *in opera servili*, any *hereditas* on which a dotal slave enters belongs to the *dos*. Modestinus seems to agree[7]. And Paul[8] seems to say that any land left to a dotal slave is dotal. On the other hand, Pomponius[9] holds that such things are dotal, *si testator noluit ad maritum pertinere*. And Ulpian[10] says that the gift is not dotal, *si respectu mariti heres sit institutus vel ei legatum datum*. And Julian himself says[11] that they go back if they are acquired before the marriage or after its end, which seems to imply that they would not necessarily do so, if acquired during the marriage. It must also be remembered that Julian[12] in another connexion tells us that an institution of a slave, *propter me*, is an acquisition *ex re mea*, which, if applied to dotal slaves, gives the same result. It is likely that Julian's remarks as to acquisitions not actually during the marriage do not concern our case, but that he is laying down the rule that even though, strictly, *dos* exists only during the marriage, the husband's duty to account is the same at any time when he is holding it as *dos*[13]. The true view of the texts seems to be that such things are as a general presumption, in the *dos*[14], but that if the gift is expressly with a view of benefiting the *vir*, then it is *ex re eius* and he acquires it absolutely[15]. But it is still possible that this application of the conception of acquisition *ex re* was a novelty in Julian's time.

We are told[16], but the remark must be confined to cases in which the acquisition is dotal, that though *aditio* is always at the command of the *vir*, the wife must be examined before witnesses, lest she be prejudiced. If they both wish to refuse, the *vir* can safely do so. If she wishes to

[1] 48. 10. 14. 2. [2] 24. 3. 61.
[3] 24. 3. 24. 4, 62, 63. [4] For details and other cases, *post*, Ch. XX.
[5] 23. 3. 47; 24. 3. 31. 4. Bechmann, *op. cit.* 2. 187, thinks, with the Basilica, that in 47 it is a *servus aestimatus*.
[6] 29. 2. 45. *pr.*, 1. [7] 24. 3. 58. [8] 23. 5. 3.
[9] 23. 3. 65. [10] 15. 1. 19. 1. [11] 23. 3. 47; 24. 3. 31. 4.
[12] 29. 2. 45. 4. [13] Demangeat, Fonds dotal, 180 *sqq*.
[14] 29. 2. 45. *pr.*, 1; 24. 3. 58; 23. 5. 3. [15] 15. 1. 19. 1; 23. 3. 65; 29. 2. 45. 4.
[16] 24. 3. 58.

accept but he does not, he may convey the slave to her to be reconveyed to him after entry; in this way he runs no risk[1].

A single text[2] seems to be all the existing authority as to the *actio de peculio, etc.* in the case of a dotal slave. Its decision starts evidently from the fact that *vir* is owner of the slave. There may be two *peculia*, but, for the purpose of the *actio de peculio*, it is immaterial whether the contract was in connexion with the dotal part of the *peculium* or the other: all alike is liable, as belonging to the *vir*. It follows that all debts due to him, or to his household, may be deducted. But when the time comes for settlement of accounts, he must charge himself with what, on principles already laid down, concerned him, and charge to *dos* what was paid on dotal account[3]. Similar rules would apply to *quod iussu* and *de in rem verso*. But as to *tributoria* and *exercitoria* or *institoria* it may be doubtful. For all the profit of any transaction of the slave results from his *operae*, and goes to the *dominus*, who should therefore bear any loss. The title[4] dealing with his right to deduct says nothing about damages in such actions. He cannot charge for the maintenance of the thing, even though the money expended was not directly with the aim of turning it into profit, but for the general preservation of it[5]. Moreover so far as fungibles in the *peculium* are concerned[6], they are at his risk: he must give them back to the same amount, whatever has happened in the meantime.

VIII. *Servus Commodatus, Locatus, Depositus.*

As such a relation gave the holder no right in the slave, but only a right, *ex contractu*, against the *dominus*, there is not much to be said about the case. The holder was not noxally liable for what the slave did[7]. We have already discussed the historical development of the law as to his rights on delicts committed by the slave, in respect of him or his property, and of damage, by a slave of the borrower, to a thing lent[8]. If such a slave did harm to a third party, and the owner was sued, he had no regress, *ex locato, etc.* The liability of the borrower for damage to the slave is governed by the ordinary law of contract: the contractual relation would not in any case bar the *actio servi corrupti*. There are, however, special cases in which a man might be liable for the wrongs of

[1] If she wished to refuse but he ordered *aditio*, he was no doubt responsible for any resulting loss.
[2] 15. 1. 19. 1.
[3] The rule is simple and consistent, but there had been doubts. Ulpian brings the analogous cases of usufruct and *bonae fidei possessio* into discussion.
[4] 25. 1. [5] *e.g.* 25. 1. 16. [6] 23. 3. 42.
[7] 9. 4. 22. *pr.*; 13. 6. 5. 13. [8] *Ante*, pp. 124 *sqq*.

slaves in his employ, even though his right in them were only a *ius in personam*. All these cases seem to be of praetorian origin[1].

Such holders were liable on the contracts of such slaves whom they had appointed *institores* or *magistri navium*, and though they did not acquire contractual rights through them, they could sue the *dominus*, *ex commodato* or *ex conducto*, for cession of the actions which had been acquired through them[2]. It is sometimes held[3], not on textual authority, but by reason of the inconveniences which would be caused by the contrary rule, that a slave hired to serve as *institor* or *magister navis* acquired *dominium* to his employer. The difficulty undoubtedly exists. Yet the refusal to allow acquisition of actions through his contracts, the fact that the only known legal results of the relation are praetorian, the absence of any reference to this case in the passages and titles which deal with acquisition through others, and the fact that one held *in precario* acquired nothing to his holder[4], make it difficult to accept this opinion. The case of *servus fructuarius* so appointed is no authority: the text means that this is an acquisition *ex re*. There is however no reason to think a *servus alienus* was often so appointed[5].

IX. Slaves held *in Precario*.

As a holder *in precario* is commonly assimilated to a *commodatarius* it is not surprising that we find little mention of the rights and liabilities of *precario tenens* on acts of the slave. A few remarks are all that is possible. *Precarium ancillae* is, by a presumption of intent, *precarium partus*[6]. The *tenens* is not noxally liable[7], and has no *actio furti* if the slave be stolen, at any rate until the interdict *de precario* has been issued, when he becomes liable for *culpa* (*custodia*), and so has the same interest as *commodatarius*[8]. Presumably the *dominus* is liable on delicts done by the slave to the *tenens*[9]. The *tenens* can acquire nothing through the slave[10] and, probably, is liable on his contracts only when any other *extraneus* would be.

[1] *e.g.* the edicts as to extortion by *familia publicani*, and as to liability of *nautae*, *caupones*, *etc.* *Ante*, pp. 120 *sqq*.
[2] 14. 3. 12; 14. 1. 5. *pr*.
[3] Salkowski, Sklavenerwerb, 50. He gives a striking picture of the inconveniences.
[4] 41. 1. 22.
[5] 7. 8. 20. It did, however, happen. See *e.g.* 14. 3. 11. 8.
[6] 43. 26. 10.
[7] 9. 4. 22. 1.
[8] 47. 2. 14. 11.
[9] Unless such liability was barred by something in the origin of *precarium*, which some writers connect with *clientela*, 47. 2. 90. See Ihering, Geist, § 19.
[10] 41. 1. 22.

CHAPTER XII.

SPECIAL CASES (*cont.*). SERVUS FUGITIVUS. S. PRO DERELICTO. S. POENAE. S. PENDENTE USUFRUCTU MANUMISSUS. S. PIGNERATUS MANUMISSUS.

X. *Servus Fugitivus*.

Broadly speaking a *fugitivus* is one who has run away from his *dominus*. The word is used, however, in two senses which must be kept distinct. One of the regular warranties exacted on the sale of a slave is that he is not *fugitivus*[1]. This means that he has never been a *fugitivus* in the above sense. It is a breach of this warranty, if he be *fugax*, given to running away—which is itself a punishable offence[2]. For the purpose of the peculiar incapacities and penalties we have to consider, it is necessary that he be in flight at the present moment, and this is what is ordinarily implied in the expression *servus fugitivus*. It is in connexion with sale that the private law deals most fully with these slaves, and it is there we must look for an exact answer to the question: what is a *fugitivus*? He is one who has run away from his master, intending not to return. His intent is the material point, a fact illustrated by two common cases. He runs away, but afterwards repents and returns: he has none the less been a *fugitivus*[3]. He runs away and takes his *vicarius* with him: the *vicarius* is not a *fugitivus*, unless he assented, in full understanding, and did not return when he could[4]. It is not essential that he be off the property of his master[5], if he be beyond control[6], and thus one who hides in order to run away when he can is a *fugitivus*[7]. He does not cease to have been a *fugitivus* by renouncing his intention, *e.g.* by attempting suicide[8]. It is not essential that the flight be from the *dominus* in physical possession: it may be for instance from a pledge creditor[9], or from a *commodatarius*, or a teacher, if he do not run to the master[10]. Flight

[1] *Ante*, p. 55.
[2] C. Th. 2. 1. 8.
[3] 21. 1. 17. *pr*., 1.
[4] 21. 1. 17. 7.
[5] 21. 1. 17. 8, 15.
[6] *h. l.* 9, 13.
[7] 21. 1. 17. 7. The fact that the flight was the result of bad advice is no defence, *h. t.* 43. 2.
[8] 21. 1. 17. 5, or by going to the statue of the Emperor or to the sale yard, *h. l.* 12. Conversely it was in itself no *fuga* to run to these places or to hide from punishment, or to attempt suicide. *Ib.*, *h. l.* 4.
[9] *h. l.* 11.
[10] *h. l. pr*., 4.

from a *bonae fidei possessor* may be *fuga* whatever be the slave's state of knowledge, unless it be with the intent of returning to the real owner[1]

On the other hand he must have done more than form and express an intention he must have actually started[2], with intent to get away from his master It is not *fuga* to run from enemies, or fire, or to escape punishment by teacher or *commodatarius*, if he run to the master , a way of putting the matter which seems to imply that there would be a presumption of *fuga* It is not *fuga* to run to a friend of the master to secure intercession, and in this case mere failing to return is not *fuga* there must be some definite act of flight[4]

Fugitivi were a great administrative difficulty, and no doubt a public danger There was much legislation dealing with the capture and return of such people Much of it was no doubt temporary and local the most important permanent part having for its starting-point the edict, *de fugitivis*[5] This provided that the municipal magistrates must guard *fugitivi* brought to them, binding them if necessary, till they could be brought before the *Praeses* or *Praefectus vigilum* They were to make full note of physical characteristics, scars, etc , and hand this on to the higher authority[6] The edict was supplemented by *senatus consulta*, and constitutions, so that it is not clear what was done by each agency There was a penalty for failing to report *fugitivi* to the local authority within twenty days of discovering them on your land[7] The *senatus consultum* which seems to have provided this, on the motion of Antoninus Pius[8], gave a right of entry, on warrant, to search for *fugitivi*, with a fine for refusing assistance or in any way hindering the search The *Praeses* and local authorities, including *limenarchae* and *stationarii*, were required by Commodus, Marcus Aurelius and later emperors[9], to help in such matters, to restore the fugitives and to punish offenders Any such official who, on such enquiry, found a *fugitivus*, must hand him over to the municipal authority[10] Simple *fugitivi* were, it seems, merely to be handed back to their owners but those pretending to be free were more severely dealt with[11] Even one who had given himself

[1] 21 1 43 3 [2] 50 16 225 [3] 21 1 17 1—3
[4] 21 1 17 5 *h t* 43 1 A slave sent to a province hears that his master is dead and has freed him He lives as though free he is not a fugitive though his master is not dead Though he know he is not free his so acting is not *fuga* whatever else it may be if he stays where he is and carries on the business, 21 1 17 16 The text is corrupt
[5] Lenel Ed Perp § 4
[6] 11 4 1 6—8 P 1 6a 4 A text which says that posting up such marks was enough is commonly regarded as a meaningless interpolation on its merits and on grammatical grounds 11 4 1 8a Lenel *loc cit* Peimce Labeo 2 1 107
[7] 11 4 1 1 Apuleius Met 6 4 [8] 11 4 1 2
[9] *Ib* 11 4 4 P 1 6a 5 Marcus Aurelius declared land of Caesar and the fisc liable to the search 11 4 3 P *loc cit* special rules of later law as to fugitive slaves of the Emperor, C Th 10 20 2 [10] 11 4 1 3 6
[11] 11 4 2 There was a temporary enactment of Maximus requiring all *fugitivi* to fight in the arena Iul Cap Maximus 12 No doubt there were many cases of special punishment Those attempting to escape to *barbaricos* were to have a foot amputated or were condemned to penal slavery C 6 1 3 (Constantine)

to fight in the arena must be returned[1] Any fugitive whom his owner did not claim was sold by the fisc, and the buyer, if evicted, could claim the price from the fisc within three years[2] Labeo held that an *error* was a fugitive for this purpose, but the child of a *fugitiva* was not[3]

It was theft to conceal a *fugitivus* or aid him to escape[4] There was a punishment for *mala fide* maintaining *fugitivi* in claims of liberty[5] Heavy damages were payable, under legislation of Constantine, for retaining a fugitive without his master's knowledge except in *bona fide* belief that he was a free man These damages were increased on repetition of the offence, and punishment might be awarded if the damages were not recoverable There seems also to have been a fear that the rules would lead to blackmailing for the enactment provided that if the master had fraudulently sent the slave with a view to profit, a question which was to be determined by torture of the slave if necessary, the slave was to be forfeited to the fisc[6] Though it was the duty and interest, of persons to point out the whereabouts of *fugitivi* they had discovered, so as to avoid suspicion of theft, humanity or corruption might make them reluctant to give the information Hence it was permitted to offer rewards, and these could be sued for it was not a *turpis causa*[7]

A slave in *fuga* could not be bought or sold or given away, and there was a penalty due from each party to such a transaction[8], these rules being partly contained in, and partly based on, the *lex* Fabia[4] There were of course some necessary relaxations of these rules Thus *coheredes* and common owners might reckon such slaves in the division[9], and it was not uncommon to agree for the sale of a *fugitivus*, the agreement not to take effect till capture Instructions to a *fugitivarius* (a person who catches slaves for reward[10]) to catch and sell him, were valid[11]

A *fugitivus* is still possessed by his owner he is the only *res se movens*, possession of which is not limited by control[1] Various reasons

[1] 11 4 5
[2] P 1 6a 6 7 Huschke *ad h l* thinks it should be four referring to C 7 37 1 A soldier who had charge of a fugitive to return him to his master and lost him was liable to pay his value 48 3 14 7 [3] 11 4 1 5
[4] *Ante* 1 33 T by alleging himself to be owner obtained release of a fugitive who was in custody this was *furtum* 47 2 52 12 It was not theft to point out the way to a fugitive who asked it *h t* 63 For a case on the border line, see Aul Gell Noct Att 11 18 14
[5] C 6 1 6
[6] C 6 1 4 4 In Asia the rule developed that a man might be enslaved for concealing a slave Syro Roman Lawbook Bruns Sachau 215
[7] 19 5 15 For illustrations see Bruns Fontes 1 320 Blair Slavery among the Romans 249
[8] 48 15 2 4 6 2 P 1 6a 2 Fr d i Fisci 9 Coll 14 2 1 3, C 9 20 6
[9] 10 3 19 3
[10] 19 5 18 P 1 6a 1 Either in an individual case or as a business They were punished if they concealed the fugitives C Th 10 12 1 2
[11] 48 15 2 2 C 9 20 6
[12] 41 2 1 14 3 13 13 1 47 2 17 3 P 2 31 37 Modestinus does not contradict this (41 1 51 4), he says there are cases in which we do not possess a fugitive

are assigned in the texts for this odd-looking rule: *ne ipse nos privet possessione*[1]; *alioquin per momenta servorum quos non viderimus interire possessionem*[2], or because he may have the intention of returning, which other *res se moventes* have not[3], or, *utilitatis causa ut impleatur usucapio*[4]. The doctrine seems to have been definitely laid down by Nerva *filius*, though he appears to allude to earlier authority[5]. Girard[6] considers it to be a merely empirical rule of classical law. But though the above-cited texts shew that when they were written, there was no certainty about the principle of the rule, it seems probable that it does not rest purely on empirical (if this means utilitarian) considerations, but on some view as to the nature of possession. For it is noticeable that the rule itself was settled before (and thus without reference to) an important economic result, *i.e.* acquisition of possession through the slave[7]. And a slave who has run away differs in no external respect from one who is away about his owner's affairs. The owner still has the external appearance of ownership. But the doubts which existed as to the limits of the rule shew an uncertainly conceived principle. The jurists were not agreed on the question, how long we possessed such a slave. It was clear that if a third person took possession of him, the owner's possession was ended[8]. If the unchanged external appearances are the basis of the continued possession by the owner, the possession ought to cease as soon as he begins to act as a free man: *pro libero se gerere*. There seems to be no extant text asserting this, though it may seem to be implied in certain texts which deny that we can acquire possession through such a slave. These will shortly be considered[9]. Probably the later law is that laid down by Paul[10], that we do not cease to possess him by his acting as a free man. Yet Paul himself lays down a rule[11] that a slave *in libertate* can acquire possession for one in whose name he acts. This either implies that a slave in that position is no longer possessed, apparently contrary to Paul's own view, or it conflicts with a rule, also laid down by Paul[12], that we cannot acquire possession through one who is possessed by another. A text of Ulpian and Celsus[13] to the effect that a slave possessed by no one can acquire possession for one whom he names, may mean the same thing, but it is not explicit as to the circumstances under which the man is not possessed. It may be that the case is one in which he has begun, or is prepared[14] to begin, a *causa liberalis*, which might quite change the situation. It might be possible to harmonise some of these

[1] 41. 2. 13. *pr.* [2] *h. t.* 44. *pr.* [3] *h. t.* 47.
[4] *h. t.* 1. 14, the only text which extends the continuance of possession to anyone but *dominus*. See also 41. 2. 15.
[5] 41. 2. 1. 14, 3. 13, 47. [6] Manuel, 273. [7] *Post*, p. 272.
[8] 41. 2. 1. 14, 50. 1. [9] *Post*, p. 272. [10] 41. 3. 15. 1.
[11] 41. 3. 31. 2. [12] 41. 2. 1. 6; 41. 1. 54. 4. [13] 41. 2. 34. 2.
[14] 41. 3. 15. 1.

texts on the view that a man *pro libero se gerens* is not necessarily *in libertate*, this state of things arising only on cesser of the owner's possession[1]. On this hypothesis the law may be thus stated: the owner possesses until a third person possesses, or the slave begins a *causa liberalis*, or *pro libero se gerit* in such a way as to shew that he is prepared to defend his claim of liberty against the master, or has been so long left to himself that tolerance by the master may be inferred[2]: in these latter cases he is said to be *in libertate*. But the evidence of the texts is more correctly represented by the proposition that they shew a tendency to the acceptance of these distinctions rather than an actual expression of them[3].

A *fugitivus* is a *fur sui*, and thus cannot be usucapted, even by a *bonae fidei possessor*[4]. We have already considered the rule in the case of *partus ancillae furtivae*[5].

Where a *fugitivus* is left as a legacy, questions arise as to the resulting rights. The principle arrived at is that the recovery of the slave is at the cost and risk of the legatee, unless his non-production is in some way due to the negligence of the *heres*[6]. In that case the *heres* must pay his value. In the other, it is sufficient if he give security to hand him over if and when he is recovered. The same rule applies if the *servus fugitivus legatus* is *alienus*[7]. If "A or B" be left, and either be a *fugitivus*, the heir, not in *mora*, may give either the present one or the value of the absent one, the reason assigned by Ulpian for thus increasing the liability of the *heres* being *totiens enim electio est heredi committenda quotiens moram non est facturus legatario*[8]. The point seems to be that the legatee is delayed in getting his slave by the choice of the *heres*, a rather doubtful piece of logic. If both are *in fuga* the security must be that, if either return, the *heres* will give the value either of him or the other. This expresses the same principle[9].

A *fugitivus* is none the less the property of his master, and thus acquires for him, apart from questions of possession. Thus we are told that where a *fugitivus* buys goods, and they are violently taken from him, his owner can bring the *actio vi bonorum raptorum*, because the goods were in his *bona*[10]—quite independently of the question whether he has ever possessed them. Again, if my slave in flight buys a thing from a non-owner, Pomponius says I have the Publician, even though I have not acquired possession through him[11]. The difficulties of this

[1] As to the special rules in a pending *causa liberalis*, *post*, Ch. XXVIII.
[2] 41. 2. 3. 10. [3] *Post*, p. 338.
[4] 47. 2. 61; C. 6. 1. 1; In. 2. 6. 1, *etc.* A protection to *domini*.
[5] *Ante*, p. 24. Where such persons cannot be usucapted, the holder has no Publiciana, 6. 2. 9. 5.
[6] 30. 108 *pr.* [7] 30. 47. 2. [8] *h. l.* 3.
[9] *Ante*, p. 16. [10] 47. 8. 2. 25. [11] 6. 2. 15.

text, which has been much discussed, do not here concern us[1]: in any case, it shews that acquisition is not barred by the fact that the slave is a *fugitivus*[2].

Of acceptance of an inheritance there can be no question. No texts discuss legacies to *fugitivi*, but no doubt ordinary rules apply. There remains the case of possession. We have seen that a slave cannot acquire possession for his *dominus*, unless the latter knows of it, or has authorised it, or it is *in re peculiari*[3]. We have seen, or been told, for the authority is doubtful[4], that the slave does not acquire possession to his master, if he does not intend to do so. Such rules and the fact that a *fugitivus* is not likely to have a *peculium*, since the owner can adeem it *nutu*[5], would seem to preclude any question of acquisition of possession by a *fugitivus*. For though the ancients had held that we could not possess except through one whom we possessed, the converse was far from necessarily true. Yet, as in the case of *res peculiares*, there seems to have been a gradual recognition, *utilitatis causa*, of possession by the master through the *fugitivus*. Nerva *filius*, who seems to have accepted, with some reluctance, the view that we possess a fugitive, denies that we can possess through him[6], and Pomponius appears to hold the same view[7]. But Ulpian tells us that possession can be continued through such a slave[8], and Paul accepts the view, which he credits to Cassius and Julian, that a *dominus* can acquire possession through a fugitive, *sicut per eos quos in provincia habemus*[9]. These names suggest a school controversy. Hermogenianus adopts the same view with the characteristic limitation, "unless he thinks he is free[10]." All are agreed, on the other hand, that we cannot possess through him, if another person possesses him[11]. But what is the exact force of Julian's parallel, *sicut per eos quos in provincia habemus*? Cassius and Julian cannot have supposed acquisition of possession by a slave *in provincia* to be independent of the knowledge of the *dominus*: they are the very writers cited to shew that this was a special rule, *in re peculiari*[12]. But if we are to suppose the acquisition of possession by a *fugitivus* to the *dominus* to require knowledge or *iussum* of the latter, this is almost to deny its possibility, for all practical purposes, since ratification does not seem to have been retrospectively effective in such matters. And this is in accordance with principle, and could have caused little in-

[1] See Appleton, Propriété Prétorienne, § 82.
[2] Where my slave, a fugitive *apud furem*, and so not in my possession, acquired money and bought slaves with it, and T received them from the vendor with the slave's consent, I had *actio mandati* against T on my slave's mandate. If it was not with the slave's consent, I had *ex empto* against the vendor. The obligation was acquired though he was a fugitive, 17. 1. 22. 9.
[3] *Ante*, pp. 131, 2.
[4] 41. 2. 1. 19, *ante*, p. 133.
[5] *Ante*, p. 205.
[6] 41. 2. 1. 14.
[7] 6. 2. 15.
[8] 44. 3. 8.
[9] 41. 2. 1. 14, *in fin.*
[10] *h. t.* 50. 1.
[11] *Ib.*; *h. t.* 1. 14.
[12] *h. t.* 1. 5.

convenience: it is only the language attributed to Cassius and Julian[1] which raises difficulty.

If the fugitive *in libertate moretur*, we are told by Paul that we do not acquire possession through him[2]. This may mean one who is in such a state of apparent freedom, as exceeds what is implied in *pro libero se gerere*[3], but we are told the same thing by Hermogenianus[4] of the slave *in fuga* who thinks himself free, a phrase which for this purpose means no more than *pro libero se gerere*. Julian says[5] that if a fugitive *pro libero se gerens* sells a thing, a valid obligation (as it seems, *ex empto*) is created, from which the buyers are not released by paying the fugitive. If this is not a *solutio*, that must be, assuming good faith[6], because the possession does not vest in the *dominus*, for it is clear that the *dominium* does. Pomponius cites Labeo as holding a different view. Such a *fugitivus* lent money which he had stolen from his master (*i.e.* not *ex peculio*). Labeo says an obligation is created from which the debtor is released by payment to the *fugitivus* thinking him free: the money is made the master's, and there is a *quasi-solutum* to him[7]. This implies that the *dominus* gets possession of the money. The contradiction is exact. No doubt here, as in the cases of a similar type we have just considered, harmony might be reached by conjectural additions to the hypothesis. But it is better to treat it as another instance of the constant flux of opinion in these matters in minds swayed alternately by considerations of logic and of convenience. It would be a mistake to suppose even that there was a steady unbroken tendency in one direction, or that the views of any one jurist represent necessarily any coherent scheme.

The power of the *fugitivus* to bind his *dominus* is necessarily limited. Though he have a *peculium*, he loses any power of *administratio*[8]. In the two texts last discussed, he appears as selling and lending money, both transactions involving transfer of property. But the text on sale speaks[9] only of the contract: so far as we are told, the owner might have vindicated the property if he liked. And in the other case[10], we are told only that an obligation is created. It need not have been *mutuum*: it may well have been a *condictio* based on consumption. Ulpian[11] deals with an exactly similar state of facts, and says that there is no *mutuum*, since the property does not pass. The money can be vindicated if traceable; if it is not, there is *ad exhibendum* or *condictio sine causa*, according as it has been made away with in bad or in good faith[12].

[1] 41. 2. 1. 14.
[2] 41. 3. 31. 2.
[3] *Ante*, p. 270.
[4] 41. 2. 50. 1.
[5] 46. 3. 34. 5.
[6] *Ante*, pp. 163, 4.
[7] 46. 3. 19.
[8] 15. 1. 48.
[9] 46. 3. 34. 5.
[10] 46. 3. 19.
[11] 12. 1. 11. 2. See also 12. 1. 13.
[12] Presumably all authority is revoked *ipso facto* by the flight, without express withdrawal. It may also be assumed that there is no *actio institoria*, or *quod iussu* on transactions by a

It has been remarked above that a slave may be a *fugitivus* without being *in libertate* or even *pro libero se gerens*. The converse is equally true: a slave may be *in libertate* without being a fugitive[1]. It does not appear that this would make any difference in the rights or liabilities of the *dominus*: the texts at least draw no distinction[2]. Such a man may be in the apparent *potestas* of another acting in good faith. This is not a case of *bonae fidei possessio*. It is clearly laid down that the apparent father can acquire nothing through the apparent son, even though he is in good faith[3]. In all such cases it may be presumed that he acquires property for his *dominus*, but not possession. The liability *de peculio* can hardly arise, and the rule as to noxal liability would be as in the case of *fugitivus*.

XI. *Servus pro Derelicto.*

The expression *servus derelictus* is very rare: the usual form is *servus quem dominus pro derelicto habet*[4]. This is so not only in connexion with *usucapio*, or where the abandonment may not have been by the owner, where the usage would explain itself, but in all contexts. The explanation is historical. There was an old dispute as to whether *derelictio* was at once complete, or whether ownership was divested only when a third person took possession. The former view prevailed in relation to slaves as well as other things[5].

We shall see that under imperial legislation abandonment of a sick slave might under certain circumstances make him free, and that in Justinian's latest law any abandonment might have that effect[6]. Here, however, we are concerned with the normal case, in which a slave abandoned by his owner remained a slave[7].

The developed Roman law permitted complete abandonment of ownership in slaves, at any rate so far as the advantages of ownership were concerned[8]. As to what amounted to a *derelictio*, this was a question of fact, which had few rules peculiar to the case of a slave. There must be intention to abandon[9], coupled with an actual casting

fugitivus: the case is not mentioned. There may be *de peculio* (15. 1. 3. 8, 52. *pr.*), and, though it would need rather improbable facts, *de in rem verso*. *Tributoria* is probably barred. Noxal liability, *ante*, p. 129.

[1] As to rules in a *causa liberalis*, *post*, Ch. XXVIII.

[2] *e.g.* 15. 1. 3. 8, 52. *pr.*; 41. 2. 3. 10; 41. 3. 31. 2.

[3] 41. 2. 50. *pr.*; 41. 3. 44. *pr.* The case might arise where, *e.g.*, a child abandoned by its slave mother was reared and given in adoption, or gave himself in adrogation.

[4] In 45. 3. 36 both forms appear.

[5] 41. 7. 2. 1; 9. 4. 38. 1. In relation to slaves the other view is not mentioned. Both these texts credit the rule to Julian.

[6] *Post*, Ch. XXVI.

[7] Jewish slavery did not admit of the existence of this class. Slavery being relative, liberty was only hidden by the power of the master. Winter, Stellung der Sklaven, 30.

[8] 41. 7. 1 and *pass.*; 45. 3. 36. C. Th. 5. 9. 1 seems to hint at a right of preemption in an abandoning owner of an *infans*.

[9] C. 8. 51. 1.

off of possession[1], and thus mere refusal to defend on a capital charge did not amount to a dereliction[2]. The main effect of abandonment was to make the slave a *servus sine domino*, on whom his late master had now no claim. Thus he could not acquire through the slave, who had indeed no capacities, his derivative capacity having ceased to exist. Thus any stipulations or other transactions of his were merely null[3]. As he had no derivative capacity, and the institution of slaves depended on the *testamenti factio* of their *domini*[4], it would seem that any institution of such a person would be void, though absence of *ius capiendi* in the *dominus* did not prevent the institution, but allowed the slave to enter if alienated[5]. But our case is not discussed. And while we are told that corporations could not be instituted[6], we are told that if the slave of a municipality was instituted, and was alienated or freed, the institution could take effect[7]. For Justinian's own law this would hardly seem worth stating, since municipalities could then be instituted[8]. If it be accepted as a classical rule, it creates a doubt for our present case. But as it purports to be from Ulpian, and is opposed to his very general statement[9] on the matter, it seems likely that it has been altered, perhaps by the omission of a negative. Whether this be so or not, the case of a *dominus incapax* is different from that of no *dominus* at all. The texts which bear on that state of facts are against admitting any possible validity in such an institution. Thus we are told that Antoninus Pius declared in a rescript that the institution of a *servus poenae* was absolutely null[10]. And Javolenus says *servus hereditarius* can be instituted *quamvis nullius sit*; an implication that an ordinary *servus nullius* could not be instituted[11].

The rule, *noxa caput sequitur*[12], protected the former master against liability for past or future delicts. On the other hand, dereliction did not destroy any rights of action the master might have acquired on account of delict committed in respect of the slave[13], any more than it would rights of action, on contract, already acquired through him. As to liability on past contracts, on *derelictio* the *actio de peculio* would become *annalis*, but any other existing edictal actions of this class would not be affected, as they are *perpetuae*. It must be supposed that the former *dominus* would not be liable on any contract made after the dereliction, except, indeed, in the improbable case of an owner who abandoned his slave, but retained his services as *institor* or the like.

[1] 41. 2. 17. 1.

[2] 48. 1. 9.

[3] 41. 7. 8; 45. 3. 36. After *occupatio* by a new *dominus* he acquires for him under ordinary rules.

[4] 28. 5. 31. *pr.*; U. 22. 9.

[5] 29. 2. 82.

[6] U. 22. 5.

[7] 29. 2. 25. 1.

[8] C. 6. 24. 12.

[9] U. 22. 1, 5, 9.

[10] 29. 2. 25. 3.

[11] 28. 5. 65; cp. *h. t.* 31. 1. No doubt the fact that the slave became *nullius* after the will was made would be no bar if he were now in the hand of a *capax*. See 28. 5. 6. 2.

[12] *Ante*, p. 106; D. 9. 4. 38. 1.

[13] 47. 2. 46. *pr. in fin.*

Difficulties might arise from contracts made, in ignorance, with a derelict slave, but they are more apparent than real. Any property handed over on the faith of such a contract could be vindicated. This would not indeed apply to consumables, or to services rendered at cost of time or money, and it does not seem that the law would give any remedy[1].

Curious questions arise where the slave abandoned is, at the time, the subject of lesser rights than *dominium*, vested in some third person. So far as these are mere contractual rights arising from *commodatum* or the like, the case is simple though the texts give us no help. The only right of the *commodatarius* is one on the contract. So long as he is undisturbed, no question arises. If a third party seizes the slave, his remedy is an *actio commodati contraria* against the lender. But there are greater difficulties if the right created was a *ius in rem*. Two typical cases alone need be considered.

1. The case of a slave abandoned by his *dominus* when some third person has a usufruct in him. We are nowhere told what happens. We know that usufruct is not affected by death of the *dominus*. If this be understood as perfectly general, and as applying in the case of a man who dies without representatives, and whose estate the fisc will have nothing to do with, it is an authority for the view that usufruct is absolutely independent of the fate of the *dominium*. This brings us in face of a wider question, *i.e.* that of the possibility of the existence of servitudes without *dominium*. Our case is discussed by Kuntze[2], who considers the usufruct as unaffected. There seems no reason to doubt his conclusion, which rests mainly on the analogy of the classical law in the cases of *servus pendente usufructu manumissus*, and that in which a man is a party to a fraudulent sale, to a *bona fide* buyer, of a usufruct in himself[3]. Two remarks may however be made. In Justinian's latest law, every abandonment seems to have been a manumission[4]. It follows that the present case would then be only an instance of a *servus sub usufructu manumissus*, who, under his law, is no longer a *servus sine domino*. The other remark is that no conclusion can be drawn from this case to that of praedial servitudes, *sine dominio*, partly because slaves may very well have been exceptionally treated in such a matter[5], but also because the classical texts give us no warrant for applying to usufruct in the classical law that dependence on *dominium* which is involved in the name *servitus*.

[1] Cases may readily be conceived in which the late owner was liable on account of *dolus*. but dereliction of slaves with whom anyone was likely to have commercial dealings must have been rare.

[2] Servus Fructuarius, 60 *sqq*.

[3] *Post*, p. 278 and Ch. XVI. *in fin.* In both cases there was usufruct without *dominium*.

[4] *Post*, Ch. XXVI.

[5] Kuntze, *loc. cit.*

There seems to be no text in the surviving ante-Justinian legal literature, which applies the name *servitus* to usufruct or the like, and there are obvious signs of a usage confining it to praedial servitudes[1].

2. The case of a slave abandoned by his owner while he is pledged. Pledge is not servitude. The creditor's right is a right to possess, in a limited sense of that word, and no more. We have not the logical difficulty involved in the conception of *servitus* without *dominium*: *pignus* being only a praetorian right to hold, is never contemplated as a part of *dominium*. The title dealing with release of pledge[2] makes it clear that no act of the debtor's can affect the creditor's right of possession without his consent[3]. There can be no doubt that *derelictio*, whether followed by *occupatio* or not, leaves the creditor's right intact.

XII. *Servus Poenae.*

There is little to be said here of these persons: most of the points of interest will arise in connexion with the law of enslavement and manumission[4]. A few points may, however, be discussed. A *servus poenae* may have been, before his condemnation, either a slave or a freeman. In the latter case he was destroyed by the enslavement, and if freed, was not the same person: slavery was akin to death[5]. If he had been a slave, the condemnation destroyed the ownership[6], and it did not revive on pardon[7]. What then was his position? The matter seems to have been obscure till, under Caracalla or a little later, it was accepted that he vested in the fisc[8]. *Servi poenae* themselves were not the property of anyone: they were slaves of punishment, not belonging to Caesar or the fisc[9]. Having no owner, they could have no derivative faculty or *peculium*, and, as slaves, they could have no faculty or property of their own. It seems obvious that they could not contract, though this is not stated. Their earlier made will was *irritum*[10]. Institutions of them or legacies to them were *pro non scriptis*, whether they were condemned before or after the will was made; the

[1] *e.g.* Vat. Fr. 54; G. 2. 14. Other texts shew that the relation of usufruct to *dominium* was disputed among the classical lawyers, Roby, de usufructu, 42.

[2] 20. 6. [3] See for a strong case, 20. 6. 4. *pr.* [4] *Post*, Ch. XVII.

[5] 50. 17. 209; Nov. Just. 22. 9. For some effects see 36. 1. 18. 6.

[6] 48. 19. 8. 12. The *peculium* remained with the former owner, C. 9. 49. 1.

[7] 48. 19. 8. 12. If in temporary *vincula*, expiration of sentence freed them from all results, so that, as Divi Fratres laid down, they could take any form of gift if released when the *hereditas* under which the gift arose was entered on, 48. 19. 33. Papinian says that this limitation results not only from the constitution but from the reason of the thing. The point is that otherwise the gift cannot operate at once and there is no reason for postponement. The case is not one of *servitus poenae*: temporary or even permanent chains (*h. t.* 8. 13) or whipping (*h. t.* 28. 4) does not affect ownership. On release the slave reverts. If his master refuses him he is offered for sale. If this fails he is a *servus poenae*, 48. 19. 10. *pr.* See C. 9. 47. 13.

[8] 40. 5. 24. 5. Details, *post*, Ch. XVII.

[9] 34. 8. 3; 48. 19. 17. *pr.*; 49. 14. 12. [10] 28. 3. 6. 6.

practical result being that the gift was not *caducum*, and did not go to the fisc[1]. The texts refer to Pius as having resolved these points; it may have been doubtful before whether such people were not the property of the fisc. Gifts of liberty to them were void, though if, and when, they vested in the fisc, on pardon, effect would be given to any such fideicommissary gift to them[2].

Tutela on either side was destroyed by condemnation[3]. Children of any condemned woman would be slaves[4], subject to some exceptions, *favore libertatis*, to be later considered[5]. They would not however be *servi poenae*, but ordinary slaves, capable of receiving fideicommissary gifts of liberty[6]. There must have been some doubt as to the ownership of them. Antoninus Pius seems to have settled it, perhaps by the same enactment as that mentioned above[7], by providing that they might be sold by the public authority[8]. We are told that *servi poenae* could not delate, *i.e.* were not allowed to report cases of fraud on the treasury, *e.g.* by way of unlawful *fideicommissum* or the like, in the hope of reward. But this was not a result of their position: it was a precautionary measure, *ne desperati ad delationem facile possint sine causa confugere*[9].

XIII. *Servus pendente Usufructu Manumissus.*

In Justinian's time such a slave became free, and there is no question for us. The only points to consider arise in connexion with his relation to his former owner, in earlier times, when he became a *servus sine domino* as the immediate result of the manumission[10]. We have little authority, but, in general, there is no great difficulty. The fructuary's rights were unaffected. The master necessarily ceased to be noxally liable for the man as to future acts, and as he had ceased to have *potestas* or *dominium*, he was free from liability for acts already done[11]. Similarly he could have no action for damage to the slave or for theft of him. He would seem to have the same noxal rights against the fructuary or any *bonae fidei possessor* as any third person would have. He would not be liable on any future contracts, except, indeed, by the *actio institoria*, if the man still acted in that capacity, as any freeman or *servus alienus* might do. His liability on past contracts would not be affected so far as the *actiones quod iussu*, and *de in rem verso* were

[1] 29. 2. 25. 3; 34. 8. 3; 48. 19. 17. *pr.*; 49. 14. 12.
[2] 40. 5. 24. 5. But this is administration, not law. As to the general attitude of the fisc in such cases, *post*, Ch. XXVII.
[3] In. 1. 22. 4. [4] 40. 5. 24. 6. [5] *Post*, Ch. XVII.
[6] 40. 5. 24. 6. [7] See n. 1. [8] 40. 5. 24. 6.
[9] 49. 14. 18. They shared the disability with women, *clarissimi*, *veterani* and others barred on different grounds.
[10] Fr. Dos. 11; U. 1. 19; C. 7. 15. 1.
[11] Subject to liability for *dolus*, *ante*, p. 106.

concerned. The *actio de peculio* would presumably become *annalis*, subject to the rules already stated[1]. To the *actio tributoria* he no doubt remained liable, if he retained the *peculium*[2]. But if he gave the man his *peculium*, it is not quite clear what would be the result. It would pass to the fructuary only if this intent were declared, and in that case the rules as to the liability of the fructuary in the *actio de peculio* would apply[3]. If it did not go to the fructuary, it could not go to the slave himself. It must either remain with the master or become derelict: the effect would be the same in most cases so far as liability *de peculio* is concerned, since this would ordinarily be such *dolus* as is contemplated by the Edict[4]. It would seem from the wording of Justinian's enactment that the master could acquire nothing through him, and the same result follows from general principle, since he was not now the slave's *dominus*[5].

XIV. Slave informally freed before the *lex Iunia*.

The state of facts here referred to will be considered later[6]. The class was so early obsolete that it is idle to try to lay down rules about them. It is enough to say that though the Praetor protected them in *de facto* liberty, so that their master could not make them work, they were still his slaves and he still acquired through them[7]. He would still be liable, *de peculio et in rem verso*: indeed in all respects he would still be liable for them as for ordinary slaves, though the point would presumably not often arise. Whether he was noxally liable or not depends on the unanswerable question, whether the theory of *potestas* in this matter had developed so early. As this theory does not apply to *damnum*[8], it seems that he would be liable *e lege* Aquilia. Conversely he could have no noxal action for anything done by such a man, so far as the *lex* Aquilia was concerned, but he might conceivably have had an action against a *bonae fidei possessor* for other delicts. Presumably he would have an action for damage to such people, as this would lessen their power of acquisition, and no doubt he had the *actio furti*. As they were still slaves it may be assumed that the child of an *ancilla* in such a position was an ordinary slave.

XV. Pledged Slave freed by the Debtor.

We are told in many texts, of Justinian's time, that such a manumission was absolutely null[9]. It follows that the relations of master

[1] *Ante*, pp. 227 *sqq.* [2] *Ante*, p. 237. [3] *Post*, p. 359.
[4] Arg. 14. 4. 7. 2, 3. [5] C. 7. 15. 1; G. 2. 95; In. 2. 9. 5.
[6] *Post*, Ch. XIX. [7] Fr. Dos. 5. [8] *Ante*, p. 130.
[9] *e.g.* C. 7. 8, *pass.*; D. 40. 1. 3; 40. 5. 24. 10. *Post*, Ch. XXV.

and slave were absolutely unaffected by it. Two points may be noted. The case cannot be regarded as equivalent to a *derelictio*, for one who frees a slave acquires a *libertus*, a potential asset of some value[1]. Thus to treat an attempted manumission as abandonment would be to go far beyond the manumitter's intention. Whether it can be treated as a case of informal manumission, for the earlier law, depends on the view that is taken of the only text[2]. It is defective but appears to mean that the slave became a Latin when the pledge ceased to be operative. This interpretation suggests that before the *lex* Iunia, the praetor would have intervened and treated the case as one of informal manumission, so soon as, but not before, the pledge was in some way released, *i.e.* so soon as capacity was restored—overlooking the fact that there was no capacity at the time the act was done. Till then its effects were null. If Huschke's view is accepted, that the slave became a Latin at once, this will imply that in the Republic the Praetor's protection is given at once, and the case will come under the class last mentioned[3].

[1] In 50. 17. 126. 1 we are told: *locupletior non est factus qui libertum adquisierit*. A *libertus* is not necessarily a source of profit, even by way of succession.
[2] Fr. Dos. 16. [3] *Post*, Ch. xxv.

CHAPTER XIII.

SPECIAL CASES (*cont.*). SERVUS PIGNERATICIUS, FIDUCIAE DATUS, STATULIBER, CAPTIVUS.

XVI. *Servus Pigneraticius.*

THE law concerning a pledged slave derives some peculiarities from the fact that, while on the one hand the rights acquired by the pledge creditor are slight (being essentially no more than the right to hold the slave without deriving profit from him), on the other hand the institution is only a praetorian modification of the old fiduciary mancipation, under which the creditor became owner. Many of the texts in the Digest which now speak of *pignus* were originally written of *fiducia*, and the compilers have not always succeeded in making the changes so as to produce a neat result.

A pledged slave is still *in bonis debitoris*[1], and thus a legacy of my slaves includes those I have pledged, but not those pledged to me[2]. The debtor retains the *actio servi corrupti*[3]. The pledged slave is treated for the purpose of the *Sc.* Silanianum in all respects as if he had not been pledged[4]. But there are many respects in which the creditor's interest comes effectively into play.

If[5] the pledge creditor kills the slave, the debtor has the *actio* Aquilia against him, or, if he prefers, he may bring the action on the contract[6]. If on the other hand the debtor kills the slave, the creditor has not the *actio* Aquilia, even *utilis*, but is given an *actio in factum*[7]. If the slave is killed by a third party, the pledger has the *actio* Aquilia, and the creditor is allowed an *actio utilis*, because in view of possible insolvency of the debtor he has an *interesse*. A text[8] credited to Paul, hints, in a rambling manner, that the creditor's action is given only in the case in which the debtor is insolvent, or the creditor's remedy, apart from the pledge, is time-barred, and says that, in that case, the debtor

[1] C. 4. 24. 9. [2] 32. 73. 2. [3] 11. 3. 14. 4.
[4] 29. 5. 1. 3; *ante*, p. 95.
[5] Theft and damage in relation to pledged property, Hellwig, Verpfändung von Forderungen, 43—50.
[6] 9. 2. 18. [7] *h. t.* 17. [8] 9. 2. 30. 1.

has it only if the debt is less than the value of the slave Gradenwitz shews conclusively that these later propositions are from the compilers[1]

The case of theft of a pledged slave presents difficulties they have nothing to do especially with slaves but cannot well be left undiscussed, as one or two of the most difficult texts deal with slaves Many texts shew clearly that the pledge creditor has *actio furti* if the thing is stolen[2], even by the debtor[3], and that he will himself be liable to the action if he exceeds his right[4] Beyond this it is difficult to get a clear doctrine there are divergences on all material points In seeking the basis of the pledge creditor's *interesse*, it is natural to think of his obligation *custodiam praestare*, either absolute, except for *vis maior*[5], or only *diligentiam exactam praestare*[6] And two texts of Ulpian[7], in one of which there is an appeal to older authority, seem to start from this point of view, but the first shews that there is an *interesse* independent of *obligatio*[8], and the words from *hoc ita* to *competit* are probably from Tribonian The responsibility is limited to the case of *culpa*, and there is some reason to think that at least in the case of *pignus*, this limitation dates from the later Empire[9] What Pomponius approves is the earlier part of the text In the other[10], the words *item locati pignorisve accepti* may be interpolated, but, indeed, the whole text looks corrupt[11]

It is clear on other grounds that the obligation whatever its extent cannot have been the sole basis of the *interesse* Had it been so, there would have been, at least, doubts as to the right of action where the debtor stole the thing, since in that case the obligation did not exist[12]

[1] Interpolationen, 89 *sqq* Do they represent even later law? G points out that where as here, two can sue, though substantially only one sum is due, the normal course is for the first plaintiff to give security for defence of the person liable against the other

[2] 13 7 22 *pr*, 47 2 14 16, 15 *pr*, In 4 1 14, 4 2 2, *etc*

[3] 13 7 3, 41 4 5, 47 2 12 2 67 *pr*, C 7 26 6, G 3 200 203, P 2 31 19, *etc*

[4] 13 7 4 5, 47 2 52 7, 55 *pr*, 56 74, C 9 33 3, *etc*

[5] 13 7 13 1, 14, C 8 13 19 [6] C 4 24 5 8, In 3 14 4

[7] 47 2 14 6, 16 [8] 47 2 14 6

[9] As to the nature of *custodia* the most acceptable opinion seems to be that which may still be called the orthodox view (See for this, with variations, Pernice, Labeo 2 1 345, Lehmann, Z Sav Stift 9 110, Biermann same review, 12 33, Girard, Manuel, 655 *Contra*, Ferrini, Archivio Giuridico, 53 260) According to this doctrine, *custodia* meant originally the obligation to keep the thing as against thieves, but not as against robbers This was gradually modified, till except in a few cases, it was no longer to be distinguished from the obligation *diligentiam maximam praestare* This development explains such texts as speak of *custodiam diligentem* (*e g* 13 6 5 5) and the like But there is room for difference of opinion as to the date of this change Pernice attributes it to the influence of Julian Biermann is, in general, of the same opinion, but considers that in regard to *pignus* the change is of the later Empire, since Diocletian still distinguishes in this connexion between *culpa* and *custodia* Paul and Ulpian make the same distinction in other connexions (P 2 4 3, D 19 1 36, 47 2 14 6, *etc*), but this Biermann regards as mere *historische Reminiscenz* But that kind of reminiscence is more characteristic of Tribonian than of Ulpian or Paul, and as they state the distinction clearly it is likely that the law of their time admitted it It seems highly probable that the assimilation in most cases of the liability *custodiam praestare* to that *diligentiam praestare* was a development of the later Empire, except in the case of *commodatum*, which had special rules It is to be observed that nearly all the texts which state the newer doctrine are confused in form (*e g* 18 6 2 1, 18 6 3, 13 6 10, 47 2 14 12, 47 8 2 22, 23)

[10] 47 2 14 6

[11] Doubts in the case of *commodatum* are plentiful 13 6 5 6, 47 2 14 16, and many in C 6 2 22

[12] 13 6 21 *pr*

But many texts give the action in that case and none denies or doubts its existence[1] Again, in all cases except where the thief is the debtor, the creditor must set off what he recovers against the debt[2], while in the other cases of *interesse* based on obligation, the plaintiff keeps what he recovers[3] Again, if the right were based on obligation, the creditor's action would exclude that of the debtor[4], but, here, both parties have the action[5] Ulpian tells us indeed[6], that there had been doubts as to the creditor's action if the debtor were solvent, but himself holds, with Julian, Pomponius and Papinian, that he has an interest in all cases a rule for which the Institutes give the reason, *quia expedit ei pignori potius incumbere quam in personam agere*[7] The text says nothing about obligation Again, if the right were based on obligation it would not exist, as it does, where there is a mere hypothec, since here the obligation does not exist[8] It seems clear, then, that, at least on the dominant view, the creditor's right does not depend on his liability There is, however, one difficulty Two texts of Paul[9] allow the creditor to recover the value of the *res* This is consistent with the view that his right rests on obligation, and not easy to reconcile with any other view But one of them definitely gives the action against the debtor, which is inconsistent with that view[10], and though Paul here notes that in that case the recovery is limited to the amount of the claim, this itself shews that there is another basis of *interesse* There are, however, a number of texts, mainly from Ulpian[11], which limit the creditor's right in all cases to the amount of his claim

What is this other basis of interest? The mere fact of possession would not suffice, if indeed the pledge creditor can be said strictly to have possession[12] But his right, narrow as it is, exceeds mere possession. It has an economic content He has a right to keep the thing until his claim is satisfied, and thus he will win, not only in possessory proceedings, but also even if the owner vindicates the thing It is this *ius retentionis* which bases his *actio furti*[13] This is why his interest is limited to the amount of the debt, and why, if there are several things pledged together for one debt, the action, if any one of them is stolen, is limited only by the total amount of the debt[14] Paul's texts giving a right to recover the whole value[15] do not seem to have been retouched they may perhaps be based on a recognition of the right resting on

[1] See *ante*, p 282, n 4, and 41 3 49, 47 2 19 6, 88, In 4 1 10, 14

[2] 13 7 22 *pr*, 47 2 14 6, 14 7, 15 *pr*

[3] 13 6 7, 19 2 6, C 6 2 22 3 [4] G 3 203, 6, D 47 2 12 *pr etc*

[5] 47 2 12 2, 46 4, 52 7, 55 *pr*, 74 [6] 47 2 12 2

[7] In 4 1 14 [8] 47 2 19 6, 62 8

[9] *h t* 15 *pr*, 88 [10] *h t* 88

[11] 47 2 14 5—7, 46 4, 5, 47 8 2 22 23, In 4 2 2 [12] 2 8 15 2

[13] 47 2 46 5 Obscure, but bringing out the fact that his *interesse* is distinct from that of owner

[14] 47 2 14 5—7 [15] *h t* 15 *pr*, 88

liability, but their explanation is more likely to be found in the known genealogy of *pignus*. The rule of *fiducia*, by which the creditor, being owner, recovered the whole value, simply passes over to *pignus*. Perhaps as early as Pomponius[1], the more logical view appears which limits his action to the amount of his claim. Later on, the pledgee is so far assimilated to other holders who *custodiam praestant*, that his right based on liability is recognised, without excluding the other. But this is of late law, and, even in the Digest, the dominant doctrine ignores it. It may be noted that in several other cases, in some of which there would not be a possessory right, the *ius retinendi* gives an *actio furti*[2], on the analogy of pledge[3].

In one text already mentioned[4], Ulpian seems to give the debtor (the owner) an action only if the thing is worth more than the debt. There is no obvious reason for this limitation, and he elsewhere ignores it[5]. The interjected form of the limitation in the text suggests interpolation. On the other hand it may be a survival from the system of *fiducia*, in which the debtor, having neither ownership nor possession, has no clear basis of action. The text certainly treats the debtor's right to sue as of an exceptional nature.

The rules as to noxal liability for the slave have already been discussed[6]. It may be added that the *actio ad exhibendum* lies against the creditor and not against the debtor: he has no power of producing the man[7].

As to acquisitions, the rule is simple. The slave cannot acquire for the pledge creditor in any way, by *traditio*, *stipulatio*, or otherwise, not even possession, though the creditor possesses him for interdictal purposes[8]. All fruits and acquisitions *ex operis* are the debtor's, and go to reduce the debt, any balance over the amount of the debt being recoverable by the debtor[9]. All other acquisitions, *e.g. hereditas* or *donatio*, go of course to the debtor. And the rules as to the effect of acquiring or purporting to acquire expressly for any person other than the owner are in no way exceptional in this case. The debtor cannot acquire possession through the slave since he is possessed by another, except so far as bars *usucapio* by the creditor, and allows the debtor to usucapt things of which possession had already begun[10].

The creditor must not misuse the thing pledged and thus if he prostitute a pledged *ancilla*, the pledge is destroyed[11]. Unusual expenses may be added to the charge, and thus, if a pledged slave is

[1] 47. 2. 14. 6, 7. [2] *h. t.* 14. 1, 15. 2, 54. 4, 60; In. 4. 1. 14.
[3] Modestinus (Coll. 10. 2. 6) denies *actio furti* to depositee even with *ius retentionis*. The reason is not clear and the rule is not in the Digest. The rule probably began with *pignus*.
[4] 47. 2. 46. 4. [5] *h. t.* 12. 2. [6] *Ante*, pp. 116, 125.
[7] 41. 3. 16. [8] 41. 1. 37. *pr.*; 41. 2. 1. 15. [9] C. 4. 24. 1, 2.
[10] 41. 2. 1. 15. Or the slave himself. The rule does not of course apply to hypothec.
[11] 13. 7. 24. 3.

captured and redeemed, the creditor's right revives when he has paid off the lien of the redeemer, and he may add the amount paid to his charge[1]. In the same way he may add to the charge any reasonable expenses incurred in training the slave in either necessary arts, or those in which the debtor had already begun to train him, or those to his training in which the debtor has assented[2]. Expenses incurred in paying damages for a delict by him can also presumably be added, for we know that the creditor is compellable to pay them or abandon his pledge[3].

XVII. Slave held in *Fiducia*.

Upon this case the texts give us little information: the institution was obsolete in Justinian's time, and, as we have learnt from Lenel, many of the texts which really dealt with *fiducia cum creditore* have been applied by the compilers to *pignus*, with or without alteration. But of these there are very few which have any special importance in regard to slaves as opposed to other chattels. Such slaves were technically the property of the *fiduciarius*. Thus a legacy of "my slaves," by the debtor, did not cover those he had so conveyed[4]. And what such slaves acquired in any way was the property of the *fiduciarius*. But this ownership was little more than nominal, for he must account for all such receipts, setting them off against the debt, and being liable for any balance[5], having however the same right of charging expenses as the creditor in a *pignus*[6]. Moreover, a thing given in *fiducia* could be left *per praeceptionem*, at least according to the Sabinians, the heirs being bound to free it, though in general such legacies were confined to the property of the testator[7]. The Sabinians did not consider this form to be confined, as legacy *per vindicationem* was, to the quiritary property of the testator, but applied it to anything in his *bona*[8]. But this is, as Gaius observes, a still further extension, for technically such a slave is not *in bonis debitoris*. As we have seen, however, the rules of account make this formal rather than real; Gaius, in fact, treats the transaction as essentially a pledge, the heirs being under a duty to reduce the thing into possession[9].

[1] 49. 15. 12. 12.
[2] 13. 7. 25. Paul, wrongly attributed to Ulpian. See Lenel, Paling. *ad h. l.* Originally written of *fiducia*.
[3] *Ante*, p. 116. Apart from agreement the pledge did not cover *peculium* wherever acquired, 20. 1. 1. 1. The case of *partus* of pledged *ancilla* has already been considered. *Ante*, p. 23.
[4] P. 3. 6. 69. [5] P. 2. 13. 2. [6] Cp. 13. 7. 25.
[7] G. 2. 220. This does not conflict with P. 3. 6. 69. That is a rule of construction as to what certain words mean: here the only question is whether a certain gift is good.
[8] G. 2. 219—222.
[9] Cp. P. 3. 6. 16; In. 2. 20. 12, *etc.* Another relaxation, P. 3. 6. 1. If the creditor held the slave, the debtor could not acquire possession through him. If he was with the debtor, this resulted from a *precarium* or *locatio* or *commodatum*: the position of the debtor was governed by the rules of these relations independent of their origin.

As the creditor was owner he could have no noxal action for anything done by the slave, but it may be inferred from some texts discussed in the chapter on noxal liability that he had a right to an indemnity[1], the amount of which could be added to the debt. The debtor could, however, abandon the slave instead of paying, leaving the original debt intact, but only if he was unaware of the character of the slave he was mancipating[2]. Conversely it seems to follow that the creditor was noxally liable for anything the slave did, but of course this surrender while it ended the security did not destroy the debt, and did not impose on the creditor any liability for the value of the slave[3]. If the slave stole from the debtor there ought to be a noxal action against the creditor, but such an action would be of little use. For if the creditor surrendered the slave the debt remained, and he was usually in a position to require fresh security. If he paid the debt, because it was less than the value of the slave, it would seem that he could add the money so paid to the debt. But direct authority is lacking.

XVIII. *Statuliberi.*

The most important points in relation to these will arise for discussion under the law of manumission, but something must be said here as to their position while still slaves. It is not necessary to define them with any exactness. Broadly, they are persons to whom liberty has been given by will under a condition, or from a day, which has not yet arrived[4].

The main principle as to their position is that till the gift of liberty takes effect in some way[5], they are still slaves of the heir[6], for all purposes. Thus they may be examined under the *Scc.* Silanianum and Claudianum, if the heir is killed[7]. Children of an *ancilla statulibera* are slaves of the heir[8]. *Statuliberi* are subject to the ordinary incidents of slavery, with the restriction that no act of the heir can deprive them of their prospect of liberty, on the occurrence of a certain event, and some other restrictions shortly to be stated. Thus they may be sold, legated, delivered by *traditio*, adjudicated, and even usucapted, but always carrying with them their conditional right to liberty[9]. They may be pledged, but arrival of the condition destroys the creditor's lien[10]. A usufruct may be created in them[11]. They may be noxally

[1] *Ante*, p. 125. [2] *Arg.* 47. 2. 62. 3. [3] *Arg.* 9. 4. 17. 1. *Ante*, p. 116.
[4] 40. 7. 1. One as to whom it is doubtful if his freedom is in fraud of creditors is a *statuliber*. *Ibid.* See Festus, s.v. *Statuliber*. And see *post*, Ch. XXI.
[5] As to cases in which the gift took effect without satisfaction of the condition, *post*, Ch. XXI.
[6] U. 2. 2; D. 40. 7. 16, 29. *pr.* [7] 29. 5. 1. 4. [8] 40. 7. 16; C. 7. 4. 3.
[9] 30. 81. 9; 40. 7. 6. 3, 9. 1; U. 2. 3; C. 7. 2. 13; *etc.* The condition may be such that alienation destroys the *spes*, *e.g.* "to be free if my *heres* do not sell him," 40. 7. 30. A sale may be with or without *peculium*, 40. 7. 3. 7, 6. 6, 27, 35.
[10] 20. 1. 13. 1. [11] 33. 2. 20.

surrendered, and this will discharge the *dominus*, without affecting their hope of liberty, and if the condition be satisfied during the litigation, the *dominus* is entitled to absolution[1]. As they belong to the heir, they cannot receive a legacy under his will, unless the condition is satisfied at his death, or the legacy is under the same condition as that under which they are to be free[2]. So, too, a *statuliber* can acquire for the *hereditas*[3].

But there are respects in which their position differs from that of an ordinary slave. Though they can be sold, the sale may not be under harsh conditions[4]: the *heres* may do nothing to make their position worse[5]. He may be validly directed to maintain them till the condition arrives, *cibaria dare*, a special enactment of Severus and Caracalla forming an exception to the rule that a legacy cannot be made to your own slave *sine libertate*[6]. It would seem to be aimed at preventing the *heres* from abandoning a slave from whom, as he is about to be free, no great profit can be expected[7]. A legacy of *optio servi* or *legatum generis* does not give the legatee a right to choose a *statuliber*, so long as the condition is possible[8]. Such a choice is hardly likely since he takes his *spes* with him. But in any case, the rule is merely one of construction: a testator who has made both gifts cannot be supposed to have meant the choice to cover the man freed, and the rule that if the condition fails, he may be chosen, rests on the view, of Q. M. Scaevola, that a gift of which the condition has failed is to be regarded as completely non-existent.

Slaves can ordinarily be tortured as witnesses but *statuliberi* may not, at least from the time of Antoninus Pius, in ordinary pecuniary cases, though they may in a case of adultery without prejudice to their ultimate right to liberty[9].

Where his value is material a *statuliber* is reckoned at his value as such, *e.g.*, in *actio furti* and *condictio furtiva*[10], and for the purpose of the *lex* Falcidia. If the slave so freed dies, he is reckoned as part of the *hereditas* at his value as a *statuliber*, if, as the event turns out, the condition fails, but if the condition arrives after he is dead, he is not reckoned at all[11]. A text of Julian deals with a similar question in relation to *condictio furtiva*. If a thief, or his heir, is sued by *condictio furtiva*, and the thing stolen ceases to exist, *e.g.* a stolen slave dies, the plaintiff is still entitled to judgment[12]. But Julian says[13] that if a slave,

[1] 40. 7. 9. *pr.*, 2; 47. 2. 62. 9. In this case liberty was attained by paying 10 to *heres*. He must give this to plaintiff unless it comes out of *peculium*. This is because the *heres* might in that case have forbidden the payment without barring the liberty. *Post*, Ch. XXI.
[2] 31. 11. *pr.* [3] 40. 7. 28. 1.
[4] *h. t.* 25. Such as, *ne intra loca serviant, ne unquam manumittantur.*
[5] *h. t.* 33; C. 7. 2. 13. [6] 30. 113. 1.
[7] No mode of enforcement is stated. Probably failure would ground appeal to the Emperor under the rule then newly laid down by Antoninus Pius, *ante*, p. 37. See *post*, Ch. XX.
[8] 33. 5. 9. 1. [9] 48. 18. 8. 1, 9. 3.
[10] 13. 1. 14. *pr.*; 47. 2. 52. 29, 81. 1. [11] 35. 2. 11. 1.
[12] 13. 1. 8. 1, 20. The thief is always *in mora*. [13] 13. 1. 14. *pr.*

left conditionally, is stolen, the *heres* has *condictio furtiva* so long as the condition is unfulfilled, but if, pending the action, the condition arrives, there must be absolution. He adds that the same is true if the gift is one of liberty, since the plaintiff has now no *interesse* and the thing has ceased to belong to the thief, without *dolus* of his. The second reason is none, for it is indifferent in this action whether the thief is still owner or not[1]. The first reason is hardly satisfactory. If a stolen slave is dead, we are told that the action must still proceed, because there may be other interests than the personal value of the slave, *e.g.* the loss of an inheritance to which he was instituted, on which his master has been prevented from making him enter[2]. The same reasoning might have applied here. In another text Ulpian says the same thing[3] about *actio furti* for a *statuliber*. But he confines the rule to the case in which the condition is satisfied before *aditio*, so that the slave never was the heir's. In the case of *condictio*, Julian allows release if the condition is satisfied at any time before judgment. This requires altogether different reasoning. It is no doubt, as Windscheid says[4], an application of the rule *soli domino condictio competit*. There is nothing remarkable in allowing the cesser of ownership after *litis contestatio* to affect the matter, in view of the tendencies of classical law, but it seems somewhat unfair in *condictio furtiva*. It is in fact an application to this action of the principle applied to real actions (though ill evidenced in the texts[5]), that the plaintiff cannot recover unless his interest continues to the time of judgment.

As to criminal liability there is some difficulty. In one passage we are told, by Pomponius, that *statuliberi* are liable to the same criminal penalties as other slaves[6]. But Modestinus and Ulpian say[7] that, on account of their prospect of liberty, they are to be punished as freemen would be, in the like case. The contradiction is absolute. Ulpian attributes the rule to a rescript of Antoninus Pius[8], and as Pomponius is much the earliest of these jurists and wrote some work under Hadrian, it may be that this text states the older law, before the rescript, and that its insertion in the Digest is an oversight of the compilers.

We have seen that *statuliberi* may be bought and sold, but it is clear that one who wishes to buy a slave will not be satisfied with a *statuliber*. We are told in one text that if Titius owes Stichus *ex stipulatu*, and hands him over, the promise is satisfied though he is a *statuliber*. This view is credited by Ulpian to Octavenus[9]. It deals

[1] See *ante*, p. 287, n. 12. [2] 13. 1. 3. [3] 47. 2. 52. 29.
[4] Lehrbuch, § 361. [5] 10. 4. 7. 7. See Pellat, De rei vind. 226.
[6] 40. 7. 29. *pr.* Gaius and Ulpian say that a *statuliber* may *ut servus coerceri*. They mean only that as he is a slave and can be punished by his master he cannot be treated as free and sued after his liberty is complete, under the Edict as to damage to the *hereditas* by freed slaves. See 47. 4. 1. 3, 2, 3; *ante*, p. 255; *post*, Ch. XXIX.
[7] 48. 18. 14; 48. 19. 9. 16. [8] See Pothier *ad h. l.* [9] 40. 7. 9. 2.

of course only with the case of a promise of a particular man, who must be taken *talis qualis*. Thus Africanus tells us[1] that if a man *hominem promisit*, and delivers a *statuliber*, this is not performance. The receiver can sue on the stipulation, without waiting till the condition is satisfied. Africanus adds that if in the meantime the condition fails, there is no loss and therefore no right of action. It is in relation to sale that this matter is most fully discussed. There are several possible cases.

(*a*) The slave is sold with no mention of the fact that he is entitled to liberty on a condition. Ulpian says there is weighty authority for regarding this as *stellionatus*, but whether this be so or not, there is an *actio ex empto*[2]. But subject to the ordinary rules as to notice, there is also the ordinary remedy *evictionis nomine*, *i.e.* the express or implied *stipulatio duplae*[3]. This of course depends on the buyer's ignorance, and is subject to one deduction which may be important. The condition may be *si decem dederit*, or the like. In that case if the money has been paid to the buyer, as it would ordinarily be, he must allow for it, unless it has been paid out of the buyer's property, for instance out of the slave's *peculium*[4].

(*b*) The vendor says that the man is a *statuliber*, but does not say what the condition is. Here if he knew what the condition was, but the buyer did not, he is liable, not *evictionis nomine*, but *ex empto*[5]. The text repeats itself. The first statement looks like Scaevola's own, which the compilers proceed to amplify, and justify, which Scaevola very rarely does. It is not obvious why the buyer should have any action at all, and this is perhaps what struck the compilers. The rule seems to be that if the vendor gives the buyer to understand that he is buying a *statuliber*, he saves himself from liability on the warranty but if he does so loosely, *perfusorie*, laying no stress on it, knowing all the time that it is a likely contingency, he may very well have deceived the buyer, who may bring the *actio ex empto*. As this is a *bonae fidei iudicium*, the *iudex* will ascertain, without any *exceptio*, whether there was *dolus* and the buyer was deceived.

(*c*) The vendor states a condition, but states one entirely different from the actual one. Here the liability is *evictionis nomine*[6]. Thus where a slave was to be free on accounting, and there was in fact nothing due on his accounts, and the vendor said the liberty was conditional on payment of so much money, he was liable as for eviction, the man sold not being a *statuliber* at all, but already entitled to his liberty[7].

[1] 46. 3. 38. 3. [2] 40. 7. 9. 1. [3] 21. 2. 39. 4, 46. 2, 51. 1.
[4] 44. 4. 2. 7. If the man has already paid the vendor the money or part, this can be recovered by the vendee, but only if he releases the liability *ex evictione*, 44. 4. 3.
[5] 21. 2. 69. 5. [6] 21. 2. 69. 2.
[7] *h. l.* 4. Same rule where one whose liberty was unconditional was sold as a *statuliber*, *h. l.* 1.

(*d*) The vendor states the condition but states it inaccurately so that the buyer is prejudiced. There were evidently different opinions here, the dispute being not exactly as to what the remedy was in this case, but as to what cases ought to come under this head, rather than the last. The case discussed is that in which the vendor says there is a condition of payment, but overstates the amount. Here, on the authority of Servius, the view prevailed that this was not a case for the eviction penalty, but only for *actio ex empto*[1]. In a text of Paul the same rule is laid down, but the remark is added that, if there has been an express *stipulatio duplae*, the action on this arises. This seems contradictory and the grammatical form of the sentence suggests that it is compilers' work[2]. A similar case arises where the slave is to be free on accounting, and there is money due on his accounts, and he is sold as *decem dare iussus*. Here if what is due is less than ten, an *actio ex empto* arises. If it is the same or more, there is no prejudice, and thus no action[3]. On the other hand, if the sum is stated correctly, but it is payable to a third person, so that it does not pass to the buyer, this is essentially a different condition, and the facts come under case (*c*), giving rise to the eviction penalty[4].

(*e*) The vendor excepts generally the case of his freedom: here if he is already free or is now entitled to liberty, there is no liability at all. It may be presumed that if he has led the buyer to believe that the liberty is not yet due, there will be an *actio ex empto*[5].

All these liabilities depend on prejudice to the vendee. We have already seen this, in the case of the liability *ex empto*[6]: the same rule is laid down for the liability *evictionis nomine*. Thus where the condition was *si Titius consul factus fuerit*, but on the sale the condition declared was *si navis ex Asia venerit*, and this latter event occurred first, there was no liability at all[7]. Africanus seems to add that the same rule applies where, though the slave was entitled to liberty on the easier condition, he actually does satisfy the condition stated in the sale. He takes the case of a gift of freedom in one year, the condition stated in the sale having been of freedom in two years. Here, if the slave does not claim the liberty for two years, there is no liability. So also if there was a condition to pay 10 and the vendor says 5, and he pays the 10[8]. Neither of these cases is clear. The second is, as stated, no illustration of the proposition, for the condition named is less onerous than that which actually exists. The case is rendered a little confusing by the fact that if the money is not payable out of the *peculium*, the larger payment, while more onerous to the slave is also more beneficial to the

[1] 21. 2. 54. 1, 69. 3. [2] 40. 7. 10.
[3] 21. 2. 69. 4. [4] *h. t.* 54. 1. [5] *h. t.* 69. *pr.* [6] *h. t.* 69. 4.
[7] 21. 2. 46. 2. [8] *h. l.* 3.

buyer, who will receive the money. But that does not affect the matter. In the first illustration, the decision is unfair, since the slave is free from the year, and this makes a great difference as to the destination of his acquisitions, during the second year, even though he be in that year a *bona fide serviens*. There is some authority for reading the text differently[1], and making the real condition two years, and that stated, one. This brings the two illustrations into line, but makes them illustrate only the obvious proposition that if there is no possibility of prejudice to the buyer there is no liability.

The various rules as to immutability of *status* apply only if the man actually is a *statuliber*. But he is not a *statuliber* till an heir has entered under the will. Thus the rule is laid down by Ulpian that, if, before entry, he is delivered by *traditio*, or usucapted or manumitted, his hope of liberty is lost[2]. But elsewhere he tells us that on such facts, if a *heres* does ultimately enter under the will, the man's position as a *statuliber* is restored *favore sui*[3]. He says this only in relation to *usucapio*, but it is presumably general[4]. Marcellus is quoted by Marcian[5] as laying down the same rule for *usucapio*[6]. Indeed this, and manumission by the usucaptor, are the only cases which are likely to happen, for it is not easy to see how a slave in such a position can be effectively transferred by anyone before *aditio*[7].

XIX. *Captivi.*

The circumstances under which a man became a *captivus* should properly be discussed later in connexion with modes of enslavement, and those under which he regained his liberty with the modes of release from slavery. But as the matter stands somewhat apart from the general law of slavery, it seems best to take it all together. The sources deal almost exclusively with the case of a Roman subject captured by the enemy.

The principle governing the matter is that persons captured become slaves[8]. In general the capture will be in a war, and those captured will be part of a force. But they may be persons taken in the hostile country when the war breaks out[9], and it is not always

[1] Mommsen, *ad h. l.*
[2] 40. 7. 2. *pr.* He loses by manumission the position of *libertus orcinus*.
[3] 40. 7. 9. 3. [4] *Post*, Ch. XXI.
[5] 40. 5. 55. 1. He says it might be regarded as due to their *culpa* that they were so dealt with; except in the case of children: he does not seem to mean that such *culpa* would bar.
[6] The favourable rule is clearly late and is not in the Edict. It seems that the point was decided by *cognitio* of the Praetor, 40. 5. 55. 1. As to whether persons so relieved were *cives* or Latins, *post*, Ch. XXIII.
[7] Probably the words *sive tradetur* are incautiously adopted from the earlier part of the text where they are rightly used.
[8] In. 1. 3. 4. They must be actually removed to the foreign territory, 49. 15. 5. 1.
[9] 49. 15. 12. *pr.*

the case that there is a war persons who are found in a State with which Rome has no agreed friendly relations are liable to be made captives, though there is no declared war[1] But if it is a war it must be one with a foreign people[2]. Those taken by pirates or robbers, or in civil war, remain free[3]

If captured by the forces they become, it is clear, the property of the State[4] Whether under any circumstances they belong to an individual captor is not clear[5] Where they become the property of the State, they do not necessarily become *servi publici populi Romani* In many cases they are given freedom[6] Often they are sold, *sub hasta*, or *sub corona*[7] Some are made *servi populi*, with or without a view to their manumission if they properly carry out the duties entrusted to them Some remain the property of the State but without the status of *servi publici*, being set to meaner labours, and often, no doubt, intended to be sold in course of time[8].

The person captured may have been before his capture a slave or a freeman if he return he is restored to his old position by *postliminium*[9], subject to some important restrictions, and in some cases to a redeemer's lien, both of which will require detailed discussion While in captivity he is a slave if he die captive he is regarded as having died at the moment of capture, though there were doubts as to this in classical law[10]

So far as the doings of the *captivus* during his captivity are concerned there is nothing to be said he is a slave and the ordinary rules of slavery apply to him[11] the possibility of *postliminium* does not affect the matter, any more than the possibility of manumission does in other cases[12] But the case is different with his property and family left behind. Here the provisional nature of his status is freely expressed in the rules, which can hardly be stated so as to present a logical appearance It is necessary to consider the state of things during his life in captivity, the effect of his death in captivity, and the conditions and effect of *postliminium*

The general principle governing the rules as to transactions and events during the captivity is that the status of the captive is in suspense and the destination of the acquisition, etc, will be determined by the event of death or return But it is clear that this rule is

[1] *h t* 5 2 See Sueton Tiberius, 37 So captures might be made by unauthorised raids on such territories
[2] 49 15 24 [3] *h t* 19 2 21 1, 24, C 7 14 4
[4] 48 13 15, Livy, 26 47
[5] Girard, Manuel, 281 The rule of the foreign capturing State would not necessarily be the same
[6] Livy, 6 13, 26 47, 32 26, Halkin, Esclaves publics, 17
[7] Marquardt Vie Privee, 1 196
[8] See Mommsen Droit public 1 275, Staatsrecht (3) 1 241, as to the rights of the general in command See also Blair, Slavery among the Romans 17
[9] C Th 5 7 1 [10] G 1 129
[11] See the emphatic language of In 1 3 4
[12] An exception in case of wills to be considered shortly

a gradual development, which in some parts of the law is far from complete in some, indeed, there is no trace of the rule of suspense, the captivity ends the right

The son or slave of a *captivus* can acquire and the effect of an acquisition is in suspense[1] There is no conflict of opinion, and the rules are assimilated to those applied in the case of transactions by a *servus hereditarius*[2] No doubt the rule applies to all cases of direct acquisition[3] This condition of suspense raises difficulties both theoretical and practical as to the interim ownership There is here no such conception as the *hereditas* in which acquisitions can vest, and thus it is not easy to say to whom any acquisition is made in the meanwhile Paul and Pomponius are clear that the property is not in the *captivus*[4] On the other hand Javolenus says that *in retinendo iura singulare ius est*[5] And Diocletian[6] and Justinian[7], speaking of protection of the property, use language which attributes interim ownership to the captive This is in fact a mere question of language the real difficulty is that, whether he is owner or not, he is not there to protect his own interests Some protection must be devised Certain forms of pillage can no doubt be dealt with criminally, and the fact that no seizer can make a title is *pro tanto* a protection But these cannot suffice The earliest protection of which we know anything is provided by a *lex* Hostilia, certainly early but not mentioned in any extant text earlier than Justinian, a fact which has led some writers to doubt its authenticity[8] It authorises action on behalf of those *apud hostes*, perhaps a *popularis actio*[9], for the case of spoliation But it probably plays but a small part, and in later times we find a more effective remedy in the power, of those who would succeed to the property, to apply to have a *curator bonorum* appointed in their interests, who gives security to a public slave[10] This *curatio* does not seem to have been an ancient institution It is mentioned only by Diocletian and Ulpian[11] the latter speaking of it as a well recognised institution[12] There is no trace of it in the Edict Moreover, while it is clear that such a *curator* can sue, and be sued, as *defensor*[13], Papinian says that if a *heres* has given security for a legacy and is then captured, his sureties cannot be sued as there is no person primarily liable under the

[1] Stipulation (45 1 73 1, 45 3 18 2, 49 15 1, 22 1 2), legacy (49 15 22 1), *constitutum* and *acceptilatio* (13 5 11 *pr* 46 4 11 3), *negotiorum gestio* (3 5 18 5), *institutio* (28 5 32 1), though there could be no entry on such an *institutio* in the meantime, 49 15 12 1
[2] 9 2 43 45 1 73 1, 45 3 25, 49 15 29
[3] 49 15 12 1 22 1—2 [4] 3 5 18 5, 9 2 43
[5] 41 2 23 1 [6] C 8 50 3 [7] In 4 10 *pr*
[8] *Ib*, Theoph *ad h l* See Pernice, Labeo, 1 378 and the literature there cited
[9] Pernice *loc cit* [10] C 8 50 3
[11] C 8 50 3 D 4 6 15 *pr*, 26 1 6 4 27 3 7 1, 38 17 2 30 See Cuq, Institutions, 2 172
[12] 4 6 15 *pr* [13] C 8 50 3, D 27 3 7 1

stipulation[1]. Ulpian sees no such difficulty in an analogous case[2]. The reasonable inference is that Papinian did not know of this application of *curatio*. It seems to have been a development from the better known case of *curatio bonis* in the interest of creditors. There could be no *bonorum venditio* in the case of a captive debtor[3], but the creditors could apply, under the general edict[4], for the appointment of a *curator bonis*[5]. Such a *curator* has no functions except to protect the property: his powers and duties are in the field of procedure, and it does not appear that he could, by contract or the like, create rights or duties for the estate[6].

As a *captivus* is himself possessed he cannot possess. It follows that capture definitely ends possession by the captive himself, and thus interrupts *usucapio* by him. Nor is there any question of suspense: if he return he does not reacquire possession except by retaking, and his retaking has no retro-active effect, even though no one has possessed in the meantime[7]. Thus his possession is a new one, a fact which may be material, if for instance he has learnt in the meantime that he is not entitled: this will prevent him from usucapting, and bar the *actio* Publiciana. If the possession was not by himself, but by a son or slave, the rule is the same[8], unless the matter was one of the *peculium*. But there is a difference of opinion if the *res* is *peculiaris*, held at the time of the capture, or subsequently received. According to Labeo's view[9], the rule is the same in this case. This may be the logical view, at least in the case of a slave, since his capacity is purely derivative, and the captive, himself now a slave, has none. But the view which prevails is that of Julian, justified by obvious considerations of convenience, that in this case the possession continues, if the slave still holds, and ripens to ownership by usucapion at its proper time[10]. Julian, it may be remarked, says that the *usucapio* is in suspense so that it will be effective, if the captive returns, but he doubts for the case of his death[11]. This turns on difficulties as to the *fictio legis* Corneliae, to be considered later. Marcellus thinks[12] on the other hand that, if he dies, since his death is then supposed to have occurred at the moment of capture, it ought to make no difference whether he or the slave possessed, since from the moment of capture there was a *hereditas*, and the *hereditas iacens* was by his time capable of possession[13]. But this view is not

[1] 36. 3. 5. *pr.* [2] 46. 6. 4. 5. [3] 42. 4. 6. 2.
[4] 42. 7. [5] 42. 5. 39. 1.
[6] This would be to be a procurator: a captive as a slave could have none, 4. 6. 15. *pr.*
[7] 41. 2. 23. 1; 41. 3. 11, 15. *pr.*, 44. 7; 49. 15. 12. 2, 29.
[8] 41. 3. 11. [9] 49. 15. 29.
[10] 41. 3. 15. *pr.*, 44. 7; 49. 15. 12. 2, 22. 3, 29. Papinian and Paul justify the rule on the ground that even if he were present his knowledge and cooperation would not be needed, 41. 3. 44. 7; 49. 15. 29. But we have seen (*ante*, p. 200) that this rule rests merely on convenience, and cannot be argued from. Here he is *incapax*.
[11] 49. 15. 22. 3; 41. 3. 15. *pr.* [12] 41. 3. 15. *pr.* [13] *Ante*, p. 257.

accepted. Marcellus goes indeed so far as to hold[1] that whether he dies or not there ought to be usucapion of what he has possessed, presumably on the ground that the fiction of *postliminium* was that he had never been away. But this ignores the real point, namely, that the fiction of presence and the fiction of possession are not the same thing: we shall see that there are many things that the *postliminium* does not *ipso iure* undo. From the fact that a *captivus* has *restitutio in integrum*, within an *annus utilis* of his return, or even before his return, if a *curator* has been appointed to his property[2], we know that *usucapio* runs against him *ipso iure*, that actions by or against him may be barred by time, and so forth. If, as we are told, he does not lose his right as *suus* or *legitimus heres* or his right to *bonorum possessio contra tabulas*, this is precisely because these claims are not subject to any statutory limit[3]. The case in which a slave of a *captivus* stipulates and takes a surety, is on the same footing as that of such a contract by *servus hereditarius*[4]. This branch of the matter may be left with the remark that if a man has given security for his appearance in court (*iudicio sisti*), supervening captivity is an excuse and his sureties are not liable[5].

The law of family relations is governed by the same principle. Paul indeed says[6] that a captive ceases to have his children in *potestas*. But this means only that their status is in suspense, just as is that of a *captus filius familias*[7]. Thus no tutor can be given to one whose *pater* is captive, and (though there were doubts) Ulpian holds that such an appointment is not merely suspended in operation, but absolutely null[8]. On the other hand the *tutela* is ended by captivity of the tutor or of the ward, so completely that, though it is possible for the tutor to regain his position, his sureties may be sued[9]. Consideration of the purposes for which a tutor is appointed will shew that any rule of suspense would cause intolerable inconvenience. But if a person otherwise entitled to *legitima tutela* is a captive the person next entitled is not let in; a praetorian tutor is appointed[10], and thus though we learn that the old *tutela* is recoverable by *postliminium*, this cannot be retrospective[11].

As we have seen, a captive does not lose his rights of succession[12], and there are many texts laying down the rule, for various cases, that if, upon a death, there exists a *heres* who is a captive, though he cannot himself make a present claim, he excludes from claiming those who would be entitled if he did not exist[13]. In many other ways his existence

[1] 49. 15. 12. 2. [2] 4. 6. 1. 1, 15. *pr.*
[3] P. 4. 8. 22; D. 37. 4. 1. 4. As to *bonorum possessio* see 38. 15. 2. 5.
[4] *Ante*, p. 261. [5] 2. 11. 4. 3. [6] P. 2. 25. 1.
[7] 38. 16. 15; 49. 15. 12. 1, 22. 2; In. 1. 12. 5; G. 1. 129.
[8] 26. 1. 6. 4. [9] 26. 1. 14. 2; 27. 3. 7. 1; 46. 6. 4. 5.
[10] 26. 4. 1. 2. [11] G. 1. 187. [12] 37. 4. 1. 4; P. 4. 8. 22.
[13] 38. 16. 1. 4, 2. *pr.*; 38. 17. 2. 7.

is recognised. Thus his mother must apply for a *curator bonorum* to be appointed to him, if she wishes to preserve her rights under the *Sc.* Tertullianum, just as she would have had to get a tutor appointed to an *impubes*, not captive[1]. A captive, or his slave, may be validly instituted[2], though there can be no question of entry. Similarly, since he is not dead, there can be no entry on his *hereditas*[3]. But a child born in captivity to a *captivus* is no relative to him apart from *postliminium*[4].

It is clear that capture of either party dissolves a marriage, and that it is not restored by *postliminium*, but only by renewed consent[5]. Paul is reported as saying that, if the wife refuses this renewal of consent without just cause, she is liable to the penalties resulting from causeless divorce[6]. It may be doubted whether this remark is really from Paul. The evidence for the existence of definite money penalties for causeless divorce in classical law is very doubtful[7]. The cesser of the marriage might seem to be explained by the fact that there can be no *connubium* with a slave[8], but this would not of itself account for the refusal to treat the matter as in suspense. And its insufficiency is also shewn by the fact that if the wife is a *libertina*, freed for the purpose of marriage, the marriage still subsists though the patron be captured, according to a rule laid down by Julian and reported by Ulpian[9]. The real reason is one of convenience, and the rule brings into strong relief the *de facto* nature of marriage as conceived by the Roman Law.

But though the marriage has ceased it does not follow that there is complete liberty to marry again, and the texts create some difficulty[10]. Justinian in a Novel[11] observes that captivity is such a dissolution of marriage as had involved no penalties. But he adds that he takes a humaner view, and lays it down that the marriage is to subsist so long as it is certain that the captive, male or female, is alive; and the other party cannot contract another marriage without incurring the penalties for causeless divorce. But if it is uncertain whether the captive is alive or dead, there must be five years' delay, after which, if the uncertainty still exists, or the captive is dead, the party at home may remarry, without fear of any penalties, as if there had been a perfectly valid *repudium*. If this stood alone there would be no difficulty: it is a typical piece of Byzantine legislation. But though it looks like new legislation, and probably is so, as to the continuance of the marriage, it certainly is not absolutely new as to the bar to remarriage. For it is later than the Digest, which contains two texts which speak of a similar rule. Paul is reported as saying[12] that the wife is free to marry *post*

[1] 38. 17. 2. 23, 30. [2] 28. 5. 32. 1. [3] C. 8. 50. 4.
[4] 38. 17. 1. 3; 49. 15. 25; C. 8. 50. 1. See *post*, p. 308.
[5] 24. 2. 1; 49. 15. 8, 12. 4, 14. 1. [6] 49. 15. 8.
[7] See especially the tenor of C. 8. 38. 2. [8] Nov. 22. 7; D. 23. 2. 45. 6.
[9] 23. 2. 45. 6. [10] Karlowa, R. R. G., 2. 120.
[11] Nov. 22. 7. [12] 49. 15. 8.

constitutum tempus, and Julian as laying down a rule[1] which is substantially that of the Novel except in two respects. He does not say that the marriage continues, but only that it may seem to continue from the fact that remarriage is barred. And he is more explicit as to the date from which the five years are to run: it is the commencement of the captivity. Karlowa is of opinion that the five year rule was contained in the *lex* Papia, or in connected legislation, since the text of Paul in which he mentions the rule[2], is in his commentary on that law, and thus, that the text of Julian, notwithstanding its florid style, is genuine so far as that rule is concerned[3]. But it is generally thought that the allusion in the text of Paul is interpolated, and Lenel[4] treats it, and nearly the whole text of Julian, as compilers' work. And this seems the more probable view. The Novel[5] refers to earlier legislation dealing with the matter, and we have some of this in the Code. Theodosius provides that on divorce by a wife without cause, she may not remarry at all within five years[6]. Julian's opening remark is probably no more than an allusion to the fact that those whose husbands were captured were forbidden, though not absolutely prevented, from marrying for a certain time for reasons sufficiently obvious; the rule applied primarily to widows and divorced women[7]. The compilers build on it an extension of the limit of five years, if it is uncertain whether the husband is alive or dead, to this case of captivity, the rule being a prohibition, but not a bar. The Novel declares the marriage still on foot and applies the five year rule to both sexes equally.

A captive father cannot assent to his son's marriage, and public convenience makes it necessary to dispense with his approval though in the event this may cause children to be added to his *familia* without his consent[8]. If he does not assent, says Tryphoninus, at least he does not dissent. This text imposes no delay. But Ulpian appears[9] as holding that a son can marry only after three years. Paul lays down a similar rule[10] for son or daughter where the whereabouts of the father is not known, and Julian observes[11] that if a son or daughter of a captive, or *absens*, marries before the three years are over, the marriage is good if the spouse is one to whom the father could not have objected. These texts do not tell a consistent story, and it is perhaps impossible to extract the development of the law from them. There is no trace of any earlier legislation on the matter, and the jurists could hardly have established the positive term of three years. The texts contain many errors of grammar and peculiarities of diction, which suggest Tribonian, and

[1] 24. 2. 6. [2] 49. 15. 8.
[3] *loc. cit.* He thinks that the distinction between certainty and doubt is an interpolation.
[4] Paling. *ad hh. ll.* [5] Nov. 22. 7. [6] C. 5. 17. 8, 9.
[7] Girard, Manuel, 162. [8] 49. 15. 12. 3. [9] 23. 2. 9. 1.
[10] *h. t.* 10. [11] *h. t.* 11.

perhaps the right solution is that classical law allowed marriage without consent, and Justinian allowed it only after three years of captivity, unless the person was one to whom no exception could be taken by the father[1]

If the person captured was a slave old rights in him cease to exist, subject of course, to *postliminium*[2] Thus if he has been pledged, the pledge does not exist for the time[3] Ownership is gone he is for the time a *servus hostium*[4] Usufruct in him is gone, though it may be restored by *postliminium*[5] If in the meantime the period of nonuser has passed, it would seem that some form of *restitutio in integrum* may be necessary since usufruct needs positive enjoyment to its retention, not, like *dominium*, mere absence of adverse possession But the text seems to negative this requirement, and the Edict does not mention this case The slave loses for the time his old characteristics He becomes incapable of possessing[6] He ceases to be a *servus poenae*, if he was one before[7], and if he has been from any cause incapable of manumission, the defect does not apply to him till *postliminium*[7] But several texts bring out the suspensive and provisional character of these rules The slave still exists Thus an *actio de peculio* on his account does not become *annalis* so long as he can possibly return with *postliminium* A legacy of him, made before or after he was captured is good, and the heir must give security, not for his value but for his delivery on his return[8]

The situation is of course completely changed if the captive dies *apud hostes* The matters in suspense are now decided, and the nature of the settlement calls for a good deal of discussion Matters are in general adjusted as if there had been no captivity[9] The captive's children become *sui iuris* and though for Gaius it is doubtful from what date their independence is regarded as beginning[10], he stands alone in this doubt Ulpian indeed says merely that they become *sui iuris*[11] But the Digest is quite explicit, and the texts do not seem to be interpolated Tryphoninus says that on the death of a *captivus* his children are *sui iuris* as from the day of capture[12] Julian lays it down

[1] See Accarias Precis § 84 Karlowa thinks (R R G 2 121 following Bruns) that in the text of Julian a '*non* has dropped out The three years rule is classical for captives (hence Paul s doubt as to absence), the compilers extended it to *absentes* and Julian s allusion to these is an interpolation He remarks however that Bechmann reverses this It may be noticed that if a *non* is inserted in Julian s text, the resulting rule is so severe as to give little relief and that all Karlowa s argument is equally in favour of the more complete interpolation

[2] 35 2 43, C 8 50 10 12, *etc* [3] 49 15 12 12

[4] 40 7 6 1, 49 15 5 2 [5] 7 4 26

[6] 41 3 11 [7] 49 15 12 16

[8] 30 47 2 A legacy of A or B where B is a *captivus* is treated like one in which he is a *fugitivus ante* p 271

[9] 24 1 32 14 *in fin*, 24 3 10 *pr* 38 16 1 4, 2 *pr*, 38 17 2 7, C 8 50 4

[10] G 1 129 [11] U 10 4

[12] 49 15 12 1, and thus can have a *hereditas*, 38 16 15

that what a son of a captive stipulates for, or otherwise acquires, is his own if his father dies still a captive[1] And it is repeatedly laid down generally that in all parts of the law the effect of the death is the same as if it had occurred at the moment of capture[2] So, on his death, since (as we shall shortly see) his will operates, he is restored to his place in his father's succession, and thus the other representatives, even his own children, may be excluded[3] Papinian discusses the case of a son or slave, of a captive, who stipulates in the name of the father or master, and considers the effect if the captive die in captivity[4] He observes that though, in a simple stipulation, the effect would be different in each case, since the slave would benefit the heir of the *dominus*, and the son would benefit himself alone, yet here they are on the same level Both are bad. In the case of the son this is because he stipulates *alii, non sibi* it is in fact for a non-existent person In the case of the slave it is a stipulation for his dead master, which, as we have seen, is void[5] One case is peculiar We are told by implication, by Paul[6], that where a slave is *captus*, the *actio de peculio* on his account becomes *annalis* on his death, but it is evident that the year is not counted from the capture

It is in connexion with the succession to the dead captive that the most difficult questions arise The man dies a slave and cannot in strictness have any will or indeed any inheritance[7] We are told explicitly by Ulpian that his will becomes *irritum* on his capture[8] As he is a slave he cannot make a will in captivity[9], and though as we shall see there is relief against the destruction of a previously made will, codicils made during captivity are not confirmed by it they are not valid even for the purpose of creating *fideicommissa*, since at the time of making them he had not *testamenti factio*[9] Whether, in very early law, succession to such a person did not exist at all cannot be said Perhaps the relief developed *pari passu* with the notion that a captive suffered *capitis deminutio maxima*[10] However that may be, it was provided, directly or indirectly, by a certain *lex* Cornelia[11], that the succession to such a person should be regulated as if he had died *in civitate*[12] The exact nature and scope of this provision cannot be clearly made out from the texts The rule is sometimes stated as a direct

[1] 49 15 22 2 2a

[2] 49 15 18 22, C 8 50 1, *etc* A legacy to a captive is null if he dies still a captive (30 101 1), but if his slave is instituted the gift is good and goes if the captive dies *apud hostes* to the person who takes his inheritance, 28 5 32 1, 49 15 22 1

[3] 38 16 1 4 The text is rather obscure As to the case of *postumi* 28 2 29 6 So if my son is captured while my father is alive and dies *apud hostes* after I am a *paterfamilias* his children take his place in succession to me, 38 16 1 5 and see *post*, p 301

[4] 45 3 18 2 [5] *Ante* p 260 [6] 15 2 2 1

[7] 50 16 3 1 [8] 28 3 6 5

[9] P 3 4a 8 In 2 12 5, D 49 15 12 5 [10] Cuq, Institutions, 1 573

[11] Sulla? Karlowa R R G, 2 124 [12] U 23 5, *etc*

provision of the *lex*[1] Sometimes it is called the *beneficium legis Corneliae*[2], sometimes the *fictio legis Corneliae*[3] While many texts speak of the rule as creating a *hereditas*[4], others do not use this expression, and Ulpian, in two texts, declares that it is not, strictly speaking, a *hereditas*, giving, as his reason, that a man who dies a slave cannot have a *hereditas*, and that one who could not make a will cannot properly be said to have died intestate He adds that as succession is given to those to whom it would have been given, if he had died in the State, it is treated as if it were a *hereditas*[5] It is widely held that the rule is not a direct provision of the *lex*[6], but a juristic interpretation of something therein, and conjecture has gone so far as to assume that this *lex* Cornelia is identical with the *lex* Cornelia *de falsis*, and that it contained a rule punishing the forgery of the will of one who was *apud hostes*, from which the jurists inferred that the will of such a person would be valid[7] For this opinion there seems to be no evidence whatsoever[8], and it is difficult to hold it in face of the texts which say that the *lex* did contain a direct and express provision on the matter[9]

It is not easy to say what this provision was It is fairly certain that it was in a form which left room for doubts, since it is observable that a large proportion of the texts dealing with the matter are from collections of *Quaestiones* and *Disputationes*[10] It is also most probable that it was in the form of a fiction[11], and, from Ulpian's language[12], that it did not speak of *heres* or *hereditas* Thus Paul tells us not that the *lex* but that the *fictio legis* Corneliae *et heredem et hereditatem facit*[13], though elsewhere both he and Papinian use more unguarded language[14] One or two of the texts give us what purport to be explicit statements as to the content of the *lex* Ulpian says that the *lex* confirms the will as if he had died *in civitate*[15] Julian says that by the *lex* Cornelia the state of things is to be that *quae futura esset si hi de quorum hereditatibus et tutelis constituebatur in hostium potestatem non pervenissent*[16] Paul says it confirms wills, *legitimae tutelae* and *legitimae hereditates*[1] On all this evidence it seems clear that the *lex* itself, without speaking of *heres* or *hereditas*, confirmed the succession to him as if he had not been captured, a provision which exactly accounts for Ulpian's purist

[1] *e g* 28 6 28 49 15 10 11 1, 22 3 U 23 5, *etc* [2] *e g* P 3 4a 8, C 2 53 5
[3] *e g* 35 2 18 *pr*, 41 3 15 *pr*, C 8 50 1 1 Confusion in C 8 50 9
[4] 28 1 12, 28 6 28 35 2 18 *pr*, 49 15 22 1, C 8 50 1, *etc*
[5] 38 16 1 *pr* 50 16 3 1 [6] See Pernice Labeo, 1 375
[7] Accarias *op cit* § 531 [8] Girard Manuel, 191
[9] *Lex* Cornelia *quae testamenta confirmat* (28 6 28 Julian), *qua lege etiam legitimae tutelae hereditatesque confirmantur* (P 3 4a 8), *lege Cornelia quae successionem eius confirmat* (U 23 5) See also 28 1 12 49 15 22 *pr* and many others See Karlowa, *loc cit*, who sees in 49 15 22 *pr* a verbal reminiscence of the *lex*
[10] 28 6 29, 29 1 39, 35 2 18 *pr*, 38 16 15, 49 15 10—12, *etc*
[11] See n 3 [12] See n 5 [13] 35 2 18 *pr*
[14] P 3 4a 8, 49 15 10 1 [15] U 23 5
[16] 49 15 22 *pr* (see n 9) He makes a similar remark in 28 1 12
[17] P 3 4a 8

objections, which do not in the least require that the whole rule be one of juristic inference[1] The *lex* also dealt with *tutela*, as to which provision there is some difficulty It had nothing to do with provision for *tutelae* in his will it is expressly distinguished from the provision affecting wills[2] It cannot have referred to a *tutela* held by or over the captive he was dead, and in any case such *tutelae* were ended by the capture[3] The *tutela*[4] is *legitima*. Karlowa[5] suggests that the provision referred to *tutela* of his children left behind But it is difficult to see any need for this it could not be retrospective, and these children and their agnates had suffered no *capitis deminutio* More probably it was *tutela* over *liberti* The *lex* enabled the children to claim *tutela* as *liberi patroni*, the *captus* not having really been patron at the time of his death, apart from the fiction

The *lex* left open the question at what date the will was supposed to operate, and the lawyers developed the principle, which as we have seen, came ultimately to be applied generally[6], that the case was to be treated as if he had died at the moment of capture[7] The texts do not state this refinement as part of the *lex*, which also left open the question of the application of the rule to pupillary substitutions—*secundae tabulae*—a matter which gave rise to much discussion. Apart from these substitutions the working of the rule is fairly simple, and can be illustrated very briefly

Its general effect is that the succession is to go to those who would have had it if the deceased had never been captured[8], there being a right to enter as soon as it is known that he is dead[9], and if there are no *heredes* under the *lex*, the property goes to the State[10] It is only wills made before capture which are thus validated[11] The will can produce no more effect than it would if he were in the State Thus where a man was captured while his wife was pregnant, and a child was born and died, the will was null, as it would have been had he not been a captive[12] The validation of the will does not amount to *postliminium*, and thus if a child is born *apud hostes*, and returns, but the father dies there, the child can have no claim under the *lex* Cornelia he is a *spurius*, the father being regarded as having died at the moment of capture[13]. If a *filius familias miles* dies *apud hostes*, the rule applies,

[1] See also Julian in 28 1 12 [2] P 3 4a 8, 49 15 22 *pr*
[3] Karlowa, *loc cit* [4] P 3 4a 8
[5] *loc cit* [6] *Ante*, p 298
[7] 29 1 39, 38 16 15 49 15 10 *pr*, *h t* 11 *pr*, an enactment of Severus and Caracalla almost states this refinement as a part of the *lex* C 8 50 1 1
[8] 49 15 22 *pr* [9] C 8 50 4 [10] 49 15 22 1
[11] In 2 12 5 *etc* Codicils made during captivity could not be confirmed by anticipation in a previously made will and as having been made by one without *testamenti factio* they were invalid to create *fideicommissa*, 49 15 12 5
[1] 49 15 22 4
[13] 38 17 1 3, 49 15 9 25, C 8 50 1 1 A slave made *heres* will be free and *he es* whether he wishes to be or not and a son will be *heres* at civil law, though as Julian observes the expressions *necessarius* and *suus* are not strictly applicable 28 1 12

and if before his death his father has died, leaving a grandson (by the *miles*), and the grandfather has omitted the *nepos*, his will fails, but that of the soldier does not, if he has omitted his son, both rules being due to the fact that he is supposed to have died at capture while still a *filius familias*[1]. If a child, captured with his parents, returns, but they die in captivity, he has a right to succession by the *lex* Cornelia[2].

The effect of the rule, on pupillary substitutions, is discussed in several texts some of which give rise to difficulty[3]. If the father is *captus* and dies, and then the *impubes* dies, the pupillary substitution takes effect, as the *lex* covers all inheritances passing by the will of the captive[4]. To the objection that in fact the child was *sui iuris* before his father's death, Papinian answers that the accepted principle is that on his death the captive is regarded as having died at the moment of capture[5]. It is likely that the rule was not so settled till the classical law. In the following text Papinian seems to adopt the view that he has here rejected[6], but it is probable that, as Cujas suggested, the words *nihil est quod tractari possit* do not mean that there can be no question, *i.e.* of pupillary substitution, but that the case can give rise to no difficulty. Probably there has been abridgement.

If the son alone is captured after the father's death and dies *impubes* the *lex* applies and a substitution will be good, but this is really an extension of the *lex*, since the person who dies is not the actual testator, and the *lex* says only that the will of the dead captive is to be confirmed. Accordingly Papinian says the Praetor must give *utiles actiones*[7]. If the father die after the son's capture the *lex* has no application, for this would be to give the provision more effect than it would have had if he had died at the moment of capture, when he would have had no *bona*[8]: he has, in law, predeceased his father, and that destroys pupillary substitutions[9].

There is difficulty in the case where both are captured. There are two texts, both obscure. Papinian says[10]:

Sed si ambo apud hostes et prior pater decedat, sufficiat lex Cornelia *substituto non alias quam si apud hostes patre defuncto, postea filius in civitate decessisset.*

The only rule stated in this text is that if both die in captivity the substitution fails while if the son returns and dies *impubes* it takes

[1] 29. 1. 39. The traditional explanation of an obscure text. See Pothier *ad h. l.*
[2] C. 2. 53. 5. The text adds (it is an application of a rule already stated), that he has *restitutio in integrum*, like any other captive, against *usucapio, etc.*, within an *annus utilis*. In such a case it is an extension of the *restitutio*, since it is not he against whom time was running and he is not an ordinary successor. The rule is not confined to *milites*, 4. 6. 15. *pr.*
[3] Mühlenbruch-Glück, 40, 449 *sqq.*; Buhl, Salvius Iulianus, 1. 267 *sqq.*
[4] 28. 6. 28. [5] 49. 15. 10. *pr.* [6] *h. t.* 11. *pr.*
[7] 28. 6. 28; 49. 15. 10. 1. [8] 28. 6. 28.
[9] So, if he had been a *pubes*, captured while his father was alive, the *lex* has no application, though the father ultimately die first.
[10] 49. 15. 11. 1.

effect, a decision which agrees, as Mühlenbruch observes, with the presumption, where an *impubes* and a *pubes* have died at unknown dates, that the *impubes* died first. But its opening words seem to foreshadow treatment of a case in which both die *apud hostes*, and as it stands the word *prior* serves no purpose. Among the proposed explanations[1] is that of taking *non alias* to mean *similiter*, and taking the text to mean that though both die in captivity, the substitution can take effect, if it be shewn that the father died first. But this is arbitrarily to change the meaning of words, though the rule itself would not be unreasonable. The earlier commentators, cited by Mühlenbruch, are not quite satisfied with it, and suppose that the father was captured first and the words *et prior pater decedat* are a gloss. This is very conjectural. Perhaps the suggestion of the insertion of the word *sint* after the first occurrence of *hostes* is best[2], though that does not account for the word *prior*. Better still is it to admit that we cannot reconstruct the original text: it is impossible to be satisfied with it as it stands.

The other text is from Scaevola[3]:

Si pater captus sit ab hostibus, mox filius, et ibi ambo decedant, quamvis prior pater decedat, lex Cornelia ad pupilli substitutionem non pertinebit nisi reversus in civitate impubes decedat, quoniam et si ambo in civitate decessissent veniret substitutus.

Here one would expect the substitution to be effective, since if each had died at the moment of capture, the father would have died first. Mühlenbruch[4] considers however that the rule is correctly stated in the text. He remarks that the *hereditas* is not *delata* till the actual death, that the *impubes* could have had no property, and that thus no one could inherit from him. The point as to *delatio* is hardly material, but this seems the right explanation of these texts. The child is a captive who had nothing at capture, and, not having returned, he has no *postliminium*. He can thus have acquired nothing by *hereditas* or otherwise. Thus there is nothing on which the *substitutio*[5] can operate[6]. The allusions to the date of the father's death suggest doubts as to the reference back to the date of capture. But as it is plain that the text now under discussion is not as it was originally written[7], it is also possible that these allusions here and in the other text are hasty interpolations. Many emendations have been suggested, starting from different points of view, but none of them is satisfactory[8]. The only thing certain is that Scaevola did not write it as it stands[9].

[1] Faber, *cit.* Mühlenbruch, *loc. cit.* [2] Haloander, *cit.* Mommsen, *ad h. l.*
[3] 28. 6. 29. [4] *loc. cit.*
[5] Treated as his will. A *substitutio vulgaris* would operate.
[6] 28. 6. 28. [7] Lenel, Paling. *ad h. l.*
[8] Earlier views, Mühlenbruch, *loc. cit.* See also, Lenel, *loc. cit.*; Mommsen, *ad h.*
[9] But Mühlenbruch accepts both texts.

The next topic for discussion is *postliminium*. The prisoner of war who, under certain conditions, returns to Roman territory, is restored to his old legal position, with some limitations, this right of *postliminium* being suspended, if the captive was redeemed for money, till the redeemer's lien is paid off. There are thus three topics: the conditions of *postliminium*, its effects, and the law as to a redeemer's rights.

As we are concerned only with *captivi*, we shall not consider a voluntary change of State in time of peace. Most of the requirements for *postliminium* can be shortly stated. Not every captive who escapes is said *postliminio redire*[1]. He must actually have returned to the territory or to that of a friendly State[2], though it matters not how he effects his escape, whether by evasion, *vi aut fallacia*, by dismissal, exchange or recapture[3]. He must have returned as soon as it was possible for him to do so[4]. He must come to stay, not having any intention of returning to the enemy[5]. It may be that this requirement is of classical law though it is expressed by the traditions of republican Rome, which however are not contemporary. Regulus was declared not to have *postliminium*, not because he had sworn to the Carthaginians that he would return, but because he meant to keep his oath, *non habuerat animum Romae remanendi*[6]. The captives who were sent by Hannibal to Rome, on the same mission, and who stayed there, and shewed that they had never meant to go back, notwithstanding their oath, had *postliminium*, though they were declared *ignominiosi* and *intestabiles* for not keeping their promise[7].

Discreditable circumstances might bar *postliminium*. Thus, one who had surrendered when armed had no *postliminium*[8]. One who had been *deditus* by the *pater patratus* had no such right, though apparently this had been doubted[9]. There was a tradition of a difficulty in the case of Mancinus, who had been so surrendered to the Numantines, but they had refused to receive him. It was held, on his return to Rome, says Cicero[10], that he had no *postliminium*. Elsewhere the same authority throws doubt on the decision, or, rather, holds that the man had never ceased to be a *civis*[11], since there could be

[1] Festus, *s.v. Postliminium*. Or *postliminium redire*, a form expressing the result rather than the rule.
[2] 49. 15. 5. 1, 19. 3. [3] 49. 15. 26; C. 8. 50. 5, 12.
[4] 49. 15. 12. *pr.* [5] *h. t.* 5. 3, 12. 9, 26. [6] *h. t.* 5. 3.
[7] Aul. Gell., Noct. Att. 7. 18. In the case of Menander, a Greek slave, who had been freed and made a Roman *civis*, and was employed as interpreter to an embassy to Greece, a law was passed that if he returned to Rome, he should again be a Roman *civis*. Cicero (Pro Balbo, 28) thought this law had some significance, though Pomponius says (49. 15. 5. 3) that it was thought needless, since if he returned he would be a *civis* and if he did not he would not be one, apart from this law. Perhaps for Cicero the requirement of intent to stay was not certain, but it is likely that the law was a precaution due to the fact that *postliminium* from captivity and *postliminium* from reversion to original *civitas* are not the same thing. See however Daremberg et Saglio, Dict. des Antiq. *s.v. Postliminium*.
[8] 49. 15. 17. [9] 49. 15. 4. [10] de Orat. 1. 181.
[11] Top. 37; Pro Caec. 98.

no such thing as *deditio*, any more than there could be *donatio*, without an acceptance. There is no *postliminium* for a *transfuga, i.e.* one who treacherously goes over to the enemy, or to a people with whom we have only an armistice, or one with whom we have no friendly relations[1]. As we shall see shortly, this rule is not applied in the case of slaves. But this exception is strictly construed: the rule applies in all its severity to the case of a *filiusfamilias*, notwithstanding his father's rights[2]. In strictness of course a person who never was a Roman *civis* cannot have *postliminium*. Even in the case of children born to *captivi*, this rule is so far applied that if the child reaches Rome, but neither parent does, he has no *civitas*: if he and his mother come he is a *civis* and her *spurius*: if he and both parents come, he is a *filiusfamilias*[3].

A further suggested requirement of *postliminium* has given rise to some discussion. It is laid down by some writers that to obtain *postliminium* the captive must return *eodem bello, i.e.* before the conclusion of peace[4]. This view seems to rest mainly on three texts. Pomponius tells us that a captive *si eodem bello reversus fuerit postliminium habet*[5]. Paul says that if a man returns during *indutiarum tempus, i.e.* during an armistice, he has no *postliminium*[6]. Finally he tells us[7] that if a captive returns after peace has been declared, and on a fresh outbreak of war is recaptured, he reverts to his old owner, by *postliminium*. The first text of Paul is of no weight: an agreement for an armistice involves, as he says, the maintenance of the *status quo* so long as it exists: *indutiae* and peace are not the same thing. The other text of Paul looks more weighty, since, as Accarias says, if he is still a slave of the old master, he has not been freed. But he was not freed by his old master, and the more reasonable inference is that *postliminium* gives him restitution only against his own State, apart from some special agreement. It is the allusion to the peace that is regarded as making the text important in the present connexion. But it may be noted that if the war is still continuing, my slave escaping to the enemy is a *transfuga*, and by virtue of the special rule in such cases will revert to me if recaptured[8]. Paul purposely takes a case to which this special rule would not apply. Neither of these texts is conclusive. That of Pomponius remains. Against it may be set a text of Tryphoninus[9], which says that there is *postliminium* on return after peace is made, if there is nothing in the treaty of peace to exclude it, and

[1] 49. 15. 19. 4, 19. 8; 4. 6. 14.
[2] 49. 15. 19. 7. The Romans, says Paul, set *disciplina castrorum* before *caritas filiorum*.
[3] 38. 17. 1. 3; 49. 15. 25; C. 8. 50. 1.
[4] Karlowa, *op. cit.* 2. 118; Accarias, Précis, § 43. [5] 49. 15. 5. 1.
[6] *h. t.* 19. 1. [7] 49. 15. 28.
[8] 49. 15. 19. 5; 41. 1. 51. *pr.* This text is sometimes understood to mean that we acquire *transfugae* who come from the enemy.
[9] 49. 15. 12. *pr.*

goes on to make the same remark about those who were caught in the foreign country at the outbreak of war. There are other considerations. Returns after peace must have been not uncommon, and one would have expected discussion of the case of those who had not *postliminium*. Yet the texts, though they tell us that not every escaped prisoner has *postliminium*, say nothing about the state of things where it does not arise. And that *postliminium* is the common case appears from the fact that many texts speak of return of captives as giving *postliminium*, without more[1]. It may be added that while we have reference to agreements that there shall be no *postliminium*, after the peace[2], we have none the other way: what we have are agreements that prisoners shall be allowed to return[3], which is a different matter. As Karlowa says[4], a war ends either by surrender of the enemy—*deditio*—or by a treaty of *amicitia*, and he points out that we are told that between states in friendship there is no *postliminium*, since the subjects of each state retain their rights in the other[5]. But the reason shews that the writer is dealing with cases arising after the *foedus*, not with persons who were captives at the time of the treaty.

It may also be observed that the principal text[6] is not conclusive: it lays down a right of *postliminium* if the captive return *eodem bello*, and it is only in that case that a general proposition is justified: the fact that the treaty might exclude the right compels the limitation. Nevertheless the text is regarded as so conclusive as to require an emendation of the above cited text of Tryphoninus which is even more conclusive the other way[7]. For *his* it is proposed to read *non iis*. This drastic measure is defended as being necessary to account for the words: *quod ideo placuisse Servius scribit, quia spem revertendi civibus in virtute bellica magis quam in pace Romani esse voluerunt*, and for the contrast established later on in the text. But the remark of Servius is quite plain as the text stands. It is the practice of exclusion by treaty that he is justifying. And the contrast is between those who left Roman territory in time of peace and those who did so during the war, and no more[8]. If the contrast had been that supposed by Karlowa, the jurist would have said *tam in pace quam in bello* and not *tam in bello quam in pace*. The other contrast is an unreasonable one: a person who is in the other country at the outbreak of war is to be allowed an unlimited time for return, but one captured in the war is not. And the absurdity is emphasised by the jurist, who notes that these persons are there, *suo facto*[9]. There is no justification for so altering texts as to create this

[1] *e.g.* In. 1. 12. 5; U. 10. 4; G. 1. 129, all seeming to use a common form. See also Festus, *s.v. Postliminium*.
[2] 49. 15. 12. *pr.*
[3] *h. t.* 20. *pr.*, 28.
[4] *loc. cit.*
[5] 49. 15. 7.
[6] *h. t.* 5. 1.
[7] *h. t.* 12. *pr.*
[8] So the Gloss.
[9] 49. 15. 5. 2.

distinction, especially as those captured without war by a State with which there are no friendly relations are clearly under no such restriction. Altogether the requirement that, to obtain *postliminium* the captive must have returned before the peace, is not made out. It is impossible to be certain on the point, but the most probable view seems to be that there is no such rule, but that treaties of peace sometimes exclude *postliminium* for later returns.

What is the position of one who returns without *postliminium*? There is but little authority. *Transfugam*, we are told, *iure belli recipimus*[1]. This seems to mean that a slave *transfuga* reverts to his master. If he is not a slave he is at best a prisoner of war; but he is ordinarily capitally punishable[2]. Apart from this case we know really nothing. Most probably their previous Roman condition is simply ignored, and they take the position, whatever it is, which they would have taken had they belonged originally (either as slaves or freemen) to the State from which they came.

We have now to consider the effect of *postliminium*. The general effect is to put the *civis* in the same position as if he had never been captured[3]. The captives, according to the traditional formula, *recipiunt omnia pristina iura*[4], and, it may be added, obligations too[5]. Moreover the effect is retrospective[6]: *fingitur*, says Justinian, *semper in civitate fuisse*[7], and this expression clearly represents the classical law. It is, says Paul, *ac si nunquam ab hostibus captus sit*, and the same conception is involved in the notion of pendency of rights, already considered[8]. It is not necessary to repeat, by way of illustration of the general rule, what has already been said. It may be observed in addition that he has *actio furti* for what has been stolen in the meantime[9], and probably the same is true of *actio* Aquilia. It may also be presumed, though the texts are silent, that he is noxally liable for what has happened in the meantime. An *actio de peculio* and the like will probably lie against him, though the texts are silent, and those dealing with restitution of actions, to and against him, where time has run, are not specific as to the date of the transaction[10]. But there can really be no doubt. A person who manages any affair for the *captivus* has an action on *negotia gesta* on his return[11]. The captive can sue, on his return, on contracts

[1] 41. 1. 51.
[2] 48. 19. 38. 1; 49. 15. 12. 17.
[3] P. 2. 25. 1.
[4] G. 1. 129; U. 10. 4, *etc.*
[5] If a *deportatus* before capture he is one on return, 49. 15. 12. 15.
[6] *h. t.* 12. 6, 16.
[7] In. 1. 12. 5.
[8] *Ante*, p. 293. On the question whether the retrospective effect is republican see Karlowa, *loc. cit.*, and Pernice, Labeo, 1. 375, who thinks it an expression of the Ciceronian doctrine that a man cannot lose *civitas* without his own consent.
[9] 47. 2. 41. *pr.* The text shews that there had been doubts.
[10] 4. 6. 1, 14, 15.
[11] 3. 5. 18. 5.

made, and securities taken, by his son or slave[1], and, in general, he is in the position of one succeeding to a *hereditas iacens*[2].

The questions as to the effect of *postliminium*, on the marriage of the *captivus* or of his child, and on *tutela*, have already been discussed[3]. There remain however some topics to consider. The rules as to the effect of *postliminium* on *patria potestas* are in the main fairly simple. The father, returning, regains *potestas* over his children, and acquires it over those of whom his wife was pregnant at the time of the capture, and even over the issue of any lawful marriage contracted by a son so born[4]. In the case of a child born to a captive there was evidently some difficulty. There could be no *postliminium* for one who was never *captus*. The law seems to have been settled by a comprehensive rescript of Severus and Caracalla, part of which is preserved in the Code. The practical result is that *postliminium* is given to those born in captivity, in right of their parents, but not otherwise, so that if both parents return the child is in *potestas*, with its parent's status, and with rights of succession[5]. But if the mother alone returns, with the child, the father dying captive, the child has no succession to the father, since the *lex* Cornelia, as it assumes the father to have died at capture, cannot give rights to those born in the captivity[6]. It is thus connected only with the mother, to whom it stands in the relation of any other child *sine patre*[7]. It is noticeable that no text mentions the case of the father returning with a child born in captivity, the mother having died *apud hostes*: the chief texts especially require the return of both parents[8]. Indeed since the marriage ended at capture, and the mother is supposed to have died then, it is difficult to see how the child can be regarded as having been born in wedlock.

His will made before he was captured is valid[9]. *Postliminium* does not validate what he has done as a captive, and thus a will made during captivity is void. The same is true of codicils even though an earlier will has confirmed them, since when they were made he had not *testamenti factio*. But Justinian alters a text of Tryphoninus, in a dubious way, so as to make him say that on grounds of humanity, they are to be enforced, if he returns with *postliminium*[10]. On the other hand, he or his slave may be instituted, and if he return he may make or order the necessary entry[11].

[1] 44. 3. 4; 45. 1. 73. 1; 45. 3. 18. 2, 25; 46. 4. 11. 3; 49. 15. 22. 2.
[2] 9. 2. 43; 45. 1. 73. 1.
[3] *Ante*, pp. 295, 296.
[4] 49. 15. 8, 23. Analogous restitution if the mother alone was *capta* and returned, Arg. C. 8. 50. 14. So if a child was *captus* alone and returned he regained his rights of succession, C. 8. 50. 9.
[5] C. 8. 50. 1; cp. 38. 17. 1. 3; 49. 15. 9, 25. In 49. 15. 9 the words mean that the parents have returned. See also 38. 16. 1. 1.
[6] C. 8. 50. 1.
[7] C. 8. 50. 16; D. 38. 17. 1. 3.
[8] C. 8. 50. 1; D. 49. 15. 25.
[9] U. 23. 5; In. 2. 12. 5.
[10] 49. 15. 12. 5.
[11] 28. 5. 32. 1.

As to ownership, a returned captive acquires at once all that is *in eodem statu*; and as to those rights which have been lost by *usucapio* or by non-use, he has, as we have seen, an *annus utilis* within which to recover them by *utiles actiones*. This is provided for in the edict as to *restitutio in integrum* for those over 25[1]. If a son has died in the meantime, his acquisitions vest in the returned captive[2].

He has ceased to possess and thus, subject to what has been said as to possession by sons and slaves *peculiari causa*[3], he has no possession till he has actually retaken it, even though no other person has possessed the thing in the meantime[4]. *Postliminium* has no application here[5]. This may have the result of barring his usucapion altogether. For it is a new possession, and if, since the purchase, he has learnt that there was no title, there can be, on well known principles, no usucapion[6]. It is immaterial whether he was already usucapting or a slave has received the things not *ex peculiari causa* during the captivity. If however he is still in good faith he will usucapt. The question whether he can add his former possession or must begin afresh is not resolved by the texts. Most writers hold[7] that the earlier time is quite lost. But the texts are far from conclusive[8]. They make it clear that possession is interrupted, and that it is not restored by usucapion. But they do not clearly deny that in such a case the two possessions can be added together, if both were begun in good faith, as in the case of a buyer, whose possession is equally a new one. They speak of *nova possessio*[9], *secunda possessio*[10], which it no doubt is, but they also speak of *reciperata possessio*[11]. They say that there can be no *usucapio*, if the second possession was begun in bad faith[12], and that, in any case, *postliminium ei non prodest*. But the words are added *ut videatur usucepisse*[13], which are limitative in form and are not inconsistent with allowance of *accessio temporum*. But the accepted view is that of most modern systems of law in analogous cases, and the silence of the texts as to *accessio* is in favour of it[14].

In the case of slaves, *postliminium* does not operate quite in the same way as in the case of freemen. It is a case of *postliminium rerum*, the principle of which is that ownership reverts only in those things which are useful in war, except arms and clothing, which, it is said, cannot have been lost without disgrace[15], a slave, of any sex or age, being regarded as

[1] 4. 6. 1. 1, 14, 15. Gratian declares this effective against the fisc, C. 8. 50. 19.
[2] 38. 16. 15.
[3] *Ante*, p. 294.
[4] 41. 2. 23. 1; 49. 15. 12. 2. If a slave bought, not *in re peculiari*, *usucapio* could not begin till *dominus* returned and took actual possession.
[5] 41. 3. 44. 7; 49. 15. 12. 2, 29.
[6] 41. 3. 15. 2; 41. 4. 7. 4.
[7] *e.g.* Windscheid, Lehrb. § 180; Pernice, Labeo, 1. 401; Accarias, Précis, § 237.
[8] 4. 6. 19; 41. 2. 23. 1; 41. 3. 5, 15. *pr.*, 15. 2; 41. 4. 7. 4; 41. 6. 5; 49. 15. 12. 2, *etc.*
[9] 41. 2. 23. 1.
[10] 41. 3. 15. 2; 41. 4. 7. 4.
[11] 41. 4. 7. 4.
[12] *Ibid.*; 41. 3. 15. 2.
[13] 41. 3. 15. *pr.*
[14] They speak of it only where there is in law no interruption.
[15] 49. 15. 2, 3.

a thing useful in war, since he can be employed in carrying messages or advising, and in many ways other than actual fighting[1]. No reason is assigned for this limitation[2]. In any case the rule has the odd result of discouraging the private recapture of such things, since the actual captor gets nothing out of it. A slave, though a thing, has a will of his own, and hence it is easy to see possible conflict between the traditional principles of *postliminium* and regard for the interests of the master. In three points the latter prevailed.

(*a*) A *transfuga* has no right to *postliminium*[3], but a slave *transfuga* does revert to his master. This is only in the latter's interest. If he has been a *statuliber*, and the condition has arrived during his absence, he loses the benefit of it[4], but the text is not very clear as to what does happen. Presumably he is punished as an ordinary *transfuga*: at any rate he does not revert, as his owner would not have had him after the arrival of the condition in any case.

(*b*) A freeman does not recover his rights by *postliminium*, unless his return is with intention to remain: a slave reverts by *postliminium* in any case[5].

(*c*) A freeman has returned as soon as he is in Roman territory, but as it is not on his own account that a slave has *postliminium*, he does not revert till he is in his master's possession, or in that of someone, as a slave[6].

Apart from those points the case is simple. If other conditions are unchanged, not only does his owner's right revive[7], but so do minor rights, such as usufruct[8]. If he was a *servus poenae* before, he is one still[9]. A *servus furtivus*, captured, recaptured and sold, remains a *res furtiva*, incapable of *usucapio* by the buyer[10]. If he was a *statuliber*, he is a *statuliber* still, but if the condition has arrived during his captivity he gets the benefit of it[11]. A legacy of him or to him or an institution of him before or during the captivity is effective on his return[12]. Moreover the captivity has operated no *capitis deminutio*: he is *eadem res*, and thus an *exceptio rei iudicatae*, which applied to him before the capture, applies to him still[13]. If he has been pledged before capture the creditor's right revives[14].

[1] 49. 15. 19. 10.

[2] Karlowa, *op. cit.* 2. 125, associates it with the alleged rule that there was *postliminium* only in the same war: he treats it as an inference from that rule. There is no obvious connexion: it is not here confined to the same war.

[3] 49. 15. 19. 4. [4] *h. l.* 5, 6. [5] *h. t.* 12. 9. [6] *h. t.* 30.

[7] C. 8. 50. 10, 12; Festus, *s.v. Postliminium*; 49. 15. 28, *etc.*

[8] 7. 4. 26. If he returns after his owner's death he is in the *hereditas* for Falcidian purposes, 35. 2. 43.

[9] 49. 15. 6. [10] *h. t.* 27.

[11] *h. t.* 12. 10. And thus the child of a *statulibera captiva* whenever conceived is *ingenua* if the mother returns with *postliminium*, 40. 7. 6. 1, 2. The application of the rule to one conceived in captivity is a humane extension. Cp. C. 8. 50. 16.

[12] 30. 98. [13] 44. 2. 11. 4.

[14] 49. 15. 12. 12. If before the captivity he had been sold on the terms that he was not to be freed, or was subject to another impediment to manumission, the prohibition still applied if the conditions were unchanged in other ways, 49. 15. 12. 16. *Ante*, p. 72. *Post*, Ch. xxv.

It remains to consider how far these rights are suspended in the case of redemption for a price, by a third party. In the Christian Empire the provision of a fund for the redemption of captives seems to have been a usual form of charity. There is no trace of anything like organisation of such funds till the time of Justinian, who provided that if a man left all his property for this purpose, by making *captivos*, generally, his heirs, the institution was to be valid, the estate being kept in perpetuity for this purpose, the annual profits of all kinds, from rents and sales of produce, being applied without any reduction for the cost of administration. This was to be managed by the Bishop and the *Oeconomus* of the testator's place of residence, who were to have all the rights and liabilities of the *heres*[1]. Somewhat later he authorised the local churches to alienate any land, which had been given to them without any prohibition of alienation, for the purpose of redemption of captives[2]. Again, he provided that if any provision was made by will for the redemption of captives, and the will did not say who was to carry out the redemption, the Bishop and *Oeconomus* were to see to it. If someone were appointed, and neglected, after two warnings from the Bishop, to carry it out, his benefit was forfeited to the Bishop, who was to administer the whole for charitable purposes[3]. A provision inspired by the same spirit is that which makes neglect to redeem any ascendant a just cause of *exheredatio*, while if the ascendant dies in captivity, the neglectful descendant's share is forfeited to the Bishop and goes to redeem captives. And, generally, where any person is entitled on intestacy (whether a will has also been made in his favour or not) to succeed to any *extraneus* who is a captive, or, not being a relative, knows that he has been instituted heir, neglect to ransom is punished by similar forfeiture of benefits to the purpose of redemptions, the rest of the will standing good[4]. Justinian had also provided that donations for the redemption of captives were to be exempt from the rules as to registration[5]. It may be presumed that all these provisions as to the duties of relatives, etc., apply equally to the payment of money due to an actual *redemptor*, under the rules now to be considered.

A complex situation arises where a man has redeemed a captive, by paying a ransom. The general rule applied here is that the ransomer has a lien on the redeemed captive, and *postliminium*, with its various results, is postponed till the lien is ended[6]. There is no lien except for actual redemption money. Thus there is no lien if he is simply

[1] C. 1. 3. 48. Neither they nor anyone else having Falcidian rights.

[2] Nov. 120. 9. [3] Nov. 131. 11.

[4] Nov. 115. 3, 13. The rule applies only if the *heres* is over 18. To prevent the excuse of lack of means, it is provided that such persons can pledge the property of the captive.

[5] C. 8. 53. 36. [6] 38. 16. 1. 4; 49. 15. 12. 14, 20. 2.

captured from the enemy[1], though at a certain cost[2]. Nor is there any lien if the redemption is of relatives, *pietatis causa*, even though redemption is for a price, and the payer afterwards seeks to recover it[3].

The state of things so long as the money remains unpaid cannot easily be expressed in terms of any other institutions. It is apparently rather illogical. We are told that it is a state of pledge, not slavery[4], and yet we know that the captive has not yet *postliminium* from his captivity in which he was a slave. The practical meaning seems to be that the lien in itself has no enslaving effect, no reference being intended to the provisional slavery involved in capture. The significance of the proposition is shewn in the rule that when the lien is ended the old status is restored: the man is not a *libertus* and owes no *obsequium* to the *redemptor*[5]. The disabilities under which he suffers are not the result of the lien, but of the fact that he has not yet *postliminium*. He can serve no *militia*[6]. Apparently he cannot validly marry[7]. He cannot in strictness enter on a *hereditas*, but, *favore ingenuitatis*, he is allowed to do so, or to receive a legacy, so that the money may be applied to the release from the lien[8]. A child redeemed with the mother is under the lien[9]. An enactment of Diocletian lays it down as undisputed law that a child born to a woman under such a lien is not itself subject thereto[10]. But Ulpian seems to imply that the pledge covers such issue[11], and Tryphoninus must have been of the same opinion, at least where the person redeemed was originally a slave[12]. But this is only a case of the dispute already considered as to whether *partus* is covered by pledge[13]. Pledge is not the only close analogy. The transaction is, from the captors' point of view, a sale: the *redemptor* is constantly spoken of as buying the captive, and it is part of the argument of Tryphoninus in the text just mentioned that the *partus* is to be treated as sold with her. Here too the same point has already been considered, with special reference to eviction and usucapion[14]. The better view is that in later law the pledge covers the *partus*, though the classics are not agreed[15].

The texts are not clear as to what advantage the *redemptor* can claim from a redeemed *ingenuus*. He can assign the lien, but not so as to increase the amount payable by the *redemptus*, the person who takes

[1] 49. 15. 21. *pr.*; C. 8. 50. 12.
[2] Or where he was handed over without a price (C. 8. 50. 5) or where help was rendered on the way home, *h. t.* 20. 1.
[3] *h. t.* 17. [4] 28. 1. 20. 1; C. 8. 50. 2. [5] C. 8. 50. 11.
[6] 49. 16. 8. [7] C. 8. 50. 2. [8] C. 8. 50. 15; D. 38. 16. 1. 4.
[9] 49. 15. 12. 18. [10] C. 8. 50. 8. [11] 49. 15. 21. 1.
[12] *h. t.* 12. 18. [13] *Ante*, p. 23. [14] *Ante*, p. 51.
[15] The lien has priority over other charges over the *redemptus*, and over any right of punishment: the fisc does not claim one *in metallum datus* without paying off the lien, 49. 15. 6, 12. 16, 17.

it over having an action against the *redemptor* for any excess[1]. We must assume that the *redemptor* is bound to maintain the man, and we have seen that his lien covers only what he has actually paid to the captors[2]. Unless we assume the *redemptor* to be a philanthropist of a most unselfish kind, and therefore the case of redemption kept by the law within very narrow limits, we must suppose that he may employ the man. We shall see that in later law, the captive may pay off the lien by labour[3], but this of itself does not prove that he can be made to work. As to acquisitions through an *ingenuus* so held we have no information. A pledgee does not take acquisitions, and the language of pledge is constantly used in this connexion[4], with the implied warning that it cannot be a true pledge, since the man is not a thing[5]. Thus he is so far in the holder's *potestas* that he cannot witness his will, and this, not slavery, is given as the reason[6]; and the reason why the interdict *quem liberum* does not apply to him is only that the holder *non dolo facit*[7]. The discharge of the lien is called *luitio*, the primary meaning of which is discharge of a pledge[8]. On the other hand, his purchase is regarded as an *emptio*[9], and where the *redemptus* was originally a slave the redeemer becomes, as we shall see later, his owner, in a limited sense[10]. Tryphoninus discusses the case of a *statuliber* under a condition of payment, and decides that the money can be paid by the *redemptus* out of any part of his *peculium* except what is acquired *ex operis suis* or *ex re redemptoris*[11]. This does not however imply that the holder acquires, like a *bonae fidei possessor*[12], only *ex re sua* and *ex operis servi*, at any rate where the person actually was a slave: a special constitution created logical difficulties in that case[13]. We shall see that the *redemptus* may free himself by labour, but we hear nothing of his freeing himself by means of his acquisitions. This may mean no more than that such a dealing would come within the general rule[11] as to repayment of the money. The texts clearly contemplate his paying the money himself[14], and it may be that his acquisitions *ex re redemptoris* and *ex operis suis* go to his holder, while other things go to himself.

The lien may be ended in various ways. Actual payment of course suffices[15]. Children redeemed with a man or woman may be freed from the lien by independent payments; either the sum specifically paid for them, or if there was no allotment, then a proper proportion[16].

[1] 49. 15. 19. 9. [2] C. Th. 5. 7. 2; C. 8. 50. 20. [3] *Post*, p. 314.
[4] See, *e.g.* 30. 43. 3; 49. 15. 15, 19. 9, 21. *pr.*; C. 8. 50. 8, 11, 13.
[5] Hence such expressions as: *naturalis pignoris vinculum*, *vinculo quodam*, C. 8. 50. 2; D. 28. 1. 20. 1.
[6] 28. 1. 20. 1. [7] 43. 29. 3. 3. Karlowa, *loc. cit.*
[8] 38. 16. 1. 4; 49. 15. 15; 49. 16. 8; G. 4. 32; Dirksen, Manuale, *s.v. luitio*.
[9] 49. 15. 12. 18, 19. 9; C. 8. 50. 17, 20. 2, *etc.*
[10] 49. 15. 12. 7. [11] *h. t.* 12. 11. [12] *Post*, p. 341.
[13] *Post*, p. 315. [14] 49. 15. 19. 9; C. 8. 50. 17, 20. 2.
[15] C. 8. 50. 2, *etc.* [16] So as to children born *apud redemptorem*, 49. 15. 12. 18.

It may be ended also by tender and refusal of the redemption money[1], or by any remission of the debt, which, however informal, cannot be revoked[2]. It is no doubt on this principle of remission that it is ended by the redeemer's marrying the *captiva*[3], indeed we are told that remission results from cohabitation with her[4]. The same result follows from his instituting the captive as his heir[5]. The pledge is ended, and the right to the money forfeited, if the *redemptor* prostitutes, knowingly, the woman redeemed[6]. It seems further that, at least in later law by a constitution of A.D. 408[7], five years' service ends the lien, at least in the case of a *civis* captured. It is clear from some of the rules just laid down that the lien is not affected by the death of the holder. In earlier law the death of the captive, though it of necessity destroyed any practical lien, left the debt standing and prevented the heirs from succeeding till they had cleared it off[8], the result being that they were worse off than if he had died still a captive. But Ulpian here mentions, and elsewhere accepts without comment[9], so that it is clearly the later law, a doctrine more favourable to the successors. The death ends the pledge: the *redemptus* gets *postliminium* and is restored to his old *status* so that the whole obligation is blotted out.

The effect of *luitio* is to bring into operation the ordinary *postliminium*[10]. Heavy penalties are imposed by Honorius, by the enactment of 408, on those who detain captives on whom there is no lien, or the lien on whom is from any cause ended. If the undue detention is caused by an agent, the principal being away, he is to be liable to *deportatio*, or even to *condemnatio in metallum*: if it is by the principal himself, he is liable to *deportatio* and forfeiture. To assist in enforcing this law the local clergy are to watch over such cases, and the *curiales* of the neighbouring localities are liable to penalties of 10 *aurei*, they and their *apparitores*, if they fail to see to the carrying out of the law[11].

Where the redeemed captive is a slave, there are special rules of some difficulty. Here too, though the slave is property, there is no lien except for money paid for redemption[12]: recapturers must give him up at once and have no right in him[13]. On repayment of the money he goes back to the *dominus*[14], and any old rights in him, *e.g.* pledge, revive.

[1] C. 8. 50. 6. [2] 43. 29. 3. 3; C. 8. 50. 17.
[3] C. 8. 50. 13. [4] 49. 15. 21. *pr.*
[5] 29. 2. 71. *pr.*, and presumably from a legacy of him to himself: such a legacy from an outsider was equivalent to one of the money, 30. 43. 3.
[6] C. 8. 50. 7.
[7] C. Th. 5. 7. 2 (C. Sirm. 16) = C. 8. 50. 20. On the occasion of Alaric's sack of Rome.
[8] 49. 15. 15. [9] 38. 16. 1. 4. [10] *Ante*, p. 307.
[11] Const. Sirm. 16. It is abridged in C. Th. 5. 5. 2 and in C. 8. 50. 20. But here it is not the clergy, but *christiani*: probably the meaning is the same. In addition to these special penalties the *dominus* would have ordinary actions for recovery of him if he were a slave and, for a free man, there would be the interdict *Quem liberum*, 43. 29. 3. 3.
[12] C. 8. 50. 10. [13] *h. t.* 2. [14] 49. 15. 12. 7.

In fact a pledgee can pay off the lien, and add the sum to his charge, just as a creditor with a subsequent charge can confirm it by paying off a prior incumbrancer[1]. Apparently the lien cannot be paid off *pro parte* by one of common owners, but if all pay their share, or one pay the whole in the name of all, the lien is at an end; in the latter case the payment will come into account in the *actio communi dividundo*. If he is acting for himself or for some of the others, then, as to their shares, the lien is at an end, and the common ownership restored: as to the others it is an assignment of the lien, and the payers are in the place of the *redemptor*[2].

For convenience the right of the *redemptor* has been called a lien. In fact it is a great deal more. Tryphoninus tells us that a certain constitution *protinus redimentis servum captum facit*[3]. We have no information as to what this constitution was. Karlowa[4], in view of the form of the allusions to it, thinks it to have been a general provision, and he considers it identical with the *constitutio* Rutiliana, which Julian applies to the alienation of a woman's property without *tutoris auctoritas*[5]; the form of the allusion, here too, being such as to suggest that it had no special application to that case[6]. But it may be noted that the Rutilian constitution is cited as making *usucapio* possible. The present constitution is cited as causing *dominium* to pass and so making *usucapio* impossible. Moreover in that case the thing is the property of the alienor, the mode of conveyance being defective: here the defect is of a different kind, consisting in the overriding right of the old owner. All that they have in common is that the effect of the transaction can be set aside on the repayment of certain money. One of the allusions (not cited by Karlowa) looks as if the enactment dealt specially with this case: *at is de quo quaeritur lege nostra quam constitutio fecit civem Romanum dominum habuit*[7].

Whatever its nature, the effect of the constitution is to set up an exceptional state of things. There is an ownership in the *redemptor*, and another ownership in the old *dominus*, liable to come into operation at any moment. Cases of ownership which are to come to an end on failure of some condition, etc., are not uncommon, especially in relation to sale and *donatio*. But, in such cases, there is, in classical law, a need of reconveyance. In our case *postliminium* operates with no such need[8].

[1] *h. l.* 12. The text notes that as the pledgee is really the earlier incumbrancer it is only an artificial priority given to the lien which postpones him.
[2] 49. 15. 12. 13. [3] *h. l.* 7, 8.
[4] *op. cit.* 2. 404. [5] Vat. Fr. 1.
[6] Bechmann, *cit.* Karlowa, *loc. cit.* K. gives reasons for thinking it may have been a senatusconsult.
[7] 49. 15. 12. 9, *med.* [8] 49. 15. 12. 7.

The *redemptor* is set in the position which the *hostis* held: if he does acts in relation to the man, which if done by the *hostis* would not be effective, as against the rights of the old owner, by the Roman law, how are these to be looked at, seeing that he is not actually a *hostis*, but a Roman *civis*? The question is considered in relation to several states of fact.

A *statuliber*, to be free on paying a certain sum, can pay it out of *peculium* to his master for the time being[1]. Such a master ordinarily derives title directly or indirectly from the donor of the freedom, and, at least, if he gave value, has a remedy, if he was not informed of the prospect of liberty[2]. How if he is a *redemptor*, as to whom none of this is true? Tryphoninus says[3] the man is free on payment to the *redemptor*. But in ordinary cases he cannot pay it out of any *peculium* but that which passed with him[1]. There is no such *peculium* here. Whether the *redemptor* bought him *cum peculio* so that his *peculium* represents that *apud hostes*, or did not, at any rate it does not represent that which belonged to the donor of liberty. Nevertheless, says Tryphoninus, he is allowed, *favore libertatis*, to pay it out of any part of his *peculium*, except what is acquired *ex operis* or *ex re redemptoris*. This is a sort of rough justice: it must not be understood to imply that the *redemptor* (and owner) acquired only what a *bonae fidei possessor* would have acquired.

The constitution applies to a purchase in the ordinary way of business: it does not require that the buyer shall know that he is redeeming a captive. If the purchase was made without that knowledge, can the buyer, since he is a *bonae fidei emptor*, usucapt the slave to the exclusion of the old *dominus*? The difficulty is that by the constitution he is owner and a man cannot usucapt his own. Tryphoninus, arguing from the view that the constitution is not designed, by making him owner, to make his position worse, concludes that on such facts, though the conception of *usucapio* is not applicable, the old owner's right to pay off the charge will be barred by the period of *usucapio*[4].

This topic leads the jurist to another. If the redeemer can usucapt, can he manumit? Tryphoninus remarks that, of course, manumission by the *hostis*, whose place he has taken, would not bar the old owner, and asks whether a manumission by *redemptor* will free, or will merely release his right, and cause the man to revert to his original *dominus*. Clearly the *redemptor*, in the case in which time has barred the old owner's claim, can free, and Tryphoninus observes[5] that even under the old law, if the redeemer had bought him knowing that he was (a captive and) *alienus*, and had sold him to a *bona fide* buyer, the

[1] *Post*, Ch. xxi. [2] *Ante*, p. 289. [3] 49. 15. 12. 11.
[4] 49. 15. 12. 8. [5] 49. 15. 12. 9.

buyer could usucapt and manumit, and thus the right of the original owner would be destroyed. Therefore he holds that the redeemer himself can manumit. He does not rest his view on the technical ownership created by the constitution, but rather on the fact that if the old owner never pays the *redemptor* the slave will be in the position of being incapable of manumission through no fault of his own. The argument is not convincing: the same thing is true of ordinary pledged slaves[1] and of many others. No doubt the ownership created by the constitution is really the deciding factor. The result, for which the strange provision of the constitution is to blame, is at any rate in appearance unfair, and Tryphoninus tries, with little success, to put a better moral face on it. Indeed his view as expressed would lead logically to a requirement of notice to the old owner.

Ulpian discusses the same case more shortly and without much reasoning[2]. He holds, somewhat doubtfully, *favore libertatis*, that the manumission frees him and that *postliminium* operates, not so as to restore him to his old master (*hoc enim satis impium est*), but to cause the *libertus* to be indebted to his old owner to the amount of his own value as a slave. Ulpian makes no reference to the constitution, and indeed, while Tryphoninus seems to be struggling with a logical necessity, leading to a power of manumission which he thinks inequitable, Ulpian thinks the logic the other way, and frees the man only *favore libertatis*. The language of Tryphoninus throughout the discussion does not suggest that the constitution he is discussing is an ancient one, a republican *senatusconsult*, as Karlowa thinks[3], but rather a new one the working of which is not yet clear. Nothing that is known of the dates of the two jurists makes it impossible for the text of Tryphoninus to have been written after that of Ulpian. It seems not impossible that Ulpian is writing under, or with reference to, a *régime* under which the *redemptor* is in an anomalous position, since he has acquired what Roman law recognises as the subject of ownership, from one whom Roman law recognises as its owner (*quod ex nostro ad eos pervenit illorum fit*[4]), and yet is not himself recognised as owner[5].

[1] *Post*, Ch. xxv. [2] 29. 2. 71. *pr.*
[3] *loc. cit.* [4] 49. 15. 5. 2.
[5] If the slave was incapable of being freed before capture he is so still in the hands of the *redemptor*, 49. 15. 12. 16.

CHAPTER XIV.

SPECIAL CASES (*cont.*). S. PUBLICUS POPULI ROMANI, FISCI, ETC. S. UNIVERSITATIS.

XX. *Servus Publicus Populi Romani, Fisci, Caesaris.*

The evidence as to the position of these slaves is so imperfect, that nothing more than an outline is possible. But their interest is mainly political and public: so far as private law is concerned there is little to be said, and thus a short account of them will suffice.

It is impossible to make a clear statement on our topic, without some remarks on the history of the relations of the popular treasury (*Aerarium*), with the Imperial treasury (*Fiscus*) and with the *Privata Res Caesaris*[1].

In the earlier part of the Imperial period the *Aerarium* is quite distinct from the *Fiscus*, and so long as this distinction is real, the expression *servi publici populi Romani* applies in strictness only to those belonging to the people, and not to *servi fiscales*. The *Fiscus* is not only distinct from the *Aerarium*: it is regarded as the private property of the Emperor. In strict law it does not differ from the *res familiares* and other *privatae res Caesaris*. It is however distinctly administered, and it is the duty of the Emperor to devote it to public purposes[2]. It passes as a matter of course to his successor on the throne. There is another form of property of the Emperor, which is distinguished under the name *patrimonium*. This too is more or less public in character: the revenues of Egypt come under this head. While it is not strictly fiscal it is administered on similar lines. There is no trace of any attempt to devise it away from the throne. Much of it, perhaps all, is public in everything except form. Besides this, there is the ordinary private property of the Emperor, which he deals with exactly as a private *civis* may, but which in the early Empire is not formally distinguishable from fiscal and patrimonial property, and in the Byzantine Empire has again become, for practical purposes, confused with it.

[1] Mommsen, Droit Pub. Rom. 5. 290 *sqq*. Marquardt, Organ. Financ. 394 *sqq*.
[2] The separation of this property from the *privata res Caesaris* is said to date from Severus: Marquardt, *loc. cit.*

In the course of the Empire great changes occur in the relations of these different funds. The *Fiscus* steadily grows to be regarded more and more as public property. Ulpian speaks of it as still the property of the Emperor[1], but Caracalla, and, later, Pertinax, both treat it as essentially public, and in the Monarchy, after Diocletian, all substantial difference between public property and fiscal property has disappeared. This change in the position of the Fisc necessitates a more clear distinction between it and the private property of the Emperor, and accordingly from the time of Septimius Severus there appears a separate machinery for the administration of the true *res privatae* and *familiares* of the Emperor. Yet another change must be noted. Justinian, and, perhaps, earlier Emperors, shew a tendency to extend to their private property, while still retaining the advantages of private ownership, the same privileges as exist for the Fisc[2].

These gradual changes of attitude make it impossible to say with certainty whether a particular rule which is applied by classical law to *servi publici populi Romani* is or is not in later law extended to *servi fiscales* or to *servi privatae rei*. Existing texts give little but negative results.

The name *servus publicus populi Romani* implies something more than that the slave in question is the property of the people: it imports that he is in some way employed on public affairs, and on that part of public affairs which belongs to the Senatorian department rather than to the Imperial. As we shall see, captives do not become *servi publici* by the mere fact of capture, but only by their being devoted to the permanent service of the public[3]. It is this limitation of the name which accounts for the fact, noted by Mommsen, that there is no trace of female *servi publici*[4].

The true *servus publicus* is completely obsolete in Justinian's time, and is nearly so in the classical law, so that it is not surprising to find little mention of him in the juristic texts. Most of our information is from inscriptions, and a short statement is necessary as to the chief conclusions which have been drawn as to the position of these slaves.

Servi publici seem from the evidence of the inscriptions to have usually married, or cohabited with (for it is difficult to give a name to their connexion), freewomen, *ingenuae* or *libertinae*. Mommsen holds[5] that they never cohabited with *ancillae*. But though such connexions might not be usual or creditable, it is unlikely that they did not occur. Indeed there are at least three inscriptions which seem to shew that

[1] 43. 8. 2. 4. [2] 49. 14. 6. 1; In. 2. 6. 14. [3] Livy, 26. 47.
[4] Mommsen, *op. cit.* 1. 367; Staatsrecht (3) 1. 324; Halkin, Esclaves Publics, 117 *sqq*. M.'s remark that the State possessed no female slaves is too strong. A proscription or capture might vest such women in the State, but they would be sold: they never entered the class to which the name and privileges of *servi publici* applied. [5] *loc. cit.*

such connexions did occur and were avowed, though clearly they were open to objection on many grounds[1]. In one inscription we have a memorial set up to a *libertinus*, by, *inter alios*, his patron, and his father who is a *servus publicus*[2]. In another we have a man called Primitivos, apparently therefore a slave, setting up a memorial to his father who was a *servus publicus*[3]. In another we have a *servus publicus* setting up a memorial to his son Neptunalis, apparently a slave[4]. Halkin cites other inscriptions of the same type[5]. It is notable that in them, as in those cited above, the mother is always free. Mommsen does not advert to these cases, but Halkin disposes of them by assuming that the connexion existed and the child was born before the man became a public slave. It seems at least equally consistent with the evidence to suppose that such connexions did occur, but that the public slave commonly secured the manumission of the woman and her children.

In any case however the child of a *servus publicus* would not be a *servus publicus*: no one was born into that position. They were thus ordinarily acquired, a circumstance which is expressed in the second name which most of them bore, commonly terminating in *ianus*, and recording the name of their former owner[6]. In many cases however they appear with only one name[7], a circumstance which may indicate that they vested in the State otherwise than by purchase[8].

Public slaves, while forbidden to wear the toga, seem to have had a special costume[9]. The *lex* Julia Municipalis alludes to assignments by the Censor of sites for dwellings for the *servi publici*[10], but it is not clear that this refers to slaves of the people, or even that, if it does, it expresses any general rule.

During the Republic *servi publici* were employed on a great variety of works: as in private life, the greater part of the business of Rome seems to have been conducted through slaves. Most of their work was subordinate, though not all[11]. It is not possible to go into their various employments[12]. In connexion with some of these employments, though not it seems with all, the slave received an annual stipend, or rather

[1] See C. 6. 1. 8. [2] C. I. L. 6. 2334. [3] C. I. L. 6. 2340.
[4] C. I. L. 6. 2357. [5] *op. cit.* 119; C. I. L. 6. 2343, 2361.
[6] Mommsen, *loc. cit.*, and for illustrations, C. I. L. 6. 2307 *sqq.*
[7] C. I. L. 6. 2313, 2331, 2343—5, 2365, 2366, 2369—71, 2374, 4847, 11784, *etc.*
[8] Capture, proscription, forfeiture. See Halkin, *op. cit.*, 17 *sqq.* He says that *dediticii*, freed after they had been sold into perpetual slavery, came into this class. But we are told only that they become the property of the Roman people, not that they enter this privileged class, G. 1. 27.
[9] Mommsen, *loc. cit.* [10] Bruns, Fontes, 1. 109.
[11] They served as priests of Hercules, Halkin, *op. cit.* 49 *sqq.*
[12] They were employed as messengers in all departments, as attendants on the magistrates, as servants in the temples, some being attached as a *familia* to certain priesthoods. Not to magistracies, on account, so Mommsen thinks, of the temporary nature of the office. They were employed in collecting unfarmed revenue, in libraries, in administration of justice, in fire and water services, and generally in public works. See as to this Mommsen, D. P. Rom. 1. 362 *sqq.*; Staatsrecht (3) 1. 325 *sqq.*; Halkin, *op. cit.* 40—106; Wallon, Hist. de l'esclavage, 2. 86 *sqq.*, 3. ch. 4. As to employment as soldiers, see *ante*, p. 73.

maintenance allowance—*cibaria annua*—paid annually from the *aerarium*[1]. Savings on this were doubtless among the sources of their *peculia*[2]. But mere temporary employment on public work did not entitle them to rank as *servi publici*. Thus Livy tells us[3] that of the prisoners taken by Scipio, some were declared to be public slaves, and these were set to various handicrafts with a prospect of liberty if they deserved it. Others were set to work as oarsmen in the naval galleys, and these were not regarded as public slaves at all[4].

So far as private law is concerned we hear little of *servi publici*. In a text which as it stands is very corrupt, we are told that they had a power of devise of half their *peculium*[5], the other half, and all if they were intestate, reverting no doubt to the State. As to acquisitions by the *publicus*, rights and liabilities on his contracts, and noxal liability for him, the texts tell us not a word. This does not mean that this sort of question did not arise, but that at the times when our texts were written the *servus publicus populi Romani* was obsolescent[6]. There can be no reasonable doubt that their acquisitions vested in the State, and little more that their free superior would be liable under a contract authorised by him. So much can be inferred from the rule in the case of slaves of municipalities. But beyond this there is no certainty: it is not to be taken for granted that they had an unrestricted right to bind their *peculia*. It seems that debt to the State could be paid to a public slave only with consent of the person entitled to receive it. If so paid without that consent the debt was still due, subject to a deduction for what was still in the *peculium*[7]. In relation to obligations incurred by them the rule may have been the same[8].

It is obvious that they took a social rank very different from that of ordinary slaves. Thus in one inscription, as Mommsen notes, they take precedence of their father who is a freeman[9]. In inscriptions relating to them it is not unusual to omit the word *servus*, and to call the person in question *publicus*, with, sometimes, a further description shewing his function, *e.g.* "Hermes Caesennianus *publicus Pontificum*[10]," "Glaucus *publicus a sacris*[11]." Of course most of the inscriptions relating to them are sepulchral, and it is easy to understand the omission of the unpleasant word. There are however many cases in which they are described as *servi*[12].

In the Empire the field of employment of *servi publici* rapidly

[1] Pliny, Litt. Traj. 31; Halkin, *op. cit.* 115. [2] 16. 2. 19; C. Th. 8. 5. 58.
[3] Livy, 26. 47; Polybius, 10. 17.
[4] Gladiators were not public slaves, but often those of private owners, aspirants to office, or of Caesar. [5] Ulp. 20. 16; C. I. L. 6. 2354.
[6] The surviving praejustinianian juristic texts contain no allusion to *servi publici populi Romani*.
[7] 16. 2. 19. [8] *Ante*, pp. 163, 4, and, as to certain contracts by them, *post*, p. 322.
[9] C. I. L. 6. 2318. [10] C. I. L. 6. 2308. [11] C. I. L. 6. 2331.
[12] *e.g.*, C. I. L. 6. 2338, 9 (monuments erected by public slaves); 6. 3883 (monument to public slave); 3. 7906 (not sepulchral).

diminished. Mommsen could find no trace of any such persons outside the capital, after the founding of the Empire[1]. The low standard of morality with which slaves were credited naturally led to restrictions on the financial side. Alexander enacts that *cautiones, i.e.* receipts, by public slaves of municipalities are not to be valid unless countersigned by the person to whom the money was payable[2]. This is not strictly relevant to our topic, but it indicates a tendency. From Diocletian onwards all important public service is done by freemen, though in the various forms of labour slaves are still employed. In the time of Alexander *administratio* is essentially servile. Arcadius absolutely forbids the employment of slaves therein[3]. But as will shortly appear, all this later legislation has no direct bearing on *servi populi Romani.*

We have seen that in all probability the *servus publicus* was superseded outside the city under Augustus, and indeed the method of farming the republican revenues prevented his appearance in a field of activity in which the slaves of the Fisc are prominent in later times. But apart from this, the gradual absorption of the Senatorial power by the Emperor and of the *Aerarium* by the Fisc, seems to have involved the disappearance of the old *servus publicus populi Romani.* This absorption is said to have been completed early in the third century[4], at about which time the affairs of the Fisc come to be regarded as public[5]. There are however a few texts in Justinian's compilations in which the *servus publicus* seems to be referred to[6]. We are told of three cases in which security may be taken by a public slave in what is essentially private business. On adrogation of an *impubes,* the adrogator may give the necessary security to a public slave[7], since the obligation, as civil, would be destroyed by the *confusio* resulting from the *adrogatio,* if it was given to the *impubes* himself or to one of his slaves. So the goods of a person in captivity with the enemy may be placed in the custody of one who gives security to a public slave[8]. And, where a *pupillus* has no slave, an intended tutor, in the case in which security is needed, can give security *rem salvam fore pupillo* to a public slave[9]. Of course the lawyers were aware that a *servus populi* was not the property of individual citizens[10], and indeed the texts nowhere rest the rule on any community in the slave. But it is difficult to resist the opinion that it is on this ground that a public slave is chosen: his stipulation, that the goods shall be given to the person entitled[11], would be void except for this fictitious ownership as a stipulation for a third person[12]. But the rule has convenience on its side, and that it is recog-

[1] *loc. cit.* [2] C. 11. 40.
[3] C. 10. 71. 3; 11. 37. 1. As to progress and causes of the change, see Halkin, *op. cit.* 224 *sqq.*
[4] Marquardt, Org. Financ. 386. [5] Mommsen, D. P. Rom. 5. 293 *sqq.*
[6] Wallon, *op. cit.* 3. 135 *sqq.*, cites several from the Codes but they all refer to slaves of *municipia*, or the Fisc.
[7] 1. 7. 18; C. 8. 47. 2. [8] C. 8. 50. 3. [9] 27. 8. 1. 15; 46. 6. 2.
[10] 48. 18. 1. 7. [11] C. 8. 47. 2. [12] In. 3. 19. 4.

nised as having no more appears from the fact that in the case last stated, *i.e.* of the tutor, we are expressly told that the pupil acquires only an *actio utilis*[1]. All these texts give an intelligible sense, if they are understood of municipal slaves, and in none of them is the slave called a *servus publicus populi Romani*[2]. Nevertheless they cannot well be understood as representing the law of Justinian's time. In the case of the adrogator the Institutes say that the security is given *publicae personae hoc est tabulario*[3]. It is certain that public *tabularii* were not slaves in Justinian's time[4]. In the case of the tutor, one of the texts allows the magistrate to nominate a person to take the promise with the same resulting *actio utilis* to the *pupillus,* and the other text dealing with the same matter gives him the right to take the promise himself[5]. The fact seems to be that the fictitious part ownership which was the excuse for allowing the security to be given to a *servus publicus* was lost sight of in the later law, and his public character illogically regarded as the essential, so that in later law the security is given to a public person whether he is a slave or not. It may then fairly be assumed that the true *servus publicus populi Romani* has long ceased to exist in the law of Justinian.

Of slaves the property of the Emperor it is possible to make three classes: *servi* (*patrimoniales*) Caesaris or Augusti[6]; *servi fiscales*; *servi privatae rei* Caesaris. All of them are Caesar's, and most of the rules which are stated of *servi* Caesaris may be applied to all three.

Servi Caesaris present close analogies with the public slaves just discussed. The name however does not seem to be confined to those who exercise some function in Caesar's name, though neither *servi privatae rei* nor *vicarii* of *servi* Caesaris are commonly called *servi* Caesaris[7]. Like *servi publici* they wear a special dress[8], and it is common for them to have two names. Sometimes the second name has the termination *ianus* indicative of acquisition from a private owner[9], but more often it is not in this form[10]. In the majority of the inscriptions and in all the later ones, only one name appears[11]. There are many references to *ancillae* Caesaris[12], some unmarried[13], some having

[1] 27. 8. 1. 15, 16; 46. 6. 4. *pr.* [2] But their general form is opposed to this limitation.
[3] In. 1. 11. 3. [4] C. 10. 71. 3.
[5] 27. 8. 1. 15; 46. 6. 4. Interpolation is immaterial here. In the same sequence of ideas comes the rule that the stipulation need not be made if the sureties are present and assent to the entry of their liability on the *acta*, 27. 7. 4. 3.
[6] C. I. L. 6. 586.
[7] Orelli, 2825, 2920, cited Erman, S. Vicarius, 417; C. I. L. 3. 556; 8. 8488, *etc.*
[8] Lampridius (Alexander, 23. 3) and Flavius Vopiscus (Aurelianus, 50. 3) cite these emperors as not giving a special dress.
[9] *e.g.*, C. I. L. 6. 239. [10] *e.g.*, C. I. L. 6. 74, 8. 6974, 8488, *etc.*
[11] *e.g.*, C. I. L. 2. 4187; 6. 5349—52, 138, 614. Mommsen (*ad* C. I. L. 8. 12600 *sqq.*) thinks Hadrian suppressed the use of two names.
[12] Fr. de iure Fisci, 13; C. I. L. 5. 369; 8. 1129, 1898, 10628, *etc.*
[13] C. I. L. 8. 1129.

two names[1], and one who is described as a *vilica*, which, as her husband is not named, may mean, not the wife of a *vilicus*, but one herself exercising that function[2]. *Servi* Caesaris sometimes married freewomen[3], but more usually *ancillae*, often, it is likely, *ancillae* Caesaris[4]. Thus many *servi* Caesaris are so by birth: *vernae* Caesaris are common in inscriptions[5]. Persons so described are no doubt, usually, the offspring of a *servus* Caesaris and an *ancilla* Caesaris not in his *peculium*. If she were *in peculio*, the child would not be technically a *servus* Caesaris, but a *verna servi* Caesaris[6]: a *vicarius* of a *servus* Caesaris is not a *servus* Caesaris. Probably many of the slaves described as *vicarii servi* Caesaris are children of the *servi* concerned. In some cases we are expressly told that this is so[7], and this may be the reason for stating the obvious rule that they may not manumit their *vicarii*[8]. If the *ancilla* is not a *vicaria*, but a *serva* Caesaris, the child is a *servus* Caesaris[9] and may be a *verna*[10].

Of the various employments of *servi* Caesaris it is not necessary to say much[11]. There is the same history of a gradual transference of the higher posts held by them, to freemen, which has already been noticed in connexion with *servi publici*[12]. In general their range of employments is similar. Two points of difference must however be observed. The financial administration of the Imperial property was largely in their hands. The system of farming taxes, applied in a great many branches during the Republic, almost ceased under the Flavian emperors. It was never so freely used in Imperial matters, and even where it had been adopted it was almost completely abandoned[13]. Moreover the slaves of Caesar were largely employed in weaving and similar factory work, and there was legislation imposing heavy money penalties on those who concealed or abducted slaves belonging to these *gynecaea* or *textrina*[14].

Servi fisci or *fiscales* are those employed on the business of the *Fiscus*. This term excludes on the one hand slaves who have merely

[1] C. I. L. 6. 74. [2] C. I. L. 8. 5384; D. 33. 7. 15. 2.
[3] C. I. L. 10. 529, *cit.* Mommsen, D. P. Rom. 5. 107.
[4] C. I. L. 5. 170; 369—71; 6. 4353; 8. 1844, *etc.*
[5] C. I. L. 3. 333, 349, 556, 1085, 2082, *etc.*
[6] Orelli, 2920; C. I. L. 6. 878; 14. 202, cited by Erman, *op. cit.* 416. He points out the difficulties of 3. 4828.
[7] C. I. L. 3. 4828.
[8] C. 7. 11. 2; cp. C. I. L. 6. 8495, *libertis eius et vicariis suis.*
[9] C. I. L. 3. 1470, 1994; 8. 4372, 3. [10] C. I. L. 5. 371.
[11] Mommsen gives (C. I. L. 8. Supp. I. p. 1335 *sqq.*) an account of them from Carthaginian inscriptions.
[12] Wallon, *op. cit.* 3, chh. 3, 4.
[13] Mommsen, *op. cit.* 5. 110; Marquardt, *op. cit.* 396. It is difficult to trace any practical difference between fiscal slaves and those dealing with the public part of the *patrimonium*.
[14] C. Th. 10. 20. 2, 6—9; C. 11. 8. 5, 6; cp. C. 6. 1. 8. Even in the Byzantine Empire some of these workers were slaves.

become the property of the *Fiscus* by forfeiture or condemnation[1], those which belonged to estates forfeited for secret *fideicommissa*, those whose masters have died without heirs—*mancipia vaga*[2]—and those belonging to estates on which the heirs have refused to enter[3], and on the other hand those belonging to the *patrimonium* or to the *privata res* Caesaris. But there are many texts which shew the close similarity which existed between these classes. Some have already been noticed[4]. The Fragmentum de iure Fisci hardly seems to distinguish between them[5].

It is nowhere expressly said that either of these classes of slaves had any right of devise of the *peculium*. But a mutilated text tells us that certain persons, who may be either *servi* Caesaris or his *liberti*, may deal freely with their *res*, so long as their transactions are not *in fraudem portionis* Caesaris[6]. As the whole passage is dealing with slaves, it seems probable that this refers to the *peculium* of *servi* Caesaris, and that it implies an extension to them of a power of devise of a half. Huschke[7] remarks that their right was much the same as that of *filii familias* in their *peculium castrense*. But they had no power of manumission[8]. Nothing is known as to the mode of reckoning of this half[9].

Some Emperors reserved to themselves a power of punishment in excess of what was allowed to private owners[10], but in general the capacity and position of *servi* Caesaris were apparently normal in most respects. They could enter on inheritances on the order of the person concerned[11]. They could presumably acquire in other ways and contract like slaves in general. Clearly however there were some restrictions. Thus we are told that it was forbidden to lend money to a *dispensator* Caesaris, or to his *vicarius*, which here means, no doubt, any slave representing him[12]. The ordinary *servus* Caesaris must have had many occasions to contract, and it is not unlikely that on his private dealings his half of his *peculium* alone was liable, that of Caesar being in no way affected by his dealings, while on the other hand, on his contracts made on Caesar's business, probably the head of the department was liable, at any rate to the same extent as in the case of slaves of a municipality[13]. Trajan indeed provided that with slaves of the Fisc,

[1] They are called *fisci mancipia*, C. 9. 51. 8.
[2] C. Th. 10. 10. 20; 10. 12. 1, 2; 11. 1. 12.
[3] Any of these might become a *servus fiscalis*.
[4] *e.g.* 49. 14. 6. 1; In. 2. 6. 14.
[5] Fr. de i. Fisci, 12, 13. Property of deceased *liberti* Caesaris goes to the Fisc so far as it is not validly devised. So too of treasure found on land of the *fiscus* or of Caesar, the owner's part goes to the Fisc, 49. 14. 3. 10.
[6] Fr. de i. Fisci, 6 a. [7] *ad h. l.*, citing Ulp. 20. 16.
[8] C. 7. 11. 2, *post*, Ch. xxv.
[9] Many inscriptions shew *servi* Caesaris erecting monuments *de suo*, an expression used probably to make it clear that the *pars* Caesaris has not been encroached on. Dessau, 1654; 1821, cited Erman, *op. cit.* 413, 417; cp. C. I. L. 6. 479, 744.
[10] Flav. Vopisc. Aurelian, 49. [11] 29. 2. 25. 2.
[12] Fr. de i. Fisci, 7. [13] Cp. 16. 2. 19.

the provincials should not contract at all under a penalty of, apparently, twice any resulting loss[1]. This refers of course to slaves engaged in the collection of revenue, the only ones to which the name *servus fiscalis* seems to be properly applicable. The language of this text and that just mentioned as to loans to *dispensatores* suggests that such a transaction though prohibited was not void. If so, the liability must have been *de peculio et in rem verso*.

Prohibitions of *delatio* did not prevent *servi fiscales* from reporting to the treasury in money matters: it was in fact their master's business[2,3].

We have already observed that the *fiscus* though technically the private property of the Emperor is practically, and in the later law admittedly, public property. We have also seen that the *privata res* follows somewhat the same course, or rather, to put the matter more accurately, that the Emperors claim for it the same privileges as those possessed by the *fiscus* and the public part of the *patrimonium*, while not in any way loosening their hold or power of disposition of it. Accordingly *servi privatae rei* are in most respects on a level, in later law, with those just discussed. They enter on inheritances for Caesar at the command of him or his procurator[4].

There are extant several enactments as to the tribunal which may try them. In A.D. 349 it was provided that crimes of slaves of the *res privata* might be tried in the provinces by the regular *iudices*, and the *interpretatio* perhaps makes this apply to patrimonial and fiscal slaves, while it seems to give the *procurator* Caesaris a right of intervention[5]. There was legislation about the same time requiring the presence of the *rationalis* both in civil and in criminal cases[6], but so far as criminal cases were concerned this was dispensed with in A.D. 398[7]. For the capital, at least, Theodosius and Valentinian laid down, in A.D. 442[8], a different rule. Any litigation civil or criminal in which the slaves of the household were concerned was to go before the *Praepositus sacri cubiculi* or *Comes Domorum*. This rule clearly does not apply to Fiscal slaves, though the rubric of the title groups together such slaves and those of the *privata res*[9].

[1] Fr. de i. F. 6. [2] P. 5. 13. 2; *ante*, p. 85.
[3] We shall see (*post*, p. 417) that the rules as to freewomen cohabiting with *servi alieni* were specially severe in the case of *servi fiscales*.
[4] 1. 19. 1. 2; 49. 14. 46. 8. [5] C. Th. 2. 1. 1.
[6] C. Th. 2. 1. 3; C. 3. 26. 8. [7] C. Th. 2. 1. 11. [8] C. 3. 26. 11.
[9] As to the relation in the later Empire between these different funds, see Marquardt, Org. Finan. 393 *sqq*.

XXI. *Servi Publici* of *Municipia*.

These are really only an instance of the wider class of *servi universitatis*. But as practically nothing is known of special rules affecting *servi* of other forms of corporate bodies, *servi collegiorum*, and the like, and as the slaves of municipalities played a very important part, closely analogous to that of the *servi populi Romani*, it seems convenient to treat them separately. Such slaves are the property of the community, not of the individual citizens or corporators[1]. Thus they can be tortured for or against such persons[2], and, after manumission, they are not *liberti* of individuals, and thus can bring legal proceedings against them without *venia*, though they cannot proceed against the corporation without it[3]. Heavy penalties are imposed on those who use slaves of the municipality for their own purposes[4]. The illogical exceptions recently discussed are not such as to create any real difficulty: they are recognised as mere subterfuges[5]. The texts may not refer to the slaves of towns at all, but there seems no reason why these should not be covered by them. Certainly such slaves are called public[6]. Ulpian and Gaius indeed tell us that the application of the epithet "public" to the property of anything but the State is incorrect[7], but the practice is perfectly clear though it may have begun in a false analogy. The municipality has in general the same rights of ownership as ordinary owners[8]. The slaves usually bear only one name, but some are found with two, of which one is sometimes that of the person from whom they were acquired[9]. It is clear on the evidence of juristic texts and inscriptions brought together by Halkin[10], that there are female slaves of towns, that these intermarry with the male slaves, and that the class of *servi publici* (*civitatis*) is recruited by birth. Children born into the class are themselves described as *publici*[11], so that, as here used, the name has no relation to their service.

They are employed in much the same ways as *servi publici populi*, but even more freely, since they serve in some cases as military guards[12]. They are employed in financial administration: even the responsible position of *actor* is ordinarily filled by a slave[13]. There is the same

[1] G. 2. 11. [2] 1. 8. 6. 1; 48. 18. 1. 7.
[3] 1. 8. 6. 1; 2. 4. 10. 4. [4] C. 6. 1. 5.
[5] *Ante*, p. 322; 1. 7. 18; 27. 8. 1. 15, 16; 28. 6. 40; 46. 6. 2, 4. *pr*.
[6] G. 2. 11. See also many inscriptions cited by Halkin, *op. cit.* 160 *sqq*.
[7] 50. 16. 15, 16.
[8] Subject only to such restrictions in the matter of sale as were applied to them in late law in their dealings with all important property, C. 11. 32. 3.
[9] Halkin, *op. cit.* 145 *sqq*. As in the case of *servi populi* inscriptions often omit the word *servus*, Halkin, *op. cit.* 193. Most of what follows so far as it refers to the public law in this matter is due to Halkin, *op. cit.* 126—end.
[10] 38. 16. 3. 6; 38. 3. 1; Halkin, *op. cit.* 198 *sqq*. [11] C. I. L. 11. 2656.
[12] Pliny, Litt. Traj. 19, 20. [13] C. 11. 40. Inscriptions, Halkin, *loc. cit.*

tendency as in the case of slaves of the State, in the later Empire, to exclusion from responsible duties such as those of a *tabularius*[1]. They receive pay, or rather maintenance allowance[2]. They have *peculium*[3], which is the property of the municipality[4]. Halkin is of opinion[5] that they have the same right of devise of their *peculium* as have slaves of the Roman people. He cites in support of this an inscription from Calais in which a monument is set up to a public slave of the town by his two *heredes*[6]. But this is not conclusive. Such persons are frequently members of *collegia*[7], and, even though slaves, are allowed to leave their *funeraticia* to persons, who are called their *heredes*, precisely that they may put up memorial tablets[8]. On the other hand, the fact that their *peculium* belongs to the community is emphasised[9], and Ulpian, if his text is properly read, which is far from certain, imposes a limitation which, if Halkin's view is correct, is quite unnecessary, since he speaks only of slaves of the people[10]. It is noticeable that in the case of *servi* Caesaris to whom there is some evidence that the privilege extends[11] we are clearly told that half of their *peculium* is their own[12].

They can acquire for the municipality with all the ordinary results. Thus a *traditio* to a *servus publicus* entitles the *municipes* to the *actio* Publiciana[13]. According to the old view, municipalities cannot possess, *quia universi consentire non possunt*[14]. The reason is Paul's, and, as his language shews, is a confusion between common and corporate ownership. The true reason is that the corporation is incapable of either *animus* or the physical act of apprehension. It cannot authorise another to do what it cannot do itself; moreover, as the text adds, it does not possess its slave, and so cannot possess through him. Nerva *filius* however holds that the corporation can possess and usucapt what the slave receives, *peculiariter*[15]. This recalls the exception to the rule that a man cannot possess through his slave without his own knowledge[16]. But it clearly carries the exception further, as in the case of *captivi*[17]. Even the implied authorisation involved in the gift of a *peculium*[18] cannot arise here, for the corporation, unlike the captive, never was capable of authorising. The general rule that we cannot acquire possession through one whom we do not possess, early breaks down, but so far as our own slaves are concerned this case seems the only

[1] 50. 4. 18. 10; C. 7. 9. 3; Halkin, *op. cit.* 179. At pp. 153—192 he gives a full account of what is known of their employments.
[2] Pliny, Litt. Traj. 31.
[3] 16. 2. 19; 40. 3. 3.
[4] 50. 16. 17. *pr.*
[5] *op. cit.* 197.
[6] C. I. L. 10. 4687.
[7] Halkin, *op. cit.* 202.
[8] *Ante*, p. 75.
[9] *Procul dubio*, 50. 16. 17. *pr.*
[10] Ulp. 20. 16.
[11] *Ante*, p. 325.
[12] Fr. de i. Fisci, 6a.
[13] 6. 2. 9. 6.
[14] 41. 2. 1. 22.
[15] *Ibid.*
[16] *Ante*, p. 200.
[17] *Ante*, p. 294. There also capacity and possession in the principal are both ignored.
[18] 15. 1. 46; 41. 2. 1. 5.

exception, even in late law[1]. But convenience, which dictated the whole institution, needed a further step. Ulpian lays down the rule in general terms, that *municipes* can possess and usucapt through slaves[2]. No doubt, in non-peculiar cases, the *animus* was provided by *praepositi administrationi*.

The corporation acquires through its slave's stipulation[3], and thus he can take the various *cautiones* on its behalf[4]. There is not much authority on the liability of the corporation on its slave's contracts. We are told that a *praepositus administrationi* on whose *iussum* a contract was made with a slave of the corporation is liable to the *actio quod iussu*[5]. It may be supposed, though not confidently asserted, that similar rules apply to other actions of this class. The same conclusion may be reached with a little more confidence as to noxal liability for the slave, just as it is fairly clear that the *praepositus* was entitled to sue if the slave, or any other property, was injured[6].

Nerva provides that legacies may be made to *civitates*[7]. In the classical law towns and other corporations cannot be instituted heirs, for two reasons. They are regarded as *incertae personae*, says Ulpian, and moreover whether the gift is to the *municipium* or to *municipes* (of both which expressions the legal result is the same), the donee is incapable of the acts involved in *cretio* or *pro herede gestio*[8]. As we cannot institute the *civitas*, neither can we its slave, for we can never institute the slave of one with whom we have not *testamenti factio*[9]. To this rule the classical law admits few exceptions. A senatusconsult allows them (and thus their slaves) to be instituted by their *liberti*[10], and *bonorum possessio* can be claimed under such a gift or on intestacy[11]. The entry will be at the order of a *praepositus*. Again, though Hadrian forbids *fideicommissa* in favour of *incertae personae*, Ulpian records a senatusconsult allowing them in favour of municipalities[12]. He tells us also that certain deities can be instituted[13]. Classical law seems to have gone no further, so far as general rules are concerned, though there are traces of special concessions of *testamenti factio* to certain *coloniae*[14]. In one text it is said that slaves of a *municipium* or *collegium* or *decuria* instituted and either alienated or freed, can enter[15]. In Justinian's time this is obvious, but for Ulpian's it seems to imply that the institution may have this modified validity, that if the slave passes into such a

[1] 41. 2. 1. 15. As to possession by *municipia*, *per alium*, 10. 4. 7. 3; 50. 12. 13. 1; Mommsen, Z. S. S. 25. 41.
[2] 41. 2. 2.
[3] 45. 3. 3; 22. 1. 11. 1.
[4] 3. 4. 10.
[5] 15. 4. 4.
[6] Vat. Fr. 335.
[7] Confirmed by Hadrian, Ulp. 24. 28; cp. D. 34. 5. 20. Mommsen (Z. S. S. 25. 40) cites an earlier instance, C. I. L. 10. 5056.
[8] Ulp. 22. 5. See however *ante*, p. 328, and Mommsen, Z. S. S. 25. 37.
[9] Ulp. 22. 9; D. 28. 5. 31. *pr.*; 30. 12. 2.
[10] Ulp. 22. 5.
[11] 38. 3. 1.
[12] Ulp. 22. 5; D. 36. 1. 27, Paul.
[13] Ulp. 22. 6.
[14] G. 2. 195; D. 28. 6. 30. See Accarias, Précis, § 332.
[15] 29. 2. 25. 1.

position that a gift then made to him would be good, it may take effect. But this is entirely contrary to general principle[1]. We know that where the slave of one without *ius capiendi* is instituted the gift may take effect if he is alienated[2], but that is a different matter: here it is a case of lack of *testamenti factio*.

Leo allows all forms of gift by will to be made to municipalities[3]. As to other corporate bodies, we gather from an enactment of Diocletian[4] that some *collegia* could be instituted by special privilege. Several enactments authorised gifts to churches and charities[5], and finally Justinian abolished the rule forbidding institution of *incertae personae* altogether[6]. Wherever a body can be instituted, no doubt its slaves can[7].

[1] *Ante*, p. 137.
[2] 29. 2. 82.
[3] C. 6. 24. 12.
[4] C. 6. 24. 8.
[5] Girard, Manuel, 818.
[6] In. 2. 20. 25; C. 6. 48. 1.
[7] The difficulty that the body is not capable of the necessary *aditio* is not mentioned: it does not seem to have been felt by the later lawyers. We know that in case of mere physical defect or where there was no defect, there might be delegation, 29. 2. 26; 36. 1. 67. 3.

CHAPTER XV.

SPECIAL CASES (*cont.*). BONA FIDE SERVIENS. SERVUS MALA FIDE POSSESSUS. SERVUS FRUCTUARIUS, USUARIUS.

XXII. *Bona Fide Serviens.*

THE expressions *qui bona fide servit*, and *bona fide serviens* are rather misleading. The *bona fides* really in question is that of the holder. This would be *a priori* almost certain (for it is scarcely conceivable that the classical lawyers should have made the *animus* of the slave decisive) and the texts leave no doubt. They are cited by Salkowski, who shews that *bona fide possidere* and *bona fide servire* are used interchangeably[1], and that there are texts which expressly make the *bona fides* attach to the possessor[2].

As to what is involved in *bona fides* a few words are necessary. Gaius tells us there must be a *iusta possessio*[3]. This appears to mean that *iusta causa* is required. On the other hand it is immaterial that the slave is *furtivus*[4]. So far as the *bona fides* itself is concerned, the texts give no indication that the words have any meaning other than that they bear in the law of *usucapio*. But just as a man may have *bona fides* and yet be unable to usucapt, because the thing is *furtiva*, so it is conceivable that one who cannot usucapt because his possession began in bad faith, may become a *bonae fidei possessor* for our purpose in the course of events. Broadly speaking a *bonae fidei possessor* is one who supposes himself to have the rights of owner, and whose acts will be regulated on that assumption. No man regards himself at the moment as a *bonae fidei possessor*[5]. The holder may know of the defect in his title before he is actually evicted: in that case he becomes a *malae fidei*

[1] Salkowski, Sklavenerwerb, 155. This work contains an exhaustive discussion of acquisition in this case and in some others. The texts cited on the present point are 7. 1. 25. 6; 11. 3. 1. 1; 24. 1. 19. *pr.*; 41. 1. 23. 3, 54, 57; 45. 3. 19.
[2] 21. 1. 43. 3; 39. 4. 12. 2; 41. 1. 23. 1, 54. *pr.* See also G. 2. 94. A crucial case is that of the *fugitivus*: it must have happened not infrequently that a slave ran away from a bad master and became incorporated into the *familia* of one he thought better. There can be no doubt that he acquired to his holder, notwithstanding his own bad faith.
[3] G. 2. 95.
[4] 19. 1. 24. 1 and *passim*.
[5] This fact must be borne in mind, since some of the rules cannot be intelligibly applied till the *bonae fidei possessio* has ceased.

possessor from the moment when he learns that he is not entitled. It is easy to see that difficulties might arise as to bringing that knowledge home to him. Judgment, or admission on his part, will settle the matter, and many facts equally decisive may readily be imagined. But since *bona fides* is always presumed[1], it must often have been hard to recover profits already received by a *possessor*. This fact may have led some jurists to the view, represented in the Digest, that acquisition continues till eviction,—a view which certainly did not prevail[2].

It is a *bonae fidei possessor* who acquires: possession is necessary. To this general rule circumstances induced the admission of an exception. In discussing *servi hereditarii*[3] we saw that the ordinary rules as to acquisition through slaves were relaxed on considerations of convenience. We have here a somewhat similar case. In a text of Africanus[4] the case is put of a slave employed in commercial matters at a distance. His owner dies, having, by his will, freed him and instituted him *heres pro parte*. He, in ignorance of these events, continues his trading. Are the results of his dealings acquired to his coheirs? The answer given in the text is that if the other heirs have entered and know of the facts they cannot acquire, for they no longer have *bona fides*. But if they have not yet entered or have entered without knowledge of the facts affecting him, or were, like him, *necessarii*, and ignorant of the facts, then the text does allow acquisition through him, but in an inconsequent and incomplete manner. If debtors have paid him in good faith, they are discharged (on a principle already considered[5]). But the money they pay is not acquired to the *hereditas*, but to him alone, and he is liable to *actio negotiorum gestorum* on account of it, but not to *familiae erciscundae*. In view of the rule that, if money due to the testator is paid to one of the *heredes*, the others have *familiae erciscundae*[6], this must be due to the fact that he does not take it as heir, but as acting for his supposed master[7]. If he purports to lend money, there is no *mutuum* except as to his share and the money can be vindicated. But if he stipulates for the money lent, the *heredes* do acquire the action *ex stipulatu*: *hereditati ex re hereditaria adquiri*. To this extent he is a *bona fide serviens*, and the text adds that if there were two such persons they might be regarded as *bona fide servientes* to each other. All this is very unsatisfactory. Salkowski[8] points out that it dispenses with possession altogether as a

[1] C. 8. 45. 30.
[2] Julian (22. 1. 25. 2) allows a man to acquire for his holder, notwithstanding supervening bad faith, and Ulpian (41. 1. 23. 1) contradicts this in terms which shew that there had been dispute. See Salkowski, *op. cit.* 162—4 and the texts he cites.
[3] *Ante*, p. 256.
[4] 12. 1. 41. As to this difficult text, see Salkowski, *loc. cit.* and his references.
[5] *Ante*, p. 163. [6] 10. 2. 9. [7] Cp. C. 3. 36. 18, 20.
[8] *op. cit.* 159.

requirement for acquisition; substituting for it a rather obscure relation of *bona fide* service, which does not involve putative ownership, since at least in the last case neither of the two persons can possibly suppose himself owner. He seems prepared to accept the text as an authority for the view that *bona fide* service was recognised in the exceptional case of a *necessarius* acting without knowledge of the will, where possession was impossible, a rule which is clearly convenient, and for which there is, as Salkowski observes, the authority of another text of Africanus and one of Javolenus[1]. But apart from this particular rule the text has difficulties to which Salkowski does not advert. It gives no explanation of the fact that while the money paid to Stichus *ex re hereditaria* is not acquired to the estate, the stipulation is. It does not explain why if the *mutuum* was void except as to his share, the stipulation for repayment, which no doubt replaced, so far as his share went, the *mutuum*, was not *sine causa*, or at least capable of being met by an *exceptio doli*. The stipulation seems in some mysterious way to validate the *mutuum*. Down to the words *ut credendo nummos alienaret* the text is consistent with principle. Stichus acquires to himself, subject to a duty to account for what he receives. Then comes the reference to a *stipulatio*, leading to the odd doctrines just stated. This part of the text may well have been written or at least modified by a later hand. It is noticeable that at the point at which the stipulation appears the construction of the sentence changes—*referret* and *esset stipulatus* are used instead of the infinitives.

The person *bona fide* possessed may be either a *servus alienus* or a *liber homo*: the rules are in general the same, *mutatis mutandis*. We are concerned with the *servus alienus*, and shall consider the *liber homo bona fide serviens* only where some difference of rule calls for examination[2].

Though the *bonae fidei possessor* is not *dominus*, he is *de facto* in much the same position, and necessarily regards the slave as his. This fact is reflected in the law of legacy. Thus a legacy of "my slaves" may be construed to include those possessed in good faith by the testator, if this appears to be his intention[3]. Gifts to *liberti* are not within the restrictions of the *lex* Cincia, and we are told that gifts to one who, having been a *bona fide serviens*, has been declared free, are on the same level: he is *pro liberto*[4].

[1] 41. 1. 40; 45. 3. 34. But in both these there is the assumption that the *heredes* still possess.
[2] Thus though the holder may possibly usucapt a *servus alienus* (41. 1. 10. 5), he cannot a freeman. *Post*, Ch. XXVIII. For legislation as to disposition of his apparent *peculium* when he is found to be free, see C. Th. 4. 8. 6 = C. 7. 18. 3.
[3] 32. 73. 1.
[4] Vat. Fr. 307. No doubt the rule will not apply to a gift to a *servus alienus* who has been in the donor's possession, nor for obvious reasons is such a slave owned for the purpose of the *Scc.* Silanianum and Claudianum, 29. 5. 1. 2.

Like other things *bona fide* possessed, slaves may have *fructus*. The law as to restitution of these received during the action if the slave is vindicated, has already been discussed[1]. The *fructus* of a slave are *fructus civiles*, earnings and the like, differing in character from *fructus naturales*[2]. There is however no reason to suppose that there was any difference in legal rule. It is now generally held that the rule requiring restitution of *fructus exstantes* is due to Justinian[3], and in fact it is not applied at all clearly to *fructus* of this sort. The texts which speak of restitution refer to *fructus* received during the action[4], and one of them gives, as the reason for the restitution, that he is not to make a profit out of a man who is already the subject of litigation[5]. Paul's remark that it is unfair to ask for fruits of an art acquired at the cost of the possessor does not seem to refer to earlier earnings[6].

The principles of the law as to delicts in respect of such slaves are in some respects difficult to gather. The *bonae fidei possessor* is not liable for *servi corruptio*, or for *furtum*, since he cannot be guilty of the *dolus* which these delicts require[7]: the case of *iniuria* is not discussed, but it is difficult to imagine a case in which he could be liable, even *servi nomine*. He may be liable to the *actio* Aquilia: Javolenus tells us that he is so liable, at least noxally[8].

On the other hand, he is not entitled to the *actio servi corrupti*[9], probably because the words *servum alienum* in the Edict[10] are regarded as imposing on the plaintiff proof of ownership, though Ulpian gives two other reasons, namely, that *nihil eius interest servum non corrumpi*, and that if he had the right the wrongdoer would be liable to two, which he thinks absurd. Neither of these reasons is worth much, in view of the rules in the other delicts. He may have an *actio iniuriarum* if the wrong is plainly *in contumeliam eius*, though an *iniuria* is primarily regarded as against the *dominus*[11].

It is clearly laid down that a *bonae fidei possessor* has an *actio furti* in respect of the slave[12], but the basis of his *interesse* is not clearly defined, though the rule is at any rate classical, and may be republican[13]. The right does not turn on the interruption of usucapion, since it is immaterial that the *res* is *vitiosa*[14]. His interest is not regarded as a

[1] *Ante*, p. 12.
[2] As to their relation to acquisitions *ex operis*, *post*, p. 342.
[3] Girard, Manuel, 322.
[4] 6. 1. 16, 17. 1, 20.
[5] 6. 1. 17. 1.
[6] *Ante*, p. 12.
[7] 11. 3. 3. *pr.*, 1.
[8] 9. 2. 38. There seems no difficulty in regarding a *bonae fidei possessor* as capable of the necessary *culpa*, but Pernice thinks otherwise, Sachbeschäd. 194. See also Pernice, Labeo, 2. 2. 1. 86; Monro, Lex Aquilia, *ad h. l.*; Willems, La loi Aquilienne, 80.
[9] 11. 3. 1. *pr.*, 1.
[10] *Ibid.*; Lenel, Ed. Perp. § 62.
[11] In. 4. 4. 6; 47. 10. 15. 36, 37, 47, 48. The first clause of the Edict refers to *servus alienus*, which might exclude the *bonae fidei possessor*, as in *servi corruptio*, but there is a general clause: *si quid aliud factum esse dicetur, causa cognita iudicium dabo*, 47. 10. 15. 34.
[12] 47. 2. 12. 1; 47. 8. 2. 23, *etc.*
[13] 47. 2. 77. 1; G. 3. 200.
[14] 47. 2. 75; cp. *h. t.* 72. 1, 77. 1.

part of ownership, since what he recovers is not deducted from what the owner can get, as is that which the usufructuary recovers[1]. The Institutes tell us that the *bonae fidei possessor* has the action "like a pledge creditor[2]," and Javolenus tells us that the *interesse* depends on his possession[3]. But, as we have seen[4], the *interesse* of the pledge creditor is not easy to define and was differently conceived at different times. But whether it rest on his right of retention against the owner, or on his liability for *custodia*, neither of these applies generally to the *bonae fidei possessor*: in fact, however, the language of the Institutes hardly shews that the bases of the *interesse* were identical in the two cases. His right being not merely a part of the owner's right, it is not surprising that he has the action against the *dominus*. But here too the texts are not clear as to the basis of his right, or even as to its extent. Gaius says simply that he has the action[5], but in the corresponding passage of the Institutes, the words referring to *bonae fidei possessor* are omitted[6], as it seems from the form of the text, intentionally. In the Digest Paul gives the action against the *dominus* in general terms, to a *bonae fidei emptor*[7], and citing Julian, allows it to a donee from a non-owner only if he has a right of detention, *propter impensas*[8]. This is tantamount to refusing it to a donee as such, for even a *commodatarius* has it against the *dominus* on such facts[9]. This distinction in favour of the *emptor* can hardly be due to the fact that he loses his remedy against his vendor on eviction, for he secures this remedy by failing as plaintiff as well as if he fails in defence[10]. The fact that he has paid a price is relevant, for it is mentioned in a case where the action is against a third party, where it seems to serve no purpose except to shew loss[11]. The fact that this is recoverable from the vendor is presumably immaterial: he is for the time deprived of the advantage he paid for, and, as in the case of ownership, later recovery is immaterial[12]. As the limitation to the *emptor* is not found in the texts dealing with the case of theft by a third party, it seems that in that case the price is merely a guide for estimating damages, the *interesse* really consisting in the right to fruits and acquisitions. In the case of taking by the owner he loses only what he was not entitled to, as against the owner, and thus there is no *interesse* unless he paid a price. The possible case of a right to retention does not come into consideration: even one without *possessio* at all might have this right and would have the resulting *interesse*. This seems to be the later law, but it is likely that there were differences of opinion as to the *interesse* in classical law.

[1] 47. 2. 46. 1, 75.
[2] In. 4. 1. 15.
[3] 47. 2. 75.
[4] *Ante*, p. 282.
[5] G. 3. 200.
[6] In. 4. 1. 10.
[7] 47. 2. 20. 1.
[8] 47. 2. 54. 4.
[9] 47. 2. 60. Probably in Justinian's law a depositee had it if he had a *ius retentionis* on any account, though this is denied in the Collatio, 10. 2. 6.
[10] 21. 2. 16. 1.
[11] 47. 2. 75.
[12] *h. t.* 46. *pr.*

For *damnum* to the slave the *bonae fidei possessor* has an *actio in factum*, based on the *lex* Aquilia, even against the *dominus*[1]. As against third persons this is intelligible, though it is our informant, Ulpian, who tells us elsewhere that he has no *actio servi corrupti* as *nihil eius interest servum non corrumpi*[2]. But it is surprising to find that he has the action against the *dominus*. The deprivation of enjoyment can hardly be a wrong if done by the owner entitled to possession, and accordingly it is generally held that the damage is the loss of his eviction remedy against his vendor, since it is now impossible for him to be evicted[3]. It is consistent with this that the text speaks only of *occisio*[4], not of lesser damage. But another limitation, generally received[5], does not seem so well founded. It is said that the action must be confined to the case in which the owner knew of the other's possession and so acted in a sense *mala fide*. The principle on which this rests can demand no more than that he shall not know that he is owner, which must have been the usual case. But even so limited it does not seem to be justified. The *lex* Aquilia did not need *mala fides*. This idea is in fact due to the opinion that an owner cannot be guilty of *culpa*, and is an attempt to find another basis of liability. The other branch of the alternative seems preferable. But the limitation which has been accepted above, compels another, not indicated in the texts: it excludes the action against the *dominus* where the *bonae fidei* holder is a donee.

There remains another difficulty. It is said that a *bonae fidei possessor*, against whom a real action is brought is required to hand to the owner all profits he has received in respect of the thing, even Aquilian damages[6]. If this is so, his action against the *dominus* means little. But in point of fact this is said only for *hereditatis petitio*, against a person claiming to be *heres*, who was very differently dealt with from an ordinary *bonae fidei possessor*[7]. Moreover our *actio* Aquilia lies in favour of the *bonae fidei possessor* only if the slave is killed, and there can then be no question of a *vindicatio* of him. It may be added that a duty to account to the owner for such profits would not necessarily cover damages recovered from the *dominus* himself: we have already seen that a pledge creditor must account to the owner for damages for theft (probably also *ex* Aquilia), except where the owner was the wrongdoer[8].

[1] 9. 2. 11. 8, 17. A *liber homo bona fide serviens* has it in his own name when the subjection has ceased, 9. 2. 13. *pr*.
[2] 11. 3. 1. 1.
[3] Pernice, Sachbeschäd. 196, and literature there cited.
[4] 9. 2. 17.
[5] Pernice, *loc. cit*.
[6] 5. 3. 55. The rule in 6. 1. 17 is differently explained. See *ante*, p. 12.
[7] Girard, Manuel, 901 *sqq*.
[8] *Ante*, p. 283.

The *bonae fidei possessor* is *ipso iure* liable to noxal actions for the acts of the slave. He is released by handing over the man, since the owner, if he attempts to vindicate him, is met by *doli mali exceptio*, unless he pays the damages[1], and, if he gets possession, can be sued by the Publician action, the *exceptio iusti dominii* being met by *replicatio doli mali*[2]. A *bonae fidei possessor* when sued by the *dominus*, can set off the cost of noxal defence[3]. Where the *bonae fidei possessor* is liable the *dominus* is not[4], subject to questions of *dolus*[5]. The reason for the owner's non-liability is that he has not *potestas*, and thus if a *fugitivus* steals from his *dominus*, a later *bonae fidei possessor* will be liable noxally[6], if the man has not since been in the *potestas* of his owner. The owner can arrive at a similar result by bringing *vindicatio* for the slave, but in the noxal action he has not to prove *dominium*, and the holder cannot set off expenses. It should be added that a *bonae fidei possessor*, who *dolo malo* ceases to possess, does not cease to be liable, any more than an owner would[7].

These rules are set forth in the texts with some indications of doubt, but no conflict of opinion is expressed. But that there were such differences is stated by Justinian, and, in view of the technical nature of the distinctions drawn, was inevitable. Justinian observes[8] that if a slave in my *bonae fidei* possession stole from X or from me, it had been doubted whether I was liable to X, or could sue the *dominus*, and he refers to the rule which denies noxal right and liability in the same person. Some, in view of this rule, had held that the *bonae fidei possessor* was not liable, and could sue the *dominus* when the slave got back to him, for what he took while with the *bonae fidei possessor*, or before he got back to his owner. Justinian enacted that as he thought himself owner, he was to be liable for thefts committed by the thief while with him, and could have no claim against the *dominus* for thefts committed during that time. But when he ceases to possess the slave, and the slave gets back to his true owner, the former *bonae fidei possessor* ceases to be liable and has an action for things stolen by the slave from him at any time after the "retention" ceased. He adds that this lays down a general rule consistent with principle, making the possessor liable and not entitled for a certain time, and the owner liable and not entitled for another time. If really free, he is, after his freedom is shewn, personally liable, even to the *bonae fidei possessor*, and his late holder is not liable, this being not in any way inconsistent with the general principle excluding action by a person noxally liable for acts done while he was liable, even though the relation has ceased.

[1] *Ante*, p. 116.
[2] 9. 4. 11, 28.
[3] 47. 2. 54. 4.
[4] 9. 4. 11.
[5] *Ante*, pp. 104, 114.
[6] 47. 2. 17. 3.
[7] 9. 4. 12.
[8] C. 6. 2. 21.

His point is that the action against the freeman is not a noxal action. It will be remembered that a former master has no action for delict against one he has freed[1], nor does Justinian allow it against an owner by a former *bonae fidei possessor*, for what was done during the possession[2]. But in the present case the man having been actually free all through there can never have been any real question of noxal liability.

Two or three remarks on this enactment are necessary:

(i) It is clear from it that the unanimity in the Digest is due to the compilers, but the doctrine Justinian lays down is not new: there is no reason to doubt that it was held by the jurists to whom the Digest credits it[3].

(ii) The spaces of time are not exhaustive. A *bonae fidei possessor* is liable so long as "retention" lasts, the owner as soon as the slave gets back to him. Is either liable for what the slave may steal in the interim, if he never in fact returns to either? Apparently, not. The word *retentio*[4] shews that the rule applies only while actual *potestas* lasts. The question is suggested, by way of digression, whether the rule that a *fugitivus* is still possessed, applies to a *fugitivus* from a *bonae fidei possessor*. Apparently it does. The owner possesses only till another possesses[5], and Paul says that the continuation of possession in a *fugitivus* is *ut impleatur usucapio*[6]. The context shews that this must mean *usucapio* in the slave himself and not in what he possesses. On the other hand we are told, by Paul[7], that to run away from a *bonae fidei possessor* is a case of *fuga*, unless the slave was intending to return to the owner. Paul says that the man's state of knowledge is indifferent, which suggests that the interest of the master alone is in question. No doubt the conception of *fuga* is here considered from an entirely different point of view, but, even so, these texts confirm the view already expressed that the principles governing possession of a *fugitivus* were never a coherent whole[8].

(iii) Justinian's enactment says nothing about *damnum*. We have already seen that here the texts lay down[9] an entirely different rule. The rules and the cause for the difference have already been considered:

[1] 47. 2. 17. 1. [2] C. 6. 2. 21. *in fin.* [3] *Ante*, pp. 101, 129.
[4] C. 6. 2. 21. [5] *Ante*, p. 270.
[6] 41. 2. 1. 14. [7] 21. 1. 43. 3.
[8] *Ante*, p. 271. Salkowski (*op. cit.* p. 150) observes that logic requires that one who has run away from a *bonae fidei possessor* should be still possessed by him and acquire to him, but that the rule as to possession of a fugitive is a mere rule of convenience not to be extended. There are no texts, but he thinks that the fate of acquisition by such a man depends on events If he returns to *bonae fidei possessor*, all acquisitions *intra causas* go to him: others to *dominus*. If he goes to *dominus* all is acquired to him. It may be remarked that while it is difficult to pursue the possible development of Roman rules on logical lines, it is practically impossible to say, without texts, what rules the jurists may have laid down on grounds of expediency.
[9] 9. 2. 13. 1, 27. 3; 41. 1. 54. 2.

here it is enough to say that the limitation of Justinian's enactment is an important confirmation of the views held by Girard[1].

The law as to the liability of the *bonae fidei possessor* on the dealings of the slave is not easily to be made out. Of usufructuary, we are told by Pomponius, in general terms, that the various edictal actions are available against him only so far as the transaction was one out of which he would acquire, *i.e. ex re eius* or *ex operis servi*[2]. The fructuary is so constantly assimilated to the *bonae fidei possessor* for such purposes that it is safe to treat the statement as applying to both. This is confirmed by Paul for the *actio tributoria*: he is liable so far as the *merx* is his property[3]. Of *quod iussu* we are merely told by Marcellus and Ulpian[4] that the action is available against a *bonae fidei possessor*. It is doubtful whether the limitation above given applies to this action: on a transaction authorised by him, he might be expected to be fully liable. But if so, and if, as may well be the case, the transaction concerns what is not really his property at all, but the *peculium* which belongs to the real owner, what is his position? No doubt his right of retention for *impensae* may be made effective in some cases, but many circumstances may bar this. He cannot proceed on *negotia gesta*, since he was acting purely on his own account[5], and for like reasons he does not seem to have a *condictio*. It might indeed be contended that the *iussum* was void if it was not in connexion with a matter out of which he acquired, like a *iussum* for a contract by *servus alienus*[6]. But there is no real reason for this: if I authorise a contract with my slave, the effect of performance of which is to vest property in a third person, I am none the less liable *quod iussu*. Of course, in the absence of some other determining factor, the fact that the contract was at my *iussum* would suffice to determine that it was *ex re mea*.

On the *actio de peculio* we have a good deal of information, but it is not satisfactory[7]. The action is available against the *bonae fidei possessor*, and he can deduct only what is due to him, not what is due to *dominus* or another *possessor*[8]. But here disagreement begins. Pomponius, speaking indeed expressly only of *servus fructuarius* (but there is no reason to doubt the applicability of the remark to a *bonae fidei possessor*), says that this action, like the other edictal actions, is available against the fructuary only so far as he can acquire, *i.e. ex re eius* and *ex operis*[9].

[1] *Ante*, p. 129. [2] 15. 1. 2.
[3] 14. 4. 1. 5, 2. *Institoria* and *exercitoria* raise no difficulty. [4] 15. 4. 1. 8.
[5] 10. 3. 14. 1. There were exceptions in favour of *bonae fidei possessor*, but they do not touch this point, 3. 5. 48; 5. 3. 50. 1. See Accarias, *op. cit.* § 656.
[6] 15. 4. 2. 2.
[7] *De in rem verso* does not seem to be mentioned in this connexion. Presumably it was available so far as the *versum* vested beneficially in the possessor.
[8] 15. 1. 1. 6, 13, 15; 21. 1. 23. 6. [9] 15. 1. 2.

But as the creditor contracts in view of the whole *peculium*, and has no means of determining the different *causae*, there is room for the view that the *possessor* is liable *de peculio* on all contracts, though of course he cannot be condemned beyond the amount of the *peculium* which belongs to him[1]. This view seems to have prevailed. Marcellus is of opinion that his liability ought to be perfectly general, but says that, at any rate, if the action is brought against the owner or fructuary, and full satisfaction is not obtained, the other can be sued for the balance. In this Ulpian and Papinian agree[2]. Elsewhere Ulpian perhaps holds for complete liability as between two *bonae fidei possessores*, and Papinian lays down this rule as between owner and *possessor*[3]. Julian inclines to the intermediate view, that the person directly concerned is primarily liable, the other only for what the *peculium* of the first cannot pay. He does not however, so far as a rather obscure *lex* can be made out[4], require action to be brought first against the principal really concerned, but only that, if the other is first sued, an allowance be made for what can be recovered from the *peculium* belonging to the person primarily liable. The extreme view that either might be sued, looking at the matter from the creditor's point of view, is quite in accordance with what is supposed to be the tenor of the Edict[5]. The intermediate views are equitable compromises. It is clear that Julian's text has been corrupted in some way: it is not impossible that, as originally written, it expressed the view that the person primarily interested must be sued first[6].

There remains a puzzling text which confines liability *de peculio* to the *dominus*, in a certain case. Money is lent to a slave, and he pays it to his *bonae fidei possessor*, on an agreement for manumission. The *bonae fidei possessor* goes through the form of manumission[7]. The lender asks against whom he may bring the *actio de peculio*. Papinian answers that though in general the creditor has a choice, here he may sue only the *dominus*. The money, he says, was acquired to him, and the payment by the slave to the *bonae fidei possessor* did not transfer the property, such a transaction, *pro capite servi facta*, being beyond the slave's power of alienation: and he adds that even if the manumission is gone through it is not acquired thereby to the *possessor*, as not being really *ex re eius*, but only *propter rem eius*. The point for us is that the *actio de peculio* is against *dominus* only, and that Julian emphasises the fact that he acquired on the loan. Salkowski[8] lays down the rule

[1] 15. 1. 32. *pr.* [2] 15. 1. 19. 1. *Restitutio*, *post*, App. II.
[3] 15. 1. 32. *pr.*, 50. 3. See *post*, App. II.
[4] 15. 1. 37. 3. Salkowski, *op. cit.* 229, discusses this text, but treats it as dealing in part with transaction between *serviens* and *possessor*.
[5] Lenel, Ed. Perp. § 104. [6] See also *post*, p. 359. [7] 15. 1. 50. 3.
[8] *op. cit.* pp. 125 *sqq.*

that *mutuum* was an exception to the general principle, and that only he in whom the money had vested could be sued *de peculio* on a *mutuum*. And the *bonae fidei possessor* would not acquire it unless it was received on his behalf, or applied to his concerns. The explanation is consistent with the text itself, but there is no other evidence of any such general rule as Salkowski seeks: the writer or writers of this text may well be laying down what is clearly a reasonable rule for an exceptional case[1].

We now pass to acquisitions through *bona fide serviens*. This topic has been thoroughly worked out by Salkowski[2], whose excellent book has suggested most of what follows on this matter. The well-known general rule is that what he acquires *ex re possessoris*, or *ex operis suis*, is acquired to the *bonae fidei possessor*, everything else to his owner, or to himself if he be really free, the rule applying equally to *dominium*, *iura in re*, *possessio* and *iura in personam*[3]. The right of the *possessor* is in no way derived from that of the owner; in fact it is adverse, a point of some importance. Thus if a *bonae fidei possessor* has acquired possession through the *serviens*, his master, or he himself, if free, can never claim *accessio temporum*[4].

There is one case in which one who is really a *bonae fidei possessor* acquires only *ex re*. This is the case of one who enters on an inheritance believing himself heir, but really not entitled. Such a person must restore to the *heres* all acquisitions through a slave except those *ex re*[5]. Thus the better way to put the rule in the text is that he acquires like any other *bonae fidei possessor*, but though he can, *e.g.*, vindicate an acquisition *ex operis*, he must account for it[6]. Another text lays down an exceptional rule. Pomponius quotes Proculus as holding that where a thing is sold and delivered to a *bona fide serviens*, not within the *causae*, it is not acquired to the *dominus* because he does not possess the slave[7]. This is an isolated text depending on the notion that acquisition by *traditio* depended on the passing of possession, and it is universally agreed that such a slave could not acquire possession for his owner[8]. The text is illogical in that it allows a *liber homo bona fide serviens* to acquire in such a case, though he was incapable of possession. But, in fact, acquisition by *traditio* does not involve acquisition of possession[9].

[1] Papinian's language does not look like application of a general rule: *quamquam creditor electionem aliter haberet tamen in proposito dominum esse conveniendum.* In 3. 5. 5. 3, which Salkowski cites in support, there is no *mutuum* at all: that text illustrates only the rule that in *mutuum* property must pass, 46. 1. 56. 2. Salkowski rightly rejects the view that our text extends to the *possessor* the rule that mandate by the slave to a third party for his own manumission gives no *de peculio* (*ante*, p. 216): here there is *de peculio*, but on the loan.
[2] Sklavenerwerb, Ch. II.
[3] G. 2. 86, 91, 92; In. 2. 9. *pr.*, 4; C. 3. 32. 1; D. 41. 1. 10. 4, 19, 23. *pr.*, 43. *pr.*; 41. 2. 1. 6, 34. 2; 41. 4. 7. 8.
[4] 41. 2. 13. 3. [5] 5. 3. 33.
[6] Girard, Manuel, 902; Accarias, Précis, § 816. [7] 41. 1. 21. *pr.*
[8] *Post*, p. 347.
[9] Salkowski, *op. cit.* 36; Appleton, Propriété Prétorienne, §§ 81 *sqq.*

The two conceptions, *ex operis* and *ex re*, are not easy to define.

I. *Ex operis.* This means "by virtue of" or "in course of" his labours, rather than "by active proceeding on his part." It does not however mean the immediate result of his labour. If I employ a slave to make a thing for me, I am using him but I am not acquiring through him. A *conductor*, who can acquire nothing through a slave, a usuary who cannot acquire *ex operis*, both of these will have the result of his labour[1]. It involves essentially the acquisition of a right *ex operis servi*. Its field is therefore narrow. According to Salkowski it covers only the case of the slave hiring out himself or his service, being in some way active for a third person for hire[2]. In two well-known cases the jurists discuss the limits of acquisition *ex operis*.

(*a*) Institution of, or legacy to, the slave. Here the view undoubtedly dominant is that the *bonae fidei possessor* cannot acquire such things, as they are neither *ex re possessoris* nor *ex operis servi*. This is said by Gaius, Pomponius (quoting Aristo), Celsus, Paul, Ulpian, Modestinus[3]. But there are traces of a conflicting view. In legacy there could be no question of *operae*, but in inheritance there is an act of entry. If this is done *iussu possessoris*, cannot this be regarded as *ex operis*? This doubt is suggested by Aristo (through Pomponius)[4], and is by him recorded as having agitated one Varius Lucullus. This view may be understood in two ways. It may mean that its supporters hold that such an act of entry is a piece of labour, and the right to the inheritance is a direct result of it: a sort of *uti*, as if the man had been told to make some article. On this view there would be no question of acquisition *ex operis*. It is more probable that the supporters of this view treat the case as one of acquisition *ex opera*. But this could not be admitted. The *opera* involved in acquisition *ex operis* is not that expended in making the acquisition, but that which is the consideration for the acquisition. Both these ways of looking at it are open to the fatal objection that they would require acquisition of all *hereditates*, not merely those in which the testator intended to benefit the apparent master, and not only all inheritances, but under any transaction effected *iussu possessoris*, a *reductio ad absurdum* of the view. Accordingly Julian, the only weighty authority who thinks a *bonae fidei possessor* can acquire such things in any case, suggests that if the intent were to benefit the *possessor*, the entry of the slave, *iussu possessoris*, might be regarded as an acquisition *ex re*

[1] 7. 8. 12. 6, 14. *pr.*; 18. 6. 17. They are fruits, *deductis impensis*. See Salkowski, *op. cit.* 118. He notes one text in which acquisition *ex operis* is referred to the immediate *operari*, 7. 1. 23. 1.

[2] Mandate for an *honorarium*; acquisition from a *societas* to which the slave has contributed labour; acceptance of a contract for work, by the slave.

[3] G. 2. 92; In. 2. 9. 4; D. 6. 1. 20; 28. 5. 60. *pr.*; 29. 2. 25. *pr.*; 41. 1. 10. 3, 4, 19, 54. *pr.*; 48. 10. 22. 4. See also C. Th. 4. 8. 6. See Salkowski, *op. cit.* 175 *sqq.*

[4] 41. 1. 19.

possessoris. He is clear that it cannot be *ex opera*[1]. There is something to be said for this view, but that which prevails is clearly that the *possessor* cannot acquire such things at all.

(*b*) Treasure trove[2]. If such a slave finds treasure trove, to whom does the finder's half go? Tryphoninus states[3], and rejects, a suggestion that it may go to fructuary or *possessor*, as being *ex opera*. But of course it is not. The event may happen while he is labouring, but the very existence of a finder's half at all requires that the discovery shall not have been the object of his labour[4], and if it were possible to acquire it on intentional search, it would not be an acquisition *ex operis* but *fructus* or product.

II. *Ex re.* This is acquisition through or relating to the property of the *bonae fidei possessor*, not necessarily through any physical thing belonging to him. It would be perhaps more exact to say that acquisition *ex re* is acquisition by a transaction connected with his affairs[5]. Commercial dealings are so various that it is not possible to state the different forms, and a few illustrations, mostly from Salkowski, must suffice. Purchase with *peculium* belonging to the *possessor*[6], sale *ex peculio eius*, taking *traditio* of a thing bought by the *possessor*, stipulating for the price of a thing sold by the *possessor*, loan of money for purposes connected with his property, or the *peculium* which belongs to him[7], *etc.* Three cases appear to create a certain difficulty.

(*a*) Release of a debt. It is clear that if the *possessor* owes money, and the *bona fide serviens* takes an *acceptilatio*, or a *pactum de non petendo*, or any other pact which will base an *exceptio*, the benefit is acquired to the *possessor*. We are told that this is *ex re*[8]. Salkowski[9] finds some difficulty in accepting this. He attributes the view that it was *ex re* to the practical needs of life which made it inconvenient to make the effect of a release depend on its *causa*. He holds that for this reason a release by way of gift was put on the same level as one given in discharge of some obligation, and was thus called *ex re*. The explanation seems unnecessary: the discharge is *in re possessoris*, it is in his affairs. If the *possessor* has lent money to A and borrowed money from B, and the *bona fide serviens* has received the money from A and a release from B, both these transactions are equally *ex re possessoris*.

(*b*) *Donationes.* In one text Gaius denies that a gift can go to the *bonae fidei possessor*, as it is not within the *causae*. This is from the

[1] 29. 2. 45. *pr.*, *aditio hereditatis non est in opera servili*; 29. 2. 45. 4, *ut intelligatur non opera sua mihi adquirere sed ex re mea.*

[2] Salkowski, *op. cit.* 120.

[3] 41. 1. 63. 3 deals with fructuary, but doubtless applies equally here.

[4] In. 2. 1. 39.

[5] It is always *ex re*, never in the plural.

[6] 41. 1. 23. 3.

[7] This case is rare.

[8] 2. 14. 19. *pr.*, 59; 46. 4. 11. *pr.*

[9] *op. cit.* 122 *sqq.*

Institutes[1], and thus is a mere general statement which might admit of exceptions. It is confirmed in the same general form by Pomponius, quoting Aristo[2]. But Paul remarks that a gift given *indistincte* to a *bona fide serviens* goes to the *dominus*[3], which implies that expression of intent might divert it to the *possessor*. And Ulpian, in a text which has been retouched, after expressing some doubt, appears as saying that *donationes, mortis causa* and *inter vivos*, are acquired to the *possessor* if intent to benefit him was shewn[4]. It is not clear that this is Ulpian's. It is however an application to *donatio* of the extension of the notion *ex re* which Julian tentatively suggested for *hereditas*[5]. The intention to benefit the *possessor* may reasonably be regarded as making the transaction his affair, one in which his patrimony is concerned in a more definite way than by the mere fact that it would be better off for the acquisition. Ulpian says the same thing of a payment of money made to satisfy a condition on liberty. This is, if the money is payable, as it usually is, out of *peculium*, an authorisation to give, if he likes. It is not a *donatio* by the owner of the slave. The intended receiver would have no sort of claim against the *heres* for it. It is however a gift so far as the receiver is concerned. If it is *contemplatione fructuarii*, it goes to him[6].

(c) Gift by the *bonae fidei possessor* to the slave[7]. Such a transaction is clearly *ex re*. Its only legal effect is to transfer the thing into *peculium*. This is equally true though less obvious where the *possessor* gives the *servus* his *operae*. The only result is that the various acquisitions *ex operis* are *in peculio*[8].

Salkowski discusses[9] at some length the origin of this principle of the two *causae*. *Ex operis* presents no difficulty: such acquisitions are in essence *fructus*. *Ex re*, says the author, is a growth due to trade exigencies, to avoid roundabout adjustments which would otherwise have been necessary. The jurists recognise the anomalous nature of the rule. They do not apply it to the case of the apparent *filius-familias*[10], where the need is not so great, or to pledge creditor or to *precario tenens*[11]. He thinks that in usufruct acquisitions were at first limited to *operae*. Acquisition of rights through *servus fructuarius* was first allowed in the normal case—usufruct created by will[12]. According to Ulpian the rule was extended to all usufructs by Pegasus. *Ex re*

[1] G. 2. 92; In. 2. 9. 4; D. 41. 1. 10. 3, 4.
[2] 41. 1. 19.
[3] 41. 1. 19.
[4] 7. 1. 22.
[5] 29. 2. 45.
[6] This principle would cover the case of *acceptilatio* if it were really a gift: otherwise, *i.e.* if it were one of a series of transactions affecting the possessor's affairs, it was certainly *ex re*.
[7] Salkowski, *op. cit.* 130.
[8] 7. 1. 31; 7. 8. 16. 2; 41. 1. 49, all dealing with *s. fructuarius*, but equally applicable here.
[9] *op. cit.* 132 *sqq.*
[10] 41. 3. 44. *pr.*
[11] 41. 1. 22.
[12] 7. 1. 25. 7.

grows out of *ex operis*: traces of connexion appear[1]. And it is not, he says, fully developed till after Sabinus. In *hereditas* and treasure trove, Julian and Tryphoninus find it necessary to negative current wide views as to the nature of *ex operis*[2]. Then acquisition *ex operis* gets narrowed down to cases of employment[3] in trading, and it is recognised that *ex re* is *uti* not *frui*[4]. Salkowski remarks that there is little indication of development of an *a posteriori* juristic basis for these acquisitions[5]. The process of definition may have followed these lines, though in the state of the texts there is a good deal of speculation about any such conclusions. Salkowski is not very clear as to the reason for regarding acquisition through such slaves as anomalous. It seems the inevitable result of recognition of *bonae fidei* possession and usufruct as independent rights *in rem*, involving the right of employing the slave. To exclude his employment in the field of contract making, the most characteristic and important feature of slave labour in the absence of any theory of agency, would have been absurd, and illogical. That it was not allowed to pledge creditor or *precario tenens* is natural: the mere fact of possession, *ad interdicta*, was never recognised by the Romans as what is nowadays called a *ius in rem*: this has been achieved by more recent jurisprudence. And as the right of the *bonae fidei possessor* of a slave is a development from *bonae fidei possessio* in general, it is not surprising that it is not applied to putative *patria potestas*, where there is no possession at all. There seems no reason to regard *ex re* as the later of the two to develop: it may be remembered that in the case in which it was necessary to cut down the right of the *bonae fidei possessor, i.e.* in the case of *hereditatis petitio*[6], it was acquisition *ex operis* which was cut off, not that *ex re*: this was regarded as a matter of course.

We can now consider the effect of some transactions in cases in which there is not acquisition to the *bonae fidei possessor*.

(i) *Hereditas*. The *bonae fidei possessor* did not acquire, but the texts are not clear as to what did become of the *hereditas*. No entry of the *serviens* could bind his *dominus*, and if his circumstances became known in time, his *dominus* could make him enter[7]. But if he was a *liber homo*, Trebatius was of opinion that his entry, even *iussu*, made him liable as heir, since whatever his intent was he had gone through the act of entry. Labeo held that he was not bound by his entry unless he was willing to enter of his own account apart from *iussum*[8], and the texts shew that this view prevailed. *Velle non creditur qui*

[1] 7. 8. 14. *pr.*
[2] 41. 1. 19, 63. 3; 29. 2. 45.
[3] 7. 8. 16. 2, 20.
[4] 7. 1. 12. 3; 45. 3. 36.
[5] See also Pernice, Labeo, 2. 1. 370.
[6] *Ante*, p. 341.
[7] 41. 1. 10. 4.
[8] 28. 5. 60. *pr.*; 41. 1. 19.

obsequitur imperio patris vel domini[1]. Thus entry, merely *iussu*, does not bind him, but entry *sine iussu*, or where he was willing to enter apart from *iussum*, does[2]. One of the texts, speaking of the case in which the intent is to benefit the *possessor*, contains a very puzzling remark: *sed licet ei* (*sc. possessori*) *minime adquirit, attamen si voluntas testatoris evidens appareat restituendam eam hereditatem*[3]. The words, which are interpolated[4], seem to mean that if intent to benefit the *possessor* was clear then whether the *liber homo* entered *sponte* or *iussu*, or the *servus alienus* entered *iussu domini*, the person who acquired the *hereditas* would be under a *fideicommissum* to hand it back to the *bonae fidei possessor*. It would have been simpler, as Salkowski remarks[5], to allow the *possessor* to acquire where intent to benefit him was clear[6]. Salkowski doubts if the text be interpolated[7], since it disagrees with a rule laid down by Justinian for an analogous case. It is clear that a person who doubted whether he was a *filius* or *paterfamilias*, or free, or *statuliber*, was personally bound if he entered even *iussu*[8]. This might make one engaged in a *causa liberalis* hesitate to enter even *iussu*. Justinian accordingly provides[9] that if in the will he is described as *servus* Titii, he must enter on *iussum*, and if he refuses is to have no claim, even if really free. If however he is simply instituted, *ut liber*, in his own name, the *hereditas* will await the issue of the *causa liberalis*, which will decide its destination. Thus the mere mention of the name of the *possessor* is to be conclusive evidence of intention to benefit him, and entitles him to claim the *hereditas*, and not merely a *fideicommissum*. But this rule is on the face of it a departure from ordinary rules, for a particular case, and in no way bars Tribonian's authorship of the rule just discussed. The word *fideicommissum* is not used in our text[10], and there is some difficulty as to the event in which the trust takes effect. All that is clear is that, if he enters so as to bind himself, the direction takes effect. But if he enters only *iussu*, so that the entry is null, according to the rules already stated, or does not enter, so that the gift goes to substitutes, it is not certain that the direction is binding. Salkowski thinks that in that case the direction is null[11]. He holds also[12] that if *bona fide serviens liber* enters after his freedom is clear, there can be no question of restitution, for this would give *bonae fidei possessor* greater rights than those of a real owner, who can claim

[1] 50. 17. 4.
[2] 29. 2. 6. 4, 74. 2; 41. 1. 19, 54. *pr.*; cp. 29. 2. 25. 9. This would involve difficulties of proof, but these are held lightly by Roman lawyers. They lead Salkowski to think (*op. cit.* 184, 5) that the choice is made and intent shewn later, when the facts are known, but the texts are against this. 41. 1. 54. 4 speaks of intent to acquire to himself, which is difficult to understand in the case of one in apparent slavery. This leads S. to the view mentioned.
[3] 41. 1. 19. [4] Lenel, Palingen., *ad h. l.* [5] *op. cit.* 178.
[6] We have seen that Julian suggested this and that it was adopted in the case of *donatio*. *Ante*, p. 343.
[7] *op. cit.* 177. [8] 29. 2. 6. 4, 34. *pr.*, 74. 4. Salkowski, *op. cit.* 182—4.
[9] C. 6. 30. 21. [10] 41. 1. 19. [11] *op. cit.* 185. [12] *op. cit.* 178.

nothing if the slave enters after manumission. The analogy is not very close, for manumission is a voluntary surrender of all rights in the slave. And it is hardly possible to apply strict logic to the interpretation of interpolations of this sort.

(ii) Gift and legacy. In the cases in which these did not go to the *possessor*, they went to the *liber homo* or the *dominus*[1]. We do not learn that any rule was laid down as to restitution in case of intent to benefit the *possessor* in legacy. In *donatio mortis causa* the life of the actual beneficiary would be the material one from the point of view of survival[2]. The difficulties which might arise as to *usucapio* and consumption of such things do not here concern us.

(iii) *Possessio*[3]. Possession can be acquired for us by persons *bona fide* possessed by us, within the *causae*, and, if it is *in re peculiari*, without our knowledge[4]. But where these conditions are not satisfied we find a new principle. They do not acquire the possession for themselves or for the *dominus*. It is acquired to no one. One who is himself possessed cannot possess or usucapt[5]. An owner cannot possess through one who is possessed by another[6]. It is odd that Ulpian in one text[7] declares that what is possessed by a *filiusfamilias bona fide serviens, peculiari causa*, and thus not acquired to the holder, is possessed by the *paterfamilias*. This text conflicts with the rules already pointed out, and makes one capable of possessing through one possessed by another. It must be an error[8].

(iv) Contract. Here too the general principle applies: he acquires to the *bonae fidei possessor ex re eius* and *ex operis*[9]. The nature of the contract is in general immaterial[10], *mutuum* being not often recorded. The only topic for discussion is the rule that even within the *causae* what cannot be acquired to the *possessor* goes to the *dominus* or to the man himself[11]. The rule appears to be an extension by Julian of an analogous rule in the case of *servus communis*[12]. The case contemplated is that of a stipulation for what is already the property of the *bonae fidei possessor*. This is sound, since the owner can acquire anything, and the right of the *possessor* is merely cut out of his right. Conversely Paul

[1] 41. 1. 10. 3, 19. [2] Salkowski, *op. cit.* 170, 1.
[3] Salkowski, *op. cit.* 164 *sqq*. [4] G. 2. 94; In. 2. 9. 4; D. 41. 2. 1. 5; 41. 4. 7. 8.
[5] 41. 2. 1. 6; 50. 17. 118; and thus a captive is not restored retrospectively to possession by *postliminium*, 41. 2. 23. 1.
[6] 41. 2. 1. 6. Thus a pledge debtor cannot acquire possession through a pledged slave, though the creditor cannot, *h. t.* 1. 15. Salkowski, *op. cit.* 166, 7, finds traces of an older view, according to which any *possessio* gave the holder possession of what was held by the person possessed. But this is not classical or later law.
[7] 41. 2. 4.
[8] For some texts creating difficulties in the rules as to *servi ab aliis possessi*, see *ante*, p. 270.
[9] G. 3. 164; In. 3. 28. 1; Ulp. 19. 21; C. 3. 32. 1; D. 12. 1. 41.
[10] Stipulation, *constitutum*, deposit, *etc.* P. 2. 2. 2; D. 12. 1. 41; 13. 5. 6; 16. 3. 1. 27.
[11] 41. 1. 23. 2; 45. 3. 20. *pr.* The texts do not speak of *servus alienus*, but the rule may be assumed to cover his case, as 7. 1. 25. 3 lays down the same rule for *servus fructuarius*.
[12] *Post*, p. 389.

tells us[1] that if a *bona fide serviens* stipulates for something that is his, within the *duae causae*, it goes to his holder, the doubt in the text being due to the fact that it is his own thing, and one cannot stipulate for that. Paul meets that by the reply that within the *causae* he is to be regarded as the holder's slave, and to have no property beyond his *peculium*, of which the thing in question is not a part. But Ulpian says[2] that even if it is *extra causas* the *possessor* will acquire on such facts. This contradicts the general rule and makes the *possessor* capable of acquiring beyond the *causae*. It has been proposed to omit a *non*, which would make the text orthodox[3], but entirely empty. More acceptable is Salkowski's view[4], that it is a mistake of Ulpian's due to the appearance of logical sequence and symmetry, coupled with the fact that otherwise the transaction would be void. The impossibility of acquisition beyond the *causae*, Ulpian himself emphasises[5].

Most of the slave's dealings are in connexion with his *peculium* in ordinary cases. This *peculium* may be twofold, part belonging to the *possessor*, part to the owner, and the effect of his transaction will vary according to the part of the *peculium* with which it is concerned. His contract is often a part of a dealing entered on by his *dominus* or *possessor*. The *possessor* may sell and the slave stipulate for the price. In one case the *possessor* hands over money, by way of *mutuum*, out of that part of the *peculium* which belongs to the owner, and the slave stipulates in the name of the *possessor* for its return. If this *mutuum* were a contract, it would be acquired to the *possessor*, for it is made by him, and the stipulation would be *ex re*, and so acquired to him. A *mutuum*, however, needs conveyance of the money, and this, on the facts, never occurred: there was no *mutuum* and so far no liability, and thus it is not *ex re*[6]. If the stipulation was not *nominatim* to the *possessor* no doubt, as Salkowski says, Julian would treat it as acquired to the owner: unless this is so, it is not clear why the *mihi* is inserted.

Where A bought B's slave S from a thief, and S with the *peculium* which belonged to B bought a *res* and it was delivered to A, B could condict the thing from A[7]. The text adds that if A has incurred any expense in the matter, he has *de peculio* against B. This involves a quasi-contract of the slave with A[8].

[1] 45. 3. 20. *pr.* [2] 41. 1. 23. 2.
[3] See for references, Salkowski, *op. cit.* 194, 5. [4] *loc. cit.* [5] 7. 1. 25. 3.
[6] 45. 3. 1. 1. Salkowski thinks (*op. cit.* p. 124) that if the coins are consumed the *possessor* acquires the stipulation. This is hardly consistent with the energetic language of the jurist (*nihil agit*), or with the nature of stipulation: *ex praesenti vires accipit*, V. Fr. 55. Subsequent events may determine to whom it is acquired, but hardly whether it exists or not. Nor is it needed: there is a *condictio* in any case if the money is consumed, 12. 1. 11. 2, 13. *pr.*
[7] 19. 1. 24. 1.
[8] S, with B's money, bought a thing for A. A's action is *negotiorum gestorum de peculio*. In 12. 1. 31. 1 the same case is discussed and alternative remedies are considered. *Ante*, p. 226.

Purchase of freedom with *peculium* is a common case. A *bonae fidei possessor* cannot manumit, and any payment to him for this object is not acquired to him, on its receipt by the slave. Thus money borrowed from an *extraneus* and paid to the *possessor* for manumission, vests in the *dominus*[1], or, if the man was really free, can be condicted by the payer[2]. If a *liber homo bona fide serviens* gives an *extraneus* a mandate to buy him, in order to free him, and gives him money out of his own *peculium*, the *extraneus* paying the price and then manumitting him, what is the result when he is declared *ingenuus*[3]? He has, say Ulpian and Julian, an *actio mandati* against the *extraneus* to claim from him cession of his actions. There is an *actio ex empto*, for the sale is valid[4]. The money has become the property of the *bonae fidei possessor*, as it became that of the *extraneus*: it cannot therefore be vindicated, nor, the transaction being a valid sale, is it a case for *condictio*[5]. If the money was *ex peculio possessoris*, he has simply received his own, and there are no actions to cede, for the *extraneus* cannot recover *ex empto*, not having really paid any price.

In some cases the answer to the question out of which *peculium* the consideration proceeds will determine who acquires, which is, till that is settled, in suspense[6].

The effect of a transaction is often modified by *iussum* or *nominatio*, *i.e.* the slave enters on it at the command of, or in the name of, X. The effect of this can be shortly stated. If the *serviens* contracts *nominatim* to the *possessor*, *ex re domini* (or rather not *ex re possessoris* or *ex opera*), the contract is null: the *possessor* cannot acquire *extra causas*, and the fact that the agreement names him prevents the *dominus* from acquiring[7]. If on the other hand he stipulates *nominatim* for his owner, *ex re possessoris*, the acquisition is to the *dominus*, as it is only the fact that the *possessor* acquires which prevents him from acquiring on any contract of the slave, and as the *possessor* cannot here take, the owner does[8]. If he stipulates *iussu possessoris* but *ex re alterius*, he acquires to his *dominus*, *quia iussum domino cohaeret*. It has not the same privative or negative effect as *nominatio*[9]. If he stipulates *ex re possessoris*, *iussu domini* he acquires for the *dominus*[10]. It is not clear why *iussum domini* excludes acquisition to the fructuary or *possessor ex re eius*, since *iussum* has not in other cases any privative effect[11]. Logic would seem to require division. The text is clear and does not seem to be interpolated: the result is more symmetrical than

[1] 15. 1. 50. 3. [2] 12. 4. 3. 5. [3] 17. 1. 8. 5.
[4] 18. 1. 4. [5] 12. 4. 16.
[6] *Post*, p. 363, in connexion with fructuary.
[7] 7. 1. 25. 1; 45. 3. 1. 1, 22, 23, 30, 31.
[8] 7. 1. 25. 1; 41. 1. 37. 5; 45. 3. 39. Salkowski cites also 45. 3. 1. 5, 28. *pr.*; 46. 3. 98. 7.
[9] 45. 3. 31, 33. *pr.* [10] 7. 1. 25. 3. [11] Salkowski, *op. cit.* 193.

logical. To give the *iussum* no effect at all would be to confine acquisition by owner to transactions *ex re sua*. To divide would be clumsy. The matter is the less important in that the acquisition *domino, ex re fructuarii vel possessoris*, is not definitive: we learn that there was doubt as to the remedy of fructuary or *possessor*, but on the authority of Cassius it is laid down that there is a *condictio*[1].

Transactions between the *possessor* and the *serviens* in which no other person is concerned (*i.e.* within the *causae*) can have no legal effect except so far as they may affect the amount of the slave's *peculium*[2] (and subject to a question as to the liability of a *liber homo bona fide serviens* on his promise). In the same way dealings between *serviens* and *dominus* (which are quite conceivable) will produce no other result so far as they are not within the *causae*. But if the contract with *possessor* be *iussu domini* or *nominatim domino* (and even this is conceivable though improbable), the *dominus* will acquire, and if, for example, the thing bought is paid for out of *peculium* which does not belong to the *possessor*, the owner acquires a right on the contract, (not *de peculio*, but absolute, for it is a contract made by his slave,) against the *possessor*. This needs no further authority[3]. In any case in which the owner acquires a right of action on the contract, the *possessor* must acquire, if it is a bilateral transaction, an *actio de peculio*, and conversely in any bilateral transaction in which the *possessor* acquires a direct action against the owner, the latter will have an *actio de peculio*[4]. In unilateral transactions the same rule holds. If the slave promises to *possessor, ex re eius*, the *possessor* acquires no *actio*. If it is *extra causas* he does[5]. What is and what is not *ex re* is to be determined on lines already laid down. The difficulty found by Salkowski on this point seems to be due to his regarding *ex re* as meaning "originating in the property of," instead of "connected with the concerns of" the *possessor*[6].

In the case of *liber homo bona fide serviens* we get new conditions. The jurists agree, apparently, that as he is a free man, capable of contracting, he must be liable to his holder on contracts with him. One case which attracts great attention is that in which the *serviens* manages the affairs of the *possessor*. Here, whether he acts *iussu* or

[1] 45. 3. 39; cp. 12. 7. 1—3. Pomponius expresses a present doubt and solves it on the authority of Cassius, who must have died fifty years before. He calls him Gaius *noster*. The remark may be from the compilers and refer to Gaius.
[2] 7. 1. 25. 5; 45. 1. 118. *pr.*
[3] See 7. 1. 25. 5. As to acquisition in suspense, *post*, p. 363.
[4] Thus where S bought from P a *res* and paid for it with money of his *peculium* which belonged to D, D acquired an *actio ex empto*, and P an *actio de peculio ex vendito*. If he bought the thing from D, no action would arise unless he paid with *peculium* of P, in which case it was as if D were an *extraneus*.
[5] 45. 1. 118. *pr.*
[6] *op. cit.* 225.

not, he is liable to the *possessor*. There were doubts in early law, but apparently only as to the right remedy. Labeo doubted whether *actio mandati* would lie, because the special liabilities of that case are hardly applicable where he acted *servili necessitate*[1]. But the view which prevailed was that if there was authorisation there was *actio mandati*, and otherwise there was *negotiorum gestorum*[2]. Thus Pomponius says he is liable to me *omnimodo*, if he promises to me, *quamvis in re mea*, *i.e.* even in cases which would not have given me an *actio de peculio* against his *dominus* had he been a *servus alienus*[3]. Elsewhere Pomponius lays down the same rule for *commodatum*, saying nothing expressly of the connexion with *res possessoris*[4]. In another text Pomponius says that the *liber homo* may be liable to us by promise, sale, purchase, letting or hiring. The expression *poterit obligari*[5] suggests some limitation, which at first sight seems to be called for, since it is obviously unfair that the *liber homo* should be liable on contracts the whole benefit of which has enured to the *possessor*. But the inclusive language of Papinian[6] is strongly opposed to such a limitation.

The injustice is in fact only apparent, as will appear on examination of three typical cases. The *possessor* expends money on *res peculiares* of his own, and stipulates with the *liber homo* for reimbursement. When the man's freedom is declared the former *possessor* can sue on the stipulation. But on the facts there is an *exceptio doli*. It is true that there was nothing fraudulent, but *ipsa res in se dolum habet*[7]. The *serviens* borrows from the *possessor* and buys things which are devoted to the *peculium* which belongs to the latter. There is no *mutuum*, as there was no intention to pass property to the *serviens*: the money is merely added to his *peculium*[8]. His alienation within his powers is indeed a transfer, but it is no *mutuum*, and it is noticeable that *mutuum* is not mentioned as one of the ways in which a *bona fide serviens* can become liable. The *serviens* contracts with the *possessor* to buy a *res* of him. If he has paid for the thing out of his own property there is no question[9]. If he has not paid at all or has paid out of *peculium possessoris*, he is liable. But he is entitled to the thing and the former *possessor* cannot bring *ex empto* without satisfying the ordinary requirements of this action. These cases shew that, except where he had a real economic interest, the liability of the *serviens* was only nominal. Not much is left of Papinian's *quamvis ex re mea*, for if it really is *ex re mea*, the obligation is nominal. Papinian's language shews that he is dealing

[1] 3. 5. 18. 2.
[2] 3. 5. 5. 7, 18. 2; 13. 6. 13. 2; 41. 1. 54. 3.
[3] 45. 1. 118. *pr.*
[4] 13. 6. 13. 2.
[5] 41. 1. 54. 1.
[6] 45. 1. 118. *pr.*
[7] See 45. 1. 36.
[8] See the texts as to *donatio*, *ante*, p. 343.
[9] He is entitled to claim the thing.

with a conclusion forced on him by logic: *quid aliud dici potest quominus liber homo teneatur*. The equitable defence, the *exceptio doli*, where the benefit has gone to the *possessor*, is in no way opposed to his way of looking at the matter.

As to the rights of *serviens* on his contracts we have little information. We know that if the transaction was *ex re possessoris*, the *serviens* has no rights: from this point of view the transaction is one between a master and his slave[1]. Whether he necessarily had an action if it were *extra causas* is not clearly stated. In one case where he borrowed from an outsider and applied the proceeds to the concerns of the *possessor*, Paul allows him *actio negotiorum gestorum contraria*[2]. He has some doubts which turn on the fact that, as he was apparently acting for his master, his act can hardly be regarded as intervention by a friend. His right is due to the fact that he has made himself liable to an outsider, and throws no light on the matter. But as the *possessor* would undoubtedly have been liable to the owner had he been a *servus alienus*, it may be assumed that he was liable to *liber homo*[3].

In these matters the expression, *ex re possessoris*, is used in a way which may cause confusion. When we say that a *possessor* acquires on a slave's contract *ex re possessoris*, we are speaking of a right acquired *prima facie* by the slave, and enuring to the *possessor*. But here we have been dealing with a totally different state of things: it is not a case where the *possessor* is in the background acquiring by the slave; the *possessor* and the slave appear as two opposing contracting parties, and what the *possessor* acquires is not what is undertaken *to* the slave, but what is undertaken *by* him. This does not however require any modification of the conception, *ex re*[4]. In the case of *liber homo* the point is unimportant, since the liability is not affected by the distinction, but the *servus alienus* does not bind his owner by a promise to the *possessor ex re possessoris*. If the transaction is essentially in the concerns of *possessor* there will be no action against the owner: if it is not there will be *de peculio*. Thus if the slave sells and delivers to the *possessor* a *res* from the *peculium* which belongs to the *dominus*, the *possessor* will have *de peculio ex empto* against the *dominus*: not if it was in the *possessor's* part of the *peculium*. If he buy a thing from the *possessor* there will be the same distinction according to the fund which pays for it[5]. If he undertake a job, the question is, for which estate is it? There does not seem to be a difficulty of principle, though the line may sometimes be difficult to draw.

[1] 45. 1. 118. *pr.* [2] 3. 5. 35. [3] *Ante*, p. 351.
[4] *Ante*, p. 343. [5] *Post*, p. 363.

XXIII. The Slave *Mala Fide* Possessed.

We are not concerned with a *liber homo mala fide* possessed: it is clear that mere forcible detaining of a freeman without pretence of right is not possession at all[1]. There are texts which equally deny possession to any *mala fide* holder of a *liber homo*[2]. Their logic is not very clear. Javolenus attributes the rule in the case of forcible detainer to the fact that *civiliter eum in mea potestate non habeo*[3]. Africanus says we do not possess him because we have not *animus possidendi*[4], which is not necessarily true: in fact he has in his mind the case of knowledge, not merely that we are not entitled, but also that he is really free[5]. Paul appears to hold that what is incapable of being commercially dealt with cannot be possessed[6], which would cover *bona fide* possession[7]. In fact it is probably a hesitation to admit that a freeman could be possessed that led to the preference for the expression *liber homo bona fide serviens*, though there is no doubt that he was possessed according to many texts[8]. There could be no noxal liability for such a person, and no acquisition through him. We are not told whether there was any liability on his contracts, but analogy suggests *actio doli*. The detainer would be liable to the interdict *Quem liberum*[9], and might come within the provisions of the *lex* Fabia[10].

There are some cases of possession which are neither *bonae fidei* nor *malae fidei*. Such are those of *precario tenens* and pledge creditor. There are others which are more like *malae fidei* possession. Such are those of a slave given by a woman *sine tutoris auctoritate*, or given by wife to husband and *vice versa*. Here the consent of the owner is given but the law prevents ownership from passing. Salkowski shews that all these, so far at least as acquisition is concerned, are treated as *malae fidei possessio*[11]. There is no authority upon other points, but from the reluctance with which it was admitted that in the case of gift to a wife even possession passed[12], it seems most probable that the law ignored the transaction and treated the slave for all purposes, as far as possible, as still held by the owner.

The case with which we are concerned is that of one who holds a *servus alienus* as his own, with knowledge that he is not entitled, and adversely to the owner. The great breadth of the definition of *furtum*

[1] 41. 2. 23. 2. The title dealing with wrongful detention of freemen (43. 29) does not speak of possession.
[2] 45. 3. 34. [3] 41. 2. 23. 2. [4] 12. 1. 41.
[5] So has Javolenus in 45. 3. 34. [6] 41. 2. 30. 1.
[7] See also 22. 3. 20; 4. 6. 11. [8] 41. 2. 1. 6; 50. 17. 118, *etc.*
[9] 43. 29. [10] 48. 15; *ante*, p. 32.
[11] *op. cit.* 146 *sqq.* The chief texts are 41. 1. 57; 24. 1. 17—20.
[12] Salkowski, *loc. cit.* in note.

makes a *malae fidei possessor* usually a *fur*, though not always. But for our purpose this is immaterial.

A *malae fidei possessor* has no *actio furti* if the slave be stolen, his *interesse* not being *honestum*[1]: it may be inferred that he has no *actio* Aquilia *utilis*[2], or *servi corrupti*[3], though no doubt he is liable on both these.

He is liable noxally for wrongs by the slave[4]. The reason given by Gaius is that it would be absurd that a *bonae fidei emptor* should incur this liability and the mere *praedo* escape. A sufficient reason seems to be that the *malae fidei possessor* has the *potestas* on which in classical law the liability depends[5]. As he appears to be owner the action will be brought against him: if the fact that he knew that he was not entitled were a defence he must raise it himself, and the result would be abandonment of the slave, which would release him even if he were liable[6]. It is nowhere stated whether he is noxally liable for *damnum*, but in all probability he is not, in this case, since the theory of *potestas* is not applied to it, and the liability always rests on *dominium*[7]. On the other hand, it is surprising to find that a *malae fidei possessor* has *furti noxalis* against the owner[8]. This is in direct conflict with the rule that one who is noxally liable for a slave cannot have a noxal action for what he does[9]. Celsus, who so states the rule, appears to see that it needs special justification, and he defends it on the grounds that otherwise misdeeds would go unpunished and that *domini* would profit by them: *plerumque enim eius generis servorum furtis peculia eorundem augentur.* This is a poor reason: it gives a *malae fidei possessor* a profit which is at least as undesirable[10].

It is surprising also to find that there is no authority as to the liability of *malae fidei possessor* on the slave's *negotia*. *Malae fidei possessio* occurs in many texts and cannot have been very rare. For it to endure, the holder must find it necessary to act in all respects as if he were owner. There will be buying and selling, and all ordinary transactions, as appears indeed from the texts we shall have to discuss. But of contracts by the slave purporting to bind himself or his holder there is not a word. The holder will, like any *extraneus*, be liable to the actions *exercitoria* and *institoria*. Apparently he will not be liable to the *actio quod iussu*[11]. There will of course be *de peculio* against the *dominus*, and if the *peculium* is insufficient, it may be that there is *de dolo* against the *possessor*[12]. Such a slave may well have a *peculium*, *de facto*, belonging to the holder. There seems to be no *tributoria*[13], and

[1] 47. 2. 12. 1. [2] 9. 2. 17. [3] 11. 3. 1. 1.
[4] 9. 4. 13. [5] *Ante*, p. 101. [6] *Ante*, p. 103.
[7] *Ante*, p. 130. [8] 47. 2. 68. 4. [9] *Ante*, p. 106.
[10] Other parts of this *lex* are suspected of interpolation on grammatical grounds. See Eisele, Z. S. S. 7. It may be a Tribonianism. See *ante*, p. 106.
[11] *Arg.* 15. 4. 2. 2. [12] 4. 3. 6. [13] *Arg.* 14. 4. 1. 5.

indeed there is no trace of any edictal action. No doubt *de dolo* is available if there is no other remedy, and there is no reason for creating a limited liability[1].

Besides this apparent *peculium* of the *possessor* there may be a real *peculium* belonging to the owner. In such case questions may arise as to rights and liabilities as between himself and his owner. As there can be no question of the two *causae*, it seems that every bilateral contract between the slave and the *possessor*, will give the owner a direct right of action on the contract against the *possessor*, and the possessor an *actio de peculio* against the owner[2].

The law as to acquisitions is simple and is fully stated. The *possessor* can acquire nothing[3], whether he is a thief, one who holds *vi clam aut precario*, or one whose possession began in good faith so that he is usucapting[4]. In like manner an heir who knows the man is *alienus* can usucapt him, but cannot acquire through him[5]. Acquisitions therefore go to the *dominus*, and on his claiming the slave all must be restored to him. Three remarks are necessary to complete this statement.

(*a*) Though a wife or husband, who has received a gift of a slave from the other, is so far in the position of a *malae fidei possessor*, that she (or he) can acquire nothing and must restore everything obtained through the slave, legacies, *hereditates*, *partus*, *etc.*[6], there is one relaxation. If a thing acquired by the slave is bought with money of the donee, he can claim to be allowed the price[7]. It seems that a *malae fidei possessor* cannot.

(*b*) Things indirectly acquired through the slave must be restored. Thus where a *malae fidei possessor* has let out the slave's *operae*, he acquires on his own contract, but is bound to pay the proceeds to the *dominus*: if the slave makes the contract, the money never vests in the *possessor*[8].

(*c*) There are some cases in which the *dominus* cannot acquire, and in that case no one does. Thus he cannot acquire possession through the slave[9], and a contract, *nominatim furi*, cannot be acquired to the *dominus* and so is simply void[10].

[1] There can hardly be *de in rem verso*: delivery to the slave vests the thing in *dominus*, and its application to a purpose of the holder's still leaves the owner a *vindicatio* or a *condictio*, according to circumstances.
[2] There must be limitations. If it is wholly *ex re possessoris* (*e.g. possessor* sells to slave a thing for his apparent *peculium*), the *dominus* must at least have had an *exceptio doli*.
[3] C. 3. 32. 1. 1. See Pernice, Labeo, 2. 1. 376, as to the possibility of a different view as to possession among the earlier lawyers.
[4] 41. 1. 22, 23. 1; 45. 3. 14.
[5] 41. 1. 40. The fact that in general the liability of *m. f. possessor* in *vindicatio* is greater than that of *b. f. possessor* has nothing specially to do with slaves. See *ante*, pp. 12 *sqq.*
[6] 24. 1. 28. 5. [7] 24. 1. 19. 1. [8] 12. 6. 55. [9] 41. 2. 1. 6.
[10] 45. 3. 14. No doubt a stipulation by the slave for a servitude to attach to a *praedium* of the *possessor* would be equally void, 8. 1. 11; 45. 1. 140. 2, *etc.*

XXIV. *Servus Fructuarius*[1].

The prominence of Usufruct in Roman settlements of property makes this an important subject. No doubt the rules originated in relation to usufructs created by will: it is clear that this was always the normal case. The early history and development of the institution do not concern us: it is probable, as Kuntze says[2], that the principles of the matter were only settled by the classical lawyers: indeed this is probably true of nearly every institution, with elaborate rules, known to the classical law. It is unlikely that usufruct in individual slaves was a common case; most usually it would arise in connexion with usufruct of a *fundus instructus*, or of the whole content of an inheritance[3]. But though usually so created it might be set up *inter vivos*, and, at least in the developed law, its mode of origin was so far as we are concerned immaterial, the rights and liabilities of the fructuary being the same in both cases[4].

The usufructuary is not owner, and thus a legacy of "my slaves" does not cover those in which I have a usufruct, and does cover those in which I have granted a usufruct to someone else[5]. The rules under the *Scc.* Silanianum and Claudianum as to the torture of slaves whose master has been killed do not apply to the case of one living on an estate, of which, with its slaves, the deceased had the usufruct[6]. The danger must have been equally great, but the senatusconsult speaks of *domini*[7], and fructuary is not *dominus*. It is of course the interest of the *extraneus dominus* which compels this literal construction—not any feeling of hesitation in construing widely a penal provision. For the slaves of a son not *in potestate* could be tortured if under the roof of the murdered man[8]. Most of the rules affecting the *servus fructuarius* regarded as a chattel are familiar and obvious. A legacy in the terms "I wish my slave S to serve Titius" is, as a matter of construction, a legacy of the usufruct to Titius[9]. A usufruct may be validly created in a slave conditionally freed[10], or in mad, infirm or infant slaves[11]: their defects will be material in estimating the value of the gift for the purpose of the *lex* Falcidia, but not otherwise. We get little information as to the mode of reckoning of the value of usufruct of a slave. No doubt the cost of maintenance must be deducted

[1] Salkowski, Sklavenerwerb; Kuntze, Servus Fructuarius.
[2] *op. cit.* 12, 13.
[3] 7. 5. 1, 3.
[4] 7. 1. 25. 7. See Salkowski, *op. cit.* 138.
[5] 32. 73, 74.
[6] 29. 5. 1. 2. *Ante*, p. 95.
[7] 29. 5. 1. *passim*.
[8] 29. 5. 1. 14. So far as this text refers to *peculium castrense* it seems classical, but the words referring to a son not in *potestas* may be interpolated. If a husband or wife be killed the slaves of each may be tortured, but this seems to be an express provision, *h. t.* 1. 15.
[9] 33. 2. 24. 1.
[10] 33. 2. 20.
[11] P. 3. 6. 18.

from the annual value of his *fructus, etc.*[1], but as the usufruct ends with the life of either party, and might end, in classical law, in some cases, by the death of a son or slave through whom it had been acquired, there is evidently a complex actuarial question turning on the multiple expectation, which the Romans give no sign of having faced[2]. An owner cannot of course be fructuary also, and thus if the fructuary becomes owner the usufruct ceases. We are told that if the owner of a slave make the fructuary his heir and leave the slave to another person, the slave is wholly due to the legatee, the usufruct being ended by *confusio*[3]. This *confusio* is rather remarkable, as the slave never belonged to the *heres*[4], who, in analogous cases, is treated as never having been owner[5]. It may be that our text really lays down a mere rule of construction, a view more or less strengthened by the fact that the text goes on to say that this would be avoided by a legacy of the usufruct to the *heres*[3]. But it is more likely, notwithstanding that the text in its present form gives the legatee a *vindicatio*, that Marcellus is considering a legacy *per damnationem*, which leaves ownership in the *heres*.

But though an owner cannot be usufructuary, one of common owners may be, *i.e.* in that part of which he is not owner. In such a case he must give the ordinary securities of a fructuary, since his rights in that capacity could not come into discussion in *communi dividundo*[6]. Of course a usufructuary cannot become owner by *usucapio*, not because he has not the necessary *animus*, for he might have it, but because he has not possession but only quasi-possession[7]. But here a curious question arises. T is in process of usucapting a slave who belongs to X. X dies leaving a usufruct of all his property to T, and making Y his *heres*. At the death of T, when all the facts are known, Y claims the slave on the ground that *usucapio* could not have continued after T had become usufructuary of the slave. The result is nowhere stated. It seems clear however that if T accepted the usufruct, knowing that the slave was included, he at once ceased to possess. So much may be inferred from the texts dealing with *conductio* by one in course of usucapting[8], and one of them is so general[9] as to suggest that whether T knew or not that the slave was included his possession would cease[10].

Usufruct, though usually for life, is not always so. It may be

[1] 7. 7. 4.
[2] Roby, de Usuf., 188.
[3] 31. 26.
[4] 31. 80.
[5] Thus he has a noxal action if a slave *pure legatus* steals from him before the legacy is accepted, 47. 2. 65.
[6] 7. 9. 10.
[7] G. 2. 92; In. 2. 9. 4.
[8] 41. 2. 19, 28.
[9] 41. 2. 19.
[10] It seems a case for the principle: *plus est in re quam in existimatione*, rather than for its opposite, 29. 2. 15; 40. 2. 4. 1.

for a fixed time: in the case of a slave, it may be till manumission[1], and there is no difficulty in creating a usufruct of a *statuliber*[2].

The usufructuary has a right to the services of the slave, and may hire them out. They are indeed the normal *fructus* of the man[3]. The fructuary can compel the man to work, can teach him an industry, and can employ him in it[4]. But he must not set him to inappropriate services, such as may lessen his fitness for the work for which he has been trained[5], a rule laid down in the interest of the owner. Similarly he must not put him to dangerous work, in particular he must not make him fight as a gladiator, though if the slave do so fight, the reward goes to the fructuary[6]. He may not torture the slave or beat him in such a way as to lessen his value, though he may correct him by reasonable castigation[7]. If he torture the slave, he is liable to the *actiones* Aquilia, *servi corrupti* and *iniuriarum*[8]. In the same way the owner may not so punish the slave as to make him worth less to the fructuary, though, subject to this, he has *plenissima coercitio* so long as there is no *dolus*[9]. Neither has *actio iniuriarum* against the other for mere castigation of the slave, though *dominus* may have the action against the fructuary, and the converse is apparently true[10]. In general an insult to the slave is regarded as against the owner unless it is plainly *in contumeliam fructuarii*[11]. If the slave be stolen, both have *actio furti*, based on their *interesse*[12]: the owner may have it against the fructuary and *vice versa*[13]. In the same way each may be liable to the other for *servi corruptio*, the fructuary's action being *utilis*[14]. The same rules apply under the *lex* Aquilia[15].

Though there had been doubts, it was early settled that fructuary did not acquire *partus ancillarum*. He had not even a usufruct in them, though of course special agreements could be made[16].

The usufructuary has noxal actions for *furtum*, *servi corruptio* and *iniuria*, and presumably by an *actio utilis* for *damnum*[17]. Surrender frees the *dominus* and ends the usufruct by *confusio*[18]. The *dominus*

[1] 7. 4. 15. No doubt acceptance of such a usufruct avoided question as to assent to the manumission. *Post*, Ch. xxv.
[2] 33. 2. 20. If a usufruct was created as the result of an ordinary sale, there would be a remedy for eviction if the man proved to be a *statuliber*, *ante*, p. 50.
[3] 7. 7. 3. The wage received by the master who hires him out is not an acquisition *ex operis*, *ante*, p. 342.
[4] 7. 1. 23. 1, 27. 2.
[5] 7. 1. 15. 1, 2; *e.g.* set a *librarius* to work as a mason, a musician as porter, *etc.* V. Fr. 72.
[6] V. Fr. 72 as read by Huschke. See however Mommsen, *ad h. l.* The rule is not in the Digest, such fights being obsolete. *Post*, p. 405.
[7] 7. 1. 23. 1; P. 3. 6. 23. [8] 7. 1. 66. [9] 7. 1. 17. 1.
[10] 47. 10. 15. 37, 38. [11] 47. 10. 15. 45—48; In. 4. 4. 5.
[12] 41. 3. 35; 47. 2. 46. 1. [13] 47. 2. 15. 1, 46. 6. [14] 7. 1. 66; 11. 3. 9. 1.
[15] 7. 1. 17. 3, 66; 9. 2. 11. 10, 12. It has been suggested that if the slave is killed the usufructuary receives the whole value, having a quasi usufruct in it. Grüber, Lex Aquilia, 45.
[16] G. 2. 50; P. 3. 6. 19; In. 2. 1. 37; 2. 6. 5; D. 7. 1. 68. *pr.*; 22. 1. 28. 1, *ante*, p. 21.
[17] 9. 4. 18; 11. 3. 14. 3; 47. 2. 43. 12; 47. 10. 17. 9.
[18] 7. 4. 27; 9. 4. 18.

being noxally liable to third persons may surrender to them without incurring any liability to the fructuary[1]. On the other hand, the fructuary is in strictness not liable for the slave's delict. This however means little, since as we have seen he can be indirectly compelled to pay or surrender the man[2]. It is remarkable that no text deals with the case of *damnum*. On principle it would seem that notwithstanding the special rules affecting noxal actions for this delict[3], it was on this matter on the same footing as the others: the *dominus* being liable, by *actio utilis*, to the fructuary, and the latter having the indirect liability already mentioned[4].

As to contractual liability the rules are in general simple. The fructuary is liable to the *actio quod iussu*, to the *actio tributoria*, and generally in the edictal actions, on matters through which he acquires to the slave—in others the *dominus* alone is liable[5]. But in *de peculio* he is liable on all contracts, since the other party relies on the whole of the *peculium*[6]. It is remarked by Salkowski[7] that any other rule would be unfair to the creditor since it might be impossible, and would often be difficult for him to say to whom the right was acquired. But, as he shews, other views are represented: they have been discussed in connexion with the parallel case of *bona fide serviens*[8]. The rule of later law seems to have been, so far as an obscure text of Julian can be made out[9], that the creditor is not bound to sue either party first on contracts specially affecting him, but that if the *dominus* is sued first on a contract affecting the fructuary, he may deduct what could be recovered from the *peculium* of the fructuary[10], so that the ultimate adjustment will be exactly as if the fructuary had been sued first. The rule is on the face of it anomalous, since the liability of *dominus* is unlimited: the reason of it may be that otherwise there would be no means of adjustment, since there is no *iudicium communi dividundo* or the like between them[11], and the obligations of a usufructuary do not clearly cover any reimbursement in such a case. If the case be reversed, and the usufructuary be sued first on a contract not affecting him, the same rule ought to apply, and with more logical justification, but the point is not raised in the texts. If there are two usufructuaries,

[1] 42. 1. 4. 8.
[2] 7. 1. 17. 2; 9. 4. 17. 1, 27. *pr.* See *ante*, p. 116 *sq.* [3] *Ante*, p. 130.
[4] See 9. 4. 19. 1. Kuntze thinks (*op. cit.* 41) that this text deals with *furtum* and gives fructuary a noxal action against *dominus*. That rule is clear, but this text deals with *damnum*: it is one of a group all from the same book, dealing with *damnum*. The words "*verba efficiunt*," *etc.*, which are meaningless as to *furtum*, are intelligible under the *lex* Aquilia. It has nothing to do with owner's liability to fructuary. It merely says that the existence of usufruct does not bar owner's liability *ex* Aquilia, where he has hired the slave. For whatever question might arise as to *potestas*, this does not affect *damnum*. *Ante*, p. 130.
[5] 14. 4. 1. 5, 2; 15. 1. 2; 15. 4. 1. 8. [6] 15. 1. 19. 1. See Erman, Z. S. S. 20. 247.
[7] *op. cit.* 204.
[8] *Ante*, p. 339. Salkowski (*loc. cit.*) credits the wider view to Julian. Chief texts, 15. 1. 2, 13, 19. 1, 37. 3, 50. 3.
[9] 15. 1. 37. 3. [10] Salkowski, *op. cit.* 229. [11] Cp. 10. 3. 8. 4.

and one has been sued, the plaintiff may proceed against the other or others till satisfaction[1]. Nothing is said here as to deduction of what is in the *peculium* of the fructuary really concerned, as there is *communi dividundo* between fructuaries[2].

It may be added that the liability *de peculio* lasted as in other cases for one year from the expiration of the interest[3].

Usufruct of a slave, as of anything else, may be lost by non-use, and there is a rather puzzling text[4] in which the question is raised whether if the slave runs away, this involves non-use, so that by lapse of *constitutum tempus* the usufruct will be lost[5]. Clearly mere adverse possession of the subject of the usufruct does not end it: the fructuary's right is independent and does not depend on possession[6]. Ulpian reports Pomponius[5] as thinking that if the slave transacts business *ex re mea*, this is enough to prevent time from running against me, the usufructuary. He adds that the mere fact that no effective use is made of him is immaterial, since no such use is made of sick or infant slaves, and yet our usufruct in them is unaffected. He cites Julian as holding that so long as the man is not possessed by a third person, the fructuary's right is in no way affected: his quasi-possession continues as does possession by an owner in the like case.

The argument as a whole is not very satisfactory. The analogy between these and infant and sick slaves is worthless: of them all the use is being made of which they are capable, which is not the case with the fugitive. It may further be questioned whether the exceptional rule that a *fugitivus* is still possessed should be extended by analogy[7], but if that step is taken, the further step is natural, *i.e.* to regard the continued quasi-possession as amounting to *uti*, since in technical language possession is often treated as equivalent to use[8]. And *uti* without *frui* is enough to preserve usufruct[9]. The analogy with loss of ownership by lapse of time is halting, since ownership is ended by adverse enjoyment, while mere non-enjoyment ends usufruct[10], with no requirement of adverse possession. Justinian in one text seems to lay down a rule that usufruct is to be barred only by such facts as would bar *vindicatio*, but another later text of his shews that he still regarded it as lost by non-use[11]. But all this affects Julian's analogy rather than any rule laid down. His curious parallel of usufruct[12] (instead of quasi-possession) with possession, which Salkowski thinks[13] to indicate a hazy view of the matter, seems rather to be due to the fact that there is no

[1] 15. 1. 32. *pr.* See App. II. [2] 10. 3. 7. 7. [3] 15. 2. 1. 9.
[4] Salkowski, *op. cit.* 152, 3; Kuntze, *op. cit.* 59.
[5] V. Fr. 89 = D. 7. 1. 12. 3, 4. [6] 7. 6. 5. 1; 41. 2. 52. *pr.*
[7] Cp. 50. 17. 141. *pr.* [8] Acquisition by long possession is called *usucapio*.
[9] 7. 4. 20; 50. 16. 115. [10] 7. 1. 38.
[11] C. 3. 33. 16. 1; C. 3. 34. 13; Accarias, Précis, § 279.
[12] V. Fr. 89 *in fin.* [13] *loc. cit.*

substantive to express "quasi-possession": his meaning is clear, that just as possession is not interrupted, so time is not running against the fructuary because his quasi-possession (*uti*) remains. In the next text, as it appears in the Digest[1] (but it is not in the Vatican Fragments), Julian (or Pomponius) considers the case of a slave who has passed into the possession of a third person. Quasi-possession has ceased, so that this form of *uti* has ceased. Time begins to run against the fructuary. But if the slave contracts *ex re fructuarii*, this is use, and keeps the usufruct alive, the acquisition being to the fructuary. There seems no objection to this view or any contradiction of what the jurist has already said[2].

Such infant slaves as are mentioned above can hardly be lost by non-use, other than adverse possession[3]. There is no profit in them, and till they are of such an age as to be able to work, they are regarded as valueless[4].

Before entering on the subject of acquisition it may be remarked that slaves held in usufruct have the same power of alienation as other slaves: they cannot, for instance, even with *administratio*, alienate by way of *donatio*[5].

In relation to acquisition through *servi fructuarii*, which is the most important topic, most of the questions of principle have been dealt with by anticipation in connexion with *bona fide serviens*. The general principles being the same in the two cases it is not necessary to repeat the discussions, and the rules, so far as they are identical, will therefore be dealt with mainly by way of reference. The general rule is that the fructuary acquires *ex re* and *ex operis servi*: all else goes to the *dominus*[6], the fructuary having no interest in it[7]. A few remarks are needed on cases of special interest.

(*a*) Inheritance and legacy. We have seen that after some doubts it was settled that *bonae fidei possessor* could not acquire such things through the slave. The same principle was generally held in case of *servus fructuarius*[8]. Most of the doubters speak only of *bonae fidei possessor*, but Labeo[9] thinks that usufructuary would acquire if testator intended to benefit him. Salkowski thinks[10] this must be accepted as

[1] 7. 1. 12. 4.
[2] Salkowski, *op. cit.* 153, seems to hold that one who says that quasi-possession is use cannot hold that there can be use without it, but this hardly follows. It may well be that from Tribonian's point of view a mere stipulation, *nomine fructuarii*, kept the usufruct alive, whether it was acquired to the fructuary or not. These texts do not say that the fructuary is acquiring *ex operis*.
[3] V. Fr. 89; 7. 1. 12. 3. [4] 7. 1. 55, 68. *pr.*; 7. 7. 6. 1. [5] 24. 1. 3. 8.
[6] G. 2. 86, 90, 92; 3. 165; Ulp. 19. 21; P. 5. 7. 3; V. Fr. 71 b; In. 2. 9. 4; 3. 28. 2; D. 2. 14. 59; 7 1. 21; 41. 1. 10. *pr.*, 3, 37. 2; 45. 3. 27.
[7] 41. 1. 37. 2. [8] 29. 2. 45. 3; *ante*, p. 342.
[9] 7. 1. 21. He puts legacy in the same position. [10] *op. cit.* 174.

the law of Justinian's time, as the texts shew that they have been handled by the compilers. But this seems very doubtful in view of the large number of texts which contradict it[1]. It is more reasonable to suppose that the compilers fell here into a plausible error, than to read limitations into all the other texts.

(*b*) *Donatio*[2]. Here it is perfectly clear that in the later law the fructuary would acquire if the intent of the donor was to benefit him[3]. Releases to the slave for the fructuary are valid as being *ex re*[4]. Gifts by fructuary to the slave are dealt with as in the case of the *bonae fidei possessor*[5]. We are told by Paul, however, that, if the intent was to benefit the *dominus*, the gift may take effect in his favour. This is no doubt a late development and may be an interpolation[6].

(*c*) Possession[7]. Possession can be acquired, within the two *causae*, for the *fructuarius*[8], and through this possession *usucapio* may operate, subject to the ordinary rules as to knowledge of the principal in matters not within the *peculium*[9]. In relation to *usucapio* there seems no reason to distinguish, as Kuntze seems inclined to do[10], between *servus fructuarius* and *bona fide serviens*. There had been some doubt, mentioned by Gaius and rejected by Paul[11] (who refers to the analogous case of the *filiusfamilias*), as to whether there could be possession through such slaves, since they were not possessed. Papinian gives, as a reason for allowing it: *cum et naturaliter a fructuario teneatur et plurimum ex iure possessio mutuetur*[12]. Kuntze[13] remarks that the reason is not a good one since detention is not possession, and doubts whether these words be Papinian's. But though possession of the man is unnecessary to the acquisition of possession through him, the fact that he is not possessed is not without importance. We have seen[14] that if the *serviens* does not acquire possession for his *bonae fidei* holder, he does not acquire it at all, for the owner cannot acquire possession through one who is in fact possessed by another. This difficulty does not arise in the case of a *servus fructuarius*.

(*d*) Contract. Any contract which the slave can make at all he can make, within the *causae*, for the fructuary. Here, as in the case of the *bona fide serviens*, we get the rule that what he cannot acquire to the fructuary the slave acquires to the owner, even within the *causae*[15]. The rule is illustrated by the case of a *servus fructuarius* who stipulates for the usufruct in himself. This is a *res sua* so far as the fructuary is

[1] *e.g.* 29. 2. 45. 3 (Julian); *h. t.* 25. *pr.* (Ulpian); 41. 1. 47 (Paul); 41. 1. 10. 3 (Gaius); G. 2. 92; In. 2. 9. 4. None of these texts speaks of intent.
[2] *Ante*, p. 343.
[3] 7. 1. 22, 24, 25. *pr.*; 41. 1. 49.
[4] *Ante*, p. 343; 7. 1. 23. *pr.*; 46. 3. 63; 46. 4. 11. *pr.*; V. Fr. 72.
[5] *Ante*, p. 343; 7. 1. 31; 7. 8. 16. 2.
[6] 41. 1. 49.
[7] *Ante*, p. 347; Salkowski, *op. cit.* 164 *sqq.*
[8] 7. 1. 21; 41. 2. 1. 8, 49. *pr.*; G. 2. 94.
[9] 41. 4. 7. 8; G. 2. 94.
[10] *op. cit.* 34.
[11] 41. 2. 1. 8; In. 2. 9. 4; G. 2. 94.
[12] 41. 2. 49. *pr.*
[13] *op. cit.* 34.
[14] *Ante*, p. 347.
[15] *Ante*, p. 347; D. 7. 1. 25. 3.

concerned and thus cannot be acquired to him: it goes therefore to the owner[1]. The doubt in the case of the *liber homo bona fide serviens* cannot arise here.

The rules as to the effect of *iussum* and *nominatio* are the same as in the case of *bona fide serviens*[2]. If the stipulation is *nominatim domino* or *iussu domini*, even *ex operis* or *ex re fructuarii*, it is the owner who acquires[3]. If, on the other hand, he stipulates *nominatim fructuario*, not within the *causae*, the agreement is null[4]: the *dominus* cannot acquire in contradiction of its terms. If it is at the *iussum* of the fructuary, the *dominus* can acquire[5]. The same principle is illustrated by the rule that if the stipulation is *domino aut fructuario*, not within the *causae*, the agreement is valid: all is acquired to the *dominus*, though payment may be made to the fructuary, who is regarded as *solutionis causa adiectus*[6]. On the other hand if he stipulates *domino aut fructuario, ex re fructuarii*, the agreement is void for uncertainty, since he can acquire in such a way for either, and we cannot say which has acquired and which is *solutionis causa adiectus*[7].

Many of a slave's transactions would relate to his *peculium*, and in the present case he may have two *peculia*. A transaction will be *ex re domini* or *ex re fructuarii* according to the *peculium* to which it belongs. Thus in bilateral transactions it may happen that till payment is made it may be impossible to say to whom the thing is acquired. Under this head three cases may be discussed[8].

(i) The slave, about to lend money, stipulates for its return from the intending borrower. Here, till the money is lent, any action by either can be met by *exceptio doli*. When it is lent the payment declares for whom the stipulation was acquired *ab initio*[9]. No doubt, as Salkowski says[10], it will be for fructuary to prove that it was *ex re eius*, the *dominus* being able to recover unless the borrower proves that it was *ex re fructuarii*. In another case the stipulation was for "whatever money I shall lend you[11]." The case seems exactly the same, though Salkowski holds[12] that here there is no obligation till the money is lent, and that it is in no way retrospective. But if the money is lent, and the stipulation is sued on, it must be that stipulation, and it must have

[1] 7. 1. 25. 4. Salkowski, *op. cit.* 193, accepts the view of the Gloss that the *stipulatio* is made with the fructuary himself.
[2] *Ante*, p. 349.
[3] 7. 1. 25. 3, 4; 41. 1. 37. 5; 45. 3. 22, 23, 39. The expression *ex re* is used inclusively: the slave's *operae* are *res fructuarii*.
[4] 45. 3. 22, 23, 31; 7. 1. 25. 3.
[5] 45. 3. 31. As to *condictio* for adjustment (45. 3. 39) see *ante*, p. 350.
[6] 45. 3. 1. 5, 28. *pr.*; 46. 3. 98. 7. Cp. In. 3. 19. 4.
[7] 45. 3. 1. 5; 46. 3. 98. 7.
[8] For full discussion see Salkowski, *op. cit.* 197—220, from which much of what follows is drawn.
[9] 7. 1. 25. 1.
[10] *op. cit.* 202.
[11] 45. 3. 18. 3.
[12] *loc. cit.*

been acquired when it was made. Fitting's view[1] that it is conditional and retrospective seems preferable.

(ii) The slave buys, and takes delivery with a credit term, so that ownership passes though the price is not yet paid. The ownership is in suspense till the price is paid. There are three distinct points:

(*a*) The rights of the parties during the suspense[2]. Neither fructuary or *dominus* can redhibit, for this would be to abandon rights which may not be his[3]. There can be no *actio ex empto*[4]. There can hardly be an *actio* Publiciana, since, the price not being paid, the slave knows that ownership has not passed, and it is his knowledge which is decisive[5]. There can be no *condictio furtiva*[6]. There is no *actio* Aquilia[7], at any rate unless there is some mistake of fact as to whether the price has or has not been paid[8]. On the other hand, on the principles already laid down the vendor can bring an *actio ex vendito de peculio* against either[9], and *condemnatio*, if for the full price, will end the suspense. Salkowski thinks it will end it in any case if there is no *peculium, apud alterum*[10]. But if the owner has paid half *de peculio*, and the fructuary then pays the other half, they will own *pro rata*[11].

(*b*) Termination of the suspense by payment. The thing vests in the owner of the money[12]. Only one text deals with this matter in detail[13]. If it is paid out of the *peculium* of one no question arises. If it is paid out of both, Ulpian reports Julian as holding, reasonably, that they acquire *pro rata*. Ulpian then goes on to consider other possibilities. If the slave pays the whole price out of each *peculium* the thing belongs to him out of whose *peculium* it was first paid for, the other being entitled to vindicate the coins since the slave has no power of gratuitous alienation. If it was all paid together, Ulpian holds that there is no alienation at all, and no payment[14]. All the money is vindicable.

(*c*) Effect of termination of the usufruct before the price is paid. Here, if the usufruct ends before the thing is handed over, the jurists are

[1] Cited by Salkowski, *op. cit.* 199. [2] Salkowski, *op. cit.* 200 *sqq*.
[3] 21. 1. 43. 10. [4] 19. 1. 24. *pr*.
[5] Salkowski, *loc. cit.* There is the possibility of mistake as to whether the money was paid or not.
[6] 7. 1. 12. 5. [7] Salkowski, *op. cit.* 202.
[8] No text deals with *furti* or *servi corrupti*. A buyer who has not paid is liable for *culpa levis*, and therefore may have *actio furti*. *Servi corrupti* is specially for the owner (*ante*, p. 33): he has not this action, but can no doubt claim cession of actions.
[9] *Ante*, p. 359. [10] *loc. cit.*
[11] Salkowski considers further complications where vendor delivers the thing not to slave but to owner or fructuary before or after payment.
[12] 19. 1. 24. *pr*.; 41. 1. 43. 2. [13] 7. 1. 25. 1.
[14] It is not obvious why the thing did not become common, each being entitled to claim half his money back. Salkowski observes that Ulpian treats the coins as *corpora certa* and not as a quantity, contrary to Papinian and Pomponius (46. 3. 94. 1; 12. 6. 19. 2), and refers to Julian (45. 1. 54) and Ulpian himself (12. 1. 13. 2; 46. 3. 29). The result in the text would follow if he bought "*domino aut fructuario*," since here he can acquire only to one, and it is impossible on the facts to say which one. See *ante*, p. 363, and *post*, App. III.

agreed that payment by the fructuary cannot make the thing vest in him. He is now a mere third person, and cannot, by paying the price, acquire an *actio ex empto* on the slave's contract[1], and no delivery to the slave can make the thing vest in him. He ceases to be liable to the *actio de peculio* even *utilis* and *annalis*[2], not merely because the usufruct is ended, since liability *de peculio* is not bound up with acquisition, but because the vendor has not completed the requirements for an *actio ex vendito* before the fructuary's connexion with the slave ceased. If now the fructuary pays the price, after the usufruct is ended by *capitis deminutio*, Julian says[3] that he can have no *actio ex empto*, but has *condictio indebiti* against the vendor. There is the difficulty that the error must be one of law. But though it is generally held that the *condictio indebiti* would not lie on error of this kind, the opinion is not very securely based: this is not the only text which gives it on error of law[4].

If the thing has been handed over before the usufruct ends, and payment is made after its close, the view of Marcellus and Mauricianus is that no such payment can vest the thing in the fructuary. But Julian lays it down and Ulpian accepts it as the equitable view, that payment even then will determine the thing to the fructuary[5]. As Salkowski says[6], this equitableness seems to rest on the ground that the rule gives him rights correlative to his liability *de peculio*, which would logically require him to make the payment within one year, since his liability *de peculio* lasts no longer. But the texts give us no further assistance. Salkowski goes on to remark that the rule of pendency seems to have been settled by Julian. He infers an original doctrine, that the delivery vested the thing in the *dominus*, with a liability to divest on payment by the fructuary, and compares the case with that of *legatum per vindicationem*, according to the Sabinians[7].

It should be observed that this pendency is not a necessary accompaniment of a sale on credit to such a slave. Payment is only one way of determining with whose affairs the thing is connected, decisive only in absence of other evidence. If, for instance, the slave was managing a shop for the fructuary, and bought on credit stock-in-trade which was delivered to that shop, there can be no doubt that this is *in re fructuarii*, and payment by the owner will not affect the matter[8].

(iii) The slave lets out his *operae* for a term at so much a week or for a lump sum: during the term the fructuary dies. Here all the texts

[1] 19. 1. 24. *pr*. [2] Salkowski, *op. cit.* p. 212; G. 3. 84; D. 4. 5. 2. 1.
[3] 19. 1. 24. *pr*.
[4] See also 36. 4. 1. *pr*.; 22. 6. 7, cited by Girard, Manuel, 617. Another difficulty, that of regarding the action as vesting in him personally after adrogation, is not great. See 7. 4. 2. 1, 3. 1.
[5] 7. 1. 25. 1. [6] *op. cit.* 211. [7] 30. 38. 1; G. 2. 185.
[8] For similar cases and resulting remedies, see Salkowski, *op. cit.* 203.

agree as to the law. The fructuary is entitled to the hire for the time for which the usufruct lasted, and the owner to the rest[1]. Salkowski thinks[2] that if it was for a lump sum the usufructuary acquires the whole, and *dominus* must condict his share. The text he cites[3] does indeed refer only to *annos singulos*, but it does not exclude the other case. Paul definitely includes it[4]. Nor is there any reason for the distinction: as Salkowski remarks, whether the payment is *in annos singulos* or not, it is equally one stipulation. But the jurists disagree as to the basis of the rule. Ulpian says[5] that for the years during which the usufruct lasts, the fructuary acquires, but for the later years *transit ad proprietarium stipulatio semel adquisita fructuario*. His language is confused, but he seems to mean that the whole is in the fructuary (it is indeed one stipulation), and part is divested. He remarks that this is unusual, since the owner is not a universal successor. He adds that there will be a repeated transition if the usufruct is lost by *capitis deminutio* and restored by virtue of *repetitio*. This is to state the rule, not to explain it. Kuntze[6] thinks it involves the notion that the obligation is really rooted in the slave, and passes with him. But as Salkowski observes[7] the language gives no hint of this, and one would expect so remarkable a principle to be mentioned, and the same result ought to arise in all cases of transfer of a slave who had made such a contract.

Papinian[8], quoting the rule from Julian, takes a different view. He treats it as a case of suspense. At the beginning of each year it is acquired to the fructuary for that year if the usufruct is still on foot. When this expires it is definitively acquired to the owner. Papinian's language is applicable only to the case of agreement for yearly payments, but the reasoning is equally applicable to the other case: it is as easy to divide a mass *pro rata* as a number of sums. This view differs in practical result: if the whole were regarded as vesting, as Ulpian holds, in the fructuary, it would be possible for him to destroy the owner's right by giving a release[9]. In other respects also Papinian's explanation is to be preferred. There is nothing exceptional in regarding a slave's stipulation as conferring independent rights on two people: this is the ordinary rule in contracts by a common slave[10]. And it is only in so far as the *operae* are within the usufruct that the fructuary acquires a promise in respect of them. If a slave stipulated for so much a year for *operae* during the usufruct, and then stipulated for the same rate afterwards the first would be acquired to the fructuary, the second to the *dominus*. Here the same result is attained by treating the one

[1] 7. 1. 25. 2, 26; 45. 3. 18. 3.
[2] *op. cit.* 217.
[3] 7. 1. 25. 2.
[4] *h. t.* 26.
[5] *h. t.* 25. 2.
[6] *op. cit.* 67.
[7] *loc. cit.*
[8] 45. 3. 18. 3.
[9] Salkowski, *loc. cit.*
[10] *Post*, p. 379.

stipulation as divided. This does not meet Ulpian's language, but that is very confused, and as Papinian shews[1] that the rule was Julian's and was not explained by him, it does not appear too much to regard Ulpian's words as an erroneous explanation by him or the compilers.

The case of transactions between the slave and his holder has already been considered in connexion with the *bona fide serviens*[2]. The same principles apply here. So far as they are *ex causis* they can only affect the *peculium*. This is expressed in several texts which mention letting of his *operae* to the slave, stipulation by the slave *ex re*, promise to the fructuary *ex re*, and hiring a thing from fructuary[3]. In such things fructuary is treated as *dominus*[4], and a general rule is laid down that a contract, which if made with a third person is acquired to fructuary, is legally null if made with him[5]. One case looks exceptional. If the slave stipulates for the usufruct in himself, he acquires this to the *dominus*[6]. The Gloss regards this as made with the fructuary, and Salkowski[7] explains the rule on the ground that as what is stipulated is a right which can be created only by *cessio in iure*, it would be null if the stipulation had been *sibi dari*, so that to make it valid it must be construed as if it had been *nominatim domino*. This artificial view is open to objections. It contradicts the general rule just cited[8], which says that all such things are void *nisi nominatim domino*. To say that because it would be invalid in any other form it is to be construed as if it were *nominatim domino* is to reduce these words to an absurdity, and they are stated in the adjoining paragraph[9]. If the view is sound the same rule must apply to a stipulation for a usufruct in any subject-matter of the usufruct. Indeed the restriction to usufruct is misleading, for the same rule must apply to any stipulation for a right, since it must be bad if the slave stipulated *sibi*[10]. But in fact there is no reason to treat the stipulation in our text as made with the fructuary: on the contrary, the case is paralleled with another in which it is clear that the stipulation was with a third person[11]. It is thus covered by the rule that what cannot be acquired by the fructuary goes to the *dominus*, even within the *causae*[12].

If the slave's contract with the fructuary be *iussu domini*, or *nominatim domino*, or if it be *extra causas*, it is acquired to the *dominus*, and he has an action on it against the fructuary, while, if it is bilateral, the latter has an *actio de peculio* against him[13]. If the slave deals with *dominus*, the agreement is null if *extra causas*, even though in the name or at

[1] 45. 3. 18. 3.
[2] *Ante*, p. 350.
[3] 7. 1. 25. 5; 45. 1. 118. *pr.*
[4] 45. 1. 118. *pr.*
[5] 7. 1. 25. 5.
[6] *h. l.* 4.
[7] *op. cit.* 223.
[8] 7. 1. 25. 5.
[9] *h. l.* 4.
[10] *Ante*, p. 156.
[11] 7. 1. 25. 4.
[12] *Ante*, p. 362.
[13] 45. 1. 118. *pr.*; 7. 1. 25. 4.

command of the fructuary. If it be within the *causae* the fructuary acquires on a promise to the slave, and the owner has an *actio de peculio* against him on bilateral transactions. These propositions do not need further authority, but one text raises a difficulty. Ulpian says[1] that the fructuary has sometimes an *actio de peculio* against *dominus*, as, e.g., if the slave has a *peculium* with *dominus*, and none, or less than he owes the fructuary, with the latter. The same is true, he says, conversely, though between common owners *pro socio* or *communi dividundo* suffices. If the text refers to contracts within the *causae*, it breaks the rule that promises to the fructuary in such matters are null[2]. If it refers to matters not within the *causae*, the limitation that he cannot sue if there is the means of satisfaction within his own *peculium* conflicts with what is implied in the text last cited. Salkowski[3] assumes it to refer to the latter, and justifies it on the ground that he can in fact treat the debt as 'peculiar,' and so make it effective against creditors *de peculio*. This is hardly satisfactory. It is not absolutely certain that he can deduct such a debt, since in such a matter the slave is a *servus alienus*. The rule that there could be no deduction if there were other means of recovery[4], and the present rule that it can be recovered by action if there is no means of deduction are a vicious circle, but the first of these rules is not so well established as to justify us in laying stress on this point.

But even admitting the right to deduct we are little better off. There may be no 'peculiar' creditors, and it is unfair to make him pay himself out of his own money, when the *dominus* has benefited under the transaction. Suppose the slave hires a house from the fructuary, *nominatim domino*, and *dominus* has lived or stored property in it. It is absurd that the fructuary should be compelled to recoup himself at his own expense or at that of creditors. Even if there are creditors the unfairness may be the same, for if the *peculium* is solvent the right of deduction is worthless, and *dominus* gets the house for nothing. Only if the *peculium* is insolvent is anything like justice done, for the disappointed creditors can proceed against the *dominus* under his subsidiary liability[5]. Only if it is penniless, and there are other creditors to the amount of the debt of *dominus*, is full justice done. The texts cited by Salkowski in support are not convincing. A person who has *de peculio* against the owner of a slave buys the slave. He has *de peculio* still against the vendor for a year, but, says Ulpian, he can, *if he prefers*, deduct the amount from the *peculium* if he is sued *de peculio*[6]. Gaius and Paul and Julian say that he must allow for what

[1] 15. 1. 19. 2. [2] 45. 1. 118. *pr.* [3] *op. cit.* 228.
[4] *Ante*, p. 224.
[5] 15. 1. 13; *h. t.* 19. 1. In the first illustration there might be *de in rem verso*, not in the second.
[6] 15. 1. 11. 8.

he has *in peculio* if he sues the vendor[1]. But here there is a voluntary acquisition of the slave after the debt was contracted, which quite differentiates the case. And his right to deduct, which gives an air of similarity to the cases, is due to the fact that the slave is now his slave. In our case he is still *servus alienus* so far as *res extra causas* are concerned. It may be added that the text, in declaring the rule to apply both ways, ignores the fact that while the *dominus* can conceivably acquire on all contracts of the slave, the fructuary cannot on those *extra causas*. This rather suggests that the text is to apply to those within the *causae*, as to which either can theoretically acquire, and that Ulpian is limiting the general rule laid down by Papinian[2], that there can in no case be *actio de peculio* against *dominus* on such a contract.

XXV. *Servus Usuarius. Operae Servi.*

The difference between *ususfructus* and *usus* is expressed in their names, but it is not easy to say exactly what is involved in use as opposed to *fructus*. In the case of land there was a gradual improvement in the rights of usuary, till it was settled that he was even entitled to some of the fruits[3]. The case of the slave shews the same tendency, as we shall see in the matter of acquisitions. Apart from acquisition the rules were much the same as in usufruct, and the texts say little of *usus*.

Usus is indivisible: the only result which the texts draw from this we shall deal with under *operae servi*[4]. The usuary is entitled to *opera* and *ministerium*, he may employ the slave for the purposes of his family, not merely personal to him, and in his business. He may take his whole time, but he may not hand him over to anyone else[5]. He has an *interesse* for *actio furti*[6]. He is never mentioned in connexion with noxal rights and liabilities, so that the rules are no doubt the same as in *ususfructus*. Subject to the fact that his field of acquisition is less, the rules in the *actiones honorariae* are as in usufruct[7]. He can acquire a release by *acceptilatio* in the same way[8].

As to acquisitions there is a marked difference. The usuary is entitled *uti* and not *frui*. Hence he can acquire *ex re* and not *ex operis*, acquisition *ex re* being a form of *uti*[9]. It is possible for the slave to have a *peculium* in relation to usuary, and acquisition in connexion with this is *ex re*[10]. We have seen that employing a slave in business is *uti*, not

[1] 15. 1. 27. 6, 47. 4. [2] 45. 1. 118. *pr.*
[3] See Accarias, Précis, § 281. [4] *Post*, p. 370.
[5] 7. 8. 12. 5, 6, 15. *pr.*; In. 2. 5. 3. [6] 47. 2. 46. 3. [7] 15. 1. 2.
[8] 46. 4. 11. *pr.* No doubt the rules as to his liabilities and rights in case of damage to the slave are the same, *ante*, p. 358.
[9] 7. 8. 14. *pr.*; 45. 3. 23. [10] 7. 8. 16. 2.

frui[1]; hence he can be employed as *institor* and his contracts in that capacity will enure to the usuary[2]. The text adds that usuary can acquire *iussu*; this does not mean that every *traditio* at *iussum* of usuary will be acquired to him, but only that *iussum* is an indication, not necessarily conclusive, that the acquisition is *ex re usuarii*. But hire for services is the slave's typical *fructus*, and therefore the usuary cannot locate his services, or rather cannot definitively acquire what is paid for the hire[3]. But Gaius tells us that he may take money from the slave in lieu of services[4]. This evasion is somewhat doubtfully put and is attributed to Labeo. The resulting situation is not explained. It can hardly mean that he lets the slave work for other people, the proceeds going into the slave's *peculium*, belonging to the usuary. This would be allowing the slave to locate his services. The reward for such services would unquestionably belong to the *dominus*. It may be that he allows the slave, in return for a sum, paid *ex peculio*, to dispose of the produce, *e.g.* of a farm he is allowed to till, the proceeds forming part of the *peculium*. It may mean that the money comes from the *dominus*, *i.e.* from the *peculium* which belongs to him, so that usuary can now get nothing out of his service though he can still acquire *ex re*. His service then belongs to the *peculium* attaching to his *dominus*.

Operae servorum may be called a kind of *usus*[5]. They are indivisible. Thus a legacy of *operae servorum* must be given in full, and money allowed if necessary for the Falcidian deduction, while in usufruct, though the valuation, to arrive at the amount to be deducted, has to be made in the same way, yet, when it is made, the *heres* can retain the proper proportion of the thing itself[6]. The rights of personal enjoyment in this case are as in *usus*[7], but it differs in several ways:

(i) No text refers to it, except as created by legacy, and it is commonly held that it can arise in no other way.

(ii) The beneficiary can let the *operae* or allow the slave to do so[8].

(iii) It is not lost by *capitis deminutio*, or by non-use[9].

(iv) It is not lost by death of the beneficiary, but passes to the heir[10]. Apparently it is commonly for the life of the slave, but it may be only for a fixed time.

(v) It is lost, as usufruct and *usus* are not, if a third person usucapts the man[11].

[1] *Ante*, p. 342.
[2] 7. 8. 20.
[3] In. 2. 5. 3; D. 7. 8. 12. 6, 14. *pr.* See Salkowski, *op. cit.* 118.
[4] 7. 8. 13.
[5] 7. 7. 5.
[6] 35. 2. 1. 9. In estimating its value, cost of maintenance must be deducted and nothing allowed for service of incapables or *pretium affectionis*.
[7] 7. 7. 5.
[8] 7. 7. 3; 33. 2. 2.
[9] 7. 7. 1; 33. 2. 2.
[10] 33. 2. 2.
[11] 7. 1. 17. 2; 33. 2. 2.

(vi) We are told that *in actu consistit*, and so it does not exist at all, until *dies venit*—until it is actually due[1]. The practical meaning of this seems to be that it cannot be lost, *e.g.* by surrender before that time[2]. The idea has one other remarkable result. The legacy of *usus* or usufruct "cedes" only on *aditio*[3]. This postponement is partly due to the intransmissibility of the right, and partly to the fact that earlier "ceding" might increase the risk of loss by *capitis deminutio*. Neither of these affects the present case, and yet, here, *dies cedens* is postponed still further. Ulpian settles a doubt by saying that it cedes only when it is actually claimed[4]. It is clear that Ulpian has in mind a legacy for a certain time, and his rule means that the days do not begin to run till the *operae* are claimed[5]. If the slave is unwell, the person entitled can wait till he is well again, but as Ulpian says, if the man falls ill after the claim is set up, the days count as against the legatee.

It may be noted that a gift of *operae servi* is necessarily a specific gift of the slave or slaves, alone, while one of *usus* might be, and probably usually was, part of a wider gift, *e.g.* of *usus fundi instructi*. As a specific institution it is a late juristic development. For Terentius Clemens and Julian it is another word for *usus*[6]. Papinian, Paul and Ulpian are the only jurists who treat it as having distinct rules, and Paul shews[7] that its rules were doubtful in his time. What was happening was the assignment of a strict legal meaning to an untechnical word of the lay vocabulary.

[1] 7. 7. 1.
[2] *Arg.* 46. 4. 12, 13. 9. It could be let or sold as *res futura*.
[3] 36. 2. 2, 3, 5. 1.
[4] 33. 2. 7.
[5] Cp. 45. 1. 73. *pr.*, *in fin.*
[6] 7. 7. 5.
[7] 35. 2. 1. 9. He cites Aristo as discussing the matter.

CHAPTER XVI.

SPECIAL CASES (*cont.*). S. COMMUNIS. COMBINATIONS OF DIFFERENT INTERESTS.

XXVI. *Servus Communis*[1].

Regarded purely as a chattel, there is little to be said of the *servus communis*. The general principles of common ownership apply, and a few remarks will therefore suffice. He is the property of the owners in undivided shares[2], and possession of him by one of his owners, *omnium nomine*, is possession by all[3]. A legacy of "my slaves" includes those in whom I own a share[4]. They are reckoned, *pro* Falcidia, in the estate of each owner[5]. The rights of ownership are necessarily somewhat cut down in view of the rights of other owners. Thus one of common owners cannot put the slave to torture, save in a matter of common interest[6]. On the same principle, the *actio servi corrupti* is available to one master against another[7]. The text appears corrupt, and there are signs of doubt, which may be due to the fact that the slave is the wrongdoer's own in a sense—a fact which is allowed to bar any action on *servi corruptio*, for *receptio*, *i.e.* of a *fugitivus*, against a co-owner[8]. But even here Ulpian inclines to allow the action if the reception was *celandi animo*, though he quotes Julian as refusing it in any case. It is not easy to see why the relation makes any difference, since the act is presumably a *furtum*, for which Paul and Ulpian are clear that *actio furti* will lie against a co-owner[9]. In all these cases an indemnity can be claimed by *communi dividundo*, or, if they are *socii*, by *pro socio*[10].

[1] For an account of various modern theories as to the conception of common ownership, see Zur Nieden, Miteigentumsverhältniss, 13—26.
[2] 45. 3. 5.
[3] 41. 2. 42. *pr.* *Post*, p. 386. We shall see that these rules are important in relation to acquisition through such slaves.
[4] 32. 74. The legacy is valid only to the extent of the share.
[5] 35. 2. 38. 1.
[6] An application of a wider rule applicable to all common ownership, 10. 2. 27, 28.
[7] 11. 3. 9. *pr.*
[8] 11. 3. 9. *pr.* As to this reception, *ante*, p. 269.
[9] 47. 2. 45; P. 2. 31. 26. Probably the rule is a late development, which Julian would have rejected.
[10] 17. 2. 45; 11. 3. 9. *pr.*; see also 9. 4. 10 and *post*, p. 375.

For *damnum* to the slave by one of the owners the others have the *actio* Aquilia, *pro parte*[1]. For *iniuria* by one of the masters an action lies as if it had been by an outsider, except that no such action lies under the edict as to *verberatio*, because it uses the expression *servum alienum*, and the *verberatio* is done *iure dominii*[2]. For theft or *corruptio* or *damnum* by a third person, the common owners have their action. We are told that this is *pro parte* in the case of *damnum*[3], and from the fact that, in *furtum*, action by one owner did not bar action by the other, we may infer that the rule was the same[4]. In the case of *iniuria* the rule is laid down that, for striking by a third person, each owner has the action[5]. But if the person who did the beating did it by consent of one owner whom he thought sole owner, there is no *actio iniuriarum* to anyone: if he knew there were other owners he is liable to all except the one who consented[6]. There is an at least apparent conflict in the texts as to the distribution of damages. In the Institutes[7] we are told that the damages need not be strictly *pro parte*, but that regard is to be had to the position of the different masters. But Paul holds, citing Pedius[8], that the *iudex* must apportion the damages according to the shares in the slave. It is clear that the Institutes deal only with the case in which there is intention to insult the *dominus*, and the action is therefore *suo nomine*[9]. It cannot be said with equal certainty that the other text is confined to cases in which there was no intent to insult the owner, and the action is therefore *servi nomine*, but this is a plausible distinction[10].

The cases of redemption of a common slave who has been captured and of the Aedilician actions on sale of a common slave have already been considered[11].

For any injuries to the slave each owner can of course sue: the right to compensation is, as we have seen, divided. But noxal surrender must be *in solidum* to any plaintiff: *haec res divisionem non recipit*[12]. It is, however, in the discretion of the *iudex* to order a surrender to the owners jointly[13]. In these cases, if he has been surrendered to one, the matter can be adjusted in the *actio communi dividundo*[14].

For delict by a common slave[15] all his owners are responsible, and, on a principle somewhat like that applied in case of delict by several persons, the liability of each is *in solidum*. It is as if, says Gaius,

[1] 9. 2. 19.
[2] 47. 10. 15. 36.
[3] 9. 2. 19, 27. 2.
[4] 47. 2. 46. 5.
[5] 47. 10. 15. 49.
[6] 47. 10. 17. *pr.*
[7] In. 4. 4. 4.
[8] 47. 10. 16.
[9] *Ante*, p. 80.
[10] The text confines its statement to a case in which an action *servi nomine* would certainly lie.
[11] As to redemption of captives, *ante*, p. 315. As to redhibition, *ante*, p. 68. As to special rules where the vendors were slave dealers, *ante*, p. 39.
[12] 9. 2. 27. 2.
[13] 9. 4. 19. *pr.*
[14] *Ib.*
[15] See Sell, Aus dem Noxalrechte, 194 *sqq.*

quoting Sabinus, he was defending *totum suum hominem*, and he cannot be allowed to defend in part[1]: this is not *defensio* at all[2]. But while joint tort feasors are not released by proceedings against one[3], a different rule applies here: since it is essentially one delict by one man[4]. Satisfaction by one of the owners discharges them all, *e.g.* if with the consent of the others he surrenders the man[5] or if he pays the claim[6]. Action against one releases all the others on *litis contestatio*[7]. If the action proceeds to judgment he can free himself by surrender, and for this purpose he can call on the other owners to hand over their shares to him, for surrender, giving security for return if he does not surrender, the demand being made by *actio communi dividundo*[8]. If, instead of surrendering, he prefers to pay, he can sue his co-owners for their share, by *communi dividundo*, but can only recover their quota of the value of the slave, if on the facts the *condemnatio* was for more than the value, so that it would have been better to surrender[9]. If the other owners enable him to surrender, and he does so, but on the facts it would have been wiser to pay, it seems that the other owners will have a claim in *communi dividundo* against him[10].

Although if the action is once brought surrender of part is ineffective, an owner can always free himself before action brought by surrendering his part[11]. It hardly seems likely that the injured party can be compelled to accept this partial surrender, since it has the effect of making him part owner and thus bars any noxal action against the other owners[12]. It is even doubted whether he has the lesser right of compensation for the damage from his (now) co-owners by *communi dividundo*, since the wrong was before the community began. And though this is allowed, it is a much less valuable right than that of delictal damages[13]. If the one owner, before action brought, abandons his share, he will presumably be free from liability, and the share of the other owners will be increased. It may be added that if one owner refuses to defend any other can do so[14].

We have anticipated the rule, based on the principle that one who is noxally liable for a man cannot have a noxal action for his act[15], that one co-owner cannot have a noxal action against another[16]. The case is not without a remedy: the wrong must be allowed for by the other

[1] 2. 9. 4; 9. 4. 5. *pr.*, 8; 10. 3. 15; 11. 3. 14. 2. [2] 46. 7. 17.
[3] 9. 2. 11. 2. [4] As to this unity, Sell, *op. cit.* 198.
[5] 9. 4. 8. [6] 11. 3. 14. 2. [7] 11. 1. 20. *pr.*
[8] 9. 4. 8; 10. 3. 15. [9] *Ib.*; 10. 3. 8. 3.
[10] The transfer is to enable him to surrender if and when it shall be reasonable: this appears from the fact that security is taken for return if there is no surrender.
[11] 9. 4. 8. [12] See n. 16. [13] 9. 4. 8.
[14] 9. 4. 26. 2, 6. [15] *Ante*, p. 107.
[16] 9. 4. 41; 9. 2. 27. 1; 11. 3. 14. 2; 47. 2. 62. *pr.*; 47. 10. 17. 9. Ulpian suggests, perhaps from Proculus, the reason that otherwise the slave might determine which he would serve (9. 2. 27. 1), but this would bar a noxal action in any case.

owner in the *actio communi dividundo*[1], and the *iudex* has discretion to allow surrender of the part in lieu of damages: the liability passes to a buyer from the co-owner exactly as noxal liability would. If the slave dies the remedy ceases, except as to any profit which has been received from the wrong[2].

The case is different where one of the owners was *sciens*. Such a person is liable in full with no power of surrender[3]. Some complications arise from the fact that while he is so liable, the other owner is none the less noxally liable. If the *sciens* is sued there can be no surrender, but the *ignorans* is freed[4]. If the *ignorans* is sued and surrenders, then notwithstanding the general law as to consumption of actions, the *sciens* can still be sued for any difference between the value of the slave and the *damni persecutio*, which presumably means the damages for the delict, and not the damage done[5]. The rules as to contribution are in the main simple. If the *ignorans*, being noxally liable, has been condemned to pay, he can recover half from the other[6]. It seems also that he has a claim against him for deterioration of the slave whichever of them has been sued, though one would have expected this rather in case of *iussum* than of mere *scientia*[7]. If the *ignorans* has surrendered he has no claim except in respect of deterioration[8]. These claims can be made effective by *iudicium communi dividundo*, if the community still exists, but as that is essential for the action, the right can be enforced in the contrary case, if they are *socii*, by the *actio pro socio*, if not, by an *actio in factum*[9]. If the *sciens* has been condemned *in solidum*, Paul tells us that he can recover the half, not of what he has paid, but of the value of the slave, *i.e.* that part of the ordinary noxal liability which would fall on *ignorans*[10]. But in another text Paul says that on such facts he can recover nothing: *sui enim facti poenam meruit*[11]. This is the unquestioned rule in the case of actual *iussum* in which Paul himself uses very similar language: he can recover nothing, *cum ex suo delicto damnum patiatur*[12]. In case of *iussum* the innocent owner is entitled to complete indemnity, and if sued can claim a complete refund from the *iubens*[13]. Thus Paul applies the rule for *iussum* to mere *scientia*, in conflict with himself. The usual explanation is that in the text in which he denies any claim in a case of *scientia* he really means *iussum*. Sell objects to this that it is purely arbitrary, and himself holds[14], from the use of the word *poena*[15], that when Paul says he can recover nothing, he means nothing but half the value of the slave, the

[1] 9. 4. 41; 47. 2. 62. *pr.* [2] 47. 2. 62. *pr.* [3] *Ante*, pp. 114 *sqq.*
[4] 9. 4. 9. [5] 9. 4. 17. *pr.* [6] 9. 4. 9; 9. 4. 17. *pr.*
[7] 9. 4. 10. [8] The *sciens* must have given him half.
[9] 9. 4. 10. [10] *h. t.* 17. *pr.* So says also Marcellus in a different connexion, 47. 6. 5.
[11] 9. 4. 9. [12] *h. t.* 17. *pr.* [13] 47. 6. 5.
[14] *op. cit.* 204, 5. [15] 9. 4. 9.

rest being *poena*. In respect of arbitrariness this explanation has no right to reproach the other: the text says very clearly that he can recover nothing at all. The older explanation is preferable[1]: the matter is of little importance, the contradiction is sharp, and there can be no doubt as to which view represents the law.

There is a further complication: where several of a man's slaves are concerned in a delict, the Edict[2] limits noxal liability, and provides that the owner, while he can free himself by surrendering all the slaves concerned, cannot be sued noxally for each, but can only be made to pay what could be recovered from a single freeman who had done the act. The limitation is conditional on his innocence. If he was *sciens* he is liable *suo nomine* and noxally for each of the slaves. If he was a co-owner the innocent owner has the benefit of the Edictal limit, though he has not, but may be sued on account of all. He can recover from his co-owner only his share of the edictal liability, or if there were actual *iussum*, presumably nothing at all. If the *ignorans* has been sued he can recover half of what he has paid, and here, as in the case just discussed (though Marcellus speaks hesitatingly), the *sciens* may be sued for the rest of the damages[3].

If, of two *domini*, one *dolo malo* ceases to possess his part of a *servus noxius*, the injured person can choose whether he will sue the other holder by the ordinary noxal action, or bring the special praetorian action against the dolose owner, *in solidum*[4]. The text is clear that it is an *electio*, yet there seems as much reason for allowing an action against the wrongdoer to survive as in the other case[5].

If one of common owners sued *ex noxa* falsely denies possession the liabiiity is *in solidum* against him but not against the other: no doubt here too the detailed rules are the same[6].

If all the *domini* were *scientes*, we learn that each of them is liable *in solidum, quemadmodum si plures deliquissent*, and action against one does not release the others[7]. We are told no more. The natural inference from this language is that the damages are recoverable from each, and that there is no right of regress[8]. The language used is precisely that employed where the liability of one is independent of what is paid by the other[9]. This implies the notion that they are separate delicts, which as our text shews is not exactly the case. Where there was absolute *iussum*, there is no reason to doubt that the law was so, and this has as a corollary the denial of any right of regress, which

[1] Both this and the adjoining 10 shew some confusion between *scientia* and *iussum*.
[2] *Ante*, p. 118. [3] 47. 6. 5. [4] 9. 4. 26. 2.
[5] Probably the text must not be understood to deny this: we may suppose the rules as to contribution to have been as in the last case. The case is not very practical. If all have *dolo malo* ceased to possess there is the same *electio*, 9. 4. 39. *pr.*
[6] 11. 1. 17. [7] 9. 4. 5. *pr.* [8] 9. 2. 11. 2; C. 4. 8. 1.
[9] 9. 2. 11. 2.

would be meaningless. Sell[1] thinks that payment by one discharges all, but that there is no right of regress[2], a refusal which he shews not to be inconsistent with discharge by one payment, by citing the case of *dolus* by two tutors[3]. But this release is a rule special to *dolus*[4] and other cases where the claim is for indemnification merely[5]. The rule is probably the same in case of mere *scientia*, but if it be held that payment by one releases, it is inevitable that there be regress at least to the same extent as against one who was *ignorans*—perhaps to the extent of half the damages[6].

We have seen that noxal actions do not lie for delicts by the slave against one of his masters[7]. Here too the law is somewhat affected by *scientia* on the part of one of the masters. In such a case there is a delictal action against the master personally[8]. This circumstance confirms the view taken above as against that of Sell, since the *scientia* is treated as amounting to a separate delict[9].

Where a common slave acts as *exercitor*, all the owners who consent are liable *in solidum*[10], and one owner may be liable to the other. So if he is *magister navis* for one *dominus*, another may have an action on that account[11]. The same rule applies to *institoria*, and where several owners appoint, as the obligation is *in solidum*, it is immaterial that their shares are unequal: adjustment is arrived at by the *actio communi dividundo* or *pro socio*[12]. In the *actio quod iussu* none are liable but those who command, but they are liable *in solidum*[13]. So also none is ordinarily liable to the *actio de in rem verso* except for what is *versum*[14] to him. It is said however in the next text that there is an exception to this[15]. Marcellus, commenting on the foregoing rule, laid down by Julian, observes that sometimes one co-owner may be liable to this action for what has been *versum* to the other, being able to recoup himself by action against the other[16]: *quid enim dicemus si peculium servo ab altero ademptum fuerit.* And Paul adds, *ergo haec quaestio ita procedit si de peculio agi non potest.* The rule is remarkable: the explanatory comment is obscure. Marcellus seems to mean that the *actio de peculio*

[1] *op. cit.* 207. [2] *Arg.* 9. 4. 17. *pr.* [3] 27. 3. 1. 14; *h. t.* 15.
[4] Girard, Manuel, p. 745. [5] 4. 3. 1. *pr.* See also *ante*, p. 376, n. 5.
[6] So Sell, *loc. cit.* [7] *Ante*, p. 374.
[8] 9. 2. 27. 1. The word used is *voluntas*. But in this connexion knowledge with failure to prohibit is said to be *voluntas*, 47. 6. 1. 1.
[9] If one owner is a *caupo* and uses the slave his absolute liability for theft, *etc.*, by the slave exists as against co-owners as well as *extranei*: it has no relation to ownership. But there is no personal delict and the liability is rather unreal, as he can claim compensation in *communi dividundo*, 4. 9. 6. 1. *Ante*, p. 122. There might of course be no claim in *communi dividundo*, *e.g.*, where the slave was hired *talis qualis*.
[10] 14. 1. 4. 2, 6. 1. [11] *h. t.* 5. *pr.*
[12] 14. 3. 13. 2, 14. [13] 15. 3. 13; 15. 4. 5. 1.
[14] 15. 3. 13. Though as we shall see each owner is liable *de peculio* for the whole fund. *Post*, p. 378.
[15] 15. 3. 14. [16] Presumably *communi dividundo*.

is barred against one and not against the other. Paul seems to say it is barred altogether. The most commonly accepted view is that this is an analogous extension of the rule in the *actio de peculio* to that *de in rem verso*, in the case in which *de peculio* is no longer available against the owner who benefited by the *versio*[1], since this enables the creditor to recover by one action instead of compelling him to bring two[2]. This explanation requires, what is not impossible, that Paul and Marcellus ignore the rule that as between common owners, in view of the fact that all the *peculium* comes into account, an owner can be sued *de peculio* even though there is no *peculium* in respect of him[3].

In the case of the *actio tributoria*, all the *domini* who knew of the trading must bring their debts into *tributio*: what is due to one who did not know is to be deducted *in solidum*[4].

In the *actio de peculio* the matter is complicated by the fact that a slave may have *peculium* with one owner and not with the other[5], and the *peculium* may be either a joint fund or in distinct funds[6]. The general rule is that the *actio de peculio* may be brought against any one of the owners on the basis of the whole of the *peculium*[7]. As the owner sued is liable over the whole fund, he is entitled to deduct debts due to other *domini*[8], and the liabilities may be finally adjusted by *communi dividundo*[9]. The enlarged liability depends on the existence of this right[10]. But an owner in respect of whom there is no *peculium*, though he can be sued *de peculio*[11], cannot be made to bear any part of the burden in the ultimate distribution[12]. The action for contribution can be brought immediately on condemnation *de peculio*: it is not necessary to have actually paid[13]. We are not told expressly the basis of adjustment, but several texts[14] shew that it was not determined by the fate of the acquisition, but that the liability was borne in proportion to the shares in the *peculium*, the reason assigned being that the payment has released the non-payer from an obligation[15]. If the *peculium* does not suffice to pay all, the action can be brought again[16], and as in the case of

[1] Von Tuhr, De in rem verso, 240 *sqq*. He cites other explanations.
[2] *i.e. de peculio* against one owner followed by *de in rem verso* against the other.
[3] 15. 1. 12. This text is Julian's, and shews that the present rule as thus explained, cannot be due, as Von Tuhr supposes, to him. It is possible that some part of the hypothesis of Marcellus has dropped out. See Von Tuhr, *loc. cit.*
[4] 14. 4. 3. *pr.*, 5. 10.
[5] 15. 1. 7. 1; 45. 3. 1. 2; and for several cases, 15. 1. 16.
[6] 15. 1. 15.
[7] 10. 3. 8. 4, 9, 15, 25; 14. 4. 3. *pr.*; 15. 1. 11. 9, 27. 8, 51.
[8] 14. 4. 3. *pr.*; 15. 1. 11. 9, 15.
[9] 10. 3. 8. 4, 15; 15. 1. 27. 8.
[10] 15. 1. 51. A and B have common property including a slave. A sells his share of the slave to C. A creditor sues C *de peculio*. C is not liable to the extent of A's *peculium*, as he has no means of redressing the balance. If the creditor sues B within the *annus utilis*, B is liable to the extent of A's *peculium*, since A is liable *de peculio* and, as they have common property, the matter can be adjusted. If the year is up, A's *peculium* is not reckoned in any case, *h. t.* 37. 2.
[11] 15. 1. 12.
[12] 15. 1. 27. 8.
[13] 10. 3. 15.
[14] 10. 3. 8. 4, 25; 15. 1. 27. 8.
[15] It must be remembered that acquisitions were common: there might however be a further adjustment, *post*, p. 386.
[16] *Post*, App. II.

vendor and buyer, no doubt the creditor having sued one owner is not in practice barred from suing another. As the comprehensive liability is due to the right of regress against the others, the *peculium* in their hands is not valued at its full amount, but deduction is made for cost and delay involved in recovering it, and as in similar cases, cession of the action against the other owner will discharge[1].

If the co-owner dies without representatives there is in strictness no longer any *peculium* of his, and accordingly, Julian tells us that in that case, the owner sued should be condemned only in the amount of actual *peculium*, and what can be recovered out of the *bona* of the deceased[2].

The right to claim contribution being completed by the condemnation to the "peculiar" creditor, it is not affected by subsequent loss or destruction of the *peculium* in the hands of the other owner, since, the *peculium* being a common fund, it is not fair that the loss should fall wholly on him who has to pay in the *actio de peculio*[3].

The liability may be complicated by the existence of a right to the *actio tributoria*. If the owner who knew of the trading is sued thus, all that is due to the other owner may be deducted, and if that other is sued *de peculio*, what is due to either is deducted[4].

The common liability extending over the whole, with the right of contribution, rests on the fact that it is a common fund, all the destinies of which ought to be common[5]: if therefore the *peculia* are not held as common but are kept distinct by the respective owners, then no owner can be sued for more than his own share, he can deduct only debts due to himself, and there is no occasion for contribution[6].

It remains to be said that if the creditor is himself a co-owner there is no *actio de peculio*: the rights are adjusted by means of *iudicium communi dividundo*[7].

The law as to acquisition through common slaves is rather complex[8]: the general rule is that acquisitions are common, *pro parte*, whether *inter vivos* or on death[9], and even where they are *ex re unius ex dominis*, though here they have to be accounted for[10]. So if I promise two things to a common slave, each owner is entitled to half of each, unless they are "fungibles[11]." This community of acquisitions could be avoided by the

[1] 15. 1. 51. *Ante*, p. 220.
[2] 15. 1. 28.
[3] 10. 3. 9.
[4] 14. 4. 3. *pr.*
[5] 10. 3. 9.
[6] 15. 1. 15.
[7] *h. t.* 19. 2, 20.
[8] Elaborately worked out by Salkowski, *op. cit.* Ch. I. Most of the following remarks are based on this book.
[9] G. 3. 59, 167; In. 3. 28. 3; D. 16. 3. 1. 31; 30. 50. *pr.*; 41. 1. 45; 45. 3. 5, 27. In 12. 1. 13. 2 the money must be common.
[10] In *communi dividundo*, 10. 3. 24; 41. 1. 45.
[11] 46. 3. 29. A common slave could stipulate for what none of the owners could, *e.g.* a right of way to a common farm, 8. 3. 19. See Zur Nieden, Miteigentumsverhaltniss, 33.

use of apt words. Thus if the acquisition was *nominatim* for one or more that one or more acquired the whole[1]. So if the acquisition was at the *iussum* of one, though the matter is disputed, the rule is laid down that he alone acquires: *iussum* is equivalent to *nominatio* for this purpose[2]. Further there are cases, in which one acquires alone apart from *iussum* or *nominatio*, mainly dependent on the principle that what cannot from any cause be acquired to one goes to the others *pro rata*[3]. But the application of all these principles is full of difficulties.

The effect of *nominatio* must be carefully analysed. It is a well recognised rule that if a slave makes a stipulation, *nominatim*, in favour of one who is not his master, the effect is merely null: the stipulation is void. The *nominatio* excludes his master, who is not named, but it does not avail to give a right to the *extraneus*. In other words its effect is simply negative or exclusive. The intent of the slave is not a material point. It cannot make an owner acquire what he would not, apart from this intent. The same principle governs the case of a common slave. The *nominatio* of one master necessarily excludes the others. The fact that the named one acquires the whole is due to the principle that what cannot be acquired to one goes to the other[4]. Each of his owners is his owner and can thus acquire all his acquisitions[5]. If he stipulates *nominatim* for the owner to whom the thing belongs already the stipulation is a mere nullity[6]. In one text we are told by Papinian[7], that if a common slave of A and B stipulates from a third party for the part of him which belongs to A, *nominatim* for B, this is valid and B acquires, and that if no name is mentioned all goes to B in the same way[8]. The text adds that if he stipulates for the same part *sibi dari*, this is void, presumably as being an absurdity[9]. Elsewhere Ulpian says[10] that he cannot stipulate for himself *sibi dari*, though he can *domino dari*. This is not quite the same case, for he stipulates for the whole of himself. It can be valid only for that part which the owner has not already. If it were, or could be read, *dominis dari*, each would presumably acquire against the outsider an obligation for the part which belonged to the other. This is perhaps what Ulpian means by the closing words: *non enim se domino adquirit, sed de se obligationem.*

The rule as to the effect of *nominatio* applies to all kinds of transaction, to stipulation[11], mancipation[12], *traditio*[13], *emptio, mutuum*[14], and

[1] Taking in proportion to their share in him. G. 3. 167; In. 3. 28. 3; D. 41. 1. 37; 45. 3. 5, 7. *pr.*, 28. 3.
[2] 45. 3. 5, 6.
[3] 41. 1. 23. 3.
[4] 7. 1. 25. 4; 41. 1. 23. 3.
[5] Thus he can acquire correal obligations for both, 45. 3. 28. 2, 29.
[6] 7. 1. 25. 4.
[7] 45. 3. 18. 1.
[8] *Post*, p. 389.
[9] Salkowski, *op. cit.* 86.
[10] 45. 3. 2.
[11] G. 3. 167; In. 3. 28. 3; D. 41. 1. 37. 3.
[12] G. 3. 167.
[13] 41. 1. 37. 3. This may have been written of *mancipatio*.
[14] 45. 3. 28. 3.

even *acceptilatio*[1], which, as being a release from debt, is a form of acquisition[2]. Gaius applies it to *quodlibet negotium*[3].

If a slave takes a promise to himself and one owner, *nominatim*, ordinary principles apply—the named *dominus* takes half, and all the *domini*, including the one named, take the other half *pro parte dominica*[4]. If he stipulates in the name of some or all of his *domini*, the principle above laid down would lead to the view that the *nominatio* will have no effect except to exclude those not named: the *nominatio* confers no right on any *dominus* which he had not apart from it. Thus the named masters ought to take *pro parte*, and if all are named the *nominatio* will have no legal effect. So Ulpian decides[5]. But Pomponius holds that if two *domini* are named, they take equally, though if it had been *dominis meis* they would take *pro parte*. If the words were to A and B, *dominis meis*, the order is material, the earlier being the material party, the later mere *demonstratio*[6]. As Salkowski shews[7], the origin of Pomponius' view is in the rules of interpretation applied to wills imposing burdens on the *heres*. If they are mentioned by name, and especially if some only are named, it is presumed that the testator intended them in their personal capacity, and the liability is equal. If they are called *heredes*, the liability is *pro parte*[8]. Salkowski holds the analogy applicable, but it seems out of place. In the case of a will we have to do with the intent of the testator, with words used by one who could make what disposition he liked, and whose intent governs the whole matter. In our case we have to do with a slave whose intent is not material, and whose *nominatio* has only a privative effect, a point which Salkowski seems here to overlook[9].

If the stipulation be to A or B (*domini*) it is void, as neither can be regarded as *solutionis causa adiectus*, for both can acquire on the stipulation, which is thus void for uncertainty[10]. If the same stipulation is made with a condition, "whichever be alive" on a day fixed in the stipulation for payment, Venuleius and Julian hold it still void. It is not saved by the condition, though on the day one be dead, so that there is no uncertainty[11]. Julian seems to hold that, as a stipulation *ex praesenti vires accipit*, there must be no uncertainty in the original

[1] 46. 4. 8. 1.
[2] 46. 3. 63.
[3] 45. 3. 28. 3. Salkowski thinks, on the evidence of the language of the texts, that the rule applied originally only to cases in which the restriction appeared in the formula of the transaction and so not to informal transactions. *Mutuum* he thinks an early extension. *Op. cit.* 75.
[4] 45. 3. 4.
[5] 45. 3. 7. *pr.*
[6] 45. 3. 37.
[7] *loc. cit.*
[8] The rule being one of pure construction there were differences of opinion. See 30. 54. 3; *h. t.* 124; 45. 2. 17, cited by Salkowski.
[9] He urges a further argument *ab inconvenienti*.
[10] 45. 3. 9. 1, 10, 11 unless some other circumstance shews that one is only *solutionis causa adiectus*, 46. 1. 16. *pr.* Cassius and Julian are cited in support: there is no sign of dispute.
[11] 45. 3. 21.

formulation. Salkowski observes[1] that Julian's argument proves too much: it would, he says, invalidate any conditional stipulation. But this is hardly the case: the argument deals only with stipulations in which it is uncertain which acquires, not with those as to which it is uncertain whether there will be any acquisition at all. But the decision is not dependent on the rather ill-expressed argument. The stipulation is defective in that it leaves it quite uncertain what is to happen if they both survive. There seems little authority for the effect of conditions in saving stipulations which as drawn are subject to an ambiguity or doubt which may be cured by time[2]. Julian elsewhere discusses a somewhat similar case. The common slave stipulates for 10 to T, on a certain date, with a further clause: "if you do not then give it, do you promise to give M (the other owner) 20?" These, he says, are two stipulations, but if T sue after the day is past, he can be met by an *exceptio doli*[3]. In the foregoing case there cannot be two stipulations even with the help of the principle that a stipulation by a common slave is as many stipulations as he has masters[4].

Another case may be noted. A common slave stipulates, *sibi aut P aut S, dominis.* Ulpian holds that the word *sibi* acquires to all the masters and that the stipulation so far as it names P and S is void, on which account they are validly put in as *solutionis causa adiecti*[5]. This seems quite in accordance with principle. The word *sibi* confers the right on all *domini*: the names which follow could not in any case confer rights on anyone, and the word *sibi* prevents their privative effect. It is this word *sibi* which distinguishes this case from that of a stipulation: *Titio aut Seio, dominis*[6].

The principles are well illustrated in another text of Julian's. A common slave stipulates to one *dominus*, A, by name. Then from a *fideiussor* he stipulates for the same payment "to A or B, *domini.*" This is valid, B is only *solutionis causa adiectus*[7]; the point is that as a *fideiussor* cannot be liable to one to whom his principal is not, there can be no question of B's being entitled.

To complete the statement as to *nominatio*, it must be said that the origin of the acquisition is immaterial: if a stipulation is *nominatim Titio ex re Maevii*, Titius alone acquires[8], and where on these rules one acquires or is excluded unfairly, the matter is adjusted by *communi dividundo* or *pro socio*[9].

[1] *op. cit.* 83.
[2] As to those which were impossible, see Accarias, Précis, § 508.
[3] 45. 3. 1. 6. [4] *h. t.* 1. 4.
[5] 45. 3. 11. It may also be Julian's view.
[6] Salkowski, *op. cit.* 84, objects to Ulpian's reasoning, but hardly takes enough account of this point and of the fact that *nominatio* is privative merely: it simply bars those owners who are not named.
[7] 46. 1. 16. *pr.* [8] 41. 1. 23. 3. [9] 45. 3. 28. 1.

As we have seen, *iussum* by one master is put by later law on the same footing as *nominatio*[1]. The rule in *nominatio* is a direct result of the fact that *nominatio* of a third party in any transaction prevented acquisition to the owner. This was not the case with *iussum* by a third party, and thus it is not surprising that the recognition of the effect of *iussum* was later. For the time of Justinian, the texts are explicit and general: *iussum pro nomine accipimus*[2]. But they are few and some are interpolated. Gaius tells us that the Sabinian school put *iussum* on a level with *nominatio*, while the Proculians treated it as having no effect at all[3]. The Institutes speak of the question as only finally settled by a constitution of Justinian[4]. On the other hand, texts of Ulpian which have no sign of interpolation treat the matter as quite settled[5], and the only rule laid down in Justinian's constitution is that if a stipulation is made on the *iussum* of one master, *nominatim* to another, the former will acquire[6]. The law speaks of this matter as having been much debated, but, apart from concurrence of the two, treats the recognition of *iussum* as settled. The only text in the Digest referring to the matter, and earlier than Ulpian, is one by Pomponius, the curious language of which suggests, first, that not all Sabinians, but only some named Sabinians, allowed force to *iussum*, and, secondly, that they were not sure of it: they say: *posse ei soli adquiri*[7]. The text has certainly been handled by the compilers. It is tempting to treat this text of Pomponius as shewing adoption by some Sabinians of the view that *iussum* was effective, that of Gaius as shewing the adoption of this view by all Sabinians, and those of Ulpian as shewing acceptance by all jurists. But such exactitude the texts are not strong enough to permit.

If *iussum* concurs with *nominatio, i.e.* a master orders a contract[8], and the slave contracts in the name of another, all we know of ante-justinianian law is that there were disputes. Justinian settles the matter, but his enactment contradicts itself, and commentators from the Glossators on have disagreed as to which line he takes. The most generally accepted view, *i.e.* that if the direction was to contract in the name of the *iussor* this prevails, but if it were a mere direction to contract, the *nominatio* does, is a mere plausible guess. It has no logical basis, but it may have approved itself to Tribonian[9].

It must be supposed that *iussum* could not be by ratification: the common acquisition once completed could not be varied by one master.

[1] *Iussum* here means direction to the slave: it has no close connexion with such *iussum* as bases an *actio quod iussu.*
[2] In. 3. 28. 3; D. 7. 1. 25. 6; 45. 3. 5—7. *pr.*
[3] G. 3. 167a. [4] In. 3. 28. 3.
[5] 7. 1. 25. 6; 45. 3. 5, 7. *pr.* See Salkowski, *op. cit.* 93, 98. [6] C. 4. 27. 3.
[7] 45. 3. 6. See for discussion of this text, Salkowski, *op. cit.* 91 *sq.*
[8] Either in his name or without this instruction.
[9] See Salkowski, *op. cit.* 96, 98, for this and his own different hypothesis.

We can now return to the general principle. There are several special cases to consider[1].

(i) Treasure trove. Here the rule is that if a common slave finds treasure in a third person's land, the finder's half is divided amongst his owners, *pro portione*[2]. This is clear, but the following text says that if it is found on land of one owner, both the owner's half and the finder's half go to the owner of the land[3]. Principle seems to require that he should take only his share of the finder's half. Salkowski holds that the rule stated is to be confined to the case in which the treasure is found during work ordered by the owner, which would put it on a level with acquisition *iussu unius domini*, with which the text expressly compares it[4].

(ii) *Hereditas.* If a common slave is instituted his masters are entitled *pro portione*[5]. In strictness as there is only one institution there should be only one entry. But the slave can enter either at once for all or separately for each owner who authorises entry. We are told by Paul that the right of entering separately is not based on any theory of testator's intention but is in the interest of the masters, *utilitatis causa*, lest delay by one injure the others[6]. The effect of entry at the command of one is to acquire to that one only to the extent of his share, with ultimate accrual if the other *domini* do not order entry within the period allotted[7]. Each owner has a separate *tempus deliberandi*, which of course may not be the same in all cases[8]. If the slave has entered under the orders of one master and is afterwards freed, he can himself enter on his own account for the other half[9]. This must be true only if the time allowed to the other master for deliberation has not expired: whether he had a new time or only the residue of the old is not told us.

All this looks very like treating them as distinct institutions. But this is negatived partly by the rule that he could enter once for all, but more obviously by the fact that, if the slave has once entered, the death of another master without ordering entry will not make a *caducum*. But there are traces of the view that they are distinct *institutiones*, in a certain conflict as to substitution. If one is instituted for several parts, he cannot take one and refuse the other, whether anyone is substituted to the other part or not[10]. In like manner Paul, the author of this text, says, elsewhere, that if the common slave has a substitute, entry at the order of one master bars the substitute, *i.e.* it is one institution[11]. But Scaevola says that the substitute will take the share of any owner who

[1] In the following remarks Salkowski's exposition is in the main followed.
[2] 41. 1. 63. 1. [3] *h. l.* 2.
[4] *op. cit.* 3 *sqq.* He thinks the limiting words are purposely omitted as they occur in the next case.
[5] In. 2. 14. 3. [6] 29. 2. 68. [7] *h. t.* 67. [8] 28. 8. 1. *pr.*
[9] 29. 2. 64. [10] 29. 2. 80. *pr.* [11] *h. t.* 65.

does not authorise entry[1]. This must rest on the view that they are distinct institutions, and not in any way joint, *i.e.* the substitutions must be regarded as distinct substitutions in each case[2].

(iii) Legacies, *etc.*[3] The general rule is simple: a legacy to a common slave goes to his owners *pro portione*[4]. But when we get beyond this there are disputes due to differences of opinion analogous to those mentioned in connexion with institutions, *i.e.*, as to whether it is to be regarded as one legacy or several, whether the individuality of the slave is to be considered or those only of his *domini*. Thus if a legacy is left to a common slave under a condition of paying money, some jurists think the condition cannot be satisfied *per partes*, but only by paying all. The rule of the Digest given by Paul is that each owner can satisfy *pro parte* and so acquire[5]. This is the rule in cases where a legacy is left to two persons on such a condition—*enumeratione personarum videri esse divisa*[6], but not, says Javolenus, where it is left to one, even though circumstances divide it so that two stand in the place of the original legatee[7]. It is clear that the legacy to a common slave is for this purpose regarded as two. So Julian says, if a thing is left to a common slave, one can accept and the other refuse, *nam in hanc causam servus communis quasi duo servi sunt*[8]. On the other hand, a senatusconsult under the *lex* Cornelia *de falsis*, penalising the writing of legacies, *etc.*, to oneself, applies to legacies to a common slave: the name being a *falsum* must be struck out, and the whole gift is void[9]. A word cannot be *pro parte pro non scripto*[10]. Upon the question of accrual, the dispute is clearly brought out. In a *legatum per vindicationem* to two persons *coniunctim* or *disiunctim* if one refuses the other takes all, each being entitled *in solidum—partes concursu fiunt.* How if the legacy was to a common slave? Here on the Proculian view reported by Celsus, there is no accrual, *non enim coniunctim sed partes legatas,—nam si ambo vindicarent*, each will have the part he had in the slave[11]. That is to say that each is not entitled *in solidum*, and limited to a share only by concurrence[12]. This construction of the gift does not seem inevitable, but it is accepted even by those who come to an opposite decision on the actual question, and hold that there is accrual. Julian holds, as reported by Ulpian[13], that if one of the common owners refuses, the other gets it all, notwithstanding that they take *pro parte dominica*, and not

[1] 28. 6. 48. *pr.*
[2] Salkowski, *op. cit.* 15. But the last clause may be a hasty interpolation.
[3] Salkowski, *op. cit.* 19 *sqq.* [4] 30. 50 *pr.* [5] 35. 1. 44. 8.
[6] 35. 1. 54. 1, 56. [7] *h. t.* 56. [8] 30. 81. 1.
[9] 48. 10. 14. *pr.* *Post*, p. 390.
[10] This is in fact the decisive point, which deprives the text of much force in this connexion.
[11] 31. 20. The reasoning is defective: this would be equally true in a *legatum coniunctim*.
[12] Cp. 32. 80; D. 35. 1. 54. 1; 7. 2. 1. *pr.*, 3; Vat. F. 75, 76, 79.
[13] Vat. Fr. 75. 2; D. 7. 2. 1. 1.

equally. This, says Julian, is because the *persona* of the slave is looked at. That is not very lucid. But the next text in the Vatican Fragments, laying down the rule that if it be left to a *servus communis* and Titius, and one master refuses, his share lapses to the other, remarks that this had been disputed, but the author, Ulpian, approves Julian's view, not on the ground of *ius accrescendi*, but because *quamdiu servus est cuius persona in legato spectatur, non debet perire portio*[1]. It is curious to find Julian, who holds that a *servus communis* in case of legacy *quasi duo servi sunt*[2], cited as authority for this view which seems to contradict him.

(iv) Possession[3]. There is little to be said here. Possession by one of common owners is possession by all. This must be *nomine omnium*[4], and applies to retaining, not to taking, possession. There is no reason to suppose that apart from *peculium* one of common owners who had not given *iussum* possessed a thing held by a common slave till he knew the slave had it[5]. In general we acquire possession through a common slave, *sicut in dominio adquirendo*[6], which does not mean that when we acquire the one we acquire the other, but only that the rules as to the effect of *iussum* and *nominatio*, and as to acquisition *pro rata* in ordinary cases apply here too.

(v) Acquisition *ex re unius*. It is a general rule that the source of the money with which any acquisition was made is immaterial: the acquisition is common *pro rata*. A thing acquired by a common slave with stolen money is common[7]. So, obviously, if the thing with which it is acquired is the property of one owner: still the acquisition is to all, subject to adjustment by *iudicium communi dividundo*. This is laid down in general terms in many texts[8]. It is immaterial whether it is *ex peculio unius* or with his independent property, not held by the slave[9]. Where an owner hands over property to a common slave on the terms that it is to remain his, and the slave buys land with it, the land is common[10]. Adjustment by *communi dividundo* is of course a remedy for any injustice[11]: the rule is clear. A striking instance apart from *peculium* is that of *damnum infectum*. Where a common slave stipulates *damni infecti*, it is as if all the owners had stipulated, *pro partibus*. There is no hint that the menaced property was itself

[1] Vat. Fr. 75. 3—5; cp. 7. 2. 1. 2 and 31. 40 which Salkowski regards as possibly illustrating the same view.
[2] 30. 81. 1. He limits it: *in hanc causam*. The text refers only to usufruct, but the reasoning and the rule that the gift is only *pro parte* are not so limited.
[3] Salkowski, *op. cit.* 33—44.
[4] 41. 2. 42. *pr.*
[5] 41. 2. 1. 7.
[6] *Ib.* See also *post*, p. 387.
[7] 41. 1. 37. 2. But the text is not without difficulty. It raises the question what kind of payment suffices to cause the ownership to pass on delivery on a sale.
[8] 10. 3. 24. *pr.*; 41. 1. 37. 2, 45; 45. 3. 28. 1.
[9] 45. 3. 27.
[10] 41. 3. 37. 2.
[11] There must be difficulties as to this adjustment, where the slave has *peculia* of all his owners and is actively dealing with all of them. See Salkowski, *op. cit.* 70—73.

common[1]. One text raises an apparent difficulty. Julian says that if a common slave lends money out of the *peculium* of one owner, he alone acquires the action *ex mutuo*[2]. But as no person can acquire *ex mutuo* unless he was the owner of the money lent, this is a mere application of the principle that what cannot be acquired to one goes to the other[3].

(vi) Bilateral contracts. To say that each acquires the rights *pro portione* and is liable *in solidum, de peculio*, subject to adjustment by *communi dividundo*, does not sufficiently explain the situation. There is at least one case in which such a subdivision of the resulting rights is not possible. If a common slave buys, one of the owners cannot by paying his quota acquire an *actio ex empto* for delivery of his part[4], nor can he, on paying all, claim delivery of all: he has a right under the contract only to a part. If the thing bought has been delivered, there can be no redhibition unless all consent[5]. Other similar cases may arise, *e.g.*, under a sale in which the buyer has a right of withdrawal within a certain time[6], and under the other well known *pacta adiecta*. The texts do not discuss these cases. Can one owner claim relief for *laesio enormis*? If a common slave lets a house, can one owner forfeit for non-payment of rent, *pro parte*, or absolutely, if the others do not wish to do so? Probably, in all these cases, all must consent, but there is no authoritative answer to the questions.

(vii) Intent of the Slave[7]. We have already considered the question whether the intent of a slave can vary the effect of a transaction. One text, dealing with a slave of one owner, and saying that the master acquires possession through the slave only if the slave intends to acquire it to him, we have rejected as a statement of the classical law[8]. The same point arises in certain texts dealing with common slaves. In one text we are told by Paul that we can acquire by a common slave possession for ourself alone, *si hoc agat servus ut uni adquirat, sicut in dominio adquirendo*[9]. Here too it seems likely that the words *si... adquirat* are a hasty and wrong explanation by the compilers, the cases in the mind of the jurist having been *nominatio* and *iussum*. But there is one pair of texts in sharp contradiction with each other which need careful examination. Ulpian says[10] that if one intending to benefit me delivers a thing to a common slave of me and Titius, and the slave takes it either for Titius or for both, then, notwithstanding the intention of the slave, I alone acquire, just as, if a thing were delivered to my procurator, with the intent that I should acquire, and he took it for

[1] 39. 2. 42.
[2] 45. 3. 1. 2..
[3] 12. 1. 2. 4, Salkowski, *op. cit.* 68—70.
[4] 21. 1. 31. 8.
[5] *h. l.* 7. If a common slave is sold there is redhibition *pro parte*: the effect would not here be to force part ownership on one who was not common owner before, *h. l.* 10.
[6] 41. 4. 2. 5.
[7] Salkowski, *op. cit.* 45—64.
[8] *Ante*, p. 133.
[9] 41. 2. 1. 7.
[10] 39. 5. 13.

himself, he would acquire for me not for himself. On the other hand, Julian[1], dealing with a hypothesis which differs only in that the common owner has certainly given previous authorisation to the intending donor to deliver the thing to the common slave, says that if the slave takes it intending it to be for Titius, nobody acquires, and if the slave intended it to be common the transfer would be void as to half. And he says that in like case, if a procurator took it for himself there would be no transfer of ownership. It is clear on these texts that the deliverer names his intended beneficiary. But this has no relation to acquisition *nominatim*, for it is perfectly clear on the texts that in that case the *nominatio* proceeds from the slave. All the texts assume this and one expresses it very strongly[2].

Our two texts have been discussed and explained from time immemorial. None of the explanations has been accepted as solving the problem[3]. Only a few remarks will be made here, and those with little confidence. There are two questions: (1) Why was the acquisition, apart from the intent of the slave, not common? (2) Why was the slave's intent material? The intervention of a slave in a transaction may occur in three ways. He may be employed merely as a messenger to take the thing to his owner. In this case the delivery is not complete till the master has it: there can be no question of the personality of the slave[4]. He may be the party to the whole transaction or to the conveyance which completes it. In that case acquisition is through him, and in the circumstances of these texts the acquisition would on the face of it be common. For there is no *iussum* or *nominatio* and it is clear, from the earlier law as to *donatio* to a *bona fide serviens*, that the express intention of the donor to benefit the holder does not prevent acquisition to the owner[5]. But the slave's intervention may take a third form. If I direct my vendor to throw the thing in the sea, or in any way to dispose of it, and he does so, that is a valid *traditio* to me. The same is true if he delivers it to some other person for me, and it is immaterial who that person is: the acquisition is to me, if, for instance, the thing is delivered to a slave I have hired, who is to work on it. The slave is a mere receiver: there is no real question of acquisition through him[6]. This seems to be the present hypothesis and the acquisition is direct to the master who directed delivery to the slave. This makes Julian's text orthodox, as to the first point[7].

[1] 41. 1. 37. 6.
[2] 45. 3. 28. 3. So also it is not *iussu*, for the slave does not receive any *iussum*.
[3] See Salkowski, *op. cit.* 56 *sqq.* for explanation and references to literature.
[4] Salkowski, *loc. cit.* [5] *Ante*, p. 344.
[6] See, *e.g.*, 15. 4. 5. *pr.*; C. 4. 26. 4.
[7] Ulpian says nothing of authority to deliver to the slave, but as S. shews (*op. cit.* 57) the structure of his argument requires it.

Is the slave's intent material? No, says Ulpian, but, according to Julian, the transfer is effective only in so far as the slave takes with the intent of receiving for the intended donee. It may be that Julian is guided by precisely the consideration that the slave is not the agent who acquires, but a mere receiver who cannot be such in so far as he refuses to act as such[1].

Both texts treat of *donatio*, and Salkowski holds[2] that the rule applies only to that case. If the above account is correct, it must apply equally to any case in which the transaction is essentially the master's altogether. But if a sale had been chosen, it would have been necessary to distinguish according to the circumstances of the previous contract. In *donatio* this is not the case. The declaration of intent to give is not itself a transaction and has no legal force. Whether it be made to the slave or direct to the master it is at once the master's transaction when it is communicated to him and he directs delivery to the slave.

There are cases in which, independently of *nominatio* or *iussum*, one of the common owners acquires to the exclusion of the other. They all turn on the general rule, adopted on practical grounds of convenience, that what cannot be acquired to one of the common owners goes to the other[3]. The rule is consistent with the principle that each owner, being owner, is potentially capable of acquiring *in solidum*. The cases discussed in the texts are the following.

(*a*) If a common slave stipulates for a servitude, it will be acquired only to such of his owners as have tenements to which it can attach. Those who have such tenements will acquire, each *in solidum*[4]. If he mentions the land to which it is to belong, then it attaches to the owner of that land, wholly and alone[5].

(*b*) Where one owner is about to marry and *dos* is promised to the common slave. Here the rule can apply only if the words used, or the circumstances, shew what marriage was in view[6].

(*c*) A thing promised to a common slave by a third party belongs already to one master. Whether the stipulation was *sine nomine*, or to all by name, the whole will go to those of his masters to whom it did not belong[7].

(*d*) A slave of A stipulates with C for a performance to a common slave of A and B. Here so far as the common slave belongs to B, he is *servus alienus*. But, says Julian, the rule applies that what one owner

[1] This may be the explanation of Paul's anomalous view in 41. 2. 1. 19, *ante*, p. 133.
[2] *op. cit.* 61.
[3] Salkowski shews (*op. cit.* 99) that the rule is one of great antiquity (26. 8. 12). It is stated many times (In. 3. 17. 3; D. 41. 1. 23. 3; 45. 3. 7. 1, 19, *etc.*). The following remarks are mainly from Salkowski.
[4] 45. 3. 17. [5] 45. 3. 7. 1. [6] 45. 3. 8.
[7] Though it be a part of himself, 45. 3. 18. 1.

cannot acquire the other does. To bring this rule into operation we have, he says, to treat the stipulation as two distinct stipulations, one valid, the other void, each for the full amount[1]. This is straightforward, but it has the difficulty that the transaction is not by the common slave at all. The acquisition is made by the slave of A. It is a bold rule of construction to avoid the inconveniences which would have resulted if the claim had been limited to one half[2]. It is in fact the Sabinian view of the effect of a stipulation "to me and a third person." The survival of this view into the Digest seems to be due to the fact that the words are here construed as two stipulations, and not as one, in which case A would acquire, in the Proculian and later view, only one half. The Sabinians treat such a stipulation as one, with a name uselessly added[3].

(*e*) Where a legal rule bars acquisition to one owner, the other takes all. Thus if a *pupillus* alienates to a common slave one of whose owners is his tutor, the conveyance to the tutor cannot take effect, as he cannot authorise a transaction for his own benefit[4]. Here too we have Julian to deal with, and it is probable that he regarded it as two transactions, otherwise, as Salkowski says[5], the authorisation being *pro parte* null, the gift ought to have been valid only *pro parte*. This seems the only case mentioned[6].

Many difficult questions arise where the transaction brings one or more of the common owners into play on both sides; *e.g.* on purchase by a common slave from one of his owners. The general principle is that such a transaction is void, so far as concerns the proportion of the slave which is vested in the other party. If he stipulates *nominatim* or *iussu* for one master, from another, the transaction is good, but if he stipulates simply, the contract is void as to that part of him which the promisor owns, since a man cannot stipulate with himself or his own slave. The rest goes to the others[7]. It is not a case for the rule that what cannot be acquired to one goes to the other: the transaction is *pro parte* wholly void. In one case the slave appears on both sides. Having stipulated for his master A from his master B, he takes an *acceptilatio* for B from A. This is quite valid[8]. If a common owner

[1] 45. 3. 1. 4.
[2] Salkowski discusses (*op. cit.* 106 *sqq.*) the inconveniences which would result from the other view, since we must assume that the form was not adopted for no reason, but because the other slave was concerned. He takes a somewhat different view of the meaning of Julian's reasoning.
[3] G. 3. 103. [4] 26. 8. 12. [5] *op. cit.* 112.
[6] S. (*op. cit.* 114) discusses the case of a man who writes a legacy to a man of whom he is part owner: the name being a *falsum* the whole thing is void, 48. 10. 14. 1. The text has traces of an earlier view that it may have been valid for the other owner. Julian appears obscurely. If he held it valid at all he must, it seems, have held it wholly valid as two distinct gifts one of which had failed. S. discusses other possible cases.
[7] 45. 3. 7. 1. He may stipulate for himself *nominatim* to one of his masters though not to himself, 45. 3. 2, 18. 1. See Salkowski, *op. cit.* 85.
[8] 46. 4. 8. 2. No authority on other contracts.

pledges his part of the slave to the other this is valid, and will have to be reckoned with in *communi dividundo*[1]. No doubt the slave can do it himself.

There are few texts dealing with conveyance *inter vivos*. Where an owner gives money to a common slave, if his intent is merely to add to his *peculium*, held on his account, there is no change of ownership. But if he gives it as he would have given it to a *servus alienus*, the others take that share of the gift which they have in the slave[2]: his own proportion remains with the donor. Another text, obscure and corrupt, seems to lay down the same rule[3]. It will be observed that the rule brings about the same result as if the conveyance had been wholly valid: the owner of the slave has his right share of the thing conveyed, but by retention, not on conveyance. There is another case in the same range of ideas, but turning on a different principle. A common slave gives from his common *peculium* to the wife of one of his owners: the gift is void in proportion to the husband's share in the slave[4].

In relation to *hereditas* there are some complications, but as most of these arise where the gift is accompanied by a manumission, they will be considered later[5]. If the slave is instituted without liberty, this is *ut alienus*[6], and he will take, on general principle, at the command of, and for the benefit of, his other master. If he is sole heir he takes all, and his other masters divide in proportion to their share in him[7]. If he is one of several *heredes*, we are not told exactly what share he will take. Salkowski[8] thinks that as he is *sine libertate institutus*, the gift being void as to that part of him which belonged to the testator, the other heirs can claim nothing, as his owners, through him, for they acquire him only on entry, and can claim nothing in the inheritance through him, as he is a *servus hereditarius*[9]. Thus his other owner will acquire through him the whole part of the *hereditas* which was left to the slave. It might be said, simply, that the gift ought to be void as to the share which belonged to the deceased, so that this part would go by accrual. But this is not to give sufficient force to Ulpian's energetic language[10]: the institution is to be regarded as if he were a *servus alienus*. Paul uses the same expression—*ut alienus*—in laying down the rule that if I institute my co-owner and a common slave, *sine libertate*, this is valid[11]. The rule seems to be that it is construed as *institutio* of a *servus alienus* for all purposes[12].

[1] 10. 3. 6. 9. [2] 41. 1. 37. 1. [3] *h. t.* 17.
[4] 24. 1. 38. *pr.* [5] *Post*, Ch. xxv. [6] Ulp. 22. 7, 10.
[7] In. 2. 14. 3. [8] *op. cit.* 16.
[9] 29. 2. 43. See however, *ante*, p. 259.
[10] Ulp. 22. 7, 10. [11] 28. 5. 90.
[12] And thus there is no reason to appeal to the obscure rule as to *servi hereditarii*. A *hereditas* is left to me. I direct a *servus communis* of me and the *hereditas* to enter. I acquire the *hereditas*, but here he is doing only a ministerial act, 41. 2. 1. 18.

In legacy the rule is clear that where a legacy is left by one of his owners to a common slave, the other owners take the whole gift, not merely the proportion corresponding to their shares, dividing it in proportion to their shares in him[1]. The reason for this is differently given by different jurists. Julian says it is because the other owner is the only one who can acquire at the time of *dies cedens*[2]. But this does not explain why it is not void *pro parte* as a gift *inter vivos* would be. In another text the same point arises, and Cassius is cited and approved, by Paul, as saying much the same thing, *i.e.* that it is to be treated as a case where all goes to one owner because the other cannot acquire[3]. This, as Salkowski says[4], is simply giving the rule as a reason for itself. Why is it construed not as gifts *inter vivos* from one master are, but as gifts from third parties are, where from some cause one owner cannot acquire? We know that the reason for this last distinction is, that in the case of gifts from an outsider there is no fundamental invalidity in the gift, but only in the receiver, so that the whole thing may conceivably be good, while, where the donor is one owner, the part of the transaction which is with himself is necessarily void, so that the gift fails *pro parte*[5]. Why is not this rule applied here? The answer may be that we have here an instance, not isolated, of the extension to legacies of a rule laid down for institutions. The common slave is *ut alienus* for this purpose[6], and is regarded as belonging to the other owners. This is expressed in a well-known text by Sabinus, Julian, Pomponius and Ulpian: it is acquired not *propter communionem sed ob suam partem*[7]. There is not the same theoretical difficulty that would have arisen in institutions, on the other construction, but here as elsewhere the same rule of construction is applied to all parts of the same document. The same thing is done in relation to the effect of impossible conditions[8]. The result is reasonable: it is unlikely that a testator who left money to a slave held in common with X meant his heir to share it[9].

Co-heirs of an owner are co-owners of a special kind, but the most important and special rules arise where they do not succeed to the slave himself.

In regard to the Aedilician actions, as in the case of co-vendors, there can be redhibition to the heirs of a vendor *pro parte*, singly[10], and,

[1] 33. 5. 11; P. 3. 6. 4. [2] 33. 5. 11. [3] 35. 2. 49. *pr.*
[4] *op. cit.* 29. [5] *Ante*, pp. 390, 391. [6] Ulp. 22. 10.
[7] 17. 2. 63. 9. Salkowski's explanation is rather abstract: he regards it as material that it is not acquired till entry (*op. cit.* 28—31). It may be noted that Paul tells us that if a co-owner makes his *socius* sole *heres* and gives a legacy to a common slave this is void: he is a slave of the *heres*, 28. 5. 90.
[8] In. 2. 14. 10; D. 28. 7. 14; cp. G. 3. 98 as to the dispute between the schools.
[9] So in *fideicommissa*, 35. 2. 49. *pr.*
[10] 21. 1. 31. 10.

conversely, if there are several heirs to a vendee, they cannot redhibit unless all consent[1], lest, as Pomponius says, the vendor be put in the awkward position of having the thing returned *pro parte*, while another heir claims damages. On the other hand if the slave be dead or redhibited, they may sue singly for any damage done to them[2]. As they must sue together in the *actio redhibitoria*, Pomponius thinks it best for them to appoint a common *procurator ad agendum*[3]. If one co-heir or a person for whom he is responsible has made the slave worse, *culpa* or *dolo*, since this bars redhibition unless satisfaction is made[4], the others can claim for the damages in the *iudicium familiae erciscundae*[5].

There can be no noxal action between them, and thus if a slave of the *hereditas* steals from an heir he has no *actio furti*, his remedy being *iudicium familiae erciscundae* for simple damages, or surrender[6]. Each heir is liable noxally, and if he has defended, and rightly paid, he can recover *pro parte* in the same way[7].

In relation to contractual liability, the point of interest is that if the slave is freed or dead or legated, *sine peculio*, they are not common owners, but they succeed, together, to the liabilities of the owner. As the slave is not common, and they may have nothing in common, they may have no *iudicium communi dividundo*, and as the *iudicium familiae erciscundae* can be brought only once, this may not be available for distribution of loss[8]. Moreover on general principle, debts are divided *pro rata* among the heirs. Thus, while common owners may be liable *in solidum*, *ex institoria*, the heirs not holding the slave are liable only *pro parte*[9]. So in the *actio de peculio*, where the liability is only *annua* owing to the death or freeing of the slave, the heirs may be sued all together or singly, but in this case each is liable only so far as his share of the *peculium* goes, and cannot deduct what is due to other heirs[10]. If the slave himself is one of the heirs[11], he is liable to be sued as such, *de peculio*, but he cannot be liable personally as a son would be[12]. *Coheredes* can sue each other *de peculio* (though common owners cannot), but, apart from ownership of the slave, only like other creditors, *pro parte*[13]. This applies only to debts due to them personally: even if the slave is left to one of the heirs, there is no *actio de peculio* for debts to the estate: these might have been deducted in handing over the *peculium*[14]. So in the *actio de in rem verso* a *heres* is liable only *pro parte* for what was *versum* to the deceased, though he is of course absolutely liable as to what he himself has received[15].

[1] *h. l.* 5, 7. [2] *h. l.* 6. [3] *h. l.* 5, 9. [4] *Ante*, p. 61.
[5] 21. 1. 31. 9. [6] 10. 2. 16. 6. [7] *h. t.* 25. 15.
[8] *h. t.* 20. 4; 14. 3. 14. [9] 14. 3. 14. [10] 15. 1. 14, 27. 3, 30. 1. [11] 15. 1. 30. 2.
[12] P. 2. 13. 9; C. 4. 14. 1, 2; D. 15. 1. 30. 2, 3; 16. 3. 1. 18. [13] 15. 1. 29.
[14] 15. 1. 54, 58. See as to the difficulties, *ante*, pp. 230 *sqq.*, and *post*, App. II.
[15] 15. 1. 30. 1.

XXVII. Combinations of the foregoing interests.

The texts deal mainly with questions of acquisition, and they are fully discussed by Salkowski[1]: a few remarks will suffice.

(I) Joint usufructuaries and *bonae fidei possessores.* In the range of contractual liabilities complicated questions might arise, but they would be matters of account rather than of law, *e.g.* in the *actio tributoria,* where, the slave having a common *peculium,* one alone of the holders or fructuaries knew of the trading. But there is no authority on this or on noxal rights or liabilities. As to acquisition it is to be remembered that neither *nominatio* nor *iussum* can make a fructuary or a *bonae fidei possessor* acquire beyond the two *causae*[2]. So, one cannot acquire *ex re* of the other holder, or *ex operis* beyond his share. If then he stipulates *ex operis* simply, they acquire *pro rata.* If he does it *nominatim* for one, that one acquires *pro parte*: the rest is void, for the *nominatio* excludes both the owner and the other holder[3]. There is no logical reason why *iussum* should have had the same effect, but the rule of later law may have been so—*iussum pro nomine accipimus*[4]. As to acquisition *ex re,* there is some difficulty. What the slave acquires *ex re utriusque* they take *pro parte,* unless he expressly names one, or it is *iussu unius,* in which case all goes to that one, subject to adjustment by *iudicium communi dividundo* (*utilis*)[5]. This at first sight seems as if one was acquiring *ex re alterius.* But it is impossible to say to what part of the affair the particular acquisition referred: the whole *res* concerns him[6]. But apart from *iussum* or *nominatio,* what exactly is meant by *pro parte*? In proportion to their interest in the slave, or, as Salkowski thinks[7], in the business? This would be convenient, but it rests on an assumption which would be fatal to the rule just laid down as to the effect of *nominatio,* for it requires, since *nominatio* is privative only, that the named person shall acquire only to the extent of his interest in the concern. More probably his interest in the slave is the decisive point, subject to adjustment. No doubt they were often the same. There is another question. If it is *ex re unius,* and there is no *iussum* or *nominatio,* the other can acquire nothing. But does all go to the other fructuary, or does he acquire only to the extent of his interest in the usufruct, the rest going to the *dominus*? In later law it is clear that all goes to the fructuary[8]. An earlier view limits it in the way suggested. Scaevola is cited as holding both views[9]. The doctrine which

[1] *op. cit.* 237 *sqq.*
[2] *Ante,* pp. 349, 363.
[3] 45. 3. 24.
[4] *Ante,* p. 349.
[5] 45. 3. 32, 33. 1. Salkowski, *loc. cit.* takes a different view of the effect of this text.
[6] *Ante,* p. 343.
[7] *op. cit.* 244, 5.
[8] 7. 1. 25. 6; 45. 3. 19.
[9] *Ibid.*; 41. 1. 23. 3.

prevailed is rested on the view that the *dominus* cannot be concerned, as it is *ex re fructuarii,* and that what one fructuary cannot acquire must go to the other. The argument is rather ill put, but the result is convenient and may be supported in another way. An acquisition *ex re* is not like one *ex operis, i.e.* it is not from a *causa* to which the other party is in part entitled, and thus there is no reason for applying the same rule[1], and making it in any way dependent on the division of the usufruct. The other view fails to take account of this distinction[2]. There was never any doubt that if it was *iussu* or *nominatim* to the one whose *res* it was, he acquired the whole[3].

(II) A person not entitled holds the man in good faith, as usufructuary. The guiding principle is that he cannot acquire more than if he were a real fructuary, nor than any *bonae fidei possessor* can acquire[4]. As their acquisitions are the same, there is nothing to be said.

(III) A person not entitled is in possession in good faith as a common owner. The rule is the same[5], but here it is a real limit. Though the acquisition is wholly *ex re eius,* he can by the rule acquire only *pro parte,* as that is the rule between common owners. No doubt adjustment is made by *communi dividundo* (*utilis*).

(IV) There is an existing usufruct, but there is an adverse *bonae fidei possessor*[6]. It would seem from what has been said[7] that the fructuary can acquire only *ex re,* at any rate we are not told that acquisition *ex operis* will avail to keep the usufruct on foot. The *bonae fidei possessor* will acquire *ex re* and *ex operis.* The fructuary can hardly acquire possession *ex re,* for the slave is in the adverse possession of someone else[8]. If the slave stipulates, *ex operis, nominatim* for the fructuary, this will exclude the possessor. But it does not seem that it ought to entitle the fructuary, for that he should acquire the whole of it as the result of *nominatio* implies that he would have acquired some of it, apart from *nominatio.* Salkowski, however[9], takes an opposite view on this last point, on the ground that the fructuary could have acquired *ex operis* but for the concurrence of the *bona fidei possessor,* which is excluded by the *nominatio.* This gives *nominatio* more than a privative effect.

(V) One of common owners has a usufruct or *bona fide* possession. The matter is discussed in only one text[10] in which Paul says, sub-

[1] *i.e.*, that in 45. 3. 24.
[2] Salkowski rests the same view on another basis. He gives a necessarily somewhat hypothetical account of the causes and histories of the two views, *op. cit.* 247—252.
[3] 7. 1. 25. 6; 41. 1. 23. 3. See also Kuntze, Servus Fructuarius, 55 *sqq.* Each of joint fructuaries or possessors may be sued *de peculio,* being liable only to the extent of the *peculium* in his hands. Suing one releases the others, subject to a right of *restitutio actionis,* 15. 1. 32. *pr.* *Post,* App. II.
[4] 41. 1. 54. 3 a.
[5] *Ibid.*
[6] Salkowski, *op. cit.* 243.
[7] *Ante,* p. 360.
[8] Arg. 41. 2. 1. 6.
[9] *op. cit.* 244.
[10] 45. 3. 20. 1; cp. 7. 9. 10. Fully discussed by Salkowski, *op. cit.* 237 *sqq.*

stantially, that if a slave who belongs to two, and is in the *bona fide* possession of one of them, stipulates at the order of the possessor, *in re utriusque*, they both acquire. This cannot be right: a common owner, *jubens ex re utriusque*, acquires *in solidum*[1]: he cannot have acquired less because he was also a *bonae fidei possessor*[2]. Paul ignores either the common ownership or the *iussum*. The common owner must have acquired *in solidum*, subject to adjustment[3]. With *nominatio* the result would be the same, as also in the unlikely case of *iussum* or *nominatio* of the non-possessing owner. Apart from *nominatio* or *iussum*, if it is *ex operis*, or *ex re possessoris* he alone acquires. Otherwise it is divided. The fact that the *res* is also common does not affect the matter, at this stage, though it is material in the ultimate settlement[4].

[1] *Ante*, p. 383.
[2] The matter of the stipulation is doubtful on the text: the obscurity does not affect the present point.
[3] *Familiae erciscundae* or *hereditatis petitio*. See Salkowski, *loc. cit.*
[4] Salkowski enters on conjectural calculations which seem to imply (1) that a part fructuary acquired *ex re sua* only in the proportion to which he was fructuary, which was not the rule of later law, and (2) that the shares in the *res communis* would affect the matter, for which there is no evidence, *ante*, p. 394.

PART II.

ENSLAVEMENT AND RELEASE FROM SLAVERY.

CHAPTER XVII.

ENSLAVEMENT.

JUSTINIAN[1] classifies the Modes of Enslavement as being either *Iure Gentium* or *Iure Civili*, the former being those conceived of as common to all States, the latter as peculiar to Rome. According to the Institutes, birth is not strictly under either of these heads: the classification is applied only to those ways in which a living person becomes a slave. In the Digest it covers birth as well[2]. Gaius speaks of the rule as to birth as being *iure gentium*[3]: the distinction is clearly classical. It should be noted that it is only as to their general principle that any of these rules can be said to be *iuris gentium*. In relation both to birth and to capture, the Roman law had many special rules. The distinction is of no great practical importance, but it is authoritative and convenient.

MODES OF ENSLAVEMENT, *IURE GENTIUM*.

These are two in number:

(1) Capture in war. This has already been discussed[4]. It was found convenient in considering the legal position of a *captivus* to treat, in anticipation, all the law of the topic.

(2) Birth. This is, in historic times, by far the most important of the causes of slavery. The general principle is simple. The child born

[1] In. 1. 3. 4.
[2] 1. 5. 5. 1. Marcian.
[3] G. 1. 82 *sqq*.
[4] *Ante*, pp. 291 *sqq*.

of a female slave is a slave, whatever be the *status* of the father, and conversely, if the mother is free the child is free, whatever the *status* of the father. This, says Gaius, is the rule of the *ius gentium*[1]—the general rule that where there is no *conubium* the child takes the *status* of the mother, *i.e.* her *status* at the time of the birth[2]. It may be added that the slave issue belongs to the owner of the mother at the time of birth, not at the time of conception[3].

This, however, is only the general rule. Cases may present themselves in which a freewoman has a slave child, and conversely, in which a slave woman gives birth to an *ingenuus*. In relation to them there arise questions of some difficulty.

Cases in which the child of a freewoman is a slave. There appear to be only three.

(*a*) By the *Sc.* Claudianum (A.D. 53) it was provided that if a freewoman cohabited with a slave to the knowledge of his *dominus* the child might, by agreement between her and the *dominus*, be a slave. This rule, which was abolished by Hadrian, will be discussed later in connexion with other provisions of this enactment and of legislation which arose out of it. It is hardly possible to isolate this provision for the purpose of discussion[4].

(*b*) Gaius observes that if a freewoman cohabited with a slave, whom she knew to be one, the issue was a slave. This rule, operative in the time of Gaius, but of earlier origin[5], is credited by him to a certain *lex*, the name of which is lost. It is difficult to see why Hadrian abolished the rule last mentioned without destroying this similar *inelegantia*. Accordingly Huschke[6] suggests that a hiatus in the manuscript should be filled by the words *e lege* Latina. His conjecture starts from the idea that the law was not a Roman law, but local, a view which gets some support from Gaius' allusion to those *apud quos talis lex non est*[7]. Huschke adds that any such general rule as this would render meaningless the above provision of the *Sc.* Claudianum. The suggestion Latina, as opposed to any other people, is due to the fact that Vespasian, who, as Gaius says, abolished one provision of this law, is known to have innovated largely in the law of Latinity[8]. There is little trace of the rule in later times, a circumstance which further

[1] G. 1. 32; cp. In. 1. 3. 4; D. 50. 2. 9. *pr.*; C. 7. 14. 9.
[2] Ulp. 5. 9—10; Greg. Wis. 6. 3; C. 3. 32. 7; D. 1. 5. 24. A *statulibera* was to be free on having three children. She had one and then three at a birth. It is a question of fact which of these was born last and so is *ingenuus*, 1. 5. 15, 16.
[3] 13. 7. 18. 2; 41. 1. 66; C. 3. 32. 12. [4] *Post*, p. 412.
[5] G. 1. 85, 86. Older than Vespasian.
[6] The hiatus is very small and the words are clearly an insertion, as H. says. Most editors insert something. Böcking, "*e lege Aelia Sentia.*"
[7] G. 1. 86. [8] Reff., Huschke, *loc. cit.*

supports the view that it was not a general law. What may be traces of it are found in two or three texts. Thus it is said by Papinian that an enquiry into the *status* of a child may prejudice that of his deceased father[1]. So in A.D. 215 a woman who has married a slave thinking him free is informed that her child is *ingenuus*[2]. There must have been some reason for the enquiry, and both these texts are after Hadrian's repeal of the rule in the case last discussed. But, as we shall see shortly, there survived other rules under the *Sc.* which would account for the remarks[3].

(*c*) In A.D. 468 Anthemius[4] enacted that any woman marrying her own *libertus* was liable to deportation, the issue to be slaves, and to belong to the Fisc.

Cases in which the child of an *ancilla* is free. There are several.

(*a*) Among the many rules introduced, we are told, *favore libertatis*[5], was one that if the mother were free at any moment between conception and birth, the child is free[6]. The rule seems to have begun in an isolated humane decision of Hadrian[7], adopted in practice as a general rule. So far as the rule is concerned that the child is free if the mother is free at the time of the birth, there is no *favor libertatis*: it is common law[8]. It may not indeed be necessary to appeal to *favor libertatis* in any case. There is a rule of much wider application that a child in the womb is to be regarded as already born so far as this makes to his own advantage, but not for the advantage of other people or to his own detriment[9]. But the present may well be its earliest application, as it is assuredly its most important, so that this wider rule may be only a further generalisation. It is repeatedly laid down in relation to the case we are discussing. *Media tempora libertati prodesse, non nocere possunt*[10]. *Non debet calamitas matris nocere ei qui in ventre est*[11]. It must be noted that Gaius[12] cites a current opinion which would in part except from this rule the case of a *civis* Romana who was enslaved *ex Sc.* Claudiano. A child of which she was already pregnant was on this view a slave if *volgo conceptus*, free if *ex iustis nuptiis*.

(*b*) The principle was carried still further in the interest of the child. If the mother was a *statulibera* and the child is born after

[1] 40. 15. 2. *pr.* This was a puzzle to the Glossators, Haenel, Diss. Domm. 185.
[2] C. 5. 18. 3. [3] *Post*, pp. 412 *sqq*.
[4] Nov. Anthem., 1. No trace of this rule in Justinian's law.
[5] P. 2. 24. 2. [6] In. 1. 4. *pr.*; C. 9. 47. 4.
[7] 1. 5. 18; Girard, Manuel, p. 99. [8] G. 1. 39.
[9] 1. 5. 7, 26; 38. 17. 2. 3; 50. 16. 231. [10] P. 2. 24. 3.
[11] 1. 5. 5. 2, 3. Specially illustrated in the case of *captiva* and *serva poenae*, 1. 5. 18; 38. 17. 2. 3; 48. 23. 4. A *condemnata* is kept till her child is born: he is then *ingenuus*, C. 9. 47. 4. She may not even be tortured, 48. 19. 3; P. 1. 12. 5.
[12] G. 1. 91. The epitomator of Gaius states it as law, G. Ep. 1. 4. 9. See *post*, p. 414. For another exception in the case of *libertae ingratae*, *post*, p. 427.

the condition is satisfied, it is free even if the mother never actually became free, owing to captivity[1] or *condemnatio*[2] The supervening slavery which bars the mother's liberty is not allowed to prejudice the child In the first case the liberty will take effect by *postliminium*, even though the child was not conceived till the captivity had begun[3] It is unlikely that this is also the case where the mother has been condemned there is in that case no principle of *postliminium* to help it out There never was a time during gestation in which there was a *spes libertatis*

(*c*) Gaius[4] tells us that, by the doubtful *lex* Latina already mentioned, male issue of a freeman and an *ancilla* whom he thought free was *ingenuus* Vespasian repealed this rule, though he left the other

(*d*) By a *Sc* Silanianum[5] the inheritance of a man who is supposed to have been killed by someone of his household may not be entered on, or his will opened, till an enquiry has been held[6]. If, during the delay thus caused, an *ancilla*, freed by the will, has a child, Justinian decides, settling certain doubts, that if the will ultimately takes effect the child so born is an *ingenuus*[7]

(*e*) If the mother is a slave at the time of the birth, but already entitled to her freedom under a *fideicommissum* the child is an *ingenuus* if the delay is due to the fault of the *fiduciarius*[8], the mother having demanded the manumission[9], but not if it is an unavoidable or purely accidental delay[10] If, in case of fault, the mother has not demanded it, the child is a slave, but the mother is entitled to have it handed over to her for manumission[11], and the same rule applies where the liberty is not strictly due, because the heir had delayed entry so that the child shall be born his slave Here too she is entitled to have the child handed over for manumission[12] These cases will arise again for discussion[13]

(*f*) If there is a direct gift of liberty by will to a woman, and the heir delays entry, a child born to her during the delay will be declared free on application to the Praetor, on the same principles as in the case of *fideicommissum*[14]

(*g*) If there is a direction that freedom is to be given to an unborn person, Justinian decides settling doubts that the child shall be free, whether the mother is still a slave or not[15]

1 40 7 6 1 2 *h l pr* 3 *h l* 2
4 G 1 85 5 *Ante* p 94 6 P 3 5, D 29 5
7 C 6 35 11 He did not here deal with the case of an *ancilla* entitled to immediate freedom under a *fideicommissum*
8 1 5 22, 38 16 1 1 38 17 2 3, 40 5 53 C 7 4 3 P 2 24 4
9 40 5 26 1, C 7 4 4 10 The texts cited base the rule on *mora*
11 40 5 26 1 12 40 5 53
13 *Post*, Ch XXVII 14 Perhaps due to Marcellus, 40 5 53 1
15 C 7 4 14, *post*, Ch XXIV

(*h*) If a manumission is of a sort that is valid only on cause shewn before the *consilium* and a child is born while the enquiry is in progress, the child is *ingenuus* if the manumission is ultimately allowed[1]

(*i*) Another possible case is suggested by a constitution of Justinian. He enacts that an *ancilla* whom her owner has treated as a concubine till his death is free, and her children are *ingenui* The enactment is obscure it may be that the gift is retrospective, in which case the *ingenuitas* of the children is not exceptional[2]

We pass now to the *iure civili* causes of enslavement Several of these belong to early law, and do not really concern us Such are

(*a*) *Furtum manifestum* By the XII Tables, while a slave who was caught in manifest theft was scourged and thrown over the Tarpeian Rock, a freeman was scourged and *addictus* to him from whom he had stolen[3] Gaius, speaking of the *addictio*, says that the *Veteres* were not agreed as to the exact effect of this, whether he became at once a slave, or was in the position of an *adiudicatus*[4], who would not become a slave till after some delay, and then was sold *trans Tiberim* It is idle to attempt to settle what was controverted among the early lawyers themselves, but it is not easy to see what the delay could mean here Aulus Gellius, quoting Sextus Caecilius, speaks of it as *in servitutem traditio*, and seems to imply that the man remained as the slave of the injured person[5] In any case the punishment was *capitalis*, and reduced him ultimately to slavery But the whole rule fell into disuse when the Praetor introduced the fourfold penalty[6]

(*b*) Evasion of the census Persons who were *incensi* were liable to be sold by the public authority[7]. The object of this was to punish avoidance of taxation It became unimportant when the State ceased to tax *cives*, about 166 B C, and passed into oblivion with the census itself[8].

(*c*) Evasion of military service. Gaius, whose text is imperfect, and Ulpian, do not mention this It might be by evasion of the census, or by desertion, or by self-mutilation[9] Offenders were sold, presumably *trans Tiberim*[10]

1 40 2 19 A minor under 20 could free *matrimonii causa* He must marry the woman within six months If she is pregnant when freed, and a child is born before the marriage its status will depend on the event, marriage or not *Post* Ch XXIII
2 C 6 4 4 3 Apparently part of a comprehensive enactment, mainly declaratory
3 Aul Gell 11 18 8 4 G 3 189
5 Aul Gell 20 1 7 It is possible that a practice of redemption on payment of fourfold may have existed 6 G 3 189, In 4 1 5
7 G 160 Ulp 11 11 See Cicero, Pro Caec 34 99 and Dion Hal 4 15
8 Cuq Instit Jurid (Ed 1) 1 542 Gaius says *pridem desuetudine abolitum est* See Livy 1 44 Cicero holds (Pro Caec 34 99) that the state is not depriving him of his liberty (no *lex* can do this) but that by not putting his name on the roll he has abdicated his rights As to this see Mommsen, Strafrecht, 945 9 See references in Willems, Droit P R 117
10 The Digest shews it to have been long obsolete there is no trace of it in the Empire 49 16 4 10

(*d*) A judgment debtor might ultimately find himself sold into slavery[1]. The position of the *iudicatus* in early law is in some points obscure, and as, so far as these provisions are concerned, the system was very early obsolete and belongs to quite another branch of the law it is unnecessary to discuss it[2].

There were other causes of enslavement which continued to exist in law (though some were obsolete in practice), till Justinian's time, and were abolished by him.

(*a*) By the *lex* Aelia Sentia certain degraded slaves were ranked, on manumission, not as *cives*, but with the *dediticii*. Among their disabilities was the rule that they might not inhabit (*morari, habere domicilium*) within 100 miles of Rome. If they did so, they and their goods were to be sold by the public authority, on the condition that they were to be kept beyond that limit, and never freed: if they were manumitted they were to become *servi populi* Romani[3]. We are not told how they were to be dealt with if brought by their purchaser within the forbidden area. In the later law *dediticii* altogether disappear, and Justinian, remarking that no trace of the class is left and that it has become *vanum nomen*, definitely abolishes it[4].

(*b*) *Liberi expositi*[5]. Children exposed did not become slaves in classical law[6]. But there was a time, during the later Empire, in which a harsher rule prevailed[7]. Constantine enacted that one who charitably reared a boy (or girl) who had been exposed in early infancy by the father (or owner), or to his knowledge, might bring him up either as his child or as a slave, and the real father (or owner) should have no right in him[8]. We are here concerned only with those who were actually free-born. This rule is perhaps that referred to allusively in an enactment of 366, which speaks of persons who become slaves *bello*, praemio, *coniunctione*[9]. It is a reward to the charitable fosterer. In 374 the practice of exposing children was forbidden in very general terms. But though the statute speaks of an existing punishment, apparently severe, the rule must have been disregarded[10]. Justinian provided that no one who reared a child so exposed should have any right to claim him as a

[1] Aul. Gell. 20. 1. 47.
[2] Other cases mentioned by Cicero (de oratore, 1. 40; Pro Caec. 34. 98) do not concern us. Mere arbitrary condemnations by Emperors in specific cases are omitted. Mommsen, Strafrecht, 858. The rule that seems to have developed in Asia of enslaving those who conceal *fugitivi* is not Roman. Syro-Roman Law Book, Bruns-Sachau, 215.
[3] G. 1. 27, 160. [4] C. 7. 5.
[5] See as to the sale of children so found, Mitteis, Reichsrecht und Volksrecht, 361.
[6] See the two cases in Suetonius, de Grammaticis, 7, 21, especially the later. When freed (and before), they were *ingenui*. See also, Pliny, Litt. Trai. 65, 66. Blair says (*op. cit.* 44) that in earlier law they were enslaved, but the authorities amount to little.
[7] Roby, Rom. Priv. Law, 1. 46; Wallon, *op. cit.* 2. 19 and 3. Ch. 10.
[8] C. Th. 5. 9. 1, 2. Cp. C. 8. 51. 1. It seems from C. 5. 4. 16 that under Diocletian they were free.
[9] C. Th. 4. 12. 6. [10] C. 8. 51. 2. *Animadversio.*

slave or *adscriptitius*, but that such a child should retain his status as an *ingenuus*[1].

(*c*) *Coloni fugitivi.* These were an administrative difficulty: there is much legislation as to the penalties they incur. A constitution of Constantine says, of such fugitives, that *in servilem conditionem ferro ligari conveniet...ut officio quae liberis congruunt merito servilis condemnationis compellantur implere*[2]. This is not very clear: the *interpretatio* treats it as meaning actual slavery. It is not found in Justinian's legislation.

(*d*) The case of sale of *sanguinolenti* who were issue of a forbidden union with a barbarian, which was obsolete under Justinian, must be mentioned here, but will be treated in connexion with the general case of *sanguinolenti*[3].

Two cases of greater importance remain.

(*e*) *Servi poenae.* The general rule may be shortly stated thus: a person convicted of crime and sentenced in one of certain ways suffered *capitis deminutio maxima*, and became a slave. It was essentially capital punishment[4], and the *capitis deminutio* had all its ordinary results. It occurred at once on the final *condemnatio*[5], when there had been no appeal, or when an appeal had been decided against the accused[6], or in some cases when the Emperor had confirmed the rejection of the appeal[7]. The sentence must be one legal in relation to both the person and the crime. Thus the man was not a *servus poenae* if the magistrate had no jurisdiction or if he, being a *decurio*, was sentenced to a punishment not legal in regard to that class[8].

It was not every capital punishment which reduced the criminal to penal slavery. Anything which deprived him of *civitas* was capital[9]: many cases were punishable by *publicatio* and loss of *civitas*, and nothing more. A man so punished was not a *servus poenae*: he lost *quae iuris civilis sunt* but not *quae iuris gentium*[10]. Such a punishment was *deportatio*[11]. *Opus publicum perpetuum*, which meant road making and the like, was on the same level[12]. It was an ordinary way of punishing the lower class of freemen, but it could not legally be applied to *decuriones* on the one hand or to slaves on the other[13]. Such also

[1] C. 8. 51. 3=C. 1. 4. 24. The text says nothing of any claim of the true father: its language strongly suggests that there was no *patria potestas* in anyone.
[2] C. Th. 5. 17. 1. 1. A good MS. reads *non congruent*. Mommsen *ad h. l.* [3] *Post*, p. 420.
[4] 48. 19. 2. *pr.* [5] 28. 3. 6. 7, 8. [6] *Ib.*; 48. 19. 2. 2.
[7] 28. 3. 6. 9. As to time limit and other restrictions on appeal see 49. 1. 1—13; P. 5. 33.
[8] 28. 3. 6. 10. *Post*, p. 405. Accused is not to be condemned in absence: notice must be given by the magistrate in his district. If he does not appear in one year from the publication of this notice his goods are forfeited to the Fisc, and in the meantime living things and other perishables may be sold. But he does not become a *servus poenae*, 48. 17.
[9] 48. 1. 2; 48. 19. 2. *pr.* Mommsen, Strafrecht, 907. [10] 48. 19. 17.
[11] *Ib.*; C. 9. 47. 1; P. 5. 17. 2. [12] C. 9. 47. 1.
[13] 48. 19. 34. *pr.*; C. 9. 47. 3. *Opus publicum* was usually temporary, and thus not capital and not involving loss of *testamenti factio*, 48. 19. 10. *pr.*, 28. 1, 34. *pr.*; P. 3. 4a. 9. In 48. 1.

were *proscriptio*[1] and *aquae et ignis interdictio*[2] It was essential to *servitus poenae* to be lifelong, and thus it did not result from condemnation to *castigatio* or *vincula*[3]. Even condemnation to perpetual chains did not involve it, for though such punishments were not unheard of, they were always unlawful[4] Imprisonment was not a recognised mode of punishment. *carcer ad continendos homines non ad puniendos haberi debet*[5] Its essential purpose was the detention of persons accused of crime[6] And though condemnation to work in the mines was a typical case of penal slavery, condemnation to help the miners (*ad ministerium metallicorum*), or even *ad metallum*, for a term, was not *servitus poenae*, and thus children born to women so condemned were free[7]. The most usual form of penal slavery was that resulting from condemnation *in metallum* or *ad opus metalli*[8], the latter being a little lighter in the matter of chains[9] These were essentially perpetual, and if the sentence were expressed in terms which made the punishment temporary, it was construed as *ministerium metalli*[10], and thus was not slavery There was no system of ticket-of-leave, but Antoninus Pius provided that old and infirm prisoners might be released, after 10 years' service, if they had relatives to look after them[11] Another form of penal slavery mentioned in the Digest is *ludum venatorium* This was a lighter punishment, involving hunting, with arms, wild beasts in the arena, applied to young offenders who had incurred capital liability. It involved some training and skill, and little danger, and on this account some jurists doubted whether it were really penal slavery But it was perpetual, and the Digest is clear[12]

A death sentence also involved penal slavery for the interval between sentence and death[13]. This is not quite so empty a statement as it seems The Roman law had a number of forms of execution, *e.g.* beheading, *ad gladium* (or *ad ferrum*) *traditio*, crucifixion, burning (of late introduction), *etc.*[14] Even in these cases there might be an appreciable interval, for it was not unusual to keep condemned men in order to extract from them, by torture, evidence against other men[15].

9 10 *pr* a slave refused by his master after punishment is sent to *opus publicum in perpetuum*, but this is not exactly punishment

[1] C Th 9 42 24

[2] P 5 17 3 26 3 29 1, G 1 90 *etc* *Aquae et ignis interdictio* though mentioned in the Digest (1 5 18, 48 1 2) and Code (C 5 16 24) is superseded by other punishments in later law 48 19 2 1

[3] 48 19 10 *pr*, 28 4, 33, 34

[4] P 5 4 22, 5 18 1, C 9 47 6 10, D 48 19 8 13, 35

[5] 48 19 8 9

[6] C Th 11 7 3 As to its use in *coercitio*, Mommsen *op cit* 48

[7] 48 19 8 8, 28 6 If no term was stated, temporary condemnation was for ten years

[8] 48 19 8 6, 36 Work *in calcaria vel sulpuraria* was *in metallo*, *h t* 8 11

[9] *h t* 8 6

[10] *h t* 28 6

[11] *h t* 22

[12] *h t* 8 11, 12 For a full account of penalties, Mommsen Strafrecht, 949 *sqq*

[13] 28 3 6 6 48 19 29 As to the use of the word *animadvertere* in connexion with death sentences Mommsen Strafrecht 911

[14] P 5 17 2, Coll 11 6, 7, 8, C Th 9 7 6, D 28 1 8 4, 48 19 28 *pr* Mommsen, *op cit* 911 *sqq*

[15] 48 19 29 Statutory rules fixing minimum delays, Mommsen, *op cit* 912

But the classical law required those condemned *ad gladium* to be destroyed within the year, a rule which no doubt applied to other modes of direct execution and existed in the later law as well[1] There are however two cases which are on a different footing These are condemnation to the arena, to fight either as a gladiator or with wild beasts The former punishment was abolished by Constantine for the Eastern Empire in A D 325[2] In the West it continued till 404, when Honorius put a stop to such shows on the advice of Prudentius, on the occasion of the death of Telemachus, a monk who was stoned to death in the arena while exhorting the gladiators to peace[3] But condemnation *ad bestias*, a very common punishment in classical times[4] and later[5], is repeatedly mentioned in Justinian's laws[6], and perhaps was never abolished In these cases much time might elapse between the condemnation and the death Thus Ulpian tells us that after three years in the arena they might be released from further service, and if having earned this they continued for two years more, they might get a complete pardon[7]

Freemen and slaves alike might be *servi poenae*[8], but the law was not alike for all Slaves were in general more severely punished than freemen[9], and, apart from this, there were many special rules on this matter, which varied no doubt from time to time Thus though death and other capital punishments might be inflicted on *decuriones*[10] it was essential that the matter be referred to the Emperor before it was carried out[11], and the same rule seems to have applied to *relegatio*[12] But to degrading punishments they could not be condemned at all[13] Their ascendants and issue were similarly protected[14], and the protection covered children born before the *decurionate* began, or after it ceased, provided they were conceived before its end[15] The practical result is that a *decurio* could rarely become a *servus poenae* The only possible case left is that of death *per gladium* But there is a sweeping rule laid

[1] P 5 17 2 Coll 11 7 4

[2] C Th 15 12 1 = C 11 44 1 J Gothofredus thinks he forbade gladiatorial shows altogether, arguing from the word *omnino* but the next *lex* treats such shows as still in existence and G quotes from Libanus an account of them at Antioch in 328 Probably as a punishment this was never common

[3] Theodoretus Hist Ecc cited Gothofredus, *loc cit*

[4] P 5 *pass* Coll 11 *pass*

[5] C Th 9 18 1 (= C 9 20 16) *etc*

[6] In 1 12 3 C 9 47 12 D 28 1 8 4, 48 19 11 3 12 29 31, 49 16 3 10 4 1, 49 18 1 3

[7] Coll 11 7 4 Constantine's enactment (C Th 9 18 1) that for offences under the *lex* Fabia a freeman should be made to fight as a gladiator on the terms that before he could defend himself he should be *gladio consumptus* is really a direction to execute *per gladium*

[8] C 9 47 11, 14 2 3 See *ante* p 277

[9] 48 19 16 3, *ante*, p 93

[10] C Th 9 42 24 = C 9 49 10

[11] 48 8 16 which exempts persons holding any *honor* See also 48 19 27 1 2

[12] *Ibid* *Bestiis caedi metallum*, *opus metalli* or *ministerium metalli furca* burning fighting with beasts *etc* such penalties were altered or discharged by the Emperor Even *opus publicum* was forbidden C Th 12 1 47 80 C 9 47 3, 9 12, D 48 19 9 11

[13] 48 19 9 12 13, C 9 47 9, 12

[14] 48 19 9 14, 15 50 2 2 2, 3 6 A child conceived and born during temporary removal from the *ordo* was protected, though his father died before the time expired, 50 2 2 5

down by Hadrian that a death penalty was not to apply to a *decurio* except for parricide[1] It may be that this, like those already noted, is only a requirement that the Emperor must intervene before it could be carried out Certainly another text contemplates a death penalty under this condition[2]. In any case it is clear that these persons could not be ordinary *servi poenae*

Milites and *veterani* and their children were in much the same position they were not punishable by *metallum, opus metalli*, fighting with beasts, *furca, fustigatio*, or, generally, any penalty from which a *decurio* was protected[3] Nothing is said of *parentes*, and the privilege may not have applied to remoter issue[4]

Other privileged classes are mentioned who could hardly become *servi poenae*, but we have no details[5] There is, however, at least in later law, a general rule We learn that, by various Imperial enactments, *honestiores* were not liable to *fustigatio*[6], and also that those who were not liable to *fustigatio* were to have the same *reverentia* as *decuriones* had[7], and so could not be condemned *in metallum*[8] This is in the Digest, but rules of this kind are laid down in relation to a number of different crimes, by a large number of earlier texts There are, of course, many texts in which a capital punishment is declared without distinctions[9] But there are many cases in which, while *humiliores* are killed, or condemned *in metallum, honestiores* are deported[10] or even merely *relegati*[11], which involves no *capitis deminutio* There are others in which *honestiores* appear as liable to capital punishment, but in less degrading forms than those which apply to *humiliores*[12] In one text a similar distinction is drawn between *ingenui* and others[13], and in another it is between slaves and free[14].

The goods of a person capitally condemned were forfeited to the

[1] 48 19 15 cp 48 22 6 2 Mommsen (*op cit* 1036) adds *maiestas*
[2] 48 8 16
[3] 49 16 3 1 49 18 1 3 A *miles condemnatus* for a military offence, though to death, is not a *servus poenae* He can make a will 28 3 6 6
[4] C 9 47 5 A *miles* loses his protection if he becomes a *transfuga*, 49 16 3 10 Special habilities of *milites* 48 19 14 38 11 12 49 16 *passim*
[5] Bishops, C Th 16 2 12, *Senatorii*, C Th 9 40 10 As to *Clarissimi* and *Illustres*, C Th 9 1 1 C 3 24 1, and D 48 8 16
[6] 48 19 28 2
[7] Mommsen observes (Strafrecht 1036) that though the rules are expressly laid down merely for *decuriones* this is because they are the lowest of the privileged classes what holds for them holds *a fortiori* for the higher classes It should be noted however that some of the exemptions are introduced to make the decurionate less unpopular other applications are secondary
[8] 48 19 28 5 [9] *e g* P 5 20 1, 5 21 1 3 *etc*
[10] P 1 21 4 5, 5 19 1, 5 21 2, 5 25 1, 2, 7 (=D 48 19 38 7), 5 26 1 Coll 8 5 1, 12 5 1
[11] P 5 20 2, 5 23 14 (=D 48 19 38 5), 5 23 19, 5 25 8, 9, 5 26 3 Coll 1 7 2, 11 8 3 14 2 2 cp C Th 7 18 1, D 48 19 38 3
[12] P 5 23 1 16, Coll 8 4 2 *Plebei tenuiores*, Mommsen, Strafrecht 1035
[13] C Th 9 18 1 (= C 9 20 16)
[14] P 5 22 2 As to the line between *honestiores* and *humiles* see Mommsen *loc cit*

Fisc[1], but this *publicatio* occurred only on final *condemnatio*, not on death pending appeal[2], unless the prisoner committed suicide in order to avoid liability for crime[3] such as would involve forfeiture[4] From the forfeitable fund were excluded certain things in which the criminal had only a limited interest, and also gifts to emancipated children made before the accusation, although the *hereditas* would practically include this in consequence of the rules as to *collatio*[5] A *dos* given by him to his daughter was not forfeited by his condemnation, even though she died, unless it was given in expectation of condemnation[6], and thus a *dos* which he had promised to give might be recovered from the Fisc by the husband If her marriage was dissolved before the father's condemnation and she had assented to the father's receiving the *dos*, the Fisc could claim it if she had not, it was her property[7] All this shews that what was forfeited was what was his own, including, however, what had fallen to him after the condemnation[8] It must further be noted that collusive or gratuitous alienation after the accusation would not save the property so dealt with[9], and that the Fisc here, as in other cases, took the estate subject to all debts If it was solvent the Fisc paid the creditors and took the surplus if insolvent the goods were sold and the Fisc took nothing[10]

This rule of forfeiture was subject to restrictions, dating from the classical law, in favour of the criminal's natural heirs From the title of, and some citations from, a book of Paul's on the matter, it can be inferred that no relatives but *liberi usti* had a claim, and that their claim was only to a part of the goods, though Hadrian, by way of grace, allowed the whole to be divided where there were several sons[11] Any children conceived before the condemnation were entitled to share[12], and even children adopted in good faith before the accusation[13]

The rules as to the persons who were entitled to share, and as to the proportion of the estate to be so restored, were the subject of

[1] C 9 49 4 P 5 12 12 D 48 20 1 *pr* Apparently the clothing of the criminal was disposed of by the executive in its service 48 20 6 *Publicatio* is part of the deterrent punishment It does not result from the man s vesting in the Fisc he does not See *ante*, p 277
[2] 48 20 11 *pr* [3] P 5 12 1, C 9 50 1 2 [4] 48 21 3 1
[5] The *dos* and *donatio propter nuptias* of the criminal were not forfeited See on these rules, C Th 9 42 1, *h t* 15 C 5 16 24 9 49 9
[6] 48 20 8 4 9 [7] 48 20 10 1
[8] 48 20 7 5 10 This could not occur in case of a *servus poenae* as his enslavement destroyed his power of acquisition 49 14 12
[9] 39 5 15 48 20 11 1
[10] 49 14 1 1 11 17 37 It is liable to creditors of the estate (48 20 4 10 *pr* C 9 49 5) and conversely it can claim from debtors thereto 49 14 3 8 6 21
[11] 48 20 7 *pr* 3 [12] *h t* 1 1
[13] *h t* 7 2 Of course nothing acquired through the crime was included *h t* 7 4 A woman entered *in sua patris* on the *hereditas* of one she had poisoned Antoninus Pius declared this forfeited though it was never hers *Ib* These rules seem to be all imperial They can hardly be juristic and there is no reference to any *lex* or *Sc* or Edict

much legislation, of which, though the record is not complete, a general account can be given. Some constitutions refer only to *deportati*, but in most cases it seems clear that they cover *damnati* also. The general principle that children are to be entitled to a share is laid down by Callistratus in terms which suggest that part only went to them[1], though it may be that by A.D. 241 the whole was available[2]. All details must be looked for in the Codes. In 356 it was enacted that all relatives to the third degree were to have a claim, before the Fisc, to all the goods, except in cases of *maiestas* and magic in which even *liberi* were to get nothing[3]. Two years later this was repealed: all was to go to the Fisc in all cases[4]. In 366 it was enacted that children were to have all the goods except in case of *maiestas*[5]. In 380 Theodosius I legislated comprehensively on the matter. His enactment dealt, in terms, only with *damnatus interfectus*, but it no doubt covered the *servus poenae*. He gave children and grandchildren all the estate, while if there were only remoter issue, through males, they shared half. He added provisions giving a constantly lessening share to father, mother, with or without *ius liberorum*, paternal grandparents, and brothers and sisters, agnatic, emancipated and uterine[6]. No one else was to exclude the Fisc. In 383 he included *postumi*, probably to settle doubts[7]. In 421 all claims were suppressed except those of parents and children[8]. In 426 Theodosius II seems to have suppressed all claims but those of *filii*, who were to have half[9]. Justinian accepted this enactment, changing *filii* to *liberi* and giving the language a more general form[10]: as Theodosius wrote it, it might have referred only to a special case. He also accepted the rule admitting *emancipati* and *postumi*[11]. This represents the law of his time[12] till 535 when he gave all the property to successors, suppressing any claim of the Fisc[13]. Three special cases need mention.

(*a*) Women. If a woman was condemned her children could claim nothing[14]. The rule is expressed as one of undoubted and, apparently, ancient law. This exclusion is shewn by Paul's language to have been

[1] 48. 20. 1.
[2] C. 6. 6. 5. They are to have *obsequium* of (all) the *liberti* of the *damnatus*. But the rights of *liberi patroni* are independent of those of patron, G. 3. 45; Ulp. 29. 5. This rule existed at a time (37. 14. 4) when it is fairly clear that they had only a share of the *bona*. In the earlier empire it was usual to give part to the children in individual cases though there was no general rule. Tac. Ann. 3. 17; 4. 20; 13. 43; Plin. Epist. 3, 9, 27 cited Mommsen, Strafrecht, 1006. The rule, *nullam esse divisionem libertorum*, does not affect this matter, 10. 2. 41; 37. 14. 24.
[3] C. Th. 9. 42. 2.
[4] *h. t.* 4. Constantius may have meant only to restore the old law.
[5] *h. t.* 6. The *interpretatio* says, *ad filios vel ad heredes legitimos*.
[6] *h. t.* 9.
[7] *h. t.* 10.
[8] *h. t.* 23. No claim is allowed in *maiestas*.
[9] *h. t.* 24. *pr.*
[10] C. 9. 49. 10.
[11] C. 9. 49. 8, 10.
[12] Fines short of *publicatio*, P. 5. 23. 14, 19; D. 48. 20. 1, *etc.*
[13] Nov. 17. 12.
[14] C. 9. 49. 6. The text speaks of *deportatio* but no doubt the rule is general.

due to the fact that the real basis of the claim of the children in such cases was their civil law position as *sui heredes*[1]. He remarks that as parents could not arbitrarily exclude them by an expression of will, so they ought not to be able to do so by crime. None of this language applies to children of women: it is a late expression of the old civil law view of succession.

(*b*) *Decuriones.* The enactment of 426 provided that on *condemnatio* of a *decurio* his property should go to the *Curia*, which might keep it, or allot it to anyone who would take over his responsibilities. If, however, there were male issue alone they took the property and the responsibilities. If there were daughters alone they took half. If there were both the males took half on account of their curial responsibility, and divided the other half with the females. Justinian adopted this, adding that *postumi* were to be entitled, and excluding any claim in *maiestas*[2].

(*c*) *Liberti.* The only statement we have of the rules in this case is in the Digest, and it may not represent classical law. A patron is to have the share he would have had in an ordinary case of death, the Fisc taking the rest[3]. This purports to be from Paul's book on the matter. Another text, from Macer, applies a similar rule to *liberi patroni*[4] and adds that if there are children of the *libertus* they exclude the children of the patron, and as these exclude the Fisc, the latter has no claim[5]. This is rather obscure: on the face of it, it gives them all, while, both in Paul's time and in Justinian's, the children of *ingenui* took only half: the reasoning shews that the exclusion was only from the part the patron would have taken[6].

A person condemned to penal slavery was ordinarily in that position for life, which, in the case of death sentences, would be short. But we have already seen that even persons condemned *ad bestias* had a hope of pardon[7], and of course in the case of a *damnatus in metallum* the chance of pardon was greater: it is clear on the texts that the case was not uncommon. We hear of *restitutio in integrum ius*, and of simple pardon. Each such release was an express act of authority, and the warrant would state the terms of it, which might, and as we shall see, often did, give rights more than mere pardon and less in various ways than complete restoration. A striking point is that in this connexion

[1] 48. 20. 7. *pr.* Her *dos* is subject to special rules. In some important crimes it is forfeited subject to claims of *vir*: in others it passes as if she were dead, 48. 20. 3—5.
[2] C. Th. 9. 42. 24; C. 9. 49. 10.
[3] 48. 20. 7. 1.
[4] 48. 20. 8. *pr.* Though they do not claim *bonorum possessio* they exclude the Fisc as to their part, *h. l.* 2.
[5] 40. 20. 8. 1.
[6] The texts were written under the regime of the *lex* Papia, obsolete under Justinian. Complex questions arise but do not concern us.
[7] *Ante*, p. 405.

we hear nothing of manumission. A *servus poenae* was not the property of anyone, and could not well be released from anyone's *manus*: he regained his liberty by the Emperor's decree[1].

A pardon was commonly by *indulgentia generalis* or *communis*, no doubt on occasions of public rejoicing[2]. It released from the labour and made a man, who had been free, once more a freeman[3]. But it did not restore his former private rights. His property remained with the Fisc[4]. He did not recover old rights of action[5]. He did not recover *potestas*, and thus he could not acquire through his children[6]. He was not liable to old actions[7]. In one remarkable text, Ulpian is reported as saying that a person merely pardoned, and not *restitutus*, could not have succeeded under the *Sc.* Orphitianum, but, *humana interpretatione*, he was allowed to do so[8]. This last rule is no doubt Tribonian's: it jars with the others. The question whether it expresses a rule applicable in late law to other cases of succession must, on the texts, be answered in the negative[9]. One who had been a slave did not on pardon revert to his old *dominus*[10]. That ownership was gone, and though, up to the time of Caracalla, there seems to have been some doubt as to whether he vested in the Fisc, Ulpian, recording Caracalla's doubt, declares this to be the law[11], as also does a rescript of Valerian[12]. He was now an ordinary slave, capable of receiving fideicommissary gifts of liberty[13], and presumably of being sold[14]. Such a state of things is hardly applicable to a case where the slave was ultimately proved to have been innocent: it involves an unjustified injury to the *dominus*. Nor was *restitutio in integrum ius* applicable to a slave. For such cases the proper provision was the *revocatio* of the sentence, the effect of which was to restore the slave to his former position. The effect of the condemnation being completely undone, the old ownership revived. In a case recorded he had been instituted by his *dominus*, and he became again a *heres necessarius*. So too, a *statuliber revocatus* would still be free on the occurrence of the condition[15].

The release or pardon might be accompanied by a more or less complete restoration to his original position. The effect of complete restitution is illustrated in many texts. The man regained all rights of

[1] *Servi poenae* were released by local authority and put to work appropriate to *servi publici*. Trajan ordered them back to slavery, except old men who had been so released 10 years: these were put to inferior work. Pliny, Litt. Trai. 31, 32. In the early empire the Senate usually gave the pardon. Mommsen, Strafrecht, 484.

[2] C. 9. 51. 5, 9.

[3] Presumably to citizenship, though in a case in C. 9. 51. 3 this is expressly given.

[4] C. 9. 49. 4; 9. 51. 2. [5] C. 9. 51. 5. [6] *h. t.* 9.

[7] *h. t.* 4; D. 44. 7. 30. [8] 38. 17. 1. 6.

[9] *h. l.* 4. See *post*, as to *restitutio*. [10] 48. 19. 8. 12.

[11] 40. 5. 24. 5. [12] C. 9. 51. 8.

[13] 40. 5. 24. 5. [14] *Arg. h. l.* 6.

[15] 40. 4. 46. Restitution is not spoken of in connexion with those who had been slaves.

succession[1]; his will was revalidated[2]; he recovered his *potestas*[3], his property[4], *honores, ordo, munera* and so forth[5]. He became a good witness[6]. He regained all rights of action, and conversely became liable to old debts[7]. The actions were not *utiles* but *directae*[8]: in short, the effect of the enslavement was completely annulled[9].

This complete restitution was expressed by the words *per omnia in integrum*[10]; *in statum pristinum cum bonis*[11]; or the like, or by the mere word *restitutus*[12]. But less comprehensive forms are found giving a limited restoration. These naturally gave rise to questions of construction, some of which are recorded in the texts. If part of his property was restored, old debts revived against him *pro parte*[13], and presumably his old rights of action revived to the same extent[14]. If his pardon was accompanied by a regrant of *potestas*, he again acquired through his children[15]. Restitution to *praecedens dignitas*, with no reference to *bona*, did not restore any property or rights of action or any liabilities[16]. It did not replace him in his old *potestas*[17], for this involves property rights: it dealt only with public rights.

It is obvious that a restoration of *bona* may create complications where part of the property has passed to heirs. We do not know how these were dealt with at the time when even collateral heirs took some of the property: the rules we have are embodied in legislation of Constantine at a time when, so far as we know, the claim was confined to children. It is laid down on Papinian's authority, that acts done by a son of full age are confirmed, and not affected by his reentry into *potestas*—even any will he may have made. As to any acts done by a *pupillus, auctore tutore*, the law is obscure. The *tutela* of course ends unless, in the bad character of the father, there is a special reason for retaining it. The law is confirmed by insertion in Justinian's Code[18]. It will be remembered that by his time the rule confining claims to children was restored[19]. Justinian adopts the constitution with none

[1] P. 4. 8. 22; In. 1. 12. 1; 37. 1. 13; 37. 4. 1. 9, 2; 38. 17. 1. 4. The right of succession covered succession to those conceived before slavery, or if conceived during slavery, born after the restitution, 38. 17. 2. 3. In 48. 23. 4 it is said that if the child is conceived and born during slavery, the right of succession exists on grounds of humanity. This may be Tribonian.

[2] 28. 3. 6. 12. [3] C. Th. 9. 43. 1; C. 9. 51. 13.

[4] Even payments due in the meantime, 34. 1. 11.

[5] 50. 4. 3. 2; C. 9. 51. 1. [6] 22. 5. 3. 5.

[7] C. 9. 51. 11, 12; D. 48. 23. 2, 3. [8] 48. 23. 2. 3.

[9] His *iura patronatus* are revived, a rule admitted with hesitation, of which there are signs in other of these rules, 48. 23. 1. 1; 37. 14. 21. *pr.* Conversely if he is a *libertus*, 38. 2. 3. 7. See 48. 23. 4; *h. t.* 1. 1. The doubts seem to turn on the point that slavery being akin to death must have extinguished these rights. They are not raised in other cases, *e.g. deportatio*.

[10] P. 4. 8. 22. [11] C. 9. 51. 4. [12] 38. 17. 1. 4.

[13] C. 9. 51. 3. A mere gift of money by the Emperor on his pardon produced no such effect. *Ib.*

[14] It does not follow. That he should receive his goods without liabilities is unjust to his creditors. No such point arises in the converse case.

[15] C. 9. 51. 9. [16] 48. 23. 2, 3. [17] C. 9. 51. 6.

[18] C. Th. 9. 43. 1 = C. 9. 51. 13, *remotis Ulpiani atque Pauli notis*. [19] *Ante*, p. 408.

but very slight verbal changes, a circumstance which is unfortunate in view of its rambling and obscure character[1].

In 536 Justinian by a Novel[2], adverting to *condemnatio in metallum* as the typical form, definitely abolishes the rule that a convict becomes a *servus poenae*. His primary object is to prevent dissolution of marriage, and he lays down this rule, very characteristically in the middle of a long and comprehensive set of provisions on the subject of marriage[3].

(*f*) Cases under the *Sc.* Claudianum and connected legislation.

By this enactment, of A.D. 52, it was provided (no doubt, *inter alia*), (1) that, if a freewoman[4] lived with the slave of another person after notice (*denuntiatio*) by the owner that he forbade it, she, and the issue, became his slaves[5]; (2) that, if the owner consented, she could remain free *ex pacto*, the issue being slaves[6]. This second rule Gaius tells us was abolished by Hadrian as being harsh and *inelegans*. For the future if the owner consented so that the mother remained free, the child was also to be free[7]. The text of Tacitus cited above says that there might be an agreement that she should be a *liberta*[8]. A point of status seems to be left to private agreement notwithstanding the maxim: *Conventio privata neque servum quemque neque libertum facere potest*[9]. The fact is that these are not mere private agreements: they are confirmed by the Senatusconsult[10].

The woman became the slave of the owner of the man if she persevered in the cohabitation after *denuntiatio* by him. It appears that one denunciation did not suffice: it must be three times repeated[11], and the third denunciation had, by an enactment of A.D. 317, to be in the presence of seven Roman witnesses[12]. One constitution speaks of the three denunciations as expressly provided for by the *Sc.* Claudianum[13], but it is at least equally probable that it was a juristic interpretation of

[1] It is not certain that as it appears in the Code of Theodosius it represents the original text.
[2] Nov. 22. 8.
[3] Nov. 134. 13 enacts that in case of *maiestas* the Fisc shall take *dos* and *donatio*, but lays down an order of preferential claims in other cases.
[4] Knowing she was free, P. 2. 21a. 12.
[5] Taciti Annales, 12. 53; G. 1. 91, 160; P. 2. 21a. 1; Ulp. 11. 11; Tertullian, ad uxorem, 2. 8. Suetonius attributes the rule to Vespasian (Vesp. 11) but he only modified existing legislation, G. 1 85.
[6] G. 1. 84; P. 4. 10. 2. As to the distinction between cohabitation in the owner's house and elsewhere, made in the Syro-Roman Law book, see Mitteis, Reichsr. und Volksrecht, 366; Mommsen, Strafrecht, 855.
[7] G. 1. 84
[8] See Huschke, ad P. 4. 10. 2 One text, at least, suggests agreements affecting the children. Thus Ulpian speaks of *filius* and *filia* becoming *liberti*, and his language shews that it is a case which might have occurred both in Julian's and in Ulpian's time, 38 17. 2. 2. See also P. 4. 10. 2.
[9] 40. 12. 37; C. 7. 16. 10.
[10] G. 1. 84. The latest reference to such agreements seems to be Cons. 9. 7, where some obscure words are understood by Huschke to refer to them.
[11] P. 2. 21a. 1; C. Th. 4. 12. 2, 3, 5, 7.
[12] *h. t.* 2. [13] *h. t.* 5.

the word *perseveratio*, which is used in comments on the *Sc.*[1], and may have been contained in it. The enslavement was completed by a magisterial decree, following the third denunciation[2]. Neither Ulpian nor Gaius refers to the need for three denunciations, or to the decree, and Justinian in abolishing the whole rule speaks of Claudianum *senatusconsultum et omnem eius observationem circa denuntiationes et iudicum sententias*[3], language which suggests a construction of the lawyers[4].

In A.D. 314 Constantine seems to have enacted that no denunciations were needed, but, if this is really the effect of his enactment, it must have been repealed almost at once, for three years later we find the three denunciations assumed to be necessary[5]. In 331 he reverts to the rule of 314, declaring that no denunciations shall be needed[6]. In 362 Julian confirms the *Sc.* Claudianum, repealing all contrary laws, so that a freewoman cohabiting with a *procurator* or *actor* or any other slave, is not to be enslaved till after three denunciations[7]. The language suggests that in another law it was provided that the harsher rule should apply only where the slave was in a position of trust[8]. A law of 365 seems to shew that the three denunciations had gone out of use again[9]. In 398 Honorius and Arcadius again assert the need of them[10].

We are nowhere told expressly what becomes of her property. The Institutes say that she loses liberty *et cum libertate substantiam*[11], which does not prove that her *dominus* gets it. Another text says that if liberty is lost with *capitis minutio* there is *actio utilis* against the *dominus* for the debts[12]. This implies that he gets the property, but it does not expressly mention this case, and it would not strictly be true for all cases, *e.g. captivitas*. The only other view possible is that it goes to the natural heirs as on death: *servitutem mortalitati comparamus*[13]. But though this gets a certain support from the expression *successio miserabilis*[14], it is most improbable in view of the general language of the texts above cited. Assuming that the *dominus* gets the property he is liable to *actiones utiles* already mentioned, and also to noxal actions[15].

Many of the texts speak of the woman to whom these rules applied as *civis* Romana, and Gaius seems expressly to limit the rule to this case[16]. It is clear that it applied also to Latinae: Paul puts them on

[1] P. 2. 21a. 13, 18; Tertullian, ad uxorem, 2. 8. [2] P. 2. 21a. 17.
[3] C. 7. 24. P. 2. 21a. 17 shews that the *Sc.* did not provide for the *decretum*. Cp. C. 7 15. 1. *pr.*
[4] *Denuntiatio* might be by *procurator* or duly authorised son or slave, P. 2. 21a. 4.
[5] C Th 4. 12. 1, 2. [6] *h. t.* 4 [7] *h. t.* 5.
[8] Gothofredus thinks a special rule as to these was contained in *h. t.* 2.
[9] Consult. 9. 7. Gothofredus inserts this in C. Th. 4. 12.
[10] C. Th. 4. 12. 7. If the *denuntiationes* were a juristic creation these variations are intelligible.
[11] In. 3 12. 1. [12] 4. 5 7. 2; cp. G. 4. 77.
[13] 50. 17. 209. [14] In. 3. 12. 1; cp In. 3 3 2.
[15] As in *adrogatio*. It may be therefore that rights of action passed absolutely as they did there, but the texts do not say so
[16] G. 1. 84, 91, 160; Ulp 11. 11.

the same level[1]. The later law seems to have been still more severe, and the enactments in the Codex Theodosianus speak simply of *mulieres liberae*[2]. The text of Tertullian already cited[3] seems to hint of a possible application of the rule to freemen cohabiting with *ancillae alienae*. Whether his words really mean this or not, it is clear that some such view was propounded, for it is categorically denied by an enactment of 226[4], while another, of 294, denies that such cohabitation could give the owner of the *ancilla* any right of succession[5]. This seems to mean that someone had an idea that the man might become a *libertus, i.e.* by the owner's assent to the union. Justinian's enactment abolishing the whole system makes it clear that it applied only to women[6].

The state of the authorities makes it difficult to say what was the effect of the enactment on the woman's children in case of prohibition. Most of our earliest authorities say nothing about children. Paul, dealing, *ex professo*, with the whole matter, does not mention them[7]. Nor does Ulpian, in his Regulae[8]. Nor do Suetonius and Tertullian[9]. Justinian's general repealing enactment mentions no special rule about children[10]. The allusion in the text of Tacitus deals only with agreements as to the mother's status[11]. Gaius says that some thought that, apart from agreement, children already conceived were free if *ex iustis nuptiis*, slaves if *volgo concepti*[12]. The language of the much later Epitomator of Gaius suggests that he thought this was the law[13]. But rules as to children were certainly laid down in the later law. Apart from any possible effect of agreement, the course of things may have been as follows. The Senatusconsult said nothing of children. As the rule making the child free, if the mother were free at any time between conception and birth, had not yet developed[14], the effect would be that all children born after the enslavement were slaves. In time the rule was accepted that freedom of the mother at any intermediate time saved the child. This was a juristic development, and it was doubted how far it ought to apply to a case like this, where the child might well be the fruit of the forbidden intercourse[15]. This doubt ultimately led to legislation, in an enactment of 314, which provided that the *filii* should be slaves. This was confirmed in 366[16]. An enactment of 320 provides that if it were a fiscal slave the child would be a Latin[17].

There remain for discussion several cases in which complications might arise owing to the position of one or other of the parties.

[1] P. 2. 21a. 1. [2] C. Th. 4. 12. 1, 5, 7; In. 3. 12. 1; C. 7. 24.
[3] Tertullian, ad uxorem, 2. 8. [4] C. 7. 16. 3. [5] C. 6. 59. 9.
[6] C. 7. 24. [7] P. 2. 21a. [8] Ulp. 11. 11. [9] *locc. citt.*
[10] C. 7. 24. [11] Taciti Ann. 12. 53; *ante*, p. 412. [12] G. 1. 91.
[13] G. Ep. 1. 4. 9. [14] *Ante*, p. 399. [15] See G. 1. 91.
[16] C. Th. 4. 12. 1, 6. Mitteis, Reichsrecht und Volksr., 370, following Zimmern, holds that it applied to children already born.
[17] C. Th. 4. 12. 3.

(*a*) Cases of *tutela*[1]. If the slave was the property of a *pupillus* the *tutor* could denounce[2], while if he was the slave of a woman in *tutela* she herself could do so[3]. The latter part of this text is imperfect, but the form of it seems to imply that the *pupillus* himself could not denounce[4].

(*b*) Common ownership of the slave. The only text dealing with this case says that, if all the owners denounced, the *ancilla* was common, but that in other cases she became the property of the owner who first denounces[5]. This was not a case of acquiring through the slave: it was acquisition by denunciation. The slave was no more than one of the facts basing the denunciation. But the rule as it stands hardly looks practical: probably it means that if any owners had, with knowledge, refused to denounce, they could not afterwards claim any share in the *ancilla*.

(*c*) Cases of *patria potestas*. If the slave was in the *peculium* of a son, it was the son who denounced and the father acquired without his knowledge, and even against his will[6]. If the slave was in a *castrense peculium* the *ancilla* acquired on the son's *denuntiatio* was also therein[7]. This text was written before the introduction of *peculium quasi castrense*: no doubt the rule must be extended to this and also to *bona adventitia*.

If the woman was a *filiafamilias* she did not lose her status on *denuntiatio*, since this would involve her having the power to impoverish her father in a certain sense, by depriving him of a daughter[8]. But if she continued the cohabitation after she was *sui iuris* the ordinary rule applied[9]. If, however, she was acting under the *iussum* of her father she became a slave on *denuntiatio*, since, says Paul, fathers can make their children's position worse[10]. The word *iubere* here cannot mean command but authorise: it is incredible that the father could have power to order such a connexion[11]. But this makes the reasoning unmeaning: the father does not make the child's position worse, but only enables her to do so. By assenting he waives his right.

If the slave was the property of the freewoman's own son, respect

[1] Not including cases in which *iura patronatus* also arise.
[2] P. 2. 21a. 2. [3] *h. t.* 3.
[4] So usually understood, but as the act is so far as the pupil is concerned purely acquisitive, this seems an unnecessary precaution. But any other interpretation seems to need bold emendation.
[5] P. 2. 21a. 15.
[6] *h. t.* 5. The rule as to denunciation is no doubt the same where the slave is in the *peculium* of another slave, since the denunciation is in no way judicial, but the final decree seems to require the intervention of the *dominus*.
[7] P. 2. 21a. 8. [8] *h. t.* 9. [9] *h. t.* 18.
[10] *h. t.* 10.
[11] It would be an indirect way of enslaving her, which he could not do directly. C. Th. 4. 8. 6 = C. 8. 46. 10.

for the maternal relation prevented the right of denunciation from arising[1].

(*d*) Cases of *iura patronatus*. If the woman was a *liberta* her patron's rights came into play. If he was aware of the transaction and assented, the owner of the slave acquired the woman as an *ancilla* by denouncing[2]. But a *patrona*, so long as perpetual *tutela* lasted, could not lose her rights by assenting without the *auctoritas* of her *tutor*[3]. If the woman's patron did not know, she became his slave and she could never be made a *civis* by manumission by him[4]. From the wording it seems that he could make her a Latin[5], and that if she were sold the buyer had a complete power of manumission. The rule was no doubt the same in the case of a *patrona, i.e.* that though her assent was ineffective to give the owner the right to denounce, it was effective to bar her from exercising the analogous right. If the slave belonged to the woman's patron the union produced no such legal effects[6]. If the owner of the slave was the *libertus* of the woman, he could not denounce for reasons analogous to those in the case in which he was her son[7]. These rules present no difficulty, but their origin is obscure. Some of them may be juristic, but some must have been express legislation, *e.g.* the rule making her the *ancilla* of her patron with limited power of manumission. This is probably part of the legislation of Vespasian referred to by Suetonius[8].

(*e*) Municipal slaves. The few texts shew that special rules were applied to this case, but they are not complete enough to enable us to state the development of the law with certainty. We learn that in the classical law an *ingenua* who cohabited with a slave of a municipality, knowingly, became a slave without *denuntiatio*, but not if she was unaware that he was a municipal slave, and ceased from cohabitation as soon as she knew. Presumably a *liberta* was subject to the ordinary law. Nothing is said as to assent of the municipality: apparently the possibility of this was not considered[9]. The concluding words of a law in the Codex Theodosianus shew that *improvidus error, vel simplex ignorantia, vel aetatis infirmae lapsus* were to exclude this special rule, but it is not clear whether this is a new rule or a recital of the old[10]. The enactment of 362 confirming the need for three denunciations was not to apply to slaves of municipalities[11].

[1] P. 2. 21a. 16. [2] P. 2. 21a. 6. [3] Ulp. 11. 27.
[4] P. 2. 21a. 7. [5] Huschke, *ad h. l.*
[6] P. 2. 21a. 11, *quia domum patroni videtur deserere noluisse.*
[7] *h. t.* 13. See *h. t.* 16. [8] Suetonius, *loc. cit.*
[9] P. 2. 21a. 14, *Universi consentire non possunt, ante*, p. 328.
[10] C. Th. 4. 12. 3. *Error* here means probably mistake of law, and *ignorantia*, mistake of fact: the terms are occasionally so distinguished, *e.g.* 22. 6. 2. But this is far from uniform: *error facti* and *ignorantia iuris* are common, 22. 6. 7, 9. Error of law was allowed to a woman as a defence in some cases *propter sexus infirmitatem*, 22. 6. 9. *pr.*
[11] C. Th. 4. 12. 5.

(*f*) Fiscal slaves. There were special rules of a somewhat similar character for *servi fiscales*. We learn that *ingenuae* who cohabited with fiscal slaves were, in classical law, deprived of their *natalia*, without regard to ignorance or youth. This is stated in the Codex Theodosianus[1], and confirmed by the fragment, *de iure fisci*, which speaks of *libertae Caesaris coniunctione effectae*[2]. It is added that the rights of fathers or patrons not assenting are not to be affected. This differs from the rule in the last case, in that they became *libertae* and not slaves, and in that error was not material. The rule that they were to be *libertae* is no doubt due to the superior dignity of fiscal slaves: these frequently, if not usually, "married" freewomen[3], so that the degradation was less, and the lesser effect of the union will account for the harsh looking rule that ignorance was not considered. The provision as to rights of fathers and patrons presumably means that if the father did not assent the general rule applied and the woman did not lose her status[4]. If the woman was a *liberta* already she had no *natalia*: here the proviso means that she remained the *liberta* of the patron, who could himself denounce her and claim her as a slave. It may be noted, that the rule as cited in the Codex Theodosianus deals only with *ingenuae*. If the patron assented the woman no doubt became a *liberta* Caesaris[5]. The law of 320[6], reciting the old rule, lays down a new one. If an *ingenua* knowingly or in ignorance cohabits with a fiscal slave or with one belonging to the *patrimonium* or to the *privata res* Caesaris, her status is not affected, but the children are latins subject to rights of patronage in Caesar. Nothing is said about *libertae*, and it may be that the old rule still applies to them. It is probable that the declaration that the rule is to cover all kinds of slaves of Caesar is not new. The enactment of 362[7], confirming the need of three *denuntiationes* does not apply to the case of fiscal slaves.

(*g*) An obscure enactment of 415[8] refers to the *Sc.* Claudianum and seems to provide that if the woman was descended from a *decurio* any child of which she was pregnant at the time of condemnation was not only free, which is contrary to the rules already stated, but was also liable to serve on the *Curia*. The point is that descent on the mother's side did not ordinarily create that liability[9]. At the end of the constitution it is said that *servus actor sive procurator* is to be burnt. Another enactment had provided that any *servus actor* of a municipality who connived at connexion between a *decurio* and an *ancilla aliena* was to be severely dealt with[10]. The aim of this is to secure successors to

[1] *h. t.* 3, *ius vetus.* [2] Fr. de i. Fisci, 12. Text corrupt.
[3] *Ante*, p. 324. The Fr. de i. Fisci does not distinguish between fiscal slaves and others of Caesar.
[4] P. 2. 21a. 9. [5] *h. t.* 7. [6] C. Th. 4. 12. 3.
[7] *h. t.* 5. [8] C. Th. 12. 1. 179. *pr.*
[9] See references cited Gothofredus, *ad h. l.* [10] *h. t.* 6 = C. 5. 5. 3.

decuriones and so to keep the lists full. The purpose of the law with which we are more directly concerned is much the same. It may therefore be assumed that the slave so to be dealt with was not the slave with whom she cohabited[1], but any slave of the *civitas* in a position of trust who connived at this or any other matters forbidden in the constitution.

The whole of the law of the *Sc.* Claudianum disappeared under Justinian. We are told in the Institutes[2] that it was not to be inserted in the Digest at all. The abolishing enactment[3] says nothing about that, and in point of fact the Digest does contain by oversight at least one reference to the abolished[4] rule. The enactment in the Code retains a punishment for the slave concerned[5].

[1] It may be remembered that slaves cohabiting with their own mistresses were burnt, C. Th. 9. 9. 1 = C. 9. 11. 1. *Ante*, p. 93.
[2] In. 3. 12. 1. [3] C. 7. 24.
[4] 16. 3. 27. The words *nulla...facta* should have been struck out.
[5] Several laws reduce to the rank of their husbands women who cohabit with the semi-servile labourers, C. Th. 10. 20. 3 (= C. 11. 8. 3); C. Th. 10. 20. 10. For another possible case, *post*, p. 433.

CHAPTER XVIII.

ENSLAVEMENT (*cont.*).

WE have now to consider those cases of enslavement *iure civili* which Justinian introduced or retained. Several are recorded, but few are important in the general law. The less important will be treated first.

(*a*) Defaulting claimants of liberty. As we shall see later, Justinian abolished the need of *adsertores* (free persons acting on behalf of the claimant of liberty), in *causae liberales*, and allowed the claimants to conduct their own cases. He required them to give personal security, but if this were impossible, they were to give a sworn undertaking—*cautio iuratoria*. If after these preliminaries they failed to appear, and, being duly cited, remained absent for a year, they were adjudged slaves of the other party, whatever the real merits of the case may have been[1].

(*b*) False pretence and collusion of *dominus*. If an owner by his fraud and collusion passed his slave off as a freeman and obtained a judgment to that effect, Domitian provided that the person so adjudicated free should be decreed a slave of anyone who denounced him[2]. But as he can hardly be said to have been free before, this case will be more appropriately discussed later, in connexion with the general law as to the effect of such adjudication[3].

(*c*) Slaves sold for export and freed. The Vatican Fragments[4] contain a text, in part corrupt, to the effect that if a slave is sold with a condition that he is to be kept away from a certain place[5], with a power of seizure on return, and he does return, still a slave, the vendor may seize him and keep him as his slave. If he is freed by the buyer and then returns, he is sold by the Fisc into perpetual slavery on the same condition. This amounts to re-enslavement, for the manumission by the buyer before he had broken the condition was perfectly valid[6].

[1] C. 7. 17. 1. 2. *Post*, Ch. XXVIII.
[2] A senatusconsult, 40. 16. 1.
[3] *Post*, Ch. XXVIII.
[4] Vat. Fr. 6.
[5] As to this see *ante*, p. 69.
[6] C. 4. 55. 1.

The same rule is laid down by Severus and Caracalla[1]. Some details are necessary to complete the statement. The power of seizure (*manus iniectio*) is merely a right to take the slave: it has nothing to do with *legis actio*. If the vendor has agreed not for a right of seizure, but for a money penalty, the Fisc seizes the man, though he is still a slave, and sells him as in the case of return after manumission[2]. If the slave returns without the buyer's consent, there is no right of seizure, for the slave cannot be allowed to deprive his owner of himself[3]. If the buyer instead of exporting him, frees him in the State, the manumission is void and the vendor has the right of seizure[4]. If the buyer resells him under the same condition and he comes to the forbidden place with assent of the second buyer, the original vendor has the right of seizure, not the first vendee, whose imposition of the same condition is merely regarded as notice to his vendee, to protect himself from liability[5]. As the vendor imposed the condition for his own protection, he can remit it at any time while the man is still a slave, and so either seize the slave and keep him at Rome, or free him, or, waiving the right of seizure, allow the buyer to keep him at Rome[5]. But the case is different if the slave returns to the place as a freeman. The vendor has now no means of control over him, and might be terrorised into remitting the prohibition. Accordingly the Fisc takes the matter in hand and sells the man as above[6].

(*d*) Young children sold under pressure of poverty[7]. It was a rule of the developed Roman law that a father though he had, at least in theory, a *ius vitae necisque* over his issue, could not sell them into slavery. Paul lays down the rule of classical law that such a sale cannot prejudice their *ingenuitas*, since a freeman *nullo pretio aestimatur*[8]. He adds that therefore the father cannot pledge them, or give them in *fiducia*, and that a creditor who knowingly receives them as security is punishable[9]. Caracalla says much the same as to sale, describing it as illicit and shameful and in no way prejudicing the child[10]. Diocletian speaks of the rule utterly forbidding sale as settled law[11]. Such a pledge is void[12] and such a sale in some way punishable[13]. Even later the rule is laid down in quite general terms by Constantine in 315 and 323[14].

[1] *Ibid.*
[2] C. 4. 55. 2. So, probably, if the conditions were imposed without expressed penalty.
[3] 18. 7. 9. [4] C. 4. 55. 3.
[5] 18. 7. 1; Vat. Fr. 6.
[6] This seems to be the meaning of Vat. Fr. 6 *fin.*, read in connexion with C. 4. 55. 1.
[7] As to the practice of sale of self and children in eastern provinces, see Mitteis, Reichsrecht und Volksrecht, 358.
[8] P. 5. 1. 1. [9] *Ib.*; D. 20. 3. 5. [10] C. 7. 16. 1.
[11] C. 4. 43. 1. [12] C. 8. 16. 6; cp. *h. t.* 1.
[13] C. 7. 16. 37. Huschke makes Vat. Fr. 27 lay down the general rule, but this is doubtful.
[14] Vat. Fr. 33; C. Th. 4. 8. 6. An enactment of 322 records the fact that provincials had been in the habit of selling their children under pressure of poverty, and orders that, to prevent this, such people are to be relieved from the treasury, C. Th. 11. 27. 2. It does not appear that the sales were lawful.

But a constitution, earlier than the first of these dates, introduces or mentions an exception. As early as 313, Constantine treats as valid the sale of a new-born child (*sanguinolentus*)[1], and in 329 he says that this is law established by earlier Emperors[2]. His own contribution to the matter seems to have been to regulate it by laying down several rules to which such sales must conform. The transaction must be evidenced by written documents. A proper price must have been paid[3]. If these are not attended to the sale is void. The buyer may lawfully possess him and may even sell him, but only for the payment of debts: any sale in contravention of this law is penalised and presumably void. The vendor, or the person sold, or anyone else, may redeem him on payment of what he may be worth, or by giving a slave of equal value in his place, but there is no right of redemption if the child is the issue of union with a barbarian[4].

The rules as to evidentiary documents, as to issue of marriage with barbarians, and as to restrictions on sale of the person bought, seem to have disappeared, but the main principles are retained in a constitution of Constantine which is inserted in Justinian's Code and represents the law of his time[5]. But traces remain in the Codex Theodosianus which shew that between the ages of Constantine and Justinian there had been variations of practice if not of law. In 391 it was provided that those who had been sold into slavery by their parents should be restored to *ingenuitas* and that a holder whom they had served, for *non minimi temporis spatium*, should have no claim to remuneration. This is not in terms confined to *sanguinolenti* and may indicate a practice of selling older children[6]. It is not in Justinian's Code. Again a Novel of Valentinian says that the prevalent distress throughout Italy had caused parents to sell their children, and that thus life had been saved at the expense of liberty. Where this had happened their *ingenuitas* was not to be affected and, in accordance with *statuta maiorum*, the sale was to be set aside, but so that the buyer received back the price he paid, plus 20 %[7]. Any real price for them seems absurd if they were new-born infants, and in any case it must have been so small that 20 % added could have been no return for the cost of rearing. Thus it seems that a practice had grown up of selling older persons

[1] Vat. Fr. 34. [2] C. Th. 5. 10. 1.
[3] Vat. Fr. 34; C. Th. 5. 10. 1.
[4] *Ibid.* Unions with *barbari* were forbidden a little later, and capitally punished, C. Th. 3. 14. 1. A rule laid down much later by Valentinian may have been due to Constantine, viz. that any such sale for export to barbarians was heavily penalised, Nov. Val. 33. He speaks of such sales as already forbidden.
[5] C. 4. 43. 2. Probably identical with C. Th. 5. 10. 1.
[6] C. Th. 3. 3. 1. The *interpretatio* says, *si servitio suo satisfecerit*, which suggests sale for a definite time. Gothofredus, *ad h. l.*, suggests five years, on the analogy of *captivi* redeemed. See *ante*, p. 314, and *post*, Ch. XXVIII. But this would exclude limitation to *sanguinolenti*.
[7] Nov. Val. 33.

and had been recognised as legal[1]. There is no such right under Justinian.

The language of these last two laws shews that the status was one of true slavery. But this is not so certain of the more permanent institution regulated by Constantine. The expression, reversion to *ingenuitas*, used by Constantine[2] seems inconsistent with his being a slave, but as the law also speaks of the buyer as *dominus* and *possessor*[3], it is generally held that it was genuine slavery. It is indeed conceivable that this was no longer so in Justinian's day, for one of Constantine's laws as reproduced by Justinian in his Code speaks of the buyer as entitled to use the man's services[4]. Justinian's own enactment as to *liberi expositi*[5] jars rather with the rule now under discussion, but, slavery or not slavery, it is clear from the insertion of Constantine's enactment in Justinian's Code that the institution continued to exist[6].

There remain two cases[7] of much greater importance.

(*e*) The *libertus ingratus*. The general principle of this matter is set forth in the Institutes[8] in four words: *liberti ut ingrati condemnati*. The rule referred to is that *liberti* might on complaint of their patron be re-enslaved on the ground of ingratitude. The history of the matter is somewhat obscure. Neglecting *dediticii*, there were up to the time of Justinian two kinds of freedmen, *cives* and latins; the liability applied more or less to the freedmen and to their issue; not only the patron but also some of his heirs had the right of complaint, and ingratitude did not always lead to re-enslavement to the old master, but was sometimes met by other punishments, ranging from reprimand to penal slavery. It is not easy to tell from the sources how all these factors were combined.

No legal text refers to the rules as to this matter during the Republic. It must not be assumed from this that ingratitude on the part of a *libertus* was not repressed, but only that the powers of domestic

[1] It became the rule of West-Gothic law, Z. S. S. Germ. Abth. 7. 238; 9. 45. Traces of the practice are in the Code and Novels, Mitteis, *op. cit.* 363.
[2] C. Th. 3. 3. 1; C. Th. 5. 10. 1 = C. 4. 43. 2.
[3] C. Th. 5. 10. 1; Vat. Fr. 34.
[4] C. 4. 43. 2.
[5] C. 8. 51. 3; *ante*, p. 402.
[6] The importance of the question whether the child was slave or free in the meantime is plain, but the texts do not consider it. See as to the analogous case of *liberi expositi*, C. 8. 51. 3, and *ante*, p. 402. It should be noted that Constantine gave the same right of repurchase or substitution where the *sanguinolentus* was a slave, C. Th. 5. 10. 1. But in 419 it was provided that, as such a reclaim was unfair to the rearer, this right should be conditional on payment of double value and all charges (Const. Sirm. 5). This made the right worthless except for natural children. The Code of Justinian does not refer to this right, even in the enactment of Constantine which provides for freeborn children.
[7] For another exceptional mode of enslavement under Justinian see *post*, Ch. XXVI at beginning.
[8] In. 1. 16. 1.

authority sufficed[1]. With the imperial system came a change: the old methods no longer served and legislation began. The *lex* Aelia Sentia (A.D. 4) allowed a formal accusation. We do not know by legal texts what were the penalties it authorised, but there is no reason to think they amounted to re-enslavement[2], and a non-legal writer seems to say that they did not go so far[3]. The Digest contains many references to these minor punishments. The matter seems to have been the subject of repeated imperial regulation, and no doubt a wide discretion was left to the magistrate as to the degree of punishment in each case. Thus one text tells us that the magistrate was to sentence to fine, forfeiture of part of his property to the patron, or whipping, according to the nature of the offence[4]. Others are more specific. They tell us that for defect in *obsequium*, *liberti* were to be punished by whipping, reprimand and warning as to severer punishment if the offence was repeated[5]. For *convicium* or *contumelia* the same punishments are suggested together with temporary exile[6]. For assault or *calumnia* or conspiracy or subornation of delators they were to be condemned *in metallum*[7]. It is noticeable that though the list has an air of completeness no case is given in which the punishment is re-enslavement to the patron. It may be that the patron might choose whether the man should go *in metallum* or revert to his *dominium*[8]. One punishment is of special interest. Salvianus, who was Bishop of Marseilles about 440, uses language which seems to mean that patrons had the right to reduce their *liberti* to the position of latini for ingratitude[9]. Constantine, in 326, refers to a *libertus* reduced from citizenship to latinity[10], and Suetonius, writing of the time of Nero, and speaking of ingratitude as involving loss of right of testation[11], seems to have the same rule in mind.

The history of re-enslavement as a punishment for ingratitude, can be shortly stated, so far as it is known. Claudius provided that any *libertinus* who suborned delators, to dispute his patron's status, might be re-enslaved by him[12]. In the next reign the Senate seems to have tried to lay down some general rule of re-enslavement, but Nero refused his assent to this, requiring each case to be considered on its merits, but clearly contemplating re-enslavement as a possibility[13]. It was

[1] For traces of this see 47. 2. 90.
[2] 50. 16. 70; 40. 9. 30, and rubric.
[3] Dositheus, Sent. Had. 3, cited by Gothofredus *ad* C. Th. 2. 22. 1.
[4] 37. 14. 7. 1.
[5] 1. 16. 9. 3; 37. 14. 1.
[6] 1. 12. 1. 10; 37. 14. 1; cp. Tacit. Ann. 13. 26.
[7] *Ibid.*
[8] In C. 6. 7. 2 we are told that the penalty could be rescinded on application of the patron.
[9] Ad Eccles. 3. 33.
[10] C. Th. 2. 22. 1.
[11] Suetonius, Nero, 32. Gothofredus *ad* C. Th. 2. 22. 1, suggests that *cives* were made latins, the penalty of enslavement being usually confined to latins. This is highly probable, though the case put in C. 6. 7. 2 shews that enslavement of *cives liberti* for ingratitude could occur. Cp. Tacit. *loc. cit.*
[12] 37. 14. 5. Suetonius says, too generally: *ingratos et de quibus patroni quererentur revocavit in servitutem*, Claud. 5.
[13] A.D. 56. Tacit. Ann. 13. 26.

reserved for that accomplished *censor morum*, Commodus, to lay down the general rule[1]. He is said by Modestinus to have enacted that on proof that *liberti* had treated their patrons with contumely, or struck them, or neglected them in illness or distress, they were to be restored to the *potestas* of their patrons, and, if that did not suffice, they were to be sold by the *praeses* and the price given to the patron[2]. In 205 the power of re-enslavement is treated by Severus as existing[3]. An enactment of Diocletian seems to refer to a general rule of re-enslavement for ingratitude[4], but another notes[5] that there is no re-enslavement for mere lack of *obsequium*[6]. Constantine speaks more severely, and declares that *liberti* may be re-enslaved, if *iactancia vel contumelia cervices erexerunt* or even if *levis offensae contraxerunt culpam*[7]. Later enactments, of 423[8] and 426[9], speak of re-enslavement without stating the limits on the power. It can hardly be doubted, however, that it was rare in the later Empire. The only texts mentioning it in the Digest are those giving the rule of Claudius and that of Commodus, together with one to the effect that if a woman, having offended her patron and thereby endangered her status, agrees to pay him something to avoid reduction to slavery, the agreement is valid and not a case of *metus*[10]. The texts from the Code and the words of the Institutes shew that the rule was still in operation, and in the Novels it is again laid down very generally[11]. Upon the whole record it seems that there could not at any time be re-enslavement for mere lack of *obsequium* (though Constantine's rule goes very near to it), but that it might be incurred for any worse form of ingratitude. Other punishments might be chosen and usually were, so that the *libertus ingratus* re-enslaved to his patron was at no time common.

Such accusations are deemed to require careful trial. They are tried as *iudicia extraordinaria*[12] and must go before the chief magistrate of the province in which they arose[13], the Proconsul[14] or other *praeses*[15], or, in the city, the *praefectus urbi*[16]. Constantine speaks of them as going before *iudices pedaneos*[17]. They are capital, and ought therefore

[1] For statement and criticism of Leist's view that it is much older, see Pernice, Labeo, 3. 81.
[2] 25. 3. 6. 1. Similar rule to this last was laid down for a different reason by Antoninus Pius for slaves illtreated, see *ante*, p. 37.
[3] C. 6. 3. 2.
[4] C. 6. 3. 12. But the words, *nisi ingrati probentur*, may be interpolated.
[5] C. 7. 16. 30.
[6] C. 7. 16. 30.
[7] C. Th. 4. 10. 1 = C. 6. 7. 2.
[8] *h. t.* 2 = C. *h. t.* 3.
[9] *h. t.* 3 = C. *h. t.* 4.
[10] 4. 2. 21. *pr.*
[11] Nov. 78. 2. This wordy law does not suggest that there was liability to enslavement for mere lack of *obsequium*, but it brings in a new point. Intolerable waste is mentioned (ζημίαν), which presumably means waste of property he is administering, not of his own property to the prejudice of the patron's potential succession.
[12] C. 6. 7. 1; Tacit. Ann. 13. 26.
[13] Tacit. *loc. cit.*
[14] 1. 16. 9. 3.
[15] 37. 14. 1; *h. t.* 7. 1.
[16] 1. 12. 1. 10.
[17] C. Th. 4. 10. 1 = C. 6. 7. 2. These were the newly introduced deputies to the magistrates.

to involve personal intervention of, at least, the accused—the general rule of capital charges[1]. But the very enactment of Severus and Caracalla on which this obvious precaution is based[2] allows a procurator to appear on either side, by way of exception[3]. This, too, indicates that it was not often capital. The whole rule here excepted from does not, it may be supposed, apply to failure in *obsequium*, for though this is ingratitude[4], it cannot lead to enslavement[5], and we are further told[6] that a case of this sort may be disposed of *de plano*.

If there are several patrons they may all accuse (in which case they will reacquire the slave *pro parte*) or, if the ingratitude were clearly to one of the patrons alone, he can accuse (and so acquire the slave), but only with the consent of all[7]. Of a *servus castrensis* freed by the son he is patron and he can therefore accuse[8], but of any slave freed by him, *iussu patris*[9], the father has the right of accusation as if he had manumitted[10]. All this merely illustrates the rule that it is the person who is substantially patron who can accuse. But there are several cases in which the patron has not the right of accusation. The principle is laid down by Caracalla that he has it only when the manumission is gratuitous and voluntary, and not when it is in pursuance of an obligation[11]. Hence he cannot accuse one whom he was bound by *fideicommissum* to free[12], or whom he had bought with the "slave's own money" and freed[13], or one conveyed to him on a condition that he would free him[14], and this whether he actually did free him or the slave acquired his freedom under the Constitutio Marci[15]. All these cases turn on the fact that though the manumitter is technically patron[16], he has conferred no favour: he has done no more than he was legally bound to do and there is no occasion for gratitude. One case looks indeed at first sight exceptional. If a master has taken money from his own slave, or a friend, as the price of freedom and has freed accordingly, he has the right of accusation; for, says the text, though it was not done for nothing he did in fact confer a benefit: he was not like a mere fiduciary manumitter who simply *operam accommodat*[17]. But his position is exactly that of one who has taken a legacy with a *fideicommissum* to free a slave of his own. Such a manumitter cannot accuse, though he shares with the case now under discussion the one characteristic which marks it off from the other cases mentioned; *i.e.*, the fact that the ownership of the slave was not created merely

[1] 48. 19. 5. *pr.* P. 5. 5a. 9.
[2] 48. 17. 1. *pr.*; also expressed by Trajan, 48. 19. 5. *pr.*, and Gordian, C. 9. 2. 6.
[3] P. 5. 16. 11; D. 37. 15. 4.
[4] 37. 14. 1, 19.
[5] C. 7. 16. 30.
[6] 1. 16. 9. 3.
[7] 40. 9. 30. 4.
[8] *h. t.* 30. 2; 37. 14. 8. *pr.*
[9] *Post*, p. 458.
[10] 40. 9. 30. 1.
[11] C. 6. 7. 1.
[12] *Ibid.*
[13] C. 6. 3. 8; *post*, Ch. XXVII.
[14] C. 6. 3. 2.
[15] 37. 14. 8. 1; 40. 9. 30. *pr.*; *post*, Ch. XXVII.
[16] See nn. 11—15.
[17] 37. 15. 3.

with a view to the manumission. And in later law the distinction is very unreal. In this case there is a right *extorquere libertatem*, as in the case of *servus suis nummis redemptus*, or one bought *ut manumittatur*[1]. But as it does not exactly come under the words of the Constitutio, and is clearly an extension, *favore libertatis*[2], and Marcellus, the author of our text, lived at the time of the promulgation of the original decree, the text was probably written long before the principle was extended to this case, and its retention by Justinian is thus an oversight[3].

It hardly needs statement that the act basing the accusation may be one done only indirectly to the patron, *e.g.* refusing to undertake the *tutela* of a son of his[4]. But the rule goes further and allows the *heres* of the patron to accuse. The *lex* Aelia Sentia allows a *filius heres patroni* to accuse[5], and Diocletian provides that as freedmen owe *reverentia* to the *filii patroni* these can accuse them for ingratitude[6]. Marcellus lays down a similar rule for *filius et heres*[7]. In 423 a wider rule seems to have been laid down, giving the right of accusation to any *heres* of the patron[8], and this for ingratitude not to the late patron but to them. In 447 Valentinian seems to have utterly destroyed this right in sons or other heirs: he provides[9] that they cannot accuse, but have ordinary actions (*iniuriarum, etc.*). This prohibition is not found in Justinian's law. He adopts the law of 423 and there are texts in the Digest which give the right of accusation to *filii heredes*[10], and again to *liberi patroni*[11]. In spite of the generality of the words in the Code[8], it is doubtful whether any right exists in later law for *heredes* other than children, and it may be taken for granted that the right is so far connected with the right of succession to the *libertus* that one who is from any cause excluded from that succession cannot accuse. Thus Ulpian tells us that if the *libertus* is *assignatus*, only the assignee can accuse[12]. It must also be noted that none of these texts dealing with accusation by a *heres* says anything about a right of re-enslavement to them, though there is one which may mean that condemnation *in metallum* is possible[13].

Authority on the converse case, that of the *filius liberti*, is scanty. On the one hand we are told in the Digest that the *heres liberti* has all the rights of an *extraneus* against the patron[14], a statement which, in

[1] Probably not, however, till the time of Justinian, *post*, Ch. XXVII.
[2] Note the language of 40. 12. 38. 1 and 40. 1. 19.
[3] The right of accusation is perpetual, but it is lost if the intending accuser ceases to be patron, 40. 9. 30. 3.
[4] 1. 12. 1. 10; 37. 14. 19. - 50. 16. 70. Not *heres heredis*.
[5] C. 6. 3. 12. [7] 37. 15. 3. [8] C. Th. 4. 10. 2 = C. 6. 7. 3.
[9] Nov. Valent. 25. 1. [10] 37. 15. 3; 40. 9. 30. 5.
[11] 1. 16. 9. 3; 37. 14. 1. But these texts are not clear. They may be read as merely giving the patron rights in respect of acts done to *liberi*. This is clearly the meaning of Nov. 78. 2 (*filius*).
[12] 40. 9. 30. 5. [13] 37. 14. 1. [14] 37. 15. 8.

view of its context, seems to mean that he owes him no *reverentia* or *obsequium*, and, as there is also no right of succession in the patron, it would seem to follow that there can be no accusation. But elsewhere we learn that in 426 it was enacted that children of a freedman even holding an office within the class of *militiae* can be re-enslaved for ingratitude. The enactment is, even in the Codex Theodosianus, in a mutilated form, and Justinian abridges it still more[1]. In the earlier form it speaks of *reverentia* as due from the *filius liberti*, and Justinian, striking out this duty, on which the right to accuse logically rests, reserves, nevertheless, the right of accusation. In the earlier form the right extends to children of the patron, but Justinian omits this. The rule is again mentioned, but not so as to explain anything, in the Novels[2]. It may be conjectured that the duty of *reverentia* is newly imposed on *liberi*, by the enactment of 426.

An enactment of Constantine in the Codex Theodosianus dealing with these accusations, and dated 332, reappears in Justinian's Code as of a slightly earlier date[3]. It contains here much that is not in the earlier form, and, no doubt, two constitutions have been run together. As given by Justinian it contains two rather strange rules. It provides that re-enslavement of a *manumissus* to his patron shall affect afterborn children, *filiis etiam qui postea nati fuerint servituris, quoniam illis delicta parentum non nocent quos tunc esse ortos constiterit dum libertate illi potirentur*. The only way in which this can be made intelligible is to refer this provision to *manumissae*[4]. The other curious rule is that the person enslaved for ingratitude after having been freed, *vindicta, in consilio*, will not be restored to liberty on petition except at the patron's request. This, since it does not speak of manumission, seems to refer to *servitus poenae*, which suggests that the other constitution of Constantine, which is lacking in the Codex Theodosianus, but appears in Justinian's Code in the form of a clause added to the one which is in the earlier Code, dealt with *servitus poenae* as a punishment for ingratitude[5].

(*f*) A freeman allowing fraudulent sale of himself. This is one of the many legal institutions which resulted from the fact that slave and free cannot be distinguished by inspection[6].

The general rule is that any *liber homo* over twenty years of age who knowingly allows himself to be sold as a slave, in order to share

[1] C. Th. 4. 10. 3 = C. 6. 7. 4. [2] Nov. 22. 9.
[3] C. Th. 4. 10. 1; C. 6. 7. 2.
[4] C. 6. 7. 2. 1. They are not to have the benefit of their mother's freedom between conception and birth. *Ante*, p. 399.
[5] The allusion to the *consilium* seems to shew that this was originally a rescript dealing with a special case.
[6] 18. 1. 5; *ante*, pp. 5, 6.

the price, is enslaved, or, as it is more usually expressed, is forbidden *proclamare in libertatem, i.e.* to claim his liberty[1]. It is a *capitis deminutio maxima*[2]. The rules are stated in the Digest with a good deal of detail, most of which is fairly clear. It is essential that the object was to share the price[3]. If it was not, then, whatever other fraud was contemplated, liberty can still be claimed[4]. Even though the man had this object he is not barred unless he has actually received a part of the price[5]. It is essential also that the buyer have been deceived: if he knew, then there is no bar to the claim of liberty[6]. But if he in turn sell to an innocent buyer, the subject of the sale is barred from claiming if he has received part of the price, it would seem, on either sale[7]. If there were two buyers, and one knew of the fraud while the other did not, there is a conflict in the texts. The man cannot be partly free. To allow him to be wholly free would make it easy to defeat the whole rule. Accordingly Paul says that as the wrongdoer can claim nothing the man must go wholly to the other: a rational rule, but one in which Ulpian sees a difficulty. He holds that the buyer bought only a share and can therefore be entitled to no more: the rest must therefore go to the buyer who knew the facts, who thus profits by the ignorance of the other buyer[8]. But this rule that he cannot be entitled to more than the share he bought is not inevitable. The case is closely analogous to that of manumission by one of common owners in the classical law, in which case all vested in the other[9]. In fact, the beginning of Ulpian's text looks as if he was about to lay down the rule adopted by Paul: it is probable that the actual solution in the latter part of the text is not his but Justinian's[10].

A person under the age of 25 has in most cases a right of *restitutio in integrum*, but not in this case. The reason given by Ulpian, following Papinian, is that there can be no *restitutio in integrum* from *status mutatio*[11]. This is sufficient: the texts which say that there is *restitutio* in cases of *status mutatio*[12] merely mean that actions that have been lost by the change can be restored by the help of a Praetorian fiction, not that the status can be restored[13]. They have no bearing on the present case[14]. If, however, he was a minor under 20, he is not barred even though he refrains from taking steps till he is over that age. But

[1] In. 1. 3. 4; D. 1. 5. 5. 1; 4. 4. 9. 4; 40. 14. 2. *pr.*; C. Th. 4. 8. 6; C. 7. 18. 1. Male or female, D. 40. 13. 3; C. 7. 16. 16.
[2] In. 1. 16. 1.
[3] C. 7. 18. 1; 7. 16. 5. 1.
[4] 40. 12. 7. *pr.*
[5] 40. 13. 1. *pr.*; C. 7. 18. 1.
[6] 40. 12. 7. 2, 33.
[7] *Ibid.*
[8] 40. 13. 5; 40. 12. 7. 3.
[9] *Post*, Ch. XXV.
[10] Other parts of the text are interpolated, Gradenwitz, Interp. 101.
[11] 4. 4. 9. 4.
[12] 4. 1. 2; P. 1. 7. 2.
[13] *e.g.*, against an *adrogatus* in the matter of debts.
[14] The fact that he was a wrongdoer might have barred restitution in any case, in the absence of *metus*, 4. 4. 9. 2; 4. 1. 7. 1.

if, having been sold under 20, he shares the price after he has reached that age, then the rule barring claim applies to him[1].

The texts speak usually of sale, but it is obvious that many other transactions might have substantially the same result, and accordingly we are told that pledge, gift and giving in *dos* are all on the same level as sale[2], though it is difficult to apply the notion of sharing price to these transactions[3]. So, again, what is sold need not be the *dominium*. Thus Paul discusses the sale of the usufruct of a freeman as a slave, and says, on the authority of Quintus Mucius, that *cessio in iure* under such an agreement makes a slave of him: the buyer will have the usufruct of him, and, the vendor being fraudulent, he is a *servus sine domino*. If, however, the vendor was in good faith he acquires the *nuda proprietas*[4].

Questions of difficulty arise, and are not very clearly dealt with, where the person sold was not actually free, but was entitled to be freed. Where a person to whom fideicommissary liberty was due allowed himself to be so sold, a consultant of Paul remarks that while one feels he ought not to be better off than a freeman in the same case, there is the difficulty that there was a valid sale and a vendible thing sold. Paul's answer is that the contract is valid in each case (which is hardly to the point), that if the buyer knew, no question arises, and that if he was innocent, then the slave who could have demanded liberty and preferred to be sold is barred from claiming his liberty as unworthy of the aid of the Praetor *fideicommissarius*. The fact that he was still a slave and could thus be sold against his will is no defence to him, since he had but to disclose his position to end the whole matter. The case is different, he says, with a *statuliber*. Here a condition has yet to be satisfied, and when it arrives he will, notwithstanding his knowledge and fraud, be allowed to claim his liberty, even though the condition was one within his own power[5]. The point of this last remark is that though it be in his own power, it may be something substantial, and thus differs widely from merely having to state the facts. All this cannot be called satisfactory, though it seems to represent both classical and later law.

The texts throughout speak of the rule as applying to *liberi homines* without any restriction to *cives*, and though it is not expressly so stated, it is clear that no such restriction existed. Thus in the chief enactment

[1] 40. 12. 7. 1; 40. 13. 1. 1; cp. C. Th. 4. 8. 6.
[2] 40. 12. 23. 1. See also the Syro-Roman Law-book, Bruns and Sachau. pp. 22, 55, 88, 102, 124, and Syrische Rechtsbücher, Sachau, pp. 13, 67, 99, 165. These speak only of *ancillae* as given in *dos*.
[3] *Post*, p. 432.
[4] 40. 12. 23. *pr.* Kuntze, Servus Fructuarius, 64, remarks that where he is *servus sine domino* he will reacquire his liberty at the end of the usufruct, *post*, Ch. XXV.
[5] 40. 13. 4; C. 7. 18. 1.

in the Code on the matter, the rule is applied, even though he be a *civis*[1]. In fact the rule that a man cannot validly sell himself into slavery is based on the sanctity of liberty, not on that of citizenship[2]. We have seen that private agreements could not make a man a slave or a *libertus*[3] and we know that in the theory of the Republic, at least as expressed by Cicero, the State could not deprive a man of *civitas* or *libertas*: he was always regarded as abdicating his rights[4]. Exile was voluntary. In like manner in this case the man enslaved is regarded as having abdicated his liberty, and similar language is used in relation to other causes of enslavement *iure civili*[5].

In most of the texts, though not in all, the offender is not described as re-enslaved but as forbidden *proclamare in libertatem*[6]. This rather suggests that he is not exactly enslaved, but is, so to speak, estopped from claiming his liberty. This way of looking at the matter receives some slight support from the words of a text which says that Hadrian, while laying down the general rule, nevertheless, *interdum*, allowed him to proclaim his liberty if he restored the price, *i.e.* he became free again without manumission[7]. From the fact that this is in the Digest it is likely that it was a general rule for later law[8]. But though it suggests that the bar was only procedural, it is really only a case of restitution analogous to that mentioned in the case of *servi poenae*[9] and *liberti ingrati*[10], where there is no suggestion that the slavery was not real. The evidence that it was not mere estoppel but actual slavery is overwhelming. It is so described in many texts[11]. It is called a *status mutatio*, and *restitutio in integrum* is refused on that account[12]. It is a *capitis deminutio maxima*[13]. Manumission is the normal mode of release, and on manumission the man is a *libertinus*, not an *ingenuus*[14], and this is noteworthy, as one might have thought that manumission ended the punishment. But he is barred from claiming *ingenuitas* even after manumission[15]. Again if a woman is so sold her children born during her slavery are slaves[16]. Such a man is the subject of *dominium*[17]. It

[1] C. 7. 18. 1; C. 7. 16. 5. 1 and In. 1. 16. 1 are dealing only with *cives*.
[2] The class of slaves was recruited by purchase from *barbaros* outside the protection of the Empire (Mitteis, *op. cit.* 360 *sqq.*), but this is hardly material.
[3] 40. 12. 37; C. 7. 16. 10. See also C. Th. 4. 8. 6 = C. 8. 46. 10. Apparent exception under *Sc.* Claudianum, *ante*, p. 412.
[4] Cicero, Pro Caec. 33 and Pro Domo 29, *etc.* As to some exceptional cases, C. Th. 3. 4. 1; 5. 8. 1; Vat. Fr. 34.
[5] *e.g.* 1. 5. 21; C. Th. 4. 12. 6. This language does not seem to be used about *libertus ingratus*.
[6] *e.g.* 40. 12. 14, 40; 40. 13. 3, *etc.* *Post*, Ch. XXVIII.
[7] 40. 14. 2. *pr.*
[8] It accords with *favor libertatis* and seems to involve a penalty of part of the price.
[9] *Ante*, p. 411. [10] *Ante*, p. 427.
[11] *e.g.* C. 7. 18. 1; In. 1. 3. 4; 1. 16. 1.
[12] 4. 4. 9. 4. [13] In. 1. 16. 1.
[14] 1. 5. 21; 40. 12. 40. [15] 40. 12. 40.
[16] 40. 13. 3. [17] 40. 12. 23. *pr.*

is clear that it is true slavery, and the point could be raised without *exceptio* as a reply to an *adsertio libertatis*[1].

The rules set forth in the foregoing pages give an account of the institution as it appears in Justinian's law. But the state of the sources raises a curious question as to the origin of the rules. Every legal text which mentions the matter, with two exceptions (a provision of Constantine which is in the Codex Theodosianus but not in Justinian's[2], and one in the Syro-Roman Law-book[3]), is from Justinian's compilations. The institution is of so remarkable a nature that one would have expected to find it frequently mentioned. Yet it appears also, though such a statement must be open to correction, that the historians, poets, grammarians, antiquaries, Christian fathers, and in fact all literature, are equally silent. Plautus handles such a fraud[4], but he does not mention the rule. In view of this conspiracy of silence, we are driven to Justinian to find the origin of the rule. The result is not very informing. From one text we learn that Quintus Mucius was acquainted with it[5]. Another tells us that Hadrian laid down such a rule[6]. In the Code, legislation on the matter is referred to by Gordian, who treats it as an existing institution[7]. Paul treats the matter in a work on the *Sc.* Claudianum[8], and Pomponius speaks of it as to be looked for in *Senatusconsulta*[9]. All this tempts us to think of the Edict, confirmed and extended by *Senatusconsulta* and constitutions, after the Edict had lost its vitality. Some commentators definitely treat it as Edictal[10], but there is no direct evidence for this, except that the Edict did provide for an *actio in factum*, where there had been such a fraud, but the circumstances were not such as to bar claim of liberty. It seems hardly likely that this alone would be stated if both belonged to the Edict. Indeed the words in which Ulpian refers to the *actio in factum* are such as strongly suggest that this was the only Praetorian remedy, and that it first existed at a time when there was no other[11]. There is no trace in the remaining fragments of the Edict of anything remotely resembling a penalty of re-enslavement. And the fact that Marcian speaks of it as *iure civili* is strong evidence that it was not of

[1] From the fact that Gaius does not mention it in his list of *cap. dem. max.* (G. 1. 160), Karlowa infers (R. R. G. 2. 1116) that the effect was then only procedural, becoming substantive later. But G. also omits *libertus ingratus* and *servus poenae*.
[2] C. Th. 4. 8. 6. See the *interpretatio*. As this law appears in Justinian's Code this point is omitted, C. 7. 18. 3; 8. 46. 10.
[3] Syro-Roman Law book, Bruns and Sachau, § 73; Syrische Rechtsbücher, *locc. citt.*
[4] Pers. 1. 3.
[5] 40. 12. 23. *pr.* But it may be Quintus Cervidius Scaevola (Mommsen, Strafrecht, 854). The original Florentine reading was *meus*. Mucius is a generally accepted correction in the MS., but it is late (Mommsen, Digest, Ed. mai. *ad h. l.*). Under the circumstances Quintus *meus* seems rather less likely than Scaevola *noster* which M. cites in support of it.
[6] 40. 14. 2. [7] C. 7. 18. 1. [8] 40. 13. 5.
[9] *h. t.* 3. [10] *e.g.* Karlowa, *loc. cit.*; Girard, Manuel, 100.
[11] 40. 12. 14. *pr.*, 1.

Edictal origin[1]. It is true that among the books in which it is treated are Paul's and Ulpian's commentaries on the Edict. But Ulpian's Book 11[2] is on *restitutio in integrum*, and this matter comes in incidentally. Paul's Book 50 and Ulpian's Book 54[3] are on a topic in which this matter would naturally come if it were in the Edict, *i.e. de liberali causa*[4], and they are in those books of the commentary which according to Blume belonged to the Edictal group. But they are books which, it has been supposed[5], were transferred to the Edictal group from the Sabinian to save time[6].

Examination of the texts raises another question. It is clear that in Justinian's time, sharing the price was essential[7]. It is made the test as early as Gordian[8], and even Hadrian is cited as regarding it as necessary[9]. Yet many of the texts do not mention this requirement[10]. This of itself would mean little, as they may be expressed too generally, but the omissions are noteworthy in kind. In none of the texts from Paul is the requirement mentioned[11], and it is he who cites Quintus Mucius[12], and in the same *lex* tells us that *dos*, *donatio* and pledge are on the same footing as sale[13]. It is difficult to square the notion of sharing price with this, and still more difficult to understand how he could have discussed the matter without adverting to this difficulty if the requirement had existed. The only Roman text independent of Justinian says nothing of this requirement[14]. The texts dealing with the *actio in factum* for cases of fraud where *proclamatio* was not barred do not speak of this as a distinguishing mark[15]. A text which says that a *miles* allowing himself to be sold as a slave is capitally punishable says nothing of this requirement[16]. It may be added that, while some texts speak of sharing the price[17], others speak simply of receiving it[18]. On the other hand it is perplexing to find price sharing mentioned in every one of Ulpian's texts[19]. So too the age rule is not treated uniformly. Some texts do not mention it[20]. Others speak merely of *maior* and *minor*[21]. All this suggests that the rule as we have it in the

[1] 1. 5. 5. 1. Explained away by Girard (*loc. cit.*) as a reference to confirmation by *Scc etc.*, and by Karlowa (*loc. cit.*), who observes that the contrast is with *ius gentium*.
[2] 4. 4. 9. 4; Lenel, Ed. Perp. (2) xxii.
[3] 40. 12. 7; *h. t.* 23.
[4] Lenel, Ed. Perp. (2) xxii.
[5] Roby, Introd. to Digest, liv.
[6] Lenel does not treat it as Edictal.
[7] 4. 4. 9. 4; 40. 12. 7. *pr.*; 40. 13. 1.
[8] C. 7. 18. 1.
[9] 40. 14. 2. *pr.*
[10] 1. 5. 21; 40. 12. 23, 33; 40. 13. 3, 4, 5; C. 7. 14. 14; 7. 16. 16; C. Th. 4. 8. 6, *etc.*
[11] 40. 12. 23. *pr.*, 1, 33; 40. 13. 4 (a long and argumentative text).
[12] 40. 12. 23. *pr.*
[13] See also C. 7. 16. 16, and Syrische Rechtsbücher, *locc. citt.*
[14] C. Th. 4. 8. 6.
[15] 40. 12. 14—22.
[16] 48. 19. 14.
[17] 4. 4. 9. 4; 28. 3. 6. 5; 40. 12. 7. *pr.*, 1, 40; 40. 13. 1. 1; C. 7. 18. 1.
[18] 40. 13. 1. *pr.*; 40. 14. 2. *pr.*
[19] 4. 4. 9. 4; 28. 3. 6. 5; 40. 12. 7; 40. 13. 1. 1. Of these some are corrupt. 28. 3. 6. 5 and 40. 12. 7 shew that price-sharing was not the only case. The different MSS. of the Syro-Roman Law-book deal capriciously with this point. In one, and that, it seems, an early one (Syrische Rechtsbücher, 67), the rule is applied though he gets none of the price.
[20] 1. 5. 21; 40. 12. 23, 33; C. 7. 18. 1.
[21] 40. 14. 2. *pr.*; C. Th. 4. 8. 6.

Digest is the result of an evolution[1]. But the stages in that evolution cannot be stated with any confidence. It is probable that the rule of enslavement is as old as Q. M. Scaevola, but even this is not certain, as the Quintus mentioned may be Q. Cerv. Scaevola[2]. The rule of price sharing is probably not nearly so old. No text takes it further back than Hadrian, and in the text which treats the requirement as known in his time, the words referring to price are in a parenthesis. The course of events may have been as follows: A praetorian *actio in factum* was given covering all cases. Then, perhaps still under the Republic, but probably later[3], the more drastic remedy was introduced apparently by *Senatusconsulta*[4], which specified the cases in which *proclamatio* was refused. They were at least two, price sharing, and desire to exercise the function of *actor*[5]. As time went on this last died out. In private life, as in public affairs, there was a great development of free labour, and the increased power of representation in the field of contract made it possible and usual to employ free *actores*[6]. By the time of Justinian price sharing was the only case of importance left, and thus it appears as a general condition on the bar. The allusion to it appears in most cases in a parenthetical form[7], and may well be, at least in some cases, an interpolation.

The *actio in factum* above mentioned has, in strictness, nothing to do with enslavement, and thus it is not necessary to state its rules in detail[8]. It covered any possible case in which a freeman *dolo malo* allowed himself to be sold as a slave, not covered by the other rule. Ulpian so expresses its scope[9], a fact which indicates that its field varied with changes in the scope of the more severe rule. It required *dolus*, beyond mere silence, and thus capacity for *dolus*, on the part of the man; but, apart from that, his age was not material[10]. The nature of the fraud was not material, and he need not have profited. The action was for double any loss or liability: it was independent of any contractual remedies against the actual vendor, and the buyer must have been ignorant of the facts[11].

[1] As to interpolation of some of these texts, see Gradenwitz, Interp. 100 *sqq.*
[2] 40. 12. 23. *pr.* See *ante*, p. 432. Karlowa, R. R. G. 2. 1117, thinks this text has nothing to do with our rule.
[3] Karlowa, *loc. cit.*, supposes our rule republican, on account of 40. 12. 22. 5. But that assumes that it antedated the *actio in factum*, which does not seem likely.
[4] 40. 13. 3.
[5] Karlowa, *loc. cit.*; 28. 3. 6. 5; C. Th. 4. 8. 6. 1. Allowing themselves to be included in a *dos* is another probable case. See Syro-Roman Law-book and Syrische Rechtsbücher, *locc. citt.* Not much can be safely inferred for Roman law from these sources. See Mitteis, Z. S. S. 25. 286 *sqq.* But Paul, too, refers to this case as also to that of allowing himself to be included in a pledge or a gift, 40. 12. 23. *pr.* It is possible that the actual limitation of the rule to price sharing is due to Ulpian.
[6] Wallon, *op. cit.* 3. 107 *sqq.*
[7] *e.g.* 4. 4. 9. 4; 40. 14. 2. *pr.*
[8] They are fully set out in 40. 12. 14—22.
[9] 40. 12. 14. 1.
[10] 40. 12. 14. 2, 15.
[11] *h. t.* 18, 16. 2, 20. 4.

It remains to consider shortly the general effect of enslavement on the man's preexisting rights and duties. It must be borne in mind that the vast majority of slaves were so by birth, and that as to them no such question can arise, while of the rest, a number, which must have varied greatly from time to time, were so by capture. Their position, which was abnormal, has already been considered[1]. The remainder, whom alone we have to discuss, must have been relatively very few.

A number of general propositions on the matter are familiar. Every enslavement is a *capitis deminutio maxima*, for this is declared to result wherever liberty and citizenship are lost[2], and it is mentioned expressly in several cases, *e.g.* those of *servus poenae, libertus ingratus* and fraudulent sale[3]. These are, of course, the most important cases in later law. For earlier law it is stated for *incensi, dediticii* reenslaved, and cases under the Sc. Claudianum[4]; this list also being representative rather than complete.

A slave is a mere nullity at civil and praetorian law[5]. He has no *caput*, or what seems to be the same thing, his *caput* has no *ius*[6]. The principle is summed up in the remark that supervening slavery is akin to death[7]. Yet this does not adequately express the matter: the event is in some ways more destructive than death. Like death it destroys usufructs and similar rights[8]. There needs no authority for the statement that it ends all those relations of private and public life which imply that the persons concerned are *cives*. It ends any office, private or public, such as *tutela*. It ends marriage. It ends partnership, precisely as we are told, because the man is regarded as dead[9]. It produces all the effects of other *capitis deminutiones*, which need not be particularised. But it does much more. A will, which death brings into operation, is rendered *irritum* by enslavement[10]. Death avoids any gift, to the person who dies, by a will not yet operative (subject to some exceptions), and so does enslavement, *quia servitus morti adsimilatur*[11]. But even if it was after *dies cedens* he could not claim, nor do we learn that his heirs could, as they could in case of death[12]. It destroys all rights resulting from cognation or affinity[13]. We are told that *iura sanguinis* cannot be destroyed by any civil law[1], but slavery is *iuris gentium*.

In dealing with the effects on debts due to and by him we have to remember that persons made slaves fall into two classes: they pass either into private ownership or into none. For it is a noticeable fact that there is no case (with the exception, if it be an exception, of the *captivus*) in which he vests in the Fisc. In some cases the Fisc sells him, but it does not appear that the State has the *dominium*, even where the price vests in it.

For delicts committed by such persons we know that the new owner is noxally liable: *noxa caput sequitur*[2]. But where the man was free before, there is in addition to this noxal liability the personal liability of the man. This is a burden on his estate, and need not be distinguished from other debts, except that like all debts *ex delicto*, it falls on successors only to the extent of their benefit, if any. In the case of *servi poenae* there can be no noxal action. There is no owner; moreover they cannot be allowed to pass from their terrible position into that of ordinary slaves because they have committed a wrong.

As to contractual and quasi-contractual debts, direct authority is very scanty. It is fairly certain that the liabilities and rights, so far as they survive, go with the *bona*. We are told that this is so as to liabilities[3], the man's own liability being extinct[4]. Another text tells us that there is an *actio utilis* against the *dominus* and if it is not defended *in solidum*, there is *missio in possessionem* of the goods of the former freeman[5], a rule analogous to that in the case of *adrogati*[6]. This implies that the property goes to the *dominus*, which is no doubt the case under the Sc. Claudianum[7], and in fraudulent sale.

As to the converse case, that of debts due to the enslaved man, there seems to be no textual authority at all. It seems likely that the analogy with *adrogatio* governs this case also. If that be so the *dominus* acquires rights of action *ipso iure*[8]. The case is differentiated from that of *bonorum emptor* in that there he has no civil law right; his succession is edictal, and thus his actions are indirect[9]. None of our cases is edictal, subject to what has been said above[10] as to the case of reenslavement for ingratitude.

Altogether different considerations arise in relation to *servus poenae*. Here, in general, the Fisc acquires, though it does not own the man.

1 *Ante*, pp. 291 *sqq*. 2 4. 5. 11. 3 In. 1. 16. 1.
4 G. 1. 160; Ulp. 11. 11. *Captivitas* is not in these lists. The case is a special one. The law of *postliminium*, and the effect allowed to the will of one who dies a captive, make this a rather abnormal case. See *ante*, pp. 291 *sqq*.
5 28. 8. 1. *pr*.; 50. 17. 32. The text adds that they are equal to other people by natural law. This justifies the natural obligation of the slave (*post*, Ch. XXIX.) and counts for something in the gradual recognition of *cognatio servilis*. *Ante*, p. 76.
6 4. 5. 3. 1; In. 1. 16. 4. 7 50. 17. 209; Nov. 22. 9; G. 3. 101.
8 7. 4. 14; In. 2. 4. 3; C. 3. 33. 16. 2; P. 3. 6. 29.
9 17. 2. 63. 10; In. 3. 25. 7. If entitled under *fideicommissum* to appoint property among his issue he cannot do it when enslaved: it is as if he had died without doing it, 36. 1. 18. 6.
10 28. 3. 6. 5, 6, 8—12; In. 2. 17. 4, 6; G. 2. 147.
11 35. 1. 59. 2; 49. 14. 12. 12 38. 17. 1. 4. 13 38. 8. 7; 38. 10. 4. 11; In. 1. 16. 6.

1 50. 17. 8. 2 In. 4. 8. 5; G. 4. 77. 3 4. 5. 2. *pr*.
4 *Novus homo videtur esse*, 34. 4. 27. 1; 44. 7. 30.
5 4. 5. 7. 2. 6 In. 3. 10. 3.
7 *Ante*, p. 413. In Justinian's latest legislation the rule may have been different in the case of *libertus ingratus*. Nov. 22. 9, of which the rubric seems hardly consistent with the text, may mean that the children took some of the goods. If so they no doubt incurred proportionate liability, but the text is extremely obscure.
8 In. 3. 10. 1, 3. 9 G. 3. 80, 81. 10 *Ante*, p. 431.

There seems no reason to distinguish this from other cases in which the Fisc takes a succession[1]. On this view all that need be said is that the Fisc takes the estate subject to its debts[2]. The creditors can make their right effective by *bonorum venditio*[3]. The Fisc can prevent the forced sale of a clearly solvent estate by paying off the creditors. On the other hand if the property has definitely vested in the Fisc, it can sue for debts due to the estate, having in such cases only such privileges as the private creditor would have had[4]. We must remember however that a share of the property goes to the children (and at some dates to other successors[5]). Where the Fisc takes no share at all, it seems clear from the language used in the different texts, that it is an ordinary case of succession[6]. So also where the man was a *decurio*, and part goes to the children (in some cases) and part to the *curia*[7]: both the children and the *curia* appear to inherit. So too where he was a *libertus*; the rights of *patroni* and *filii patroni* are not affected: they inherit as to their share[8]. But, at least in the time of Justinian, where the children, and they alone, get a share, they do not appear to inherit, but to receive a grant from the Fisc[9]. As the Fisc takes only subject to debts and has a right of action, we must assume that the children have none, and are not liable. But we cannot be sure that this is the right interpretation, and, if it is, we cannot be sure that the classical rule was the same. Hadrian's rule is expressed in the same language[10]. But that of the law of 380 is obscure and may mean that they are heirs *pro parte*, though the expression, *fiscus concedit*, appears therein, as in the abridged edition in the Code[11].

[1] The omission of this case in 49. 14. 1 is due to the fact that here no *nuntiatio* was in question.
[2] 49. 14. 1. 1, 11, 12, 17, 37; Lenel, Ed. Perp. § 212.
[3] 48. 20. 4, 10. *pr.*; C. 9. 49. 5.
[4] 49. 14. 3. 8, 6. *pr.*, 21.
[5] *Ante*, p. 407.
[6] C. Th. 9. 42. 2, 6, 9, 10, 23.
[7] C. 9. 49. 10 = C. Th. 9. 42. 24.
[8] 48. 20. 7. 1, 8.
[9] *h. t.* 1, 7. *pr. etc.*
[10] *h. t.* 7. 3.
[11] C. Th. 9. 42. 8 = C. 9. 49. 8; C. Th. 9. 42. 9. As to *postliminium*, *ante*, pp. 304 *sqq.*; *restitutio servi poenae*, *ante*, p. 411; *sanguinolentus*, reverting to *ingenuitas*, *ante*, p. 422; redemption of person who fraudulently sells himself by return of price, *ante*, p. 430.

CHAPTER XIX.

RELEASE FROM SLAVERY. GENERALIA. OUTLINE OF LAW OF MANUMISSION DURING THE REPUBLIC.

IT is not necessary to attempt the hopeless task of defining liberty. Justinian adopts from Florentinus[1] the definition: Liberty is the natural capacity (*facultas*) of doing what we like, except what, by force or law, we are prevented from doing. This definition no doubt expresses certain truths. Liberty is "natural": slavery is *iuris gentium*. It is presumed that a freeman can do any act in the law: his incapacity must be proved. The reverse is the case with a slave. But, literally understood, it would make everybody free. As a matter of fact all persons not slaves are free, and as we have arrived at a more or less exact notion of Roman slavery we may leave the matter there.

The conception of manumission needs some examination. It is not in strictness transfer of *dominium*. A man has no *dominium* in himself or his members[2]. Nor is it an alienation of liberty. The right received is not that of the master, and the rule that a man cannot give a better liberty than he has is intelligible without reference to such an idea. Nor is it a mere release from the owner's *dominium*: that is *derelictio*, from which manumission differs in several ways. Dereliction does not make the man free, it merely makes him a *res nullius*[3]. Moreover manumission leaves many rights in the master, and there is no such thing as partial dereliction[4]. If it had contained a dereliction, then, since *derelictio* is purely informal, a manumission which failed for lack of form would have been a dereliction. But this was not the case. At civil law such a defective manumission produced no effect at all, and even under the Praetorian law and the *lex* Iunia it left large rights in the master, and entitled no third person to seize[5]. We have seen[6] that the Roman conception of slavery was subjection to ownership, actual or potential: a slave was a human *res*. Manumission is an act emanating

[1] 1. 5. 4; In. 1. 3. 1.
[2] 9. 2. 13.
[3] 41. 7. 2.
[4] *h. t.* 3.
[5] *Post*, p. 445.
[6] *Ante*, p. 2. As to the nature of manumission, see further, *post*, App. IV.

from the holder of ownership removing the man (by the authority of the State, which is present in all formal manumission) from that class. It is essentially a release not merely from the owner's control, but from all possibility of being owned. It does indeed confer rights and capacities on him[1], but it is from the notion of destroying capacities for rights over him that the conception starts.

There are some general rules which may be shortly stated here, though some of them will need more detailed treatment later.

An *ingenuus* is a freeborn person who has never been in lawful slavery[2]. One who has been a slave is, on release from that position, a *libertinus*[3]. The law favours freedom on the one hand but guards the purity of *ingenuitas* on the other. An *ingenuus* does not cease to be one by being sold by his father[4], or by manumission from apparent slavery[5], or by being treated in any way as a slave, wrongly[6]. Even a declaration by the man himself under pressure that he is not an *ingenuus* does not deprive him of that position[7]. Adverse decision does not prevent repeated assertion of liberty, though a decision in favour of liberty may prevent its being again disputed[8]. In the same way a man cannot become a slave by lapse of time spent in apparent slavery[9], though he may be free by prescription[10]. All these are evidences of the favour shewn to liberty: *infinita est aestimatio libertatis*[11]. On the other hand, though a *libertinus* may be adopted, at any rate by his patron, he does not thereby become an *ingenuus*[12], so far, at least, as rights in relation to third persons are concerned[13].

To these general rules there are some exceptions, little more than apparent, which need only mention. They can be grouped under three heads.

(i) A *libertinus* may by special grace acquire the rights of an *ingenuus*. With this case we shall not deal[14].

(ii) It is possible in certain cases, already discussed, for a person to be a *libertus* without having been a slave[15].

(iii) It is possible for one who has been validly enslaved to become an *ingenuus* on again becoming free[16].

There is a general tendency, doubtless accentuated in later law, to interpret rules and facts as far as possible in favour of liberty. It is a

[1] *Post*, p. 439. [2] G. 1. 11. [3] 1. 5. 6; In. 1. 5. *pr.*; G. 1. 11.
[4] P. 5. 1. 1; C. 7. 16. 1, *ante*, p. 420. [5] P. 5. 1. 2; In. 1. 4. 1.
[6] P. 5. 1. 3. [7] *h. t.* 4. [8] C. 7. 16. 2, 4.
[9] C. 7. 22. 3. [10] C. 7. 21. 7; 7. 22. 1, 2; *post*, Ch. XXVIII.
[11] 50. 17. 176. 1. [12] 1. 5. 27; 1. 7. 46; Aul. Gell. 5. 19. 12.
[13] 1. 7. 15. 3, 46; 2. 4. 10. 2; 37. 12. 1. 2; 38. 2. 49. An *ingenuus* adopted by a *libertinus* was still of course *ingenuus*, 1. 7. 35. From the texts cited in this and the last note, with others, it appears that adrogation of *libertini*, by any but the *patronus*, was one of the things which *non debent fieri, sed facta valent*.
[14] See, *e.g.*, Moyle, ad In. 1. 5. 3. [15] *Ante*, p. 412.
[16] Thus *captivus* is a slave but reverts to *ingenuitas* by *postliminium* (*ante*, p. 304). See also the case of children sold, *ante*, p. 420, and see p. 410.

general principle that in doubtful or ambiguous cases it is best to follow the more liberal view[1]. Liberty being of immeasurable value and *omnibus rebus favorabilior*[2], the principle is naturally laid down that in doubtful questions affecting liberty, *secundum libertatem respondendum erit*[3]. Countless illustrations of this tendency will be found in the following chapters.

A slave may become free either as the result of manumission by his *dominus*, or without the latter's consent. It is convenient to begin with manumission, and, as the topic is somewhat complicated, to deal first with the simplest case. This is manumission, by a sole and unencumbered owner who is a *civis* not under any disqualification, of a slave, himself under no disqualification, and in whom no other person has any right. And this must be treated historically.

With the very early law we are not concerned, and indeed little but guesswork is possible in relation to it. The origin of manumissions is unknown. Dionysius of Halicarnassus credits the foundation of the law on the point to Servius Tullius[4], but as he refers nearly everything else to that king no particular weight attaches to his testimony. The XII Tables shew that at their time it was an established institution[5]. All manumission is regarded as an institution of the *ius gentium*[6]. It is a *datio libertatis*: *liberatur* (*servus*) *potestate*[7]. But it is more than that: it is, at any rate during the Republic, the making of a *civis*. Ulpian tells us that *legitime manumissi, nullo iure impediente*[8], become *cives*. In the Digest he speaks of the patron's rights as a return for having made *cives* of the slaves[9]. Thus citizenship is always the ordinary result of a typical manumission. From this characteristic of manumission it follows that all the modes of manumission are public, *i.e.* are in some way under public control. The State is interested in seeing that *civitas* is not bestowed on unworthy persons[10].

Of these modes of manumission there are three.

I. *Censu.* Although the Census survived into the Empire, it is so essentially a republican institution that it seems best to say here the little that is to be said about it.

It is not necessary to discuss the Census in general: we are concerned with it only as a mode of manumission. It is probable that this form of manumission is extremely old, but it hardly survives into the classical

[1] *Benigniora praeferenda; benigniorem sententiam sequi non minus iustius quam tutius est; humaniorem sententiam sequi oportet*, 28. 4. 3; 34. 5. 10. 1; 35. 2. 32. 5; 50. 17. 56, 192. 1.
[2] 50. 17. 122.
[3] 50. 17. 20. The language, though not the decision, of C. 2. 4. 43 is in the same vein.
[4] Dion. Hal. 4. 22. [5] Bruns, Fontes, 1. 24, 28. [6] In. 1. 5. *pr.*
[7] *Ib.*; D. 1. 1. 4. [8] Ulp. 1. 6.
[9] 38. 2. 1. *pr.*; 38. 16. 3. 1. [10] Boethius in Cic. Top. 2. 10.

law with which we are really concerned. There was a census in A.D. 74, and there was at least the name of one in 243. But this form of manumission was really extinct. Paul does not mention it. Ulpian says, *olim manumittebantur censu*[1]. Gaius, however, writing somewhat earlier, speaks of it in several texts as if it still existed[2]. The Fragmentum Dositheum of about the same date as Gaius discusses it as a living institution[3]. But in several other texts in the Fragment, where we should have expected to see it side by side with *vindicta*, it is not mentioned[4]. This circumstance and the known facts of history[5] make it clear that the texts are discussing an unreality. The institution is obsolete. Such counting of the population as occurs under the Emperors may be called by the same name, but it has little or no relation to the republican Census.

The Census, taken every five years[6], is in essence a list of *cives* made for fiscal purposes and for the regulation of military service. The form of manumission is the inscription of the name of the man on the list of citizens. It involves three steps. The slave presents himself and claims to be a citizen: *censu profitebantur*[7]. The assent of the owner is shewn: *iussu* or *consensu domini*[8]. The Censor inscribes the name on the list of *cives*. On each of these three requirements there is something to be said[9]. The *professio* mentioned is the formal presentation of himself which each *civis* was bound to make to avoid the penalties falling on an *incensus*[10]. The *iussum* of the master does not seem to have been a formal part of the ceremony, though of course the Censor would not enrol the name without it[11]. It is an authorisation to the slave, not to the Censor, and its informal nature is expressed in Cicero's description of it as *consensus*[12]. We are not expressly told that the master had to be present, but this was probably the case, especially in view of the fact that in 176 B.C. a temporary rule was laid down that in certain cases of manumission before the Censor or other magistrate the owner was required to take a certain oath[13]. No juristic text actually mentions the entry on the roll as an essential, but Cicero does[14], and the very name of the institution and the language of the other texts obviously take it for granted[15]. The Censor could no doubt refuse to enrol the man.

[1] Ulp. 1. 8. [2] G. 1. 17, 44, 138, 140. [3] Fr. Dos. 5, 17.
[4] Fr. Dos. 11, 13, 15. [5] Mommsen, Röm. Staatsr. (3) 2. 1. 415; D. P. R. 4. 98.
[6] Fr. Dos. 17. In early times it was frequently less. [7] Ulp. 1. 8.
[8] *Ibid.*; Cicero, De Orat. 1. 183.
[9] Fully discussed by Degenkolb, Befreiung durch Census, 3—14, of which work much use has been made.
[10] *Ante*, p. 401.
[11] Degenkolb treats it as essential but not as part of the form. It is in this way that he explains release from *mancipium* without consent of the holder.
[12] Cicero, *loc. cit.* [13] Livy, 41. 9.
[14] Cicero, de Orat. 1. 183.
[15] Fr. Dos. 17; Theophil. 1. 5. 4. He describes the process inexactly.

The process could take place only at Rome, for it was only at Rome that the true Roman Census was held[1]. The slave must be the property *ex iure quiritium* of the manumitter[2], and it is plain that no modality of any kind could be attached to manumission in this form. But it must be borne in mind that the freedman's oath was not a condition, and, no doubt, by means of it many conditions could practically be imposed, breach of the undertaking being a punishable case of ingratitude.

The procedure of the Census is a long business: the new lists cannot be prepared in a day. Apparently it was not usually till towards the end of their eighteen months of office that the lists were completed and the Censors proceeded to the formal act, *lustrum condere*, which brought the new lists into operation. It was not clear whether the slave was free from the moment of enrolment, or only when the new lists came into operation. The doubt is referred to by Cicero, and again in the much later Fragmentum Dositheum[3]. It was not confined to this question, but extended to all acts of the Censor taking effect in the Census Roll, *e.g. notae censoriae* and the like. It would seem that the question must have been of great practical importance, and yet that it was never determined. It may be that these various acts, which were more than mere records of fact, were postponed till the last moment. Logic seems to require that, at least in our case, the later date should apply. It seems that it must have been so, so far as concerns public law. But it may well be that for private law the practice was otherwise. The entry does not purport to make him a *civis*: it is a fictitious renewal of an entry, and the Censor is recording the fact that the man is a *civis*, not making him one. Strictly indeed he is only recording the fact that the man has claimed to be a *civis*, and if such an entry is made in error it is null[4], and cannot operate by lapse of time, for it is not till much later that we find rules as to liberty by prescription[5].

Some of the early Emperors were Censors, and Domitian was Censor for life. It does not seem that he proceeded to any census, or *lustrum condidit* in the old sense. There are no signs of manumission before him as Censor: the whole institution is at an end.

II. *Vindicta.* This is a "fictitious" application of the procedure in a *causa liberalis*. If a claim of liberty was made on behalf of a man

[1] Fr. Dos. 17. [2] *Ibid.* [3] Fr. Dos. 17; Cicero, *loc. cit.*
[4] Mommsen, Röm. Staatsr. (3) 2. 1. 374, Dr. Pub. Rom. 4. 521. Degenkolb remarks that the doubt shews that enrolment was needed.
[5] *Post*, Ch. XXVIII. Late in the Republic the rules were so far relaxed that the collection of statistics was made in some cases in the various *municipia*. But this was not the actual Census, and it does not seem that the Censors were present. See Mommsen, Röm. Staatsr. 2. 1. 368; Dr. P. R. 4. 45.

alleged to be wrongully detained as a slave, the claim took the form of an action brought by an *adsertor libertatis*, claiming him as a free man, the form being, at this time, that of *sacramentum*[1]. Used as a mode of manumission it was essentially a case of *cessio in iure*[2]. The *adsertor libertatis* who, at least in later times, was often a *lictor*, claimed him before a magistrate as free, touching him with the wand which appears in *sacramentum*, and which gave its name to this mode of manumission. The *dominus* made no defence and the magistrate declared the man free[3]. As it was an *actus legitimus*, no condition or suspension was possible: by addition of *dies*, or condition, *actus legitimi in totum vitiantur*[4].

From the form and nature of the process it is clear that the presence and assent of the magistrate were necessary. From the text of Livy already cited[5] it may be assumed that the actual presence of the *dominus* was needed, though the oath there referred to was a temporary matter[6]. As it was in form a *vindicatio*, the slave must be on the spot.

We are not concerned with the position of a *libertinus*, but it may be as well to observe that it was not unusual to exact an oath, before manumission, that the man would render certain services. The oath was not in itself binding, but was regarded as putting the slave under the duty of swearing again, or promising, immediately after the manumission[7]. Breach of the undertaking would expose the freedman to the ordinary liabilities for ingratitude[8]. Even though the *libertus* were *impubes*, if he were old enough to take an oath, an *actio utilis* would lie to enforce the duties after puberty, and there were some duties which he could render even *impubes*; for instance, he could act as *histrio* or *nomenculator*[9].

III. *Testamento.* Gratuitous benefits are, naturally, given most readily at death. This mode of manumission was therefore by far the most important in the law. It will be necessary to deal with it at some length when we are discussing the classical law[10]: here it will suffice to describe its general nature, and to lay down a few main rules.

The origin of the institution is not certainly known[11]. It is clearly as old as the XII Tables. Pomponius tells us that they gave a very wide power of, *inter alia*, manumission, by the *uti legassit* clause, a power afterwards restricted in divers ways[12]. So Ulpian, in an imperfect

[1] As to its working in an actual claim, *post*, Ch. XXVIII. [2] *Post*, p. 451.
[3] Ulp. 1. 7; G. 1. 17; Roby, Rom. Priv. Law, 1. 26.
[4] 50. 17. 77. As to tacit conditions and suspensions, *post*, p. 455. [5] Livy, 41. 9.
[6] Some remarks of Diodorus Siculus (36. 4. 8) suggest that in time of crisis the Praetor could free without consent of *dominus*.
[7] 40. 12. 44. *pr.* The name of the patron's wife might be used in the stipulation, *h. l.* 1.
[8] *Ante*, p. 422. [9] 40. 12. 44. 2. [10] *Post*, p. 460.
[11] Fully discussed, Appleton, Le testament Romain, 86 *sqq.*
[12] 50. 16. 120.

text, seems to base the law on the XII Tables[1]. But there is reason to think it older. The incomplete text of Ulpian ends with the word *confirmat*, and may mean that the *lex* confirmed an existing practice, or that it confirmed the testator's declarations. But the most important point is that the *lex* contained detailed rules as to succession to freedmen, as to conditional gifts of liberty, as to the person to whom a man might make a payment on which his liberty was conditioned, and so forth[2], a state of things which is most unlikely if the whole institution was new. We will not enter on the still more speculative question as to the relative antiquity of this and the other two modes, but will merely remark in passing that it is the only one of the three which is direct, *i.e.* is not based on a fiction. From this it has been inferred[3] that it was the oldest: the contrary conclusion seems more reasonable.

The will of this age was, of course, the *testamentum in comitiis calatis*. The disappearance of public control is shewn by the extension of the rules to the mancipatory will of the later Republic: in that will the public aspect of the transaction has become a mere tradition.

Liberty could be given directly only to slaves of the testator, the model followed being plainly that of a *legatum per vindicationem*[4]. In conformity with the same principle Servius established the rule that the slave must have been the property of the testator both at the time of the will and at the time of death[5]. This is the rule in such legacies[6], apart from the *lex* Papia which postponed *dies cedens* to the opening of the will. We are not indeed told that our rule has anything to do with *dies cedens*, but it seems probable that it had, and this may serve to explain an apparent conflict. As in the case of legacy, *media tempora non nocent*. Sale and reacquisition after the will was made left the gift valid[7]. Maecianus tells us that if liberty was given to a slave, and he was sold, but became again the property of the *hereditas*, before *aditio*, the gift was valid[8]. Gifts to slaves ceded only on *aditio*[9], a fact which brings the present rule into connexion with the theory of *dies cedens*[10].

Of the form of the gift little need be said here: it will be considered later. There must be a clear expression of intent that the man should be free. Thus it might be *liber sit, liber esto, liberum esse iubeo*, and the like[11]. Implied gifts are not readily admitted even in later times[12]. It will be seen that the above forms follow closely that of *legatum per*

[1] Ulp. 1. 9. [2] Ulp. 2. 4; D. 40. 7. 25, 29. 1. [3] Appleton, *loc. cit.*
[4] C. 7. 2. 9. So, if a *servus alienus* is freed directly and *legatus* in the same will, the legacy is good, for he can be legated, though not *per vindicationem*, 30. 108. 9.
[5] 40. 4. 35. [6] G. 2. 196. [7] *Ibid.*
[8] 40. 4. 58. [9] In. 2. 20. 20.
[10] The position of *statuliber* is in strictness acquired only on *aditio*, though this is relieved against in later law, 40. 7. 2. *pr.*, 9. 3, *ante*, p. 291.
[11] Ulp. 2. 7; P. 4. 14. [12] *Post*, p. 461.

vindicationem. The question may be asked: what would be the effect of such a gift as *heres meus damnas esto Stichum liberum esse sinere*? Such a gift must, it seems, have been null. A legacy in that form gave only a *ius in personam* and this could not have given more. But it could not have given a right of action to the man, and fideicommissary gifts were not yet invented. The same would no doubt be true of a gift *heres meus damnas esto Stichum manumittere*[1]. The same reasoning applies. No doubt the institution might be made conditional on the manumission by the *heres* of his or a third person's slave. But this is a wholly different matter: it is in no way enforceable by the slave. It is another question how far a person who disregarded such an injunction to free one of the slaves might incur the disapproval of the Censor.

The gift takes effect only upon the actual operation of a valid will, but if the *heres* has accepted, the gift remains effective even though he afterwards gets *restitutio in integrum*[2]. If, however, the will is *ruptum*, it was never valid at all, and, apart from collusion, a liberty which may have apparently taken effect by entry is void[3]. So also it fails in an ordinary case of *testamentum destitutum*, where, apart from collusion, no heir enters[4]. There are, however, exceptional cases in which the gift will be effective, though the will does not operate, for instance, where a *heres*, entitled both by the will and on intestacy, takes on intestacy—*omissa causa testamenti*. Other cases of this type will be considered later[5].

Such gifts might, like legacies, be adeemed, and though they were not subject to the *lex* Falcidia, passed just at the close of the Republic, their existence in a will gave rise to some difficult questions when that *lex* operated. Both these topics will be more conveniently considered in connexion with the classical law[6].

These three were the only forms of manumission which were recognised during the Republic. They all, whenever they were valid at all, made the freedman a *civis*, if we leave out of account for the present the slave freed by a Latin owner. But it is obvious that occasions must have arisen under which the intention to free a man, there and then, was expressed in less formal ways. Two such are in fact recorded. They are the declaration, *inter amicos*, that the man is free, and writing him a letter of enfranchisement[7]. Such declarations were void in early law. But, towards the close of the Republic, the

[1] Accarias, Précis, § 56, thinks such a gift valid. He does not advert to the question of the remedy.
[2] C. 7. 2. 3. As to case of *heres necessarius*, *post*, pp. 505 *sqq*.
[3] *h. t.* 12. 2; D. 40. 5. 24. 11. [4] C. 7. 2. 12.
[5] 40. 4. 23. *pr*. *Post*, Ch. XXVII. [6] *Post*, pp. 473 *sqq*.
[7] See *e.g.* G. 1. 44. *Amici* are *testes*. See G. 2. 25, and Bruns, Syro-Roman Law-book, 195. See also Suetonius, de Rhet. 1. As to manumission *in convivio*, *post*, p. 446.

Praetor interfered to protect persons who had been so declared free and gave them *de facto* enjoyment of liberty. Hence they were said *in libertate servari auxilio Praetoris*[1], *in libertate tuitione Praetoris esse*[2], *in libertate domini voluntate morari*[3] (or *esse*). The texts are explicit that, notwithstanding the declaration, they were still slaves (*manebant servi, non esse liberos, ex iure quiritium servi*), and in accordance with this we learn that their *peculia* and all that they acquired belonged to their (former) master. It is clear that it was not revocable, and there is no reason to doubt that it was binding on successors in title of all kinds. It is also fairly clear on our few authorities that the status was not heritable: such persons were slaves and the child of a woman in such a position would be an ordinary slave. The main, indeed, as far as can be seen, the only, effect was to free them from any duty of working, so that if the owner tried, by force, to make them work for him, the Praetor intervened to prevent it[4]. They were evidently not *derelicti*: the informal declaration that they were to be free was very far from an abandonment of all rights.

Doubt may be thrown on some of these conclusions by other language of these texts. Thus Gaius speaks of them as *ex iure quiritium servi*, and goes on to speak of the master as *patronus*[5]. And the Frag. Dositheum speaks of him as *manumissor* and *patronus*, and says that the person so dealt with, *omnia quasi servus acquirebat manumissori*[6]. But it must be remembered that these texts were written a century and a half after the *lex* Iunia had turned these processes into real manumissions, and this part of the language is coloured by that fact. More weight must be given to the words which express what was certainly not the law of the age in which they were written.

The Fragment gives some further details. The protection of the Praetor did not proceed as a matter of course, but only if the Praetor thought the slave a fit person to have this *de facto* liberty[7]. Moreover *voluntas domini spectatur*, and thus his consent must be real. The Praetor would not intervene if the master's declaration that he wished the slave to be free was made under pressure[8]. He would not intervene if the owner was a woman who had not her tutor's *auctoritas*, or, presumably if it was an *impubes* in the same case. The text remarks that the Praetor would not intervene if the owner were under twenty. As it stands this may be a result of the *lex* Aelia Sentia, but it is equally probable that that enactment only followed in this respect what had

[1] G. 3. 56. [2] *Ibid*. [3] Fr. Dos. 4, 5.
[4] Fr. Dos. *loc. cit.*; G. *loc. cit*. [5] G. 3. 56.
[6] Fr. Dos. *loc. cit*. Conversely Tacitus (Ann. 13. 27) seems to speak of a *locus poenitentiae*. But he probably means no more than that the donor may decline to make a more formal manumission.
[7] Fr. Dos. 8. [8] Fr. Dos. 7; cp. D. 40. 9. 17. 1.

been the practice of the Praetor. The age of the slave was immaterial[1]. The master must be one who held the slave *in bonis*, but he need not be the quiritary owner[2]. If the slave were common, the declaration by one of the owners that the slave was to be free produced no effect at all[3]. These texts are mainly concerned with latinity under the *lex* Iunia, but are made relevant to our case by some words which indicate that that latinity was granted on informal manumission under such circumstances as would have led the Praetor to protect *de facto* liberty[4]. This entitles us to say that this partial relief might be given when a master, incapacitated from formal acts by physical defect, yet wished to free his slave. Thus Paul tells us that a *mutus surdus*, though he could not manumit *vindicta*, could do so *inter amicos*[5]. Wlassak, in the course of an exhaustive article[6], in which he shews that Praetorian rights were not exempt from rules of form, establishes certain conclusions in relation to these manumissions. He shews that in such manumission there was needed express declaration of intention to free, not merely to allow to be *in libertate*. He shews further that the evidence on which it has been generally held[7] that there were many of these modes of manumission shews only that there were many ways of obtaining latinity, and that of the well-known three, that *in convivio* is not mentioned till the later Empire[8]. He objects to the expression "informal," since in fact each has its form. It seems, however, justifiable to call them informal, since the presence of witnesses is rather a substantial guarantee than a formal one[9]. He discusses[10] certain texts which suggest that it was enough that the master had expressed a willingness for the slaves to be *in libertate, i.e.* that *animus manumittendi* was not needed. The non-juristic texts[11] he holds to be mere inaccuracies of expression. This is probably correct, but such allusions shew that manumissions which required only declaration before an unspecified number of witnesses must have taken place under such varying conditions as to have given an impression of formlessness. Two juristic texts[12] which raise the same suggestion are referred by Wlassak to another matter[13].

[1] Fr. Dos. 13—15.
[2] Fr. Dos. 9.
[3] Fr. Dos. 10.
[4] Fr. Dos. 5—7; G. 3. 56.
[5] P. 4. 12. 2.
[6] Z. S. S. 26. 367 *sqq.*
[7] In. 1. 5. 1; 1. 5. 3; 3. 7. 4; C. 7. 6. 1.
[8] He cites (*op. cit.* p. 404) as mentioning it Pseudo-Dion., *ad* Paul. Sam.; G. Ep. 1. 1. 2; Lex Rom. Burg. c. 44; Theoph. *ad* Inst. 1. 5. 4. It is not in the Digest or in the comprehensive C. 7. 6.
[9] It may be noted that in the record of manumission *inter amicos* which we possess (Girard, Textes (3), Appendice) the witnesses are not named and do not sign as in the recorded mancipations (Girard, *op. cit.* 785, 806 *sqq.*).
[10] p. 391.
[11] Pseudo-Quintil. Declam. 340, 342.
[12] 40. 12. 24. 3, 28.
[13] *Post*, Ch. XXVIII. That such transactions as those recorded in Suetonius and the Declamationes, *locc. citt.* should have been thought valid by anyone shews how little any notion of form enters into the matter. In dealing with Latini Iuniani we shall see that either the conception, *inter amicos*, was very widely construed or before Justinian a number of informal modes had come to be recognised.

The texts do not touch the question whether a manumission in a Praetorian will could be enforced in this way. It seems very unlikely for many reasons. It seems almost certain that if it had been so we should have heard of it, for we hear in various places a good deal about these wills, and about the ways in which Junian latinity could be obtained, and it is nowhere mentioned in either of these connexions. All informal manumission seems to be contemplated as *inter vivos*. Moreover the expression Praetorian will is a little misleading. It is far less than a will. It operates under certain edicts, to the effect that if the document is in a certain form claimants under it will be given possession of the *bona*. All that can be got under it is *bonorum possessio*, and this *de facto* liberty cannot be brought under that conception. The enactment of Justinian abolishing latinity deals with two cases closely akin to this. Liberty given by codicils is mentioned allusively[1], and the case is discussed of a direction by the testator that certain slaves should share in his funeral, wearing the pileus which was the sign of liberation. This last he adds to his list of informal manumissions, remarking that as such a gift it had been of no effect before his time[2]. It seems that so verbose a draftsman must have adverted to the case we are concerned with, if it had existed.

The same question calls for the same answer, in the case of gifts made in indirect forms before the introduction of *fideicommissa*[3].

Some peculiar cases of manumission, perhaps exceptional in form, are mentioned by other than legal writers. Festus, in two passages[4], refers to *manumissio sacrorum causa*, to which we have no other reference. It is manumission by a solemn declaration that the man is to be free, the master holding him by a limb and undertaking to pay a sum of money if the man so freed departs afterwards from the *sacra*. Then he turns him round and releases him and he is free. This may be a case of *manumissio vindicta*. If this is so, either it is very incompletely stated (which, in view of the author's purpose, is likely enough), or the breakdown in formality of manumission *vindicta* is much earlier than is commonly supposed. Mommsen[5] treats it as no manumission at all, but only a sale to the temple with an agreed penalty for taking him away. It is connected with a similar Greek practice[6]. In Greece it was common to sell slaves to the service of a deity, in which case they became sacred and free, at least from the secular law. Gradually the process came to be applied, as a fiction, for what was plainly manu-

[1] C. 7. 6. 1 c, 2.
[2] C. 7. 6. 5; *post*, Ch. XXIV. His language may mean that this had given latinity.
[3] Praetorian protection in case of other defects, *post*, Ch. XXIII.
[4] Festus, *vv.* manumitti, purum.
[5] Mommsen, Röm. Staatsr. 3. 1. 421; D. P. R. 6. 2. 2.
[6] See Wlassak, Z. S. S. 28, pp. 22 *sqq.*

mission[1]. But the process recorded by Festus never seems to have got further than the devotion of the man to the service of the deity. Festus is however very clear that it was a manumission, though his authority cannot be ranked as very high in view of the antiquity of the institution.

Aulus Gellius observes[2] that many jurists had laid it down (though he treats the matter as of purely antiquarian interest) that a master could give his slave in adoption. This too seems to be ordinarily regarded[3] as a case of manumission *vindicta*, with some special formalities, and it seems to be sometimes treated as the same rule as that which Justinian attributes to Cato[4], that is, that a master could adopt his own slave and so free him. But the two cases are not the same. The language of Aulus Gellius shews that he is contemplating an adoption by *vindicta* or an analogous process, and by a person who is not the *dominus*: *servus a domino per praetorem in adoptionem dari potest.* On the other hand the case in the Institutes is plainly one of adoption by the *dominus* himself. It is hard to see how this could be done directly by *vindicta*, and we have no right to suppose a transfer to a third person, followed by adoption. On the whole it seems more likely that it was a case of adrogation, in effect a shortening, by leave of the Comitia, of the form of manumission followed by adrogation of the freedman by his patron. This last we know to have been a familiar case[5]. Wlassak[6] objects to the view that it is an adrogation on the ground that a slave could not have appeared *in comitiis.* If a woman could not be adrogated a slave could not. He supposes a fiduciary sale followed by adoption. There is no logical answer to this objection, but it may be doubted whether so severe a logic can be safely applied in such a case[7]. In any case the institution is not important to us for it leaves no trace in the classical law[8].

[1] See the literature cited by Girard, Manuel, 116. See also Dareste, Recueil des Inscriptions Grecques, Série 2, pp. 234 *sqq*. For various opinions as to the nature of the Roman institution, see Vangerow, Latini Iuniani, 59.

[2] Aul. Gell. Noct. Att. 5. 19. 13—14.

[3] Moyle, *ad* Inst. 1. 11. 12; Vangerow, *op. cit.* 62.

[4] In. 1. 11. 12. [5] 1. 5. 27; 1. 7. 46 *etc.* [6] Z. S. S. 26, 387.

[7] The effect of the transaction is to make him *capax*; it is not so in the case of a woman.

[8] The declaration *apud acta* that the slave is your son which seems to have given latinity before Justinian (*post*, Ch. XXIII.), is a similar institution, but it is an innovation rather than a survival.

CHAPTER XX.

MANUMISSION DURING THE EMPIRE. FORMS.

THE period covered by this heading extends over nearly 600 years, if we regard Justinian's reign as the end of things. It ought in strictness to be treated as at least three distinct periods, but as nearly the whole of our information is derived from Justinian's compilations, it is not easy so to divide it. But it is plain that he made many changes, and it is possible thus to treat the matter as having a history in two periods, of which the first ends with the accession of Justinian. It must, however, be remembered that changes are going on rapidly throughout this period, and thus it is important to keep perspective in view. Moreover, of a great mass of detail, it is not easy to tell how much of it is classical and how much is of a later age. This will be treated, for the most part, in the discussion of the first period, so that the law under Justinian will be dealt with more shortly.

It was no longer true in the Empire that all manumission made the slave a *civis*, but, for the present, we shall discuss the normal case, leaving the special statutory rules and restrictions for a later chapter.

The formal modes of manumission are (1) *Censu*, (2) *In sacrosanctis Ecclesiis*, (3) *Vindicta*, (4) *Testamento.*

1. CENSU. This is practically obsolete[1].

2. IN SACROSANCTIS ECCLESIIS. This is a method which it seems somewhat out of place to consider so early, for, as we know it, it dates only from the time of Constantine. It is of little importance in the general development of the law, and therefore may be disposed of at once, and there is this further justification for treating it here, that it retains a trace of that element of public control which is dying out in the other forms, and which makes it more or less a successor of the method by *Census.*

A constitution of Constantine, addressed in A.D. 316 to a certain bishop, and plainly reciting only earlier law, remarks that it has long been allowed for masters to give liberty to their slaves *in ecclesia*

[1] *Ante*, p. 440.

catholica. It must be done before the people in the presence of the priests, and there must be a writing signed by the *dominus, vice testium*[1]. The next constitution, five years later, also addressed to a bishop, provides that such a gift of liberty before the priests shall give citizenship[2]. The rule is mentioned in the Institutes, and in the paraphrase of Theophilus[3], but it does not seem to be mentioned in the Digest, though it gives rise to some questions which the bare provisions of the Code do not determine. The following remarks may be made on it.

(*a*) Constantine in stating the rule says *dudum placuit*. What degree of antiquity this imports is uncertain. There is evidence that he published a third constitution on the matter[4], which has been lost, and which may be earlier than those we possess: this may be the origin of the rule, since Justinian treats it as *ex sacris constitutionibus*[5]. The use of the word *dudum* does not exclude a recent origin[6]. In the Syro-Roman Law-book are traces of what may be this other enactment: there is a rule requiring bishop and priests to be present[7].

(*b*) It would seem that under the original rule *civitas* was not conferred. The enactment of 321 first speaks of this and calls it *civitas romana*, which suggests that till then the process had given only *latinitas*, that in fact it began as an "informal" mode before Constantine legislated at all. For what one might do *inter amicos* without other formality, one might surely do in full congregation. The expression, *vice testium*, imports the same suggestion[8].

(*c*) The requirement of signed writing is mentioned in the enactment of 316, of which we have only Justinian's edition, but not in that of 321 which gives the larger right and which we have in the earlier form of the Codex Theodosianus. It seems likely that the provision is added by him. The signature is to be *vice testium*, and the express requirement of witnesses in certain cases of informal manumission seems to be due to him[9].

(*d*) The presence of the slave is not indicated as necessary.

(*e*) It is supposed that the institution descends from or is suggested by the manumission by offer to the temple of a deity[10].

(*f*) Such manumissions are not subject to the rule as to the age of the slave[11] which is laid down by the *lex* Aelia Sentia[12]. This again suggests its origin as an informal mode: latinity in no case requires a slave to be over 30. It may be presumed that they are subject to the other restrictive rules.

[1] C. 1. 13. 1. [2] C. 1. 13. 2 = C. Th. 4. 7. 1.
[3] In. 1. 5. 1; Theoph. *ad h. l.*; Gai. Ep. 1. 1. 2. [4] Gothofredus, *ad* C. Th. 4. 7. 1.
[5] In. 1. 5. 1. [6] Brissonius, De Verb. Sign. *s.v. dudum*.
[7] Ed. Bruns-Sachau, 196. [8] *Ante*, p. 446. [9] *Post*, p. 554.
[10] *Ante*, p. 447. See especially Mitteis, Reichsrecht und Volksr. 100, 376.
[11] C. 7. 15. 2. But the reference may possibly be to the institution mentioned *post*, p. 451.
[12] *Post*, Ch. XXIII.

(*g*) These enactments contain a further rule giving exceptional privileges to priests who own slaves. That of 316 tells the bishop to whom it is addressed that he may free his slaves in what manner he pleases, provided his intention is clear. That of 321, also addressed to a bishop, lays down a similar rule for all priests, expressly dispensing with witnesses, and declaring that the gift shall take effect from the moment of the declaration, even if it is *postremo iudicio*. The text seems to contemplate his making a will and declaring its effect at once[1]. No doubt the effect would be to give the slave citizenship. These provisions seem to have left no other mark on the sources.

3. VINDICTA. The general character of this process has already been described[2]. It is in form a *legis actio*: a claim of liberty on the lines of *sacramentum*, stopped by a tacit admission that the claim is well founded. The *adsertor libertatis* claims in formal words that the slave is free: the master, on enquiry by the Praetor, makes no counter-claim in express words, but it is clear that, at some point, he, like the *adsertor*, touches the slave with a *festuca*, exactly as is done in a real *adsertio libertatis*[3]. This counter-vindication, if such it is, does not occur in ordinary *cessio in iure*, and Karlowa[4] regards it not as a claim of ownership against the *adsertor*, but as an assertion of *potestas*, material as a preliminary to the manumission. He remarks that the name of the process and the repeated reference to the *impositio vindictae* shew that in the eyes of the jurists this is the kernel of the process. In conformity with this he holds that the process is, formally, a declaration of intention to free, and he refers to language of Festus[5] in relation to manumission *sacrorum causa* as shewing that there was an express declaration of intent to free. But the relevance of the words of Festus to an ordinary manumission *vindicta* is very doubtful[6]. Karlowa regards the magistrate's *addictio* not as a judgment, even in form, but as a magisterial recognition of what has been done. Some non-juristic texts speak of the master as taking the slave by a limb, slapping his cheek[7] and then turning him round. This also Karlowa regards as a part of the legal formality, the slap being a last indication of slavery, the turning round a sign of his changed position[8]. He remarks that in later times the whole appears fused as one act, striking with a rod, *festuca ferire*. On these views two remarks may be made.

[1] The allusion may be only to deathbed gifts. [2] *Ante*, p. 441.
[3] 40. 12. 12. 2; 40. 1. 14. 1; 49. 17. 19. 4; C. 2. 30. 2. All cited by Karlowa, R. R. G. 2. 133.
[4] G. 2. 24; Karlowa, *loc. cit.* As to the significance of the various steps see *post*, App. IV.
[5] Festus, *s.v. mammitti*. [6] *Ante*, p. 441. [7] Isod. Sev. 9. 48.
[8] See the references in Karlowa, *loc. cit.*; Willems, Droit Publ. Rom. 144, 145; Roby, Rom. Priv. Law, 1. 26.

(i) The process is so plainly a modification of a true *adsertio libertatis* that the originally quasi-judicial nature of the magistrate's act can hardly be doubted. Doubtless the real nature of the act would tend to appear through the form, but it is most unlikely that the *vindictae impositio* by the master contained originally any idea other than that of counter-claim. The fact that the master does actually vindicate the slave and so carries the form a little further than it goes in ordinary *cessio in iure* is explained by the fact that the judgment is in favour of the slave, not, as in other cases, in favour of the opposing party: the master's *vindictae impositio* brings out the fact that the matter is between him and the slave[1].

(ii) The slap and turning round as part of a legal process are unexampled: they are simple enough regarded as conventional practices. They are mentioned in no juristic text[2]. Moreover we are told that a *mutus* cannot manumit *vindicta*. As he need not speak, this is explained by the fact that the law requires as evidence of renunciation nothing but silence, which, in the case of a mute, can have no such significance. If the definite act of turning round was required by the rules of form, there would be no reason for excluding mutes[3].

The judicial character of the process, always somewhat unreal, is freely disregarded in the imperial law. The forms are much relaxed in all ways. It is impossible to fix a date for these relaxations, which are progressive, but it is clear that they are not complete till late in the classical age. Ulpian notes, as apparently a new relaxation, that he has seen such a manumission done in the country by the Praetor without the presence of a lictor[4]. It is no longer necessarily done *pro tribunali*: the Praetor may do it *in transitu* on his way to the baths or theatre, or his business, or anywhere[5]. Hermogenianus says the whole thing may be done by lictors, *tacente domino*[6]. This is obscure, since there is no other indication that the *dominus* has to speak[7]: it is probable that he means that no sacramental words need be spoken at all and that the *vindictae impositio* by the master may be dispensed with. The lictors can act as assertors, but it must not be inferred that the presence of the magistrate is unnecessary. Macrobius quotes from Trebatius[8] the rule that this process, like all *iudicia*, can be gone through on *nundinae*. But it can be done on days not open to true

[1] See however Wlassak (Z. S. S. 25. 102 *sqq.*) as to the nature of *cessio in iure*. He considers it not as a piece of fictitious litigation but as an avowed act of conveyance, the magisterial intervention being an act of sanction, not a decision. But it is difficult to see an act of conveyance in the last step in *adoptio*. See *post*, App. IV.

[2] But often in non-juristic. See *ante*, p. 451, n. 8.

[3] *i.e.* for maintaining the rule, which applied generally in *legis actio*.

[4] 40. 2. 8.

[5] G. 1. 20; In. 1. 5. 2; D. 40. 2. 7. Karlowa (*loc. cit.*) thinks this not a relaxation but an original rule, shewing the difference between this and a real process.

[6] 40. 2. 23.

[7] Manumission *sacrorum causa* (*ante*, p. 447) is here disregarded.

[8] Sat. 1. 16. 23.

litigation. Constantine allows it to be done on Sundays[1], and the 14 days round Easter, while excluding lawsuits. Later legislation follows apparently the same lines, though manumission is not mentioned[2]. An enactment of 392 forbids *actus publici vel privati* in the fortnight around Easter. Justinian adopts the same law so altered as to allow manumissions[3].

It is the practice in all manumissions to give *instrumenta manumissionis*[4], which it is not necessary for the son of the manumitter to sign[5]. It is hardly necessary to say that several can be freed together if present[6].

As it is in essence a *legis actio*, Ulpian lays down the rule that the person before whom it is done must be a magistrate of the Roman people (*i.e.* one who has the *legis actio*[7]), and he mentions Consul, Praetor or Proconsul[8], these being the magistrates most commonly mentioned in connexion with it[9]. But this must be understood to include *legati* Caesaris[10], who govern imperial provinces, and are in fact propraetors[11]: thus a number of texts speak merely of Praesides[12]. Paul tells us, and a constitution of 319 (?) repeats, that a manumission may take place before a municipal magistrate, if he has the *legis actio*[13]. The Proconsul has "voluntary jurisdiction," *i.e.* for such acts as manumission or adoption, so soon as he has left the City, though he does not acquire contentious jurisdiction till he has reached his province[14]. As to the power of his *legatus*, there is some difficulty. Paul definitely says that there can be manumission before him[15]. Marcian says that there cannot, because he has not *talem jurisdictionem*. Ulpian agrees, *quia non est apud eum legis actio*[16]. It seems clear however that the legate may have the *legis actio*[17], but only by virtue of a *mandatum jurisdictionis* to him by the Consul. Such a mandate cannot be made so as to take effect till the Proconsul has actually entered his province[18], but as the reason assigned is that he cannot delegate a jurisdiction he has not acquired the restriction may not apply to this case[19].

Even as early as Augustus, the right to preside at such a manumission is conferred on the *Praefectus* Aegypto, the *Procurator* Caesaris in what is regarded as patrimonial property of the Emperor, an officer therefore who cannot at this time be regarded as a magistrate of the

[1] C. Th. 2. 8. 1.

[2] C. Th. 2. 8. 18, 19; C. 3. 12. 6.

[3] C. Th. 2. 8. 21; C. 3. 12. 7.

[4] 4. 2. 8. 1; C. 7. 16. 25, 26. In view of their importance in case of later dispute the manumitter was compelled to give them, but their absence did not vitiate the manumission.

[5] C. 7. 16. 32. *Ante*, p. 189. The practice in Greek law was for the heir to sign the documents. See Dareste, Recueil des Inscript. Grecq. Série 2, 253.

[6] 40. 2. 15. 2.

[7] 1. 7. 4; P. 2. 25. 4.

[8] Ulp. 1. 7.

[9] G. 1. 20; In. 1. 5. 2; D. 40. 2. 5, 7, 8, 20. 4; C. 7. 1. 4.

[10] 40. 2. 7.

[11] Mommsen, Droit Publ. Rom. 3. 280; Staatsrecht (3) 2. 1. 244.

[12] C. 7. 1. 4; D. 1. 18. 2; 40. 2. 15. 5; 40. 5. 51. 7.

[13] C. 7. 1. 4; P. 2. 25. 4.

[14] 1. 16. 2. *pr.*; 40. 2. 17.

[15] 40. 2. 17.

[16] 1. 16. 2. 1, 3.

[17] Girard, Manuel, 972.

[18] 1. 16. 4. 6.

[19] Paul's words seem to contemplate a legate's action apart from entry, 40. 2. 17.

Roman people[1]. Constantine lays it down that there may be manumission *apud consilium nostrum*[2]: this is a form of the judicial activity of the Emperor in council[3].

Just as a magistrate has jurisdiction for this purpose before entry, so conversely, he retains it on expiration of his office till he has notice of his successor's arrival[4]. The Praeses may act even though the parties are not domiciled in his province[5], a rule laid down by the *sc.* Articuleianum. Either consul or both can conduct the manumission[6]. But what one begins he must finish, except, by virtue of a Senatusconsult of unknown date, where he is prevented by infirmity or other sufficient cause[7].

It is immaterial that the magistrate is a *filiusfamilias*, even a *filius* of the owner of the slave, though *filiusfamilias* has himself no power of manumission[8]. This is a mere illustration of the separation of public from private capacities.

It is settled law that a magistrate can free his own slave before himself[9], either by himself or by authorising his *filiusfamilias* to free on his behalf[10]. Thus he is at least in point of form judge in his own cause[11]. In the same spirit we are told that he may be tutor and authoriser of a pupil who frees before him[12]. On the other hand we are told by Paul that he cannot free before his *collega, i.e.* one with *par imperium*, though a praetor can, before a consul[13]. This is the more surprising in that, though he cannot be *in ius vocatus* before his equal colleague, a man can voluntarily submit himself to an equal or even to a minor jurisdiction[14]. Moreover, whereas in one text we are told that a consul can free his own slave before himself, even though he be under 20, the same writer, Ulpian, in the same section of the same book, says that a consul under 20 cannot free his own slave before himself, as he would have to enquire into the *causa*, and he must therefore do it before his colleague[15]. Here Ulpian appears in conflict with himself on one point and with Paul on another. Probably Paul is expressing a rule already obsolete in saying that there can be no manumission before an equal colleague: the *dominus*, in the later classical law, may

[1] 40. 2. 21. [2] C. 7. 1. 4. [3] Cp. C. 7. 10. 7.
[4] 1. 16. 10; 1. 18. 17. [5] 40. 5. 51. 7.
[6] The rule applies no doubt to other duplicated magistracies.
[7] 1. 10. 1. 1. In the later Empire difficulties arose through the quasi magistracies of usurpers. Enactments dealing with acts of Magnentius, Maximus and Eugenius annulled their acts in general, but allowed manumissions before them to be good, *favore libertatis*. In the case of Heraclianus they were void, but the manumitter was required to repeat them, C. Th. 15. 14. 5, 8, 9, 13. [8] 1. 14. 1; 40. 2. 18. *pr.*
[9] 1. 10. 1. 2; 1. 18. 2; 40. 2. 5, 20. 4. Probably as old as Cicero (Ad Att. 7. 2. 8), see Wlassak, Z. S. S. 28. 42 *sqq.*, who shews that the difficulty felt in 40. 2. 5, surmounted on the authority of Javolenus, was as to manumission of a slave under 30, where the magistrate presided in the *consilium*.
[10] 40. 2. 18. 2. *Post*, App. v. [11] Cp. 2. 1. 10.
[12] 40. 2. 1. [13] 40. 1. 14; 40. 2. 18. 1.
[14] 2. 1. 14. [15] 1. 10. 1. 2; 40. 2. 20. 4.

do it before himself or before a colleague. If however he is under 20 he can do it only before a colleague: the text in which Ulpian seems to allow him to do it, *apud se*, is probably the work of the compilers.

Manumission *vindicta* is a *legis actio*: it is an *actus legitimus*. Accordingly, if it be formally gone through, there is a manumission, if the parties were in the proper relation, whatever their state of mind, *i.e.*, even though one or both parties wrongly thought they did not so stand[1]. But there is another more practically important result. An *actus legitimus* is vitiated by any express *dies* or condition[2]. The point of such a manumission is an official declaration that the slave is free, and thus the freedom cannot be, expressly, in the future or conditional. But the text which lays down the general rule adds the proviso: *nonnunquam tamen actus (legitimi) tacite recipiunt quae aperte comprehensa vitia adferunt.* This proposition the text proceeds to illustrate, and thereby raises obscurely the question whether manumission *vindicta* can be subject to a tacit *dies* or condition. It is sometimes said[3] that the text just cited implies that there may be tacit condition. But no such general proposition can be justified. The text illustrates its statement by the case of an *acceptilatio* of a conditional debt. It remarks that there is no *acceptilatio* till the condition occurs. But this is not a condition voluntarily created: it is one which *inest* in the transaction. The act is meaningless unless there is a debt. Analogous cases can readily be found in manumission *vindicta*. If a slave is legated the ownership is, in the Sabinian view, which clearly prevailed, determined retroactively by the acceptance or repudiation of the legacy. If, now, the *heres* has freed a *servus legatus*, the act is a nullity if the legatee accepts, but, if he refuses, the gift is perfectly good[4]. This is not a conditional manumission. In the events which have happened the slave was the manumitter's at the time of the manumission, and it is an absolute manumission. The words of the text shew clearly that this is the proper view to take: *retro competit libertas.* It cannot be said that this text goes far towards authorising tacit conditions in manumission *vindicta*. Nothing in this or in the above general text suggests that a manumission *vindicta* can be so made, at the will of the parties, that the slave freed is in a certain event to remain the property of the manumitter. No text carries the matter further[5], except in relation to manumission *mortis causa*, as to which there is one text which requires careful examination. This text remarks[6] that a slave can be freed *mortis causa*, in such sense that *quemadmodum si vindicta eum liberaret absolute, scilicet quia moriturum se putet mors eius expectabitur,*

[1] 40. 2. 4. 1. [2] 50. 17. 77. [3] *e g.* Accarias, Précis, § 56.
[4] 40. 2. 3. [5] As to pledged slaves, *post*, Ch. xxv.
[6] 40. 1. 15. See also In. 3. 11. 6.

so too in this case the gift takes effect at death, provided the donor does not change his mind. However this rather obscure text is understood, it implies as it stands that if a slave is freed *vindicta, mortis causa,* the gift takes effect only on the death. This is hardly a conditional gift, for *dies incertus* is not a condition except in wills[1]. But whether it is strictly a condition or not is less important than the determination of the exact scope of the rule. On that point the following may be said.

(1) That part of the text which refers expressly to manumission *vindicta* has not been unchallenged. Mommsen, led presumably by the word *absolute,* would cut out the words *mors eius expectabitur,* in which case the text would say for our purpose no more than that it is possible for a man to free his slave when he thought he was dying. One other text is, however, understood by Huschke to assert the rule that in manumission *mortis causa* by *vindicta,* the gift does not take effect till the death. But the restoration is so hazardous that no great weight can be attached to it[2]. If Mommsen's emendation be accepted, we may infer that suspension in such cases till the death is an innovation of Justinian's.

(2) The text does not, even accepted as it stands, shew that the power of revocation applies. On principle it is hardly possible that it should apply. The last part of the text, which alone speaks of revocation, is dealing with other manumission, contrasted with that *vindicta*[3], and this may have been informal manumission, at least in Justinian's time. The whole text looks corrupt and rehandled. It is worth noting that none of the ante-Justinian texts which deal with revocable *donationes mortis causa* speak of any which result from an *actus legitimus,* such as *cessio in iure* or *mancipatio,* and those which deal with land speak of *traditio*[4]. It is a fair inference that manumission *vindicta, mortis causa,* is not revocable as other *donatio mortis causa* is.

(3) *Dies certus* is nowhere mentioned in this connexion: there is no reason to think such a modality can occur.

(4) Within the very narrow limits in which this suspended effect can be shewn to occur, there is a question to which we have no answer, as to the actual condition of the man in the meanwhile. In the case of the legated slave[5], no doubt the effect of transactions by him, *e.g.* alienations and acquisitions, or affecting him, *e.g. usucapio,* will be determined retrospectively by the event. But in the case of the *mortis causa*

[1] 35. 1. 75, *post,* p. 480. There is no authority for applying the same conception to *dies incertus* outside wills.
[2] Valer. Prob., Notae, 46—50. The text is differently understood by Krüger.
[3] It may conceivably be a contrast between manumission *vindicta, absolute* and *mortis causa.*
[4] See Fr. Vat. 249. 6, 258. [5] 40. 2. 3.

vindicta manumissus we have no information and no good analogy to guide us[1].

A question involving some difficulties may conveniently be taken here: how far and in what forms can manumission be carried out by a representative? We need consider only two cases, manumission *vindicta* and informal manumission[2]. It is far from certain that the same rule applies to both cases, at any rate before Justinian. Leaving representation of a *pater* by a *filiusfamilias* out of account for the moment, the texts are not numerous. It must be remembered that manumission *vindicta* is in point of form a *legis actio,* however degenerate. There can be no *legis actio* on behalf of another person except in certain cases of extreme urgency, and accordingly we are told that it is undoubted law that a wife cannot free *vindicta, per maritum,* or anyone, *per procuratorem*[3]. Other texts lay down similar prohibitions, not confining them to the case of *vindicta.* Thus a tutor cannot give the liberty due from his *pupillus* under a *fideicommissum*[4], and a *curator furiosi* cannot free slaves[5]. The reason assigned is that such an act is not included in *administratio*[6]. 'Octavenus is reported[7] as suggesting a way out of the difficulty, where the manumission is due under a *fideicommissum*: the curator can convey the man to another person to free. This however gives the odd result that while manumission is not an act of administration, conveyance to another person, in order that he may free, is, for we are told that a transfer by a *curator furiosi* is void unless it concerns the *administratio*[8]. Whether a *curator furiosi* may "*lege agere,*" on behalf of his charge, we are not told, but if he can, as seems most probable, and as is generally held, the prohibition seems an unnecessary inconvenience, resulting from a too rigid conception of *administratio.* In any case the texts do not help us.

There are one or two texts which seem to imply that consent of *dominus* will validate a manumission by a third party. Thus we are told that manumission without consent of *dominus* is not valid, even though the manumitter become *heres* to the *dominus*[9]. Again, we are told that if a father frees his son's slave, by his consent, the son being under 20, the manumission is invalid[10], which seems to imply

[1] Shortly considered by Bufnoir, Conditions, 58. See also Haymann, Freilassungspflicht, 30. As to a somewhat analogous case, *post,* Ch. XXVII, where it is a question of mancipation.
[2] The point could not arise in wills. *Census* was obsolete, and manumission *in ecclesiis* is too little known to be worth discussing here. It is an ancient difficulty, Haenel, Diss. Domm. 108.
[3] C. 7. 1. 3. A procurator could prove the necessary *causa,* 40. 2. 15. 3. The rule that one may "*lege agere*" *pro libertate* for another, refers only to the *adsertor,* G. 4. 82.
[4] C. 7. 11. 6. [5] 40. 9. 22. [6] 27. 10. 17; 40. 1. 13.
[7] 40. 1. 13. *Traditio* has been substituted for *mancipatio.*
[8] 27. 10. 17. [9] 40. 9. 20.
[10] C. 7. 10. 6. Texts as to dotal slaves, sometimes cited, do not seem in point.

that if the son were over 20 the manumission would not be necessarily void. As there is nothing contrary to general principle in the idea that a man can authorise another to complete a formless manumission for him, it seems probable that the true rule deducible from these texts is that a man cannot manumit *vindicta* for another, that he cannot free informally without express authority, from one fully *capax*, but that there is nothing to prevent the appointing of a third person to make the necessary communication or declaration, a person so employed being in fact a mere *nuntius*[1].

Within the family there are powers of delegation which belong to the classical age. A *filiusfamilias*, not being owner, cannot free on his own account, but in classical law he can free by the authority of his *paterfamilias*, though not of his mother[2]. The effect is to make the former slave the *libertus* of the *paterfamilias*[3]. The authorisation may be such as to give him a choice among the slaves[4]. But though carried out by the son it is essentially the father's manumission[5], and thus though the son be under 20, no cause need be shewn: the father's consent suffices[6]. On one point two opposing views are set down to Julian. In one text he says that if the father authorises the manumission, and dies, and the son, not knowing of the death, carries out the manumission, the act is void, as it is if the father changes his mind[7]. In another text he lays down the same rule as to change of mind, but in the case of death says that the slave is free, *favore libertatis*, since there is no evidence of a change of mind[8]. This is no doubt a Tribonianism.

This statement of the rules as to authorisation by the *paterfamilias* leaves open a point of some difficulty for the law of the classical age. Some of the texts do not specify any mode of manumission: others speak of manumission *vindicta*. When it is remembered that so to manumit is *lege agere*, and that this cannot be by agent, and also that, according to the view generally held, and confirmed by a statement in one of the Sinaitic Scholia (on Ulpian[9]), a *filiusfamilias* is not capable of *legis actio*, it is clear that there may be doubt. Such a doubt has recently been raised by Mitteis[10]. The present writer has discussed the matter elsewhere[11]: as a treatment of it is necessarily somewhat

[1] The grammar of 40. 9. 20 is defective: the rule may possibly be of Justinian's age.
[2] P. 1. 13 a. 2. [3] 37. 14. 13; 40. 1. 16, 22. It might be a grandson *ex filio*.
[4] 40. 2. 22. [5] 23. 2. 51. 1; 40. 2. 22.
[6] 40. 1. 16. The father can accuse for ingratitude: though he did not free the case is to be treated as if he had, 40. 9. 30. 1. A deaf and dumb father can authorise, while a *furiosus*, being *incapax*, cannot, 40. 2. 10. If the son frees *iussu patris matrimonii causa*, no other person can marry the woman without the father's consent, 23. 2. 51. 1 (Mommsen).
[7] 40. 9. 15. 1. [8] 40. 2. 4. *pr.*
[9] Schol. Sin. 49 (Krüger's Edit.). [10] Mitteis, Z. S. S. 21. 199.
[11] Buckland, N. R. H. 27. 737. Reply by Mitteis, Z. S. S. 25. 379.

lengthy, he has placed in an appendix a statement of the reasons which lead him to accept the numerous and unanimous texts and to hold that even in the classical law a *filiusfamilias* could free, *vindicta*, under the authorisation of his *pater*[1].

Though manumission by a *filius* without authority is null, it may have some legal importance, in relation to questions of construction, *e.g.* in legacies. A son has a *servus peculiaris*, and purports to free him, but without authority. The father in his will leaves the son his *peculium*. The gift does not include this slave, who therefore is common to all the heirs, for the *peculium* must be taken as it is at *dies cedens*, and the son's manumission was an abandonment of him, as a part of the *peculium*, whether it was before the will was made or after[2]. In another text a similar case is discussed by Alfenus Varus[3], but he decides as a matter of construction, that if the will was before the manumission, the testator must have intended to include him in the legacy, but not if the manumission came first. This view may seem to ignore the decisive fact that the slave is not in the *peculium* at *dies cedens*, and thus by a well-known rule is not covered by the legacy. But in fact all it shews is that the testator does not contemplate him as part of the *peculium*.

The rules are altogether different where the *filiusfamilias* is a *miles*. A slave in his *peculium castrense* he can free without authority, and from Hadrian's time onward, he becomes patron for all purposes[4]. Before that time it seems that the *pater* would have been patron, the son having preference in the *bona*[5]. Similar rules apply, by a rescript of Hadrian, to any *servus castrensis peculii*. The *filius* who manumits is patron[6], having *iura in bonis*[7], and the right of accusing for ingratitude[8]. The *pater* has no such right, such slaves not being reckoned in his *familia*[9], at least *inter vivos*[10]. On the same principle if the *pater* institutes a *servus castrensis peculii*, the son is *heres necessarius*[11]. The manumission of such slaves gives rise however to one knotty question, but this will be considered in connexion with manumission by will[12].

We have already discussed the rule that on manumission *inter vivos*, the *peculium* goes with the man unless expressly reserved[13].

[1] *Post*, App. v. [2] 33. 8. 19. 2, 20.
[3] 40. 1. 7. Very confused and so badly corrupted as to be of little value.
[4] 37. 14. 8. *pr.*; 38. 16. 3. 7.
[5] 38. 2. 3. 8; 38. 2. 22. This applies only to the *peculium castrense*. Where a soldier's wife made him *heres* while on service, a slave so acquired was in his *peculium* and could be freed by him, 49. 17. 13. So where the wife gave him a slave to free for service in the legions. If he was given merely to be freed with no remoter aim, he is not *castrensis*: the *paterfamilias* must consent and will be patron, 49. 17. 6.
[6] 38. 4. 3. 3. [7] 38. 2. 3. 8. [8] 40. 9. 30. 2.
[9] 40. 1. 17. [10] *Post*, p. 465. [11] 49. 17. 18. *pr.* [12] *Post*, p. 465.
[13] *Ante*, p. 189. As to taxes on manumission see Marquardt, Organisation Financière, 355.

4. TESTAMENTO. It is evident from the texts that, as was naturally to be expected, this form of manumission always remained by far the most important. Apart from statutory rules and restrictions, to be considered later, a great change had occurred which revolutionised the law. This was the authorisation of *codicilli*, and therewith, and more important, of *fideicommissa*. These introduced a wholly new set of rules which will have to be separately considered[1], since fideicommissary gifts require completion by an act of manumission *inter vivos*. Direct gifts alone can be properly regarded as manumission by will, and we shall deal with these alone for the present.

Some points in relation to the form of such gifts have already been touched on[2]. It must be an express gift, and the *legitima verba, liber esto, liberum esse iubeo*[3], and the like, are analogous to those used in *legatum per vindicationem*, though Greek words would do as well, at least in the later law[4]. Not only must the gift be express, it must be peremptory—words expressing mere desire, such as *volo*, do not suffice[5]. It must also be *nominatim*, a rule which Gaius attributes to the provisions of the *lex* Fufia Caninia[6], to be considered later[7]. But a correct description is enough. Thus Paul tells us that *qui ex illa ancilla nascetur*, or a description of the office he fills, is enough[8]. He adds that this is a regulative provision of the *sc.* Orphitianum, and that if there are two, of the same office, it must be shewn which is meant. Thus a gift of liberty to Stichus, by one who has several slaves of that name, is void[9], but a mere error in name will not bar the gift if it is clear who is meant: *falsa demonstratio non nocet*[10]. The rule that such a gift cannot be made to an *incerta persona* has probably nothing to do with the rule of *nominatio*, for an *incerta persona* can be exactly described: it is a mere application of the general rule forbidding gifts by will to *incertae personae*, though Gaius connects it with the same *lex*[11].

There seems to have been some doubt as to the effect of a gift of liberty "to A or B." All that we are told of the earlier law is that it was disputed whether it was simply void, or whether both were free, or whether only one, and if so, which one; either the first, and if he die the second, a sort of *substitutio*, or the second as representing the last will, and so adeeming the first. As the gift is direct there can be no question of any choice in the *heres*. Justinian decides that both are

[1] *Post*, pp. 513 *sqq*.
[2] *Ante*, p. 442.
[3] G. 2. 267; Ulp. 2. 7; P. 4. 14. 1.
[4] C. 7. 2. 14.
[5] 40. 5. 41. *pr*.
[6] G. 2. 239.
[7] *Post*, Ch. XXIII.
[8] P. 4. 14. 1. Unborn persons, *post*, p. 476.
[9] 34. 5. 10. *pr*.
[10] 40. 4. 54. *pr*.
[11] In. 2. 20. 25. Justinian says that even under the old law a legacy to an uncertain member of a certain class was good. If this is true of liberties the rule is of little importance as to direct gifts, and will not bar, *e.g.*, a gift to "that one of my existing slaves who shall first do" such and such a thing. As to these gifts to *incertae personae*, see *post*, p. 477.

free[1]: the principle of later law is that *in obscura voluntate manumittentis favendum est libertati*[2].

Like legacies, such gifts are invalid if given before the institutions, except in the case of a *miles*. If they are in the middle of the institutions, *e.g.* between that of A and that of B, and both enter, they are void, there being an heir instituted after them: *a fortiori*, if B alone enters. If A alone enters they will be good, by early law. But the *lex* Papia makes a change. If B refuses to enter, the gift becomes a *caducum*[3]. If A has either the *ius antiquum* or the *ius liberorum* this will make no difference, since he will take the lapsed gift. But in other cases the share will pass to other persons entitled under the *lex* Papia, and so the liberty will fail. Ulpian adds that there were some who thought it would take effect even in this case[4]. The reason of this divergent view is no doubt that the devolution under the *lex* is not an institution, whatever it is, and thus the technical rule ought not to apply. It has no connexion with the rule that *caduca* go with their *onera*[5]. On all these points the classical law seems to have treated legacies and manumissions alike.

Manumissions might be made either in the will or in a codicil confirmed by a will either afterwards or by anticipation[6].

The rule that the gift must be express cuts out implied gifts, but there may be cases in which it is doubtful whether there is or is not an express gift. Some texts shew by their language that in such matters the earlier tendency was to strictness. In one case the words of the will were Titius *heres esto, si* Titius *heres non erit*, Stichus *heres esto*, Stichus *liber esto*. Titius took the inheritance. Aristo held that Stichus was not free: his reason seems to be that the liberty was given only in connexion with the institution which did not take effect. Ulpian allows him to be free, as having received liberty not in one grade only but *dupliciter, i.e.* as if it had been written out twice[7]. It might be supposed that *favor libertatis* would lead to ready acceptance of implied gifts. But it is one thing to accept informal words, and in this direction a good deal was done[8]: it is another to accept as gifts of

[1] C. 6. 38. 4 deals also with other alternatives but they refer to other forms of gift.
[2] 50. 17. 179. See, as to these gifts, *post*, p. 556.
[3] G. 2. 230; Ulp. 1. 20, except in a soldier's will, *post*, p. 477.
[4] Ulp. 1. 21.
[5] Ulp. 17. 3. See, *e.g.*, Accarias, Précis, § 374.
[6] 40. 4. 43. They are read into the will, 29. 7. 2. 2; P. 4. 14. 2. As to this, *post*, p. 515. An enactment of Diocletian (C. 7. 2. 11) seems to say that they may be given by a will which is good only as a codicil by virtue of the *clausula codicillaris*. As this contradicts a considerable mass of evidence (*e.g.*, Ulp. 2. 12; 24. 29; C. 7. 2. 1; D. 40. 4. 43) it implies the existence of another will or is confined to *fideicommissa*.
[7] 40. 4. 2. So where a slave was substituted with liberty and a legacy was made to him without liberty, Pius and Divi Fratres decided *favorabiliter* that it was to be held as if *libertas adscripta esset*, 40. 4. 26.
[8] 50. 17. 179.

liberty what may not have been so intended, and this is the meaning of the refusal to recognise implied gifts. Several texts shew this. "Let X not be free unless he renders accounts" is not a gift of freedom even if he does[1]. "I leave Stichus 10 because he was born after his mother was free," is not a gift of liberty if he was not so born[2].

On the other hand where the intent to free is clear, but it may be doubtful whether the gift is direct or fideicommissary, the tendency is to treat it as direct, if possible. If a man is freed twice it is in general the first effective one which operates[3]. But if one gift is direct and the other by *fideicommissum*, Marcus Aurelius enacts that he may choose in which way he will have it[4]. One type of case seems to have given rise to doubts, though the texts as they stand give a coherent rule. It is the case of gift of a slave by will with a direction that, if the donee does not free him, he is to be free. Here if there is a simple direction to the *heres*, or legatee, to free, followed by a gift of freedom in default, the rule is clear that the slave is free *directo*, the gift of him being a nullity[5]. In some of the texts there is also a legacy to the slave and the rule has the incidental effect of making this valid. The decision rests no doubt on the fact that a mere gift, *ut manumittatur*, shews no intent to benefit the donee. But where there is no *fideicommissum* of liberty, but only a gift of liberty if the donee does not free, it is not clear that there is no intent to benefit the donee. Thus if the direction is that if he is not freed within a certain time or by the donee's will, he is to be free, this is a direct gift of liberty, conditional on his not being freed by the donee[6]. If no limit of time is set down, it might be supposed that the donee had all his life within which to free. But Paul lays down the rule that he must do it so soon as he reasonably can without seriously deranging his own affairs, otherwise the man is free *directo*. This seems to be a somewhat unwarranted interpretation of the testator's words, no doubt, *favore libertatis*.

Two cases of implied gift gave rise to some dispute. Gaius tells us positively that a mere gift of the inheritance without a gift of liberty did not imply such a gift and was therefore void. And as the heir must have had *testamenti factio* at the time when the will was made, the

[1] 40. 4. 59. 2.
[2] 40. 4. 60 (the text is obscure). Stichus, *imo* Pamphilus *liber esto*. P. alone is free, 40. 4. 21. Sticho *liberto do lego*, is not a gift of liberty, C. 6. 21. 7. Cp. Plin. Epist. 4. 10. Otherwise had the gift been of the *hereditas*: dislike of intestacy reinforces *favor libertatis*, C. 6. 27. 2.
[3] 40. 4. 1. [4] 40. 4. 56.
[5] 40. 4. 9. *pr.* (*saepe responsum*); 40. 4. 19; 40. 5. 34. 2; 40. 7. 37. See the case of a gift *inter vivos, ut manumittatur, post*, Ch. XXVII.
[6] 40. 4. 15; 40. 5. 34. 2, both by Julian who is the author of one of the other set (40. 4. 19). See also Paul, 40. 7. 20. 6, *in fine*.

matter is not mended by a manumission of the slave *inter vivos*[1]. No other surviving classical text states the rule[2], and Justinian altered the law. But the Constitution by which this was done[3] declares that the old lawyers had had many disputes about the matter, and in the Institutes[4] it is said that Paul quotes Atilicinus as holding that the institution implies the liberty. A similar question arises in connexion with the appointment of a slave by his master as testamentary tutor. Did this imply manumission? It is clear that such an appointment implied some sort of gift of liberty even before Justinian[5]. But the language of the texts which justify this statement do not make it clear whether the gift was direct or fideicommissary, and they suggest that the whole rule was rather late. A text attributed to Paul shews that in Justinian's time it implies a direct gift. The slave is free from *aditio*[6]. But the difficulty discussed in the text, *i.e.* that the slave being under 25 could not be tutor, was one created by Justinian's new rule, and so cannot have been discussed by Paul. In his time the difficulty would have been that the man was a latin, and this was a permanent disability. This would suggest that Paul treated it as implying a fideicommissary gift, as, in the resulting manumission *inter vivos*, the difficulty would be met by shewing cause *apud consilium*. But that would apply only to cases of this type. In general there is no reason why it should be construed as fideicommissary rather than direct if it is recognised at all, though it would not be the only case in which a defective direct gift was construed as a *fideicommissum, i.e.* as imposing a pious duty[7]. That treatment however would create difficulties, since the man could not be tutor there and then, but only when freed, a difficulty which is noted by Papinian and Paul in respect of fideicommissary gifts in general[8]. On the other hand an enactment of A.D. 260[9] declares that it does take effect as a *fideicommissum*, and a text of Ulpian naturally understood says the same thing[10]. But it has been pointed out[11] that this text may mean merely that just as an appointment of your own slave as tutor implies a direct gift, so the appointment of a *servus alienus* implies one by *fideicommissum*[12]. It has also been noted that the enactment of 260[13] uses the odd expression *per fideicommissum manumisisse*, which leads to the view that the words *per fideicommissum* are a hasty insertion by the compilers[14],

[1] G. 1. 21; 2. 186—8. The provisions as to *addictio bonorum libertatis causa* are an exception, *post*, Ch. XXVII.
[2] Ulp. 22. 12 implies it. [3] C. 6. 27. 5. 1. [4] In. 2. 14. *pr.*
[5] C. 6. 27. 5. 1 d. See also D. 26. 2. 10. 4, cited Syro-Roman Law-book, Bruns-Sachau, 203.
[6] 26. 2. 32. 2. Bodemeyer, de manumissione testamentaria, 38—42.
[7] *Post*, p. 514. [8] P. 4. 13. 3; D. 26. 2. 28. 1. See *post*, p. 515.
[9] C. 7. 4. 10. [10] 26. 2. 10. 4.
[11] Bodemeyer, *loc. cit.* The end of the text is probably Byzantine.
[12] But see *post*, p. 514. [13] C. 7. 4. 10.
[14] A. Faber, Conjec. 6. 16, cited Wlassak, Z. S. S. 26. 409.

misled by the case in the immediate context. But similar language is found elsewhere. Marcian uses the same form in a text which looks genuine[1], and Paul uses similar language[2], though the exact meaning of his words may be doubted. On the whole it seems most probable that the rule of later classical law is that appointment as tutor implied a *fideicommissum* of liberty, the appointment being magisterially confirmed after the man is freed[3].

For the gift to take effect the slave must have been the property of the testator[4], both at the death and at the date of the will[5]. This is a result of the analogy between this case and that of legacy *per vindicationem*[6]. We have already considered a text which treats *aditio* and not death as the critical date[7]. The rule led to one apparently harsh result. The codicil is read into the will. If therefore the slave belonged to the testator at the time of the codicil, but was *alienus* at the time of the will, there was no valid direct gift, though, at least in later law, it was a good *fideicommissum*[8].

From the same analogy results the rule that he must be the quiritary property of the testator, not merely bonitary[9]. The testator must also be bonitary owner: the bare *nudum ius Quiritium* gives no right to free[10]. A buyer cannot free even if the slave has been delivered, unless he has paid the price or given security[11]. As it must be the testator's own slave, a gift of freedom "if my heir sell him," or "if he cease to belong to my heir" is regarded as bad, since it is to operate only at a time when the slave is *alienus*, and its operation is therefore impossible. The text notes that this is different from the case of sale of a *statuliber* by the *heres*: in that case there is a valid gift which the *heres* cannot destroy[12]. With this rule can be compared another[13], to the effect that if a slave is given in usufruct to T, and to be free if that interest ceases, this is a valid conditional gift: he is not by the usufruct rendered *alienus*[14]. It should be observed that the gift cannot be treated as good on the analogy of such rules as that a slave can acquire *hereditas* and liberty at the same moment or that a contract for performance at death is

[1] 40. 5. 50. [2] 40. 5. 38. [3] P. 4. 13. 3; D. 26. 2. 28. 1.
[4] G. 2. 267, 272; D. 30. 108. 9; cp. C. 7. 10. 4.
[5] G. 2. 267; Ulp. 1. 23; In. 2. 24. 2. D. 40. 4. 35 shews that there had been doubts, but no grounds appear.
[6] Where a man instituted a *servus alienus* with a gift of freedom and afterwards acquired the slave this did not save the disposition, 28. 5. 50. *pr.*
[7] *Ante*, p. 443, where other points under this rule are considered.
[8] 29. 7. 2. 2; *post*, p. 515; cp. P. 4. 14. 2; it is thought that the *non* in the passage which deals with the converse case should be omitted, Pothier, *ad h. l.*
[9] G. 2. 267; Ulp. 1. 16, 1. 23. As to the power of bonitary owner to give latinity, *post*, p. 549.
[10] Fr. Dos. 9. Where slaves given away had been *traditi*, the *donator* could not free, C. 7. 10. 5. As to concurrence with bonitary owner, and *iteratio*, *post*, App. IV.
[11] 40. 12. 38. 2. [12] 40. 4. 39. [13] 35. 1. 96. *pr.*
[14] Possibly under Justinian a gift of this sort which failed as a direct gift might be treated as a *fideicommissum*. *Post*, p. 515.

valid: in the present case the wording of the gift definitely postpones it to the event which renders the gift impossible.

This rule that associates power of manumission and ownership has many illustrations, some of a striking kind. A vendor or promisor of the slave can free him before delivery[1]. A manumission is good even though at the date of the will and of the death the slave is *apud hostes*: an application of the principle of *postliminium*[2]. A *heres, damnatus* to hand over a slave of his own, can free him, though he will be liable for his value[3]. A text of Paul is in direct contradiction with this[4], but it seems probable that the case originally contemplated was one of a slave of the testator conditionally freed[5]. After Justinian fused the different forms of legacy, and gave a *ius in rem* in all cases, the only way to give any point to the word *damnatus* was to apply it to a slave of the *heres*, in whom, as he was not the property of the testator, the ownership could not pass. We are told that a *heres* under a trust to hand over the *hereditas*, can free before doing so, being liable for the value of the slave whether he knew of the trust or not[6]. Though he is owner, we are told that this was only *favore libertatis*[7].

The fact, that if a son with a *peculium castrense* dies intestate it reverts to the father, leads to a difficult situation discussed in two texts. If the father by his will frees a *servus peculii castrensis*, what is the result if the son dies intestate? Tryphoninus observes that he cannot be the separate property of both the son and the father and that after Hadrian's enactment he certainly would be the son's *libertus* if he freed him. However he concludes that if the son dies intestate the manumission by the father is validated by a sort of *postliminium*—the father having retrospectively reacquired ownership over the man. The father's right is excluded only so far as the son uses his. How if the son does free him by will but his inheritance is not entered on? Here he decides that it is in suspense according to the event: he feels some logical difficulty, but concludes in favour of the manumission[8]. Ulpian[9] discusses only the simpler case of the son's death intestate, and states the same result. There can hardly be said to be a principle under this: the institution itself is illogical[10].

Of a rule stated above it is said: *inter libertatem et legatum quantum ad hanc causam nihil distat*[11]. Gifts of liberty resemble

[1] 40. 1. 18; C. 7. 10. 3. He is liable on the sale and must give security for patronal rights, and for all the buyer would have been entitled to if there had been no manumission. See *ante*, p. 40. A *mandatarius* to buy, in the days of double conveyance, could free the slave, C. 7. 10. 2.
[2] 40. 4. 30. [3] 30. 112. 1. [4] 40. 9. 28.
[5] Pothier, *ad h. l.* [6] 36. 1. 26. 2. [7] *Post*, pp. 558 *sq.*
[8] 49. 17. 19. 3—5. [9] 49. 17. 9.
[10] A less liberal view was held where liberty was not in question, *ante*, p. 258.
[11] 40. 4. 39; cp. 34. 4. 32. 1.

legacies in many ways, and they have a close affinity to *legata per vindicationem*. Thus gifts of liberty *post mortem heredis*, or *pridie mortis*, and the like were void, as such legacies were[1]. A slave attempting to upset a will loses a gift of liberty under it[2]. Such a gift may be subject to *dies* and *conditio*[3], and we have already noted many rules of form, *etc.*, which apply equally to both. But it is not a legacy and is carefully distinguished from one in the texts[4]. Accarias points out[5] that it differs in some essentials, *e.g.* it is incapable of estimation in money; it cannot be refused; it can be given to a sole *heres*. There are a number of differences in detail, turning for the most part on the fact that it is indivisible and incapable of estimation in money, and on *favor libertatis*[6]. Although a legacy given *poenae nomine* was void, there was doubt in the case of a gift of liberty, though Gaius treats the doubt as obsolete and puts them on the same level[7]. Justinian allows such penal gifts, striking out the condition, if it is in any way improper[8]. Thus a legacy to a woman provided she did not marry was good and the condition was struck out[9]. But if a slave was left to a widow to be free if she married, the whole disposition was good[10]. At first this seems rather *contra libertatem*: it might be thought that the condition, being *contra bonos mores*, would be struck out and the man be free at once. There are in fact however two gifts—one to the woman on the condition that she does not marry. This the law treats as an absolute gift. Then there is a gift of liberty to the slave if X marries. There is nothing objectionable in that. When she marries there are thus two conflicting gifts, and Paul tells us in accordance with principle that *libertas potior est legato*[11]. The *sc.* Neronianum had no relation to gifts of liberty: it hardly could have[12].

Like legacies, gifts of liberty may be adeemed, though there may at one time have been doubts of this[13]. In general the same principles are applied as in case of legacy[14]. Ademption of liberty is of course ademption of any gift to the slave, for a legacy without liberty to a *servus proprius* is a nullity[15]. If several slaves of the same name, *e.g.* Stichus, are freed, *ademptio* of liberty to Stichus adeems all the gifts as in

[1] G. 2. 233; Ulp. 1. 20.
[2] 34. 9. 5. 15.
[3] G. 2. 200; Ulp. 2. 1; *post*, pp. 479 *sqq*.
[4] 30. 94. 3; G. 2. 229, 230, *etc.*
[5] Précis, § 56, citing 50. 17. 106.
[6] A gift of liberty could not be adeemed *pro parte*, 34. 4. 14. 1. One who had liberty alone could not be burdened with *fideicommissa*, though set down in the will as in lieu of *operae*, 30. 94. 3, 95. As to freedom on condition of payment of money, *post*, p. 496.
[7] G. 2. 236.
[8] In. 2. 20. 36; C. 6. 41. 1.
[9] 35. 1. 62. 3, 63. *pr*.
[10] 35. 1. 96. 1; 40. 7. 42.
[11] 35. 1. 96. 1; *post*, p. 468. If the gift over had been a legacy, *e.g.*, the man himself was to go to another person, the logical result would be that each gift being good, the widow and the second donee would share.
[12] G. 2. 197, 212, 218; Ulp. 24. 11; Vat. Fr. 85. Other differences between legacies and *libertates*, *post*, pp. 485, 491, 493.
[13] 28. 5. 6. 4; 40. 4. 10; 40. 5. 50; 40. 6. 1.
[14] *e.g.*, 28. 5. 38. 4; 34. 4. 26.
[15] 34. 4. 32. 1.

legacy[1]. A gift of liberty or a legacy left so uncertainly, is void: an *ademptio* is handled the other way, presumably because it introduces uncertainty into the gift. A curious difficulty is raised as to adeeming a condition. If a gift of liberty is conditional, can the condition be adeemed? Julian thinks it cannot be done so as to make the gift simple, for which opinion Papinian gives the rather pedantic reason that *adimere* means to take away, and can apply only to what is *datum*, conditions being not *datae* but *adscriptae*. Ulpian thinks it best to ignore this verbal distinction, and to treat them as adeemable[2].

Ademption is not necessarily by declaration in express words: it may be implied from certain dealings with the slave. An express ademption must no doubt be in the form required for ademption of legacies, and, in general, the tacit ademptions are of the same kind[3]. The chief are the cases of alienation and legacy of the slave.

Alienation of the slave is ademption of a gift of liberty to him, with a possibility of revival[4], and ademption of the gift of liberty is ademption of a legacy to him[5]. There is however a distinction to be drawn. S was given freedom and a legacy. He was sold and then the liberty was adeemed. Paul says that though the ademption was unnecessary, since the sale had adeemed the gift, it is not a mere nullity: it can be given a meaning, as the slave might be repurchased, and apart from the express ademption this would revive the gift. Thus the vendee will not get the legacy[6]. This implies that the mere sale, though an ademption of the liberty, would not necessarily have adeemed the legacy, the rule just stated being confined to express ademptions which have the effect of making the legacy a gift to *servus proprius* without liberty, and thus void. The sale of the slave might be regarded as mere *translatio* of the legacy[7]. Paul's text[8] continues with the case of a man freed by will, then freed *inter vivos*, and the liberty given to him by the will adeemed by codicil. This *ademptio* is an absolute nullity, for though you may contemplate repurchase, you may not contemplate reenslavement, and therefore it will not destroy a legacy given to him by the will. So we are told that if a slave is legated, with a legacy to him, and is freed *inter vivos*, and then the legacy of him is adeemed, this *ademptio* is a mere nullity and does not prevent him from taking what is left to him by the will. The mere freeing has not

[1] 34. 5. 10. *pr*.
[2] 34. 4. 3. 9; 35. 1. 53.
[3] Girard, Manuel, 916. Testator directed a slave to be free if he paid testator's debt to X. There was no debt: this was a gift *pure*. If testator paid the debt after the will was made, this was an ademption, 35. 1. 72. 7. Supervening impossibility was not treated as voiding the condition, *post*, p. 489.
[4] *Ante*, pp. 443, 464.
[5] 34. 4. 32. 1.
[6] *h. t.* 26. *pr*.
[7] Marcellus discusses the form, *S liber esto si meus erit*, followed by an unconditional legacy to him. S is sold. The buyer will take the gift: the words *si meus erit*, expressing what would be law in any case, imply that the legacy is to be good even though *meus non erit*, 35. 1. 47.
[8] 34. 4. 26. 1.

of itself adeemed that gift. But an effective express ademption of the legacy of him would have done so. If instead of being freed he had been sold, an express ademption of the legacy to him would not be a nullity: the gift might otherwise take effect in the alienee[1].

An obvious mode of ademption is by making a legacy or *fidei-commissum* of the slave, but as a gift of liberty may be an ademption of a gift of him, rules are necessary as to which is to prevail, where both occur in the same will or one is in the will and the other in a codicil construed with it. The general rule where there is no further complication is that the later direction is the effective one, as representing the last will, whether they are in one document, or not. If however the form of words raises a doubt, there is a general presumption in favour of the manumission, *favore libertatis*[2]. Whatever the order, a specific gift of liberty takes precedence of a general legacy, and thus where there is a legacy of his *peculium* to a slave and a gift of liberty to a particular *vicarius* in that *peculium*, the gift of liberty takes effect[3]. We are told that it is only effective manumission which bars a legacy of the slave, not the mere form of words, and thus, if the liberty cannot take effect, as being fraudulent, or of a pledged slave, or of one incapable of manumission, the legacy is still good[4]. It might have been thought that the attempt to free shewed intention to revoke the gift, but, of itself, it does not satisfy the requirements of ademption: the testator might still wish him to go to the legatee rather than to the *heres*. But there may be other complications. Though there is in general a presumption in favour of the liberty against the legacy, it must be noticed that they need not be inconsistent. Thus a gift of the slave or a gift of liberty to him, according to a certain event, *i.e.* on mutually exclusive conditions, can create no difficulty. It is also laid down that if he is *pure legatus*, and conditionally freed, the legacy is subject to the contrary condition. If the condition occurs the legacy fails: if it does not occur the manumission fails. The text notes one important result of the treatment of the legacy as conditional: if the legatee dies before the condition is satisfied, as the legacy has not vested, it fails. This does not make the gift of liberty independent of the condition but only makes the *heres* under the will benefit instead of the *heres* of the legatee[5]. On the other hand if the slave is legated, and freed *ex die*, the legacy of him

[1] 34. 4. 27. *pr.*, 1. Paul's reasoning creates difficulty in interpreting the text, which has already been considered, *ante*, p. 150.

[2] 40. 5. 50; 28. 6. 16. *pr.* Paul seems to think that, even if the legacy was last, the liberty is still good unless intent to adeem is clear, but probably no difference of rule is meant, 31. 14. *pr.*; 40. 4. 10. 1. The remark as to proof of intent may be interpolated.

[3] 40. 4. 10. *pr.*

[4] 30. 44. 7; 31. 37. A legacy of the slave with an institution of him, *sine libertate*, could have no more effect than to benefit the legatee. Even for it to do this the institution must be in some way suspended, 28. 5. 38. *pr.*; cp. G. 2. 187.

[5] 30. 68. 2; 40. 7. 42.

is void, *quia diem venturam certum est*. This inevitable definite determination is inconsistent with a gift of ownership of the slave[1]. In a case in which the slave is left to T, with liberty after the death of T, Papinian tells us that both gifts are good, whether it is a legacy to an outsider, or a *praelegatum* to one of the *heredes*, and in the last case, whether the praelegatee enters on the inheritance or not, the liberty taking effect on the death of T[2]. On the other hand Gaius cites Julian as thinking that if a slave is left to T to be free after T's death, the legacy is void, *quia moriturum Titium certum est*[3]. The explanation seems to be that Papinian applies the rule, and Julian does not, that *dies incertus in testamento facit conditionem*[4]. Julian regards the gift as *ex die* merely, and so annulling the legacy[5].

In another text we are told that there was a dispute as to the effect of the words: *Stichum Attio do lego, et, si is ei centum nummos dederit, liber esto*. Servius and Ofilius held that he was not a *statuliber*: Quintus Mucius, Gallus and Labeo held that he was, and Javolenus accepts this view[6]. The point is that a *statuliber* is in general a slave of the *heres*, and if effectively legated, this he cannot be. All the jurists are early: the reason which leads Quintus Mucius and the others to disregard the difficulty does not appear. That which is given, apparently the view of Javolenus, is that he is the slave of the *heres* and not of the legatee. This expresses the classical lawyers' way of surmounting the difficulty, just stated: the legacy is treated as under the contrary condition[7].

In a long and obscure text, of Scaevola, the effect of the following words is discussed[8]: *Titius heres esto. Stichum Maevio do lego: Stichus heres esto. Si Stichus heres non erit, Stichus liber heresque esto.* If T had entered no question would have arisen[9]. But in the present case, T did not enter, and Scaevola construes the words ignoring the institution of T. His view seems to be this: the two institutions of S are not a substitution, the second having no new condition. It is as if the words were "let S be heir, if not, let him be heir." It is thus *in uno gradu*. The gift of liberty, coming after, destroys the legacy of S,

[1] 30. 68. 3. A legacy of usufruct in him, till then, is good, 35. 2. 56. 3.

[2] 31. 65. 2, 3.

[3] 30. 68. 3 *in fin.* This view of Julian's is not contradicted by him in 28. 5. 38. *pr.*, where he says that a slave can be validly instituted after the death of a person to whom he is legated, even if the legatee is a *filius impubes exheredatus*. As there is no liberty in question there is no conflict of claim.

[4] 35. 1. 75, *post*, p. 480.

[5] *Post*, p. 481.

[6] 40. 7. 39. *pr.*

[7] 30. 68. 2. The words which follow in 40. 7. 39. *pr.* (*utpote cum legatum statulibertate tollitur*) are not clear. Mommsen omits *statu*, thus making the text say that even a conditional liberty annuls the legacy. This must be the meaning, but the words are probably due to the compilers: they go beyond what is needed and what is the rule of other texts.

[8] 28. 6. 48. 1. *Post*, p. 510.

[9] Thus where *filius impubes* was instituted and a slave was *legatus*, and under the pupillary substitution he was to be free, here if the *filius* took definitively, the legacy was good, the liberty null: if the substitute took things were reversed, 28. 6. 18. 1; 30. 81. 10.

and thus Maevius takes nothing and Stichus is free and *heres*. Scaevola quotes Julian as holding the same view[1].

We are told that if a gift of liberty is adeemed *lege*, it is to be taken *aut pro non data aut certe observari ac si a testatore adempta esset*[2]. We have no comments on this proposition, which is the only *lex* in the title *de ademptione libertatis*. It is from a treatise by Terentius Clemens on the *lex* Iulia *et* Papia. The case in view is no doubt that of a disability under the *lex* Iulia *de adulteriis*, and the expression *ademptio* implies that it is a supervening disability. The point is probably that it is not to be treated as a *caducum*[3]. The jurist's correction of his language may be no more than an effort at greater accuracy, since the gift had once certainly been valid, but it seems to involve a distinction in effect. If the gift is *pro non scripto* there can be no question of revival, but, regarded as one adeemed, then, as the ademption is not express, it may presumably revive by the disappearance of the prohibition, with no act of revival, just as such a gift adeemed by sale revived on repurchase[4].

The ademption of liberty may be conditional, the effect of which is to subject the liberty to the contrary condition[5]. It is laid down by Florentinus that ademption being a privative act cannot validate a gift. A legacy is made to a slave of the *heres*: it is conditionally adeemed. Although this makes it a conditional gift, and therefore *prima facie* valid, Florentinus denies it any such effect in this case[6]. The ademption of a condition may of course make the gift valid. Thus a manumission *poenae causa* is void, but if the condition is adeemed it may presumably take effect.

In general, manumissions stand or fall with the will[7]. One text however seems in its present form to contemplate validity in a gift of liberty though the will has failed. The difficulties of the text will be considered later: here it is enough to say that the text must probably be read, as Krüger suggests[8], as of a dispute affecting the inheritance not of the donor of the liberty, but of his heir, so that the present difficulty is only apparent.

Legacies to freed slaves give rise to several points for discussion. Such legacies vest only on entry of the *heres*, a rule said to be due to the fact that if they were construed as vesting before they must necessarily fail, as he has not capacity to take till he is free. Till then it

[1] Mommsen refers to *h. t.* 10. 7 (Julian). The point is the same: of two institutions of the same person one is not necessarily in substitution.
[2] 40. 6. 1. [3] Pothier, *ad h. l.* [4] *Ante*, pp. 443, 464, 467.
[5] 40. 7. 13. 5. [6] 34. 4. 14. *pr.*
[7] *e.g.*, where *bonorum possessio contra tabulas* is given, 37. 5. 23. Exceptions, *post*, Ch. XXVII.
[8] 40. 7. 29. 1. Krüger, Z. S. S. 24. 193. *Post*, p. 502.

is a legacy to the testator's own slave[1]. This rule leads to another affecting the construction of such a gift. If the *peculium* is left to an *extraneus* he takes it as it was at the time of death, having no right to later accessions, except pure increment of existing *res peculiares*. If it is left to the slave he takes it as it is at the time of *aditio*. This rule Julian bases on an assumption as to the intent of the testator and thus it might be varied by evidence of contrary intent[2]. It is essential that the legacy be accompanied by a gift of liberty: if it is not it is void and it is not validated by the man's getting liberty in any other way *post mortem* and before *aditio*[3]. The rule has no connexion with the *regula* Catoniana, which does not apply to legacies which vest only on *aditio*[4].

So far as both gifts are unconditional and unrestricted the rules are simple and the texts deal only with questions of construction. Where the words were "let S be free and I desire my heir to teach him a trade by which he may live," Pegasus held the *fideicommissum* void for uncertainty, the kind of trade not being mentioned. But the rule stated by Valens is that it is valid, and the Praetor or *arbiter* will direct the teaching of a suitable trade[5]. Where liberty was given to A and B, and certain land was left to them, the will elsewhere praelegated to one of the *heredes*, T, "all that X left me." This included the land. The question was: did A and B have it, or T, or all three? As a matter of construction Scaevola holds that the specific gift to A and B is to be preferred to the general gift to T[6].

More difficult questions arise where one gift is simple and the other conditional. If the gift of liberty is simple, the legacy may be either conditional or simple[7]. But if the legacy is simple and the liberty conditional, the general rule is that if the condition both can be and is satisfied before *aditio*, the legacy is good, but in other cases bad. Thus the legacy is necessarily bad if there is any condition on the liberty and the *heres* is a *necessarius*, or if the condition cannot be satisfied till after *aditio*[8], or if in fact it is still unfulfilled at the *aditio*, though it need not have been[9]. It is observable that if there is a *heres necessarius* the simple legacy is declared null in any case, *i.e.* even if the condition on the liberty be satisfied *vivo testatore*. This harsh rule is a result of the *regula* Catoniana[10]. As the legacy in this case vests at

[1] 36. 2. 7. 6, 8; 35. 2. 1. 4; In. 2. 20. 20. [2] 33. 8. 8. 8; In. 2. 20. 20.
[3] 28. 5. 77; C. 6. 37. 4. Or before the death, 30. 102. Codicils being read into the will a gift therein suffices, 29. 7. 2. 2, 8. 5. [4] 34. 7. 3; 35. 1. 86. 1. [5] 32. 12.
[6] 32. 41. 3. Where the words were *Pamphilus peculium suum cum moriar sibi habeto liberque esto*, some seem to have thought this might be bad, as the gift of *peculium* comes first before he is free. Alfenus remarks (33. 8. 14) that as they take effect at the same time the order is not material. In the Syro-Roman Law-book the right to make such legacies seems to be confined to the case of slaves who are natural children of the testator. Ed. Bruns-Sachau, 199.
[7] 30. 91. 1. [8] *e.g.*, "if he give the *heres* 10" or "if he go to Rome after the *aditio*."
[9] 30. 91. 1; 35. 1. 86. 1; 36. 2. 7. 6, 8.
[10] Machelard, Règle Catonienne, § 59; Dissertations, 517.

death it is not protected by the rule which excludes the *regula* in legacies which vest only on *aditio*[1], and it would certainly have failed if the testator had died at the time of making the will[2].

In applying these principles there is however a general tendency to save the legacy if possible by treating the condition as applying also to it, if this is possible on the wording of the will. Where a slave is to be free on rendering accounts, and the heir is to give him some land, Callistratus holds the legacy good, if the condition applies to it also, but not otherwise[3]. Where a slave is directed to give 10 to the *heres* and so be free, and to have a legacy, Maecianus, quoting Julian, says the legacy is bad unless the condition applies to both, which it may, by construction, though not expressly stated to be so applicable. It follows that if he is freed *inter vivos*, he cannot claim the legacy unless he pays the 10[4]. Where a slave is freed conditionally and receives a legacy *pure*, and the testator frees him *inter vivos, pendente conditione*, he takes the legacy whatever happens to the condition, but if the condition fails before he is freed, the legacy is void, as not accompanied by a gift of freedom: the subsequent manumission *inter vivos* being ineffective to save it, it is *irritum*[5]. This is also from Julian: the difference between this case and the last is that here the condition is not one incapable of fulfilment before *aditio*, and thus it is not necessary to the saving of the legacy that the condition be read into it. Where the words were "let my *heres* give S my slave 10, and if he serve my *heres* for two years, let him be free," jurists so early as Labeo and Trebatius were agreed that even here the condition could be read into the legacy, which is thus saved[6]. But of course the terms of the legacy might exclude this resource[7].

Other texts shewing rules of construction favourable to such gifts can be cited. A slave was to be free in 10 years and to have an annual allowance from the testator's death. He will get the annuity from the liberty, and *alimenta* meanwhile[8]. This does not mean that he can enforce the payment of *alimenta*, but that the *heres* who has

[1] 34. 7. 3; 35. 1. 86. 1.

[2] The same rules apply if the manumission though simple in form is delayed by some rule of law, *e.g.* that under the *lex* Iulia *de adulteriis*, till after the *aditio*, 31. 76. 4, *post*, Ch. XXV.

[3] 35. 1. 82.

[4] *h. t.* 86. *pr.* So if there is a *fideicommissum* subject to the same condition as the liberty, and the *heres* frees the man *pendente conditione*, he is entitled to the *fideicommissum* when the condition occurs, 35. 1. 66.

[5] 28. 5. 38. 4. [6] 32. 30. 2.

[7] 35. 1. 86. *pr.* In 40. 7. 28. 1 Javolenus quotes Cassius, as saying that if there is a legacy of *peculium* and conditional liberty, acquisitions to the *peculium* will not go to the man unless the legacy *in tempus libertatis collatum esset*. He corrects by saying that mere accessions go unless taken away by the *heres*. The legacy ought however to be wholly bad. Pothier (*ad h. l.*) supposes the legacy conditional and explains these words as meaning, unless it is expressly given as it is at the time of liberty. This may be the solution of a question already raised, *ante*, p. 191. It should be noted that if the *heres* adeems the *peculium* he does not destroy the legacy but only prevents additions to it.

[8] 33. 1. 16.

paid them can charge them against his *coheredes*, and they can be claimed by the person interested in the slave in the meantime[1]. Thus, if the slave dies before the time is up, though the legacy is not due to him, and therefore the *alimenta* cannot be due either, the *alimenta* paid, if consumed, cannot be recovered, by the *heres* who paid them, from him who had the slave at the time of payment[2]. The last point is an ordinary result of the rules of *bonae fidei possessio*. The main provision is not exactly reading the condition into the legacy in defiance of the words of the will: it is treating the testator as having in one form, made two gifts, perfectly valid. The legacy of annual payments is to run from the liberty. There is also a direction to the *heres* to give a maintenance allowance at once. This is equivalent to a gift of *cibaria*, and it is expressly enacted by Severus and Caracalla that such a direction is binding on the *heres*[3].

Where the will said, "let S be free and let my *heres* give him 5," he gets the legacy though he is freed *inter vivos*[4]. This is in accord with what has been said[5]. The result is the same if the words were "let S be free," either now or at a future time, "and, when he is free, let my heir give him 5[6]." The text adds that if the words were "let S be free and if I free him *vindicta*, let my heir give him 5," here even if he is not so freed but the gift by will takes effect, the gift of money is still good, on grounds of humanity, says the text, though the condition did not strictly occur. *Humanitas* is a bad reason for despoiling the *heres*—the decision really is that the testator meant this.

There is no special difficulty in the application of the *lex* Falcidia to legacies to freed slaves[7], but the relation of that *lex* to gifts of liberty does call for discussion. If the man is absolutely freed, and survives *aditio*, there is no difficulty. He does not count in the *hereditas*[8]. If however he dies before *aditio*, then he never was actually free, and he must be treated as a slave and counted in the *hereditas*, a rule expressed in the form: *heredi perit*. But as he could never have belonged to the heir his value is merely nominal: Papinian tells us that he is to be valued as a dying slave[9].

If the gift of liberty was conditional or *ex die*, there are some difficulties. Some of them are caused by the fact that practice was not

[1] 34. 1. 15. 1. [2] 10. 2. 39. 2.

[3] 30. 113. 1; cp. 34. 1. 11. This gives no right to the slave: it makes money so paid irrecoverable and entitles any *heres* who has paid it to charge it against his *coheredes*. It does not appear that the slave after he was free could claim arrears. Presumably the person on whom the maintenance of the slave had fallen could claim.

[4] 40. 4. 4. *pr.* [5] Cp. 28. 5. 38. 4.

[6] 40. 4. 4. 1. [7] 35. 2. 1. 4.

[8] In. 2. 22. 2, 3; *etc.* The same rule applied in the *Querela*, 5. 2. 8. 9. There were of course other ways in which he might cease to be in the *hereditas*, 35. 2. 39.

[9] 35. 2. 11. 4.

settled in classical law, as to what was to be done in the matter of charging conditional legacies. According to one view the parties had their choice either to treat the conditional legacy as a legacy, valuing it at what it would sell for as a conditional right[1], or to treat it as no legacy, so that it would not count to make up the three-fourths allowed. In both cases it is estimated in the *hereditas* at its full amount, but in the last the other legatees are called on to give security to refund, in the event of the total sum of legacies being made to exceed three-fourths by the arrival of the condition on this, so that it takes effect. It is clear that this is the simplest course: it is certainly the practice in later law[2]. When the condition arrives it becomes clear what is due to the *heres*, *ex* Falcidia. To it is added interest for the time during which it has been unpaid. From it is deducted what the *heres* has received in the way of fruits from what was conditionally legated[3]. In arriving at the sum due to the *heres*, the legacies are taken at their nominal value. But in distributing the burden among the legatees, account is taken of the fact that the conditional legacy was really lessened in actual value by what had been received by the *heres*, and thus, in apportioning the payment to the *heres*, but for that purpose only, the legacy is reckoned at the smaller amount[4].

If the legacy is simply *in diem*, then, as it is certain to be due, it is reckoned at once towards the three-quarters, but only at its present value[5]. This is simple in the case in which the legacy is money, but if it is a thing producing irregular and uncertain fruits, such as a slave, it seems likely that it is treated as conditional gifts are[6].

Similar questions present themselves in the case of a man freed conditionally or *ex die*, and are further complicated by the fact that he may be also the subject of a legacy. Where he is not legated, the question is how far he is to be reckoned as part of the estate, so as to increase the amount going to the *heres*, of which not more than three-quarters can be legated. Here, apart from the death of the slave, the rule is that if the condition fails he is a part of the *hereditas*, and if it does not fail he is not: the *lex* Falcidia does not of course affect the gift of liberty itself[7]. In the meantime the practice is to treat him as a part of the *hereditas*, the legatees giving security to refund if the condition arrives[8]. We are told by Hermogenianus[9] that

[1] 35. 2. 45. 1.
[2] 35. 2. 73. 2. Paul speaks of it as the only possible course, *h. t.* 45. 1.
[3] *h. t.* 24. 1, 88. 3.
[4] *h. t.* 88. 3, Africanus, to the benefit of that legatee as against others. Ulpian is probably dealing with the same aspect of the matter in *h. t.* 66. *pr.*
[5] *h. t.* 45. *pr.*, 73. 4.
[6] In this case the fruits received by the *heres* will be charged against the quarter and the slave reckoned temporarily at his full value, *h. t.* 56. 3, 66. *pr.*
[7] In. 2. 22. 3. [8] 35. 2. 73. 3. [9] *h. t.* 38. *pr.*

statuliber heredis non auget familiam, which seems to mean that if a *heres* has succeeded to an estate including a man given conditional liberty under the will, and he himself dies before the condition occurs, the man is not counted in his inheritance against his *heres*. It is not easy to see why this is so. The man was imputed against him as *heres* and might have been expected to be imputed against his *heres*. The fact that the deceased *heres* did not himself impose the condition does not seem to be material. It seems an avoidance of complication at some sacrifice of consistency.

If the manumission is *ex die*, it seems, though there is little evidence, that the man is treated as part of the *hereditas* till the time comes[1]. He is then deducted, and if this makes the legacies exceed three-quarters, the legatees must refund, less any profits the heir has made by the man.

If the man dies after the death of the testator, Papinian tells us that if the condition is satisfied (*i.e.* at any time), he does not perish to the *heres*, *i.e.* he is not charged as a part of the inheritance, but if the condition fails he is then to be included, *sed quanti statuliber moriens fuisse videbitur*[2]. Two remarks suggest themselves. If he is absolutely freed and dies before entry of the *heres*, it is Papinian who tells us[3] that he is imputed, though only at a nominal value. In the present case where he dies after the condition is satisfied we should have expected the same result. But here he says the slave is not imputed at all. The difference is very slight: it may be that the meaning is the same. If the condition fails we should have expected it to be as if he had never been freed at all: in that case we are told that the death of a slave between death and entry of the *heres* leaves him imputable at his full value[4]. But here we are told he is to be valued as a dying *statuliber*, *i.e.*, at a mere nominal sum. This may however conceivably mean the same thing, since we know that in the settled practice a *statuliber* is taken at his full value subject to readjustment if the condition occur[5]. But it is plain that the clause *sed quanti... videbitur* implies something different from *heredi periisse*, since it is stated as a modification of that proposition. It may be a representation of a view analogous to, but not identical with, that held by some early jurists in the case of legacy, that he was valued *ab initio* as a *statuliber*, and that failure of the condition was not to disturb that estimate[6]. But as the writer has just told us that arrival of the condition causes him to be valued at nothing, this is hardly probable. It may be an addition of the compilers[7].

[1] Arg. 35. 2. 56. 3. But see *post*, p. 522.
[2] 35. 2. 11. 1.
[3] *h. t.* 11. 4.
[4] *h. t.* 30. *pr.*
[5] *h. t.* 73. 3.
[6] Cp. *h. t.* 73. 1.
[7] The same may be said of *h. t.* 37. *pr.*, *post*, p. 522, in connexion with *fideicommissa*.

Further questions arise, and there is really no textual authority, where the freed slave is also the subject of a legacy. Here there are to be considered two questions. How far is he a legacy counting towards the three-quarters? How far is he counted in the *hereditas* towards the heir's quarter? Such a legacy is, as we have seen[1], regarded as subject to the contrary condition. As it is a conditional legacy, it is treated as no legacy, in the meanwhile[2], and if the condition determines in favour of the legacy, the rule applied must be that already stated for conditional legacies: the legatees may have to refund something on account of the extra legacy, which may have brought the total above three-quarters, and they have a right to allowance, in that case, for anything the *heres* has received. If it is decided in favour of the liberty[3], the legatees will have to refund whatever may be due by reason of the reduction in the total inheritance with the same right to allowance[4].

If the slave legated is also freed *ex die*, we have seen that the rule of later law is that the legacy is void[5]. But a legacy of the use of him till the day is valid, and in that case the interim receipts are a legacy and subject to a Falcidian deduction[6].

The texts do not discuss the case of a slave conditionally freed and legated and dying before the condition is satisfied. Presumably, as in the case just discussed, the event of the condition determined the solution, which was as if there had been no liberty or no legacy as the case might be.

A question of some interest is: could liberty be given to unborn persons, directly? Justinian, determining a long-standing doubt, declares such gifts lawful. The enactment[7] was published three years before the Digest, so that we have little authority for the earlier law. But he expresses the doubt as relating only to *fideicommissa*: as to direct gifts he seems to be making new law. Paul admits the validity of a gift in the form *qui ex ea ancilla nascetur liberum esse volo*[8], which must be a *fideicommissum*. We have seen that direct gifts of liberty, though not legacies, are closely analogous thereto[9], and the same principles may probably be applied. It might conceivably be doubted whether the validity of the gift is to be judged by the quality of the slave regarded as the thing given or as the donee. Legacies of an

[1] *Ante*, p. 472. [2] *Ante*, p. 474. [3] *Ante*, p. 474.
[4] Thus if the estate is 400 of which the slave is 100 and there are legacies of 300, legacies will be paid in full. After three months, in which S has earned 25 for *heres*, the condition arrives in favour of the legacy. 100 must be refunded, with, say, 5 for interest, and less 25. If the condition is decided in favour of liberty, the estate is reduced to 300 of which 75 must be refunded, with interest and less the earnings.
[5] *Ante*, p. 468. [6] 35. 2. 56. 3. [7] C. 7. 4. 14.
[8] P. 4. 14. 1. [9] *Ante*, p. 466.

unborn slave or of a usufruct in one are allowed[1]. But in earlier law this could be only by *damnatio* (or perhaps *sinendi modo* if the slave were alive at the death[2]), not by *vindicatio*[3]. But gifts of liberty in the form of *damnatio* could not have been valid except as *fideicommissa*[4]. It is on the whole more likely that such gifts would be regarded as gifts to the slave. They vest only on *aditio*[5], and the language of the texts in other respects favours this view[6]. The result is the same. Gaius tells us that gifts of liberty to *incertae personae* are bad[7]. But he bases this on the *lex* Fufia Caninia, and not on anything which applies, as the rule does, to legacies. But, as the above text of Paul shews[8], they are not *incertae personae*, but *postumi alieni*, a class usually kept distinct[9]. Legacies to such persons are void[10], and it is likely that liberties are equally so[11].

The gift takes effect at the moment when any heir enters under the will[12], *in eodem gradu*; not, for instance, if it follows the institutions, and all the heirs primarily instituted refuse, so that a substitution later in the will takes effect[13]. The fact that some of the institutions fail is in general immaterial. Where A and B were instituted *pure* to one quarter each, and B was given one half conditionally, liberties were good even though the condition failed, since in any case A and B would take the whole *hereditas*[14]. Assuming a valid entry the liberty is not affected by subsequent happenings. Thus it is not delayed by an accusation of theft brought by the *heres* against the *libertus*: there are other remedies[15]. And where a *heres* refuses to give the necessary security to legatees who are on that account put into possession, liberty is not affected or delayed[16]. More striking is the fact that it is not affected though the *heres* gets *restitutio in integrum*[17].

Many of the rules laid down in this chapter are departed from in the case of the will of a *miles*. A few of these relaxations may be given, but it is unnecessary to attempt an exhaustive list or to set out those relaxations in rules of form which apply to gifts of liberty as to all other kinds of gift. Nor are we concerned with the principle on which they depend[18]. The following may be noted.

[1] 7. 1. 68; 30. 24. *pr.*; 31. 73; 35. 1. 1. 3. [2] G. 2. 203, 211.
[3] G. 2. 196. [4] *Post*, p. 513. [5] 31. 65. 2; 40. 4. 58.
[6] *e.g.* 40. 5. 24. 3. [7] G. 2. 239. [8] P. 4. 14. 1.
[9] G. 2. 287. [10] *Ibid.* But see 34. 5. 5. 1, 6, 7.
[11] As to later law, Haenel, Diss. Domm. 463, and *post*, p. 557.
[12] 40. 4. 11. 2; C. 6. 51. 1. 6. [13] 40. 4. 25. [14] 35. 2. 87. 3.
[15] 40. 4. 11. 2. [16] 36. 4. 59. 1.
[17] C. 7. 2. 3. Exceptional cases in which the gift operates though there is no *aditio*, *post*, Ch. XXVII. *init.*
[18] See Roby, Roman Priv. Law, 1. 216; Girard, Manuel, 811, *etc.*; C. 6. 21. 3.

(*a*) The institution of a slave implies a gift of liberty[1]: indeed even a legacy to him does[2], and this though the legacy be conditional[3].

(*b*) Words implying that the slave has already been freed constitute a gift of liberty if there is no error; *e.g. Fortunato liberto meo do lego*[4], *Samiam in libertate esse iussi*[5].

(*c*) Liberty may be given before the *institutio*, and *post mortem heredis*[6].

(*d*) There is a difference in treatment where the *institutus* and *substitutus* died before entry[7].

[1] 29. 1. 13. 3. *Ante*, p. 463. [2] See Nov. 78. 4. [3] 29. 1. 40. 1.
[4] C. 6. 21. 7. Cp. *ante*, p. 462. [5] 40. 4. 49. [6] Ulp. 1. 20; *ante*, pp. 461, 466.
[7] 29. 1. 13. 4; 40. 5. 42. In 29. 1. 13. 3 it is said that if a *miles* institutes a *servus proprius*, whom he thought *alienus*, without a gift of liberty, this is null. The point is that since the whole thing would be null at common law there is no point in applying the privilege where the effect would not be to carry out the intention of the *miles*. See *ante*, p. 143.

CHAPTER XXI.

MANUMISSION DURING THE EMPIRE (*cont.*). MANUMISSION BY WILL. DIES, CONDITIO, INSTITUTION.

A GIFT of liberty by will is not necessarily absolute and immediate: it may be subject to a condition or deferred to a future day. Pending the event the man is a *statuliber*: we have already considered his position[1] and have now to discuss the other questions affecting these modalities.

Where the liberty is deferred to a certain future time, it is said to be subject to *dies certus*. If the words *ad annum* are added, *e.g. ad annum liber esto*, they are construed as meaning "at the end of a year[2]." If the words are *ad annos decem*, they are treated as *supervacua*[3]. A gift of freedom *intra annum post mortem* entitles the donee to liberty at once. The rule is attributed to Labeo, and is declared to be justified by him as an inference from the rule that where the gift is: Let him be free *si heredi intra decimum annum decem dederit*, the man is free if he pays at once[4]. It is plain that this does not justify the rule. The one rule says merely that to impose a time within which the condition must be satisfied is not to impose *dies* in addition to the condition: it leaves the choice of time within a certain limit to the slave himself. The other does not: it does not say who is to have the choice of time, and the actual rule is a case of *favor libertatis*. We saw that *ad annum* meant at the end of the year. The text adds that this is to be reckoned from the death, but that if the words are such as to require the time to run from the date of the will, and the testator dies within the time the gift is not void[5], but the time must be waited for. The same rule applies no doubt to all cases in which that construction is given. It is not too plain why anyone should have thought

[1] *Ante*, pp. 286 *sqq*. [2] 40. 4. 18. 2. It cannot be *in diem*, 40. 4. 33.
[3] 40. 4. 34. If it is *in annos decem*, he is free at the end of ten years, 35. 1. 49; 40. 4. 41. To be free *post annos*, means, *favore libertatis*, at the end of two years, 40. 4. 17. 2 (Tribonian discusses evidence of contrary intent). To be free *anno duodecimo post mortem* means at the beginning of the twelfth year; *post duodecim annos* means at its end, 40. 4. 41. *pr*.
[4] 40. 4. 41. 2. [5] 40. 4. 18. 2.

it void. The context suggests that Julian is simply emphasising the fact that it differs from a case in which the testator does not die within the year. Such a gift would perhaps be in strictness void in that event, as was one which gave liberty if a condition to be satisfied to the heir was satisfied within 30 days from the death, and there was no *aditio* till after that date. But here, and perhaps in the other case, the gift was allowed to be valid, *favore libertatis*[1]. It may be said in conclusion that *certum est quod certum reddi potest:* there may be *dies certus* where it is not so expressed. Thus a gift *cum per leges licebit* is valid and *ex die*[2].

Dies incertus is on a different footing. *Dies incertus* both *an* and *quando* is a condition and will be considered later[3]. As to *dies certus an, incertus quando,* of which *cum T moreretur* is the type usually cited, we are told by Papinian in a famous text[4], that *dies incertus conditionem in testamento facit,* and the proposition is confirmed in many texts[5]. It has, however, been the subject of much discussion in recent times. The existence of the rule itself has been doubted; the view being held that the *dies* referred to by Papinian is a *dies incertus an et quando.* But in view of the emptiness of the remark in that sense, the generality of his text and the content of the other texts cited, it is not necessary to do more than advert to this view[6]. But the admission of the rule leaves, still, a number of doubts, which the texts do not clear up. The main effect of the rule is to prevent transmissibility of the legacy to which the modality is attached, and that this is probably due to *intuitus personae, i.e.* a recognition of the testator's presumed intention to benefit a particular person who may not be alive at the time of the event, appears from the language of at least one of the texts[7], and from the fact that the rule was not applied to a gift *cum legatarius morietur,* since here the point could not arise: the testator's intent was clear[8]. It is not easy to see why the rule was not applied to *dies certus,* in which the same uncertainty would arise. There have been attempts to give the rule a rational basis, but none are satisfactory[9], and it is precisely this difficulty which has led some writers to try to explain the rule out of existence, notwithstanding the texts. The adoption of the view, for which some evidence will shortly be stated, that the rule as laid down by Papinian is a generalisation from the case of institution, results in reducing the problem to the familiar one: why was *dies certus* struck out in institutions while *dies incertus* was treated as a condition? This obscure question is too far from our topic for discussion. All attempts to explain it on logical lines seem to have failed[1], and perhaps it is a mistake to assume that it must have had a logical basis. The rule may very well shew no more than that the notion of direct continuity which is certainly involved in *hereditas* is inadmissibly offended by a direct postponement of *aditio,* though it may be practically no less interfered with by postponement in disguised form[2]. In these cases there is always the possibility that the succession may be immediate.

That the rule of Papinian which is our immediate concern was in fact extended from institutions to other gifts appears from the fact that all the jurists who lay it down in general terms or apply it to gifts other than institutions seem to be rather late: Pomponius is, it appears, the earliest[3]. Others are Papinian[4], Ulpian[5] and Paul[6]. On the other hand, Julian, while he admits the rule in the case of institutions[7], denies its applicability to a gift of liberty[8]. He is discussing the coexistence of a simple legacy of the slave and a gift of liberty to the slave at the death of the legatee, and he is reported by Gaius as considering the legacy void, on a principle already discussed[9], by reason of the existence of a gift of liberty subject only to *dies.* Papinian on the other hand, who discusses the same case, considers both gifts good, the *dies incertus* having clearly, for him, the effect of a condition[10].

This view, that the idea is carried over from the case of institution, though it is strongly suggested by the foregoing case, and is supported by the existence of analogous extensions, *e.g.* the treatment of unlawful and impossible conditions[11], has, however, to face some difficulties. It may be said that if this rule was carried over, the rule excluding *dies certus* ought to have come over too. The answer seems to be that this last rule is not one of interpretation: there is not the logical reason which exists in our case. The question whether certain words are to operate as a condition or not cannot depend on the kind of gift to which they are attached even though they may have been declared conditions for ulterior reasons which apply only to institutions.

It may also be objected that Labeo is found applying the rule to legacies[12]. But Labeo is speaking of a gift *si moritur,* and though the difference between *cum* and *si* would not be conclusive to a classical

[1] 40. 7. 28. *pr.* [2] 40. 4. 38.
[3] *Post,* pp. 483 *sqq.* [4] 35. 1. 75.
[5] Ulp. 24. 31; D. 30. 30. 4, 104. 6; 31. 12. 1, 65. 2, 3; 35. 1. 1. 2, 79. 1; 36. 2. 4, 13; cp. C. 6. 51. 1. 7.
[6] Brunetti, Dies Incertus, c. 3, states and refutes this view. As to attempts to confine the rule to gifts *cum heres morietur,* see *op. cit.* p. 41.
[7] 35. 1. 79. 1. [8] *Ib.*; 36. 2. 4. Brunetti, c. 5.
[9] The latest seems to be that of Brunetti, *op. cit.* Pt. 2, as to which see Audibert, N. R. H. 21. 96.

[1] See Dernburg, Pandekten, 3. § 82, n. 1, and literature there cited; Bufnoir, Conditions, 12.
[2] Karlowa, R. R. G. 2. 871. [3] 35. 1. 1. 2; 36. 2. 13.
[4] 31. 65. 2, 3; 35. 1. 75, 79. 1. [5] Ulp. 24. 31; D. 30. 30. 4; 36. 2. 4.
[6] 31. 12. 1. [7] 30. 104. 6.
[8] 30. 68. 3. [9] *Ante,* p. 468.
[10] 31. 65. 3. [11] Girard, Manuel, 912.
[12] 35. 1. 40. 2.

jurist[1], it is by no means clear that it would not have been so to Labeo. It may be noticed that he speaks of it simply as a conditional gift, and not as one which has for this purpose the effect of a condition, as Papinian says for our case[2].

It may also be said that the Code contains an enactment of Diocletian, *extraneum quum morietur heredem scribi placuit*[3], which seems to shew that the rule in this case differs from that in legacy, which thus cannot have been simply borrowed. For the text treats the gift at death of the beneficiary as conditional, since if it were mere *dies* it would be struck out, while in legacy we have seen that in that case the modality was treated as *dies*[4]. But, as it stands, the text can have but little meaning: such an institution could have no force, since it could not be entered on and thus was not transmitted in classical law. Two possible ways of dealing with it have been suggested. It may be that in such a case the words *cum (heres) morietur* were struck out as being *dies*, which would get rid of the difficulty[5]. This view does not however account for the limitation to an *extraneus*, since the same rule would apply to an institution of a *suus*. It is difficult to suppose, as Accarias does[6], that the text really means that the rule applied to both cases: the word *extraneus* must have been put in for some reason. Another view adopted by the older editors is that the text refers to a gift on the death of a third person, and they accordingly insert *quis* (*cum quis morietur*). This would make the text an ordinary illustration of our rule, but it has no MS. authority. The text may be left with the remark that its extremely terse and truncated form does not inspire confidence.

It has been pointed out that the chief text, one of Papinian, does not say that *dies incertus quando, certus an,* is a condition, but only that it *facit conditionem, i.e.* has the effect of a condition[7]. The distinction is exact as a matter of words, and Ulpian has no doubt the same point in mind when he says that such a modality *appellatur conditio*[8]. A condition is essentially *incertus an.* Elsewhere, Papinian, Ulpian and Julian ignore this distinction[9], though it recurs as late as Justinian, who carefully distinguishes the cases of *dies incertus* and *conditio,* though he gives both of them the effect of postponing *dies cedens*[10]. It does not seem indeed that the distinction involves any difference of effect[11].

Condition is a somewhat complex matter. A condition is a future

[1] See 45. 1. 45. 3. [2] 35. 2. 75. [3] C. 6. 24. 9.
[4] *Ante,* p. 480. [5] So Accarias, Précis, § 324 (cp. § 384) following Machelard.
[6] *loc. cit.* [7] 35. 1. 75. Brunetti, *op. cit.* 22, 37.
[8] 30. 30. 4. [9] 30. 104. 6; Ulp. 24. 31; D. 35. 1. 79. 1. [10] C. 6. 51. 1. 7.
[11] Brunetti, *op. cit.* 37, explains by it the view taken by Julian in a text already discussed

and uncertain event. It seems that every restriction which makes the event depend on an occurrence which may not happen is a condition even though it be such that if it occur it must occur at a certain time —*incertus an, certus quando.*

A gift of liberty is not conditional, and therefore delayed, unless it is clear that this was the intent. Some provisions which look at first like conditions may be only directory: it is a matter of construction, to be decided for each case. Thus where a man is to be free *ita ut rationes reddat,* this is not a condition: it is a direction. He must carry it out; indeed every slave who has administered has to render his accounts whether such a direction is given or not[1]. Where slaves are to be free if they attend in alternate months to the *sollennia* of the testator's tomb, this is a direction: it is to be carried out after liberty is attained, and they can be compelled *officio iudicis,* to do the duty. But the liberty is not conditional[2]. Where one is to be free "*sic tamen ut*" he stays with the heir so long as the latter is a *iuvenis,* and, if he does not, *iure servitutis teneatur,* this too is only a direction to be carried out after the man is free[3]. On the construction of the whole gift, even the strong words at the end are not allowed to limit what the jurist thinks to be meant as an immediate gift of liberty.

Another type of case is represented by such gifts as *Sticha cum liberis libera esto.* This is not a condition: she is free, apart from evidence of intention, though she have no children or they cannot from any cause be freed[4]. So where the gift was "Let S and P be free if they are mine when I die," either may take though the other has been alienated: there is no condition[5].

A condition involves future uncertainty, and thus a gift which is expressed in conditional form, but the event is one which must necessarily be determined by the time the gift operates, is not really conditional. The donee can never be a *statuliber* under it. Thus, "to be free when I die[6]," or "to be free if I do not veto it by codicil[7]" or the like: these are not conditional[8]. "To be free if he pays what I owe

(30. 68. 3) as to legacy of a slave with a gift of liberty on the death of the legatee. But we have seen (*ante,* p. 469) by comparing the text of Papinian (31. 65. 3) that the true explanation is historical. And this latter text makes it clear that the treatment of *dies incertus* as a condition produced other effects than the postponement of the vesting of a transmissible right. Such an effect would have no meaning in the case of gift of liberty discussed in the texts.

[1] 40. 4. 17. 1; 40. 5. 37. [2] 40. 4. 44.

[3] 40. 4. 52. See the Testamentum Dasumii (Girard, Textes, 767) where testator directs a slave to be free *cum contubernali sua ita ut eam in matrimonium habeat fidele.*

[4] 40. 4. 13. 3. The jurist is helped to the conclusion by the construction put on the Edict: *ventrem cum liberis in possessione esse iubebo,* 37. 9. 1. *pr.*; cp. 35. 1. 81; 40. 7. 31.

[5] 28. 7. 2. 1. [6] 40. 4. 18. 1. [7] *h. t.* 28.

[8] "To be free if he has managed my affairs well" is not conditional, he is free if the testator having long survived the making of the will has made no complaint, 40. 5. 18; "if I have no son when I die" is no condition: the gift is good or bad according to the event, 40. 4. 7: *cum moriar* being understood to include *postumi,* there might be a lapse of time.

to T" is no condition if there was no debt to T[1]. If there was a debt and the testator has paid it, the condition is treated as having failed: it was in fact an ademption[2]. It is clear that in all these cases where there is an express hypothesis on which the gift is made to depend, there may be need for enquiry on the result of which the fate of the gift will hang. In common speech they would be called conditional, and they are in fact sometimes so called in the texts. This is the case with the gift "if mine when I die[3]," and *qui sine offensa fuerunt liberi sunto*[4]. Although, as the rest of this text shews, the words refer entirely to the past, the gift is called conditional, but the man is not a *statuliber* even though there be some delay, before it is clear whether he is free or not[5]. The description of such gifts as conditional is not correct: the practical point is that when the matter is settled they are free and have been so from the time of *aditio*[6]. Thus, for instance, their interim acquisitions are their own.

Just as a gift, on the face of it conditional, may be *pura*, so, conversely, a gift on the face of it *pura* may be in fact conditional. There may be tacit conditions. Thus in the case of divorce a woman who frees within the 60 days of the *lex* Iulia makes the man a *statuliber*[7]. A slave freed in fraud of creditors is a *statuliber* till it is certain whether they will avoid the gift or not[8].

Impossible conditions are struck out—a Sabinian extension of the rules as to institutions, accepted in later law[9], and it may be assumed that the same was true as to illegal or immoral conditions, though texts seem silent[10]. Impossible conditions are those impossible in the nature of things[11]. These cases, where impossibility is patent on the gift, create no difficulty, but there are other types. Impossibility to the person concerned is no objection to the condition, and the texts put on the same level gifts on which a condition or *dies* is imposed such that, though it is not contrary to the nature of things, it is practically certain not to occur. Such for instance is a condition of paying a vast sum of money or living a hundred years[12]. Such a gift is on a level with one *cum morietur*[13], and is treated as illusory and void. It is clear that the line between these two is shifting, and probably the matter is not thoroughly thought out by the Romans[14]. Some conditions so treated

[1] 35. 1. 72. 7. It is a *falsa conditio*, treated as impossible. So where one who had never administered was to be free on rendering his accounts, 40. 5. 41. 16; 40. 7. 26. 1; cp. for legacies, 30. 104. 1.
[2] 35. 1. 72. 7. [3] 28. 7. 2. 1. [4] 40. 4. 51. 1.
[5] In the preceding text, *prout quisque meruisset* is not treated as conditional, 40. 4. 51. *pr.* Cp. *h. t.* 8; 40. 5. 41. 4; 40. 7. 21. *pr.*
[6] 40. 4. 7. [7] 40. 9. 13; *post*, Ch. xxv. [8] 40. 7. 1. 1.
[9] In. 2. 14. 10; G. 3. 98. [10] Cp. 28. 7. 9, 14; 38. 16. 3. 5; 40. 9. 31.
[11] In. 3. 19. 11. To which *natura est impedimento, ut si caelum digito tetigerit.*
[12] 40. 7. 4. 1. [13] 40. 4. 17. *pr.*; cp. *h. t.* 61.
[14] Bufnoir, *op. cit.* 21 *sqq.*; Accarias, Précis, § 325.

seem out of place. Thus where a slave is to be free, "if my heir alienate him," this is held illusory, since it cannot operate till the slave is *alienus*. There must, one would think, have been some other evidence of intention here; if not, the interpretation seems not very consistent with *favor libertatis*[1]. The view is Paul's, who comes to the same unfavourable conclusion, rather more rationally, on the words, *liber esto, si heredis esse desierit*[2]. Another case is that of a condition, possible on the face of it, but already impossible at the death owing to circumstances. This case, and the analogous one of supervening impossibility, will be discussed later in connexion with the topic of satisfaction of the condition[3].

Some conditions would doubtless avoid the gift: in general they are those which would avoid an institution[4]. There are, however, cases in which a condition is allowed in manumissions which would be differently treated in legacies. Ulpian tells us that a manumission at the discretion of a third party is valid[5], while we learn elsewhere that gifts by will in such a form are void[6], though they can be effectively made in a disguised form, *e.g. si Maevius Capitolium ascenderit*[7]. But there is perhaps no distinction here, since Ulpian seems to have rejected this rather absurd differentiation, and to have considered all such gifts valid whether disguised or not[8]. As in case of legacy the gift might be at the discretion of the donee himself[9].

A case of more importance is that of negative conditions. Liberty on such a condition, if taken literally, is nugatory, for till the death of the man it cannot be said that he will not do the thing, and the *cautio* Muciana, by which this difficulty is avoided in ordinary legacies, has no application here. Liberty once effective is irrevocable: it is inconceivable that the man should become a slave again on failing to observe the condition. Moreover, as liberty is inestimable it is impossible to give security for it. Thus such gifts seem to have been made in a derisive way, and Pomponius, taking the case, *si Capitolium non ascenderit*, says that Julian holds that if it appears that the testator meant the gift not to take effect till death it is a nullity, as a gift *cum moreretur* would be[10]. On the other hand if there was no such intent, the words

[1] 40. 4. 39. An analogous *institutio* was better treated. Where a man was to be *heres* if he freed a *servus hereditarius*, the mere act of manumission was held by Labeo to be a satisfaction of the condition though it was void: *verum est eum manumisisse*, 28. 7. 20. 1.
[2] 40. 4. 39. *in fin.*
[3] *Post*, p. 489. See De Ruggiero, Dies Impossibilis, 29 *sqq.*; Rabel, Aus Röm. und Bürg. Recht, 193 *sqq.*
[4] Accarias, *loc. cit.*
[5] 40. 5. 46. 2. The text deals with a *fideicommissum*, but its reasoning applies to direct gifts.
[6] 28. 5. 32. *pr.*; 35. 1. 52. [7] 28. 5. 69; 35. 1. 52.
[8] 30. 43. 2; 31. 1. *pr.*; 40. 5. 46. 2. Bufnoir, *op. cit.* 195 *sqq.* As to such discretion in *fideicommissa*, *post*, pp. 516 *sq.*
[9] 40. 5. 46. 1. This may be true only of *fideicommissa*. Apart from condition he could not refuse.
[10] 40. 4. 61. *pr.*; 40. 7. 4. 1.

were construed also by Julian *favore libertatis*, as if they were "if he does not do it at the first opportunity[1]," so that if at any time he was able to do the thing and abstained, he was free. It is plain that in one of these cases the gift is treated as puerile and empty, while in the other the condition is put on that level.

But there are traces of another way of looking at the matter. It is obvious that a patron may have reasons for wishing a thing not to be done by the freedman, and it is not unreasonable that he should have his way here, as in legacies. The way seems to have been found by allowing *conditiones iurisiurandi*. We are told that where liberty is given on the condition of taking an oath, this cannot be remitted by the Praetor, since to remit the condition is to bar the gift, as the liberty cannot be attained *aliter quam si paritum fuerit condicioni*[2]. Such conditions are invalid in institutions and legacies[3], and our text adds that if the liberty is coupled with a legacy, and the same condition is applied to both, he does not get the legacy unless he swears[4]. Clearly not, for he is not free, and if it were struck out from the legacy alone, the legacy would be void[5]. If the legacy is under a condition of swearing, and the liberty simple, there is no difficulty: the condition is remitted[6]. The validity of such conditions in manumission applies to any act[7], but its importance is most obvious in reference to negative conditions, and it seems possible that it is on their account that the condition is allowed. Where a condition of swearing is remitted and the thing sworn is not improper, the beneficiary is not entitled to the gift until he does the thing[8], or, no doubt, in negative conditions, gives the *cautio* Muciana. Now, in manumission, if the condition of swearing not to do were remitted, it would be quite impossible to give the *cautio*: it is inapplicable. Accordingly, as the text says, to remit the oath is to bar the gift[9]. The oath is no great security since at least in later law it is not binding[10], though Venuleius[11] records an earlier doubt, but he speaks of those who have taken such an oath as *religione adstricti*[12].

We have already seen that a condition imposed may be adeemed, even in the same will, notwithstanding the technical point that it is, in strictness, not *datum* but *adscriptum*[13]. Apart from this, the slave is,

[1] 40. 4. 17. *pr.*; cp. 35. 1. 29. [2] 40. 4. 12. *pr.* [3] 28. 7. 8.
[4] 40. 4. 12. 1. [5] *Ante*, p. 471. [6] 40. 4. 12. 2.
[7] 40. 4. 36; 40. 7. 13. 3. [8] 28. 7. 8. 6, 7. [9] 40. 4. 12. *pr.*
[10] 38. 1. 7. *pr.*, 2; 40. 4. 36. [11] 40. 12. 44. *pr.*
[12] Bodemeyer, *op. cit.* 54, cites many attempts at explaining the allowance of *conditiones iurisiurandi*. His own requires *impedire* to mean "make more difficult." Bufnoir, *op. cit.* 47, following Vangerow, Pand. § 434, thinks the right conferred by the Praetor in remitting the penalty is only praetorian, and as there is no true praetorian liberty, the freedom could be acquired only by doing the thing. Here too *impedire* is given the above sense. See also Karlowa, R. R. G. 2. 137. But Pernice has shewn (Labeo, 3. 54) that the effect of release of the condition is not to give a merely praetorian title.
[13] 34. 4. 3. 9; 35. 1. 53.

till the condition is wholly satisfied, the slave of the heir[1]. He may not know at once when it is satisfied, and it is provided that if, in ignorance of the arrival of the condition, he enters on an inheritance at the order of the *heres* who holds him, he is not personally bound[2]. But if he is in doubt as to whether it is satisfied or not, Paul cites Julian as holding that he is, so to speak, "put upon enquiry," and so is bound[3].

There remains for discussion, in relation to conditions in general, the question, what amounts to fulfilment of the condition? The rule is that it must be actually and completely fulfilled[4], though *in obscura voluntate manumittentis favendum est libertati*[5].

The meaning of a condition "to serve my *heres* (or Titius) for a certain time" is the subject of discussion. *Servire* and *operas dare* are equivalent, neither need involve slavery and thus they may be done to a third person[6]. The service must be personally rendered[7], and 100 *operae* means 100 days' work[8]. They should be rendered continuously, but days during which the man is prevented from working by illness or other good cause are credited to him as days of work[9].

Satisfaction of the condition is all that is needed[10]. If the condition is a promise or oath to do something, the promise or oath fulfils the condition and the freedom is gained, though, as we have seen, the promise is void as having been made by a slave[11]. Where the condition was "to be free on handing over the *peculium*," and the man gave up everything, he was free though he owed debts to his owner[12]. In answering the question whether the condition is satisfied or not there is a general *favor libertatis*. Thus where the condition of liberty given to a woman was "if her first child be a male," and she has twins, one of each sex, there is a presumption, apart from actual knowledge, that the male is the elder, and thus the daughter is *ingenua*[13]. If two are made free on the same condition, it is applied separately to each, if this is possible and will save the gift, *e.g.* "if they are mine at my death[14]."

[1] Ulp. 2. 2; D. 40. 7. 9. *pr.* *Ante*, p. 286.
[2] 29. 2. 74. 3. As to any right of *bonae fidei possessor*, *ante*, p. 346.
[3] 29. 2. 74. 4. [4] 40. 7. 3. 12.
[5] 50. 17. 179. "To be free when my debts are paid." They must be paid: it is immaterial that the *heres* is rich, 40. 7. 39. 1. If the *heres* wilfully delays, the rules as to prevention may come into operation, 40. 5. 41. 1. "To be free if he goes to Capua." He must go though the journey be otherwise aimless, 40. 4. 61. 1. The element of time may be material here. See also 35. 1. 44. 10.
[6] 40. 7. 4. 4, 41. *pr.* The text (4. 4) adds that the will may shew that the testator meant "be a slave to." See *post*, p. 493.
[7] 40. 4. 13. *pr.*; 40. 7. 20. 5, 39. 5. [8] 40. 7. 20. 5.
[9] 40. 7. 4. 5. This does not turn on impossibility, but on the notion that such a prevention is an ordinary incident of continuous service. Days in which the man is *in fuga*, or raising a claim of liberty, or suffering punishment for crime, do not count, and other days must be served in their stead, 40. 7. 4. 8, 14. 1, 39. 3.
[10] But *cum dare poterit* means when he does pay, 40. 7. 4. 12.
[11] 40. 7. 13. 3, 24, 41. 1. [12] 40. 7. 40. 1. [13] 34. 5. 10. 1.
[14] 32. 29. 4. The rule is the same in legacy. Where two were to be free on paying 10, either was free on paying 5. As to legacies, cp. 35. 1. 112. 1.

So where the condition was *si rationes reddiderint*, unless it had been a joint administration, in which case neither was free till the whole was adjusted[1]. If the act is indivisible, both are free if one has done it[2]. If there are two different gifts the *statuliber* may choose the easier[3] (which he may not in legacy), or, as it is put in other texts, the *levissima scriptura* applies, and that is *levissima* through which liberty is attained[4], *i.e.* he has not to make a choice, but may take the benefit of that which occurs first. This applies only if the two gifts are distinct; if they are *coniunctim*, *i.e.* "if he do this and that," he must satisfy both[5].

If a *statuliber* is alienated, and the condition is an act to be done by him in relation to someone else, the question arises: to whom must he satisfy the condition? This will be discussed in relation to two specially important conditions, *pecuniam dare* and *rationes reddere*, which will need separate discussion. Here it is enough to lay down the general rule. Any condition which admits of it may be done to the acquirer[6], but personal service, such as to teach his child, remains with the *heres* though the man be assigned[7]. But it must be an alienation of the *dominium*: to give a usufruct to a third person does not enable the payment or other act to be rendered to the usufructuary[8]. It should be added that if the condition is doing work for anyone, the slave himself must do it, but money may be paid by anyone[9].

There were, however, circumstances under which the liberty took effect though the condition was not in fact satisfied. Before entering on these it is desirable to point out that *dies* and *conditio* are sometimes intermingled in a way which makes two observations necessary.

(i) The same modality may be construed as *dies* in one case and as *conditio* in another, the decision turning sometimes on construction of the testator's language and in others on extraneous considerations such as *favor libertatis*. This is most commonly illustrated by cases in which a gift is to take effect "when X is 20," and the like. Here if X dies under 20 it may be said that the condition has failed, or it may be said that the words were a mere way of describing a certain date which has in fact arrived. Both views are found[10].

[1] 40. 4. 13. 2. [2] *h. l. pr.*
[3] 35. 1. 51. *pr.*, 87—89. [4] 35. 1. 35; 40. 4. 5.
[5] 40. 4. 45. In one case the words were "Let S be free when he is 30. Let S be not free if he does not give 10." These are not alternative gifts, one *ex die* and the other conditional. The second is in form an ademption, which puts the gift under a contrary condition, so that he is to be free at 30 if he pays 10, D. 40. 7. 13. 5. Cp. 34. 4. 14. *pr.*; 40. 4. 59. 2.
[6] 40. 7. 6. 3. The rule is as old as the XII Tables, *h. t.* 29. 1. See Appleton, Le Testament Romain, 86.
[7] 40. 7. 6. 7, which shews a more complex rule in relation to the condition of rendering accounts.
[8] 40. 7. 7. [9] *h. t.* 39. 5.
[10] *e.g.* 36. 2. 22. *pr.*; C. 6. 53. 5; 7. 2. 8. Brunetti, Dies Incertus, 160; *post*, p. 491.

(ii) A condition may, indeed it usually will, include *dies*. Here, though from any cause the donee be released from the condition, the gift will not take effect till the time has elapsed. This is illustrated in a number of texts[1] and must be borne in mind when these cases of release are under discussion. The plain reason is given, by Paul, that it is absurd that the gift should take effect before it would have done so had the condition been satisfied in the ordinary way[2], the testator having imposed both condition and *dies*, and the former alone having been released. If, however, there is no express *dies* and the condition is invalid *ab initio*, the *dies* is not considered[3].

In discussing the circumstances under which a condition is released it is necessary to look somewhat closely at the Roman conception of Impossibility. We know that where a condition is impossible in the nature of things[4] it is struck out in all gifts by will. But it is not easy to say what is impossible in the nature of things. What seemed inconceivable to a Roman might be an everyday event now[5]. But the exact position of the line is not important: the point to note is that it commonly means a condition which is on the face of it inconceivable[6]. This opens up the question how the jurists looked at impossibility on the facts—latent impossibility, either existing at the time of the will or supervening. It may be said at once that, at least in the case of wills, they do not seem in general to have applied the notion of impossibility to cases of supervening impossibility—it is indeed difficult to treat a provision as *non scriptum* by reason of an event subsequent to the making of the document. It is in fact *casus* rather than impossibility[7]. There are evidences of doubt as to the treatment of cases in which the condition becomes, or is, impossible in fact, before the *aditio*: with these we shall shortly deal. Another point of interest is that the illustrations of patent impossibility always seem to be cases in which there was something to be done or left undone by the donee. Such a condition as "if there shall be 370 days in the year" is never taken as an illustration. In one text which contains some dispute, and traces of more, the condition is *si filia et mater mea vivent* and one of these is dead at the time of the will[8]. This is a case of latent impossibility existing at the time of the will, and the condition does not contemplate action by the donee. It is clear that it gives difficulty and Pomponius, or perhaps Tribonian, describes it as a case of "quasi-impossibility."

[1] *e.g.* 40. 4. 41. 1 (corrupt); 40. 5. 41. *pr.*; 40. 7. 3. 15, 4. 2, 20. 5. Cp. 34. 1. 18. 2; 45. 1. 8.
[2] 40. 7. 4. 2. The final words in 40. 4. 41. 1 are an interpolation.
[3] Cp. 45. 1. 8. An analogous rule in case of prevention, *post*, p. 493.
[4] P. 3. 4 b. 1. See *ante*, p. 484.
[5] A man was instituted "if he build a monument in three days." Even this the lawyers, after hesitation, decide to be quasi impossible, 28. 7. 6.
[6] There were forms of such impossibility in institutions which could not have arisen in gifts of liberty, 28. 7. 4. *pr.*, 10, 20. *pr.*
[7] Cp. C. 6. 46. 6. [8] 35. 1. 6. 1, *in fin.*

We can now consider the different cases which present themselves in the texts.

There is a well marked type of case in which the gift is made to depend on the attainment of a certain age by X—the man is to be free if (or when) X is 20. This is a case of *dies incertus an, certus quando.* Here, in the texts which speak of gifts of liberty either fiduciary or direct, the death of X under 20 is treated as immaterial[1]. On the other hand some of the texts make it clear, by way of contrast, that in the case of legacy on the same condition, the death under the age would be regarded as amounting to failure of a condition[2]. This of itself would shew that the rule has nothing to do with impossibility, since, if it were treated as impossible both sorts of gift would be valid We are, however, left in no doubt we are told that it is an exceptional rule laid down *favore libertatis,* the modality being treated as *dies* in this case[3].

The case of ordinary condition to be performed by the donee is treated in the same way, where impossibility supervenes after *aditio.* In the case of legacy, the condition is regarded as having failed[4]: in gifts of liberty the other view is taken, *favore libertatis,* and the gift takes effect[5] In the case in which the condition is the payment of money to X and X dies before it is paid, there may be the further complication that the man was not ready to pay the money at the time of the death. But Julian observes that the whole favourable rule is a matter of *constitutum ius* resulting from *favor libertatis* and not resting on any logical principle of interpretation, and that thus the man will be free if at any time he has the money[6].

In the case of latent impossibility arising before the *aditio* there is more difficulty. Where the thing not only is impossible, but always was, *i.e.* where it assumes a state of facts which never existed, it is a *falsa conditio* and the gift whether of property or liberty is good[7]. The same seems to be the case where part of the condition is on that footing, the rest being separable, *e g* a gift of *hereditas* "if my wife and my daughter X survive," and the testator never had a daughter: the

[1] 40 4 16; 40 5 23 3, 41 10, 40 7 19, C 7 4 9 [2] 40 4 16; 40 5 23 3

[3] *Ibid*, 40 7 19 The case of death of X under the required age before *dies cedens* is not considered Probably the gift is good, arg 40 7 28 *pr*

[4] 35 1 31 *fin*, *h t* 94 *pr*, 40 7 20 3, C 6 46 4

[5] 35 1 94 *pr*, 40 7 4 2, 20 3, Ulp 2 6 The decision in 35 1 112 1 is a forced separation of the conditions, *benigna interpretatione*

[6] 40 7 20 3 Where the gift was *S si rationes reddiderit cum contubernali sua liber esto,* and S died after the *aditio* without rendering accounts, Paul appears to doubt if there is any real *coniunctio,* and suggests that the condition does not apply to the gift to the woman But he holds that if it does and if there are accounts to render, the whole thing fails, 35 1. 81 Julian quoted by Gaius in a very ambiguous passage thinks the gifts are distinct but under the same condition, so that the woman can satisfy it, 40 7 31 1

[7] 30 104 1, 35 1 72 7, 8, 40 5 41 16, 40 7 26 1, *ante,* p 484 In some of these cases it is an act to be done

gift is good, the reference to the daughter being ignored[1]. Where the impossibility is one which arises before the will is opened, whether before or after it is made, the matter is complicated by questions of interpretation, themselves affected by the existence of provisions independent of the purpose of the gift. But, so far as can be made out, the view of the later classics, accepted in the Digest, seems to be that in case of liberty the gift takes effect, though it is clear that this is *favore libertatis,* and independent of logic[2]. In case of legacy the gift fails[3], so that it is no question of impossibility. But there are some texts which seem at least to contradict these conclusions and which need to be carefully looked at.

In one text Paul makes the liberty fail[4]. The man is to be free if a usufruct in him given to X by the will ceases to exist. In point of fact it never arose, the fructuary not having survived to take it. On such facts the gift fails, says Paul. The condition fails, since that which never began cannot have ended. The rule, which is from Neratius, ignores *favor libertatis,* and is moreover a piece of literal interpretation, which quite disregards the plain intent of the testator. The gift is in effect one at the death of X.

Where a woman is to have a legacy if she marries *arbitratu Seii* she will take the legacy though she marry without his consent, and even though he be dead, *vivo testatore*[5]. This is due to the fact that such a condition is in practice one that she shall not marry without his consent, which is void[6]. The reason assigned for allowing the gift to be good though S be dead is given by Papinian in the words *quia suspensa quoque pro nihilo foret,* words which shew that some special reason was needed and that in ordinary cases the gift would have failed. Pomponius, however, while dealing with this case[7] applies the same rule to a legacy, *si eum manumisisses,* where the man died *vivo testatore.* His reasoning uses language appropriate to prevention, *quia per te non stetit quominus perveniat ad libertatem,* a principle which, as we shall shortly see, ought not to be applied with this breadth to legacies. Javolenus applies it to a case of impossibility arising before *aditio* in a case of liberty, but expressly observes that it is *favore libertatis*[8].

[1] 28 5 46 [2] 40 7 28 *pr*, 39 4 [3] 35 1 31.

[4] *h t* 96 *pr* [5] 30 54. 1, 2, 35 1 72 4, 28 *pr.*

[6] Other texts, Pothier ad D. 35 1, § xxxviii

[7] 30 54 2 Pothier (*ad h l*) supposes this rule to apply where it is a condition not involving cooperation of another person

[8] 40 7 28 *pr* Bufnoir, *op cit* 91, shews that Ulpian in 9 2 23 2 holds that the condition has failed in such a case He cites and refutes reconciliations by Vangerow and others B himself holds that 30 54 2 deals with *modus* But on its terms it does not But, where one is to be *heres* if he swears to free S, and S dies *vivo testatore,* the gift is good, though in such cases the condition is remitted and actual freeing substituted This confirms our rule, since the substituted act is to be done after the acquisition It is *modus,* not condition this, as appears from the hypotheses cited in support, is why the gift is good, 28 7 8 7 *Ante,* p. 483 Bufnoir, *op cit* 90

The view stated above as that of the later classics was not accepted without dispute, of which the texts shew traces. Thus we are told that Labeo and Ofilius declared a gift of liberty to fail, if the person to whom money was to be paid as a condition died, *vivo testatore*, and that Trebatius held the same view if the death was before the will was made[1]. This last view may, of course, possibly mean merely that Trebatius has a derisory gift in mind[2]. Pomponius[3] discusses a case of gift of *hereditas* on condition of freeing certain slaves, some of whom were in fact dead when the will was made. He cites Neratius, (whom we have just seen holding a severe view[4],) as thinking that the condition has failed, and that the notion of impossibility is not applicable. But he cites Labeo and Servius as holding that in a similar case, where however the condition was not something to be done[5] but the survival of two persons of whom one was dead at the time the will was made, the condition has not failed, and Sabinus and Cassius as holding that this is a case of quasi-impossibility[6]. This text involves two points, *i.e.* that the distinction between legacy and liberty where the impossibility occurs *vivo testatore* must be limited to the case *post testamentum factum*, and that where a condition has separable parts, each part has to be considered by itself for the purpose of these rules. But this can hardly be an adequate account of the law where impossibility had arisen before the will was made. The text tells us too little. Probably the state of the testator's knowledge was material, and no doubt this text is an indication of far-reaching differences of opinion[7].

Prevention of fulfilment brings other distinctions into prominence. Just as it was difficult to set exact limits to the notion "impossible," so it is not quite easy to say exactly what is meant by "prevention," but for the purpose of the rules now to be stated, two points must be made clear. Prevention is essentially an interference with the action of the donee. Hence the rules do not apply to conditions which have to be satisfied without the cooperation of the donee. This appears, apart from the specific rules which express the distinction, in the language commonly used in expressing the principle generally. The texts usually speak of *his* satisfaction of the condition being prevented[8]. Further, the thing done does not amount to prevention, unless it was

[1] 40. 7. 39. 4. Javolenus considers Labeo right in principle but says that a more liberal view is accepted.
[2] *Ante*, p. 485.
[3] 35. 1. 6. 1.
[4] 35. 1. 96. *pr.*
[5] *Ante*, p. 489.
[6] The rule as to the effect of impossibility in wills is Sabinian, G. 3. 98.
[7] Cp. Pothier, ad 35. 1, § xx; Bufnoir, *op. cit.* 23; Vangerow, Pand. § 435.
[8] *Quominus statuliber conditioni pareat*, Ulp. 2. 5; *quominus statuliber conditionem praestare possit*, Festus, *s.v. statuliber; si nemo eos impediat*, 40. 7. 3. *pr.*, and the like, 40. 4. 55; 40. 7. 3. 1.

done with a view to prevention[1]; at least where the prevention takes the form of prohibition and not of rendering the thing impossible. On the other hand if it is a definite act of prevention it is presumed to have been so intended rather than as a normal exercise of right[2].

The general rule on the matter is that, where the *statuliber* is prevented from doing the act which[3] is a fulfilment of the condition, he is placed in the same position as if the act had been done. It is immaterial for this purpose whether the person who prevents is one like the *heres*, interested in its non-performance[4], or one to whom or with whose cooperation it is to be done[5], or any third person: it is enough that someone prevented fulfilment[6]. It may be noted that the rule in *hereditas* and legacy is not so wide: it releases only in the first two cases[7]. On the other hand where the condition is to be fulfilled without the cooperation of the slave and the person to do it refuses, or fails to do it, there is no relief, any more than there would be in any other form of gift[8].

Prevention has the effect of putting the man in the same position as if he had not been prevented. If even apart from the prevention he could not have satisfied the condition, the prevention does not make him free: it is not true that *non per eum stat.* Thus where the *heres* refuses to receive the accounts but the *statuliber* is in arrear and has not the means to pay up the balance due from him he is not free[9]. In the same way, if the act would necessarily take time, *e.g.* to do so many days' work for the *heres* or another[10], to go to Capua, to go to Spain and gather in the crops[11], or to make a series of periodical payments[12], the man is not freed by refusal to let him begin work, or start on the journey, or make the first payment. These rules, however, seem to apply only to such prevention as takes the form of prohibition or refusal: if it takes the form of making the thing impossible, the man seems to be free at once. Thus where he was directed *servire heredi* for a time and was manumitted or sold by the *heres*, he was free *ex testamento*[13] at once[14]. The word *servire* here means "be slave to": in the one case this is made impossible: in the other it is made impossible for the *statuliber* to do it. It is not clear why the time was not required

[1] 40. 7. 38.
[2] *h. t.* 3. 3.
[3] With or without the cooperation of another person.
[4] Ulp. 2. 5; Festus, *loc. cit.*; D. 35. 1. 24, 57, 78; 40. 7. 3. 13, 4. 16, 17, 23. 1; 50. 17. 161.
[5] Or his guardian, Ulp. 2. 6; D. 35. 1. 78; 40. 7. 3. 10, *etc.*
[6] 40. 5. 55; 40. 7. 3. *pr.*
[7] 28. 7. 3, 11; 30. 92. 1; 35. 1. 14, 21, 31; 36. 2. 5. 5; 50. 17. 161.
[8] Consistently with all this, if one *heres* prevents a payment on which liberty is conditioned, the *statuliber* is free, 40. 7. 3. 4, while if he was to pay to two and one refuses he is released only *pro parte*, but can tender the same money to the other, 40. 7. 4. 3. See *post*, p. 503.
[9] 40. 7. 34. 1.
[10] 34. 1. 57; 40. 7. 3. 15, 4. 4, 20. 5.
[11] *Ibid.*; 40. 7. 34. 1.
[12] As to a difficulty in 40. 4. 41. 1, *post*, p. 499.
[13] 40. 7. 3. 15, 17.
[14] In classical law the manumission would commonly make him only a latin: in no case would it make him *libertus orcinus*.

to elapse. One text purports to give the reason[1], but all this amounts to is that refusal is only prevention of a part: the logical result would be that in the case where it was made impossible the man is free at the expiry of the time with no further tender, not that he is free at once.

An enactment of Justinian's[2] deals with a case which he declares to have divided the jurists. A slave was to be free on paying money to the heir. He started to travel with it to the heir, but was robbed of the money on the way. The question was, did this suffice under the condition? Clearly there was no impossibility, though on the facts it had become impossible to the man. The question seems to mean: was this prevention, *i.e.*, could it be said *per eum non stare*, since it was his going on the journey which made it possible to rob him? Justinian settles it by deciding that in such cases *per eum stat* only when he intentionally does not fulfil the condition: in all other cases of prevention by persons or *casus* he is to be free, but to remain liable for the value of the render, except in so far as it has been repudiated by the person to whom it was to have been made.

There remain for consideration two conditions of exceptional importance.

(*a*) *Rationes reddere.* The importance of this condition is shewn by the frequency of its appearance in the Digest. It is found also in a surviving roman will[3]. Though, as we have seen, all freed slaves may be called on to render an account[4] of what they hold, the importance of making it a condition is that less risk is run, since he must make the statement and render before he is free. Moreover all that can be required of him after the freedom, apart from the condition, is that he hand over the accounts and the property of the testator which he holds. No personal action will lie against him for anything done while he was a slave[5].

The condition practically means that he must state and account for all moneys that he has had to administer[6]. He must make his account in good faith and with due care, though a mere mistake, even negligent, is not a breach of the condition[7]. His account must shew his *gestio* to have been in good faith, at least to the extent that he must debit himself with anything he has wrongfully taken away, and of course there must be no false credits[8]. He must state all needful details, going over his account books, and giving a proper account of matters not in writing[9]. The condition covers the whole field of administration,

[1] 40. 7. 3. 15. [2] C. 6. 46. 6.
[3] Testamentum Dasumii, Girard, Textes, 767.
[4] 40. 4. 17. 1; 40. 5. 37. [5] *Ibid.*; C. 7. 2. 4. *Post*, ch. XXIX.
[6] If he has never administered it is a void condition, 40. 7. 26. 1.
[7] 35. 1. 32, 112. 3; 40. 4. 22. [8] 35. 1. 111; C. 7. 2. 4.
[9] 40. 7. 26. *pr.*

not merely trading[1]. If he has given credit, he must shew, not indeed that the debtor is solvent, but that at the time of the transaction he was such that a *bonus paterfamilias* might reasonably have such dealings with him[2]. He has not merely to render an account: he must hand over the *reliqua, i.e.* all property of the estate in his possession[3]. This implies that he must get in all debts now recoverable, rents due and so forth, and must make good anything he has made away with and bad debts incurred through his negligence[4], but not losses resulting from *casus*[5]. What is required is a true and just account and render: the law prescribes no exact steps[6]. He must account for receipts since the death, and, if this seems to be intended, give the same detailed account of his administration since, as before[7]. The account must be rendered where the person is, to whom it is to be rendered, at least if that person is away on public business, but in other cases reasonable arrangements may be made to suit the case[8], and a deputy appointed to receive the account[9]. Each heir is entitled to his share of the *reliqua*, and though this may be excluded by apt words, it will not be by the naming of some of the heirs in the condition[10].

The condition adds, as we have seen, to the obligation on the slave[11], but a good deal turns on the wording of it. If it was merely *reliqua reddere*[12], this is satisfied by paying over the balance without giving the full means of examining the accounts which was needed under the condition *rationes reddere*[13]. If the condition is that he is so to render accounts as to satisfy X, he must do this: even satisfaction of the curator of X *apud iudicem* will not suffice, unless X is present and assenting[14]. If the condition is *si rationes diligenter tractasset*, this involves *rationes reddere*, and proof that his diligence has been exercised in the interest of the master, and not in his own[15]. Where it is *si rationes diligenter tractasse videbitur* this means *videri poterit*[16]. If a time is set within which the account is to be rendered, and by his fault it is not done at the expiry of the time, he has not satisfied the condition[17]. As we have seen, if the condition is to account within

[1] 35. 1. 111; 40. 5. 41. 11 *omne quod quoquo genere actum fidemque servi respiceret.*
[2] 35. 1. 111; 40. 5. 41. 17.
[3] 35. 1. 111; 40. 7. 31; C. 7. 2. 4. Liquid assets must be given at once and security for the rest, 40. 7. 5. *pr.* [4] 40. 7. 40. 4—8.
[5] 40. 4. 22; 40. 5. 41. 7. He is responsible for *adiutores* if their malversation is in any way due to his negligence, 40. 7. 40. 4.
[6] Thus the fact that where *peculium* is left to him he takes it away before he has rendered his account does not bar liberty, *h. l.* 6. Nor does the fact that the testator, having been ill, has not signed the accounts for a long time, *h. l.* 3.
[7] *h. l. pr.*; 40. 5. 41. 10. If needed an *arbiter* will be appointed to settle disputed points, 35. 1. 50; 40. 1. 5. 1; 40. 7. 21. *pr.*
[8] 35. 1. 112. 3. [9] 40. 7. 4. *pr.* [10] *h. t.* 12; *post*, p. 500.
[11] 3. 5. 16—18. 1, 44. 1. [12] 35. 1. 82.
[13] *Ibid.* A condition *ne rationes reddat* is not a gift of *peculium*, but an absolution from the duty of rendering strict account, the liberty being unconditional. He must hand over any balance and account for *dolus* but there will be no enquiry into negligence, 30. 119.
[14] 40. 4. 53. [15] *h. t.* 8; 40. 7. 21. *pr.*
[16] *i.e.* to an *arbiter*, 40. 7. 21. *pr.* [17] 40. 5. 41. 12.

30 days from the death, and the *aditio* is not till later, the liberty does not fail, as it is not his fault[1]. Titius by his will[2] left certain *servi actores* to different persons, *si rationes heredi reddiderint*, and in another place said, "All the slaves whom I have legated or freed, I wish to render their accounts within four months, and to be handed over to those to whom I have left them." Later in the will he freed other *actores*, with the condition *si rationes heredi reddiderint*. The time passed and without any fault of the heir[3], the accounts were not rendered. Were the men barred or could they still claim their liberty by satisfying the condition later? The answer given by Scaevola is that it is for the person before whom the case comes to consider whether this is intended as a condition limiting the time given to the slaves or whether it is really intended to impose speediness on the heirs, by preventing them from dawdling in the matter. In the former case the claim is barred: in the latter it is not[4].

The ordinary rules apply as to prevention. If the slave is prevented by the *heres* from paying over the *reliqua* after the account has been adjusted and the *res peculiares* have been sold, he is free as if he had paid[5]. So if the *heres* is *in mora* in receiving the accounts, the slave is free if he tenders them and the balance[6]. The text adds that it is for the *arbiter* to decide which party is *in mora*, and to determine accordingly, and further that declaration of waiver of right to the balance, by the heir, satisfies the condition.

Some cases in which the difficulties are really of construction are discussed[7]. In one of these the *heres* is *impubes*. S is freed *ratione reddita*, and he agrees with the *tutor* to take some of the money due and divide it. The *tutor* certifies the account as correct. The man is not free, for though the rule is that the *reliqua* may be paid to the *tutor* of the *heres*, and his prevention of payment has the same effect as the heir's, this applies only where the *statuliber* and the *tutor* are not fraudulent. Here, the text says, as in alienation of property, the *tutor* can deprive the *pupillus* only where there is no collusive fraud[8].

(*b*) *Pecuniam dare.* If we may judge from its frequent recurrence in the sources, this was the most common and economically important of all the conditions. Its typical form is, *si* 10 *det heredi*, but *cum decem dabit* or *cum decem dare poterit* are equivalent forms[9].

[1] 40. 7. 28. *pr.* [2] 40. 7. 40. 7. [3] Mommsen, *ad h. l.*
[4] The text adds, but the words look like Tribonian, that there is a general presumption in favour of the *statuliber*.
[5] 40. 7. 23. 1. [6] *h. t.* 34. 1.
[7] As to *S si rationes reddiderit cum contubernali sua liber esto*, *ante*, p. 490. The words are clearly capable of many interpretations. [8] 40. 4. 22.
[9] 40. 7. 3. 12. Money was sometimes borrowed by the slave for the purpose. It is in such cases and where the *peculium* has been left to him that the rule is important that what is paid wrongly or in excess can be recovered, 12. 4. 3. 6; 40. 7. 3. 6.

Money paid under such a condition is a *mortis causa capio*, though it is not a *donatio*, no matter by whom or to whom it is paid[1]. A question of some difficulty arises where the *lex* Falcidia and similar legislation comes into operation. The point of importance seems to be that though it is a *mortis causa capio*, it is not necessarily acquired *hereditario iure*[2]. If, however, it is *ex bonis mortui* (which certainly covers the *peculium* which the *statuliber* had at the time of the death) and is paid to the heir, it is acquired *iure hereditario* and must be debited to him, when his quarter is being made up for the purpose of the Falcidia[3]. So too it counts towards the half that an *orbus* may take[4]. If there are two or more heirs, and the payment is to be made to one, only that part of it which corresponds to his share in the *hereditas* is acquired *hereditario iure*, and counts towards making up his quarter: the rest is an independent *mortis causa capio*[5]. If it is paid from outside—not *ex bonis mortui*, the *lex* Falcidia has no application to it[6]. There are, however, cases in which it seems to be doubtful whether it is *ex bonis mortui* or not. According to Ulpian, if the slave acquires the money only after the death, it cannot be said to be *ex bonis mortui*, and so will not be imputable[7]. Papinian, however, holds that even though it were given to the *statuliber* to be paid to the *heres* it becomes part of the *peculium*, and even if it were handed direct by the *extraneus* in the presence of the *libertus*. It is only if it is handed over by a third person without the presence of the *libertus* that the taker holds it really *aliunde*, so that it is not acquired *hereditario iure*[8]. Apparently Ulpian's view would exclude all acquisitions to the estate after the death—which certainly was not the law for his time[9].

Money validly paid under the condition is of course irrecoverable. But if it was not due it can be recovered, like an *indebitum*[10]. The remedy will be *condictio* or *vindicatio* according as the transaction has or has not vested ownership in the *heres*. This is illustrated by many texts. There can be no recovery if it was paid in full knowledge of the facts[11]. It is not strictly an *indebitum* in any case, and it is treated mainly under the head, possibly a creation of the compilers, of *condictio causa data causa non secuta*[12]. If there is no condition and he is really

[1] 39. 6. 8. *pr.*, 31. 2, 38. See *post*, p. 501. [2] 35. 2. 76. *pr.*
[3] 39. 6. 41; 35. 2. 76. *pr.*
[4] 39. 6. 36. It must be accounted for in *hereditatis petitio*, and in *restitutio hereditatis* under a *fideicommissum*, 39. 6. 41.
[5] 35. 2. 76. *pr.* It is in no way common and need not be accounted for in *familiae erciscundae*, 10. 2. 20. 9.
[6] 35. 2. 44, 76. *pr.* [7] 39. 6. 36. [8] 39. 6. 41.
[9] *Ante*, pp. 256 *sqq.* The rule interpreted in these texts is that what a *heres* acquires *hereditario iure ex bonis mortui* counts towards the Falcidian quarter.
[10] In that case it is not imputable under the *lex* Falcidia, 35. 1. 44.
[11] *e.g.* by way of ingratiation or to gain some indirect advantage, 12. 4. 3. 7.
[12] 12. 4. As to this and its relation to *condictio ob rem dati*, Roby, Rom. Priv. Law, 2. 77. The matter is discussed in two texts in the title on *condictio indebiti*, 12. 6. 34, 53.

free, and he has paid it out of his own money he can condict it[1]. But if he has given it out of *peculium* to the *heres*, thinking, as he would, that the money already belonged to the *heres*, there has been no transfer of *dominium*, and if it came, for instance, from a part of the *peculium* which he has acquired after he is free, the ownership remains with him and he can vindicate[2]. And supposing the payment was not to the *heres* but to an *extraneus*, here too if it was a *res peculiaris*, as he was not authorised so to deal with it, the ownership will not pass and the *heres* can vindicate. But if a third person has paid it to the *extraneus*, or the man has paid it himself, after he is really free, out of his property, the *dominium* will pass and the proper remedy is *condictio*[3].

Proculus lays down the same rule for the case where the will is not valid: money paid *ex peculio* to an outsider can be vindicated[4]. Scaevola discusses another case. A man really free but supposed to be a slave, receives a gift of liberty from his supposed *dominus* on a condition of 10 annual payments to the *heres*. After paying 8 he discovers that he is an *ingenuus*. He can recover by *condictio* if he has paid out of what he has acquired otherwise than *ex operis* or *ex re possessoris*. If it did come from that, he was merely giving the *heres* what was his already[5]. In all these cases there is no real divergence of opinion, but in another case there is. In a will a slave receives liberty on condition of payment to the *heres*. By a codicil he receives an unconditional gift. Before he hears of the codicil he pays the money. Can he recover it? Celsus *pater* thinks he cannot. Celsus *filius*, on grounds of equity, says that he can, and Ulpian adopts this view[6]. Nothing is said as to the reason for the view of the elder Celsus, or as to the source from which the money came, and each omission increases the difficulty of repairing the other. For the question to arise at all the money must have been paid from something which was not at the time of payment the property of the *heres*. The point is perhaps that the condition not having been adeemed, perhaps not having been adeemable[7], exists, and he has acted under the wrong gift[8].

As to what amounts to fulfilment of the condition, the ordinary principles apply, but some special rules need mention. A condition to give is satisfied by payment by a third person either with or without

[1] 12. 4. 3. 6. [2] *h. l.* 8.
[3] *Ibid.* We do not discuss the point that here he is handing over his own property thinking it another's and yet Ulpian allows property to pass. He denies this elsewhere (41. 1. 35), but Marcellus asserts it (17. 1. 49). See Monro, De Adquirendo Dominio, *ad* 41. 1. 35, and the references.
[4] 12. 6. 53. He adds that where it is paid to *extraneus* by a third person the master of the slave is strictly the proper person to condict it but that it is *benignius* and *utilius* to let the actual loser sue directly.
[5] 12. 6. 67. *pr.* [6] 12. 4. 3. 7. [7] *Ante*, p. 467.
[8] See *ante*, p. 488. Pomponius may have introduced the rule there stated.

the presence of the actual slave[1]. The whole must be paid[2]. Further, as the payment is in satisfaction and not under an obligation, there is no alienation at all, till all is paid: up to that time the owner of it can vindicate it, and the alienation does not relate back for any purpose[3]. If a time is fixed, the payment must be within the time[4], which runs from *aditio* if the will is not explicit[5], and even "thirty days from the death" is reckoned from the *aditio*, at least if it is necessary so to do to save the gift[6]. Where a man was to be free on paying 10 a month for 5 years, he is not free unless he pays it every month[7]. The heir's refusal of one payment does not release the *statuliber* from the others, though, as it does from that one, and the *heres* may not change his mind, the same money may be offered when the next pay-day comes[8]. These texts point out, as we have already seen, that such directions involve *dies* as well as *conditio*. It is, therefore, surprising to find two texts which say that if he offers all future payments at the date fixed for the first he will be free. In one of these texts the rule is justified by the consideration that the earlier loss of the slave is compensated by the earlier receipt of the money[9]. As the interest of the money bears no necessary relation to the value of the slave's services, the argument is not strong, and the form of the remarks strongly suggests Tribonian. In the other[10] it is given as a *benignior* rule, and we are told that both benefit, the one by earlier freedom, the other by earlier payment. The point is the same, with the added suggestive fact that this line of argument is one which Justinian employs elsewhere[11]. Altogether it is difficult to credit this view to the classical law.

The giving must make the alienee owner of the money: thus it may not be stolen money[12]. The transfer must not be merely illusory. Where the *heres* gave the man the money, "to pay me with," and he returned it, he was not free, though he would have been if the gift to him had been absolute[13]. It need not take the form of an actual *traditio* to the *heres*. We have just seen that release of the payment sufficed[14]. If at the death of the *heres* the man is found to have enriched the *hereditas* to the required amount, *e.g.* by payment to creditors, provision of stores or the like, he is free[15].

If it is payable to the *heres*, the commonest case, since it is payable

[1] 39. 6. 41; 40. 7. 39. 5.
[2] It may be by instalments but security does not suffice, 40. 7. 4. 6, 5. 1.
[3] 40. 7. 3. 5. [4] *h. t.* 23. *pr.* [5] 35. 1. 46.
[6] 40. 7. 3. 11. [7] *h. t.* 40. 2.
[8] 40. 7. 3. 13, *h. t.* 18. The *heres* can release the payment, and manumission by him without payment does so, so as to bar his *heres* from claiming, *h. t.* 34. *pr.*
[9] 40. 4. 41. 1. [10] 40. 7. 3. 14. [11] *e.g.* In. 2. 9. 2.
[12] Unless *bona fide* consumed by *heres*. But it may be proceeds of theft, 40. 7. 3. 9.
[13] 40. 7. 11. [14] *h. t.* 34. 1. [15] 40. 7. 15. *pr.*

to him if the will does not say to whom it is payable[1], we are told in several texts that it may be paid to *heres heredis*, the rule being due to Hadrian[2]. The point is that the personality of the payee is not imported into the condition, *favore libertatis*, for in legacy it is[3]. If the *heres* has died leaving no successor, we are told by Hermogenianus, that, *constituto iure*, the man is free, without paying at all. It is not clear whether he must have the money at the time of failure of heirs: this is suggested by the earlier part of the text[4], though the contrary suggestion is found in a remark of Julian reported by Ulpian, already considered[5]. The rule is the same even if the *heres* is mentioned by name[6]. He cannot pay it to a *pupillus heres* without the *auctoritas* of the *tutor*[7], a rule laid down rather on grounds of analogy than on strict principle, for it is not the payment of a debt[8]. If the words are *heredibus dato*, they take *pro rata*, but if they are mentioned by name they take *partes viriles*[9]. The text seems to indicate that if they are called *heredes* and also named they take *pro rata*[10]. If one *heres* renounces the institution the payment is to be made wholly to the other[11], though if having actually entered he refuses the money, there is no accrual to the other, who is only entitled to his share, which may be satisfied with the same money[12].

If it is to be paid to an *extraneus* the rules are much the same. If the payee is dead, the money can be paid to his heir, or if there be none, the man is free without paying, if at any time he has the means to pay[13]. If, however, there are several *extranei*, they take *partes viriles* unless some other division is prescribed, and thus where there are both *heredes* and *extranei*, the *heredes* will take *partes hereditariae*, and the *extranei*, *partes viriles*[14].

It may be added that a payment to the heir is retained by him even though he hands over the inheritance under a *fideicommissum* and even though he entered only under compulsion[15]. Ulpian tells us that if the payment was ordered to be to an *extraneus*, and he became *heres* to the *heres*, the payment would be made to him *non quasi in extranei*

[1] *h. t.* 8. *pr.*, 21. *pr.*
[2] 35. 1. 51. 1, 94. 1; 40. 7. 6. 4, 20. 3, 4. All the writers are late.
[3] 35. 1. 51. 1, 94. *pr.* It may even be paid to a legatee of the *heres* if the *heres* so directs in his will, 40. 7. 20. 4, where *testator* must be read *heres*.
[4] 35. 1. 94. [5] 40. 7. 20. 3, *ante*, p. 490.
[6] 35. 1. 94. 1. The rule does not apply to legacies. [7] 46. 3. 68.
[8] But he could pay it to the *tutor*, though he could not safely so pay a debt, 40. 4. 22; In. 2. 8. 2. If the *heres* were away *reipublicae causa*, he was free on paying into court, 40. 7. 4. *pr.*
[9] 40. 7. 8. 1.
[10] *h. t.* 22. 1 obscurely says *Si quidam ex heredibus quibus dare debeat nominati sint dabit his pro hereditariis portionibus*, which seems to mean that if some of the payees (*heredes*) are named the division as among them is *pro rata*.
[11] 40. 5. 41. 14. [12] 40. 7. 4. 3.
[13] Ulp. 2. 6; D. 35. 1. 94. *pr.*; 40. 7. 20. 3, *ante*, p. 490. The rule as to payment to *tutor* was the same in this case, 46. 3. 68.
[14] 40. 7. 22. 2. [15] 35. 1. 44. 4, 5.

persona, sed quasi in heredis[1]. The point appears to be that it might be imputable from the point of view of the *lex* Falcidia[2].

We have seen that, on alienation, conditions *dando* go to the alienee, while services remain with the *heres*[3]. Thus, if the condition is *rationes reddere*, the account is made and the books are produced to the *heres*, but the money is paid to the alienee[4]. The rule applies not only to sale but to all transfers of *dominium*, *e.g.* under sale, gift or legacy[5]. And the heir of the acquirer succeeds to the right as *heres heredis* does[6]. But it must be an alienation of *dominium*: conferring a usufruct on a third person does not entitle him to receive the payment[7]. On successive alienations the right passes to the last alienee[8]. If the purchase was by a slave, payment may be to the master or to the slave, if the purchase was on account of *peculium*, and this is not adeemed[9]. A buyer of a part must be paid a proportionate part of the money[10]. If the alienation is after payment of a part, the rest must be paid to the alienee[11]. We are told that on sale the *heres* may reserve the payment to himself, and this will have the effect, not merely of a covenant between buyer and seller, but of compelling the man to pay to the *heres*, in order to satisfy the condition. So in the same case he may nominate some other person to receive the money, with a similar effect[12]. It may be presumed that an alienee has the same right, and that a testator may by express words limit and vary the rules expressed in this paragraph. But whether an *extraneus* not an alienee can nominate a person to receive the payment cannot be confidently stated, though it is suggested by the last words of this *lex*.

We are told[13], as we should expect, that one *dare iussus* to a slave (*heres* or not) may not pay his master except with the slave's consent, or *vice versa*, unless the money is *versa in rem domini*. The texts are general[14], but do not expressly refer to gifts of liberty, and though these are probably the commonest case, there are others. And two texts create doubt. In one we are told[15]: *certe statuliber quin domino dare debeat non est dubium*. The use of the word *debeat* shews, when the adjoining texts are looked at, that there is no concession here. The text, which has been shortened, may be merely emphasising the rule, but it may refer to the case of one directed to pay to a fellow-slave. Here as they are in the same *hereditas*, and the money is *res heredi-*

[1] 40. 7. 6. 4. [2] *Ante*, p. 497. [3] 40. 7. 6. 7; Ulp. 2. 4, *ante*, p. 488.
[4] 40. 7. 6. 7. [5] *h. t.* 6. 3. [6] *Ibid.*
[7] 40. 7. 7. [8] *h. t.* 27.
[9] *h. t.* 6. 6. The word in the XII Tables was no doubt *emptor*. This means acquirer, and it is the master who acquires. As the slave is the actual contracting party, the payment may be made to him.
[10] *h. t.* 8. 1, 32. [11] *h. t.* 6. 5. [12] *h. t.* 15. 1.
[13] *Ante*, p. 156. [14] 35. 1. 44. *pr.*, 3; 46. 3. 95. 7.
[15] 35. 1. 44. 2.

taria, payment to a fellow-slave would effect no change in possession, and it may have been thought that for this reason it must be to the *dominus*. In either case it does not affect the rule. Another text is more serious. We learn[1] that where the condition of liberty is payment to a *filiusfamilias heres*, it may be done to the father, since he gets the profit of the *hereditas*, which applies equally to a slave. It is observable that nothing is said of *favor libertatis*, and the reason would equally apply to other cases in which the rule was as we have seen otherwise. Thus though the text may mean that the rule was relaxed in gifts of liberty, it is more likely that it is an individual view of Ulpian's.

There is difficulty where the inheritance is disputed: there is only one text and that as it stands is unintelligible[2]. It seems to begin by assuming that though the will be upset by a judgment, the gift of liberty on paying 10 to the *heres* may still be good. Part of its incomprehensibility is swept away if we adopt Krüger's emendation and read *heredis* for *his* early in the text[3]. On that view the text raises no difficulty as to the date of introduction of the principle that the setting aside the will by judgment in favour of a *heres ab intestato* is a bar to all claims under it[4]. The question it would raise is this: S is to be free on paying 10 to the *heres*. The *heres* enters and dies, and there is a dispute as to his succession. It is between one claiming under a will and one claiming on intestacy. The latter wins[5] and the man asks if he can pay the winner. Quintus Mucius says yes, and, further, that whatever be the truth of the matter he cannot pay the one who has been beaten. Labeo thinks that, as he is in no way claiming under this succession, he is free if he pays to the party really entitled. Aristo gives Celsus an opinion to the effect that only the winner is capable of being paid the money: if he is the true *heres* well and good, if not it is a case of alienation and he is entitled in that way. If the money were paid to the loser, it would be his duty to hand it over, like other acquisitions, to the winner, and when that was done no doubt the man would be free[6].

Whether the money is to be paid to the *heres* or to an *extraneus*, it can always be paid out of *peculium*[7]. The *statuliber* can of course pay it, if he prefers, from other sources[8], but not out of moneys entrusted to

[1] 40. 7. 6. 4. [2] 40. 7. 29. 1. It has been discussed from the Gloss onwards.
[3] Krüger, Z. S. S. 24. 193 *sqq*. *Paterfamilias in testamento scripserat "si A, servus meus, heredi meo dederit decem, liber esto." deinde de his bonis coeperat controversia esse.* K. reads *de heredis bonis*.
[4] See Appleton, Le Testament Romain, 87, cited Krüger, *loc. cit.*
[5] The text makes it the former, but it is universally admitted that the rest of the text requires an emendation here. Krüger, *loc. cit.*
[6] Presumably the slave paid not knowing of the dispute.
[7] 40. 7. 3. 1; 35. 1. 57. As to the effect of prohibition by *heres*, *post*, pp. 503 *sq*.
[8] 40. 7. 3. 8.

him and not forming part of the *peculium*[1]. He may pay it out of subsequent earnings, but may not count towards it money paid to the *heres* in lieu of services due to him, any more than he could the rent of a farm he hired of the *heres*[2]. Even though he is alienated *sine peculio*, he can still pay it *ex peculio*[3]. But he may not pay it out of the *peculium* belonging to his new master, for the testator's intention could not be extended to that, not even though he had been sold *cum peculio* and the vendor had failed to hand it over[4]. If he is ordered to pay it *ex peculio*, and has none, or owes all that is in it to his *dominus*, he cannot at that time satisfy the condition at all[5].

If a person to whom liberty has been given on such a condition is captured in war, and is redeemed, he may satisfy the condition out of his *peculium coram redemptore*, provided it is not *ex operis* or *ex re redemptoris*[6], but he will still be subject to the lien of the *redemptor*[7].

In this case as in others prohibition makes the man free. If the *heres* refuses the payment or refuses to let it be made to the *extraneus*, the man is *ipso facto* free[8]. If it is to be paid to a coheir and one heir refuses to allow the payment, the man is free[9]. There are other things besides direct refusal which have this effect. If there is a debt due to the *peculium*, and the *heres* refuses to sue for it so as to provide means to fulfil the condition, or money is due from the *heres* to the *peculium*, and he will not pay it, the slave is free from the *mora*. Servius was inclined to limit this to the case where the *peculium* was left to the slave, but the wider view prevailed, and seems the more logical[10]. If the *heres* delays *aditio* intentionally, the slave is free if he had the money at the right time, even though he has ceased to have it at the time of the *aditio*[11]. If, having been *dare iussus*, he is alienated *sine peculio*, there is no prohibition, until he actually is prevented from taking the money[12].

These texts create one serious difficulty. It is obvious that if a testator says: "if S pays 10 to T, let him be free," there is nothing in these words to give T any right. There is no duty in anyone to pay the money—there is no pact, no juristic relation between the *heres* (or

[1] 40. 7. 39. 2.
[2] Unless testator has expressly directed that *operae* may be counted towards it, *h. t.* 3. 8, 14. *pr.*
[3] *h. t.* 3. 7, 40. 7.
[4] *h. t.* 35. See also Pap. Resp. Fr. 9. 17 (Krüger).
[5] 40. 7. 17. [6] 49. 15. 12. 11.
[7] *Ante*, p. 312. [8] 12. 4. 3. 9; 35. 1. 110; 40. 7. 3. 1, 20. 3.
[9] 40. 7. 3. 4. Refusal or its equivalent by guardian of *heres* has the same result, *h. l.* 10.
[10] *h. l.* 2. In *h. t.* 20. 2 it is said that the slave can set off the debt and so be free: this would mean that no demand was required.
[11] 40. 7. 3. 11. It must be prevention of the whole: refusal of the first of a series of payments does not free, though it releases from that payment and *heres* may not change his mind, *h. l.* 13.
[12] *h. l.* 7. To bar him from working to earn money wherewith to pay is not prevention (for the services belong to *dominus*), unless the testator provided that the money was to be payable out of *operae*, *h. l.* 8.

the slave) and the man who is to receive it. The payment if made is a *mortis causa capio*, but as Gaius and Marcellus tell us it is not a *donatio*[1]. Accordingly several texts tell us that the *heres* will do wisely to forbid the payment of the money, for thereby he will save it, and the slave will not lose his liberty[2]. Some others use argument which involves the same conclusion[3]. But these texts do not stand alone and there are puzzling conflicts. Pomponius tells us that if the slave pays it notwithstanding the heir's prohibition, the receiver holds it only *pro possessore* and is bound to restore it[4]. On the other hand Paul gives us Julian's opinion that even in this case he makes the receiver owner[5]. Both these texts appear to be genuine: they shew a quite intelligible difference of opinion. The view of Pomponius rests on the rule that a slave cannot alienate *peculium* unless he is authorised to do so[6]. That of Julian and Javolenus rests on the fact that the payment is authorised by the will under which the *heres* holds. But other texts go further. Where it is payable to one of *coheredes*, and another forbids the payment, Ulpian appears to tell us that the *coheres* will recover (in the *actio familiae erciscundae*), *quod sua intererat prohibitum statuliberum non esse*[7], which is less than the whole amount, since some of it will come to him as *heres* if it is not paid under the condition. This text may be genuine: there may have been provisions under the will which would have made the payment essential to the carrying out of the testator's whole intention[8]. Nevertheless the remark has rather the air of an afterthought, and may be Tribonian's. One text goes further still: we are told, nominally by Ulpian[9], that if the *heres* forbids the payment, the *extraneus* to whom it was to have been made, *adversus heredem in factum actione agere potest, ut testatori pareatur.* It is certain that this is from Tribonian. The expression *in factum actione agere* is no more than suspicious[10], as is the remark that the payment would be *testatori parere.* But the conclusive fact is that the very same fragment in the immediately preceding sentence lays down the opposite rule, *si tamen vult heres nummos salvos facere, potest eum vetare dare: sic enim fiet ut...nummi non peribunt.* The fragment is

[1] 39. 6. 31. 2, 38.
[2] 12. 4. 3. 9; 35. 1. 57; 40. 7. 3. 1.
[3] The *peculium* was left to S, who was freed on giving 10 to an *extraneus*. The *heres* forbade the payment. The slave became free and sued for the *peculium*. The *heres* might deduct the 10: if he had not forbidden the payment the slave would not have had it, 40. 7. 20. *pr.* S, *decem dare iussus*, was noxally defended by the *heres*. During the action he gave the *heres* 10 and was free. Is *heres* entitled to absolution only on handing over the 10? Africanus says that if it was not from the *peculium* he must hand it over, since the plaintiff would have had it had the man been handed over at *litis contestatio*. Not if *ex peculio* since he need not have allowed the payment, 47. 2. 62. 9.
[4] 35. 1. 110.
[5] 40. 7. 20. 1; see Javolenus, *h. t.* 39. *pr.*
[6] *Ante*, p. 201.
[7] 40. 7. 3. 4.
[8] *e.g.* if the slave was *praelegatus* to the *heres* to whom the payment was to have been made.
[9] 12. 4. 3. 9.
[10] Kalb, Juristenlatein, 36.

part of an extract many other parts of which have been convicted of interpolation[1].

The fact that a slave is instituted as well as freed is not a modality, but the treatment of the matter in the same chapter is perhaps justified by the fact that the one gift depends very much on the other, and questions arise as to how far modalities affecting one are to be applied to the other.

The general principle is that a slave so freed and instituted is a *necessarius heres, i.e.* he is *heres* without entry, and has no *ius abstinendi*[2]. We have already seen that in classical times, a gift of the *hereditas* did not imply a gift of liberty. So strictly were such implications excluded that if a slave was freed, whether instituted or not, and was elsewhere substituted, it was necessary, in the opinion of some jurists, to repeat the gift of freedom, the first gift being bound up with the institution and failing if it failed[3]. It is essential that the man belong to the testator[4]. He must be the testator's at the time of the death, so that if he is freed or sold *inter vivos*, he is not a *necessarius*, but enters for himself or his master as the case may be[5], the gift of liberty in such a case being a mere nullity, just as an institution of your own slave without a gift of liberty is[6]. If at the time of the death the owner is without *testamenti factio*, the whole thing is of course void[7]. But a slave given to the wife *mortis causa* is still the husband's and if instituted with a gift of liberty in the will, he is a *necessarius heres*[8]. He must have been the testator's at the time of the will[9], though part ownership at that time is enough[10]. Where a man gives liberty and *hereditas* to a *servus alienus*, and then buys him, both gifts are bad, for the liberty to *servus extraneus* is a nullity, and the institution cannot stand without it[11]. On the other hand, if he was the property of the testator at the time when the will was made and at the death, he is a *necessarius*: the fact that he has been sold and rebought in the interval is not material[12]. The common form of his institution is *Stichus liber et heres esto*, but any imperative form suffices: equivalents are *S. liber esto: si liber erit, heres esto*, and *S. liber esto, et postea quam liber erit heres esto*[13].

[1] See, *e.g.*, Gradenwitz, Interpolationen, 148 *sqq.*
[2] 29. 2. 15; Ulp. 22. 24; In. 2. 19. 1.
[3] 28. 6. 10. 7; C. 6. 27. 4. 1. The Syro-Roman Law-book still expresses this rule. It has also a rule that a man who has children cannot institute a slave. Bruns-Sachau, 202.
[4] As to institution by pledgor, see C. 6. 27. 1; D. 28. 5. 30; 40. 1. 3; *post*, Ch. xxv.
[5] G. 2. 188; In. 2. 19. 3; D. 28. 5. 7. 1, 9. 16.
[6] G. 2. 187.
[7] 28. 5. 51. *pr.*
[8] 28. 5. 77.
[9] 40. 4. 35.
[10] 28. 5. 6. 3; *post*, Ch. xxv.
[11] *h. t.* 50. *pr.*
[12] *h. t.* 9. 16, 51. *pr.* *Media tempora non nocent.*
[13] *h. t.* 9. 14, 52. Both these forms assume liberty before inheritance, which is impossible where he is sole *heres*. But Labeo, Neratius and Aristo agree, no doubt *favore libertatis*, to ignore the word *postea*, and the other form is declared admissible by Marcus Aurelius.

Cases of error in this matter are scantily dealt with. If I institute and free a *servus alienus*, supposing him mine, his owner takes[1]. If a *miles* institutes his slave, thinking him free, the institution is void as there is no gift of liberty, and no doubt the rule is the same in the case of a *paganus*[2]. If it was a *servus alienus*, it would seem from the compromise laid down in the case of Parthenius, that the institution stands good if there is no substitution. If there is a substitution then, on a reasonable though hardly logical compromise, the substitute takes half in any case[3].

Where a slave is freed and instituted *ex parte*, he is free and *necessarius heres* before the other *heres* enters: he is said to derive his liberty from himself and not from his *coheres*, on whose entry indeed it does not in the least depend[4]. This has noticeable results. Thus, according to Julian, if a slave is a *necessarius heres* it is not possible to adeem the gift of liberty in a codicil, for just as a legacy to the *heres* is void, so is the ademption of a gift[5]. The point of the argument is that a gift taken from any beneficiary vests in the *heres*, and as he is the *heres* it is in this case a nullity. It may be said that for all purposes but *fideicommissa* the codicil requires the existence of a will, and the will would fail if effect were given to this codicil[6].

Necessarii heredes are *heredes* without their own consent: there is no question either of entry or abstention. In case of insolvency the goods are sold in their name, and the resulting *infamia* attaches, on the view which prevailed, to the slave personally, though Sabinus was of a different opinion[7]. Such a *heres* has the *beneficium separationis*, *i.e.*, if he is careful not to deal with the goods of the testator, his own after-acquired property will not be liable to seizure by the creditors. If, therefore, the goods have been sold up once, there is no danger of any further proceedings unless the *heres* makes some further acquisition *ex hereditate*[8].

The *necessarius* is not necessarily the *institutus* in first instance: he may be a substitute, or substituted to a substitute, or even a pupillary substitute, in which case he is *necessarius heres* to the *pupillus*[9]. This rule is accepted *utilitatis causa*[10], at least as to pupillary substitution. The point is that the testator is making him *necessarius heres* to someone

[1] 46. 1. 33. [2] 29. 1. 13. 3. [3] 28. 5. 41, 42; In. 2. 15. 4.
[4] 29. 2. 58; 40. 7. 2. 3. Paul points out that where the gift to him is made to be dependent on entry of another *heres* (*cum mihi quis heres erit S liber et heres esto*) this independence does not exist, 29. 2. 58.
[5] 28 5. 6. 4. [6] In. 2. 25. 2.
[7] G. 2. 152—4; In. 2. 14. *pr.*, 1. C. Th. 2. 19. 3 (332) observes that they are instituted quite as much to get the *infamia* as to get the *hereditas*.
[8] 42. 6. 1. 18; G. 2. 155; In. 2. 19. 1. A minor slave so instituted and meddling with the property, can get *restitutio in integrum*, 4. 4. 7. 5. This title gives details as to the *separatio*.
[9] 28. 6. 10. 1, 36. *pr.*; 40. 7. 2. 4.
[10] 40. 7. 2. 4, 36. Pius and Severus may have dealt with the matter, 4. 4. 7. 10.

to whom he certainly did not belong at the time when the will was made. On the same notion of utility depend also the rules that if a man institutes a young slave as *necessarius*, and substitutes another to him, this second slave, even a *postumus*, will be *necessarius heres* to the first[1], and also that a slave made a pupillary substitute is in effect a *statuliber*; a rule laid down by Celsus, and justified by Papinian, on the ground that the rule has the effect that if the heir sells him he is sold *cum sua causa*, while any other rule would have enabled the *filius*, or rather his *tutor*, to upset the father's intentions[2]. Strictly he cannot be a *statuliber* as he acquires his liberty from himself[3]. Where a man made his *impubes* son his *heres*, and gave his slave liberty and then made the slave pupillary substitute without a fresh gift of liberty it was doubtful whether this could make him a *necessarius*, as the liberty and the institution were in different grades. Justinian of course provides that the gifts are valid and make him a *necessarius heres*[4]. If the substitution of a slave takes effect, and the slave becomes free, his liberty being irrevocable, he remains free even though the *heres* is *restitutus in integrum*[5]. In like manner it seems from some obscure provisions that as a slave is instituted in order that he shall bear any resulting *infamia*, he is an *infamis*, and thus brothers or sisters can bring the *querela* against him. The will may thus be upset, but the slave retains his liberty[6].

A *servus proprius* instituted with liberty is thus always a *necessarius heres*, but it is only in case of insolvency that the most important point arises. The *lex* Aelia Sentia allows institution of *necessarii heredes* even in fraud of creditors, partly no doubt on account of the extreme dislike of intestacy, but more in order that the *infamia* attaching to insolvency shall fall on the slave and not on the memory of the dead man. But as one is enough for this purpose, only one is allowed, and thus if two are named, only the first is free[7]. Where A was instituted and two slaves with direct liberty were given a *fideicommissum* of the *hereditas*, the testator proved insolvent. The *heres* refused the inheritance and was compelled to enter on the principle of the *sc.* Pegasianum. He handed over the whole *hereditas*, but only the first of the two slaves was entitled[8]. So if a slave was instituted, and another substituted to whom the testator owed fideicommissary liberty, Neratius held that if the testator was insolvent, the second was *heres*, since his manumission

[1] 28. 6. 10. 1. [2] 40. 7. 2. 4, 36. [3] 40. 7. 2. 3.
[4] C. 6. 27. 4. [5] 4. 4. 7. 10; cp. In. 3. 11. 5.
[6] If the goods were not sold he ought not to be *infamis*: if they were, the brother gains nothing. The case is no doubt that of a testator who has mistaken his own financial position. Justinian abolished the rule, C. Th. 2. 19. 3; C. 3. 28. 7.
[7] Ulp. 1. 14.
[8] 28. 5. 84. 1, *post*, p. 509. An insolvent instituted "the two Apollonii." If one died the survivor took: if both lived the gift was void, for only one could take, as the testator was insolvent, 28. 5. 43, 44.

would not be *in fraudem creditorum*[1]. This is carried still further. If the substitute to the slave was a free man or one entitled to freedom, he must be asked first, for it is a fraud on creditors to allow the slave to be free if there is a free man willing to accept the inheritance[2]. A curious case is given in which there may be two *heredes* in such a case. A slave is instituted and the testator then says: *T heres esto si S heres fuerit.* The testator is insolvent. S is *heres necessarius.* T can now take, S is *heres* still, because *semel heres semper heres*, and of course T's claim does not in any way prejudice the creditors[3].

It may be noted that one who is barred from liberty by any enactment other than the *lex* Aelia Sentia cannot be a *heres necessarius.* The provision of this *lex* frees him from the restrictions created by the *lex* itself, but not from any other[4]. Also, the institution of a *heres necessarius* frees from the creditors none of the property except himself. Where, not knowing that the estate is insolvent, he pays certain legacies, these are recoverable by *utilis actio* under the edict for revocation of acts done in fraud of creditors[5].

On the other hand he is not a *necessarius* unless he actually gets his liberty by the will. Thus where a slave is freed under conditions, and before these are satisfied, is given liberty by the Praetor for detecting his master's murder, he is not a *heres necessarius*, but on satisfying the condition he can take the inheritance if he wishes[6].

It is enough that he belong to the testator. A slave is given liberty by *fideicommissum* under a condition. The *heres* institutes him and dies before the condition is satisfied. He becomes *heres necessarius* to this testator. But if the condition on the other gift occurs, he will cease to be *necessarius*, not, we are told, that he will cease to be *heres, sed ut ius in eo mutetur successionis*[7]. A person to whom fideicommissary liberty is due is a quasi *statuliber*[8], and the *heres* cannot make his position worse. Thus his position as a *necessarius heres* must depend on the non-arrival of the condition[9]. Where a slave, S, is instituted and freed, *si meus erit cum morior*, the words are not mere surplusage, though the gift of liberty would fail in any case if S were alienated *vivo testatore*, since it requires ownership at the time when the will operates.

[1] 28. 5. 56.
[2] *Ibid.* This is no breach of the rule *semel heres semper heres.* In insolvent estates the *necessarius* is a *statuliber* till it is clear whether the creditors will attack the gift on the ground of fraud, *ante*, p. 484, *post*, p. 562.
[3] 28. 5. 89. [4] *h. t.* 84. *pr.*
[5] *Utilis* because there is no actual fraud, 42. 8. 6. 13; *h. t.* 10. 10. There could be no *condictio indebiti*, if the legacy were *per damnationem*, but there might in other cases: the legacies were not due, 42. 8. 23.
[6] 28. 5. 91; so if freed *vivo testatore*, *h. t.* 7. *pr.*
[7] *h. t.* 3. 3. [8] *Post*, p. 524.
[9] What is the effect of ceasing to be *necessarius* without ceasing to be *heres*? If the goods have been sold he will cease to be *infamis.* Unless on the occurrence he is a voluntary *heres* who has not yet accepted, his position is bad as he loses the *beneficium separationis.*

But apart from them he would acquire the *hereditas* to the alienee[1]. They operate as a sort of condition. The text goes on to consider what will happen if he has been freed *inter vivos.* He cannot be a *necessarius*, but he can take the *hereditas*, since he satisfies the terms of the gift: he is *meus*, not *servus*, but *libertus*[2]. If he was freed *si meus erit* and instituted *pure*, he can, if alienated, take *iussu domini.* Here too the text points out that words which so far as their primary purpose goes lay down only what the law enacts may nevertheless incidentally change the effect of the gift[3].

It is in general essential that institution and liberty be *in eodem gradu*, and, *a fortiori*, that both be direct gifts. But there are relaxations of which the limits are not clear: perhaps it is useless to seek for a principle. The relief is greatest in the case of a *miles.* A soldier institutes X and gives S liberty and a *fideicommissum hereditatis.* X dies without making *aditio.* Ulpian tells us that Severus and Caracalla construed this as a direct gift to S[4]. Maecianus considers whether this applies to *pagani*, and decides, or is made by the compilers to decide, that it applies only if the testator did not know of the death[5]. Where the *heres* does not die but refuses, the risk of *infamia* makes the need of relief more urgent. Accordingly Gaius holds that the same relief is given here: he treats it as a direct gift to S, *ex sententia legis* (Aeliae Sentiae), *i.e.* of the clauses as to fraud of creditors and *necessarii heredes.* He remarks[6] that, on the facts, the estate being insolvent, and S not a *necessarius heres*, X cannot be made to enter, and if he does enter S cannot be free or take a transfer. But in another case in which the facts are the same so far as the present point is concerned, Scaevola says[7] that a *senatusconsultum* of Hadrian's time provides that S can compel X to enter, whether the gift of liberty is direct or only fideicommissary[8]. In the actual case there are two such slaves, of whom only one can take, but that does not seem material. The solution of Gaius evades the difficulty by a forced construction: that of Scaevola involves a new definition of *necessarius heres.* Another text goes further. Even where the *fideicommissum* is conditional, the slave, freed *pure*, compels the *heres* to enter, says Marcian, and if the condition fails, his freedom will stand good[9].

In one case the slave has a gift of liberty, and a *fideicommissum* of the *hereditas.* He compels the *heres* to enter. Then the slave, now free, dies before he has in any way delayed to take over the *hereditas*, leaving T his *heres.* T refuses to take the *hereditas.* Marcellus observes that the *senatusconsultum* (Trebellianum) deals only with the *manumissus*

[1] *Ante*, p. 137. [2] 28. 5. 52. 1. [3] Cp. 35. 1. 47.
[4] 29. 1. 13. 4. [5] *h. t.* 14. The language is that of a legislator.
[6] 36. 1. 65. 15. [7] 28. 5. 84. 1. Or Tribonian as to *fideicommissum.*
[8] *Post*, p. 523. [9] 36. 1. 32. *pr.*

and not with his *heres*, but concludes on the whole that the *heres* cannot refuse what the *manumissus* would have been bound to take. He adds that if the slave had died without successor before the estate was handed over, the creditors would have had the right to seize the goods as if there had been *restitutio hereditatis*[1].

Substitutions gave rise to some rather complex questions. It is hardly possible to deal with them systematically, for they represent a series of "hard cases," in which *favor libertatis* and the desire to save a will, and to secure a successor to an insolvent, led to distorted views of principle.

A father substitutes to his *impubes* son the slave S, with liberty. The *impubes* sells him to T. T, having already made a will, makes another in which S is made free and *heres*. This will upsets his first, since it is validly made and there may be a *heres* under it. But so long as S can be *heres* to the *impubes*, he cannot be *liber* and *heres* under the will of T. If the *impubes* matures, S will be *heres necessarius* to T. If the *impubes* dies under age, he will be *heres necessarius* to the *impubes*, though of course there is nothing in that to prevent his being *heres voluntarius* to T[2]. The object is, as the texts say, to save the *necessarius* to the father's will, and the principle applied is that the slave is a kind of *statuliber*, and is thus alienated *cum sua causa, i.e.* subject to his becoming *necessarius heres* of the *impubes*, though at the time of the death of the latter the slave is in other ownership[3].

In a very long, very obscure, and in some parts, corrupt text, a will is considered which ran: T *heres esto*; S Maevio *do lego*; S *heres esto*; *si* S *heres non erit*, S *liber heresque esto*. It is impossible to be sure of the meaning of the words, which have already been considered from another point of view[4]. The first point is: under what circumstances can a man be substituted to himself? It is held that there is no substitution here: there is one institution with a gift of freedom, the whole dependent on the failure of T. The legacy to Maevius is void[5]. It is an attempt to interpret hopelessly obscure words[6].

In the cases in which the institution or the liberty, or both, are subjected to modalities of various kinds, there is a strongly marked tendency to such a construction as will preserve the status, if it may be so called, of the *necessarius heres* and to secure that he shall not get the liberty without the *hereditas*.

If a slave is instituted *pure*, and freed *ex die*, the institution is valid,

[1] 36. 1. 46. *pr*. The text is obscure and seems to contain a truncated discussion of the possible effect of delay on the part of the *heres*.
[2] 28. 5. 55; 28. 6. 48. 2.
[3] Cp. 40. 7. 2. 3.
[4] *Ante*, p. 449.
[5] 28. 6. 48. 1.
[6] Cp. 40. 4. 10. 1; 40. 5. 50.

being deferred until the day named. When that day comes, if there has been no alienation, he will become free and *heres necessarius*, and if he has been alienated or freed, he can at once take the *hereditas* for his master or himself[1]. The difficulty thus avoided by reading the *dies* into the institution is that if this is not done, the institution must necessarily fail, since at the time the will is opened he cannot take the *hereditas*, as he cannot be free. In the next following text the matter is carried still further. If the slave himself is not alienated, but the usufruct of him is, he is still the property of the testator. But he cannot be free, during the usufruct, at least in classical law, and accordingly the institution is postponed to the expiration of the usufruct, when he will be *necessarius*[2].

Where a *servus proprius* is instituted *pure*, and given liberty conditionally, the same difficulty is evaded in the same way; the institution is deferred till he is entitled to freedom, when he becomes *heres necessarius*[3]. If while the condition is still pending, the testator sells him, the effect is to destroy the gift of liberty, and he can therefore enter at the command of his new master[4]. But if the testator alienates him after the condition has failed, he cannot enter at the command of the buyer, *quia eo tempore ad eum pervenisset quo iam exstincta institutio inutilis fuerat*[5]. All this is an artificial construction. In order to save the institution the condition on the liberty is read into it, and as it is read in for one purpose on the assumption that the testator meant it to be there, there is nothing to be done, but to read it in for all purposes.

If the man is freed *pure* and instituted conditionally, there is also reason for reading the condition into both gifts. Unless it is satisfied when the will operates, the man will not be a *heres necessarius*. Both gifts therefore await the condition, and if it occurs he will be *liber* and *heres necessarius*. But what if the condition does not occur? Here, *favore libertatis*, logic is disregarded and he gets his liberty. Ulpian states this generally, but Julian is more guarded—*habetur ac si libertas sine hereditate data fuerit:* unless there is another heir, the gift must fail[6]. If a slave is freed *pure* and instituted under a condition, and to have a legacy if he is not *heres*, Marcian cites Pius as saying that the legacy is subject to the same condition[7]. This is puzzling, but Marcian's source is Papinian, whose text[8] shews that Pius meant the condition of liberty, not the other.

[1] 28. 5. 9. 17—19. This is very like *dies* in an *institutio*.
[2] 28. 5. 9. 20. Quite apart from this point a condition on one gift might be read into another as a matter of construction. Where a *fideicommissum* of liberty was given to a *servus alienus* and he was also substituted, the condition of liberty was read into the substitution, 31. 83.
[3] 28. 5. 3. 1.
[4] *h. t.* 38. 2. So if he were a common slave, *h. t.* 7 (Mommsen).
[5] *h. t.* 38. 3.
[6] 40. 4. 14; 28. 5. 21, 22. It might be effective as a *fideicommissum* on the *heres ab intestato*, but the texts treat it as a direct gift.
[7] 28. 7. 18. *pr*.
[8] 35. 1. 77. *pr*.

If the slave is freed *ex die* and instituted conditionally, it follows from what has been said that if the condition is satisfied before the day, the institution will take effect on the day, being also subject to *dies*. If the condition is fulfilled only after the day, we are expressly told that he is free and *heres* only from the day when the condition arrives[1].

Of the possible case of liberty under one condition and institution under another we hear little. We can, however, infer from one text that though logic requires, on the principles we have stated, that each gift should be subject to both conditions, the view of Julian was accepted, that if the condition on the institution fails he may still get his liberty, being regarded as an ordinary *statuliber*, the gift of *hereditas* being ignored[2]. This is a simple case of *favor libertatis*[3].

One case is rather puzzling. S is instituted *pure* and given freedom if he pays 10 before a certain date. In a codicil there is an unconditional gift of liberty. He will not be free or heir before the date, unless he pays the 10, but if at that date he has not given the 10 he will be free by the codicil[4]. The principle appears to be this: as the testator has given liberty and inheritance by the will, S cannot have the latter without the former, so far as the will is concerned, and therefore the condition is read into the institution. The codicil cannot alter that: an institution cannot be varied by codicil. But the institution being thus conditional, the gift of liberty must also, even in the codicil, have the condition read into it: the codicil is treated as if it were in the will[5]. Thus he cannot get his liberty without satisfying the condition. But, when it is no longer possible to give effect to the institution, Julian allows *favor libertatis* to have play, and the gift of liberty has its effect as if there had been no condition on it.

Where liberty is given to S directly but *ex die*, and there is a *fideicommissum hereditatis* in his favour, as he is not *ipso facto* free by the entry he has no *locus standi* to make the *heres* enter and hand over the *hereditas*, nor is there any evidence of the testator's wishing him to be *necessarius heres*[6].

It should be added that if the inheritance is conditional, *e.g.* on the payment of money, and no time is fixed for satisfaction of the condition, the creditors may apply to have one fixed, and if he does not pay the money within this time, they may proceed as if he was not instituted. But this affects only his right to any *bona*, not probably a very serious matter in such a case. It in no way affects his right to be free whenever he satisfies the condition. Strictly he would still be *heres*: the rule is a purely praetorian one, affecting nothing but the *bona*[7].

[1] 28. 5. 9. 18. [2] 40. 7. 2. 3.
[3] 28. 5. 21. *pr.* gives another case of favourable construction. A testator says: *quisquis mihi heres erit, S liber et heres esto.* Strictly this is a condition, and S ought to take nothing until there is another *heres*. It is allowed effect as if unconditional. [4] 28. 5. 38. 1.
[5] Machelard, Règle Catonienne, 40. [6] 36. 1. 32. 1, 57. 1. [7] 42. 5. 4.

CHAPTER XXII.

MANUMISSION DURING THE EMPIRE (*cont.*). FIDEICOMMISSARY GIFTS.

LEGACIES and *fideicommissa* in general underwent a process of assimilation at the hands of Justinian, but there never was much real assimilation of direct and fideicommissary gifts of liberty. The former were a good deal relaxed in form, and this is so far an assimilation. But the fact that direct gifts could be made only to the testator's slaves and made them *liberti orcini*, while the others could be made to *servi alieni* and made them *liberti* of the *fiduciarius*[1], formed an unbridgeable gap between them. It must also be noted that a gift by *fideicommissum* is not in strictness manumission by will at all: it has to be completed by an act of manumission by the *fiduciarius*[2], and this will often be *inter vivos*. But as the direction is contained in a will or codicil, and, apart from condition, operates on entry, it is convenient to treat it here. Indeed more than convenience is involved: as we shall see later, a gift by *fideicommissum* is subject to the rules of the *lex* Fufia Caninia[3] and to others specially applicable to testamentary provisions[4]. On the other hand there is room in such gifts for *causa*, to complete a gift in some way defective, and this applies essentially to gifts *inter vivos*[5].

A *fideicommissum* of liberty is in effect a direction contained in a will or codicil, addressed to some person and requiring him to free a slave. It may even be in an unconfirmed codicil, and so bind the *heres ab intestato*[6]. It may be given by word of mouth before witnesses, where the giver is *in articulo mortis*, and will then bind any *heres*[7]. We have surviving instances of such gifts by will and codicil[8]. No particular words are needed, but the intent must be clear[9], and the recorded

[1] C. 7. 4. 7; G. 2. 266—7; In. 2. 24. 2.
[2] C. 7. 4. 11; In. 2. 24. 2, *etc.* [3] *Post*, p. 547.
[4] They are equal to direct gifts for Falcidian purposes (35. 2. 36. 2, 37, *etc.*). A legacy of *alimenta* to freedmen covered those freed by *fc.* (34. 1. 2). It is the age of the testator which is material in such manumissions, *post*, p. 541. See also the rules as to *addictio bonorum*, *post*, Ch. XXVII.
[5] *Post*, p. 538.
[6] 40. 4. 43. Or in a will operating as a codicil, 40. 5. 24. 11. Vangerow, Pand. § 527.
[7] 40. 5. 47. 4.
[8] Bruns, Fontes, 1. 273, 279. On p. 273 there is a legacy of a slave with a *fideicommissum* not to free.
[9] 40. 5. 16. The word *commendo* was not enough, P. 4. 1. 6; C. 7. 4. 12.

instances seem to shew some variation of practice as to what is enough. In general the construction is favourable. Thus where X was made, by the will, *tutor* to the *heres* and a *fideicommissum* was imposed on X to free a certain slave of his own, X was excused from the *tutela*. Other *tutores* were appointed and it was held that the trust was essentially imposed on the *heres*, and therefore the new *tutores* were obliged to buy the slave with money of the estate and free him[1]. But though one who has liberty by *fideicommissum* under a will can take gifts under the same will[2], yet a *fideicommissum* of money, *sub conditione*, with no gift of liberty, is not held to imply such a gift[3]. Such words indeed do not clearly shew that any gift is intended. But even where it is clear that a gift is meant, there is no rule, at least in classical law, that an intended direct gift, in some way defective, can be construed as a fideicommissary gift to save it. This is indeed often done, but usually because the circumstances seem to impose a pious duty on someone to carry out the wishes of the deceased. Where a will gave a foster-child liberty and a *fideicommissum* and the will was imperfect, and the estate was administered as on intestacy, Paul tells us that the Emperor decided that the *alumnus* was entitled to be freed by the *heres ab intestato*, though the will contained no *clausula codicillaris*[4]. But he lays great stress on the duty of children to do what their father would have wished. A will said: *cum Thais heredi servierit* 10 *annos volo sit mea liberta.* The word *volo* is not enough for a direct gift, and the heir by freeing could not make her the testator's *liberta*. Scaevola holds that this is a fideicommissary gift, but ignores the words *mea liberta*[5]. Where the object is to appoint a *tutor*, a good many difficulties are evaded. To make a *servus alienus tutor* to your son is held to imply the condition *cum liber erit*, at least in later law[6]. It is true that the Institutes deny this[7], but the evidence is strong. The text cited[6] goes on indeed to say that unless this is plainly contrary to the wish of the testator such an appointment implies a *fideicommissum* of liberty. The reason assigned is that it is favourable to the pupil, to liberty and to the public interest, and a text in the Code also declares that the effect is a *fideicommissum* of liberty. But the mode of expression in both cases is a little Byzantine[8], and it seems likely that while the insertion of the condition is classical, the further extension dates only from Justinian. Paul[9] discusses the case of a slave of the testator given freedom by *fideicommissum*, and appointed *tutor*, and observes that

[1] 40. 5. 41. 2.
[2] See 32. 8. 1, and *ante*, p. 146, for gifts to *servus heredis*.
[3] C. 6. 42. 28. [4] 40. 5. 38.
[5] *h. t.* 41. *pr.* The case in 40. 4. 42 is construed as a legacy of the slave with a *fideicommissum* of liberty.
[6] 26. 2. 10. 4. [7] In. 1. 14. 1.
[8] C. 7. 4. 10. But it attributes the opinion to *prudentes*. [9] P. 4. 13. 3.

there is a difficulty, since he cannot be tutor till he is free, or free till there is a *tutor*[1], since an *impubes* cannot free *sine auctoritate*[2]. But, he adds, it will be treated as a case of absent *tutores*, so that under the *decretum amplissimi ordinis* he will be free and *tutor*. The reference is presumably to the *sc.* Dasumianum and connected legislation[3].

In one text[4] a direct gift which fails is, apparently for that reason alone, treated as fideicommissary. The rule laid down is that what is in a codicil is treated as if it were in the will, and thus if liberty is given in a codicil to one who was not the testator's property at the time of the will, but is at the time of the codicil, the gift fails as being to a *servus alienus*. The text adds: *et ideo licet directae libertates deficiunt attamen ad fideicommissarias eundum est.* The grammar and form generally of this remark, coupled with the fact that no reason is given, strongly suggest that this comes from Tribonian[5].

Implied gifts inferred from the words of the testator are a good deal discussed in the texts, and were freely admitted.

A direction not to alienate is, we are told, a *fideicommissum* of liberty, *si modo hoc animo fuerit adscriptum quod voluerit eum testator ad libertatem perduci*[6]. But if this means an immediate gift, the text must be interpolated, as indeed its language suggests[7]. A direction *ne postea serviat* is certainly an immediate *fideicommissum* of liberty[8]. Directions that he is not to serve anyone else or not to be alienated or the like, are *fideicommissa* of liberty to take effect at the death of the *fiduciarius*, or, if the man is alienated, at once[9]. An alienation not voluntary, but resulting inevitably from what the testator has ordered, is not an alienation for this purpose, the testator not being supposed to have meant to include this. The text seems to add that on such facts if the direction is that he is to serve no other, freedom is due at death of fiduciary[10]. If on the other hand it is neither due to the testator, nor voluntary, *e.g.* where the fiduciary is *publicatus*, the condition is declared to be satisfied, and the slave is to be freed, if necessary by the public

[1] C. 5. 28. 5. [2] 40. 5. 11.
[3] *Post*, Ch. XXVII. One given freedom by *fideicommissum* cannot properly be made *tutor*, but, says Papinian, after he is free the appointment will be confirmed, 26. 2. 28. 1.
[4] 29. 7. 2. 2, *ante*, p. 463. Fein-Glück, 1511 c, p. 237 *sqq.* treats it as the general rule, but of the texts he cites the only one in point (40. 5. 24. 10) is considered *post*, p. 573.
[5] So A. Faber and apparently Mommsen. Fein-Glück, *loc. cit.*, treats it as an expression of Julian's equitable tendency. The text gives the same rule where the slave belonged to the testator when the will was made but not at time of codicil. The view of Cujas (Ad Afr. Tract. 2) has been generally accepted, *i.e.* that a *non* should be omitted, since time between will and death is immaterial, assuming that he was in the estate at the time of death. See Fein-Glück, *loc. cit.* and Lenel, Paling., *ad h. l.* Cujas notes that Paul holds such a gift good, 34. 4. 26. Mommsen, Ed. mai. *ad h. l.*, thinks that as the concluding words of the text put the cases on one footing, the *non* is due to the compilers. Fein-Glück, *loc. cit.*, gives an account of the many points which arise in this text. One other case may be mentioned here. A gift written in favour of oneself is void: where a slave wrote a gift of liberty to himself *iussu domini*, this was in strictness void, but the Senate decided that it should impose a duty on the *heres* to free. Pius decided that it was to be as if written by his *dominus*, whom he was bound to obey, 48. 10. 15. 2, 3.
[6] 40. 5. 24. 8. [7] Gradenwitz, Interpol. 212. [8] 40. 5. 24. 7.
[9] 40. 5. 9, 10. *pr.*, 21. [10] *Ibid.*

authority[1]. If the fiduciary having sold him buys him back this does not mend matters: the condition is already satisfied[2]. All this suggests, as Gradenwitz points out[3], that the proposition at the beginning of this paragraph is interpolated, and, as he further observes, the same thing is probably true of the remark in the same text[4] that the favourable effect of such a direction as *ne alienes*, however far it goes, does not apply if there was some other object, as that the *heres* should keep him and beat him severely, the burden of proof of this contrary intent being on the *heres*.

A gift *si heres voluerit* is void: the *heres* can of course free if he likes, but is under no duty[5]. Very little more, however, will turn it into a duty. The words *si volueris fidei tuae committo, si tibi videbitur peto manumittas, si tibi videbitur manumittas, si voluntatem probaveris*[6], these, or any Greek equivalent, compel the *heres* to use the discretion of a *bonus vir* about the matter, and to free the man if he deserves it[7]. This may be a case of *favor libertatis*, since we are told that the words, *si volueris fidei tuae committo*, have no effect in other testamentary matters[8]. So also "if you find them worthy," or *si te promeruerint dignos eos libertate existimes* are good fideicommissary gifts[9]. These forms seem to mean much the same thing: the man is entitled to be freed if he is reasonably worthy, *i.e.* if he has done nothing making him clearly unworthy. His right is not to depend on his having rendered such services to the fiduciary as to have deserved liberty of him[10]. But it may be left to the *fiduciarius* to choose when he will free[11], and in the cases we have been discussing he might do it at any time during his life, and if he died without having done it, his *heres* was bound to free at once[12].

The words *si placeat* seem to be of the same class, and to impose a duty on the *heres* if the man be fit. But two texts in which this word is used create some difficulty. A slave is directed to be freed, *si uxori meae placeat*, the wife being one of the instituted *heredes*. She refuses her share, so that all falls to the other *heres*. Alexander decides that the man is entitled to his freedom if the wife does not object[13]. Elsewhere, Modestinus holds that her ceasing to be *heres* must not prejudice the man, and moreover that her dissent is immaterial[14]. As fideicommissary gifts are binding on substitutes and *coheredes*[15], and a gift

[1] *h. t.* 12. *pr.* [2] *h. t.* 21. [3] *loc. cit.* and *op. cit.* 38.
[4] 40. 5. 24. 8. [5] *h. t.* 46. 3. [6] *Ibid.*
[7] 40. 5. 46. *pr.*, 3.
[8] *Ib.* But even in other cases anything shewing that he was to exercise discretion would validate the gift, 32. 11. 7. See Bufnoir, Conditions, 193.
[9] 40. 5. 46. 3.
[10] 40. 4. 20, 51. 1; 40. 5. 41. 4, 46. 3. Where such a word as *iudicium* was used it is clear that the testator meant the *heres* to have a discretion: there was no absolute *fideicommissum*, 40. 5. 41. 6.
[11] 40. 5. 17, 46. 4. [12] 40. 4. 20. [13] C. 7. 4. 8.
[14] 40. 5. 14. [15] 31. 61. 1, *etc.*, *post*, p. 523.

of liberty may be at the discretion of a third party[1], it is not clear why anyone should have thought the gift must fail on the above facts, as it appears that someone did. It must be assumed, as is suggested above, that the words give not a mere power of veto, but impose a duty to free if the man is worthy. This might create a difficulty where the person on whom the duty is imposed cannot free, as not being *heres*, but both texts agree that this is not fatal. But Alexander[2] lays it down that she can still exercise her discretion, though he does not commit himself on the question whether it is now an absolute discretion or not. Modestinus, on the other hand[3], thinks that the discretion is vested in her as *heres*, and is now therefore not exercisable at all—apparently he regards it as struck out, as being quasi-impossible[4].

As the gift may be at the discretion of a third person[1], so it may be at that of the slave himself[5]. Even if it is not so expressed, the gift will not take effect, *invito servo*, as it is for his benefit, unless it is clear that there was an intention to benefit his master, *e.g.* if a *heres* is ordered to buy a slave at a very high price, and free him. In such a case the *heres* is compellable by the owner to buy him[6].

Where the *heres* is directed to free one of several slaves, but there is no evidence as to which the testator meant, the gift is void[7]. The case contemplated seems to be where the words are "Let my *heres* free two of my *familia rustica*" or the like, and where there is no direction to the *heres* to choose, the analogy of a *legatum generis* is not applied: in fact the analogy would be rather with a gift to one of two persons. And here the rule of legacy is followed. But where a man who has three slaves directs the *heres* to choose two and free them, this is a valid gift and the *heres* may choose as against a legatee of the slave[8]. This last point is noticeable as a case in which a more or less general gift takes precedence of a specific gift, *favore libertatis*. The case gave rise to difficulties where the *heres* failed to free any of them[9]. It may be added that in the case of *fideicommissa* in varying terms, Pius enacted that the last was to be preferred, as expressing the last will of the testator[10]. In direct gifts, as we have seen, that operates which is most favourable to liberty[11]. The difference seems to result merely from over general language of the Emperor, since in legacies also, apart from liberty, the later gift is preferred[12].

The principles to be applied as to condition and the like are much

[1] 49. 5. 46. 2. [2] C. 7. 4. 8. [3] 40. 5. 14.
[4] *Ante*, p. 489. [5] 40. 5. 46. 1.
[6] *h. t.* 32. 1; cp. 28. 5. 84. 1, *post*, p. 530. [7] 34. 5. 27.
[8] 40. 5. 46. 5. If one died the others were entitled to be freed.
[9] *Post*, p. 556. [10] 35. 1. 90; 40. 4. 5; C. 6. 38. 4. *pr.*
[11] *Ante*, p. 488. [12] 35. 1. 51. *pr.* As to gifts "to A or B," *ante*, p. **461**, ***post*, p. 556.**

the same as in direct gifts[1]: a few illustrations may be given. A slave to be freed when a certain person reaches 16 is entitled to freedom at that date though the person be dead[2]. A slave to be freed on rendering accounts is not responsible for losses not imputable to his negligence[3], nor, when the *dominus* had approved and signed his accounts, for the insolvency of any debtors therein set out[4]. On the other hand if the freedom is not due at once, he must render account of his administration since the death, it being enough that he pay over all that is due. Thus where *tutores* have approved his accounts since the death he need not get them approved again, even though the *tutores* are themselves condemned in the *actio tutelae*[5]. To be freed *in* 8 *annos* means after 8 years, and it is a matter of construction whether they run from the death or the date of the will[6]. Where a son is to free a slave after 5 years, if he pays so much a day, and he omits the payment for 2 years, he is not free unless the *heres* has taken his services instead; in that case the condition is so far satisfied, since *non per eum stat* that it is not carried out[7]. If the slave given liberty conditionally by *fideicommissum* is also legated, the legatee is entitled to take him but must give security for his restoration if the condition occur. Ofilius, however, was of opinion that this was so only if the liberty was intended to adeem the legacy *pro tanto*, the legatee being entitled to shew, if he could, that the testator meant to burden the *heres* with the cost of repurchase[8]. The text remarks that the rule is the same in direct gifts[9].

The gift may be accompanied by one of the *hereditas*. In such a case the man can compel the *heres* to enter, free him, and hand over the *hereditas*[10]. A Senatusconsult provides that if he is *impubes*, the *heres* shall be bound to enter, and a *tutor* will be appointed to take the *hereditas*, and see that all proper securities are given[11]. Where several are freed by *fideicommissum*, and the *heres* is directed to hand over the inheritance to them, and he doubts its solvency, he can be compelled to enter, and hand it over to the first, who will be free and

[1] The rules as to the effect of prevention are as in direct gifts, 40. 5. 33. 1, 47. 2; *ante*, p. 492. For a case of *modus* see Testamentum Dasumii, l. 44.
[2] C. 7. 4. 9; D. 40. 5. 41. 10; *ante*, p. 490.
[3] 40. 5. 41. 7; *ante*, p. 494. [4] 40. 5. 41. 7.
[5] *h. l.* 10. Where he is to return the *peculium* he must give also anything he has received on account of *dominus* and added to the *peculium*, and he may not deduct anything on account of debts due from the master to the *peculium*, *h. l.* 9; *h. l.* 8 (obscure).
[6] *h. l.* 15; *ante*, p. 479. The concluding words suggesting a presumption that they run from the date of the will are apparently an inept interpolation. Gradenwitz, Interp. 182.
[7] 40. 5. 23. 4. Where a slave was to pay, *filiae et uxori meae*, so much, and then be freed, and the wife abstained, all was payable to the daughter, *h. t.* 41. 14. Where he was to be freed when debts were paid, they must be paid unless the *heres* wilfully delayed so as to keep him, *h. l.* 1.
[8] 40. 4. 40. 1; 40. 5. 47. 3.
[9] For a strained construction, *favore libertatis*, to exclude a certain condition, 40. 5. 56.
[10] 36. 1. 23. 1.
[11] 26. 5. 13. The text adds that Hadrian laid down the same rule where the gift was direct.

take the *hereditas*[1]. If a *servus alienus* is appointed *heres*, there may be a *fideicommissum* of liberty to him, *post mortem domini*, which will leave his *dominus heres*[2].

Like other gifts they are liable to revocation and destruction. We are told that they may be adeemed in the form in which they were made. This does not mean, as the text seems to suggest, that if given by will they cannot be adeemed by codicil, or *vice versa*, but that the form of words used must be the same in the ademption as it was in the gift[3]. There are many forms of implied *ademptio*. Thus if the gift is prevented from taking effect by the operation of some restrictive statute, *e.g.* the *lex* Iulia, this is a practical ademption[4]. Punishing by chaining by the testator is an implied ademption[5], and it may be presumed that, in general, what would adeem any direct gift would adeem a *fideicommissum*. A legacy of the slave will ordinarily have the same effect upon the gift of liberty as it would have on a direct gift[6]. In general the latest written is preferred, whether it is the legacy or the liberty, but there is a presumption, in case of doubt, in favour of the liberty[7].

If the will completely fails from any cause, the gift fails unless it is also imposed on the *heres ab intestato*, a construction readily adopted[8]. So if the codicil in which they are given becomes *irritus* they fail, but if the *heres* confirms them and lets the slaves *in libertate morari*, it is laid down by Severus and Caracalla that the liberty is complete[9]. As it stands this is a puzzling statement. There has been no formal act of manumission, and at this time the informal permission of the heir could have given no more than latinity. If in its present form it is to be put down to the Emperors at all, it must be regarded as a *privilegium*.

The results of lapse can be shortly stated so far as they are known. If the will fails, the gift fails, unless it is charged also on the *heres ab intestato*[10], subject to the rule that if the *hereditas*, or indeed the gift on which the *fideicommissum* is charged, goes to the fisc, that authority must carry out the gift so far as possible[11]. If the gift lapses to an heir, the rule of earlier classical law is that he takes it free of the burden, so far as it is a case of lapse under the *ius antiquum*[12], but *caduca* and the like take their burdens with them[13]. Severus provided that burdens should bind substitutes, and Ulpian cites Julian as in-

[1] If the estate is insolvent this ends the matter: one alone can be free. If the others claim to be freed and have their share, this will be gone into when they claim before the Praetor, 28. 5. 84. 1. So also in case of direct gift. *Ante*, p. 507.
[2] 31. 14. 1. [3] Ulp. 2. 12; D. 46. 4. 14. [4] 40. 6. 1.
[5] 40. 5. 43. [6] *Ante*, p. 468. [7] 40. 5. 50; cp. *h. t.* 47. 4.
[8] 40. 5. 24. 11, 47. 4; C. 7. 2. 12. [9] 40. 5. 30. 17.
[10] 40. 5. 24. 11, 47. *pr.*
[11] 30. 96. 1; 35. 1. 60. 1; 34. 9. 5. 4; 40. 5. 5, 12. *pr.*, 2, 51. *pr.* As to the case of the fisc, see also *post*, Ch. XXVII.
[12] 31. 29. 2, Celsus. [13] Ulp. 17. 3.

ferring that if a *legitimus heres* refused, a *fideicommissum* charged on him would bind his coheir[1]. This is a doubtful inference, and in any case it is no authority for the case of lapse of a legacy to a *heres* or co-legatee. It is not clear whether the distinctions which applied to other burdens in case of lapse applied to gifts of liberty. We are told nothing as to manumissions charged on joint legacies, but there is reason to think they were more favourably treated than other trusts in later classical times. Where a legacy burdened with such a gift is *pro non scripto*, Papinian says, on grounds of equity, that the *heres* must carry out the trust[2]. And Ulpian lays down a similar rule, precisely because such gifts are to be favoured[3]. Paul deals in the same spirit with the case in which the legatee refuses the gift of the slave[4].

The rules under the *sc.* Pegasianum, as to compulsion to enter, have no application in the case of a mere gift of liberty without *hereditas*, but there are nevertheless some exceptions to the rule that failure of the *heres* to enter avoids the gift. Thus a collusive repudiation in order to avoid the gift leaves it still binding[5]. So where the *heres* "omits" the will and takes on intestacy, he must free those whom either he or a substitute was under a *fideicommissum* to free[6], even though they be slaves of third persons[7]. And though the gift is not binding on the *heres ab intestato*, still if the heir under the will took money not to enter he must free the slaves[8]. It should be remarked that the gift is binding on all successors of the fiduciary, of any kind[9].

If the fiduciary has charges against the slave, of malversation, or the like, this is not a ground for delaying the liberty. This is declared to have been repeatedly laid down by Marcus Aurelius, Severus and Caracalla[10]. But the Praetor, in adjudicating, will take into consideration what is due on these accounts, by means of an *arbiter* if necessary, and order securities accordingly[11]. Moreover in an appropriate case the *actio expilatae hereditatis* will lie[12], since manumission does not destroy liability for delict[13]. In the same way, the personal need of the fiduciary or the badness of the slave affords no reason why the manumission should not be carried out[14]: Cassius was of a different opinion, but was overruled on the ground that there was no compulsion to take the correlative benefit, but he might not have one without the other.

[1] 31. 61. 1. [2] 36. 1. 55. [3] 40. 5. 26. 6. [4] 40. 5. 33. 2. See *post*, p. 528.
[5] C. 7. 2. 12. [6] 29. 4. 12, 22. *pr.*, 29. [7] *h. t.* 28. 1. See also 25. 6. 1. 9—11.
[8] C. 7. 4. 1. Pius enacted that if the *heres* and substitute died suddenly without entry and there was a *fideicommissum* of *hereditas* and liberty, the liberty should take effect but not, except in soldiers' wills, the gift of *hereditas*, 40. 5. 42. This expresses only *favor libertatis*. Analogous cases, 34. 9. 5. 4; 36. 1. 55; C. 3. 31. 12.
[9] 40. 5. 12. 1, 51. *pr.*; P. 4. 13. 2. But not one taking adversely, 40. 5. 31. 3.
[10] 40. 5. 23. *pr.*; 47. 4. 1. 7. [11] 40. 12. 41, 43; 47. 4. 1. 7.
[12] 47. 4. 1. 7. [13] *Ante*, p. 106; *post*, Ch. XXIX. [14] 40. 5. 35.

The *lex* Falcidia and the *sc.* Pegasianum have obvious applications in this matter. A legacy of a slave to be freed is not liable to the Falcidian deduction, nor is the man counted in the *hereditas*, but anything left with him is of course subject to the deduction[1], as is money left to a man in order that he may free a slave[2]. Indeed the rule goes further, for if a slave and money are left to X and there is a *fideicommissum* to free the slave, the Falcidian quarter is reckoned, it seems, on the whole of the gift, including the slave. But it can be taken only out of the money, so that in effect the gift of the slave stands good in its entirety, and the man is entitled to his freedom[3]. The same rule is applied where the legacy is to the slave himself who is to be freed[4]. According to the rules laid down by Ulpian, the fideicommissary gift must be carried out by the fiduciary, if he has accepted the gift, however small this is (but not if it proves to be nothing at all), if the slave affected is his own. But if the slave is to be purchased he is not required to spend more than the gift in buying him. If, however, the gift increases in value, so as to amount to the price of the slave, the donee must buy him, and, conversely, if it was enough when it was received the fact that it has diminished in value does not release him. On the other hand if he has accepted the gift under a mistake as to its value, he is allowed to restore it. There are evidences of dispute, but all this is clearly the rule of later law[5], and there seems no reason to doubt that it is classical.

Paul considers the case in which the gift is in itself enough but is cut down by the *lex* Falcidia, so that it is too small. He mentions diverse views, *e.g.* that the donee may keep the gift and not free even in the case of his own slave (a view in conflict with that just stated, and with settled law[6], at least as to this last point), and that if he has accepted the three-quarters he must buy and free[7]. The view finally accepted is, it seems, that in this case, too, if it is his own slave he must free, but he need not buy for more than the gift: in fact the case of reduction by the *lex* Falcidia is put on the same level as original insufficiency[8]. The text of Paul ends with the solution, which must be due to the compilers, that in such a case the *heres* must pay the legacy in full as if the testator had so directed. Before the time of Justinian such a direction would have had no force[9].

Just as a slave freed is deducted in arriving at the amount of the *hereditas*, so if the *heres* is directed to free his own slave, or a *servus alienus*, he is entitled to deduct the value of this slave from the *hereditas* as a debt[10].

[1] 35. 2. 33, 34, 36. 3. [2] 35. 2. 34.
[3] *h. t.* 36. 3. The legacy of the slave may have value if the man is not to be freed at once.
[4] *h. t.* 35. [5] 40. 5. 24. 12—16, 45. 1; 35. 2. 36. 1; C. 6. 50. 13.
[6] *Post*, p. 529. [7] 40. 5. 6. [8] 40. 5. 22. *pr.*; 35. 2. 36. *pr.*, 1.
[9] Nov. 1. 2. [10] 35. 2. 36. 2, 37. 1.

Where the *fideicommissum* is not immediate, but is subject to *dies* or condition, there is, as in the case of direct gifts, some difficulty. The few texts dealing with the matter suggest that it is immaterial whether the gift is direct or fideicommissary[1]. We have seen[2] that the rule is not easy to make out in the case of direct gifts, and there certainly is the difference that, at least in later law, a legacy of a slave to whom a direct gift of liberty *post tempus* was made, was void[3], which could not be the case where the legatee was directed to free him. We are told that if a slave, the only property of the testator, is left to be freed after three years, this is in effect a legacy of three years' enjoyment of him and one fourth of the acquisitions *ex operis* will belong to the *heres*[4]. This is simple, but not very logical, since this would certainly not represent one fourth of the benefit to the *legatarius*, nor would it be what would come to the *heres* if the slave were regarded as his, as to one quarter, in the meantime. In fact the conveyance of the slave is not treated as a benefit at all: what is regarded as left is the right of acquisition *ex operis*. It is clear that no really cogent solution was reached. Another text which may be regarded as dealing with the case where the slave is legated *pure*, with a conditional *fideicommissum*[5] of liberty, reflects still more the obscurity of the matter. It is the work of Paul, citing Caecilius, and while it is not clear that Paul adopts the views of Caecilius, it is still more uncertain what those views were. The problem is whether the gift of the slave is to be regarded as a legacy, subject to a Falcidian deduction. The answer of Caecilius seems to be that the gift of the slave is a legacy and that thus a certain part of him may remain with the heir, under the *lex* Falcidia[6]. When the condition happens he vests wholly in the legatee. Caecilius adds: *si quid ex operis eius medio tempore consecutus fuerit heres, id in pretium eius erogare eum debere, propter legis Falcidiae rationem.* And Valens adds that the man is to be valued as a *statuliber*. The plain meaning of these words is that he is not in the *hereditas* at his full value, since, unlike a thing legated, which, as we have seen, was imputed at its full value[7], he, if freed simply, was not imputed at all: a legacy given absolutely was of course counted in the inheritance. The words of Caecilius seem to mean that what comes to the *heres* as part owner, must be set off by him against the value of the slave as a *statuliber*, so that, so soon as he has received what equals the quarter of the man's value, he vests wholly in the legatee[8]. This agrees in principle with the other text[9], but is not wholly satisfactory[10].

[1] *h. t.* 36. 4, 56. 3. [2] *Ante*, pp. 474 *sqq*. [3] *Ante*, p. 469. [4] 35. 2. 56. 3.
[5] 35. 2. 36, 4, 37. *pr*. The argument turns on uncertainty though *dies* is mentioned.
[6] Cp. 35. 2. 49. *pr*. [7] *Ante*, p. 474.
[8] So in principle, Pothier, *ad h. l.* (*in tit.* de legatis, LXXVI). [9] 35. 2. 56. 3.
[10] Mommsen (perhaps also Lenel) expunges the word *heres* and presumably understands the text differently. See *ante*, p. 475, n. 7.

The Trebellian (or Pegasian) principles are the same, but other and more important questions arise in connexion with them. The main point to note is that the power of compelling the *heres* to enter to save the *fideicommissum* does not apply to *fideicommissa* of liberty alone[1]: it is allowed only for the benefit of *fideicommissariae hereditates*. The rule is illustrated by many "hard cases." A man who is given a *fideicommissum* subject to a further *fideicommissum* of the whole cannot, it seems, compel the *heres* to enter, as he is to get nothing. Accordingly where A is *heres* with a *fideicommissum* of liberty and *hereditas* in favour of S, and S is subject to a *fideicommissum hereditatis* in favour of B, S cannot compel the *heres* to enter, as liberty, which is all he will get, is not enough. But it will not greatly matter, if the estate is solvent, for B is allowed to compel the *heres* to enter, and will then be bound to free S[2]. Where A and B are *heredes*, S has a *fideicommissum* of liberty from A and of *hereditas* from B. Both refuse to enter. S cannot compel them. There is no compulsion for liberty alone, and B not being bound to the liberty cannot be bound to one who has no right to be free. But though in the facts as stated the liberty will fail, still, if A alone refuses, B takes all, and can be compelled to enter, as S now has a claim against him for both liberty and *hereditas*[3]. On the same facts if A enters and frees S, then as there can be no question of intestacy, and S is free, he can compel B to enter and hand over the *hereditas*[4]. This is a provision of Antoninus Pius, whom we shall find legislating freely in cases of hardship in this connexion. It must be remembered that, in his time, the gift specially charged on B would not have bound A if, B having failed to take, A had acquired the whole by *ius accrescendi*. Later, as the result of a rescript of Severus and Caracalla, the provision would have been unnecessary, as A would have been bound by the *fideicommissum hereditatis*[5].

Where a *heres* is required to give liberty and the *hereditas* to his own slave, he cannot be compelled to enter, though, if he does, he must carry out the *fideicommissa*[6]. On the other hand there are many circumstances under which the slave can compel the *heres* to enter. Thus where the testator's slave is freed *directo*, or by *fideicommissum*, with a *fideicommissum* of the *hereditas*, he can compel the *heres* to enter[7]. Where T was *heres*, and there was a direct gift of liberty to S, S's child Z was left to S with a *fideicommissum* to free it, and there was a *fideicommissum hereditatis* in favour of Z. T refused to enter. On

[1] 36. 1. 54. 1, 57. 2. As to *bonorum addictio*, *post*, Ch. XXVII.
[2] 36. 1. 57. 2. [3] 36. 1. 54. 1. [4] *h. t.* 17. 17.
[5] See *e.g.* 31. 29. 1. As to lapse in general, *ante*, p. 470. Where S had a *fideicommissum hereditatis* from A the *heres* and of liberty from B a legatee, he could not make A enter, as his right was dependent on B's and B could not. B was in fact dead and the case was decided as one of lapse, 36. 1. 55, *ante*, p. 519. [6] 36. 1. 17. 13.
[7] *h. t.* 23. 1. Where a *heres* is *rogatus* to free S and there is a *fideicommissum hereditatis* in favour of T, and T is directed to hand the *hereditas* to S, S can make the *heres* enter, *h. t.* 17. 16. It must be presumed that the slave belonged to the testator.

application to the Emperor (Pius), it was ordered that T should enter. This made S free. Her child was then to be handed to her, and to be then freed by her, and a *tutor* appointed, by whose *auctoritas* Z could accept transfer of the *hereditas*. The will directed the inheritance to be handed to Z only when she was of marriageable age. To prevent evil results from this, as the child might die under age and the *heres* have the estate on his hands, it was ordered that if the child did so die, the estate should be sold as if there were no *heres*. The text adds that this constitutes a precedent[1]. Much in this case turns on matters which do not concern us. It seems, however, difficult to reconcile it with some of the cases already discussed: one might have thought that neither S nor Z could compel entry, for S is to get nothing but liberty[2], and Z's right is subordinate to that of S[3]. It does not appear that it is in this connexion that the text treats itself as creating a precedent, but it is clear that when the substantial intent was to give to a slave of the testator liberty and the *hereditas*, Antoninus thought it should not be hampered by too great regard for legal principle. We know that if the *heres* was to free his own slave and hand him the *hereditas*, the value of the slave so freed might be deducted from it as a debt[4].

We have seen that these gifts need for completion an act of manumission. Till that has been done, or there has been *mora*[5], they are still slaves for all purposes[6]. Their children born in the meantime are slaves and belong to their owner[7]. But the beneficiaries themselves are quasi *statuliberi*, which much improves their position. Thus their status is not affected by alienation or usucapion even though the liberty was conditional at the time when the alienation occurred, and the alienation was *inter vivos* or *mortis causa*[8]. The *fiduciarius* cannot in any way make their position worse[9]. Marcus Aurelius lays it down that no act or defect of his is in any way to affect the slave[10]. Of these acts and defects we shall have illustrations, when we come to deal with statutory restrictions[11]. Others can be taken here. If the slave is instituted by the *fiduciarius* with a gift of liberty, he is not a *heres necessarius*[12]. If the *fiduciarius* chains the slave, this is no bar to his liberty[13]. The *fiduciarius* may not hand him to another to free[14]: if, however, he does in any way alienate him, we have seen that the holder is bound to free him[15]. But he may choose, if he prefers, to be freed by the original *rogatus*—so it was provided by Hadrian and by Antoninus Pius[16]—and the *fiduciarius*

[1] *h. t.* 11. 2. [2] 36. 1. 57. 2, *fin.* [3] *h. t.* 55.
[4] *h. t.* 28. 17. *Ante*, p. 521. The rule that in estimating the value of a *hereditas*, the value of slaves to be freed is deducted, is confined to these cases of deduction of a quarter. Thus in reckoning the burden of funeral expenses of a woman, *heres* and *vir* are liable in the proportion of the *hereditas* and of that part of the *dos* which remains with the *vir*. But there is no deduction in respect of freed slaves, 11. 7. 20—25.
[5] *Post*, Ch. XXVII. [6] 40. 5. 45. 2. [7] C. 7. 4. 3; D. 35. 2. 24. 1.
[8] 40. 5. 24. 21, 45. 2, 51. 3. [9] 40. 5. 15. [10] *h. t.* 30. 16.
[11] *e.g. post*, pp. 537 *sqq.* [12] 28. 5. 85. *pr.* [13] P. 4. 12. 4.
[14] 40. 5. 34. *pr.* [15] *h. t.* 24. 21; 19. 1. 43. [16] 40. 5. 10. 1, 24. 21.

will then be bound to buy him back and manumit him[1]. So where the *heres* dies without having done it, and his *heres* hands on the *hereditas*, *ex Trebelliano*, the slave may choose by whom he will be freed[2]. Even if he has actually been freed by the wrong one, Pius decides that he can, on claiming, become a *libertus* of the original *rogatus*, the rule being perfectly general, and applying whether the alienation was voluntary or not[3]. All this is a rough and ready way of securing adherence to the testator's intention, and thus the rule is not applied if the will shews that the testator meant any holder to free[4]. Moreover if the *fiduciarius* should have died without successors, the man will be the buyer's *libertus*, since otherwise, the buyer, having no one from whom to claim, will lose both the price and the *libertus*[5]. As to those texts which say that if the *heres* dies without freeing the man, his *heres* must[6], it should be noted that under Antoninus Pius the rules of *mora* were applied in this case and he was treated as if he had been duly freed[7].

The fiduciary, as he may not make the man's position worse, may not exact services from him, even though the will authorise this: *iure publico derogare non potuit fiduciarius*[8]. Even if the *manumissus* promise them, his promise is null, for it must be *libertatis causa*, and he is entitled to his liberty[9]. But if he promise, after freedom, knowing he need not, this is a valid *donatio*[10]; if the will shews that the testator meant the fiduciary to have the full rights of patronage, then, perhaps, it is said, he may impose services[11]. Where a son was told to free his father's slave, Paul is made to say[12]: *dicendum est posse eum etiam contra tabulas habere et operas imponere: hoc enim potuisset etiamsi directam libertatem accepisset, quasi patroni filius.* This is unintelligible; a son cannot ignore his father's manumission. But for the last three words it might perhaps be understood of a son who has obtained *bonorum possessio contra tabulas* and can wholly ignore the manumission[13]. But *patroni filius* cannot impose *operae*. It seems idle to guess at what Paul may originally have written.

We have hitherto assumed the general validity of the gift: we have now to consider by whom, in favour of whom, and on whom they may be created and charged.

Any person who can make a *fideicommissum*, may make one of liberty[14], subject to the requirement of age under the *lex* Aelia Sentia[15].

[1] 40. 5. 15. [2] *h. t.* 23. 1. He might thus get an older patron, *h. t.* 15, 51. 3.
[3] *h. t.* 24. 21, 26. *pr.* Of course in this case there was no handing back.
[4] 49. 5. 24. 21. *fin.* [5] *h. t.* 25. [6] *h. t.* 12. 1; 40. 4. 20; P. 4. 13. 2.
[7] 40. 5. 26. *pr.*; *post*, Ch. XXVII. He is in some ways better off than a *statuliber*, *e.g.* in relation to the *sc.* Silanianum, *ante*, p. 95.
[8] 38. 1. 13. 1, 42; 38. 2. 29. *pr.*; cp. Vat. Fr. 225.
[9] 38. 1. 7. *pr.*, 7. 4, 13. 1. [10] *h. t.* 47. [11] 38. 2. 29. 1.
[12] 40. 5. 33. *pr.* [13] So Otto and Schilling. [14] 40. 5. 24. *pr.*
[15] C. 7. 4. 5; *post*, p. 537.

More detail is needed as to the person in favour of whom it may be made. It may be a slave of the testator or of the *heres* or of a legatee or of a *fideicommissarius* or even of a person taking nothing under the will[1], provided, according to one text, that there was *testamenti factio* with his owner[2]. The reason for this last rule is obscure: the outsider is no party to the will. There was nothing to prevent a man's buying a slave from a *peregrinus* and then freeing him, and it is not easy to see any reason why he should not be able to direct his *heres* to do so. It seems most probable that the jurist had in mind the case of an *extraneus* who was also the *fiduciarius*. One could not require a man to free his slave without giving him something by the will and one could not give him anything at least by direct gift unless there was *testamenti factio*. Indeed whatever the origin of the rule it must have been narrower than it seems or have had exceptions. Thus in one text it is doubted whether a *fideicommissum* of liberty could be given to a *servus hostium*. The objection is not, as might have been expected, that there is no *testamenti factio* with his *dominus*, but that such a person is unworthy to become a Roman citizen. The objection is overruled so far as to allow such a gift to be valid, if it were given for the event of his passing to Roman ownership[3]. It may even be given to a *servus poenae*, and will take effect if he is pardoned, though there is, in such cases, no *postliminium*[4].

It may be made in favour of a person actually free, and if at the time of the death, or, if it is conditional, at the time when the condition is fulfilled, he has become a slave, the gift will take effect[5]. It will be noticed that this is an exception, *favore libertatis*, to the rule that one cannot make provisions contemplating the enslavement of a free man[6]. It is perhaps for this reason that it is valid only if he is a slave at the time when the gift can first operate, a restriction which finds no analogy in the cases we have just discussed.

Such a gift may be made in favour of an unborn person. Paul's text is not free from difficulty[7], and Justinian speaks of a division of opinion among the jurists on the matter[8]. Against the validity of such gifts there is the rule that *fideicommissa* in favour of *incertae personae* and *postumi alieni* are void[9]. On the other hand, it is a very reasonable application of *favor libertatis*, and there are texts which make it uncertain whether such a *postumus* could be an *incerta persona*, at any rate if born before the testator died[10]. There are other texts which

[1] G. 2. 264; Ulp. 2. 11; C. 7. 4. 6; D. 32. 8. 1; 40. 5. 16; 40. 7. 13. 4.
[2] 40. 5. 31. *pr.* [3] 40. 5. 24. 2.
[4] *h. l.* 5, *ante*, p. 410. It may be given to one conceived and born *ex damnata*, since he is an ordinary slave, or to the slave of an unborn person, *h. l.* 4, 6.
[5] *h. l.* 3. [6] 18. 1. 34. 2. [7] P. 4. 14. 1. The MS. reads *nascitur*.
[8] C. 7. 4. 14. [9] *e.g.* G. 2. 287.
[10] *e.g.* 34. 5. 5 *sqq.* The classes of *incertae personae* and *postumi* are usually kept distinct.

speak of *fideicommissa* in favour of the children of a certain person, with no indication that the gift was confined to those which were born at the time the will was made[1].

If the testator thought the slave to whom fideicommissary liberty was given was his own, but he was really *alienus*, the gift is nevertheless good[2]. As the text notes, this would not be true of a *fideicommissum* of property[3]: it is a case of *favor libertatis*.

We pass to the question: on whom may such gifts be charged? The general rule is that they may be imposed on anyone who can be charged with any *fideicommissum*[4], *i.e.* substantially, on any person who takes a pecuniary benefit under the will, or the *paterfamilias* of any such person[5]. It is noticeable that Gaius does not speak of *fideicommissarii* as being liable to such charges, but we have already seen such cases[6]. If he takes anything under the will, it is enough, even though he renounces, or is excused from, some of its provisions[7]. On the other hand, if it appears as a matter of construction that the direction to free was with special reference to a particular gift, and that gift was not made or did not take effect, then even though he is entitled to benefits under other parts of the will, he may not be bound to this *fideicommissum*[8]. It must be a gift having a pecuniary value, and thus one who has received nothing by the will except the release of a lien over property for the security of a debt, which, however, remains still due, cannot be burdened with a *fideicommissum*[9]. This general statement may be ended with the remark that as the freeing is not voluntary and is not exactly an alienation, one who is bound to free under a *fideicommissum* may do so even at a time when he is forbidden to alienate[10], though a *pupillus* may not do it without the *auctoritas* of his *tutor*[11].

The cases are, however, of such different types that they must be treated under distinct heads.

A. Where the *fideicommissum* is charged either on the *heres*, the slave being an unlegated slave of the testator, or on a person to whom the slave is given either by legacy or *fideicommissum*. It may of course be charged on one or more or on all the *heredes*, and it is sometimes difficult to say which the testator meant. The *heres* charged may have only a part of the slave, in which case he must procure the other parts from his *coheredes*[12]. A difficulty arises where one of the *heredes* not

[1] *e.g.* C. 7. 4. 16. *pr.*, *ante*, p. 476.
[2] 40. 5. 39. *pr.* [3] P. 4. 1. 8; Ulp. 25. 5. [4] Ulp. 2. 9.
[5] G. 2. 263 *sqq.*; Ulp. 25. 10 (cp. 24. 21); In. 2. 24. 2; D. 29. 7. 8. 1; 36. 1. 80 2; *etc.*
[6] 36. 1. 17. 16; G. Ep. 2. 7. 2. [7] 40. 5. 41. 3. [8] 31. 34. *pr.*
[9] 32. 3, 4. The further *fideicommissum* must it seems be of liberty or something of pecuniary value. Where one was directed to free a slave in order to marry her he must free but need not marry, 40. 5. 51. 12.
[10] 40. 5. 31. 2. [11] *h. t.* 11. [12] 29. 7. 11—13.

charged is an *infans*, and is thus incapable of selling. It is settled by a *sc.* Vitrasianum, and a decree of Antoninus Pius, that the persons charged shall in that case be able to free him, a valuation being taken of the part belonging to the *infans*, and they being liable to him as if there were a judgment for that amount[1]. If the *fiduciarius* frees the slave by will and leaves his *hereditas* to him, he is not a *heres necessarius*, as he was already entitled to liberty, but if the original liberty was conditional he will be *necessarius*, unless and until the condition occurs, and then *voluntarius*[2].

The gift need not have been by actual legacy. If a slave is given to a man by *donatio mortis causa*, and there is a *fideicommissum* of liberty, and he gets nothing else he is bound to free[3], but not if it is a simple gift *inter vivos*[4]. And of course there is no *fideicommissum* on one who gets neither the slave nor anything else[5]. Where a legatee is under a *fideicommissum* to free we are told that the *heres* can refuse delivery of the slave unless the legatee will give security to carry out the manumission[6]. This rule of Julian's seems an excess of caution, in view of the machinery for compelling completion which we shall have to consider later[7], and which was certainly in existence in Julian's day. The additional precaution is rendered possible by the fact that the words used by the testator make the legacy one *sub modo*, and in the case of such gifts the *heres* has in general the right to require security for the completion of the intended purpose[8]. If on the other hand the legatee refuses to receive the slave, he may be compelled to cede his actions to some nominee of the slave, so that the liberty may not fail[9].

If a slave is left to X to free, the terms may be such as to give some profit to him (X), *e.g.* the manumission may be conditional or *ex die*. In that case a *fideicommissum* beyond that of liberty may be imposed on X in favour of the slave or any third person[10].

Where a slave was legated to be freed, and the *heres* refused to give him and was condemned to give his value, the jurists doubted whether he was entitled to be freed and if so by whom, and if by the *heres* whether the legatee was entitled to keep his legacy. Justinian is our sole authority for the dispute. After adverting to the stupidity of the judge, who had power to order delivery and not damages, he goes on to settle the point in a way we shall have to consider later[11].

[1] 40. 5. 30. 6. [2] 28. 5. 3. 3, 85. *pr.* [3] 32. 37. 3.
[4] 40. 5. 40. *pr.* [5] 40. 5. 26. 6. [6] 40. 5. 48.
[7] *Post*, Ch. XXVII. [8] 32. 19, *etc.* See Pernice, Labeo, 3. 1. 37.
[9] 40. 5. 33. 2. It is not a case of failure of the gift. [10] 32. 3. 1.
[11] C. 7. 4. 17. If the fiduciary is a *fideicommissarius* of the *hereditas*, and it is only informally handed over, it is likely that, before Justinian, the manumission could not be completed so as to make the man a *civis* till he was acquired by *usucapio*. See Pap. Resp. 9. 2; Esmein, Mélanges, 352.

B. Where a *heres*, legatee or *fideicommissarius* is charged to free his own slave. The general rule is that if he accepts the benefit he must free the slave, even though the man is worth more than the gift[1]. Where X was left land and money with a direction to free a slave, he was bound to free even though, owing to the *lex* Falcidia, he did not get the money[2]. But he must get a real benefit. Thus, accepting a *legatum dotis* does not bind the wife to free a slave of hers[3]. Upon one point there seems to have been a difference of opinion. If a man accepted a legacy burdened with such a *fideicommissum*, but the legacy reached him lessened in value, either as having been cut down by the *lex* Falcidia, or from some other cause *imminutum*, there were some jurists who thought that he was entitled to rescind his acceptance[4].

Ulpian[5] goes on to lay down the rule for the case where the instruction is to free several slaves, and the gift is not enough for all. The donee must free so many as the money will serve for. They are to be taken in the order of the will, or if this is not possible, the matter must be decided by lot or by the decision of an *arbiter*. We should be inclined to apply this text to the case of instructions to purchase and free, but for the fact that the writer immediately proceeds to discuss that as a distinct case. The rule is perhaps to be justified on the ground that while a single liberty cannot be divided, several can. But the text is corrupt and such a set of positive provisions have a Byzantine look.

Some exceptional cases may be noted[6]. Where the legatee attacks the will and thus loses his legacy, the *fideicommissum* must fail. Paul says that in such a case it is the business of the Fisc to buy and free the slave, if the *fiduciarius* will sell, which he cannot be compelled to do[7].

A *libertus* institutes his patron for his *legitima pars* and gives him a further legacy, directing him to free one of his slaves. If he takes the legacy he must free, but he may refuse it and keep the *legitima pars*. If he is made sole *heres* and accepts, he must free. But, if there is a substitute, he may by Praetorian decree take the *legitima pars*, leaving the rest to the substitute, who must free if he can buy the slave[8]. There can be little doubt that this text is interpolated[9], but

[1] 40. 5. 8, 24. 12, 24. 13, 45. 1; C. 6. 50. 13. *Restitutio* if donee is a minor: he can restore the gift before the liberty is given, 4. 4. 33.
[2] 40. 5. 22. *pr.* [3] *h. t.* 19. 1.
[4] *h. t.* 6. Another text credits this view to Ulpian (*h. t.* 24. 16), but it may be that Tribonian is speaking, as he certainly is in the concluding words of both these texts.
[5] *h. t.* 24. 17.
[6] Where a *paterfamilias* desired his sons to free a slave, in fact, but not to the father's knowledge, in the *peculium castrense* of one of them, that one must free: the error coupled with the fact that the father provided the *peculium castrense* makes it unfair to make the other son buy half and then free. This is a mere matter of construction involving no principle, 40. 5. 23. 2.
[7] 34. 9. 5. 4. In such a case the gift went to the fisc.
[8] 38. 2. 41.
[9] Gradenwitz, Z. S. S. 23. 342; Kalb, Juristenlatein, 75.

it is hard to say how far. The jurist's difficulty is to reconcile the rule, that one who receives a benefit may be burdened with a *fideicommissum*, with the duty to the patron not to impose on him a distasteful manumission. The point is not merely financial, and the rules cited by Gradenwitz[1] as to the extent to which manumissions are binding on the patron are hardly material: the point is that it is one of his own slaves, not the testator's. It seems clear that the mere gift to the patron of what he is entitled to, does not enable the testator to impose a *fideicommissum*[2], but this text, though it raises this point, does not decide it. The actual solution given is in itself rational, but it conflicts with the principle that one entitled to the whole cannot enter for half[3]. It is however probably not from Tribonian, but an abridgement of what Papinian said. The text contemplates some other application of the *decretum* than that mentioned above: it may be that, as Gradenwitz[4] supposes, Papinian suggested some solution for the case of legacy to the patron, which Tribonian has suppressed[5].

A legacy is left to A with a *fideicommissum* to free S, and a further *fideicommissum* of the legacy in S's favour. Here neither *fideicommissum* is binding. For A cannot be bound unless he gets something, which on the facts he does not, as, if he freed S, he would have to give him the money. It is as if he was under a *fideicommissum* of the money in favour of a third person. Of course he is bound if the *fideicommissum* of the money is *ex die* or *sub conditione*, so that he gets something from it[6].

C. Where a beneficiary is directed to buy and free a slave. Here the general rule is that if he takes the gift he is bound to carry out the *fideicommissum*, if he can with the money, but he need not give more than he has received, and if the owner will not sell the slave at that price the fiduciary may keep the legacy *ex voluntate testatoris*[7]. But there are complications and difficulties. If the owner has himself taken a benefit under the will, he is of course bound to sell him to the *fiduciarius* at a reasonable price and then no difficulty arises[8]. If there are several slaves and the money is not enough for all, they must be bought and freed so far as the money will go, in the order of the will if that is discoverable, if not either by lot or on the decision of an *arbiter*, as in the analogous case of a person directed to free a number

[1] *loc. cit.* He refers to C. 6. 4. 6. 16 b.
[2] 30. 114. 1; cp. 40. 5. 31. 3.
[3] 29. 2. 1—3.
[4] *op. cit.* 343.
[5] It may be that Papinian allowed the patron to keep the legacy without freeing. This is consistent with Papinian's known characteristics. See Roby, Introduction to Dig. cxiv.
[6] 40. 5. 24. 19. But there was disagreement on the point.
[7] 35. 2. 36. 1; 40. 5. 24. 12, 51. 2. An application of the principle that a *fideicommissum* may not exceed the gift on which it is charged. The rule applies only where, as here, the two are strictly commensurable, not, *e.g.*, where the *fideicommissum* is to free the fiduciary's own slave.
[8] C. 7. 4. 6, 13.

of his own slaves[1]. If the owner will not sell, or will not sell at a reasonable price (for it does not seem that the fiduciary is bound to give more, however large the benefits he has received), nothing can be done[2]. If the price asked is not obviously unreasonable, the difficulty being merely that they cannot quite come to terms, the Praetor will on application fix a price which the owner may accept if he likes[3]. If the gift of liberty is conditional and the condition is not yet satisfied, the *fiduciarius* is not bound to buy and free, even though the owner has prevented the fulfilment, and so *non per servum stat* that the condition is not satisfied. This is a common sense rule: the condition might be one benefiting the *heres*, and costing the owner something[4]. If both the owner and the slave are willing, the owner can compel the fiduciary to buy and free, or, in the alternative, he may, by a provision of Caracalla, free the slave himself and sue the fiduciary for his value[5]. In any case, the owner cannot be compelled to free or hand the man over, till he has received security for the price[6].

If the owner refuses to sell at a fair price what is the effect? Gaius and Ulpian say the gift is annulled, as does the much later Epitome of Gaius[7]. But Justinian says the gift *differtur* till the opportunity arises[8], and he inserts in his Code an enactment of about A.D. 220 which lays down the same rule[9]. It is possible that this is interpolated, though that seems unlikely. The texts in the Digest hardly touch this point, but those that approach it shew no sign of much handling[10]. On the whole it seems likely that the constitution attributed to Alexander is genuine, and that while the classics allowed pendency of the gift for the case where by any change of value it might come within the value of the legacy, Alexander allowed it also for the possibility of change of mind in the vendor. Whether these rules are of Justinian's time or earlier, they are as follows. If the owner does not sell now, the gift will be in suspense till he will[11]. The fiduciary on taking his gift may be required to give security (*cautio*), to carry out the purchase and manumission, if the owner should lower his demand, or the slave diminish in value, or the legacy increase in amount or value, though it be only by fruits or interest, provided it reach the necessary sum[12]. If he refuses to give this security, his action for the legacy will be met by an *exceptio doli*[13].

[1] 40. 5. 24. 18; cp. *h. l.* 17.
[2] *h. t.* 31. 4.
[3] *Ibid.*
[4] 40. 4. 55. 2.
[5] 40. 5. 31. 4; C. 6. 50. 13; *post*, Ch. XXVII.
[6] 40. 5. 32. *pr.*
[7] G. 2. 265; Ulp. 2. 11; G. Ep. 2. 7. 7.
[8] In. 2. 24. 2.
[9] C. 7. 4. 6.
[10] Most of them are in 40. 5. 24. Gradenwitz shews (Interpolationen, 41) that parts of this *lex* are interpolated, but he does not refer to any passage touching this point.
[11] C. 7. 4. 6.
[12] 40. 5. 7, 24. 14—16, 31. 4. In 40. 5. 24. 16 pendency may be contemplated in that part of the text of which the grammar is normal, but there is an appended clause which can hardly be by the hand which wrote the beginning.
[13] As to the case of diminution of the legacy, *ante*, p. 521.

It is likely that this *fideicommissum* to buy and free was never a common case, and it is also probable that the difficulty which certainly exists in reconstructing the classical rules is in part due to the fact that, on a considerable number of points, there were doubts among the jurists. It is noticeable that even in A.D. 220 Alexander feels it necessary to declare that such a gift is possible[1].

[1] C. 7. 4. 6.

CHAPTER XXIII.

MANUMISSION DURING THE EMPIRE (*cont.*). STATUTORY CHANGES. LI. IUNIA, AELIA SENTIA, FUFIA CANINIA.

OF these three statutes the first mentioned, perhaps the last in date, was essentially different in object from the others. It enlarged existing rights: they were restrictive. For this reason, and because some of the provisions of the *lex* Aelia Sentia seem to presuppose the *lex* Iunia, it is well to deal with this law first.

Lex Iunia.

This statute defined the position of those who had been *in libertate tuitione praetoris* by the earlier law[1]. It made them latins, giving them broadly the position of colonary latins, subject to certain disabilities of a very serious kind. Because of these restrictions they were called Latini Iuniani to mark them off from the others[2]. The cases with which it dealt were, apparently, the slave freed by his bonitary owner[3], the slave informally freed[4], and the slave freed under 30[5], though as to this case we shall see that there is doubt as to what is due to this *lex* and what to the *lex* Aelia Sentia[6]. Most of the points of difficulty under this *lex* will be more conveniently discussed later: here it is enough to mention a few points.

Notwithstanding the language of Gaius[7] it is clear that a bonitary owner could give freedom by will[8]. It is hardly so clear whether he could do it *vindicta*[9]. And it seems that manumission *censu* must have given *civitas* or nothing[10]. Apparently the entry of the man's name must have been a nullity, of no more force than any other mistake of the Censor's[11]. And it does not seem that it amounted in itself to a manumission *inter amicos* or *per epistolam*[12].

[1] *Ante*, p. 444.
[2] G. 1. 22; 3. 56.
[3] G. 1. 167; Ulp. 1. 16; 11. 19; 22. 8; Fr. D. 9.
[4] G. 1. 17, 22; 3. 56; Ulp. 1. 10; Fr. Dos. 4, 6—9, 14; C. 7. 6. 1. *Ante*, p. 444. Consent of *consilium* if *dominus* under 20, G. 1. 41; *post*, p. 538.
[5] G. 1. 17, 18; Ulp. 1. 12.
[6] *Post*, p. 542.
[7] G. 2. 267.
[8] Ulp. 1. 23; 22. 8.
[9] *Post*, p. 543.
[10] See however Vangerow, Latini Iuniani, 20.
[11] Mommsen, Rom. Staatsrecht (3) 2. 1. 374; Dr. P. R. 4. 52.
[12] *Ante*, p. 446.

Only such a slave was protected and thus became a latin as was *talis ut praetor libertatem tueatur*[1]. The language seems to contemplate defects in the slave[2], and though, as we have seen[3], the limitation is mainly referred to in connexion with the accompaniments of the manumission, it is important to remember that the words imply that protection could be refused to unworthy slaves.

Most, probably all, of the other cases of latinity we shall have to consider are of later origin. This type of status, having once been invented, had new groups added to it from time to time, by an economy of invention to which the Romans were prone. Just as the rules as to *dediticii* were made to apply to cases quite different from that for which they were invented, and Junian latins themselves are an extension of the idea of latinity, so there come to be latins under like rules who have nothing to do with the *lex* Iunia.

There are cases of inferiority in manumission which it does not in any way affect. Thus a peregrine owner could not give the slave in any case a better status than that he had himself[4]. He could it seems use only informal methods. And it may be supposed that any latin owner might use the method *per vindictam*, and any colonary latin that by will. But we are without information[5].

The only other topic to consider in connexion with this *lex* is its date. It is always called *lex* Iunia by the classical writers[6], and usually even in Justinian's time[7], but in one passage of the Institutes it is called *lex* Iunia Norbana[8]. No direct evidence as to date exists, but as the *Fasti* give consuls bearing the names Iunius and Norbanus for A.D. 19, this has been commonly accepted as the correct date. The matter has been the subject of much controversy[9], of which some statement is necessary, though the point is not important enough to justify a long account. The same names are not found again in any one year, but in 82 B.C. one of the consuls is called Norbanus. This date is impossible: Cicero, writing later[10], enumerates the modes of manumission, and could hardly have failed to mention so important a law had it existed. The date A.D. 19 is supported by the fact that the *lex* clearly belongs to a time near that of the *lex* Aelia. And Gaius, by his expression *per legem* Aeliam Sentiam *et* Iuniam[11], seems to treat it as the later of the two. But the absence of early authority for the name Norbana makes the evidence for the actual year 19 very slight,

[1] Fr. Dos. 8. [2] Vangerow, *op. cit.* 13.
[3] *Ante*, p. 445. [4] Fr. Dos. 12; *post*, p. 594.
[5] As to certain questions concerning the position of Junian latins, *post*, App. IV.
[6] *e.g.* G. 1. 22, 80, 167; 2. 110, 275; 3. 56, 57, 70; Ulp. 1. 10; 3. 3; 11. 16; 20. 14; Fr. Dos. 6, 7, 8, *etc.*
[7] In. 3. 7. 4; C. 7. 6. 1. [8] In. 1. 5. 3; Theoph. *ad h. l.*
[9] See especially Vangerow, Latini Iuniani, 4 *sqq.*; Voigt, R. R. G. 2. 160; Karlowa, R. R. G. 1. 621; Cuq, Inst. Jurid. 2. 148.
[10] Topica, 2. [11] G. 1. 80.

and there are serious difficulties. The *lex* Aelia Sentia, A.D. 4, creates and deals with a case of Junian latinity, *i.e.* that of the person freed under 30[1], and thus assumes the existence of the status. No other enactment of Tiberius extends or improves the rights of *libertini*: from the *lex* Visellia[2] it would seem that the tendency was the other way. Suetonius tells us that Augustus dealt with the different conditions of *libertini* as well as with *dediticii*[3]. This may refer either to the *lex* Aelia, as to persons under 30, or to the *lex* Iunia, but in either case it seems to assume the existence of Junian latins under Augustus, and thus to negative the date 19. But it is a mere general statement of no great weight. It is plain that the *lex* Iunia invented the status. The name shews it: we are frequently so told, and nearly every rule relating to them is repeatedly referred to that law[4]. Gaius tells us[5] that those who are Latini Iuniani were slaves before the *lex* Iunia, which would not be true, for those freed under 30, if it were later than the *lex* Aelia. No inference for the view that the *lex* Aelia was the earlier can be drawn from the fact that it gives the right of *anniculi probatio* only to latins manumitted under 30. This is not because at that time there were no others, in which case the language of Gaius in his account of the matter would be pleonastic, but because it is dealing only with persons who would have been *cives* if it had not passed, and so does not add a new class of *cives* as a wider provision would. On the other hand, the *lex* Aelia may have put those freed under 30 merely *in libertate*, and the *lex* Iunia have conferred latinity on them[6]. It must not be forgotten that one text refers the rules of *anniculi probatio* to the *lex* Iunia[7]. If this is correct one great difficulty in accepting the later date is removed, since if it was not till later that a man manumitted under 30 became a latin, it is not easy to see how the *lex* Aelia can have contemplated his marriage with a latin or a *civis*. But the earlier and repeated testimony of Gaius[8] is more weighty than an isolated text of Ulpian, especially as Gaius is more or less confirmed by another text of Ulpian, unfortunately rather corrupt[9]. It must also be noted that some texts suggest that the *lex* Iunia dealt only with informal manumission[10], though the weight of evidence is in favour of a wider scope[11]. Again Ulpian[12] tells us that slaves who had been guilty of misconduct became, on manumission, *dediticii, quoquo modo manumissi sunt*, and adds that this was enacted by the *lex* Aelia Sentia. The

[1] *Post*, p. 542. [2] Date however doubtful, see Willems, Droit Pub. Rom. 113.
[3] Aug. 40. [4] See the texts cited in nn. 6, 7, 8 on p. 534.
[5] G. 3. 56. [6] So Vangerow, Lat. Iun., 4 *sqq.*
[7] Ulp. 3. 3. [8] G. 1. 29, 31, 66.
[9] Ulp. 7. 4. Ulp. 1. 12, sometimes cited on this side, seems rather to support the other view. See *post*, p. 536, n. 3.
[10] Fr. Dos. 7; Ulp. 1. 10. So G. 1. 167 and Ulp. 11. 19, dealing with *tutela* of latins, seem to treat the *lex* as dealing only with slaves freed by bonitary owners.
[11] *e.g.* G. 1. 22; 3. 56, *etc.* [12] Ulp. 1. 11.

words quoted have little point unless they are an allusion to informal manumission. But this means that if the *lex* Aelia is earlier than the *lex* Iunia, either Ulpian is wrong or a man freed informally would be a slave if he had done no wrong—free if he were a rascal[1]. Moreover Gaius[2] in dealing with the law as to the distribution of the goods of *dediticii* uses language which implies that *latini* (*iuniani*) existed at the date of the *lex* Aelia. On the other hand in one text of Ulpian in which he is speaking of the *lex* Aelia, his language is not that which would have been expected if the *lex* Iunia had been the earlier: the *ideoque latinus fit* is certainly an inference for the present: the *lex* is cited as putting the man *in libertate*[3]. Most of these and many other considerations (*e.g.* the general character of the policy of Augustus as opposed to that of Tiberius) are weighed by Schneider in his full discussion of the question[4], and he concludes that the *lex* Iunia is the earlier. He thinks the name Norbana is a mere error, a view which leads him to disregard, as evidence for any date, the occurrence in any year of a magistrate called Norbanus. Indeed the real question is: was the *lex* Iunia earlier or later than the *lex* Aelia? The actual year matters little. There were a consul Iunius in B.C. 24 and a consul Norbanus in B.C. 23. This has led to the view[5] that the law was passed in the earlier year during the absence of Augustus in Spain, approved by him on his return in the next year, and re-enacted perhaps with some alteration. But this is an improbable suggestion: no other instance exists of such a nomenclature resulting from such facts.

So far as the general question goes, opinion seems on the whole to favour the view that the *lex* Iunia is the older[6]. But the contrary view has many supporters[7]. Karlowa[8], following Brinz, argues strongly for it. He points out that though Gaius says the *lex* Aelia deals with latins under 30, he nowhere says that they got latinity by that law, which must have been the case if the *lex* Iunia had already been passed. Indeed in one text he implies that they got it through the *lex* Iunia[9].

[1] Vangerow thinks (*op. cit.* 13) that a criminal slave freed informally was not protected by the Praetor. Fr. Dos. 10. This would avoid the absurdity. He notes that the *lex* Iunia gives latinity to all persons protected. G. 3. 56. He holds it to be only by a *Sc.* that these became *dediticii*. The remarks of Ulp. 1. 11 and G. 3. 74 that on this point the *lex* Aelia makes no difference between formal and informal manumission he treats as reading later rules into the *lex*. See Wlassak, Z. S. S. 28. 54 *sqq.*

[2] G. 3. 56, *latini essent.* [3] Ulp. 1. 12. So Vangerow, *loc. cit.*

[4] Schneider, Z. S. S. 5. 225 *sqq.*, 6. 186 *sqq.*, 7. 31 *sqq.*

[5] Du Caillaud, *cit.* Schneider, Z. S. S. 5. 241.

[6] See, *e.g.*, Girard, Manuel, 124; Mommsen, Staatsr. (3) 3. 1. 626; Dr. Pub. Rom. 6. 2. 248; Roby, Rom. Priv. Law, 1. 38, *etc.*

[7] *e.g.* Cuq, Inst. Jurid. 2. 148; Karlowa, R. R. G. 1. 621 *sqq.*; Hölder, Z. S. S. 6. 205 *sqq.*, 7. 44 *sq.* [8] *loc. cit.*

[9] G. 3. 56. The fact that it is not called Norbana by early writers he thinks proves nothing: many consular laws are cited under one name. The point is, however, not that the absence of the name Norbana shews that the *lex* is not of A.D. 19 but that the fact that it is once so called 500 years after the assumed date proves little in favour of that date, especially as the MSS. differ and the Greek paraphrase is equivalent to *Urbana*. Schneider, Z. S. S. 5. 225. Vangerow, *op. cit.* 9, points out, however, that Norbanus was also called Iunius.

It is true that the *lex* Aelia Sentia seems to speak of marriage[1] of those freed under 30, which implies latinity. Vangerow holds that the *lex* Aelia Sentia spoke only of *contubernium* and that Gaius is antedating the expression *uxorem ducere*[2].

On the whole, as Mommsen says[3], while the priority of the *lex* Iunia is the solution which creates least difficulty, certainty is unattainable. But it is only certainty on this point that can give certainty as to the meaning of some of the obscure texts in which the classical jurists seem to be at odds on points connected with this legislation.

Lex Aelia Sentia, A.D. 4.

This is a comprehensive enactment dealing with the relations between *libertini* and their patrons, and also imposing restrictions on manumission. It is only with these last provisions that we are concerned. There are four rules, which do not all start from the same point of view or protect the same interests, but have the common quality that between them they constitute the first inroad on the principle that a formal manumission by a quiritary owner makes the man a *civis*. The rules need separate consideration.

I. The manumitter must not be under 20, otherwise the manumission is void *ipso iure*, the rule being prohibitory and nullifying[4]. It applies to all cases *inter vivos* or on death, and even soldiers' wills are not exempt[5]. As the law does not divide days it is enough if he has completed the day before the 20th anniversary of his birthday. He cannot then be said to be less than 20 and the *lex* does not require him to be more than 20[6]. The rule is in one respect very favourably construed. If the manumitter was 20 when he made a codicil in which he made a direct gift of liberty, it is immaterial that the will, confirmation by which is needed, was made before he reached that age[7]. Usually the codicil is read into the will, the effect of which is in some cases to destroy the gift[8]. The text in the Code gives as the reason for laying down the more favourable rule, *nec enim potestas iuris sed iudicii consideratur*. This, which is not literally correct, since it is a question of *potestas iuris*, must mean that as the case is clearly not within the mischief attacked by the rule, and the rule itself is restrictive of a civil right, it is to be construed narrowly. The rule applies only to a manumission: thus a minor pledgee of a slave can give the assent without which the manumission is void[9].

[1] G. 1. 31. [2] *op. cit.* 8. [3] *loc. cit.*

[4] G. 1. 38—40; Ulp. 1. 13; In. 1. 6. 4—7; C. 2. 30. 3. *pr.*

[5] 29. 1. 29. 1; 40. 4. 3; C. 6. 21. 4. 1. [6] 40. 1. 1.

[7] C. 7. 2. 1. [8] *Ante*, pp. 461, 464.

[9] 40. 2. 4. 2; *post*, p. 573.

As might be expected attempts were made to evade the *lex* One at least of these was checked by a Senatusconsult which provided that a gift by a minor to a man of full age, in order that he might free, was void[1] In the same way he could not, in his will, validly direct liberty to be given[2] Where a minor sold a slave *ut manumittatur* the sale was void even though the slave was delivered, and even though the intent of the minor vendor was that the manumission was not to take place till he was of age[3] The point is that his judgment was not regarded as yet sound enough, and if the transaction was allowed to stand, he would be unable to change his mind Where a common owner, a minor, abandoned his share to a common owner *animo manumittendi*, the receiver could not free—the transaction being null *nihil aget*[4] Where a minor released a debtor on his promising to free a slave, the stipulation was void, and there was thus no novation of the old debt[5] It is evident that the Senatusconsult[6] was somewhat general in its terms Probably it prohibited what Proculus calls *fraus legi*[7], and left a good deal of room for juristic interpretation[8] The fact that there was a gradual development may perhaps account for the view attributed to the early Campanus, that if a minor requested his *heres* to free a slave of his (*i e* of the *heres*), this was valid and not affected by the *lex*[9] It is not easy to distinguish this from the last case presumably the *lex* and the Senatusconsult were at first regarded as applying only to freedom given to the minor's own slave[10]

But where a *filiusfamilias* freed under the authorisation of his *paterfamilias*, this was valid whatever the age of the minor, for here the father was the true manumitter[11].

All this is subject to the very important exception that if *causa* was shewn to a body called the *Consilium*, the minor might with its approval manumit *per vindictam*, and as proof of the *causa* did away with the statutory bar he might even free informally, with the effect of making the slave a latin[12] But, ordinarily, the manumission was done at once, on approval of the *causa*, by *vindicta*, before the magistrate whose *consilium* had approved. hence the manumission is sometimes said to be done *apud consilium*[13] This *consilium* was a council chosen by the

[1] 40 9 7 1, 18 7 4, C 7 11 4 The *Sc* seems only to have confirmed a juristic rule
[2] C 7 4 5 See below, n 9 [3] 18 7 4
[4] 40 9 16 1 [5] 45 1 66 [6] C 7 11 4
[7] 40 9 7 1 [8] *i e* apart from *Scc*
[9] 40 5 34 1 As to the date of Campanus see Roby Intr to Dig clv
[10] See n 1 A minor freed a slave *inter vivos*, and in his will gave him a legacy After he made the will he sold the man the buyer freed him before the minor died The legacy was void it was in effect a gift to his own slave *sine libertate* 30 102 *ante* p 144 A minor freed a slave *inter vivos* having by will made a *fideicommissum* of the estate to which the slave was attached with its slaves The man was not included the manumission, though void shewed that he did not mean him to be included 33 7 3 1
[11] 40 1 16 *Ante*, pp 457 *sqq* [12] G 1 37 1
[13] G 1 38, D 40 2 24, 25, Fr Dos 13 As to the unity of the whole transaction see Wlassak, Z S S 28 37 *sqq*

magistrate who presided in it It consisted, at Rome, of five Senators and five Equites, and it sat to enquire into *causae* on certain specified days. In the provinces it consisted of 20 Recuperatores, Roman citizens, and this class of business was attended to on the last day of the *Conventus*, the judicial Assize or Session[1]. This particular business however hardly seems to have been looked on as judicial, since we learn that a person domiciled in one province could shew cause in this way, and manumit, in any other province in which he chanced to be[2]. It was immaterial that the Praetor who presided was his tutor[3]. The magistrate himself might be under 20 this would not prevent him from presiding, unless it were his own slave. in that case he could not do so in earlier classical law, as he would have to nominate the *consilium*[4]

As to what was a sufficient *causa*, we have a considerable list, and we are told moreover that there was no hard and fast rule. the sufficiency of the *causa* would be determined in each case[5]. A cause duly approved, whatever it was, sufficed, and after the manumission it could not be called into question. Thus an enactment of Valerian lays it down that while a manumission by one under 20 without cause shewn was a mere nullity, one after cause shewn did not admit even of *restitutio in integrum*: liberty is irrevocable[6]. This is only an application of a well-known principle. But a text of Marcian goes a little further He tells us that Antoninus Pius laid it down, that when once the *causa* had been accepted, then, however defective it really was, the liberty must proceed *causas probatas revocari non oportere . nam causae probationi contradicendum, non etiam causa iam probata retractanda est*[7] This means presumably that there was no appeal it would not prevent a magistrate from vetoing any further steps, where a fraud was proved[8]

Apparently the only fixed requirement for a *causa* (and this was a creation of practice) was that it must be *honesta causa, non ex luxuria sed ex affectu, non delicius sed iustis affectionibus*[9]. Among the more obvious *causae* were blood-relationship of any kind or degree, the relation of nurse or *paedagogus*, foster parent or child, foster brother or sister[10] The *causa* might be notable services in the past, *e.g* the protection of life or honour[11]

[1] G 1 20, Ulp 1 13a [2] 40 2 15 5, cp 40 5 51 7
[3] 40 2 1 [4] D 1 10 2, but see *ante*, p 454
[5] 40 2 15 1, G 1 19 [6] C 2 30 3 *pr*, D 4 3 7 *pr*
[7] 40 2 9 1 This may mean no more, but it seems to imply that, *causae probatio* having annulled his incapacity, he can now free
[8] These texts deal only with insufficiency of *causa*, others shew the rule to be the same in case of *falsa causa*, In 1 6 6, C 7 1 1 See Haenel Diss Domm 166 If approval was obtained through *culpa* or fraud of the *libertus* there was a remedy even in extreme cases a criminal remedy, C 2 30 3 *pr* This seems to imply more than mere insufficiency
[9] 40 2 16 *pr*
[10] G 1 19, 39, In 1 6 5, D 40 2 11—14 *pr* The case of foster child applied especially to women freeing, but it was allowed in case of men who had provided for nurture of the child
[11] 40 2 9 *pr*, 15 1

There is more complication as to those *causae* which contemplated the future. If the slave was over 18, desire to have him as a procurator was enough[1], provided that the manumitter had more than one slave[2]. It is laid down, though not without some doubts, that the desire to have the man as *tutor* was not enough: the reason assigned being that he who needs a *tutor* is not fit to choose one[3]. The reason seems hardly satisfactory. The enquiry into the sufficiency of the *causa* would include an enquiry into the fitness of the man. The argument of the text seems indeed to suppose that the cases in which manumission by a minor was allowed were those in which even an immature mind was able to decide, but it is obvious that this was not the principle at all. The truth is that for *pupilli* without testamentary or statutory *tutores* the law provided another well-known method of appointment.

A common and much discussed *causa* was intention to marry. To make such a *causa* admissible it was required by a Senatusconsult (perhaps the one which dealt with *fraus legi*) that the minor should swear to marry the woman within six months. If he did not so marry, the manumission was null[4], so that if she had a child in the meantime, its status was in suspense till the marriage or the expiration of the six months[5]. There were obvious limitations on this *causa*. Not more than one could be freed for this purpose, and the manumitter must be of a class a member of which might reasonably marry a *libertina*[6]. That the woman might marry a third person was no *causa*, and if no other was shewn, then, even though, *e.g.* on divorce by the third party, the minor married her within the six months, this did not save the manumission: it was simply void, and could not be saved by an *ex post facto causa*[7].

A woman freed *matrimonii causa* could not refuse[8] or marry any other without the manumitter's renunciation of his right[9]. It is said that she could not divorce, but this is contrary to the Roman conception of marriage, and the rule, as Julian says, really means that if she did divorce, she could not marry anyone else. No doubt the patron could divorce her[10].

[1] 40. 2. 13. The Institutes make it 17, the minimum age for *postulatio in iure*: our text may mean, having entered on his 18th year.
[2] *Ibid.* The language of this text does not shew whether this rule was confined to this case or not. It is a juristic rule probably more accurately expressed as being that if he was the only slave a specially strong *causa* would be needed.
[3] 40. 2. 25.
[4] 40. 2. 13.
[5] 40. 2. 19.
[6] 40. 2. 20. 2. *Spado* could free *matrimonii causa* as he could marry: *castratus* could not, 23. 3. 39. 1; 40. 2. 14. 1.
[7] 40. 9. 21. Common owners could not free *matrimonii causa*: as to the share of one this was for marriage to a third person which was not enough, 40. 2. 15. 4. The technical difficulty was easily overcome.
[8] 23. 2. 29.
[9] 23. 2. 51.
[10] 24. 2. 10, 11. It must be remembered that there was no manumission at all unless the minor married her within six months. She was of course not so bound if he was under a *fc.* to free her, 23. 2. 50. As to the rule in case of acquisition *ut manumittatur* or purchase *suis nummis*, see 23. 2. 45, and *post*, Ch. XXVII.

A woman could free on most of these *causae*, but not, it seems, *matrimonii causa*, unless she was a *liberta*, and a slave, *e.g.* a fellow-slave, had been left to her for this purpose[1].

There are other *causae* of a totally different nature which need separate treatment. If a minor was instituted *heres* on condition of freeing a certain slave, this was a sufficient *causa*: his *iudicium* was not in question[2]. If a slave was conveyed to a man *ut manumittatur*, whether gratuitously or for a price, it was provided by Marcus Aurelius, about A.D. 178, that the man should become free, though nothing was done, by the effect of the disposition[3]. It is clear therefore that if he was so delivered to a minor, there was no need for the minor to shew *causa*, since he could not help the freedom. Accordingly we are told in two texts by Papinian and Ulpian dealing with *donatio ut manumittatur*, that there was no reason to shew cause[4]. But another text of Ulpian says[5] that where the slave was so given, either for nothing or for a price, the minor might prove by way of *causa*, either the *lex donationis*, or the intent of the transferor, otherwise shewn. If there was a price, there was obvious reason for shewing the *causa*, since it might involve a loss, but the text expressly covers also the case of *donatio*. The texts may perhaps be harmonised on the supposition that the expression *causae probatio* is here used untechnically, and the meaning is that where the manumitter is under 20, the Praetor presiding will require to be satisfied of the circumstances, and the matter can be referred over to the *consilium*, if need be, as in the case of sale for a price[6]. In the analogous case of a slave *suis nummis emptus*, there was a rule, a little earlier in origin, that if not freed he could apply to the Court and get an order directing the holder to free him[7]. We are told that this constitution applied even though the owner were a minor[8]. We are not told whether if the minor proceeded to free he must prove the *causa*, but from the argument of Papinian in the case last discussed[9] it is to be presumed that he must, since the liberty would not take effect of itself.

Another analogous case is that of *fideicommissum*. Here there are distinct cases. We are told that a minor could not free by direct gift by will, but that he could do so by *fideicommissum*, and that the gift would be valid, if the man was one as to whom the minor could have shewn cause, if he had freed *inter vivos*[10]. We are not told that the adult *fiduciarius* must shew cause, and, indeed, the form of the texts is opposed to this. He had a perfect right to free, and the transfer to

[1] 40. 2. 14. 1, 20. 3.
[2] 40. 2. 15. *pr.*
[3] *Post*, Ch. XXVII.
[4] 40. 1. 20. *pr.*; 40. 2. 20. 1.
[5] 40. 2. 16. 1.
[6] So apparently A. Faber, Jurispr. Scient. 267 *sq.*
[7] *Post*, Ch. XXVII.
[8] 40. 1. 4. 8.
[9] 40. 1. 20. *pr.*
[10] 40. 5. 4. 18; C. 6. 21. 4. 2; 7. 4. 5. It is possible on the form of the texts that the authorisation to free, if cause could have been shewn, is due to Justinian.

him could not be regarded as null as it could *inter vivos*[1]. If, however, the slave attempted to put in operation the compulsory machinery, he would have to satisfy the court that a *causa* existed. Another case is that of a *fideicommissum* of liberty imposed on a minor. Here we are told by Papinian[2], consistently with his view in the case of a slave *donatus ut manumittatur*, that the minor must prove the *causa*. In this case the man would not become free *ipso facto* without the intervention of a magisterial decree.

It has already been noted that the presence of *causa* nullified the statutory defect. Accordingly it justified some of those acts, by a minor, *manumittendi causa*, which without it were void. Thus a minor with *causa* could convey his part to the co-owner for manumission, though he could not without[3]. But the existence of *causa* did not do away with restrictions independent of the *lex* Aelia Sentia. Thus an *infans* could not free, whatever his *causa* was, for he could not be authorised and his tutor could not free. A *pupillus* not *infans* could however free, *tutore auctore*, but not, says Paul, so that the *peculium* passed[4].

II. The slave must be over 30 or he does not become a *civis*[5]. There can be no doubt that the *lex* Aelia Sentia went as far as this: whether it went further and defined a slave freed under 30 as a latin is uncertain. The answer depends on the relative dates of the two *leges*. If the *lex* Iunia was the later, the *lex* Aelia probably placed such persons in the same position as those informally freed[6]. The effect of *causa* is exactly as in the last case, *i.e.* if the man were freed *vindicta*, after cause approved, he became a *civis*[7]. There is however some difficulty as to what happened if there were no *causa*. If he was manumitted by will directly, he became a latin: there could be no question of *causa*[8]. So too there is no sign of *causa* in relation to manumission *censu*. If the man was over 30 he became a *civis*: if he was not it was presumably void[9]. But the point is unimportant, for when these texts were written, the *census* was long obsolete in practice. If the manumission was informal, the man could not be a *civis* in any case, so that proof of *causa* would serve no purpose. We have seen that a man under 20

[1] *Ante*, p. 538.
[2] 40. 1. 20. 1; Pap. Resp. 9. 5 (Kruger) may refer to this case or to the slave under 30. 40. 2. 20. *pr.* (where the 20 is correct, as the text is dealing with *restitutio in integrum*) is not in conflict. Ulpian means that the proof of the *fc.* is a simple matter, and that is all that the *consilium* has to consider.
[3] 40. 9. 16. 1, immaterially altered. A minor who has bought *ut manumittatur* or is under a *fc.* to free can alienate to another with a direction to free, 40. 9. 16. *pr.*, see *ante*, pp. 524, 538.
[4] 40. 2. 24. The tutor could not in general authorise a *donatio*. Accarias, Précis, § 148.
[5] G. 1. 18; Ulp. 1. 12. Vangerow (*op. cit.* 17 *sqq.*) shews (citing G. 1. 17, 18, 29, 31; Ulp. 1. 12; Fr. Dos. 17; Theophil. 1. 5; C. 7. 15. 2) that the rule of the texts is that the man does not become a *civis*, not that the manumission is void.
[6] *i.e. in libertate*, *ante*, p. 446.
[7] G. 1. 18; Ulp. 1. 12; Fr. Dos. 17.
[8] *Ibid.*; G. 1. 17.
[9] Fr. Dos. 17.

could not give liberty even by way of postponed *fideicommissum*[1]. The same reason does not apply here, and we are told[2] that a direct or fideicommissary gift of liberty to take effect when the man reached 30 was valid. The distinction shews that the reason for refusing *civitas* to slaves freed under 30 was not that till that age it was not possible to be sure of their fitness, but that till that age they were not fit to be entrusted with the responsibilities of citizenship.

The effect of manumission *vindicta sine consilio* is not clear: the only text on the matter is corrupt. As it stands it tells us that (*lex*?) *sine consilio manumissum Caesaris servum manere putat*[3]. This is absurd. He cannot *manere* what he has not been. Nor is there any reason why he should become the property of Caesar: a *derelictio* would not have this effect, but would leave him *res nullius*, and manumission, which leaves the manumitter *patronus*, is much less than that[4]. The text does not say who *putat*: it must presumably be the *lex* which is the subject of the preceding and the following sentences. To say that a *lex putat* in a text which is setting forth its provisions is perhaps unexampled[5]. Of the many suggestions for emendation[6], the old one that the word was originally the name of some jurist is the most plausible. To make this sort of emendation rational it must be assumed that in early law, at least in the opinion of some jurists, manumission *vindicta* could not make a man a latin: it must be *civitas* or nothing. There are some circumstances which tend to make this possible. No specific case of manumission *vindicta* giving latinity can be found in classical texts, and though some are mentioned in Justinian's constitution[7] abolishing latinity, they all seem to be instances of that mass of legislation and practice, creative of latinity, which he tells us overlay the ancient law, and of which, as he also tells us, he was at pains to remove the traces[8]. Moreover manumission *vindicta* is an *actus legitimus* of extreme antiquity, and for this reason may have been regarded as a nullity if not completely operative[9]. However this may be, it is probable that practice early

[1] C. 7. 4. 5.
[2] G. 2. 276; 10. 2. 39. 2; 40. 4. 38. 1; 40. 7. 13. 5; 34. 5. 29; cited by Vangerow, *op. cit.* 38.
[3] Ulp. 1. 12.
[4] It may make him *servus sine domino* (Fr. Dos. 11), but that is not quite the same thing.
[5] The expression does occur, but not apparently as a reference to an explicit provision. See 40. 7. 25 and Cicero, de Rep. 4, cited Vangerow, *op. cit.* 25.
[6] Among them are: to omit *Caesaris*, to substitute *Senatus* (suggesting regulation by *Sc.*), to substitute the name of a *lex*. These Vangerow cites and rejects on what seem adequate grounds (*op. cit.* 25 *sq.*). He also rejects the suggestion of the name of a jurist (Cassius; Caelius Sabinus) on less convincing grounds. He treats the whole clause as a gloss. He considers that the act, as it shews intention to free, is an informal manumission. This ignores the probable view that not every declaration makes the man free, but only one which comes within the conceptions *inter amicos* or *per epistolam*. *Ante*, p. 446. He also urges that the statutory bar to its giving *civitas* ought not to have prevented it from producing other effects. See also Krüger, *ad h. l.* Schneider thinks the text rational as it stands (Z. S. S. 6. 189; 7. 31 *sqq.*), but see Hölder, Z. S. S. 6. 205 *sqq.*; 7. 44 *sq.* Justinian deals with this case apart from the other cases of latinity, C. 7. 15. 2.
[7] C. 7. 6. 6, 7.
[8] The hypothesis of later legislation might account for the obscure texts as to *servus pigneraticius* and *fructuarius*, *post*, pp. 574, 579.
[9] Cp. 50. 17. 77; see App. IV.

developed disregarding these considerations, and from the generality of Gaius' language in connexion with *anniculi probatio*[1], it seems possible that for him both formal and informal modes were on the same level, as to the present point.

III. Manumission in fraud of creditors or patron is void.

This will be dealt with fully in the law of Justinian's time. Here it is enough to state a few general rules. The rule applied to peregrine manumitters though the other parts of the *lex* did not[2]. The manumission was absolutely void[3].

A manumission was fraudulent if the manumitter was, and knew himself to be, insolvent either before or as a result of the manumission, and it must be shewn that the creditors actually were injured[4]. Thus a manumission was not in fraud of creditors if the manumitter had a maritime venture under way, which at the time had become a total loss, though he did not know it[5].

Fraud on the patron would occur for instance if a *libertus* made it impossible for himself to render the due aids and services, or if a dying latin freed his slaves, or if a *civis libertus* did so when he had no children. We are, however, without any direct information as to this rule, and can only argue by analogy from the rules as to alienations in fraud of patron[6]. The rule as to the patron does not recur under Justinian's law and even traces of it are hardly discoverable[7]. There are very few references to it even in the classical law.

IV. Certain slaves become on manumission *dediticii*.

These were slaves who had been punished by their master with chains or branding or imprisonment, or had been tortured for wrongdoing, and convicted or made to fight with wild beasts. On manumission they were *in numero dediticiorum*, no matter how formal the manumission, or how complete the capacity of all parties in other respects[8]. This type was a mere addition to a pre-existing class, the *dediticii*, with whose origin we are not concerned.

The different possibilities as to form of manumission make some difficulty in this connexion. In the case of will the matter is plain, but it is clear that the manumission might be *inter vivos*[9]. If it was formal and subject to no defect but the badness of the slave, he became a

[1] G. 1. 29—31, see also G. 1. 18. [2] G. 1. 47.
[3] *Prohibet lex*, Ulp. 1. 15; *obstat libertati, vetat*, Fr. Dos. 16; *nil agit, liberi non fiunt*, G. 1. 37, 47. See further, *post*, p. 563.
[4] In. 1. 6. 3; C. 7. 11. 1. No merit of the slave would save the gift if creditors suffered, 40. 9. 23.
[5] 40. 9. 10. [6] P. 3. 3; D. 38. 5.
[7] 40. 12. 9. 2. See Bodemeyer, *op. cit.*, 22. [8] G. 1. 13; Ulp. 1. 5, 11.
[9] G. 1. 15; Ulp. 1. 11.

dediticius. But the manumission might be such as to have made the man a latin apart from his defect. If and when the view was adopted, that manumission *vindicta* need not make the man a *civis*[1], there was no difficulty in the case of manumission *vindicta* of one under 30, *sine causa*. But informal manumission creates a dilemma. If the *lex* Aelia makes him a *dediticius* and the *lex* Iunia is later, it follows that the rascal would be free, though a *dediticius*, while the honest man would be still a slave, though *in libertate*. The difficulty does not exist if the *lex* Iunia is the earlier. On the other view, the solution of Vangerow[2] may be stated, that the *lex* Aelia Sentia applied its rule as to *dediticii* only to formal manumissions, and that its extension to all forms was due to a later Senatusconsult. But this is rather heroic in view of the texts which say that for this purpose the *lex* Aelia did not distinguish between the forms[3]. It involves the further corollary that after the *lex* Aelia the informal manumission of such a degraded slave was a nullity, since it is clear that the *lex* Iunia gave latinity to all[4] who were protected by the Praetor. This is in itself not improbable, for, as Vangerow remarks, they would be just the persons to whom the Praetor might refuse his protection. But the texts give no hint of all this and much of it is, as we have seen, in contradiction with them. On the whole evidence the view that the *lex* Iunia was the earliest seems to be the most probable.

Their position was carefully defined. They were incapable of *civitas*, and thus, for instance, if they satisfied all the rules of *erroris causae probatio*, though the other effects of the rule were produced, the deditician member of the union remained a *dediticius*[5]. They had no *testamenti factio* of any kind. They could neither make wills nor take under them[6]. Their property reverted to their patron on their death under rules which hardly concern us, but which seem to have been obscurely stated in the *lex*[7]. It appears to have provided that the *bona* were to go as if they had not been *dediticii*[8]. This might mean "as if they were still slaves." But it was construed as meaning "as if they had not suffered from the defect which made them *dediticii*." This interpretation, however, itself needed limitation. As it stands it would make the goods go as those of a latin in some cases and as those of a *civis* in the others. But this would be to give a right to the children, as well as a right of testation. Neither of these existed, and the rule of the classical jurists was that the goods were to go to the patron in any case, as those of a latin, if the man would have been a latin but for his offence,

[1] *Ante*, p. 543. [2] *op. cit.* 13; Wlassak, Z. S. S. 28. 57 *sqq.*
[3] G. 1. 15; 3. 76; Ulp. 1. 11. [4] G. 3. 56, *cit.* Vangerow, *loc. cit.*
[5] G. 1. 15, 26, 67, 68. [6] G. 1. 25; Ulp. 20. 14; 22. 2.
[7] G. 3. 74—76. See as to these Schneider, Z. S. S. 6. 198 *sqq.*
[8] As to this form see the Berlin Fragment, printed in Collectio lib. iuris anteiust., 3. 299.

otherwise as those of a *civis*. In the first case this would be a reversion of *peculium*, in the other it would be a succession, the distinction being important in many ways[1].

If they stayed, or dwelt, within 100 miles of Rome, they were sold into perpetual slavery beyond that limit, and if then freed they became, so Gaius tells us, *servi populi Romani*. Though Gaius seems to say that these detailed provisions are in the *lex* Aelia Sentia, this is not the necessary meaning of his words, and there may have been *senatusconsulta*[2].

The disabilities resulting from this degradation are very grave, and Paul shews that very definite rules were laid down as to the cases in which it took effect. Thus torture without confession was no bar to complete liberty, nor was punishment by one under a *fideicommissum* to free, since he could not make the position of the slave worse. Nor, for the same reason, was punishment by one of two owners, or by pledgee or pledgor of the slave, or by a master who was insane or a *pupillus*. But punishment by a subordinate whose act was authorised or ratified was enough. Here, however, if the master knew that the man was innocent, at any time before the punishment was actually inflicted, the facts would not be a bar to future complete liberty[3].

None of these four restrictions applied, not even the last, in a case of manumission by will to provide a *necessarius heres* to an insolvent[4], in order to avoid intestacy resulting from refusal of the *heres* to enter. We have already discussed the general principles of the law as to these *heredes necessarii*[5], and a word or two here will suffice. The privilege was strictly and narrowly construed. If any other *heres* entered, the gift to the slave was not saved[6], and it was only against the restrictions of the *lex* Aelia Sentia that the exception held good[7].

Lex Fufia Caninia (B.C. 2)[8].

Slaves were very numerous in the Augustan age—an individual *civis* sometimes owned thousands—a state of things very different from that existing in earlier days, if tradition is to be believed[9]. It was a natural consequence that manumission became frequent. It appears indeed that the number of *libertini* became a public danger. Manumission by will was the most common, as it cost the owner nothing, and ensured the attendance of a number of grateful *liberti* at his funeral. The result was an undesirable increase in the number of *libertini*, and

[1] G. 3. 64—70. [2] G. 1. 27; 1. 160.
[3] P. 4. 12. 3—8. That children of *dediticii* could become *cives* appears from the rules of *erroris causae probatio*, G. 1. 26, 67, 68. As not subject to the special disabilities of their mother they were presumably on the same level as ordinary *peregrini* of the region. See Ulp. 22. 2.
[4] G. 1. 21; Ulp. 1. 14; In. 1. 6. 1; C. 6. 27. 1; D. 40. 4. 27. [5] *Ante*, pp. 505 *sqq.*
[6] Ulp. 1. 14. [7] 28. 5. 84. *pr.* [8] See Mitteis, Z. S. S. 27. 357.
[9] See the cases mentioned in Apuleius, Apol. 17. See also Wallon, *op. cit.* 2. Ch. III.

occasional ruin to *heredes*. The *lex* Fufia Caninia was passed to check the evil. It provided that a man with 2 slaves could free both by his will, with 2 to 10, one half, with 10 to 30, one third, with 30 to 100, one fourth, with 100 to 500, one fifth, and never more than a hundred[1]. The maximum in each case is called the *legitimus numerus*[2]. The *lex* further provided that the power of manumission was never to be diminished by an increase in the number of slaves[3]. If more than the right number were freed, only the earlier, up to the *legitimus numerus* were free[4]. To prevent evasion the *lex* required that they should be freed *nominatim*[5]: the *sc.* Orphitianum provided that a clear description would do as well, if there were no ambiguity, for instance, "my cook," if there were only one, or "whoever shall be born of such and such an *ancilla*[6]." If the gift broke this rule, *e.g.* a gift of freedom to "all my slaves," the whole gift was void[7]. So also if the names were written in a circle in such a way that it was impossible to say which came first, the whole was declared void under a provision of the *lex* annulling *quae in fraudem eius facta sint*. Other similar attempts to evade the *lex* were met by *senatusconsulta*[8], which have, however, left little trace. There may be, indeed, one case. The *lex* applied only to manumission by will or codicil[9], and Gaius tells us that it left manumission *vindicta, censu*, and *inter amicos* quite free[10]. His epitomator makes a similar remark, substituting *in ecclesiis aut ante consulem aut per epistolam aut inter amicos*, but he adds that if a man on the point of death freed a number of slaves *inter vivos, in fraudem legis*, the manumissions were valid only up to the *legitimus numerus*[11]. Perhaps this is the effect of a Senatusconsult[12].

In calculating the number of slaves, fugitive slaves were taken into account, a rule for which Paul finds it necessary to give the reason that such slaves are still possessed by their owner[13]. We are nowhere told how common slaves were reckoned. As the common owners' rights in the slave were in nearly every case *pro parte*[14], it is probable that the slave counted only as a fraction.

None of these texts applies the rule in express terms to fideicommissary gifts, and the enactment by which Justinian repeals the *lex* Fufia Caninia[15] is rather ambiguous. It is plain, however, that unless it did apply to them it must have been nearly nugatory, and Paul, dealing

[1] G. 1. 43; P. 4. 14. 4; Ulp. 1. 24. [2] P. 4. 1. 16.
[3] *e.g.* a man with 30 to 43 could free 10. With 44 he could free 11. G. 1. 45; Ulp. 1. 24.
[4] G. 1. 46; G. Ep. 1. 2. 2. Liberties in a codicil were treated as subsequent to those in a will, though the will were later, since they owed their validity to the will, P. 4. 14. 2.
[5] Ulp. 1. 25; P. 4. 14. 1. [6] P. 4. 14. 1.
[7] G. Ep. 1. 2. 2. [8] G. 1. 46.
[9] G. 1. 44; P. 4. 14. 1. [10] G. 1. 44. [11] G. Ep. 1. 2. 1.
[12] Probably later than Gaius. The text limits the rule to the case in which the master is already ill (of the malady of which he dies): probably no other evidence was needed to prove *fraus legi*, G. Ep. 1. 2. 3, 4.
[13] P. 4. 14. 3. Huschke (*ad h. l.*) points out that the *lex* says *habet*.
[14] *Ante*, p. 379. [15] C. 7. 3. 1.

with this *lex*, gives, as an illustrative case, *qui ex ea ancilla nascetur*[1], which could have been effective only as a *fideicommissum*. It has been suggested[2] that as at the time of the enactment *fideicommissa* were novelties, it probably did not apply to them at first, but was made to do so by one of the *senatusconsulta* to which Gaius refers. The writer notes that the various *senatusconsulta* affecting fideicommissary gifts of liberty do not begin till the time of Hadrian. He thinks that Justinian's enactment[3], abolishing the rule, is clear for its application to *fideicommissa* in later law, and he cites a text of Paul[4] in the Digest which seems to shew that it applied in the time of Neratius. There seems little reason to suppose a Senatusconsult: such a case would be well within a possible juristic interpretation of the prohibition of fraud contained in the *lex*. And the language of Paul's text is much in favour of this view[5].

Before passing to the law of Justinian, it may be well to discuss shortly the circumstances under which the status of latinity could arise[6]. The following list has no claim to completeness.

1. The slave informally freed by a competent *dominus*[7]. It has been shewn by Wlassak that the classical law knew of but two of these modes, *per epistolam* and *inter amicos*, and that manumission *in convivio* is of much later introduction[8]. He remarks also that there is nothing in the form of the rule in the *lex* Iunia to prevent its application to methods of later introduction[9]. The form of manumission *inter amicos* is not very precise. In one, the record of which has come down to us[10], the witnesses do not sign and are not named. The transaction was in Egypt and some of its provisions are coloured by Greek law[11], but there is no reason to doubt that this was in conformity with Roman practice. Hence the idea would naturally appear that any public manifestation of intent sufficed. This accounts for the acceptance of manumission *in convivio*[12], and the enactment of Justinian abolishing latinity gives other instances of the same thing, such as declaring *apud acta* that he is a son[13], giving him or destroying the papers evidencing his slavery[14], and

[1] P. 4. 14. 1. [2] Bodemeyer, *op. cit.* 34. [3] C. 7. 3. 1. [4] 35. 1. 37.
[5] Bodemeyer (*op. cit.* 33) considers whether the rule applied to soldiers' wills. He thinks the rule as to naming did, as even a *miles* might not institute an *incerta persona*, In. 2. 20. 25. From 40. 4. 51 he thinks the main rule did not. It is not, however, clear that the *centurio* is freeing all his slaves. He remarks that 29. 1. 29. 1 shews only that some restrictions applied, not that this one did. The text looks altered, and it is possible that it is precisely this *lex* which has been struck out, as repealed.
[6] As to other legislative restrictions, see *post*, Ch. xxv., and as to *iteratio*, *post*, App. iv. For most of the following cases see Vangerow, Latini Iuniani, Capp. i, v.
[7] G. 1. 17; Fr. Dos. 4. [8] Z. S. S. 26. 374, 404; *ante*, p. 446.
[9] *op. cit.* 420. [10] Girard, Textes, Appendice.
[11] Mitteis, Reichsr. und Volksr. 8 *sqq.* There was a money payment and the person who provided it undertook not to claim the freedwoman as a slave. A right to keep her till reimbursement is common in Greek documents. See, *e.g.*, Dareste, Recueil des Inscr. Jurid. Grecq. ii. 263, 267, 274.
[12] G. Ep. 1. 2. [13] C. 7. 6. 10. [14] C. 7. 6. 11.

perhaps also the direction in the will that he is to stand, *pileatus*, at the grave of the deceased[1]. It is observable that here it is indifferent whether the direction is by the deceased or the *heres*. Justinian provides that even if there was no intention to free but only to make a false shew of humanity, the men are to be *cives*, but in this case they would not have been latins in earlier law. It may be added that the *lex* Iunia required the manumission to be *nominatim*[2], but all this means is that the slaves must be *evidenter denotati*[3].

2. A slave informally freed by a master under 20, with the approval of the Consilium[4].

3. A slave manumitted under 30[5].

4. A slave manumitted by his merely bonitary owner[6]. Neither Gaius nor Ulpian enumerates the relevant cases of bonitary ownership: the latter mentions, as an illustration, the typical case of a slave acquired by mere *traditio*. But the rule must have applied equally to other cases of Praetorian ownership. Such would be the case of one held by praetorian succession (*bonorum possessio cum re*), the case of a slave *ductus* under a noxal action, that of one received under a decree of *missio in possessionem*, or a *bonorum venditio*. The case of a slave handed over under a *fideicommissum* is no doubt on the same footing, unless he was formally conveyed. The case of an owner *in integrum restitutus*, in respect of a slave, might seem to be on the same level, since it is a praetorian remedy, contradictory of the civil law, and giving rise to *actiones fictitiae* and the like. But it is clear that the Praetor restored the old state of things so far as possible, so that in this case such a reconveyance would be compelled (either *officio iudicis* or by the Praetor himself in those cases in which he carried out the *restitutio*) as would restore the quiritary ownership[7].

5. By an edict of Claudius a slave cast out because of sickness became free and a latin, provided the master *publice* ejected him and, having the means, took no steps to have him looked after or sent to a hospital[8].

6. If a slave had brought a *causa liberalis* against his master and lost, and the price of the slave was paid to his master by an outsider to secure his manumission[9], the slave, on manumission, became only a latin, as a sort of punishment[10]. The date of this is not known: Justinian credits it to *antiquitas*. It must have been express enactment.

7. If an *ancilla* was married by her *dominus* to a freeman, with a *dos*, she became a latin. This may be no more than a case of informal

[1] C. 7. 6. 5. [2] Ulp. 1. 10; Wlassak, *loc. cit.*
[3] See *ante*, p. 460, and *post*, p. 556. [4] G. 1. 41.
[5] G. 1. 17; Ulp. 1. 12. [6] G. 1. 35, 167; Ulp. 1. 16; 22. 3.
[7] 4. 2. 9. 7, 10. 1; 4. 4. 24. 4. [8] C. 7. 6. 3; *ante*, p. 36.
[9] *Post*, p. 640. [10] C. 7. 6. 8.

manumission. Justinian made it give citizenship[1], as such manumission did. But the rule may have also covered the case of fraud.

8. Where an *ancilla* was sold with a condition against prostitution, but was nevertheless prostituted by the buyer, or where there was a condition for re-seizure in the event of prostitution, and her old owner did so seize her, and himself prostituted her, she became free and a latin[2].

9. A *libertus ingratus* under the conditions already discussed[3].

10. If a testator has given a slave liberty, conditionally, and while the condition is still pendent the *extraneus heres* frees him, he becomes only a latin[4]. The text refers only to *extraneus heres*: probably a *suus heres*, whose the slave was apart from the will, might ignore the restrictive effect of the condition[5]. The date of our rule is not known: Pomponius[6] quotes Octavenus as holding that if one freed a slave by will conditionally, and expressed the desire that the *heres* should not free the slave pending the condition, this direction was of no force. From this it has been inferred that our rule is as old as the first century of the Empire.

11. A *liberta* who cohabited with a *servus alienus* without her patron's knowledge was enslaved, and became only a latin if freed by him[7].

12. Slaves who detected rape were under certain circumstances made latins by Constantine. Justinian gave them *civitas*[8].

13. A freewoman, *sciens vel ignara*, cohabiting with a slave of the Fisc, remained free under a provision of Constantine, but the children of the union were latins[9].

There remain several cases of a doubtful kind.

14. Where a person was freed formally with an expression of intent that he should be only a latin, the effect seems to have been doubtful. Justinian enacts that such expressions are to have no effect[10].

15. The *sc.* Silanianum may have contained a case, to be discussed later[11].

16. A pledged slave could not be freed[12]. But, on a text, which is imperfect, most editors seem agreed that he became a latin if so freed, at least when the debt was paid[13]. But Justinian does not mention this case in his general enactment[14].

[1] C. 7. 6. 9. [2] C. 7. 6. 4; *ante*, p. 70; *post*, p. 603.
[3] C. Th. 2. 22. 1; *ante*, p. 423.
[4] C. 7. 6. 7. Other texts imply a power in the *heres* to free, *e.g.* 28. 5. 3. 3; 40. 4. 61; 40. 7. 3. 15, *etc.* See *post*, p. 586. [5] 4. 3. 32.
[6] 40. 4. 61. 2; *post*, p. 586. [7] *Ante*, p. 416; *post*, p. 552.
[8] C. Th. 9. 24. 1. There were probably other cases of the same type, *post*, p. 598; C. 7. 13. 3.
[9] C. Th. 4. 12. 3; *ante*, p. 417. [10] C. 7. 6. 6.
[11] *Post*, p. 602. [12] *Post*, p. 573.
[13] Fr. Dos. 16. See Krüger and Huschke, *ad loc.* [14] C. 7. 6.

17. If a woman freed a slave without her tutor's *auctoritas*, this was not valid. But if *auctoritas* was given at the time an informal letter of manumission was written, it was held and finally decreed that this should suffice[1]. The text is obscure and may refer only to formal manumission, in which the tutor, though not present at the formal act of manumission, had been present and assenting when the mistress wrote a letter to the slave declaring her intention, but it is usually taken to mean that an informal manumission was good, and made the slave a latin, even though the tutor gave *auctoritas* only when the letter was written, and had altered his mind when it was received[2]. The latter view better fits the words of the text.

18. If a slave was under usufruct he could not be freed. A certain truncated text on the matter is commonly taken to mean that though the owner could not free the man *vindicta*, still, if he did go through the form, the man became a latin when the usufruct ended[3].

19. It was a standing rule of manumissions that a manumissor could not give the slave he freed a better status than his own: it may be presumed therefore that a man freed by a Junian latin was himself a Junian latin[4].

20. If a slave was freed conditionally by will, he did not become a *statuliber* till the heir entered. We are told, however, that if he was usucapted, in the meantime, the Praetor would protect his liberty[5]. In another text it is said that his *spes libertatis* is restored *favore sui*[6]. The language of the first text has led to the suggestion that the slave, on the satisfaction, became a latin[7]. This seems improbable: it is hardly consistent with the language of the other text. The help of the Praetor is referred to in other cases where the slave became a *civis*[8], and the difficulty resulting from the fact that when the *heres* entered the man was the property of another would suggest rather a *fideicommissum* than resulting latinity. But in fact the difficulty was disregarded *favore libertatis*.

[1] Fr. Dos. 15. [2] Böcking, Huschke, Krüger, *ad loc.*
[3] Fr. Dos. 11. See Ulp. 1. 19; C. 6. 61. 8. 7; C. 7. 15. 1, and *post*, p. 579.
[4] Girard, Manuel, 123, and *post*, p. 594. [5] 40. 5. 55. 1.
[6] 40. 7. 9. 3. [7] A. Faber, Coniect. 16. 10, *cit.* Bodemeyer, *op. cit.* 49.
[8] Thus in the two texts last cited it is said that the Praetor will protect in other cases where there can be no suggestion of latinity.

CHAPTER XXIV.

MANUMISSION UNDER JUSTINIAN[1].

MANY of Justinian's changes, not directly concerned with the law of manumission, had, indirectly, great effect upon it. It may be as well to enumerate the chief of these changes before stating the law systematically. He abolished the distinction between quiritary and bonitary ownership[2]. He repealed the *sc.* Claudianum, with its connected legislation[3]. He abolished the classes of *latini* and *dediticii*[4] (thereby doing away with the rule that the slave must be 30[5], and with the restrictions as to criminal slaves who were freed), and he repealed the *lex* Fufia Caninia[6].

The rules in his time may be stated thus.

A. FORM. *Census* is gone. *Vindicta* remains, having long since ceased to be, if it ever was in any reasonable sense, a judicial process. Manumission *in ecclesiis* still continues[7]. Manumission by will of course still remains. The general effect of legislation of the later Empire having been to abolish the praetorian will, the question whether freedom can be given by it is obsolete. The place in the will is now immaterial[8]. Implied gifts are more freely recognised. Whatever may have been the earlier law it is now clear that appointment of *servus proprius*, as tutor, implies a direct gift of liberty[9]. The rule is subject to some obvious restrictions. Thus, as it turns on an implication of intent, the rule does not apply where the facts negative this intent, *e.g.* where the testator thought the slave free[10]. And where the slave is appointed *cum liber erit*, the appointment is a mere nullity. Conversely the appointment of *servus alienus* without such words is a mere nullity[11], though there is one text which seems to say that the condition will be implied and even that such a gift amounts to a fideicommissary gift of liberty[12].

[1] Many rules being common to Justinian and the classical law, convenience has decided the question which should be discussed here and in earlier chapters. The same consideration accounts for some repetition.

[2] C. 7. 25. [3] In. 3. 12.

[4] C. 7. 5, 6; In. 1. 5. 3. He remarks that *dediticii* have disappeared already in practice.

[5] C. 7. 15. 2. [6] C. 7. 3; In. 1. 7. [7] C. 7. 15. 2.

[8] In. 2. 20. 34.

[9] *Ante*, p. 463. The chief text (26. 2. 32. 2) gives liberty at once but delays the *tutela* till the *libertus* is 25. This is due to Justinian, but how far the alteration goes is uncertain.

[10] 26. 2. 22. [11] In. 1. 14. 1. [12] 26. 2. 10. 4; *ante*, p. 463.

In the same way a gift of the *hereditas* to *servus proprius* implies, in Justinian's time, a gift of liberty[1]. Thus where a slave is instituted with a gift of liberty, and, in the same will, the gift of liberty is adeemed, this cannot be construed as taking away the institution, for it is a rule of law that a *hereditas* cannot be adeemed. The institution stands good, and this implies a gift of liberty, so that the slave takes the inheritance, with liberty[2]. Justinian bases his rules on a presumption of intention, but he is hardly logical, for although a legacy to a man cannot take effect unless he is free, he does not allow a gift of liberty to be inferred from a legacy[3]. The fact is that the inference from another gift is not accepted unless in addition to the benefit to the slave, and *favor libertatis*, there is also some other public interest to be protected. In the case of institution, there is intestacy to be avoided: in the case of *tutela* there is the interest of the ward.

An inference from a form of words not amounting to a formal express gift is on another footing. Here the intent must be absolutely clear. Thus the words, *in libertate esse iussi*, do not suffice[4]. And mere intent to free is not manumission. Thus where it was clear that certain slaves were destined to look after a temple about to be built, if they were not actually freed they were the property of the *heres*[5].

The refusal of classical law to make implications left room for many doubts, nor were these removed as a matter of course by the mere admission of such implications. Accordingly Justinian finds it necessary to settle a number of doubts by express provision. It is not to be expected that any clear principle shall be discovered in relation to these numerous specific decisions on points of detail and construction, but they must be set forth as illustrative of the manner and tendency of his changes. Where the institution was in a will and the liberty in a codicil, the ancients had doubted, since the institution would not have been good without the gift of liberty, and as this was in a codicil there was in effect a gift of the *hereditas* by codicil. Both are now to be good[6]. Where A made his child *heres* and freed a slave, and then made a pupillary substitution in favour of the slave without any gift of liberty, the ancients had doubted, as the institution and the liberty were in different grades. Justinian declares that the slave is *heres necessarius*[7]. A made two *heredes*: one was his slave, but had no gift of liberty. He then left the slave to a third party. The ancients doubted as to the result, whatever the order of the gifts. Justinian

[1] In. 1. 6. 2; C. 6. 27. 5. 1. [2] 28. 2. 13. 1.

[3] 34. 4. 20, except in a soldier's will, in which even a conditional legacy suffices, 29. 1. 40. 1, 2. Justinian provides that though the legacy does not imply liberty the *heres* must give the thing to the slave: apparently it is to go to the *peculium*, C. 6. 27. 5. 2.

[4] Except in a soldier's will, 40. 4. 49. [5] 40. 12. 35.

[6] C. 6. 27. 5. 1 d. [7] C. 6. 27. 4; *ante*, p. 509.

directs that the institution is to take effect notwithstanding the legacy[1]. If a slave was left as a legacy, and, later in the will, there was a pupillary substitution in his favour without a gift of liberty, the effect was doubtful. Justinian decides that the legacy is in suspense, till it is clear whether the substitution takes effect or not, which is the view that had formerly been held where the substitution had been accompanied by a gift of liberty[2]. A *servus proprius* is instituted *pure* and given liberty under a condition. If it is in his power and he fails to satisfy it, he loses both: if it is not in his power and is not satisfied, he is to be free nevertheless, but not to have the *hereditas* unless the estate is insolvent, in which case he is *heres necessarius*[3]. The reading of the condition into both gifts presents no difficulty: it was the settled rule[4]. But the reading it out again from the gift of liberty, in connexion with which it is expressed, is an illogical piece of *favor libertatis*, due to Justinian.

Fideicommissary and direct gifts can now be made to unborn persons, so that they shall be born free, and, if there are twins or more, all will be free[5]. The latter part of the rule does not look very rational: we should have expected the first born to be free[6].

As to the informal modes, Justinian legislates elaborately. He enacts that some shall be valid with witnesses, others without, and the rest shall be void[7]. Those valid are to have the same effect as manumission *vindicta* and are *legitimi* modes. Those allowed with witnesses are:

1. *Per epistolam*, five witnesses writing their names on the letter, *quasi ex imitatione codicillorum*. If the slave is absent the letter makes him free only when he receives it[8].

2. *Inter amicos*, also with five witnesses in imitation of a codicil. The act must be formally recorded by the master, and the slave must get the testimony signed by the five witnesses, and also by *publica persona, i.e.* a *tabellio*[9].

3. Formally recording the slave as a son, *apud acta*, involving of course an official witness[10]. We have seen that in this and the other case now to be stated, latinity had resulted, though probably not in classical law[11].

4. Giving to the slave, or destroying, in the presence of five witnesses, the papers evidencing his slavery[12].

[1] C. 6. 27. 5. *pr.* [2] C. 6. 27. 5. 3; *ante*, p. 468.
[3] C. 6. 27. 6. [4] *Ante*, p. 468.
[5] C. 7. 4. 14; *ante*, p. 476. As to direction to *heres* to choose and free slaves and his neglect do so, *post*, p. 610.
[6] The exact meaning of Justinian's rule is discussed later. See *post*, p. 557.
[7] C. 7. 6. [8] 41. 2. 38. *pr.*; C. 7. 6. 1. [9] C. 7. 6. 2.
[10] C. 7. 6. 10; In. 1. 11. 12. [11] *Ante*, p. 548. [12] C. 7. 6. 11.

Other informal modes allowed were[1]:

5. If by order of the deceased or of the *heres* they stand around the funeral couch, or walk in the funeral procession, *pileati, i.e.*, wearing the cap of liberty[2].

6. If a slave woman is given in marriage to a freeman with a *dos*[3].

In the other cases, apart from informal manumission, in which latinity had been conferred[4], *civitas* was now to result.

B. EFFECT AND REQUIREMENTS.

I. All valid manumission makes the slave a *civis*, and a declaration that a slave freed is to be a latin is to have no effect[5].

II. The master must be 20 years of age. To this rule there are, however, some exceptions.

(*a*) A slave may be made *necessarius heres* if the master is 14[6].

(*b*) A minor may free *vindicta* before the *consilium* for a cause approved by that body. An *impubes* needs *auctoritas tutoris*[7].

(*c*) Justinian allows it to be done by will at 17, as a man could make a will for all other purposes at 14. This *via media* seems to be adopted rather hastily. It is not mentioned in the Digest or in the Code, and it is not long preserved, since in 549 it is provided that a man may free by will at 14[8].

(*d*) The rule does not apply if the slave has been received *inter vivos*, from a competent person, on a condition to manumit[9].

It will be observed that there is in Justinian's law no limit of age in the case of the slave: he may be an infant, just as a mad slave may be freed, though a mad *dominus* cannot free[10].

III. The consent of the slave is not needed. The principle is expressed in the rule that an *infans* or a *furiosus* can be freed, and Justinian lays down the general rule that a slave is not allowed to refuse[11]. This seems to conflict with the principle that *invito beneficium non datur*[12]. It has been explained on the ground that it is a mere release of a right over a thing, and analogous to releasing a bird, and as being no more than the restoration of a "natural" state of things[13]. But manumission is not dereliction, and to be a Roman citizen is hardly

[1] The absence of the requirement of witnesses in these cases shews that they cover cases where there was no intent to free: they are constructive manumissions.
[2] C. 7. 6. 5. [3] *h. t.* 9.
[4] *Statuliber* freed by *heres extraneus pendente conditione* (*h. t.* 7); loser in a *causa liberalis* afterwards freed (*h. t.* 8), sick slave abandoned (*h. t.* 3), slave freed under 30 (C. 7. 15. 2), *ancilla* prostituted contrary to condition (C. 7. 6. 4), slave detecting rape (C. 7. 13. 3).
[5] C. 7. 6. 6. [6] *Ante*, p. 546.
[7] *Ante*, p. 538; 40. 9. 27. 1.
[8] In. 1. 6. 7; Nov. 119. 2. At 17 a boy could *postulare in iure*.
[9] As to this and the analogous case of a *fc.* imposed on a minor, *ante*, pp. 538, 541.
[10] 40. 1. 25, 26. [11] C. 7. 2. 15. 2 a.
[12] 50. 17. 69. [13] A. Faber, Jurisp. Pap. Scientia, 95, 188.

"natural." It seems more in the Roman way and more in keeping with Justinian's language to say that so mean a creature was not to be allowed to spurn Roman citizenship. The rule is not prominent in the texts and in the one in which it is clearly laid down, Justinian proceeds to state an important exception: in an *addictio bonorum libertatis causa* a slave may sometimes refuse the liberty[1].

IV. The manumission must be *nominatim*[2]. The rule remains, though the chief point of it is destroyed by the repeal of the *lex* Fufia Caninia. The survival of the rule is the more remarkable, in that its existence is expressly set down by the classical writers to that *lex*[3]. It is somewhat confused with the rule that liberty cannot be given to an *incerta persona*, which is itself based on the *lex* Fufia[4]. But this wider rule has clearly disappeared in Justinian's law, at least in analogous applications[5]. Error in name is immaterial if there is no ambiguity[6]. Thus the gift is void if there are several of the same name and there is nothing to shew which it is[7], and, in general, the gift is void for uncertainty if it is not clear who is meant[8]. It must be noted that the case contemplated is one in which the testator appears to wish that a particular one shall be free, but has not made it clear which he meant. The case is different where the language is such as to cover either of two, but it is clear that the testator was indifferent as to which was free. Such a case is that of a direction that either A or B is to be free. Justinian tells us that the effect of this was much disputed among the classical lawyers. Some held the gift null: some said both were free: some said the first named was free, in any event. Others held that if it failed, as to the first, it might take effect in favour of the second. Justinian decides that both shall be free[9], a decision which seems to deserve the contempt which commentators have thrown on it. It has been pointed out[10], however, that Justinian is only applying a rule which had already developed—as a theory at least—among the jurists, not only for this case, but also for the case in which the *heres* has a choice as to which he will free and dies without freeing either[11]. A similar case but avoiding the doubt is that in which the heir is directed to choose among certain slaves. Here the heir has the choice[12]. The only point of interest is the question what fact is sufficient to determine the

[1] C. 7. 2. 15. 2 a; *post*, p. 625. [2] 40. 4. 24.
[3] G. 2. 239; Ulp. 1. 25; P. 4. 14. 1. [4] G. 2. 239; In. 2. 20. 25.
[5] In. 2. 20. 25; C. 6. 48. 1. According to the *Sc.* Orphitianum, it is enough that he is so described that his identity is clear, 40. 4. 24, *ante*, p. 460.
[6] 40. 4. 21, 54. *pr.* [7] 34. 5. 28—30; 40. 4. 37.
[8] Fr. Vat. 227. The manumission may be in the will and the description in a codicil or *vice versa*, 40. 4. 37.
[9] C. 6. 38. 4.
[10] Bernstein, Z. S. S. 4. 177 *sqq*. He is discussing, generally, various types of alternative gift and obligation.
[11] C. 7. 4. 16; *post*, p. 610. [12] 40. 5. 22. 1, 46. 5.

choice, and entitle a particular man to his freedom[1]. An analogous case is that of a *fideicommissum*, charged on a beneficiary, to free a certain number of slaves. What is the effect where the gift is less than the value of all the slaves? Ulpian[2] appears to decide that as many of them must be freed as the amount will cover and then asks the question —which? The answer is rather in the manner of Tribonian. There is nothing to indicate any right of choice in anyone. But the text says that the order in the will should determine. If this will not serve, the matter is to be determined by lot, or by an *arbitrium*, on their merits. It is not to be left to the Praetor, lest suspicion rest on him, of *ambitio vel gratia*. It is difficult to believe that this is Ulpian. Indeed it would seem that in classical law the principles which we have already discussed would require that he should be compelled to free them all, even though they are worth more than the gift[3].

Such a gift may be made in favour of an unborn person[4]. Here too Justinian changed the law. The earlier law is not absolutely clear, but on the whole, Paul's text is very strongly in favour of the possibility of such gifts, by way of *fideicommissum*[5], and Justinian elsewhere[6] states a rule in terms which assume, as a matter of course, that such gifts were possible in early law. The doubt which Justinian suggests in his enactment[7] dealing with the matter is perhaps not as to whether such a gift could be made, but whether, if it were made, the child was born free. He enacts that both direct and fideicommissary gifts may be made in favour of unborn persons, at least if conceived, and this whether the mother be given freedom or not. The effect will be, he says, that they will be born free. It is difficult to apply this to fideicommissary gifts, since these require an act of manumission, but Justinian is not so logical that we can be quite sure that he troubled about this: it may be that he meant them to be free *ipso facto* in such a case, but to be *liberti* of the *heres*. Whether "born free" is to be taken as meaning *ingenui* is not clear: it seems hardly probable. What he says is that *cum libertate solem respiciat*. The logical difficulties are obvious: they are discussed elaborately but not to much purpose by the early commentators[8]. It is in no way inevitable that Justinian should have considered these words as meaning *ingenuitas*, though they cannot in strictness mean anything else.

[1] Bernstein, *loc. cit.* [2] 40. 5. 24. 17.
[3] *Ante*, p. 529. As to the question how far *optio* constitutes a condition, see *ante*, p. 18, and *post*, p. 583.
[4] As to the general question of gifts to *incertae personae*, see the Gloss on 34. 5. 5. See also Girard, Manuel, 817.
[5] *Ante*, p. 526. [6] C. 7. 4. 16. *pr.* [7] C. 7. 4. 14.
[8] Haenel, Diss. Domm. 463. The case is linked with the rule just discussed by the provision that if after such a gift two are born, or more, all are free though the gift was in the singular, C. 7. 4. 14. 1.

V. Manumission must be by the owner. We have already[1] considered this rule. No great change of principle seems to have occurred under Justinian, but the rules require some further discussion and illustration.

We have seen that an ownership liable to determine still entitles its holder to free. Thus a *heres* under a trust to hand over the *hereditas* can free before doing so, being liable for the value of the slave whether he knew of the trust or not[2]. The rule is no doubt classical, but the text has been mutilated by the compilers, who speak of the validity of the liberty as a case of *favor libertatis*. There could be no meaning in this for classical law: the case is on all fours with that of one who has agreed to sell the *hereditas* and who frees a slave before handing it over. He is owner and the gift is good, but nothing is said about *favor libertatis*[3]. But Justinian's fusion of legacy and *fideicommissum*, and his provision that a real action was always available, led to a good deal of confusion[4].

There must, however, be real ownership. To free another man's slave is a nullity: in some cases it is penalised[5]. We are told, however, that where A manumit B's slave, B can have, if he likes, the value of the slave instead of the man, and this is said to have been *saepe rescriptum*[6]. So far as this represents classical law it presumably means no more than that the old owner could, if he preferred, treat the matter as a sale: it does not imply that the manumission was good or would be validated by the quasi-purchase. But it is not unlikely, judging by other texts, that this is what it means for Justinian. Thus while we are told that manumission of a *servus alienus* was not confirmed by subsequent inheritance of the slave[7], we are told elsewhere that if X is directed to free a *servus hereditarius* and so be *heres*, and he does manumit, *nihil agit*, so far as freeing is concerned, yet he has manumitted and thus satisfied the condition. And the text adds: *post aditionem manumissio ...convalescit*[8]. This last clause must be an addition by Tribonian.

If a man freed a slave of his own by *vindicta* thinking he was *alienus*, or if the slave or both were under the mistake, the manumission was good[9]. The text gives as one of the reasons that, after all, he is free *voluntate domini*, which is hardly the case if the master thought his act was a nullity.

[1] *Ante*, pp. 464 *sq.* [2] 36. 1. 26. 2. [3] C. 7. 10. 3.
[4] As to this and the case of *servus legatus*, *post*, p. 580.
[5] A man tricked the Emperor into approving his manumission of a *servus*, in fact *alienus*. The approval was annulled; the slave was to be restored with two similar slaves and three were to be given to the Fisc. Penalties not to be enforced if the slave had by lapse of time acquired a prescriptive right to liberty, C. 7. 10. 7 = C. Th. 4. 9. 1. The *interpretatio* puts manumission *in ecclesia* on the same level: the actual case is one of manumission *vindicta* before the Emperor.
[6] C. 7. 10. 1. [7] 40. 9. 20. [8] 28. 7. 20. 1.
[9] 40. 2. 4. 1. This text has been much discussed. See Appendix v.

In one text we are told that a *coheres rogatus manumittere*, can, by a rescript of Pius, free the slave even before partition, (when he cannot be sole owner,) where the other *heres* is an *impubes non rogatus*. But this is part of the law as to the enforcement of *fideicommissa* not carried out[1].

Other exceptional cases may be noted. If a man is free at the time when a will is made, a fideicommissary gift of liberty to him is good, if he is a slave at the time of the death or of the satisfaction of any condition[2]. But this is not a real exception to any rule laid down, for he will be the property of the person who actually frees him. It is only noticeable in that it is a case in which it is permissible, *favore libertatis*, as it seems, to contemplate supervening slavery[3].

Where A gave a slave to his wife *mortis causa*, (which was valid,) and instituted the same slave with liberty, if the institution came last and was intended as a revocation of the gift, the slave was a *necessarius heres*. If it was not so intended, or the gift came last, the gift prevailed, and the wife got the *hereditas* through the slave[4].

The exceptional cases in which Justinian allows effective manumission by a person not *dominus* do not represent any change of principle. They are no more than attempts to do equity, in a particular case, without any thought of the relation of the decision to ordinary legal rule. It still remains true that manumission cannot be by agent. But, whatever may have been the law before, it is now clear that manumission can be carried out by a *filiusfamilias* on behalf of his *paterfamilias* by any method *inter vivos*[5]. An extension of this principle is due to Justinian. In 530 he provides[6] that ascendants of either sex might authorise their descendant of either sex, whether in *potestas* or not, to free on their behalf—a rule which follows, as he says, the general breakdown of the old narrow conception of the family. It is noticeable that, notwithstanding its date, there is no trace of this extension in the Digest, published three years later.

As a part of his rearrangement of the rights of the father in acquisitions of the son he provides[7] that if a slave is given *ab extraneo* to a *filiusfamilias* to free, he may do so, the father's usufruct established by Justinian being disregarded, as unreal, in such a case, where the whole ownership is merely formal, since there is a duty to free at once[8].

VI. Manumission in fraud of creditors is void. Nothing is said by Justinian in this connexion about fraud on the patron[9]. The reason

[1] 40. 5. 30. 6; *post*, pp. 611 *sqq.* [2] 40. 5. 24. 3. [3] Cp. 18. 1. 34. 2.
[4] 24. 2. 22. [5] *Ante*, pp. 457 *sqq.*; App. v.
[6] C. 7. 15. 1. 3. [7] C. 6. 61. 8. 7.
[8] In earlier times the gift would have vested in the father.
[9] It is casually mentioned, 40. 12. 9. 2; Accarias, Précis, § 69. See also 38. 5. 11. Bodemeyer, *op. cit.*, 20.

for the disappearance of this from the rule is not clear. No doubt Junian latins were abolished, and it was in their case that the rule was most important, since all their property went to their patron when they died. But this does not account for the omission: it would require all the rules as to fraud of patron to disappear, which they do not[1]. It has been suggested that the omission is linked with the general rearrangement of patronal rights[2]. But if Justinian had intended a definite change in the law he would probably have said something about it. It has also been suggested that the matter is sufficiently provided for by the rules as to revocation of acts done *in fraudem patroni*[3]: we are told that *omne in fraudem patroni gestum revocatur*[4]. And elsewhere Justinian tells us that when alienation is inhibited by a *lex* or other agency the words cover manumission[5]. But the title in the Digest[3], though of some length, never mentions manumission, and the application of the above text to it conflicts with the important rule, shortly to be considered, that liberty was irrevocable. The *lex* Aelia Sentia makes the manumission void *ab initio*, and the distinction is clearly recognised in matter of alienation[6]. Some modern commentators appear to ignore the reference to the patron in connexion with this provision of the *lex*. But Gaius and Ulpian are quite explicit[7].

The general principle is that the manumission, to be void, must have been intentionally fraudulent[8]. Thus where an insolvent gave liberties "if my debts are paid" there was a general agreement among jurists, though Julian doubted, that this could not be fraudulent[9]. In another text in which the same rule is laid down, Julian seems to have no doubt[10], but probably his conformity is due to Tribonian. It has been suggested[11] that Julian was inclined to hold the gift void on grounds independent of the *lex* Aelia Sentia, as not having been seriously meant. But the gift obviously was seriously meant, and the whole structure of the text brings Julian's view into connexion with the *lex*. It is true that the latter part of the text expressly negatives fraud, but this, again, does not look like a part of the original text[12].

According to the Institutes the gift is fraudulent if the owner is insolvent and knows it, or knows that he will become so by the manumission, though the text hints at an abandoned view that the fact was

[1] The *lex* Aelia, which introduced the rule, is not much concerned with latins.
[2] Demangeat, Droit Rom. 1. 202.
[3] 38. 5.
[4] *h. t.* 1. 3.
[5] C. 4. 51. 7.
[6] 37. 14. 16.
[7] G. 1. 37; Ulp. 1. 15. Girard, Manuel, 120; Sohm, Instit. § 32; Muirhead, Rom. Law, 337.
[8] G. 1. 37, 47; Ulp. 1. 15; Fr. Dos. 16; In. 1. 6. *pr.*; D. 40. 9. 16. 2; 42. 8. 6. 5; C. 7. 11. 1.
[9] 40. 4. 57.
[10] 40. 9. 5. 1.
[11] A. Faber, Jurisp. Pap. Sci., 209 *sq.*
[12] There is reason for the doubt. If the gift is valid these slaves could have only the value of *statuliberi*, however insolvent the estate was. If an insolvent *heres* entered the loss to creditors might be serious. See *post*, p. 562.

enough without knowledge of it[1]. The source of the text is a passage from Gaius, which is cited in the Digest, where, however, nothing is said about knowledge[2]. It has been suggested that Gaius did not require this, but it is at least possible that he is citing an older view only to reject it, the doctrine of the Institutes being his own[3] as it certainly was the Sabinian[4]. However this may be, it is clear for later law that *consilium fraudis* was needed. Thus we are told that if a son frees *volente patre*, the gift is void if either knows of the insolvency[5]. The rule applies only to an ordinary voluntary manumission. Thus it has no application where the manumission is of a slave received *ut manumittatur*[6]: such a person would be free without manumission if the direction were not carried out[7]. So also where the manumission is under a *fideicommissum*[8], or is in return for money[9].

If it is given *fraudandi animo* in a codicil, it is bad though at the date of a previous confirmatory will the testator was solvent[10], but if he was solvent when he made the codicil, the fact that he had been insolvent at the date of the will was immaterial.

Besides intent, there must be actual *damnum* to the creditor—*eventus* as well as *consilium*[11]. Thus insolvency at *aditio* might destroy a gift designed in fraud, but solvency at *aditio* would always save it[12]. Two cases raise some difficulty here. It was possible for a *heres* who doubted the solvency of an estate, and yet wished to save the fame of the deceased, to agree with the creditors, before entering, that they should accept a composition, and it was provided, apparently by Marcus Aurelius and Antoninus Pius, that if a majority of the creditors agreed, the composition could be confirmed by magisterial decree, and thus forced on the other creditors[13]. Scaevola in two texts[14] discusses the question whether under such circumstances manumissions in the will are valid. It is clear that legacies are not unless the estate shews a profit to the *heres*. But he lays it down that liberties are valid unless they were given *in fraudem creditorum*. It is not clear that there was any *eventus damni*, since the creditors when they made their agreement knew of these liberties. The point is, however, that the *heres* could offer more if these slaves were assets.

Another noteworthy case is that of solvency of the *heres*. Some jurists held that this would save the liberties, but the view which pre-

[1] In. 1. 6. 23. If more than one were freed the gift might be void only to the extent of the excess, taken in order unless differences of value made it more favourable to liberty to alter the order, 40. 9. 25.
[2] 40. 9. 10.
[3] A. Faber, Jurisp. Pap. Sci. 199.
[4] 40. 4. 57.
[5] 40. 9. 16. 5.
[6] 40. 1. 10; 49. 14. 45. 3; Fr. de i. Fisci, 19.
[7] *Post*, p. 628.
[8] 28. 5. 56; Fr. de i. Fisci, 19.
[9] C. 7. 11. 5. As to fideicommissary gifts, *post*, p. 565. The texts say nothing of collusion.
[10] 40. 9. 7. *pr.*
[11] C. 7. 11. 1.
[12] 40. 9. 18. *pr.*
[13] 2. 14. 7. 17—10. The texts give further details.
[14] 40. 4. 54. 1; 42. 8. 23.

vailed was that it was immaterial[1]. In a text which seems to say the contrary it is clear from the context that a *non* has dropped out[2]. Another text declares to be governed by the same principle the case in which the liberty is conditional on the payment of money, and a third party is willing to pay it, so that the estate suffers no loss[3]. It has been suggested that the reason for this rule is to induce the *heres* to enter[4]. This is open to the objection that as the estate is rendered solvent by the entry, the creditors have no interest in getting the gift declared void, and the *heres* has, as we shall see shortly, no power to do so. Moreover the principle would not apply to the second case, in which the *heres* would not lose, as he gets an equivalent, and yet the principle to be applied, whatever it is, is common to both cases. It seems more probable that it merely represents a close adherence to the idea that the state of the actual *hereditas* and the intent of the testator are the only material things. But this makes the rule applied in the case of a gift, "if my debts are paid," all the more remarkable. It can only be justified on the ground that the use of this formula negatives fraudulent intent. But as we have just seen it might have been used as rather an ingenious way of injuring the creditors, and Julian's doubt seems to be fully justified.

The rule applies to soldiers' wills[5] and, unlike other provisions of the *lex*, it applies to manumissions by peregrines[6]. Most of the texts apply to direct gifts by will, obviously the commonest case, but the rule applied equally to gifts *inter vivos*[7], and to those by way of *fideicommissum*[8].

A creditor for the purpose of these rules is anyone who has an action, or an inchoate right to sue, even though the debt be *ex die* or conditional, so that there is no present liability[9]. There is, however, one distinction to be noted: a claim on account of legacy or *fideicommissum* is a sufficient debt[10]. But if the debt is merely a conditional legacy or *fideicommissum* due from the manumitter, this is not enough[11], probably because, as there has been no *negotium* or other legal act between them, the legatee or *fideicommissarius* is not a creditor till the condition arises[12]. If the debt which makes the man insolvent is conditional, we are told that the slave is a quasi *statuliber*, pending the arrival or failure of the condition[13]. Elsewhere we are told that in the case of an absolute debt the slave is a *statuliber* till it is certain whether the creditor will

[1] 40. 4. 57; C. 7. 2. 5. [2] 40. 9. 5. *pr.*
[3] 40. 9. 18. 1. *Sed si heres locuples non proficit ad libertates nec qui dat pecuniam prodesse potest.* The case in C. 7. 11. 5 is different: there is there no *damnum* and no *animus*.
[4] Accarias, Précis, § 71. [5] 40. 9. 8. 1.
[6] G. 1. 47. A *sc.* under Hadrian. [7] 40. 9. 5. 2.
[8] C. 7. 11. 7. Roby considers on the authority of 28. 5. 84. 1 that this rests on a *sc.* under Hadrian.
[9] 40. 9. 8. *pr.*, 16. 2, 27. *pr.* [10] 40. 9. 27. *pr.*; C. 7. 11. 1; *i.e.* due from the testator.
[11] 40. 9. 27. *pr.* [12] Cp. 44. 7. 5. 2. [13] 40. 9. 16. 4.

use his right[1]. This suggests that the more accurate way in which to state the law is that the gift is bad if there is *animus*, if there is damage to the creditor, and if the latter takes steps[2].

The creditor may be an individual *civis*, a corporation, or the Fisc, *animus fraudandi* being as necessary here as elsewhere[3]. The Fisc does not seem to have had any privilege in the matter in classical law[4], and as *civitates* and the Fisc are not creditors in the strict sense of the *lex*, it seems that special enactments were necessary to bring them within the *lex*[5].

If the master was insolvent at the time of manumission, and afterwards pays off all his creditors, new creditors cannot attack the gift, since there was no intention to defraud them. Julian is quite clear that the *animus* and the *eventus* must apply to the same creditor[6]. The following text adds as a note of Paul on Papinian that this does not apply if there is proof that the money to pay off the old creditors was derived from the new[7]. In another text however, from Papinian, and apparently from the same book[8], a general rule is laid down that new creditors can attack the gift. It is possible that this was Papinian's view, corrected elsewhere by Paul. In any case it is clear that the rule of later law is otherwise: proof must be forthcoming that money of the second creditor has been used to pay the first. It has been suggested[9] that the texts may be harmonised by supposing that Papinian is dealing with a case in which there is intent to defraud future creditors as well, while in Julian's case the intent is to defraud the present creditor. The texts shew no trace of any such distinction. And when we remember that Julian, in speaking of fraudulent intent[10], speaks of it merely as knowledge of insolvency, it is difficult to resist the impression that the determination of the *animus* to the one creditor is considered by him to result from the fact that he is the only creditor, and not from any mental act of the manumitter. It is difficult to see indeed how his intent could be made out. On the whole it seems more probable that Papinian's text is a little too widely expressed[11].

We have seen that the *lex* makes the manumission absolutely null[12]. If it is set aside the man never was free and thus he is fairly called a *statuliber* in the intervening period[13]. There are, however, some texts

[1] 40. 7. 1. 1.
[2] As this will occur if at all after *aditio*, the gift is in effect conditional. See A. Faber, *op. cit.* 218.
[3] 40. 9. 11; 49. 14. 45. 3; C. 7. 11. 5. [4] As to 40. 9. 16. 3; see *post*, p. 564.
[5] 40. 9. 11. The nullity was dependent on certain steps being taken: the Fisc itself could not take these steps.
[6] 42. 8. 15. [7] *h. t.* 16; cp. *h. t.* 10. 2. [8] 40. 9. 25.
[9] A. Faber, *op. cit.* 202. Bodemeyer, *op. cit.* 23, 24. [10] 42. 8. 15.
[11] A having two slaves, S and P, and no other property, promises "S *aut* P." Julian says the *lex* prevents his freeing either. If he frees one the other may die. Scaevola confines this to the case of his having no other property, as otherwise anyone who had promised "a slave of mine" could free none at all, 40. 9. 5. 2, 6.
[12] See the references on p. 544, *ante*. [13] 40. 7. 1. 1.

which look as if the gift were only revocable. Thus we are told that the Fisc can *revocare in servitutem*[1]. But this is correct, for in the meantime the man has been or may have been *in libertate*. Other texts in which the creditor is the Fisc say *retrahi placuit*[2]. Others having nothing to do with the Fisc use similar language[3]. These can hardly be more than mere loosenesses of language. The view that the case of the Fisc is on a special footing in this matter[4] is negatived by the fact that many of these texts do not refer to the Fisc, and on the other hand there are texts dealing with the Fisc which declare the gift absolutely void[5]. The view that the case of the Fisc and of *civitates* was regulated on this point by special enactments rests on little evidence: there is no reason to suppose that the constitutions[6] and *senatusconsulta* did more than declare the *lex* to apply. It is highly improbable that the Fisc would be placed in an inferior position, or that a revocable liberty would be casually introduced in this way. On the whole we must assume that in all these cases the manumission is either void or valid.

Apart from some special provision it would seem that the nullity of such a gift ought to be capable of being pointed out at any time. There were such provisions. Liberty begun in good faith was protected after a lapse of time which varied from time to time and will be considered later[7], while if it began in bad faith it was not protected at all[8]. Similarly the status of one apparently free was not to be disputed five years after his death, though it might be up to that time[9]. These rules seem to account sufficiently for the text which tells us that the slaves we are dealing with were *statuliberi dum incertum est an creditor iure suo utatur*[10]. However other explanations have been suggested. According to one view it must be within one year from the sale of the goods, this being the time within which fraudulent alienations must be revoked[11]. But there seems no ground for assimilating the void to the voidable in this way, and there would be difficulty in applying the rule to the case, which might occur, of nullity on this ground where the goods were never sold at all[12]. Others take the view that he had ten years, arguing from a text of Paul which says that a slave freed *in fraudem fisci* is not to be recalled into slavery *si diu in libertate fuisset, id est non minus decennio*[13]. But neither Paul nor Aristo whom

[1] 40. 9. 16. 3; 49. 14. 30. [2] 49. 14. 45. 3; Fr. de i. Fisci, 19.
[3] "*Revocabitur quemadmodum si in fraudem manumisisset*" (42. 8. 6. 5; 5. 2. 8. 17); "*per legem Aeliam rescinditur*" (42. 8. 15; 40. 9. 5. 2); "*libertates in fraudem creditorum revocari*" (C. 7. 11. 1); "*si fraudem se fecisse creditoribus ut revocet libertates*" (C. 7. 8. 5). *Rescindi* is less significant than the others. See A. Faber, *op. cit.* 204.
[4] *Ante*, p. 563. [5] 40. 9. 11. 1; C. 7. 11. 5.
[6] 40. 9. 11. [7] *Post*, p. 648. [8] C. 7. 22. 1.
[9] C. 7. 21. *pass.*; *post*, p. 651. The protection did not apply to those *in fuga* or *latitantes*, C. 7. 21. 8.
[10] 40. 7. 1. 1.
[11] 42. 8. 6. 14; see Accarias, Précis, § 71.
[12] 40. 4. 57. [13] 40. 9. 16. 3.

he is quoting could have laid down this positive rule of time: it is clear that it is the work of the compilers, or at any rate of some later hand. If that is so it seems to establish a privilege of the Fisc, for there is strong reason to think that a private person could not attack the status of a person apparently free, after the lapse of five years from a traceable *prima facie* valid manumission by his *dominus*[1].

There remains one point: the manumission being void, who is entitled to have the nullity declared? Clearly the creditors can, and the language of one text seems to shew that they alone can[2]. There is no question of a *popularis actio*. As the slave was in possession of liberty, the proceeding would take the form of some sort of claim to him. If no *heres* enters, so that the *bona* are sold, the creditors can of course make a claim. If the *heres* enters he will clearly have a sufficient interest. But though as we have seen the question may be raised although there is no sale[3], it is clearly laid down in three texts that the *heres* of the manumitter is barred from bringing proceedings[4]. Thus it is difficult to say what happens if a solvent *heres* enters on an insolvent estate. The *heres*, the only person interested, has no *locus standi*. The creditors, secure of payment, will hardly move. It has been suggested[5] that the *heres* himself can proceed directly in this case but the contrary texts seem too strong. If the creditors have a claim it is possible that they may transfer their right to the *heres*, *e.g.*, by authorising him to proceed as *procurator in rem suam*, but even this seems barred by the wide language of the text. Probably the proceeding is a special one organised under the *lex*, and not an ordinary *vindicatio in servitutem*, so that the creditor's right does not depend on any claim to the slave but on the mere fact that he is a creditor. If that is so, he need not wait for a decree of *missio in possessionem*, and he would not be barred by the mere fact of entry of a *heres*, so that the *heres* might enter only on the undertaking of the creditor to proceed. The texts seem to mean that if he did not take this precaution he would have no remedy.

It may be added that there is no reason to suppose all creditors need join, and that the manumitter could not himself impeach his own manumission *inter vivos*[6].

There is some difficulty as to the application of the rule about fraudulent manumission in the case of fideicommissary gifts. The texts make it clear that, after some dispute, the rule was settled that in the case of such gifts the *animus* was not considered—the *eventus* alone determined whether the gift was valid or not[7]. What is the reason of this? It must be remembered that it was only by adoption of the Sabinian view[8] that the rule was reached which made *animus*

[1] *Post*, p. 650. [2] 40. 7. 1. 1. [3] 40. 4. 57.
[4] 40. 12. 31; C. 7. 8. 5; 7. 16. 7. [5] Accarias, Précis, § 71. [6] C. 7. 8. 5.
[7] 40. 5. 4. 19; C. 7. 11. 1, 7. [8] 40. 4. 57.

material in direct gifts. The texts shew that the non-application of this to fideicommissary gifts was not a mere oversight, but was a positive decision. It is perhaps idle to speculate as to the unrecorded reasons which led to this view. It may perhaps be due to the notion that the testator in abstaining from completing the gift may be regarded as having tacitly subjected his direction to the condition of solvency of the estate. If that is the explanation the rule does not depend on the *lex* Aelia at all, and any such dependence cannot be made out on the texts.

VII. Manumission must be in perpetuity. Any limit of time which it was sought to fix was simply struck out[1]. This idea of irrevocability, already mentioned, can be illustrated by many texts. *Civitas* once obtained cannot be added to or subtracted from by any subsequent manumission[2]. If a man frees a slave under a *fideicommissum* contained in a codicil which is afterwards shewn to be a *falsum*, or by way of fulfilling a condition which is afterwards shewn to be, from any cause, not binding, the manumission is still valid[3]. A slave is given to a legatee under a codicil which is declared false. There has been actual conveyance so that the legatee is certainly owner. If he has freed the slave the gift is good[4]. Even where the gift is such as to work a fraud on a third party, if validly given it is irrevocable. Thus where a son was under a *fideicommissum* to free a slave praelegated to him, when accounts had been rendered to the *heredes*, and he freed him before this was done the manumission was valid[5]. So when a *heres* under a *fideicommissum* to hand over the *hereditas* frees a slave, the gift is valid[6].

The case of *restitutio in integrum* is discussed in many texts. The general principle is that there is no help to a minor *adversus libertatem*[7]. The following text says, "except *ex magna causa* on appeal to the Emperor." What would be a sufficient *magna causa* does not appear, and it is likely that the words, which purport to be Paul's, are misapplied by Tribonian[8]. Thus liberties which have taken effect, by the *aditio* of the minor, are not undone by his obtaining *restitutio in integrum*[9]. If the minor is under a *fideicommissum* to free and does so, and afterwards gets *restitutio*, the liberty is unaffected[10]. A slightly more complex case is that in which a slave is substituted to a minor. Here if the minor repudiates, the slave is *necessarius heres* and free. If now the minor is *restitutus*, the liberty, having taken effect, is not affected. But if the

[1] 40. 4. 33, 34; the rule was the same in Jewish law. Winter, Stellung der Sklaven, 35, 36.
[2] C. 7. 1. 2. [3] 40. 4. 47. *pr.*, 1; 5. 2. 26.
[4] 37. 14. 23. 1. [5] 4. 3. 32.
[6] 36. 1. 72. 1. A gave a slave to B to free on the terms that he was to receive one in return. The man was freed but the other slave was not given: the manumission stands, 19. 5. 5. 5.
[7] 4. 4. 9. 6; In. 3. 11. 5. [8] 4. 4. 10. [9] C. 7. 2. 3.
[10] 4. 4. 31. Where the Praetor had declared fideicommissary manumissions due and the minor gave them, but they were not due, there was no *restitutio*, C. 2. 30. 1.

minor has accepted in the first instance and then obtained a decree of *restitutio*, Papinian thinks the slave will be neither *heres* nor free. But Ulpian disagrees, remarking that a rescript of Pius and one of Caracalla (?) have decided that on such facts the substitute is free and *necessarius*[1]. The reason for Papinian's difficulty is no doubt the rule *semel heres semper heres*: praetorian relief cannot alter that. No doubt the rescripts were necessary. It will be seen that at the end of the text Ulpian uses this principle to shew that in the first case the slave is still technically *heres*.

The principles are the same if the matter is wholly *inter vivos*. If a minor is led by the fraud of his slave, or of anyone else, to free him *vindicta*, with cause shewn, the manumission is good[2]. If a minor sells a slave and the buyer frees him, and the minor is *restitutus*, the liberty holds[3], even though the slave managed the affair in fraud[4]. If a minor over 20 sells *ut manumittatur* and the man has been freed, it cannot be undone, and if a minor acquires under this condition, he cannot be *restitutus* after he has freed[5]. We are further told that if in proceedings between the minor and a slave the latter has been declared free, there can be no *restitutio in integrum*, but only an appeal[6]. As between the parties the man must be presumed free.

The *Querela inofficiosi testamenti* raises similar points. In estimating the estate, for the purpose of the *pars legitima*, the value of freed slaves is first deducted[7]. If a will is void direct liberties are null[8]. As to fideicommissary gifts, if the slave belonged to the fiduciary, the gift, when once carried out, is good, as we have seen. If the slaves were in the *hereditas* direct gifts are good in the same way, if the testamentary *heres* enters for his share, though the will is upset by *bonorum possessio contra tabulas*, but not otherwise[9]. A will upset by the *querela* is not void, but voidable, a distinction which might have been thought material, but, as in other respects, the point is not logically treated, and the result is much as if the will were void. In a case of simple successful *querela* in which the will fails, the direct liberties fail[10]. But we are told that fideicommissary gifts must be carried out[11]. The statement is directly quoted by Modestinus from Paul, and is thus probably genuine, but it is odd to find fideicommissary gifts treated as more binding than direct. The rule looks as if the will were *pro tanto* treated as a codicil binding on the successful litigant, since fideicommissary gifts might be in a

[1] 4. 4. 7. 10.
[2] If no cause were shewn it was simply void, C. 2. 30. 2, 3.
[3] 4. 4. 48. [4] 4. 3. 7. *pr.*
[5] 4. 4. 11. 1. This has been retouched though it may represent classical law. Gradenwitz, Z. S. S. 23. 346.
[6] C. 2. 30. 4. [7] 5. 2. 8. 9. As for the *Quarta* Falcidia.
[8] 40. 4. 25. But see *post*, p. 609. [9] 37. 5. 8. 2.
[10] 5. 2. 8. 16, 9, 28; unless the *institutus* also takes on intestacy, C. 6. 4. 26 b.
[11] 5. 2. 9.

codicil while direct could not. But it is not easy to see why in that view other *fideicommissa* were not binding, and perhaps the text really means only that, if they have been carried out, they are good. This is confirmed by the further rule it contains, shortly to be considered, as to compensation, but it is not what the text says. If, as may, *ex magna causa*, be the case, the *querela* is allowed after five years, the manumissions are good[1]. This is in accordance with a principle of which we have seen and shall see other traces, *i.e.* that apparent liberty cannot ordinarily be disputed after five years from a traceable *prima facie* valid manumission by the *dominus*[2]. A constitution of Severus and Caracalla says that where a will has given fideicommissary liberty to slaves of the *hereditas*, and, there having been delay, a decree of the Praetor has ordered them to be carried out, and this has been done, the liberties are to remain good even though the will is upset by the *querela* brought by a son[3]. This is in accord with what has already been said, but there is a point in which it takes the rule a little further. It enacts that the validity of the fideicommissary gifts carried out shall not depend on their having been given by an undisputed owner: it is equally so if they were slaves of the *hereditas*. It might have been thought that these would be treated like direct gifts[4].

If, as may happen, the will stands partly good, after the *querela*, all the liberties both direct and fideicommissary stand good[5].

In many of these cases in which the principle of irrevocability causes liberties to be good, under circumstances which create injustice, there is an obligation to give compensation, but any general rule is not easily made out. In the case of liberty given under a false codicil Hadrian provided that the *libertus* must pay 20 *solidi* to the owner who lost him by the manumission[6]. In one text it is said, apparently in error, that the slave's value is to be paid[7]. How far the rule could be extended to analogous cases was, it seems, disputed. Papinian says, in his Quaestiones, that *constitutum est* that the same rule must be applied where one frees under a condition in an institution, and the

[1] 5. 2. 8. 17. [2] *Post*, p. 650. [3] C. 3. 28. 4.

[4] An imperfect admission of the principle that the ownership of the *heres* was good for the time being. Cp. 4. 4. 31; 37. 5. 8. 2. It may be that in C. 3. 28. 4 the *institutus* was also a *filius*.

[5] 31. 76. *pr.*; 37. 7. 6; 44. 2. 29. *pr.*; C. 3. 28. 13. A mother thinking her soldier son dead, instituted X and gave liberties. The son returned. Hadrian gave him the *hereditas*, but required him to carry out liberties and legacies. This is not *querela*: the will is void. The liberties are not valid: the direction to the *heres* is an exceptional rule: it is perhaps to be erected into a general rule for mistakes of this kind. But the text expressly says that it is not to be treated as making further inroad on the principle that if the will is void or avoided by *querela*, the liberties fail, 5. 2. 28. In another similar case the gifts are simply void, 40. 4. 29.

[6] 40. 4. 47. *pr.*; C. 7. 4. 2. As a medium value, Cujas, Papiniani Quaestiones, *ad* 40. 4. 47. Cp. 30. 81. 4; C. 6. 1. 4.

[7] 37. 14. 23. 1.

institution is void[1]. His language shews that this is an extension of Hadrian's rule. Ulpian, in his Disputationes, says that the slave's value must be given, which Cujas regards as meaning the same thing. But his language treats it as a juristic extension, *aequum est*[2]. The same rule is applied where the *querela* is successfully brought after five years, *ex magna causa*[3], but here the remark as to compensation may be due to Tribonian. Where the *querela* is successfully brought within the five years direct liberties are void. But as we have seen[4] Modestinus quotes Paul as holding that fideicommissary gifts must still be carried out, 20 *aurei* being paid for each[5]. This seems absurd. Hadrian's rule is meant to deal with cases in which a manumission, having taken effect, cannot be undone, but an injustice results which this payment partly remedies. To treat them as binding on the *heres ab intestato* is inconsistent with the theory on which the *querela* rests[6], and in any case, if there is an injustice not yet complete, there is no reason in an order to carry it out, subject to compensation for the injustice done. To treat it as a case of *favor libertatis* is impossible, for direct gifts are left void. It is difficult to resist the impression that the words are corrupt[7]. In the case of a partly successful *querela* where all the liberties stand good, we are told that it is the duty of the *judex* to see that an indemnity is paid to the "victor and future manumitter[8]." That is to say, as the sense requires and the context suggests, the successful claimant is to receive compensation from the freedmen concerned in respect of those gifts of liberty which were charged on the shares which failed[9]. Whether this was to be calculated on the basis of 20 *solidi per* head we do not learn[10].

As a minor is entitled to *restitutio in integrum* where his interests are damaged, and actual restitution is not possible in this case, he has a claim for his *interesse*[11]. But, apart from wrong done, if the minor does not suffer there is no compensation to anyone who does. A woman enters and frees *ex fideicommisso*. She is then *restituta* for minority. The liberties are good, having been given *optimo iure*, and the *heres ab intestato* has no claim for compensation. The minor has not suffered in any way and her restitution can give no other person a claim for compensation[12]. As the text puts it, the *manumissi* have

[1] 40. 4. 47. 1. [2] 5. 2. 26. Cujas, *loc. cit.* [3] 5. 2. 8. 17.

[4] *Ante*, p. 567. [5] 5. 2. 9. [6] 5. 2. 13.

[7] The use of the word *aureus* suggests interpolation, Kalb, Juristenlatein, 77.

[8] 40. 4. 29.

[9] And in respect of that part of other liberties which would fall on them?

[10] A will was upset by a son whose existence was unknown; the liberties were void. But where the man had been *in libertate* for five years, the liberty stood. Nothing is said of compensation. This last rule is probably Tribonian's, 40. 4. 29. *Ante*, p. 568, and *post*, p. 650.

[11] 4. 4. 11. *pr.*, 31, 48. 1.

[12] 4. 4. 31. She is still *heres* and her manumission is good. Cujas, *loc. cit.*

not to pay the 10 *aurei*, which shews that some had thought of extending Hadrian's rule to this case.

In all these cases there is no suggestion of fraud, and the compensation comes from the freedman, but if the manumission had been induced by fraud, or carelessness in one under a duty, there may be a claim, on the part of him who suffers, for full indemnity against the wrongdoer[1]. The manumitter is not necessarily the injured person, and where the manumitter is guilty of *dolus* the *actio doli* is always available to any injured person. Thus a *heres*, under a trust to hand over, who frees a slave is liable *ex fideicommisso*, and this, at least in later law, whether he knew of the *fideicommissum* or not[2]. So a *heres*, under a *fideicommissum* to free on accounting, is liable *ex dolo* to the other *heredes* if he frees at once to prevent accounting[3]. A more complex case is that in which A, entitled in any case to a *pars virilis*, enters under a will which is liable to be set aside. The liberties take effect. He is liable *de dolo* to the persons entitled to *bonorum possessio contra tabulas*, if they have given him notice and promised him his *pars virilis* (but not otherwise, though there had been disputes[4]). The view that a *heres* was liable who did not know of the *fideicommissum* seems to rest on the notion that he was under a duty to enquire on such matters before taking steps which might injure other people. But it is pushing that notion rather far, since it is said to apply even though the codicil was not to be opened till after his death, and he did not know that it had been made[5]. In fact the text (of which this clause is certainly compilers' work) seems to rest the claim not on *dolus*, but on the resulting damage. But compensation on this score ought to have come from the *manumissus* if from anyone.

To the rule that manumission is perpetual and irrevocable the case of fraudulent manumission is only an apparent exception: the manumission is null. He who had been *in libertate*, is *in servitutem revocatus*. He is assimilated to a *statuliber*[6], but there is the *de facto* difference, that while he is *in libertate*, the *statuliber* is *in servitute, pendente conditione*[7]. Similarly unreal is the case of a manumission void because the manumitter was *vi coactus*[8]. So, too, new enslavement for ingratitude is not an exception[9]: freedom does not involve incapacity ever to become a slave.

[1] C. 2. 30. 1; D. 4. 4. 11. *pr.*, even *manumissus*, 4. 3. 7. *pr.* But see *post*, Ch. XXIX. The right to damages seems to exist in such cases, where the manumitter is the injured person, only if he is a minor. In 4. 4. 48. 1 the minor has a remedy, based on *dolus* not apparent on the statement.
[2] 36. 1. 26. 2, 72. 1.
[3] 4. 3. 32.
[4] 37. 5. 8. 2.
[5] 36. 1. 26. 2, 72. 1.
[6] 40. 7. 1.
[7] Cp. 40. 9. 16. 4.
[8] 4. 2. 9. 2. Cp. Fr. Dos. 7.
[9] *Ante*, p. 424. So too the case of one sold *ne manumittatur* and freed is only an apparent exception, *ante*, p. 72; *post*, p. 585. A real exception, *post*, p. 600.

But though manumission could not be *in diem*, it might, as we have seen, be conditional or *ex die*[1]. The authority on conditions is confined almost entirely to conditions on direct manumissions. In strictness it appears that only in such a case did the status of *statuliber* arise[2], but, from the very few texts that mention the matter, it may be inferred that similar principles applied to fideicommissary gifts of liberty subject to conditions[3]. We must remember that even if there is no condition, a slave in whose favour such a gift has been made is *in loco statuliberi*[4], and this is not altered by the presence of a condition: in such a case, *cum sua causa alienetur*[5]. Thus where there is a conditional *fideicommissum* of liberty, anyone to whom the man is conveyed must give security to restore him for the purpose of the manumission when it becomes due, *nam in omnibus fere causis fideicommissas libertates pro directo datis habendas*[6]. Thus there is nothing to add as to them in the matter of conditions. With regard to manumissions *inter vivos* there is more difficulty. We have already considered whether and if so how far conditions could be imposed on manumission *per vindictam*[7]. As to informal manumissions there is nothing in their nature to exclude either tacit or express conditions, and the later part of a text already considered[8] seems to say that they might be made *mortis causa*, and revocably, in the sense that they were not to take effect unless the expected death occurred. In such a case no doubt alienation would revoke the gift as it did a *donatio mortis causa*, and the slave could in all probability be usucapted. It is not easy to say what the law was as to an ordinary *dies* or condition. One text vaguely suggests that a slave freed *ex die* was at any rate to a certain extent in the position of a *statuliber*[9]. But it is not dealing exactly with such a case, but with one transferred, *ut post tempus manumittatur*, which is a different thing, and it expressly adds that these persons are not, in all respects, like *statuliberi*. In one text it is said that if the father of a woman accused of adultery manumits, by will, a slave in her service, before the 60 days have expired, the man is a *statuliber*, *i.e.* the gift will fail if the testator dies before the days are up[10]. In a neighbouring text we are told that if the woman manumits *inter vivos*, within the time, the gift is void—which seems to imply that there is no power of suspension[11]. But this was probably written of manumission *vindicta*. It is true that the most authoritative definition of *statuliberi* is in terms which cover a *manumissus sub conditione*

[1] *Ante*, Ch. XXI.
[2] 39. 6. 8; 40. 7. 2. Expressly stated, 21. 2. 69. 1. See Festus, *s. v. Statuliberi*.
[3] *Ante*, p. 518.
[4] 40. 5. 51. 3.
[5] *h. t.* 24. 21.
[6] 40. 4. 40. 1. The laxly expressed reason may be Tribonian's. See also 40. 5. 47. 3.
[7] *Ante*, p. 455.
[8] 40. 1. 15; *ante*, p. 455.
[9] 40. 1. 20. 3.
[10] 40. 9. 13; *post*, p. 585.
[11] 40. 9. 14. 2.

inter vivos[1], but, on the other hand, the language of Festus[2] and the whole drift of the title on *statuliberi* seem to ignore this case. The absence of texts makes it impossible to say what the law really was. If such things occurred, no doubt the slave was still a slave, but he was probably not a *statuliber*, and would not carry his status with him. It is likely that an alienation would be regarded as annulling the intent to free, which had not yet operated, and probably also the slave could be usucapted. But all this is obscure, and perhaps the right inference from the silence of the texts is that such things did not occur. There could be little use in them. On the other hand there were obvious advantages about manumissions *mortis causa*, and conditions on such gifts were reasonable enough.

[1] 40. 7. 1. *pr.*

[2] Festus, *s. v. Statuliberi.*

CHAPTER XXV.

MANUMISSION. SPECIAL CASES AND MINOR RESTRICTIONS.

I. THE Pledged Slave. The main rules can be shortly stated. A slave who is the subject of a specific pledge, express or tacit, cannot be freed however solvent the owner may be[1], unless the creditor assents[2], or security in lieu of the slave is given[3]. The rule does not apply to a general hypothec, tacit or express, unless the slave has actually been seized under it, but of course the manumission must not infringe the rule of the *lex* Aelia Sentia[4] as to manumission in fraud of creditors. One text seems to imply that an express general hypothec is a bar, but this is clearly negatived by the other texts, and as the text is corrupt[5] it probably means no more than that even though the manumitter is insolvent, a manumission of a slave received for the purpose cannot be impeached on the ground of fraud, though, in general, manumission by an insolvent who had given such a pledge would be at least suspicious[6]. It is immaterial whether the manumission be *inter vivos* or by will, though as the latter operates only on *aditio* the gift will be good if the pledge is at an end at that date[7]. If the pledge still exists the gift, as a direct gift, is void. But, at least in later law, there is a more favourable construction: such a gift implies a fideicommissary gift, so that when the pledge ceases to exist the slave can claim to be freed[8]. It may be added that Severus provided by rescript that a pledged slave could be made *necessarius heres*[9].

Here, however, some difficulty arises on the texts. Most texts treat the manumission of a pledged slave as a mere nullity, but there is

[1] 40. 1. 3; 40. 8. 6; 20. 2. 9; C. 7. 8. 1, 3, 6. Even though the pledge covers other things of greater value than the debt, 40. 9. 5. 2.

[2] C. 7. 8. 4. A *pupillus* creditor needs *auctoritas*, 40. 9. 27. 1. A creditor over 14 can assent: he is not freeing, but assenting, so that the age rule of the *lex* Aelia Sentia does not apply, 40. 2. 4. 2.

[3] 40. 9. 27. 1; C. 7. 8. 5.

[4] 20. 2. 9; 40. 9. 29; 49. 14. 45. 3; C. 7. 8. 2, 3.

[5] 40. 8. 6. Mommsen omits *obligatum*: others insert *non*, cp. 40. 1. 10.

[6] Cp. 40. 1. 10; 49. 14. 45. 3.

[7] 48. 19. 33.

[8] 40. 5. 24. 10. In the creditor's will the debtor was asked to free the pledged slave. This was a valid *fideicommissum* and he could be compelled to carry it out whatever the value of the slave if he accepted the will in any way, *e.g.*, by pleading the direction when sued by the *heres*. It was apparently treated as a gift of the value of the slave.

[9] 28. 5. 30. The case is not within the rule of the *lex* Aelia Sentia. The text adds *ita tamen si paratus sit prius creditori satisfacere*, an addition which destroys the point of the text and as it contains a sudden change of subject is probably due to Tribonian, 40. 9. 27. 1.

some doubt. The favourable construction just mentioned is no doubt a late development. In any case it negatives what might otherwise have been likely, the recognition of release of the pledge as a tacit condition. But if this was not admitted in wills, it can hardly have been so *inter vivos*. So Scaevola remarks that if the debtor manumits while the charge exists the slave is not freed. But Paul adds a note by way of inference: *soluta ergo pecunia illa voluntate liber fit*[1]. It seems clear that he is speaking of payment after the act of manumission. So an enactment of 223[2] says that if the creditors are paid, pledged *ancillae* who had been manumitted become free. It is clear that the manumission was *inter vivos*, though the manumitter is now dead. This text is, however, of less significance. The question is one of fraud of creditors: so far as appears the pledge may have been a general one. One earlier text which deals with the matter is imperfect and corrupt[3]. It seems to say that a pledged slave cannot be freed, by reason of the *lex* Aelia Sentia, unless the debtor is solvent. As solvency is not material[4] and the rule does not rest on the *lex*[5], it seems likely that here too the main subject of the text is a case of general pledge and fraud on creditors. But it ends with the words *sed latinum*, as the beginning of a sentence. It is commonly treated therefore[6] as laying down the rule that after manumission *inter vivos* the slave becomes a latin if and when the debt is paid. Such a view might well have developed: whether it was *vindicta* or *inter amicos* it would have only the effect of an informal manumission[7], so that we have not to do with tacit conditions on a manumission *vindicta*[8]. Justinian does not indeed specifically mention this case in his list of causes of latinity, but he observes that in all cases in which a constitution speaks of *libertas* without expressly mentioning latinity, this is to be read for the future as *civitas*[9]. It is noticeable that both in the enactment of 223 and in Paul's text[10], the slave is spoken of as becoming *liber*.

We are not told the origin of the rule. Though one or two texts suggest the *lex* Aelia Sentia[11], others shew that the two rules are independent. A general hypothec is no bar unless it conflicts with the *lex*[12]. Solvency is immaterial[13]. It was not the *lex* but a provision of Severus which made it possible to institute a pledged slave as a *necessarius heres*[14]. One at least of the texts referring to the rule was written of *fiducia*[15], and the institution may have been carried over from it. Some of the rules are, however, opposed to this view. A gift to a slave in *fiducia*

[1] 40. 9. 26. [2] C. 7. 8. 5. [3] Fr. Dos. 16.
[4] 40. 1. 3. See on these matters, Vangerow, Latini Iuniani, 53.
[5] 40. 9. 29; C. 7. 8. 2. [6] See, *e.g.*, Krüger, *ad h. l.*
[7] See *ante*, p. 550. [8] *Ante*, p. 455. [9] C. 7. 6. 12a.
[10] C. 7. 8. 5; C. 40. 9. 26. [11] 40. 9. 5. 2, 6; Fr. Dos. 16.
[12] 40. 9. 29. *pr.*; C. 7. 8. 2. [13] 40. 1. 3.
[14] 28. 5. 30. [15] 40. 1. 3; Lenel, Ed. Perp. xix.

could not have been saved by release before *aditio*: he must have been the testator's when the will was made[1]. Assent of the creditor, the owner[2], would not have enabled the debtor to free. But these modifications in favour of liberty were consistent with the interests of the creditor, and were possible now that the debtor was owner. Indeed the whole rule had now no logical basis and was maintained on grounds of equity only, by juristic authority. It was not easy to give a basis to it, in view of the difficulty of finding a place for the creditor's right in such a scheme of property law as that of the Romans[3]. Hence the tendency to rest the rule on the *lex* Aelia Sentia. Hence the fact that general statements of the rule are found in Ulpian's Disputationes[4], and Papinian's Quaestiones[5]. Hence the enquiry addressed to Scaevola as to whether the rule bound the *heres* of the debtor[6], and Ulpian's treatment of it as a legal subtlety[7].

II. *Servus Communis.* A man cannot be partly free, partly a slave. On the other hand the owner of half cannot free the other half. Hence the classical jurists held that if one of co-owners purported to free the slave, the manumission did not take effect. The act was not, however, necessarily a mere nullity. If the manumission was formal, *i.e.* done *vindicta*, *censu* or *testamento*, the effect was to vest the share of the freeing owner in the other owner by accrual. So far all were agreed. Proculus indeed held that the same effect was produced even by an informal manumission[8], but it does not appear that any later jurist took this view: in this case the act of manumission was regarded as a mere nullity[9]. The texts express this by confining the accrual to cases in which he would have become a *civis* if the manumitter had been sole owner[10]. Accrual is a quiritary mode of transfer, and thus does not take effect unless the part owner has divested himself of his quiritary rights in the man. Notwithstanding the *lex* Iunia the old owner retained large rights in the man informally freed, though, in the main, they became effective only on his death. The same principle is expressed by Julian's rule that if a minor common owner frees, he must shew *causa*, *i.e.* the act cannot produce its effect of accrual (as a manumission it is void in any case) unless all the rules of valid manumission at civil law are complied with[11]. The rule barring manu-

[1] 48. 19. 33; *ante*, p. 464.
[2] 40. 9. 27. 1; C. 7. 8. 4.
[3] *Possessio* as being without economic content is hardly, it would seem, a *res*. See the significant C. 8. 13. 18.
[4] 40. 9. 4. [5] 48. 19. 33. [6] 40. 9. 26.
[7] 40. 5. 24. 10. [8] Fr. Dos. 10.
[9] Ulp. 1. 18; P. 4. 12. 1; Fr. Dos. 10. [10] P. 4. 12. 1; Ulp. 1. 18.
[11] 40. 2. 4. 2. The text may, however, mean merely that he cannot concur unless he has a *causa*. But this seems difficult to reconcile with 40. 2. 6.

mission by one owner did not of course prevent the man from becoming free by other causes[1].

If all joined the slave was free, and they were joint patrons[2]. If they were under 20 it was enough if one shewed cause[3]. We are told that a minor common owner freeing[4] must always shew cause: it is to be presumed that in this case, the fact that the other has a *causa* is sufficient[5]. If one owner is a minor, we are not told that the fact that the other desires to free is sufficient, but this seems to follow from this last rule. In general such manumission will be *inter vivos*, since, if the two gifts do not operate simultaneously, there will be accrual. But the case of manumission by will might occur. Thus, where one of common owners frees by will "if my partner does," and the partner afterwards frees *inter vivos*, the man is free, holding his liberty by two titles[6]. Indeed both manumissions might be by will, though the necessary hypotheses are rather artificial. Two cases are mentioned in the same text. In one two owners have freed and instituted the slave in their wills, and they die together in a catastrophe[7]. Here the first gift might have failed had he not been instituted, for entry under the wills might have been made at different times. In the other case both had freed him under the same condition[8]. Where a slave was left unconditionally to two, and one freed him and the other afterwards repudiated the gift, the manumission was good[9], on principles already considered. The repudiation made the other legatee sole owner, retrospectively[10].

Some points of interest and difficulty arise where the manumission is accompanied by an institution of the slave[11]. If one of two owners institutes the man, he may do so either *cum* or *sine libertate*. In the latter case, the slave is *quasi alienus*. In the former he is *quasi proprius*[12]. We know that if both free and institute him and the gifts chance to operate at the same moment, he is free and *heres necessarius* to both[13]. It is presumably to cases of this kind that reference is made in a text which says that if a common slave is *heres necessarius* to one or two or all of his owners, he cannot abstain from any of them[14].

If the instituting and freeing owner acquired the whole of the slave, the man, having ceased to be a *servus communis*, was free and *heres*

[1] A common slave who detected the murderer of one master was freed: the other being entitled to compensation, 29. 5. 16.
[2] 38. 1. 4; 2. 4. 23.
[3] 40. 2. 6, '*non.*' A. Faber, Jur. Pap. Sci. 265.
[4] 40. 2. 4. 2.
[5] A. Faber, *loc. cit.*
[6] 40. 4. 48.
[7] 28. 5. 8. *pr.*
[8] *h. l.* 1.
[9] 40. 2. 3.
[10] 29. 1. 31; 40. 1. 2; 33. 5. 14. Fr. Vat. 84. This does not apply if the repudiated gift becomes a *caducum*: in that case the lapsed gift may vest in another so that the manumitter is not sole owner. Fr. Vat. *cit.*
[11] As to institution without liberty, see *ante*, p. 391. There is no reason to think that Justinian's rule that institution implied a gift of liberty covered this case: he is thinking of a sole owner. *Ante*, p. 553. In. 1. 6. 2; C. 6. 27. 5. 1.
[12] 28. 5. 90; Ulp. 22. 7, 10.
[13] 28. 5. 8.
[14] 29. 2. 66.

necessarius[1], the testator having been part owner at the time the will was made[2]. So, if a common slave was substituted to a *pupillus* by one owner, who afterwards bought the rest of him, he became a *necessarius heres* to the *pupillus*[3]. If, however, he was bought by the *pupillus*, Julian thought he would not be *heres necessarius* to him: he could not in any sense be said to have been the property of the testator at the time when the will was made[4]. Ulpian appears to add[5] that, on grounds of equity, the man may be allowed to buy the share of himself from the other owner, and so acquire freedom and the *hereditas*. But it may be that this is an addition by the compilers, expressing Justinian's rule shortly to be stated.

If the slave is simply freed and instituted, by one of his owners, and no change occurs till his testator's death, the texts do not say what happens. It is generally held that he enters at command of and for the benefit of the other owners. It is likely that this was the case, though Salkowski observes[6] that it is difficult to account for it logically. His difficulty is that the slave can get liberty only on acquiring the *hereditas*. That he cannot acquire till *iussum*, and that implies that accrual has already taken place. And accrual can result only from the manumission. Both ought, he thinks, to fail. The solution he suggests as most probable is, that, contrary to the rule in a case of *servus proprius*, the institution was allowed to stand good though the manumission failed. The same result may be arrived at on the view that if the manumission of a *servus communis* failed, where there was also an institution, the manumission was simply ignored, exactly as it was in the case of a *servus proprius*[7].

The effect of manumission by one of common owners is completely changed by Justinian[8]. The rules he lays down are these:

1. If one owner desires to free *inter vivos* or by will the others shall sell their shares to him or his *heres* who shall then free[9]. If the price of the share is refused, it may be deposited with a public authority and the manumission can proceed. His accounts are to be gone into if necessary, and made up on a day fixed by a *iudex*.

2. The price is to be fixed judicially. A maximum tariff is settled ranging from 10 to 60 *solidi*, according to age, sex, function, training, education, *etc.*, with an increase in each case if he is a eunuch, but a maximum of 70 *solidi*.

3. The *peculium* will go *pro rata*; the manumitter is sole patron, and can give his share to the *libertus*.

[1] 28. 5. 6. 3.
[2] *Ante*, p. 443.
[3] 28. 6. 18. *pr.* See *ante*, p. 510.
[4] 28. 5. 6. 3; 28. 6. 18. *pr.*; cp. 28. 6. 10. 1, 36. *pr.*; 40. 7. 2. 4.
[5] 28. 6. 18. *pr.*
[6] Sklavenerwerb, 18.
[7] *Ante*, p. 462.
[8] C. 7. 7. 1.
[9] C. 7. 7. 1. 1. The form is immaterial.

4. If several wish to free, the first is to be preferred. If all at once, there will be no question of price: *peculium* and *iura patronatus* are divided *pro rata*.

5. The *ius accrescendi* is wholly swept away.

6. If a part owner left to a slave his part in him it had been doubted what the result was, as the intent might have been to free in part or to benefit the *socius*. Whatever the testator's intent may have been, it is now, *favore libertatis*, to be treated as a gift of liberty[1].

Hitherto nothing has been said of fideicommissary gifts. There seems no difficulty in such a gift, but there is the point that the other owner might decline to sell[2]. Most of our information is contained in the obscure preamble to the foregoing constitution of Justinian. It is impossible to be certain of his meaning, but the following is a possible interpretation. Africanus had held not only that such gifts were valid, but that the co-owner could be compelled by the Praetor to sell his share, a view reported and apparently adopted by Julian, Marcellus, Ulpian and Paul[3]. Further Marcian reports a decision of Severus that in a certain case, where a soldier had made a direct gift to a common slave, his *heres* was bound to buy and free the man, and, a little later, Severus and Caracalla lay down a general rule to this effect, the co-owner being bound to sell. This forms the model for Justinian: his language seems to imply that it had dealt only with *milites*, but was not confined to a specific case as the earlier one had been[4].

III. *Servus Fructuarius.* The fructuary or usuary, not being owner, could not free. His manumission *vindicta* was in form a *cessio in iure*, involving an acknowledgment that he had no right in the slave. We may infer that some jurists held that his usufruct reverted to the *dominus*, but that the view prevailed that the act was a nullity[5]. Justinian regulated this matter in a way to be stated shortly[6].

If the owner freed by will, it seems clear that the gift was good, but conditional on the expiration of the usufruct. Thus where a slave was instituted *cum libertate*, and afterwards a usufruct was created in him, the institution and manumission were both good, but took effect

[1] C. 7. 7. 1, 2. A text which says (40. 7. 13. 1) that a common slave freed under a condition of payment can take the money from which *peculium* he will, as being an ordinary *statuliber*, subject to ordinary rules, expresses the law of Justinian's time, when the liberty would take effect. For classical law it would seem to apply only where all join.

[2] 40. 5. 47. 1 seems to assume the validity of the gift, but it may be the case of a slave common to the *heres* and another.

[3] Cp. 28. 6. 18. *pr.* where it is, however, a direct gift, but nothing is said of compulsion, Mitteis, Archiv für Papyrusf. 3. 252.

[4] Roby, R. P. L. 1. 28 and Mitteis, *loc. cit.* think the rescripts applied only to fideicommissary gifts, as the opinions of the jurists did. This makes it difficult to see what is the difference, between *milites* and other people, which Justinian is ending. Mitteis also holds that the second rescript, described as 'general,' applied also to *pagani*.

[5] Cp. G. 2. 30; P. 3. 6. 32; D. 23. 3. 66.

[6] C. 7. 15. 2.

only on the expiration of the usufruct[1]. Where the usufruct of a slave was given as a legacy, and he was to be free at its expiry, this was valid: the expiry of the usufruct was a condition on the gift, so that though the beneficiary compromised for a sum of money, the slave was not free till death or *capitis deminutio* of the donee[2]. Where an owner instituted the fructuary, and gave the slave freedom on a condition, the *confusio* destroyed the usufruct, and the slave became free at once on the occurrence of the condition[3]. The act of the owner shews that he did not contemplate the natural expiry of the usufruct as a condition[4]. These texts are all from the Digest, but there is no reason to doubt that they represent classical law.

The case is different with manumission *inter vivos*: a manumission by will can be conditional, while one *vindicta* cannot[5]. Such a manumission was good if the fructuary assented (even though he was under 20[6], for he was not freeing), with the *auctoritas* of his tutor if he was a *pupillus*[7]. But beyond this there is some uncertainty as to what the classical law was. Ulpian tells us that a *servus fructuarius* freed by his owner becomes a *servus sine domino*[8]. This is a perfectly logical effect to be produced by the *cessio in iure*. The same thing is said elsewhere[9], with the addition: *sed latinum*.... This text observes that the existence of the usufruct prevents the manumission *vindicta* of the slave. This leaves open several questions. Does the restriction apply only to formal manumission? Does it nullify the act or merely suspend it till the end of the usufruct? If the latter view be taken, does the slave become a latin or a *civis* at the expiration of the usufruct? Various answers have been given to each of these questions[10]. Justinian's remarks in his reorganising enactment give us little help. It may be noted, however, that whatever the law was, it seems to have been clear: he does not refer to any disputes, but merely declares that he is modifying the law. He seems to imply in the same text that the manumission was merely void—*libertatem cadere*[11], but, on the other hand, it appears from another enactment of his that the existence of the usufruct had been only an obstacle to the slave's being free *statim*[12]. There is no reason why informal manumission should not have made

[1] 28. 5. 9. 20. He need not be sole *heres*.

[2] 7. 1. 35. 1.

[3] 40. 4. 6.

[4] If a usufruct is given "till he is freed," the *dominus* can free at any time, 7. 4. 15.

[5] *Ante*, p. 455.

[6] 40. 2. 2.

[7] 40. 9. 27. 1.

[8] Ulp. 1. 19.

[9] Fr. Dos. 11, confined expressly to manumission *vindicta*.

[10] Vangerow, Latini Iuniani, 44 *sqq.*, who cites some earlier writers, thinks that when the usufruct ended he became a latin or *civis* according to the circumstances, the manumission *vindicta*, but only that, operating at once to make him a *servus sine domino*, by destroying the quiritary ownership. Kuntze, Servus Fructuarius, 62, also thinks the rule merely suspensive, but rests his view mainly on the texts dealing with manumission by will, of small force in this connexion. Huschke, *ad* Fr. Dos. 11, thinks *vindicta* was null, and informal suspended. Krüger, *ad h. l.*, thinks he became a latin in both cases at expiry of the usufruct.

[11] C. 7. 15. 1. *pr.*

[12] C. 6. 61. 8. 7.

the man a latin at the end of the usufruct, and probably the Dositheon fragment was about to lay down some such rule. A manumission *vindicta*, regarded as such, could hardly have had such a suspended operation[1]. But the process was at least a declaration of intent to free, even though void as a formal act, and thus might possibly operate, as a declaration *inter amicos*, to make the man a latin, when the obstacle was removed[2]. It may be noted that, regarded as a *cessio in iure*, it was in no way defective: there was no condition to vitiate it: it was only the existence of the usufruct which prevented it from producing all the effect which was desired. Thus it makes the man, in the meantime, a *servus sine domino*[3].

Of the origin of the rule it is hardly possible to say more than that it appears to be a civil law rule independent of statute. Justinian declares it to be a rule of *observatio*[4], which seems to mean "of juristic origin."

Justinian reorganised the system, laying down the following rules:

1. If owner and fructuary concur, the manumission is valid in all respects.

2. If the owner frees without consent of the fructuary, the slave is free, and his *libertus*, though acquiring thereafter for himself, must serve the fructuary, *quasi servus*, till the usufruct ends. If he dies before that event the property goes to his *heredes*.

3. If the fructuary alone frees, intending a benefit to the slave, the ownership is not affected, but, till what would have been the end of the usufruct, the *judices* will protect him from interference by his *dominus*. At that time he reverts and his mesne acquisitions go to his *dominus*. If the fructuary frees him by way of ceding to the *dominus*, full *dominium* is at once reintegrated[5].

IV. *Servus Legatus*. If the slave has passed into the ownership of the legatee, he can free, even in the extreme case in which the slave has been conveyed by the *heres* under a legacy contained in a codicil afterwards shewn to be a *falsum*[6]. Where a legacy was left to two, and one of them, having accepted the gift, freed the slave, and the other legatee afterwards repudiated the gift, the manumission was good[7]. These texts, of Marcellus, Paul and Ulpian, accept the Sabinian view that in the case of a legacy *per vindicationem* refusal by the legatee acts

[1] *Ante*, p. 455.
[2] That Justinian does not mention it among the causes of latinity (C. 7. 6) is explained by the fact that his reorganising enactment (C. 7. 15. 1) was of a little earlier date. See, however, *ante*, p. 543 and App. IV.
[3] It must be presumed that as to such acquisitions as did not go to the fructuary, he was in the position of a derelict slave, *ante*, p. 274.
[4] C. 7. 15. 1. *pr.*
[5] C. 7. 15. 1. The form of manumission is immaterial.
[6] Subject to compensation, C. 7. 4. 2; cp. D. 39. 6. 39; *ante*, p. 568.
[7] Fr. Vat. 84; D. 29. 1. 31; 40. 2. 3.

retrospectively, to vest the thing in him to whom it would have belonged apart from the legacy[1]: in this case the other legatee. The two were at no time joint owners of the slave. The liberty dates from the manumission[2].

No authority is necessary for the proposition that if the *heres* has ceased to be owner he cannot free. But as to his position while the slave has not yet become the property of the legatee, it is difficult to say what the law was at different dates, in the various possible cases.

If the legacy was of a slave of the *heres*, it is clear that in classical law, at any rate, he was the slave of the *heres* till delivery. According to the view generally held this was also the case under Justinian[3]. Ulpian quotes Marcellus as saying that if, where there was such a gift, the *heres* freed the slave, the manumission was good[4], and this text which is in the Vatican Fragments, no doubt expresses classical law. The Institutes express the same rule, crediting it to Julian, and remarking that the state of knowledge of the *heres* is immaterial[5]. The Digest quotes the same doctrine from Marcian[6]. But elsewhere the rule is laid down and attributed to Paul, that the manumission is void whether the *heres* knew of the legacy or not[7]. The reasoning of the text is ill-fitted to the rule it states, and it seems likely that the decision is of the compilers, and is a misapplication of the enactment of Justinian[8], as to manumission and alienation of legated property, shortly to be considered.

The case of the slave of the testator left *pure per damnationem* should, it seems, be dealt with in the same way, but there are no texts: the case was obsolete under Justinian. Where he was left *pure per vindicationem* the case was complicated, for classical law, by the controversy which existed as to the state of the ownership pending acceptance by the legatee. It is generally held, notwithstanding the language of Gaius[9], that the view which prevailed was that of the Sabinians, that the ownership was in suspense till the legatee made up his mind, and that, if he refused, the thing was treated as having been the property of the *heres* from the date of operation of the will. This view is confirmed by the surviving texts dealing with the matter, which declare that the manumission by the *heres* is void if the legatee accepts, valid if he refuses: *retro competit libertas*[10]. Upon the same principle, if a slave is left *pure* to two, and one, having accepted, frees the man, the manumission is good if the other refuses, unless, before Justinian, the effect of the refusal was to make the gift a *caducum*, in which case the lapse

[1] Girard, Manuel, 922.
[2] 40. 2. 3; D. 29. 1. 31 is not really in contradiction.
[3] But it is not possible to be certain as to the exact meaning of his enactment, C. 6. 43. 1.
[4] Fr. Vat. 84. [5] In. 2. 20. 16. [6] 30. 112. 1.
[7] 40. 9. 28. [8] C. 6. 43. 3.
[9] G. 2. 195; see, *e.g.*, Girard, Manuel, 922.
[10] 29. 1. 31; 40. 1. 2; 40. 2. 3.

might not benefit the other legatee[1]. In an enactment of A.D. 531[2], Justinian lays down a rule that where a slave is left *pure* or *ex die*, the *heres* is to have in no case any power to free. It is plain from the context that this is intended to clear up doubts as to the effect of his general enactment assimilating all kinds of legacy[3]: there is no reason to suppose it was intended to alter in any way the rule which made the effect of a manumission by the *heres*, of a *servus legatus*, depend on the fate of the legacy.

Where the legacy was conditional, the Proculians held that, *pendente conditione*, the slave was a *res nullius*, and there could be no question of manumission by the *heres*. But the view prevailed that the *res* was in the interim the property of the *heres*[4]. On this view he ought to have been able to free, but two texts in the Digest make it clear that he cannot do so[5]. As Gaius seems to express a view which he rejects in his Institutes[4], it is not unlikely that the rule is new in Justinian's law, and that the old rule was that the *heres* could free, subject to compensation. It is noticeable that Justinian in his enactment, just cited[2], in which he prohibits dealings with things legated, assumes a *prima facie* right to alienate things conditionally legated, but declares any such alienation *irritum* if the condition arrives. He says nothing about manumission in this part of the *lex*, and it is clear that such things could not be voidable. It seems that the texts in the Digest[5] have been altered so as to state an arbitrary rule placing manumissions on the same level as other gifts, so far as is consistent with their irrevocable nature[6]. It is hardly possible to apply the rule that the effect of the manumission in classical law was in suspense, so that it failed if the condition arrived, for this would imply that acquisition to the legatee was retrospective, and this does not seem to have been the case[7]. There are, however, two texts which deal with legacy of *optio servi*, which raise a difficulty. In one we are told[8] that the legatee cannot by freeing lessen the right of the legatee, since each slave is regarded as conditionally legated. The other says that the man is not made free in the meantime, but that he will be free if the legatee chooses another slave[9]. These texts are not in conflict with each other, but they may seem difficult to reconcile with what has just been said. It is clear, however, that in Justinian's law a *legatum optionis* was not

[1] Fr. Vat. 84; D. 29. 1. 31; 40. 2. 3. If the other legatee accepted, the manumission would be void before Justinian, as having been made by one of co-owners. Presumably under his legislation the freeing owner would have to compensate the other, *ante*, p. 568.
[2] C. 6. 43. 3. 2a, 3. [3] *h. t.* 1.
[4] 40. 9. 29. 1; G. 2. 200. [5] 40. 1. 11; 40. 9. 29. 1.
[6] This is more or less confirmed by the fact that there survives into the Digest a text which tells us that when there was a *fideicommissum* of a slave under a condition and the *heres* freed the man the manumission was good, but the *heres* had to pay compensation whatever his state of mind, 36. 1. 26. 2.
[7] See the texts cited by Accarias, Précis, § 379, n. 3. [8] 40. 9. 3.
[9] 33. 5. 14.

conditional. Our text only speaks of each slave as *quodammodo*[1] conditionally legated, and in the Institutes[2] Justinian says that formerly such a gift *conditionem in se habebat*. But he took away the intransmissibility of right of choice, which gave such a gift its apparently conditional character, and we have seen[3] that the passage in the Institutes is very doubtful history. It may well be that those jurists who thought the gift ought to fail if the legatee failed to choose, thought so, not because there was an unsatisfied condition, but because there was no slave who answered the definition in the will. In fact the expression *optio servi* covers two forms of gift—*utrum elegerit habeto*, and *optionem do*. In the former case if he chooses none there is none which satisfies the definition, in the latter there is no sort of reason why the *heres* of the legatee might not choose. It is idle to attempt to reconstruct the debates[4], but enough has been said to shew that we are not entitled to construe such gifts as conditional in all respects. For Justinian they are *pure legata*, and the rule laid down is the normal rule in such cases.

V. *Servus Dotalis.* All the texts which deal with this case are from the Corpus Iuris, with the exception of one which has not been deciphered[5]. It does not appear, however, that Justinian's changes in the law of *dos* affected the right of the husband to manumit during the marriage, so that these texts probably represent classical law. The *vir* is owner and can therefore free[6], with the effect of becoming patron and *heres legitimus*[7]. But though the *vir* could free it does not follow that he would not have to account for the resulting loss to the *dos*. On this matter elaborate rules are laid down[8]. If the wife assented to the manumission, and did so with the intention of a gift to her husband, he will not have to account for any of the rights he has over the *libertus*, either *ipso iure* or expressly imposed, or even for the slave himself[9]. The gift is valid, notwithstanding that it is a gift from wife to husband, just as a gift to him, *ut manumittat*, would be[10]. If the wife assented or did not oppose, but it was *ex negotio*, as a matter of business, the *vir* must account for all he gets *ex bonis*, or *ex obligatione*, including anything specially imposed[11], even though after the manumission[12]. Thus if he accepts the man as debtor or surety *iure patroni*, the

[1] 40. 9. 3. [2] In. 2. 20. 23. [3] *Ante*, p. 19.
[4] In 33. 5. 9. *pr.* Julian evidently adverts to an analogous difficulty of construction, and refuses on common sense grounds to accept the logical interpretation of the words of the gift, under which the legatee would be entitled to both slaves if he chose neither.
[5] Responsa Papiniani, 9. 9. [6] C. 7. 8. 7.
[7] 38. 16. 3. 2; 48. 10. 14. 2; but he has no more right than any other owner, so that he cannot free if the slave is pledged to the wife or if he is insolvent, though the only creditor be the wife for the *dos*, C. 7. 8. 1; D. 40. 1. 21.
[8] See Demangeat, Fonds Dotal, 18 *sqq.* [9] 24. 3. 24. 4, 62, 63.
[10] 24. 3. 63; P. 2. 23. 2. [11] 24. 3. 24. 4, 64. *pr.*, 1.
[12] *h. t.* 64. 3.

obligation so acquired must be accounted for[1]. And by the *lex* Iulia the obligation covers not only what was received, but what would have been received but for *dolus* of the patron[2]. On the other hand, two limits are expressed on this duty of accounting. He is liable for *operae*, if he receives their value, but not if they are actually rendered to him[3]. And while he is accountable for everything he has received *iure patroni*, he need not account for extraneous benefactions from the *libertus*, and thus not for any share of the estate of the *libertus*, to which he was instituted, beyond his share as patron[4]. If, however, the manumission was against the will of the wife it appears that he must account for everything he receives through the *libertus*, as well as for the value of the man himself[5].

There is some difficulty as to the law in the case of manumission by will. In the classical law the remedy of the wife or other claimant for return of the *dos* was a personal action[6]: the slave was still the property of the husband or his estate, and thus he could free by will[7]. Though the slave could be claimed before the manumission was completed, it was impossible to set it aside when it had been carried out. On the other hand Scaevola tells us[8] that where the woman died *in matrimonio* she could free slaves by her will, at least if there had been a pact to restore the *dos* to her brother, under which pact he had stipulated for this return—a point which does not seem material. Some of the language suggests a direct gift, and a woman could certainly not free directly by will a slave who did not belong to her when she made the will[9]. But the concluding words of the text look as if the gift was fideicommissary, since the *heredes* are spoken of as bound to carry out the manumissions, and in that case there is no difficulty[10].

VI. Divorce. A woman who divorces or is divorced[11], whose marriage ends, indeed, in any way but *bona gratia*, or death, or civil death of a party, cannot free or alienate any of her slaves for 60 days from the end of the marriage[12], whether they had been hers during the marriage or not. The object is to prevent her from evading the *quaestio* for them, in the matter of adultery. The rule is laid down in

[1] *h. t.* 64. 4. [2] *h. l.* 6, 7. [3] *h. l.* 2. [4] *h. l.* 5.
[5] 24. 3. 61. It does not seem that any deduction from this was made for his value as a *libertus*. This seems to have been regarded as too problematical to be estimated; see 50. 17. 126. 1.
[6] Girard, Manuel, 950. [7] C. 5. 12. 3.
[8] 23. 4. 29. 2. [9] *Ante*, pp. 264, 464.
[10] There is no reason to suppose a direct gift construed as fideicommissary, *favore libertatis*. We have seen that this is not commonly done (*ante*, p. 514). In a reforming enactment of 529 Justinian uses language which suggests that the husband's right was reduced to a usufruct, the wife being *dominus*. This is inconsistent with the foregoing texts and with an enactment of the following year imposing restrictions on his power of alienation (C. 5. 12. 30; C. 5. 13. 1). See Girard, Manuel, 960.
[11] 40. 9. 12. 1, 14. 2. [12] 40. 9. 14.

the *lex* Iulia de adulteriis, *quod quidem perquam durum est, sed ita lex scripta est*[1]. Whenever under these rules they cannot be freed, they can be tortured[2]. The *paterfamilias*, the mother, the *avus* or *avia* cannot free or alienate, for the same time, any slaves who had been employed on the wife's service, nor can any person whose slaves would be liable to the *quaestio* in the matter[3]. If such persons, dying within the 60 days, manumit by will, the slave is a *statuliber*; the condition being that there is no accusation within the 60 days[4]. Though the husband dies within the 60 days the bar still continues, as the father can still accuse[5]. Africanus thought the time fixed by the *lex* was too short, since the trial would not be over in that time. Accordingly the rule develops that if a charge is actually begun, manumission is barred till it is over[6]. Similar rules are applied if the manumission is *in fraudem legis, i.e.* in contemplation of a divorce[7]. Justinian provides that death of the wife shall not end the prohibition, but that it shall go on for other two months, as it may still be important on the question of disposition of *dos*. After that time the *heres* may free, unless his *culpa* has delayed the husband in bringing the charge[8].

With this matter may be stated the connected rule that, if a woman is accused of adultery with her slave, she cannot free the alleged accomplice pending the accusation[9]. Under the juristic extension of the more general rule above stated this ceases to be important. Justinian preserves it only in connexion with, and for its bearing on, the law of *institutio*.

VII. Slave transferred with a condition against manumission[10]. If a slave is alienated *inter vivos* with a condition against manumission, any manumission is void[11]. It is laid down by Justinian, though the form of the text shews that the rule is older, that a prohibition of sale includes a prohibition to free. This whole rule is noticeable as a case where an agreement between two persons has an effect *in rem*: the covenant "runs with" the slave[12].

In the case of a slave left by will under a similar condition, there is more to be said. The general rule is the same: the manumission is void[13], and a direction not to sell includes a direction not to free[14]. The restriction may be temporary. We are told that where that is the case, the validity of any manumission, *e.g.* by will, depends on the time

[1] 40. 9. 12. [2] C. 9. 9. 3.
[3] 40. 9. 12. 3—5; including the husband, C. 9. 9. 25; *ante*, p. 91. [4] 40. 9. 13.
[5] *h. t.* 14. *pr.* [6] *h. t.* 12. 6. [7] *h. t.* 14. 5. [8] C. 9. 9. 35. 3.
[9] In. 2. 14. *pr.*, Severus and Caracalla; 28. 5. 49. 2. [10] *Ante*, p. 72.
[11] 18. 7. 6; 40. 1. 9; 40. 9. 9. 2. Perhaps originally applied in sale of *captivi*, Sueton. Augustus, 21; Blair, Slavery among the Romans, 18.
[12] C. 4. 51. 7. *Conditio personae eius cohaesit*, C. 4. 57. 5. *pr.*
[13] 40. 1. 9; 40. 9. 9. 2; C. 7. 12. 2. *pr.*
[14] C. 4. 51. 7. The converse is not true: a direction not to free is not a direction not to sell.

when the gift would take effect, not on the date of the will[1]. The inference that it is to be only temporary may be drawn from the facts. If the restriction is not imposed as a penalty, but, *e.g.*, in order to have some person to look after the *heres* or his estate, it will be impliedly temporary and the bar will cease if the *heres* dies[2]. In some cases the reason is stated, perhaps to avoid implications. Thus in the will of Dasumius the *heres* is requested not to free certain slaves, so long as they live, because they have neglected their duty[3]. It is not anywhere expressly said that the condition runs with the slave, and in some cases words are used which seem rather to negative this. Thus in the text just mentioned the direction was that neither donee nor his *heres* was to free. In the will of Dasumius[3] the direction is that the *heres* is not to free. But from the way in which this case is grouped with that last discussed it seems likely that, apart from expressed intention, the restriction is quite general[4]. It may be applied to a slave of the testator or of the *heres*, but not it seems to one of a third person[5].

One point is somewhat difficult. How far, in classical or later law, is a conditional manumission by will a direction to the *heres* not to free till the condition is satisfied? Justinian tells us, as we have seen[6], that in earlier law the effect was, where the *heres* was *extraneus*, to prevent him from making the slave more than a latin, and that he provides that the *heres* can make the man a *civis*, but that if the condition arrives, the man shall be *libertus orcinus*. Antoninus Pius is quoted by Marcian[7] as laying down or mentioning the rule in most general terms, not confining it to *heredes extranei*, but it is quite clear that there were possibilities of making the slave a *civis* in some cases[8]. Pomponius observes[9] that some masters, desiring that their slaves should never be free, wrote gifts of liberty to them to take effect on their death, and quotes Julian as holding that such derisory gifts were mere nullities—*nullius momenti*. This appears to mean only that they were invalid as gifts, but, as expressed, it also means that they were of no force as restrictions, the idea perhaps being that, as there was no express restriction, one could not be implied from a gift which did not take effect. Pomponius goes on, however, to quote Octavenus[10] as holding that if a testator, having given a conditional freedom, adds the words: *nolo ante conditionem eum ab herede liberum fieri*, the addition is of no effect, *nihil valere*. In the law as we know it, it is clear that such a

[1] 40. 9. 17. 2. [2] C. 7. 12. 2.
[3] Bruns, Fontes, i. 273. It does not of course bar the testator himself from freeing *inter vivos*, or even by will, 40. 5. 40. 1.
[4] Cp. 31. 31; 35. 1. 37, where a legal prohibition (*e.g. lex* Iulia) seems to be in question.
[5] A gift of land to a third person if he do not free Stichus does not bar: it is a condition on the gift giving rise to *cautio* Muciana but nothing more, 35. 1. 67.
[6] C. 7. 6. 7; *ante*, p. 550. [7] 36. 1. 32. 1.
[8] 28. 5. 3. 3; 4. 3. 32. See also 40. 7. 3. 15. *Ante*, p. 550. [9] 40. 4. 61. *pr.*
[10] 40. 4. 61. 2.

restriction could be imposed. Pothier[1] adopts the view suggested, with others, by the Gloss, that the words mean merely "I do not desire my *heres* to free before the time," and not "I desire him not to free." But the words do not mean this, and if they did their emptiness would be so obvious that Octavenus would hardly have made the remark, or Pomponius thought it worth citing. On the other hand if they are understood, as the Gloss also suggests, as useless, since they do no more than the very existence of the condition does, this is not true for the case of a *suus heres*, even if we ignore the fact that any *heres* could make the man a latin, and they are anachronistic in the time of Justinian. In any case the remark of Octavenus seems to be out of date. It must be remembered that the right to impose such a restriction is not a matter of course: we are told in two texts[2] (also cited by the Gloss) that a testator could not impose a general permanent restriction on alienation, apart from *fideicommissum*. Octavenus was an early writer, and it is possible that in his time the power had not developed. The implied restriction contained in a conditional gift is probably later still, and may not be earlier than Antoninus Pius, who seems to have legislated on these matters[3]. If that is so it is probable that the rule that in such a case the manumission, though void as such, was at least a declaration of wish that the man should be free, and thus made him a latin, was later still[4].

VIII. The slave of a person under guardianship. Manumission by an *infans* is impossible, and thus if such a person is under a *fideicommissum* to free, the beneficiary will be declared free on application: it is in fact an ordinary *fideicommissum* which the fiduciary, without personal *culpa*[5], has failed to carry out. Other *pupilli* and women under *tutela* cannot free without the *auctoritas* of the *tutor*, and, even if that is given, the manumission will not include a gift of the *peculium*[6], as it ordinarily does in manumission *inter vivos*[7]. The reason is that a *tutor* has, in general, no power to authorise gifts[8]. It should also be noted that in any manumission, by a *pupillus*, or a *pupilla* under 20, *causa* must be shewn[9]. If the *tutor* refuses to authorise a manumission due under a *fideicommissum* the same rule applies as in the case of *infans*[10].

[1] *Ad h. l.* [2] 30. 114. 14; 32. 93. *pr.* [3] 30. 114. 14; 36. 1. 32. 1.
[4] See *ante*, p. 543, and App. IV. [5] 40. 5. 30. 1—4; *post*, p. 611.
[6] 40. 2. 24; Ulp. 1. 17. [7] *Ante*, p. 189.
[8] 27. 3. 1. 2. [9] 26. 8. 9. 1.
[10] 40. 5. 11, 30. 3. In general manumission *per epistolam* operates only when it becomes known to the man, 41. 2. 38. *pr.* Thus Julian holds that the *auctoritas* must be given (and the *tutor* be present?) when the slave receives the letter (Fr. Dos. 15). But an older view, of Neratius Priscus, at least in the case of *domina*, that it is enough if the *tutor* authorises at the time of writing, is confirmed by imperial enactment (*ib.*). No doubt a part of the breakdown of *tutela* of women. Perhaps not to be applied to other cases.

A minor under 20 must of course shew cause whether he has a *curator* or not, and we are told repeatedly that a minor over 20 who frees cannot get *restitutio in integrum*[1]. These texts do not in any way distinguish between the case in which there was a *curator* and that in which there was none, a fact which is somewhat opposed to the opinion now generally held, that a minor who has a *curator* is incapable of making his position worse[2].

A *furiosus* is incapable of freeing, and his *curator* cannot free for him, as manumission is not administration[3]. The imposition of a *fideicommissum* on a *furiosus* creates an obvious difficulty. He cannot authorise his *filius*, if he has one[4]: his personal *iussum* is impossible. Octavenus[5] suggests as a way out of the difficulty that the *curator* can convey him to someone else to free. That this should have been regarded as administrative while the direct act was not is rather surprising. Antoninus Pius settled the matter by providing that the rule above stated for *infantia* was to apply[6].

IX. Slaves of corporate bodies[7]. Marcus Aurelius gave a general power of manumission *omnibus collegiis quibus coeundi ius est*[8], and they, and municipalities whose slaves are freed, have rights of succession and the other patronal rights[9]. It has been said[10] that before these enactments such a slave if freed could not become a *civis*. But in fact Varro, the contemporary of Cicero, speaks[11] of *libertini* of towns, and of their names, in terms which shew that they were not merely *in libertate morantes*, but *cives*, and he makes allusion to slaves of other corporations, obscurely indeed, but in such a way as to suggest that they were on the same footing. An enactment of Diocletian[12] refers to an ancient law authorising municipalities in Italy to free, and speaks of the right as extended to towns in the provinces by a Senatusconsult of A.D. 129. Probably many corporations other than towns had the right, but there was no general right in *collegia* till the enactment of Marcus Aurelius.

As such manumissions were *inter vivos*, the *libertus* of a town, (and presumably of any corporation,) kept his *peculium* unless it was expressly taken away, so that debts to the *peculium* were validly paid to him[13]. The form of manumission by a *collegium* is not known[14]. Slaves of

[1] *Ante*, p. 566. [2] But this opinion rests on little evidence. See Girard, Manuel, 231.
[3] 40. 1. 13; 40. 9. 22. [4] 40. 2. 10. [5] 40. 1. 13; *ante*, p. 457. [6] 40. 5. 30. 7.
[7] Mommsen, Z. S. S. 25. 39, 49; Mitteis, Röm. Privatr. 1. 385, 399; Halkin, Esclaves Publics, 142.
[8] 40. 3. 1. [9] 40. 3. 2, 3; 38. 16. 3. 6.
[10] Halkin, *loc. cit.*; Rauter, Société, 37. [11] Varro, de ling. lat. 8. 83.
[12] C. 7. 9. 3. The text calls it *lex* Vetti Libici. Of the suggested emendations, that of Mommsen (*ad h. l.*), *lex veteris reipublicae*, seems the most probable. See Mommsen, Z. S. S. 25. 49. [13] 40. 3. 3; *ante*, p. 205.
[14] As the Senate freed slaves of the State and the *Ordo* freed slaves of towns, it seems likely that a vote of the *collegium* or its governing body, if it had one, sufficed. Probably, as Mommsen says (*op. cit.* 39), recognition of a given corporation would be accompanied by regulations hereon. He suggests authorisation to a delegate (*actor*?) to free *vindicta*, but this seems unlikely.

towns were freed by a *decretum* of the local senate (*ordo, curia*) with the consent of the *Praeses* or *Rector*[1]. They took the name either of the town or of the magistrate who freed them[2]. Bruns[3] gives a case of wholesale manumission of slaves of a municipality, probably for services rendered, in B.C. 188, but this is an overriding decree of the Proconsul[4]. It seems to have been a common thing for them to give a *mancipium* in the place of themselves[5], but there is no reason to think this was a legal requirement[6]: it occurred commonly in other manumissions[7]. Such a substitute was called in some cases *vicarius*, which, in this connexion, no doubt implies that he was qualified for the same function[8].

Any person could give a *fideicommissum* of freedom to the slave of a municipality[9]. And conversely where any townsman suffered forfeiture of his goods, any slave he was bound to free was declared free by the municipal authority[10].

It is a vexed question whether *societates vectigales* were, or might be, corporate bodies. The evidence is mainly one obscure text[11]. Into the various solutions which have been offered of the problem it presents we will not enter[12]. If (or when) it was a corporation it would be governed by the rules just stated. Varro seems to refer to freedmen of *societates*[13], and may be thinking of this case, but the text is not strong evidence, and no surviving juristic text mentions the matter.

X. *Servi Publici Populi Romani, Caesaris, Fisci.* Of the manumission of ordinary *servi publici* there is little trace[14]. Mommsen can find one case only under the Empire. No real case is recorded, it seems, in Republican times. The nearest approach to a case is that in which Scipio promised liberty, on conditions, to some captives whom he had declared *servi publici*[15]. But there are many instances of gifts of liberty as a reward for services to slaves who vested in the State. In some cases they are slaves of private owners, bought and freed as a reward for revealing crime, or betraying the enemy[16], or for service in

[1] C. 7. 9. 1, 2, 3; 11. 37. 1. [2] Varro, *loc. cit.* [3] Fontes, i. 231.
[4] Acting apparently under the authority of the Senate. It is not, however, quite clear who these slaves were.
[5] C. 7. 9. 1.
[6] See, however, Wallon, Histoire de l'Esclavage, 2. 500; Erman, Servus Vicarius, 432.
[7] *E.g.* C. 6. 46. 6. *pr.*; C. Th. 4. 8. 7; D. 38. 1. 44; 41. 3. 4. 16, 17; 41. 4. 9.
[8] Erman, *loc. cit.* [9] 40. 5. 24. 1. [10] *h. t.* 12. *pr.* [11] 3. 4. 1. *pr.*
[12] See Mitteis, Röm. Privatr. 1. 403 *sqq.* He gives references to earlier literature.
[13] Varro, de l. l., 8. 83.
[14] Mommsen, Staatsr. (3) 1. 322; D. P. R. 1. 369; Willems, Sénat, 2. 354; Halkin, Esclaves Publics, 22 *sqq.* The following references are mainly due to this writer who collects and discusses the texts. It is clear from Varro, de l. l., 8. 83, that they were sometimes freed. He notes that anyone so freed had been called *Romanus* (cp. Livy, 4. 61), but was now called after the magistrate concerned.
[15] Livy, 22. 57, 26. 47.
[16] Livy, 2. 5, 4. 45, 4. 61, 22. 33, 26. 27, 27. 4, 32. 26; Cicero, pro Rab. 11. 3, pro Balbo, 9. 24; Val. Max. 5. 6. 8, 6. 5. 7; Dion. Hal. 5. 13; Sallust, Catil. 30; Plutarch, Popl. 7; Macrob. Sat. 1. 11. 40. But see, as to their ownership, *post*, p. 598.

war[1] in others they are captives freed for betraying the enemy or for services after capture[2]. It may be assumed that the mode of manumission would be the same for all slaves of the people, and it is clear that the ordinary course is for the Senate to authorise the liberty and for the magistrate to declare it. In some cases this is stated[3] in others we are merely told that liberty was given—an impersonal form, better suited to describe an act of the Senate than an independent act of the magistrate[4] Sulla certainly freed on his own authority, but this was when he was dictator with almost absolute power[5] Scipio perhaps freed captives on his own authority, it may be, as Mommsen says, he did this by virtue of the commander's power to dispose of booty[6] In many cases the *libertus* receives money as well this and indeed the abandonment of property rights in the man seem to be essentially the business of the Senate[7]. For the act of the magistrate no form is necessary. Only in a very early and doubtful case is the use of the form of *vindicta* recorded[8]. The magistrate is usually a Consul or Proconsul, but this is not essential. in one case it was the Praetors[9].

In most cases the freedman is declared to have *libertas* and *civitas* In one case Cicero says. *libertate, id est civitate, donari*[10]. But in some cases liberty only is mentioned[11], and it is quite possible that in earlier days where the event occurred in a latin region the freedman may have received the status of the ordinary inhabitants of the district.

In many cases the slave to be freed has to be first acquired from his owner We are not expressly told that he could be compelled to transfer But resistance to the decree of the Senate was improbable, and a power of compelling sale was not without analogies[12]

The only known case in post-republican times appears to have been carried out by the Emperor[13]. Whether the Senate concurred or not cannot be said, but such a concurrence must have soon become merely a form

There is a good deal of evidence as to the existence of *liberti* Caesaris but it is hardly possible to distinguish between the different grades[14] No doubt the Emperor could free by will those slaves who

[1] Livy, 22 57 26 47, Val Max 7 6 15, Florus 1 22 30
[2] Cicero, Philipp 8 11, Polyb 10 7 9, Servius in Aen 9 547, Macrob Sat 1 11; Plutarch, Sulla 10, Dio Cass 39 23
[3] Livy, 2 5, 24 14 32 26 (cp 39 19), Sallust, Catil 30, Macrob Sat 1 11 40, Plutarch, Cato Min 39
[4] Livy 4 45 4 61, 22 33, 26 27, 26 47, 27 4, Cicero, pro Rab 11 3, pro Balb 9 24, Florus, 1 22 30, Plutarch, Sulla, 10, Dion Hal 5 13
[5] Appian B C 1 100 Val Max 6 5 7 [6] Livy, 26, 47, Polyb 10 17 9
[7] Livy, 2 5, 4 45, 4 61 22 33, 26 27 27 4 32 26, cp Livy, 39 19, Eutrop 2 27
[8] Livy 2, 5, Plut Popl 7 [9] Sall Catil 30
[10] Cicero pro Balbo 9 24 [11] *E g* Livy, 4 45, 22 33, 26 47, *etc*
[12] Caesar, de Bell G 3 32, Willems, Senat 2 354, Halkin, Esclaves Publics, 25
[13] C I L 6 2340, Mommsen, *loc cit* The *liberti* Romanae *nationis a principe manumissi* of the *lex* Rom Burg (3 2) are no doubt *liberti* Caesaris See also C Th 8 5 58
[14] C 3 22 5 See the information collected by Wallon, *op cit* 2, pp 506 *sqq*

were his own private property[1], but there is no sign of an attempt to do so in the case of those in any sense State property. *Inter vivos* the manumission was done by the Emperor himself, and there exists a constitution warning magistrates that it is unlawful for them to do it[2]. He did not manumit *vindicta*, since he was subject to no jurisdiction. But we are told that *ex lege* Augusti, at his mere expression of desire, the slaves are free[3], and the Emperor has full patronal rights[4]. Whether they were always *cives*, or the *Princeps* could make them latins, or did so if they were under 30, is not clear. It may be noted that slaves in the *peculium* of *servi* Caesaris could not be freed by them, even *per interpositam personam, i e.* slaves could not be validly transferred *ut manumittantur*[5] For this rule to be effective the conveyance for this purpose must have been *ab initio* void Naturally, fideicommissary gifts of liberty could be made in favour of such persons

XI Guilty Owners and Slaves. It was provided by Antoninus Pius that a *deportatus* could not free[6] The rule refers to slaves acquired since the deportation, for of the others he has ceased to be owner As he is not a *civis* he cannot of course give *civitas*. But as he has all *iure gentium* rights, he could no doubt, apart from this express enactment, have given them the same rights as he had, just as a *relegatus* could free so as to give the man the rights he had but not so as to enable him to go to Rome[7] A person condemned, even after his death, for *maiestas*, could not free, and thus gifts of liberty in his will were nullified by subsequent condemnation[8]. The same was true of other capital crimes, and the rule, though it is vaguely expressed, seems to have been, as laid down by Antoninus Pius, that any person actually accused lost his power of manumission for the case of his ultimate condemnation[9].

Servi poenae could not be freed[10] Even where the sentence was not capital, there were cases in which the magistrate might impose as part of the sentence on a guilty slave, an incapacity for manumission[11] In some cases there was a permanent rule that the slave could not be freed[12] A slave who had been guilty of some offence under the *lex*

[1] Marquardt, Org financ 394
[2] C Th 8 5 58 There was now no practical difference between *publici* and Caesaris As to freeing by the fisc *post*, p 626
[3] 40 1 14 1 There may have been a *Sc* authorising the Emperor generally
[4] 38 16 3 8 [5] C 7 11 2, *post*, p 595 [6] 48 22 2
[7] 48 22 13 [8] C 9 8 6, cp D 48 2 20
[9] 40 1 8 1, 2, 40 9 15 *pr* This is not a condition there is nothing future and uncertain The incapacity depends on the guilt and the accusation the conviction only brings it to light No capitally convicted person can free (40 1 8 *pr*), but manumission before accusation is good, 40 1 8 *pr*, C 4 61 1
[10] *Ante*, p 410 [11] 40 1 9
[12] Slaves who had been part of a band of robbers and had by decree become private property could not be freed, C 7 18 2 A *servus relegatus* who stayed in Rome could not be freed, 40 9 2, *ante*, p 94

Fabia, for which his master had paid the fine, could not be freed for 10 years. The text adds that in the case of a will the date of the death, not that of the will, is the date taken as that of the gift[1]. Severus appears to have provided that persons condemned to perpetual *vincula* could not be freed. But as this punishment was always illegal[2], and the enactment which recites this provision goes on to treat the case as one of temporary bonds, it is probable that the original enactment dealt with that case. The reciting enactment, which is so rubricated and described[3] as to make its origin uncertain, but which is probably by Caracalla alone, or with Geta, provides that a gift of liberty which takes effect while the slave is undergoing the penalty of *vincula* is void. Expiry of the sentence would enable him to be freed, but would not revive the gift. Here, too, it is the date of the *aditio*, not of the will, which is determining. There was a still severer rule: Hadrian provided that a gift of liberty would be null if it were made only to prevent a magistrate from punishing the slave in the way appropriate to slaves[4], who, for many offences, were more severely punished than were *cives* or any freemen[5].

XII. Cases connected in other ways with criminal offences. If any person wrote a gift to himself in any will, an edict of Claudius, based on the *lex* Cornelia *de falsis*, voided and penalised the transaction. If, however, the testator noted specially that he dictated the gift in question, it was valid, and even a general *subscriptio* prevented the penalty from applying[6]. Similar rules were applied to gifts of liberty. If a slave wrote a gift of liberty to himself, it was in strictness void, but the penalty was remitted if it was shewn that the writing was at the dictation of the master, whom the slave was bound to obey[7]. If, moreover, the testator subscribed the will, the gift though not valid was declared by the Senate to impose on the *heres* a duty to free[8]—the words of the *lex* being presumably too general and peremptory to be disregarded even in this case. Antoninus Pius had a freer hand and declared that the gift should be absolutely valid if the testator acknowledged in the will that the gift was written at his dictation[9].

A master could not free his slaves so as to save them from the *quaestio* in any case in which they were liable to it, *e.g.* for adultery, which need not be adultery of the slave or his owner[10].

[1] 40. 1. 12. If the *dominus* died before the 10 years were up, it was probably *ex die*.
[2] *Ante*, p. 93. [3] 48. 19. 33; C. 7. 12. 1.
[4] 40. 1. 8. 3; 40. 9. 17. 1. [5] *Ante*, p. 93.
[6] In case of ignorance or the like the penalty was readily remitted on express renunciation of the gift, 48. 10. 15. *pr.*; C. 9. 23.
[7] C. 9. 23. 6. [8] 48. 10. 15. 2. [9] *h. t.* 15. 3.
[10] The rule is mentioned in connexion with adultery but is no doubt wider, 40. 9. 12. *pr.*; P. 5. 16. 9; Coll. 4. 12. 8. *Ante*, p. 90.

The case of the *senatusconsultum* Silanianum has already been dealt with[1]. Here it is enough to say that where, under this senatusconsult, the will has not been opened, owing to the killing of the *paterfamilias*, and there is ultimately an entry under it, the gifts of liberty which take effect do so retrospectively, so that the slaves have, as their own, their interim acquisitions, and the child of a woman in such a case is born free. This is settled by Justinian, putting an end to doubts[2]. If, however, some slaves had run away, and the enquiry had been held, and the will opened, a gift of liberty to them would not prevent their being put to the *quaestio* in the matter if there was any further enquiry[3]. But the language of the texts implies that the gifts were not void, but were only ignored so far as was necessary for the purposes of the enquiry and resulting steps. We are told that if any slave brings a claim of liberty under the will of one whose death has given cause to an enquiry under the senatusconsult, judgment on the claim may not be given till the enquiry is ended[4].

XIII. Cases of *Vis* and *Metus*. A manumission is null if the slave compelled his master to do it by threats or force[5]. The same is true if the fear is inspired by a third person or by popular clamour[6]. On the same principle Marcus Aurelius nullifies any manumission *ex acclamatione populi*[7]. By what may have been the same enactment—in form a senatusconsult—he nullified all manumissions, by anyone, of his own or anyone's slaves at the public games[8], and Dio Cassius credits similar legislation to Hadrian[9]. The reference to others is probably an allusion to a direction by some prominent person to free[10]. Conversely where a man compelled conveyance of a slave to him, and freed him by will, the manumission was null, the reason being that had it been allowed to take effect there would have been no remedy against the *heres*, as he had not benefited[11].

XIV. Slave in bonitary ownership. It has already been noted that a bonitary owner could make the slave no more than a latin[12]. The only thing that need be said here is that mere *traditio* instead of *mancipatio* is not the only source of this inferior ownership[13].

XV. *Servus Incensi*[14]. The only real authority is a very defective fragment of the Responsa Papiniani[15], too imperfect to admit of certain

[1] *Ante*, pp. 94 *sqq*. [2] C. 6. 35. 11. [3] 29. 5. 3. 17, 25. 1.
[4] 40. 12. 7. 4. [5] 40. 9. 9. *pr*. [6] Fr. Dos. 7; D. 40. 9. 17. *pr*.
[7] 40. 9. 17. *pr*. [8] C. 7. 11. 3. [9] Dio Cass. 69. 16.
[10] See Sintenis, *ad h. l.*, in Otto and Schilling's translation. [11] 40. 13. 2.
[12] Ulp. 1. 16; *ante*, p. 533. [13] *Ante*, p. 549, and Esmein, Mélanges, 352.
[14] The following remarks are from Esmein, *op. cit.* 354–8.
[15] Pap. Res. 9. 6.

interpretation. Esmein treats the text as meaning that an *incensus*, though liable to *capitis deminutio maxima*, was not barred from manumitting merely by the fact that he was *incensus*, but only by actually being adjudged so. The persons so manumitted would be free, but if the manumission took place before the *census* was closed, they themselves would be *incensi*, and subject to the same penalty. If, however, the manumission was after the *census* closed, they were in no way wrongdoers, and thus were not liable.

XVI. *Servus Latini.* The slaves of latins could possibly be freed *vindicta*, as latins had *commercium*, but not, it would seem, *censu*. A Junian latin could not, of course, free by will. The *manumissus* could never be more than a latin, though, apparently, he would always be that, if the manumission conformed to local rules, unless the rule of the *lex* Aelia Sentia as to *dediticii* applied to latins manumitting[1]. The *lex municipalis* Salpensana provides for manumission *apud IIviros* in a latin colony: the *libertini* are to be latins: *causa*, in the case of an owner under 20, is to be shewn before a committee of *decuriones*[2]. Elsewhere language is used which confirms the view that the freedman of a latin was a latin[3]. The rights of succession to such *libertini* were governed by the *lex municipalis*, and clearly differed from, and were more favourable to, patrons than those which applied to *cives*[4].

XVII. *Servus Peregrini.* Such slaves could not be freed *censu* or *vindicta* or by will, except under the local law. They could be no more than peregrines, indeed so far as the Roman law was concerned, they were only *in libertate*, as having been informally freed, subject, however, to the provisions of the relative *lex peregrina*[5]. In later law, the rule is clear that the manumitted slave of a provincial belonged to the community of his manumitter[6], even fiduciary, though the slave had been an inhabitant of another region[7]. The rules as to manumission in fraud of creditors applied to this case, by a senatusconsult of Hadrian, though the other provisions of the *lex* Aelia Sentia did not[8].

XVIII. *Servus Fugitivus.* A senatusconsult, based on the *lex* Fabia, forbade the sale of slaves *in fuga*[9]. It was allowed, however, to

[1] G. 1. 47. If the forms were not observed he would be presumably *in libertate* and after the *lex* Iunia a Junian latin.
[2] Bruns, Fontes, i. 146.
[3] Fr. Dos. 12.
[4] *Lex munic.* Salpensana, xxiii; Bruns, Fontes, i. 143.
[5] Fr. Dos. 12; Plin., Litt. Trai. 5.
[6] C. 10. 40. 7.
[7] C. 10. 39. 2.
[8] G. 1. 47.
[9] *Ante*, p. 268.

authorise *fugitivarii*, persons who made it their business to capture such fugitives, to sell one when caught[1]. Moreover any *fugitivus* whom his master did not claim would be sold by order of the *praefectus vigilum*. The buyer could recover the price from the Fisc at any time within three years, and the slave could in no case be manumitted for 10 years without consent of the former owner[2]. The rule as to recovery of price is obscure: it probably implies that the former owner was entitled to claim the slave at any time within three years[3].

XIX. Deaf and dumb owners. A deaf mute could free informally but, before Justinian, not by *vindicta*. The distinction was important, since informal manumission gave only latinity. One way of evading the difficulty was no doubt to authorise a son to free: the defect was purely physical, and did not prevent *iussum*. It was also possible to convey the slave to a competent person with a condition that he should be freed[4]. A person born deaf was allowed to free, *utilitatis causa*[5]. This must refer to manumission *vindicta*, since such a person could not be worse off than a deaf mute, and it is clear that a deaf mute could free informally.

XX. *Servus Indefensus.* Where a slave is accused of a capital crime and his master does not defend him, and he is, in the event, acquitted, it is laid down that the *dominus* cannot free him[6]. This looks like a penalty on the slave for the master's cruelty. The text may mean no more than that he cannot do so, so as to acquire the rights of a patron, but neither its language nor its position in the Digest suggests this meaning. It is more probable that it is an arbitrary rule, based on the idea that manumission is a reward and ought not to be used as a means of getting rid of a slave of whom one has a very bad opinion. It is clear that the refusal to defend does not amount to manumission or to *derelictio*: he is still the property of the old owner[7].

XXI. Manumission by *persona interposita.* There was a general rule that if a person was incapable of manumission and he left the slave to someone *ut manumittatur* the direction was void and liberty given would be null. The texts differ as to whether the legacy itself was valid[8]. The rule must clearly be limited to cases in which the prohibition was perpetual and not due to a merely physical defect, but with

[1] 48. 15. 2; C. 9. 20. 6.
[2] P. 1. 6a. 1, 6, 7; *ante*, p. 269.
[3] The text is not of the highest authority: it is one of those restored by Cujas from the Vesontine ms. now lost.
[4] P. 1. 13a. 2; 4. 12. 2; D. 40. 2. 10. Could he mancipate? Cp. Ulp. 20. 7, 13.
[5] 40. 9. 1.
[6] 40. 9. 9. 1.
[7] 1. 5. 13; 48. 1. 9.
[8] 31. 31; 35. 1. 37.

that limitation it seems probable that the rule was absolutely universal, and not confined to gift by will[1].

Similarly a slave could not free a slave in his *peculium*, even though he were a *servus* Caesaris and so had real rights in the fund[2]. This applied even to a manumitter who was not found to be a slave till after the manumission[3], and to *servi poenae*[4], who had been *cives*. And we are expressly told that a slave could not do it indirectly by *interposita persona*[2].

XXII. A *deditician* enslaved for living within the prohibited area was sold into perpetual slavery beyond it[5]. If he was then freed, the manumission was not a mere nullity, but had a peculiar statutory effect. It made him a slave of the Roman people[6]. This does not mean that he became *servus publicus populi Romani*: this was a slave the property of the State, and devoted to the public service[7]. These were always men and a privileged class[8]. The person we are now dealing with, who might be man or woman, was in no way privileged, but at the disposal of the State. The rule is obsolete in later law[9].

XXIII. Manumission in a will *post mortem heredis* was void—a rule based on the similar rule in legacies[9]. Justinian abolishes the rule in general terms[10].

XXIV. A *liberta* cohabiting with a *servus alienus* without the patron's knowledge was reenslaved without possibility of citizenship[11]. This rule disappears with the rest of the provisions dependent on the *sc.* Claudianum, under Justinian's legislation[12].

XXV. Manumission *poenae nomine*. Such manumissions were void in classical law. It is not always easy to say what are *poenae nomine*: it is a question of the intention of the testator, *i.e.* whether his real object was rather to penalise the *heres* than to benefit the donee[13]. Justinian abolishes the rule which forbade such gifts[14].

XXVI. An enactment of Alexander provides that a man may not free one whom he had been forbidden by his mother to free, *ne videaris iura pietatis violare*[15]. The words and the general character of the whole text shew that there is here no case of application of a legal principle.

XXVII. If an estate devolved on the Fisc, Severus and Caracalla enacted that the *procuratores* Caesaris were not to alienate *servi*

[1] *e.g. ante*, p. 538.
[2] C. 7. 11. 2.
[3] 40. 9. 19.
[4] 40. 1. 8. *pr.*
[5] G. 1. 27.
[6] G. 1. 27.
[7] *Ante*, p. 319.
[8] Ulp. 1. 20; G. 2. 233.
[9] *Ante*, p. 552.
[10] In. 2. 20. 35; C. 4. 11. 1; 8. 37. 11.
[11] P. 2. 21a. 7.
[12] *Ante*, pp. 418, 552.
[13] 34. 6. 2. Severus and Caracalla.
[14] C. 6. 41. 1; In. 2. 20. 36.
[15] C. 7. 2. 7.

actores of the estate, and that if they were manumitted the manumission should be void. The rule is one of obvious prudence: it is not safe, however, to infer from it that the *procurator* Caesaris ever had the power of manumission[1].

XXVIII. The case of slaves sold for export has already been considered[2].

XXIX. It may be doubted whether alien captives could be freed by a private owner. There seems to be no real authority. Of course so long as they were the property of the State they could be freed by the public authority[3]. But as to private owners, texts are wanting.

It remains to remark that there was a general rule applicable to each of these cases, that prohibition meant nullification[4]: it was not one of those transactions which *non debent fieri sed facta valent*.

[1] 49. 14. 30. As to the word *revocantur*, *ante*, p. 564.
[2] *Ante*, p. 69.
[3] *Ante*, p. 589.
[4] 40. 6. 1.

CHAPTER XXVI.

FREEDOM INDEPENDENT OF MANUMISSION.

THESE cases may be most conveniently discussed under three heads.

(i) Cases of reward to slaves. In relation to this matter it should be observed that these are cases in which the State intervenes to give liberty to the slaves of private persons, usually, as a matter of course, compensating the former owners. We have already considered some such cases[1], and assumed that the effect of the transaction with the owner was to vest the ownership in the State so that the act may be regarded as a manumission. It is not, however, clear that this is in all cases a correct analysis of the transaction. It is possible for the State by an overriding decree to give liberty to a slave who does not belong to it. We have seen such a case in connexion with *servi poenae*[2]. The cases shortly to be considered in which liberty is given in excess of any possible interpretation of the testator's intent, are not essentially different. The cases in which freedom is given as a punishment to the master can be explained only in the same way[3]. These are of course legislative acts, but it is not clear that such things would have been beyond the administrative powers of the republican Senate and the magistrate[4] even though the slave was not the property of the State. It is true that the Senate cannot make grants of *civitas*[5], but this is an equal difficulty if the transaction be regarded as a manumission.

In some of the cases which follow either interpretation is possible on the recorded facts.

(*a*) A senatusconsult, elaborating the provisions of the *lex* Cornelia *de iniuriis*, punished those who wrote, or trafficked in, libellous writings. A reward was payable to the informer, fixed by the *iudex*, and varying with the wealth of the accused. Where the informer was a slave the reward might even be a gift of liberty, but only in a case in which the discovery was of public importance[6]. The reward seems

[1] *Ante*, pp. 589 *sqq*.
[2] *Ante*, p. 410.
[3] *Post*, pp. 602 *sqq*.
[4] Willems, Sénat, 2. 270.
[5] Willems, Sénat, 2. 683.
[6] 47. 10. 5. 10, 11.

to have been payable out of the means of the accused, and it is possible that the text means that the master was compelled to manumit, being compensated from the accused's estate. There is no suggestion that the public authority was to buy and free the man. But the whole allusion to liberty in this connexion is Byzantine in form[1]: and it is almost certain that this part of the rule is the work of the compilers. It is therefore most probable that the method of application of the rule was not in fact worked out.

(*b*) A slave who denounced the commission of rape on a virgin or widow, which had been either concealed or compromised, was given latinity by Constantine, the parents, if parties to the concealment, being deported. Justinian adopts the enactment, declaring that the man is to get liberty, which in his time means *civitas*[2]. Nothing is said of compensation to the owner, but on the analogy of the next case to be stated, it seems likely that where the owner was not the wrongdoer the Fisc paid compensation.

(*c*) Slaves who denounced coiners, were given *civitas* by Constantine, their owner being compensated from the Fisc[3].

(*d*) In A.D. 380 it was provided that slaves who denounced deserters should get liberty. Justinian adopts the enactment, and with him liberty means *civitas*: it may be doubted whether this was its meaning in the original enactment. The texts say nothing about compensation[4].

(*e*) If a freewoman cohabited secretly with her slave this was capital in both. Constantine provided that a slave might inform of this with the reward of liberty on proof, and punishment if the information were false. Justinian adopts the law and speaks of liberty. Nothing is said about compensation, and it is clear that the case directly contemplated by the law is that of information given by another slave of the woman[5].

(*f*) Leo gave freedom and *ingenuitas*[6] to all persons given to the *sacrum cubiculum*, it being unseemly, in his view, that the Emperor should be served by any but freemen. But this was only where the man was voluntarily given to the *cubiculum*: an owner who alleged that this was not so could get the slave back with his *peculium* within five years. This is rather like manumission, but it is a general rule laid down once for all: nothing is done in the individual case, and it is not essential that the master have intended to make the man free[7].

[1] Kalb, Juristenlatein, 71.
[2] C. 7. 13. 3; C. Th. 9. 24. 1. If a latin he became a *civis*.
[3] C. 7. 13. 2; C. Th. 9. 21. 2.
[4] C. 7. 13. 4; C. Th. 7. 18. 4. 1.
[5] C. 9. 11. 1; C. Th. 9. 9. 1.
[6] So that there were no patronal rights, cp. Nov. 22. 11.
[7] C. 12. 5. 4. Not a case of revocable freedom: if there had been no real gift there was no real freedom. If the owner lets the slave stay for five years it is conclusively presumed against him that there was a gift.

(*g*) There are traces of a custom of giving *ancillae* liberty if they have a certain number of children, but it is not clear that this is more than a conventional title to manumission[1].

(*h*) As part of the encouragement of monasticism by the Christian Emperors, Leo and Anthemius provided that a slave becoming a monk, *volente domino*, was free, but reverted if he left the monastery. In view of the civil incapacities of a monk, and of the revocable nature of the change of status, it is not quite clear that this amounted to freedom. All that the text says is that he escapes *servitutis iugum, donec in eodem monachorum habitu duraverit*[2]. But Justinian went further. By a Novel[3] he provided that any slave might, by entering a religious house and serving a novitiate of three years, become a monk and a freeman without his master's consent. The only way in which the master can get him back is by shewing that he entered the monastery to avoid liability for theft or other misconduct. But even this claim must be made within three years: after that lapse of time the man is definitely a monk, and the master can reclaim only any property he brought with him. So far, the rule, though it favours the religious life at the expense of the *dominus*, is plain enough, but the text proceeds to say that if at any time the man leaves the monastery he reverts to his old slavery. This looks very like a revocable liberty, since in the earlier part of the text it is said that by his three years' novitiate *arripiatur in libertatem*, and the case is compared with others in which liberty is given *ex lege*. It is perhaps not necessary to scrutinise too closely the consistency of a Novel with legal principle, especially as in view of the disabilities of a monk the liberty so given is hardly more than an honorific title. In a later Novel Justinian departs, so far as language goes, even further from the old principles. He provides that if a slave is ordained with the knowledge of his master, he becomes free and *ingenuus*, and even if the master did not know, he has only one year from the ordination in which to reclaim the man[4]. That past, he is on the same footing as if the master had known. But here too if he abandons clerical life he reverts to his master. Here the breach with principle is quite definite: the liberty and *ingenuitas* in the case of the priest are very real things, his incapacities being few, and the liberty is revoked by his resigning clerical life.

(*i*) Slaves denouncing the murderer of their master. There is a general rule, stated many times in the Digest, that a slave who has discovered and denounced the murderer of his *dominus* is entitled to liberty. The history of the matter is obscure, but the rule seems to

[1] Columella, de re rust. 1. 8. *fin.*; Fr. de i. Fisci, 13.
[2] C. 1. 3. 37.
[3] Nov. 5. 2. *pr.*—3.
[4] Nov. 123. 17. Consent immaterial, so long as he does not forbid. Cp. Nov. 123. 4.

have been introduced by the *senatusconsultum* Silanianum and thus to have applied at first only where the murderer was supposed to be one of the slaves, (perhaps only where this was proved,) and to have been made a general rule[1] by later legislation. The rule itself is simple: the slave is entitled to his freedom and will be declared free by the Praetor[2]. But its working gives rise to many questions. What is the effect of a bar upon manumission? Here, at any rate in cases under the Silanianum, the reward prevails: the slave is free even though he has been *legatus* by the testator[3], and even though he was acquired by the owner with a proviso against manumission[4]. What is the rule where there are other interests in the slave? For the case of common ownership the rule is laid down that the man is free, the other owner being compensated[5]. Nothing is said about slaves in whom another person has an interest such as usufruct, but it seems likely that analogous rules applied. The obstacle in this case being of merely juristic creation there would be even less difficulty in applying the statutory rule. It is difficult to say what is done in the case of a pledge creditor—possibly a slave of equal value is given as a substitute. Conversely it may be assumed that denouncing the killer of a usufructuary or of any person other than the actual owner gives no claim to liberty.

The slave may or may not have been *sub eodem tecto*, and so may or may not have been himself liable to torture *ex* Silaniano[6]. If he was, he has no claim to liberty unless he has declared the murderer voluntarily, *i.e.* before he himself is denounced or tortured[7]. Here, however, a distinction arises. If the slave is due to an *extraneus, ex stipulatu*, and is freed in this way, the *stipulator* has an action *ex stipulatu* if the slave was not under the same roof, but if he was, then the *stipulator* has no remedy, since he loses no more than he would have lost if the slave had been put to torture, which might lawfully have been done[8].

A question on which the texts are not quite clear is that as to whose *libertus* the freedman is. According to Ulpian, who gives the fullest statement, the Praetor may declare whose *libertus* he shall be. If no such declaration is made he is the *libertus* of him whose slave he would have been, and that person would claim succession to him[9]. But Marcian tells us that one who so gains his liberty is a *libertus orcinus*[10], and Paul remarks[11] that as he is free *quasi ex senatusconsulto*, it is clear law that he is the *libertus* of no one. It is impossible to be sure that there

[1] C. 7. 13. 1; D. 38. 2. 4. *pr.*
[2] 38. 2. 4. *pr.* He is not in the *hereditas, pro* Falcidia, 35. 2. 39.
[3] 29. 5. 12.
[4] 29. 5. 3. 15, on grounds of general utility. *Ante*, p. 585.
[5] 29. 5. 16.
[6] *Ante*, p. 94.
[7] 29. 5. 3. 14.
[8] *h. l.* 13.
[9] Unless the right is taken away for *indignitas*, 38. 16. 3. 4. Tryphoninus shews what this means by the remark that if a son leaves unavenged the father's death, he will not be the patron of the denouncer, *quia indignus est*, 37. 14. 23. *pr.*
[10] 40. 8. 5.
[11] 38. 2. 4. *pr.*

is here no conflict. The last two texts agree—all that Paul means is that the man has no living patron. But that does not account for the other texts. Probably the texts of Ulpian and Tryphoninus, notwithstanding their general language, are dealing only with rights of succession. A *filius patroni* is not patron though he may have rights of succession.

In Justinian's time the slave necessarily becomes a *civis*, and we have no earlier texts. One of the texts speaks of him as *civis Romanus*[1], but this may well have been *Latinus* in the original. It may be that the Praetor could declare which the man was to be[2].

(ii) Cases of punishment or penalty imposed on *dominus*.

(*a*) Slaves exposed on account of sickness. By an Edict of Claudius it was provided that if a master abandoned a slave who was seriously ill without making any provision for his care or cure, the slave became a latin[3]. Justinian provided that the slave should become a *civis*, and the former *dominus* be barred from any rights of patronage, including that of succession. It is not clear whether his children were equally barred from succession[4].

(*b*) An *ancilla* whom her master had given in marriage to a freeman with a written contract of dowry became under earlier law a latin[5]. Justinian, as we have seen, turned this into citizenship[6]. There may be no fraud in this. But in the Novels Justinian lays down a general rule that if a *dominus* procures, or assents to, or connives by silence at, the procuring of, a marriage between a *servus* or *ancilla* of his, and a free person who supposes the other party free, the slave shall be free and *ingenuus* so that there are no patronal rights[7].

(*c*) By Justinian's final legislation it appears that a slave treated *pro derelicto* by his master became free[8]. If this is to be understood literally[9] it destroys the law of manumission *inter vivos* as to form, and also the significance of the texts which consider the position of a *servus derelictus*. As the case is dealt with in connexion with that of sick slaves, it is probable that the *dominus* in this case has no patronal rights.

(*d*) We have seen that eunuchs commanded a high price[10]. Thus there was a great inducement to owners to castrate slaves. By legislation of Constantine and Leo this was made severely punishable, at least among Romans, though the purchase of eunuchs from *barbarae gentes* was not forbidden[11]. The practice, however, continued, and Justinian found

[1] 38. 16. 3. 4.
[2] *Ante*, pp. 422 *sqq*. for a possible analogous discretion. One text suggests a possible wider discretion in later times. C. 7. 13. 1 may mean that the *Praeses* could decree liberty to one who had been active, though not the actual denouncer. But the *lex* is obscure and may be expressing only the general rule.
[3] *Ante*, p. 36.
[4] 40. 8. 2; C. 7. 6. 1. 3. Similar rule, Nov. 22. 12.
[5] *Ante*, p. 550.
[6] C. 7. 6. 1. 9.
[7] Nov. 22. 11.
[8] Nov. 22. 12.
[9] The text may refer only to sick slaves.
[10] *Ante*, p. 8.
[11] C. 4. 42. 1, 2.

it necessary to confirm the rule in a Novel[1], punishing everybody knowingly concerned in such a thing. It appears from the language of the Novel that even in earlier law the rule went further and that the slave was free[2]. However this may be, the Novel itself provides that all persons castrated by anyone after a certain date shall be free, and that no validity shall attach to any consent of the victim however formally given. The same result is to apply, even if the castration is imposed for a reasonable medical purpose. The Novel says nothing about the rights of patronage.

(*e*) Slaves prostituted. In the Empire there is a considerable history of provisions against the prostitution of slaves. The rules have already been discussed[3], but not completely as to their liberating effect.

If any owner compelled an *ancilla* to prostitution against her will it was provided by Theodosius that on appeal by the slave to the Bishop or Magistrate the master should lose his slave and also be severely punished[4]. The *lex* is not clear as to whether the slave was free or not, but a little later it was provided by Leo that the slave could be claimed as free by anyone[5]. Nothing is said here as to consent of the *ancilla*, and the wording of the *lex* seems rather to suggest that her consent did not affect the matter.

There is earlier and more elaborate provision for the case of sale with a proviso against prostitution. Three cases are to be distinguished.

(1) Where the sale merely contains a provision *ne prostituatur*. Here it is provided that upon prostitution the woman is free, even though all the owner's goods are under such a pledge that he could not have manumitted her in an ordinary way[6].

(2) Where it is provided that if prostituted the woman is to be free. If such an agreement accompanies the sale, even though only by verbal pact, the woman is free *ipso facto* if the buyer prostitutes her, and will be the *liberta* of her vendor[7]. Modestinus tells us that Vespasian decreed that if a buyer on such terms resold her, without notice of the terms, she would, on prostitution, nevertheless be free, and would be the *liberta* of the first vendor, *i.e.* the one who imposed the condition[8].

The origin of the rule is uncertain. For Vespasian, it was clearly an existing institution. It was probably due to an Emperor. As we

[1] Nov. 142.
[2] Perhaps by another enactment of Leo. Cp. Krüger, *ad* C. 4. 42.
[3] *Ante*, p. 70.
[4] C. 1. 4. 12 = C. 11. 41. 6 = C. Th. 15. 8. 2.
[5] C. 1. 4. 14 = C. 11. 41. 7. No fees are to be paid in such a case.
[6] 40. 8. 6. Alexander provides that such provisions are to be liberally construed. The words *ne corporis quaestum faceret* covered a case in which she was employed at an inn and committed fornication. In the existing social conditions this was a mere evasion, C. 4. 56. 3.
[7] 2. 4. 10. 1; C. 4. 56. 2. In 21. 2. 34. *pr*. Pomponius says that if the buyer does prostitute her and she becomes free he has no claim against the vendor. This seems to mean that the ordinary Aedilician actions are not now available. *Ante*, pp. 52 *sqq*.
[8] 37. 14. 7. *pr*. This does not negative a right of action against his vendor by the second purchaser.

shall see in the next case, Hadrian legislated on the matter, but the reference to Vespasian is very clear. There is nothing to connect the rule with the Edict.

(3) Where there was a condition *ne prostituatur*, with a right of seizure (*manus iniectio*) in the event of breach. The existence of such a condition negatives the liberty which would otherwise have resulted from prostitution and the condition is effective against ulterior buyers, even without either similar conditions, or notice of the condition[1]. But even where such a condition exists, freedom may result. Hadrian seems to have provided that if the person, who has the right to seize, waives it and permits the prostitution, the woman will be free, and will be so declared on application to the Praetor[2]. This is stated in an enactment of Alexander, which appears to be purely declaratory. Ulpian says that if the vendor, who has reserved the right of seizure, prostitutes the slave himself, she becomes free in the same way[3], and Paul says that *Imperator et pater* (probably Caracalla and Severus) lay it down that if he gives up his right of seizure, for a price, she becomes free, since to allow the prostitution is the same thing as to prostitute her himself[4]. All these remarks seem to be glosses on Hadrian's enactment, which we do not possess[5].

A case is discussed which might have created difficulties. A woman was sold to be free if prostituted, and resold with a right of *manus iniectio* in the same event. Here, the subsequent transaction cannot lessen the right created by the first, and it is clear that on prostitution she will be free. But what if the order of conditions were reversed? Logically she ought not to have been free, but it is held, *favorabilius*, that here too she is free[6].

(*f*) Religious Grounds[7]. Under the Christian *régime* from Constantine onwards, similar rules were laid down in the interest of Christian orthodoxy. The rules we are concerned with were merely ancillary to the general purposes of the legislation, which were to crush heresy, and to prevent proselytising to the tolerated non-Christian faiths. Even before Christianity became the official faith, there was legislation on this matter against Judaism. Paul tells us that *cives* who allowed themselves or their slaves to be circumcised suffered forfeiture and *relegatio*, the operator being capitally punished[8]. And Jews who

[1] 18. 1. 56; C. 4. 56. 1.
[2] C. 4. 56. 1.
[3] 2. 4. 10. 1.
[4] 40. 8. 7.
[5] Although the vendor is technically patron, and preserves his rights of succession, the texts shew that his misconduct deprives him of the honour due to a patron, so that he can, *e.g.*, be *in ius vocatus* by the woman.
[6] 18. 7. 9. The reason given is that both provisions are for her benefit, and the liberty releases her from her shame as much as the seizure would. But this is no reason: the true reason is *favor libertatis* and that in the text is probably an interpolation.
[7] For analogous rules among the Jews, Winter, Stellung d. Sklaven, 37—40.
[8] P. 5. 22. 3.

circumcised non-Jewish slaves, however acquired, were deported or otherwise *capite puniti*[1].

Our other authorities are all from the Christian Empire. The earliest legislation of known date on the matter was of A.D. 335. It provided that if a Jew acquired a non-Jewish slave, and circumcised him, the slave was entitled to freedom[2]. It appears also that Constantine provided that a Jew might not have Christian slaves, and that any such slaves could be claimed by the *ecclesia*. This does not seem to give liberty[3]: its exact meaning will be considered shortly[4]. In 339 the sons of Constantine laid down a rule that if a Jew acquired any non-Jewish slave, the slave would go to the Fisc: if he acquired a Christian slave, all his goods should be forfeited, and it was declared capital to circumcise any non-Jewish slave[5]. In A.D. 384 it was provided that no Jew should acquire any Christian slave or attempt to Judaise any that he had, on pain of forfeiture of the slave, and, further, that if any Jew had any Christian or Judaised Christian slave, the slave was to be redeemed from that servitude at a fair price, to be paid by *Christiani*[6], which Gothofredus takes to mean the local church[7]. Here too it is not clear what this means; *i.e.* whether the man belonged thenceforward to the Bishop or whether he was free. The more probable view is that he did not become free.

At this point a new factor came in: various heresies needed to be checked. In A.D. 407 it was provided that Manichaeans and some other heretics were to be outlawed and *publicati*, but slaves were to be free from liability if they avoided their master's heresy and *ad ecclesiam catholicam servitio fideliore transierunt*[8]. The meaning of this is not clear. Gothofredus thinks it means not that they belonged to the church (which indeed the text hardly suggests), but that they became free[9]. He bases this on the fact that by an enactment of A.D. 405 it had just been provided that slaves who had been compelled to be rebaptised under the Donatist heresy should acquire freedom by fleeing to the Catholic church[10]. But the argument is not convincing; the language of the texts is very different, as are the facts. The slave who has been compulsorily rebaptised has suffered a serious wrong, for which he gets compensation in the form of liberty. The other has not, and is merely allowed to escape punishment by recantation. The text does not touch, at this point, on the question of the ownership of the

[1] P. 5. 22. 4.
[2] C. Th. 16. 9. 1.
[3] C. Th. 16. 8. 22. The author of the Vita Constantini says, wrongly, that the slave was free. See Gothofredus, *ad* C. Th. 16. 9. 1.
[4] *Post*, p. 606.
[5] C. Th. 16. 9. 2; cp. C. 1. 10. 1. Non-juristic texts, Gothofredus, *ad* C. Th. 16. 9. 1, and Haenel, Corpus Legum, 209.
[6] C. Th. 3. 1. 5.
[7] *Ad* C. Th. 3. 1. 5.
[8] C. Th. 16. 5. 40. 6 = C. 1. 5. 4. 8.
[9] Gothofredus, *ad h. l.*
[10] C. Th. 16. 6. 4. 2.

slave: that was already settled by the statement that the late master was *publicatus*. In A.D. 412 and 414 there was further legislation punishing Donatists, slave or free, and even orthodox owners of Donatist slaves, if they did not compel the slaves to abandon their heresy[1]. In A.D. 415 an enactment[2] aimed at a certain Jewish dignitary called Gamaliel laid down a general rule punishing attempts to convert Christian, or other non-Jewish slaves or freemen, and circumcising them. The enactment added that, in accordance with a certain enactment of Constantine, any Christian slaves held by him could be claimed by the *ecclesia*. The concluding provision seems to refer only to Gamaliel's own slaves and to take them away, not because he had them, but because he had tried to convert and circumcise them. The enactment of Constantine to which the law refers has not been traced: it has been suggested[3] that the reference should be to a law already mentioned of the sons of Constantine. But we have not such a complete knowledge of Constantine's legislation that this correction is forced on us. It is unlikely indeed that the reference is to the rule, above cited, laid down in 335[4], since that confers freedom, and there is no real reason to suppose that the expression *ecclesiae mancipentur*[5] implies a gift of freedom, any more than the expression *fisco vindicetur*[6] does. But it is quite likely that in the same or another enactment Constantine provided in addition to his rule that circumcision involved liberty, another rule to the effect that any attempt to proselytise a Christian slave involved loss of him, just as it was clearly laid down in A.D. 384[7]. In the same year (A.D. 415) it was enacted that Jews might have Christian slaves (though they could not acquire them), provided they did not interfere with their religion: any attempt to do so was punished as sacrilege[8]. In A.D. 417 a new enactment elaborated this with some distinctions. No Jew was to acquire a Christian slave, *inter vivos*, on pain of forfeiture, the slave being entitled to liberty if he denounced the fact. Those a Jew had, or acquired by death, he might keep, being capitally punishable if he attempted to convert them to the Jewish faith[9]. An enactment of A.D. 428 enumerated over twenty different kinds of heresy, and punished them in various ways, prohibiting, *inter alia*, any attempt to proselytise orthodox slaves, or to hinder them in the exercise of their religious observances[10]. In A.D. 438 a similar prohibition was directed at all Jews, Samaritans, heretics or pagans[11].

It is noticeable that in all this considerable surviving mass of prae-Justinianian legislation there is only one statute which, dealing

[1] C. Th. 16. 5. 52. 4, 54. 8.
[2] C. Th. 16. 8. 22.
[3] For reff. see Haenel, *ad h. l.*
[4] C. Th. 16. 9. 1.
[5] C. Th. 16. 8. 22; cp. C. Th. 3. 1. 5.
[6] C. Th. 16. 9. 2.
[7] C. Th. 3. 1. 5.
[8] C. Th. 16. 9. 3.
[9] *h. t.* 4. Confirmed as to its main prohibition, in A.D. 423, *h. t.* 5.
[10] C. Th. 16. 5. 65 = C. 1. 6. 3.
[11] Nov. Theod. 3. 4 = C. 1. 7. 5.

with the slaves of heretics gives them freedom in any event[1]. On the other hand there are two[2] dealing with Jews which do so, and some others[3] the ambiguous language of which has led some commentators to understand their effect to have been to give liberty. It is quite possible that liberty may, as a matter of policy, have been more freely given in connexion with Jews. Judaism was necessarily tolerated while heresy was not, and it may have been necessary to use stronger inducements to prevent slaves from adhering to a faith which was allowed to exist. However this may be, the distinction is not traceable under Justinian, from whom the rest of our authorities come.

He inserts in his Code[4], in an altered form, the enactment of Constantine's sons of 339[5], incorporating in it part of that of Honorius in 417[6], and putting the result under the name of the latter. It now provides that no Jew is to acquire a Christian slave by any title whatsoever, and that if he does and circumcises him, or any non-Jewish slave, he is capitally punishable and the slave is free[7]. He also includes some other provisions which have been mentioned[8], but these have no direct connexion with liberty. He provides in two enactments[9] that no pagan, Jew, Samaritan or unorthodox person is to have any Christian slave. The slave is free and a money penalty is payable to the Fisc[10]. Jews circumcising any non-Jews are to be punished like castrators[11]. Whether this means that the slave would become free as he did in the case of castration[12] is not clear, but the affirmative seems most probable. Finally, by an enactment already mentioned, he provides that if any non-Christian slave of a Jew or heretic joins the Christian church the slave thereby becomes free, no compensation being payable to the *dominus*[13].

(iii) Miscellaneous cases.

Here it is necessary to do little more than to refer to a number of cases which have already been discussed.

(*a*) *Captivi.* These were true slaves during their captivity, but they became free (retrospectively) by the mere operation of *postliminium*, with no process of manumission[14].

(*b*) *Servi Poenae.* A convict might, during his life, cease to be a slave in either of two ways. He might be simply pardoned, or he might

[1] C. Th. 16. 6. 4. 2.
[2] C. Th. 16. 9. 1, 4.
[3] *e.g.* C. Th. 16. 8. 22; 3. 1. 5.
[4] C. 1. 10. 1.
[5] C. Th. 16. 9. 2.
[6] *h. t.* 4.
[7] C. 1. 10. 1. Presumably inheritance is not meant to be included.
[8] C. Th. 16. 5. 40. 6 = C. 1. 5. 4. 8; C. Th. 16. 5. 65 = C. 1. 6. 3; Nov. Theod. 3. 4 = C. 1. 7. 5.
[9] C. 1. 10. 2; 1. 3. 54. 8; see also C. 1. 5. 20. 6.
[10] *Ante*, p. 319; C. 1. 10. 2.
[11] 48. 8. 11. *pr.*
[12] *Ante*, p. 602.
[13] C. 1. 3. 54. 9, 10. The master does not reacquire the man by conforming. It is difficult to imagine a more effective defence of orthodoxy.
[14] *Ante*, pp. 304 *sqq*. See, however. Mitteis, Röm. Privatr. 1. 128.

be *restitutus*, with retrospective effect, and there were intermediate cases. These different modes of release had very different effects, already considered. Justinian abolished this form of slavery[1].

(*c*) Slaves noxally surrendered. Under the law as stated in the Institutes[2], if a slave was noxally surrendered by his master, and he had by acquisitions recouped the injured person for the damage done, *auxilio praetoris invito domino manumittetur*. The rule is clearly new and is not mentioned in the Digest. Its language shews some hastiness, for a person freed by the help of the Praetor *invito domino* is not properly said to have been manumitted[3]. It is a sort of happy thought of the compilers, an extension to slaves of the rule—obsolete in Justinian's time—that a *filiusfamilias* noxally surrendered can claim release from *mancipium* when he has made good the damage[4]. Even if it be understood to mean that the Praetor will compel the owner to free, the rule is still open to the objection pointed out by Girard[5] that such a man is better off than a slave who has committed no wrong, since he can compel his manumission.

(*d*) *Liberi Expositi*. The rules already stated shew that after Constantine, if an owner ordered the exposure of a child who was in fact a slave, a charitable person who picked him up had the right to rear him either as slave or as free[6]. If he took the latter course this was a case of a slave becoming free without manumission. The prohibition of exposure[7] must have been disregarded. In A.D. 412 it was provided that the previous owner had no right to recover him, if the finder formally proved the facts before the Bishop[8]. Justinian in his enactment dealing with the matter definitely contemplates the case of a slave so exposed, and declares that if anyone takes charge of him and rears him, he shall be in all cases free; and further that he shall be *ingenuus*, so that the charitable rearer has no patronal rights over him. The reason given is, lest charity degenerate into commercial calculation[9], but it may be doubted whether the new rule made for charity. A later enactment punishes the exposing owner who seeks to recover the slave[10].

(*e*) *Sanguinolenti*. The rules as to sale of young children, slave or free, have already been considered[11]. It is enough to point out that so far as the institution created true slavery, the power of redemption into *ingenuitas* involves a release from slavery without manumission. How far it did amount to actual slavery was considered in the earlier discussion.

[1] *Ante*, pp. 409 *sqq*. [2] In. 4. 8. 3. [3] Cp. *post*, p. 612.
[4] Coll. 2. 3. 1. [5] Girard, Manuel, 680. [6] *Ante*, p. 402. [7] C. 8. 51. 2.
[8] C. Th. 5. 9. 2. The wording is almost identical with part of that of the last-mentioned enactment, which is dated 38 years earlier, addressed to a different person and by a different Emperor. They are treated as the same by Haenel and Mommsen. It seems more probable that it was a reenactment, with the significant omission of the prohibitory clause. See *ante*, p. 402.
[9] C. 8. 51. 3. [10] Nov. 153. [11] *Ante*, pp. 420 *sq*.

CHAPTER XXVII.

FREEDOM WITHOUT MANUMISSION. CASES OF UNCOMPLETED MANUMISSION.

THERE are several types of case to consider.

I. *Concubina*. Justinian provided that if a man having no wife made a slave his concubine, and she so remained till his death, he saying nothing as to her status, she became free and her children *ingenui*, keeping their *peculia*, and subject to no patronal rights in the *heres*[1]. This applied only if the will contained no provisions, *e.g.* a legacy of them, shewing a contrary intent[2]. After varying legislation on legitimation[3] he further provided that if the *dominus* freed an *ancilla* and afterwards married her with written *instrumenta dotis*, the children already born should be *ingenui* for all purposes[4]. It is idle to look for legal principle under these rules.

II. Cases of *prima facie* abortive gift. We have already considered the cases in which a beneficiary could be compelled to accept, so that gifts took effect, and we shall soon consider the effect of refusal to carry out the gift after acceptance[5]. Apart from this a gift failed if the gift or instrument on which it depended failed to take effect. But cases of exceptional relief were rather numerous. The following list cannot claim completeness.

(*a*) Relief against failure to enter under the will.

(i) An *institutus* enters *ab intestato, omissa causa testamenti*[6]. The gift is good, retaining its modalities[7].

(ii) *Suus heres institutus* abstains. The gift is good if not *in fraudem creditorum*, which on such facts it is likely to be[8].

(iii) If the *heres* abstains for a price, he is compellable to buy the slave and free him[9].

[1] C. 6. 4. 4. 3. [2] C. 7. 15. 3. [3] *e.g.* Novv. 38, 74.
[4] Nov. 78. 3. [5] *Post*, p. 611. [6] 40. 4. 23. *pr.*; C. 6. 39. 2.
[7] 29. 4. 6. 10; *h. t.* 22. 1 is an apparent exception. *Quisquis mihi ex supra scriptis heres erit S liber heresque esto.* The *heres* omits and takes on intestacy. The liberty fails: its condition is not satisfied.
[8] 40. 4. 32. [9] C. 7. 4. 1. 1, A.D. 197.

(iv) A will is upset by collusion in order to defeat legacies, *etc.* All are good. Someone can appeal on the slave's behalf—himself if he can get no one. The text[1] refers to *fideicommissa*, but the rule is applicable to direct gifts. An enactment of 293[2] observes that if a will is upset by collusion the Consul will look after liberty, under the rules of Antoninus Pius. This seems to connect the rule with those as to defaulting fiduciaries[3].

(v) A testator gives a man liberty directly and *hereditas* by *fideicommissum*: the will fails owing to death of *institutus* and *substitutus*. Antoninus provides that the gift shall take effect apparently, in ordinary cases, as a *fideicommissum*, binding on the *heres ab intestato*[4].

(vi) A Jew who disinherits his Christian son is intestate by a provision of Theodosius, which Justinian does not adopt, but his manumissions are to stand[5].

(vii) The case of the *Querela* brought after five years[6].

(viii) Ulpian says that if a *hereditas* is *caduca*, legacies and liberties are good[7]. The rule is not here important except where there is a gift charged only on a person who does not take.

(ix) Where there has been undue delay in entry, and one to whom liberty was given by the will is usucapted by a third person. The liberty is protected by the Praetor, somewhat as in the case of delayed fideicommissary gifts[8].

(x) Where a will is upset by a son, whose existence was unknown to the testator, after five years from the death, slaves freed retain their liberty, at any rate in later law, *favore libertatis*[9].

(xi) One text seems to say that where a will is upset *iniuria iudicis*, liberties are good, but this text is probably corrupt[10].

(*b*) Case of judge ordering damages instead of delivery of slave. A slave is left to A to free and the *heres* does not hand him over. When A sues the judge orders damages instead of delivery. Justinian remarks on the foolishness of the judge and orders that in future, if judgment for delivery is not brought within two months of action brought, the man is to be free and *libertus* of the legatee, the *heres* paying fourfold costs[11]. He is settling ancient doubts by this slapdash piece of legislation.

(*c*) Case of *heres* failing to choose. A *heres* or other beneficiary is directed to choose and free a child of an *ancilla* who has several. He dies without having chosen, owing to his own fault. Justinian settles

[1] 49. 1. 14, 15. [2] C. 7. 2. 12. 2. [3] *Post*, p. 611.
[4] 29. 1. 13. 4; 40. 5. 42. [5] C. Th. 16. 8. 28.
[6] *Ante*, p. 568; *post*, p. 650. [7] Ulp. 17. 3.
[8] 40. 5. 55. 1. As to the possibility that he may have been only a latin, *ante*, p. 551.
[9] 40. 4. 29.
[10] 40. 7. 29. 1. Appleton, Testament Romain, 87; Krüger, Z. S. S. 24. 193; *ante*, p. 502.
[11] C. 7. 4. 17.

old doubts as to the effect by deciding that all are free[1]. Nothing is said of the case in which there is no fault. Probably his *heres* could choose[2].

(*d*) Case of *hereditatis petitio*. Where a *hereditas* changes hands by *hereditatis petitio*, Justinian enacts that the common law rule, according to which the gift fails, as the defeated possessor was not owner, is to apply only if the *petitio* is decided within one year from the death of the testator. If it is then still pending, direct gifts are good and *fideicommissa* are binding on the successor, subject to render of accounts. But if the will is a *falsum* all are of course void[3].

(*e*) Intervention of the Fisc. There is a general rule that where the estate falls into the hands of the Fisc, it must give effect to all liberties. The case will recur[4]: here it is enough to point out some cases. Where a succession is taken away for *indignitas*, and falls to the Fisc, liberty directed to be given to a slave of the *heres* will be given if the *heres* will sell him, which he need not do as he does not benefit under the will[5]. Where a will had given legacies and liberties, and failed because the testator struck out the names of the *heredes*, Caracalla decided that the Fisc, to whom the estate went, must give effect to all gifts[6].

These various solutions are the result of express legislation: they do not seem to express any legal principle other than an attempt to do equity in certain specific cases. As to give the liberty is to deprive some innocent person of what is legally his, the equity is often doubtful, and the rules express *favor libertatis* rather than anything else. The decisions give, approximately, the result that the gift, if validly made by the testator and affecting his own slave, would take effect if the testator died solvent in all cases which were at all likely to occur, subject to the limitation which has already been noted, that a *heres* was not compelled to enter, in general, for the sake of a *fideicommissum* of liberty alone[7].

III. The case of fideicommissary liberty overdue. Early in the Empire a set of rules developed, giving a slave to whom fideicommissary liberty was due, the right to apply to the Praetor to have himself declared free, if the fiduciary refused or neglected to complete the gift. The rules applied even if the gift were conditional, provided the condition was satisfied[8], or, even if it were not, if the circumstances were such that the man was entitled to his liberty nevertheless according to the rules already laid down[9].

[1] C. 7. 4. 16. [2] C. 6. 43. 3; In. 2. 20. 23.
[3] C. 3. 31. 12. [4] *Post*, p. 626. [5] 34. 9. 5. 4.
[6] 28. 4. 3. In the same case the name of one slave was struck out, but here too the Emperor decided, *favore libertatis*, that the liberty should take effect. It is difficult to justify this.
[7] *Ante*, p. 523. [8] 40. 4. 20. [9] 40. 5. 33. 1, 47. 2; *ante*, p. 496.

The earliest known legislation on the matter is the *sc.* Rubrianum, of A D 103, under Trajan It provides that if those from whom the liberty is due, on being summoned before the Praetor, decline to appear, the Praetor will on enquiry declare the claimant free, and he will then be regarded as having been freed *directo* by the testator[1] To bring the senatusconsult into operation the persons liable must have been summoned with notice—*edictis literisque*[2] The matter being an important one, *favore libertatis*, it must go before *maiores iudices*[3] Severus and Caracalla provide that if the liberty is not really due the Praetor's decree is a nullity[4], in other words the magistrate is not trying the question whether the gift is valid, but only whether, assuming liberty due, the fiduciary has done his duty The rule applies to all fiduciaries, *heres* or third party[5] On appearance before the Praetor the fiduciary is given the chance to free there and then, so as to avoid the praetorian decree and its privative results[6] The *sc* Rubrianum is an imperfect piece of legislation since it does not provide for the case of inability from any cause to appear, and further, in that it does not cover all cases of fideicommissary liberty Further enactments deal with these matters, though the Rubrianum remains the principal statute

The *sc* Dasumianum, of unknown date, but apparently earlier than the Iuncianum[7], provides for the case in which the failure to appear is not blameable, and enacts that in such cases the freedom shall take effect on the Praetor's decree as if the man had been duly freed *ex fideicommisso*[8] Hence follow a number of distinctions as to what is and what is not absence *iusta causa*, the result of the difference being usually expressed by saying that if the fiduciary is absent *iusta causa* he does not lose his *libertus*[9], while in the other case he does[10] A person who hides, or simply refuses to come to the tribunal, or who being present, refuses to free, comes under the *sc* Rubrianum[11], as does one who imposes hindrances and delays[12] Absence *iusta causa* includes any reasonable ground of absence, not necessarily on public affairs[13]

[1] 40 5 26 7 [2] *h t* 26 9

[3] And thus an *arbiter* need not decide a reference on such a matter 4 8 32 7 No local or personal privilege bars the *sc* 40 5 36 2 The *sc* Articuleianum (A D 128) provided that the *Praeses* might try the case though the *heres* was of another province, *h t* 51 7 Marcus Aurelius provided that like many other *cognitiones* it might be tried on holidays 2 12 2

[4] 40 5 26 8 [5] *h t* 26 10 [6] 40 5 51 9, C 7 4 11

[7] *Post* p 613 The Rubrianum seems to deal only with wrongful delay, the Iuncianum deals with both cases, the Dasumianum creates the distinction and seems thus to have come between the others

[8] 40 5 36 *pr* 51 4 [9] 40 5 30 3 33 1 36 *pr*, 1

[10] C 7 4 15 [11] 40 5 22 2, 28 1, 49, 51 9

[12] C 7 4 15 Justinian

[13] Residence at a distance and consenting, 40 5 28 5, infancy, lunacy captivity, important affairs great danger to person or property, being a *pupillus* with no *tutor* or whose *tutor* is detained in one of these ways, *tutor* refusing to act being represented by *procurator h t* 30 1 2 3, 7, *h t* 36 *pr*, 1 Some are directly under the *sc* some by imperial rescript and some by juristic extension *h t* 30 3 4 5

If the gift was conditional and the fiduciary has prevented fulfilment of the condition, he loses his *libertus* as for latitation[1] A senatusconsult declares the Praetor entitled to decree freedom, if the *rogatus* has died without successors, as also if there is a *suus heres* who abstains, or a *heres* under 25 who having accepted is *restitutus in integrum*, and in all these cases the man is, for obvious reasons, a *libertus orcinus* of the original testator But the Praetor must not act in such a case till it is quite clear that there will be no *heres* or *bonorum possessor*[2]

The *senatusconsultum* Iuncianum, of A D. 127, under Hadrian, provides for the case in which the slave to be freed did not belong to the testator In any such case if the fiduciary *adesse negabitur*, the Praetor declares the slave free as if he had been freed *ex fideicommisso*[3] The case primarily contemplated by this senatusconsult is no doubt that of a slave of the fiduciary[4], but it expressly covers any case in which any person is under a *fideicommissum* to free any slave other than a slave of the *hereditas*[5] Thus the *heres* who has bought a slave whom he was under a *fideicommissum* to free is within its terms[6] It draws no distinction as to whether there is or is not any just ground for the absence a fact which is no doubt due to the fact that any such slave could not under any circumstances be a *libertus orcinus*[7]

If the slave entitled to freedom is alienated, we know that he does not lose his right to be freed[8] Accordingly these provisions apply also[9] Where the fiduciary sells the slave, and on the slave's petition, he appears, but the vendee *latitat*, the Rubrianum applies, since he who should free absents himself[10] it is the buyer who is under a duty to free So when the *rogatus* is compelled by death or *publicatio* to pass the slave on to another, Ulpian holds that the "constitutions" apply, lest the conditions of liberty be made worse[11] This does not refer directly to these senatusconsults, but to the rules, shortly to be considered, as to whose *libertus* the freedman will be But it assumes the application of the senatusconsults Julian is quoted by Pomponius as discussing a difficult case A *heres*, directed to free a certain slave and to hand over the *hereditas* to X, hands it over without freeing On such a will the better view is (so say Octavenus and Aristo, and Julian is in substantial accord), that the slave did not constitute part of the *hereditas* within

[1] 40 5 33 1 A man was to be free on rendering accounts If the *heres* was wilfully absent, the man was declared free, the *heres* losing the *libertus* If absent *ex iusta causa* the man would be declared free if the accounts satisfied an *arbiter*, *h t* 47 2

[2] *h t* 30 9—14 [3] *h t* 28 4 [4] *h t* 51 8

[5] *h t* 28 4 [6] *h t* 51 10

[7] A text set down to Julian says that the *sc* applies if the direction is to free a *servus alienus* or a common or fructuary slave, *h t* 47 1 As to the latter cases in view of the other rights the rule is probably Tribonian s

[8] *Ante*, p 524

[9] The jurists are not always at the pains to refer each case to its appropriate *sc*

[10] 40 5 28 *pr* [11] *h t* 26 *pr*

the testator's meaning, and therefore if there has been nothing but a general handing over of the *hereditas*, the *heres* is still owner and can free, being therefore liable to the proceedings under the senatusconsults. If, however, the slave has been long enough in the possession of the transferee to have been acquired by usucapion, then the transferee is owner and is bound to free, the rules applicable being those just laid down in the case of a buyer[1].

The rules which determine whose *libertus* the man will be are not altogether clear. In the case of *servus hereditarius*, apart from alienation, if the fiduciary is absent without reasonable cause, the man is *libertus orcinus*[2]: if the fiduciary was not in fault he does not lose the *libertus*[3]. If the slave was not the property of the testator, then, apart from alienation, he is the *libertus* of the fiduciary, in fault or not[4].

Alienation creates difficulty. There are several allusions to constitutions of Hadrian, Antoninus Pius and Marcus Aurelius affecting the matter, but the scope of these enactments is not clear[5]. If the *rogatus* is dead, then so far as *servi hereditarii* are concerned his *heres* assumes his duties[6]. But if it was not a *servus hereditarius* and the *rogatus* dies (or is *publicatus*) we are told that the constitutions apply, with the result that when the man is declared free he will be *libertus* (*orcinus*) of the *rogatus* as if he had freed[7]. If the *rogatus* dies without a successor the liberty is still good[8]. Paul asks the question whose *libertus* he will be, and answers, or is made by the compilers to answer, by reference to the *sc.* Rubrianum, applicable in strictness only where he was in fault, that the man is a *libertus orcinus* of the original testator. This is clearly *ex necessitate*[9].

It was clear law, apart from these constitutions, that the *rogatus* must not do anything to make the slave's position worse[10], and there are texts discussing this in relation to sale. Julian lays it down[11] that one conditionally so freed ought not to be sold without a condition for reconveyance on arrival of the condition. Pomponius says[12] that one to whom such liberty is left is not to be sold without his consent to be the *libertus* of another rather than of the *rogatus*. While Ulpian says[13] that such a slave can be sold before *mora, cum sua causa*, Marcian tells

[1] 40. 5. 20. Where there has been no entry, *fcc.* are not in general binding on successors *ab intestato*. Exceptions, *ante*, p. 609.
[2] 26. 4. 3. 3; 40. 5. 26. 7, 33. 1, 49; *C.* 7. 4. 15, *etc.*
[3] 40. 5. 30. 3, 36. *pr.*, 51. 4. In *h. t.* 30. *pr.* it is said that Caracalla provided that if the Praetor declared absent *iusta causa* one in fact dead, the decree stood for the benefit of his *heres*, whose *libertus* the man would be.
[4] 40. 5. 5, 28. 4. This assumes that he has acquired the slave, if not his own, *ante*, p. 531.
[5] 19. 1. 43; 40. 5. 24. 21, 26. *pr.*, 30. 12, 30. 16; *C.* 7. 4. 4. [6] 40. 5. 20, 23. 1.
[7] *h. t.* 26. *pr.* If the man vests in the Fisc effect is given to the trust, *ante*, p. 611, *post*, p. 626.
[8] 40. 5. 5. A *sc.* under Hadrian.
[9] 40. 5. 30. 9—12. The text speaks of the rule as *ex constitutione*, but it is the *scc.* which are in question.
[10] *Ante*, p. 525. [11] 40. 5. 47. 3. [12] *h. t.* 34. *pr.* [13] *h. t.* 45. 2.

us[1] that one to whom liberty is due cannot be alienated to another so as to bar his liberty or make his position worse[2].

How far these texts are influenced by the constitutions is not clear: so far as these are known they do not nullify the sale, but merely enact that the man may choose whether he will be freed by the buyer or the *rogatus*; if by the latter, he must be bought back for the purpose[3]. Pius added that if already freed he could claim to be the *libertus* of the *rogatus*[4]. But the constitutions seem to have used general language which the jurists interpreted widely. They were to apply though the sale was while the liberty was still conditional, and though the person who alienated was not the original *rogatus*, but his successor, and though the man had not been the testator's[5]. In considering the ultimate position it must be remembered that the request to be freed by one or the other brings the *senatusconsulta* into operation. If having belonged to the testator he desires to be freed by the *rogatus*, and he makes default, or the buyer will not reconvey, the Rubrianum applies and the man will be *orcinus*[6]. If he was not *hereditarius* it is the Iuncianum which applies and whether there is default or not he will be the *libertus* of the person he chooses[7]. The fact that in a given case he can claim to be *orcinus* does not prevent him from asking to be freed by the *heres* if he prefers[8]. If the *rogatus* dies without a successor, after the sale, the man must be the *libertus* of the vendee in any case, since otherwise he would lose both the man and his price, as he has no remedy over[9]. One text observes[10] that the choice did not exist if the testator did not wish it, but this is probably Tribonian[11].

In considering what is involved in the question whose *libertus* the man is, it must be remembered that in all cases of fideicommissary gift the patron has but a truncated right. The liberty is, as we have seen, somewhat independent of the fiduciary[12]. Thus the fiduciary manumitter has no personal patronal rights, except that he cannot be *in ius vocatus*[13]. Hadrian provides that he cannot exact any *operae*[14]. A person so freed can plead excuses from *tutela* as against the patron[15].

[1] *h. t.* 51. 3. [2] As being potentially free, see also *h. t.* 26. *pr.*
[3] *h. t.* 15, 24. 21.
[4] *Ib.* The texts suggest that they used language to the effect that if he wished he might be free as if it had been done as directed by the will. See *h. t.* 26. *pr.*, 30. 12.
[5] 19. 1. 43; 40. 5. 10. 1, 24. 21, 26. *pr.* [6] 40. 5. 28. *pr.*
[7] *h. t.* 29, 51. 10. [8] *h. t.* 10. 1, Pothier, *ad h. l.*
[9] *h. t.* 25.
[10] *h. t.* 24. 21. The text contains another interpolation or corruption apparently giving the *rogatus* the choice.
[11] It should be added that if the *rogatus* has handed him on *ex* Trebelliano, this is for this purpose an alienation. But if there has been a mere general transfer of the *hereditas*, *ex* Trebelliano, however formal, this would not, on construction, include a man so freed, so that in the better view there was no alienation till usucapion, *h. t.* 20, 23. 1.
[12] Illustrated by the rule of Caracalla that the fiduciary can make a legacy to such a man with no gift of freedom, *h. t.* 30. 15.
[13] 2. 4. 9; 27. 1. 24; Vat. Fr. 225. [14] 38. 1. 7. 4. *Ante*, p. 525.
[15] 27. 1. 24; Vat. Fr. 225.

On the other hand the fiduciary has *iura in bonis*[1] and, what is a consequence of this, *tutela*[2]. If he loses the *libertus*, he loses all these rights[3], except in so far as he may inherit them as *heres patroni*[4].

The matter is more complicated if there are several *heredes*, some or all of whom are *rogati*. If several are *rogati*, and they are all in default, the Rubrianum applies[5]. If of the *rogati* some are present and some absent, the senatusconsult (presumably the Dasumianum) requires the Praetor to pronounce which are in default[6]. The slave will then be the *libertus* of those not so pronounced, as if they alone had been *rogati*[7], the shares of the defaulters vesting in the others[8]. Where one *rogatus* was absent with cause, and one was dead without any successors, it was provided by Marcus Aurelius and Verus that the slave would be declared free as if duly freed by both[9]. This is a curious decision in view of the fact that if the *heres* who died *sine successore* had been alone, the slave would have been a *libertus orcinus*, *i.e.* of the testator[10]. As, however, that rule was clearly adopted *ex necessitate*, it may have been thought that the other rule met the testator's intent more nearly in the present case, since the effect would be, not to make a share of the *bona* vest in the Fisc, but to vest it all in the other owner. If there are several *heredes*, of whom some are *rogati*, and these make default, the rules determining to whom the *libertus* belongs are the same, but all the *rogati* are nevertheless liable to those not *rogati* for their shares of the slave's value, either by the *iudicium familiae erciscundae* or by a *utilis actio*[11]. If one of the *heredes non rogati* is an *infans*, then, even though there be no latitation, there is the difficulty that the *infans* cannot sell his share. For such a case it is provided by the *sc.* Vitrasianum, and a later rescript of Pius, that the slave is to be valued, and the shares of the *non rogati* are to pass automatically, the *rogati* being bound to the others to the extent of their shares, as if there were a judgment against them[12]. Where a man has two *heredes* and three slaves and directs the *heredes* to free whichever two they like, and one *heres* makes his choice, but the other wrongly refrains, Papinian lays it down that these two can be declared free as if the one *heres* had been able to free them, while if one slave dies the

[1] Vat. Fr. 225. [2] 26. 4. 3. *pr.*, 1. [3] *h. t.* 1. 3, 3. 3.
[4] Even thus he may lose *iura in bonis* if he wrongs the man in serious ways, as a patron would in like case, 40. 5. 33. 1; 37. 14. 10. *pr.*, 1.
[5] 40. 5. 28. 2. [6] *h. t.* 22. 2. [7] *h. t.* 28. 3.
[8] *h. t.* 1. Pius enacts that a *rogatus infans* is absent with good cause, *h. t.* 30. 5. He says also that the presence of *infans* makes the man the *libertus*, not of all, but only of those present or absent *iusta causa*. The point is that as *infans* could not free, this would prevent actual manumission by the co-owners, and thus it could not strictly be said that they had wrongfully abstained from freeing. And a Senatusconsult had expressly enacted that where the existence of an *infans rogatus* barred the manumission the slave was to be free, in terms so general that it might have been thought to make attendance needless. Hence the rescript which negatives these otherwise strong arguments, *h. t.* 30. 1.
[9] *h. t.* 30. 13. [10] *Ante*, p. 614. [11] 40. 5. 49.
[12] 40. 5. 30. 6; cp. *h. t.* 51. 11.

others will be declared free, whatever the cause of non-assent of the other *heres*[1].

One case remains unprovided for. If a legatee is directed to free a *servus hereditarius* but has not yet become owner of him and is willing to free, while the *heres latitat*, the Praetor can do nothing on the slave's petition: the *senatusconsulta* apply only to failure by the person bound to free. Accordingly there is no resource but to petition the Emperor[2].

The system was apparently remodelled by Justinian, in a Novel. He provided that if the *heres* or other person charged failed to carry out any direction for one year from monition by a *iudex*, other beneficiaries in an order prescribed by the Novel might enter and take some or all of what was given to him, giving security to carry out the direction[3].

It remains to consider the effect of the decree on intervening events. In effect the liberty relates back. Everything the slave has acquired to his master after *mora* must be accounted for to the freedman[4]. Both the texts which say this are from Paul: the second deals with a legacy to the slave. They are quite general in their terms: one must, however, suppose an *exceptio doli* available where the acquisition was plainly *ex re domini*[5]. Where monthly payments were to be made *manumissis*, and the slave became free *absente herede*, Scaevola held that the payments were due only from the actual freedom. But the writer is clearly treating the matter as purely one of construction[6].

In the case of an *ancilla* difficult questions arise as to the status of her child born before the Praetor's declaration. On strict principle he is a slave, but there are progressive relaxations of this rule, dating apparently from Antoninus Pius and continuing till the age of Justinian. The general effect of them is, as Paul can already say, that a child born after there was *mora* in giving fideicommissary liberty is an *ingenuus*[7]. If he was born before the liberty was due, *e.g.* while a condition was unsatisfied, or a day not yet reached[8], or it was charged on a pupillary substitute, and the *pupillus* is still alive, the child is a slave and there is in general no relief[9].

The first difficulty in dealing with the rules, is in connexion with the word *mora*. It appears to contemplate what is sometimes called

[1] *h. t.* 22. 1.
[2] *h. t.* 26. 10, 11, 27. So the *scc.* did not apply where the fiduciary was directed to buy and free but did not buy. But he could be compelled to buy and when this was complete the *scc.* might be applied. *Ante*, p. 531.
[3] Nov. 1. 1. Not set out in detail, since it is far from clear that it was intended to supersede these provisions.
[4] 31. 84; 48. 10. 22. 3.
[5] Ulpian illustrates the retroactivity: where a *liberandus* under 25 was cheated, after *mora*, he could get *restitutio in integrum*, 4. 4. 5.
[6] 36. 2. 27. 1. [7] P. 2. 24. 4.
[8] C. 7. 4. 3; D. 40. 5. 26. 5. But see *post*, p. 618. [9] 40. 5. 26. 5.

mora ex persona[1], *i.e.* not only is the freedom due, but the woman has actually demanded it. In this case it seems clear that the child will be *ingenuus*[2]. If the woman has not demanded it there is some difficulty on the texts. If she is a minor it is clear that she has some excuse for not having asked: in such a case the mere elapsing of the time is sufficient *mora*, and the child is *ingenuus*[3]. But where she is not a minor the majority of the texts lay down the rule that if there is delay and no demand made, the child is born a slave but the mother can claim, apparently by real action, to have the child handed over to her to be freed; the idea being that the *heres*, not having done his duty, ought not to have the benefit of the *libertus*[4]. But some of the texts go further. Ulpian, in a text in which he has said that on such facts they must be handed to the mother to be freed, remarks that since fear, or ignorance, *etc.*, may deter a woman from asking, there ought to be some relief in such a case, and then repeats the rule. But he then proceeds to cite a case which will be discussed later, and, on facts in which nothing is said of any demand by the mother, declares the children *ingenui*[5]. This is not perhaps to be regarded as laying down any different rule. But Marcian[6], after laying down the rule that if born after demand they are *ingenui*, adds that there are constitutions which lay it down that the child is *ingenuus* if born at any time after the liberty ought to have been conferred, and adds in somewhat clumsy latin that this is no doubt the right view, since liberty is a matter of public interest, and the person liable ought to offer it. It seems hardly necessary to give reasons for following the rule laid down in *constitutiones*, and it is not unlikely that these remarks emanate from Tribonian. We are told in the same extract[7] that in the opinion of Severus, Pius and Caracalla, it is immaterial whether the delay was wilful or accidental, and it is possible that there may have been constitutions, now lost, putting the case of wilful delay on the same level as that of failure on demand.

Even where the liberty is not in strictness due there may be relief in some cases. Where an *ancilla* was pledged and the owner, by will, ordered the *heres* to free her when the creditors were paid, the *heres* delayed paying, and the creditors sold children born after the debts ought to have been paid. Severus and Caracalla provided, following Antoninus Pius, that the price was to be repaid to the buyer, and

[1] Nothing else is properly called *mora*, Girard, Manuel, 646.
[2] 38. 16. 1. 1; 40. 5. 26. 1, 2, 4, 53; C. 6. 57. 6; 7. 4. 3. Pius, Marcus Aurelius, Verus and Caracalla.
[3] 40. 5. 26. 1, Ulpian's deduction from a rescript of Severus to the effect that mere delay in paying a *fc.* of money to a minor was *mora* without demand; cp. 31. 87. 1; 22. 1. 17. 3; C. 2. 40. 3. Accarias, Précis, § 714.
[4] 40. 5. 13, 26. 1, 55. 1; C. 7. 4. 4, retouched by Justinian.
[5] 40. 5. 26. 2.
[6] *h. t.* 53.
[7] *h. t.* 26. 4.

they were to be *ingenui* as if the mother had been freed[1]. It is not said that the mother applied for the freedom. Where the *heres* was directed to buy and free an *ancilla cum filiis*, and the *ancilla* and her children were valued, and another child was born before the price was paid, Scaevola held that if the *heres* was *in mora*, he had to buy and free the last child also[2]. Here as the *ancilla* is to be bought and the purchase is not yet complete, the *senatusconsulta* do not yet apply: it is presumably for this reason that notwithstanding the *mora*, which seems to imply demand, the child is not *ingenuus*. Marcian tells us that if the liberty is not due and this is due to the delay of the *heres*, whether intentional or not, any child born in the meantime is to be handed to the mother to be freed[3]. The case he is dealing with is delay in entry, and he adds that if there was no wilful delay on the part of the *heres*, but he did not know that he was *heres*, even in this case the child is to be freed, but here as the *heres* is in no way to blame, he may free the child himself and so acquire a *libertus*[4]. Ulpian quotes a rescript of Severus and Caracalla to the effect that if the will or codicil is opened only *post quinquennium* from the death, and there is a *fideicommissum* of liberty to a woman, children born meanwhile are to be handed over to their mother to be freed, and he adds that this, and the rescript of Antoninus Pius, already mentioned[5], shew that the emperors did not mean even accidental delay to prejudice the freedom of the child[6]. One would have expected the *heres* to be allowed to free in this case[7], as the delay is accidental, but it must be noted that the case under discussion is one in which entry was postponed under the *scc.* Silanianum and Taurianum[8], and it may well have been thought that the *heres* ought not to obtain an incidental advantage from the operation of a statute which had no such aim[9].

If the mother (or her successor) having received the child, fails to free, she can be compelled to do so[10]. Nothing is said as to the means. As she is compelled actually to free, it is clear the *senatusconsulta* are not considered to apply, and indeed she hardly comes within the notion

[1] *h. t.* 26. 2.
[2] *h. t.* 41. 5.
[3] *h. t.* 53, 55. *pr.*
[4] Marcian applies a similar rule to direct gifts, though he observes that no application is needed to put the Praetor in seisin of the case, but he thinks the Praetor ought to allow a similar claim to the mother here, *h. t.* 55. 1. His basis is a statement of Marcellus that a slave directly freed, and usucapted before entry, has his liberty preserved by the Praetor, though he may be to blame, while in the present case there is no blame, *ante*, p. 291.
[5] 40. 5. 26. 2.
[6] *h. t.* 26. 3, 4.
[7] *Arg.*, *h. t.* 55. *pr.*
[8] 29. 5. 13; *ante*, p. 96.
[9] Haymann, Freilassungspflicht, 46, holds, largely on grammatical evidence, that many of these texts have been altered (*e. g.* 40. 5. 13, 26. 3, 54, 55). In some of them rehandling is clear, but the inference which he appears to draw, *i.e.*, that the rules as to the handing of the child to the mother are almost entirely due to the compilers, seems rather too drastic. The distinctions are rational and the story told in the texts is in the main consistent.
[10] 40. 5. 54.

of one bound to free under a *fideicommissum*. The child is not one to whom the *fideicommissum* referred[1].

In the same text[2] Maecianus adds, apparently without any authority, that if the mother refuses to receive the child, or is dead without any successor, a reasonable way out of the difficulty is that the *heres* should free. The case of a child in the possession of the *heres* is here considered. Nothing is said as to the mode of compulsion, or indeed on the question whether he can be compelled. Presumably here too the Praetor's order would come into play.

The rule, that, in some cases, these children were *ingenui*, brought with it the question whether they had rights of succession to their mother and father. As to the mother, the ancients doubted[3]. Ulpian, in a text probably genuine[4], takes a favourable view. He holds that, just as the issue of a *captiva*, returning with her, could succeed to her by a rescript of Severus and Caracalla, *quasi volgo quaesiti*[5], so persons declared *ingenui*, under the *sc.* Rubrianum, ought to succeed to their mother. The ground of analogy is apparently that in both cases they are alike freed from slavery by the operation of a rule of law. Justinian settles the doubt by providing[6] that, saving the right of those otherwise entitled under the *sc.* Orfitianum, there are mutual rights of succession under that senatusconsult and the *sc.* Tertullianum. But what of succession to the father? In another text Ulpian appears as still arguing from the case of *captivitas*, and holding that if both father and mother are entitled to freedom and there is *mora* affecting each, and thereafter a child is born, he is *suus heres* to his father[7]. His language suggests that he would hold this *a fortiori* if the father had been an ordinary *civis—etsi pater eiusdem sortis fuerit...ipseque moram passus sit.* In that case the analogy would seem to be with the case of children of whom a woman had been pregnant at the date of captivity. The rule is interesting as shewing that even slaves were capable of *affectio maritalis.*

IV. *Addictio Bonorum Libertatium Conservandarum Causa.* The rules of this institution were of gradual development, beginning with Marcus Aurelius and completed by Justinian. The general principle is that if an inheritance is refused an applicant may have the goods assigned to him on giving security to the creditors: he then steps into

[1] The rules of transfer *ut manumittatur* might have been applied, but the text of Maecian was probably written before Marcus Aurelius framed the rule which, with connected legislation, ended the rather chaotic state of the law on these points.
[2] 40. 5. 54. [3] C. 6. 57. 6.
[4] 38. 17. 1. 3.
[5] 49. 15. 9, 25; C. 8. 50. 1; *ante*, p. 308. [6] C. 6. 57. 6.
[7] 38. 16. 1. 1.

the position of a *bonorum possessor*, and any liberties given by will or codicil take effect[1].

By the rescript of Marcus Aurelius, such an application could be made, and security given, where there was no successor and the goods were in danger of sale by the creditors, if liberties were given in the will, by any one of the slaves who were to have freedom. The right was extended, apparently by Gordian, to *extranei*[2]. Justinian allowed even slaves not entitled to freedom to make the application[3]. It seems at first to have been allowed only if there were liberties, direct or fideicommissary, by the will, but to have been extended by juristic interpretation to the case of an intestate imposing liberties on the *heres ab intestato*, by way of *fideicommissum* in a codicil[4].

In later law it was enough if there were liberties given *mortis causa* or even *inter vivos*, if there was any possibility that they might be set aside as being in fraud of creditors: the goods might be *addicta* so as to avoid raising this question[5].

If some of the liberties were simple and others conditional or *ex die*, the *addictio* could proceed at once, the deferred liberties taking effect only if and when the day or condition occurred[6]. It could not be made if there were no liberties[7], and the older view seems to have been that if all the liberties were conditional or *ex die*, nothing could be done till there was one capable of taking effect. But the text which states this rule, at least for *dies*, proceeds to argue the matter, and comes ultimately to the conclusion that it may proceed at once. Clearly where no liberty could yet take effect there could have been no present *addictio* till after Gordian, (if it was due to him,) had authorised *addictio* to *extranei*. As Ulpian, the writer of the text, was dead before Gordian came to the throne, and the text contradicts itself, it is probable that the compilers had a hand in it as it stands[8], but it must not be inferred from this that they were making a new rule. If *addictio* to *extranei* really dates from Gordian, they may merely have incorporated a long established practice. On the other hand the origin of the rule that there could be *addictio* to *extranei* is obscure. The remark is added at the end of Gordian's constitution, the main part of which is concerned with addiction to a slave[9]. But in one of Justinian's constitutions, it is said[10] that under the constitution of Marcus Aurelius there could be *addictio* to an *extraneus*. And the rescript itself is addressed to

[1] Justinian observes that it benefits both the slaves and the deceased, as the goods will not be sold, In. 3. 11. 2. He might have added the creditors.
[2] In. 3. 11. 1; D. 40. 4. 50; C. 7. 2. 6.
[3] C. 7. 2. 15. 5.
[4] In. 3. 11. 3; D. 40. 5. 2. The language of C. 7. 2. 15. 5 makes it unlikely that this extension is due to Justinian.
[5] In. 3. 11. 2, 6. [6] 40. 5. 4. 5. [7] In. 3. 11. 6.
[8] 40. 5. 4. 5. [9] C. 7. 2. 6. [10] *h. t.* 15.

Popilius Rufus[1] and authorises *addictio* to him. Such a name denotes a freeman, and it is only Theophilus[2] who tell us he was a slave. Moreover where no one was yet entitled to freedom, it is difficult to see how Ulpian can have had any doubts as to the impossibility of *addictio*, unless *addictio* to *extranei* was already admitted.

The first effect of the *addictio* was to prevent *bonorum venditio*, and it might be made either after security had been given to the creditors, or conditionally on security being afterwards given[3]. Strictly, as Severus interpreted the rescript, there could be no *addictio* if the goods had been already sold by the creditors[4]. Ulpian appears to have suggested a more liberal view. He says that when a creditor has sold the slaves, one to whom fideicommissary liberty was due can get relief against the *heres* only *ex iusta causa*[5]. This may not refer to our case: the language does not suggest *bonorum venditio*, and the allusion may be to sale under a pledge, or seizure under a judgment in the life of the testator. But he must have held a broad view in our case, for Justinian, expressly following him, provided that *addictio* might be allowed within one year after the sale[6]. The *addictio* is allowed only where it is certain that there is no successor either by will or *ab intestato*[7]. If a *heres* who has refused is granted *restitutio in integrum*, the *addictio* at once becomes void, but, liberty being irrevocable, those gifts which have already taken effect stand good[8]. Conversely if a *heres* has accepted but is afterwards *restitutus*, there may be *addictio*[9]. Even though the *heres* is a *suus*, and therefore, in strictness, must be *heres*, still, if he has abstained, there may be *addictio*[10]. Here direct liberties take effect *ipso facto*, so that it is only fideicommissary gifts which need the *addictio*[11], except that even where the gift is direct, the *addictio* avoids the question whether it is in fraud of creditors[12]. Direct liberties take effect immediately on the *addictio*: all others must be carried out by the addictee[13].

The security which must be given in all cases must be for the debt and interest[14]. The presence or consent of the slaves affected is not necessary[15]. If the *addictio* is to two, they will have the rights and liabilities in common. They will both have to free those in favour of whom there is a *fideicommissum*, and the *liberti* will be common[16].

Upon the rule that all the liberties take effect, there is the restriction that if the testator was a minor under 20, the liberty will not take effect *nisi si fideicommissam: haec enim competeret, si modo potuit*

[1] In. 3. 11. *pr.*, 1. [2] Theoph., *ad* In. 3. 11. *pr.* [3] 40. 5. 4. 10.
[4] C. 7. 2. 15. 1a. [5] 40. 5. 52. [6] C. 7. 2. 15. 1.
[7] 40. 5. 4. *pr.*; In. 3. 11. 4; C. 7. 2. 15. *pr.* [8] 40. 5. 4. 2; In. 3. 11. 5.
[9] 40. 5. 4. 1. [10] In. 3. 11. 5.
[11] The case in 40. 5. 30. 10 is one in which there was a *fc.* binding the testator.
[12] In. 3. 11. 6. [13] 40. 5. 4. 7; In. 3. 11. 1.
[14] 40. 5. 4. 11. Any form of security may suffice, and the *iudex* must summon the creditors to nominate one to receive it on their behalf, *h. l.* 8, 9.
[15] *h. l.* 3, 4. [16] *h. l.* 23. *Familiae erciscundae, inter se.*

causam probare minor...si vivus manumitteret[1]. This is somewhat obscure: the meaning is probably, as has already been said, that it would stand good if the minor could have freed *inter vivos*[2]. If a gift of liberty were conditional on payment, simply, or to the *heres*, payment might be made to the addictee, but if it were in favour of a third person, the payment must still be made to him[3]. If liberty was to be given to slaves of a third person, the addictee must buy and free them. Even though legatees were to free, and the legacy of course failed, the addictee must free[4].

The addictee will be the tutor of any minor slave so freed[5]. The constitution provides that those to whom direct freedom was given will be *liberti orcini*, except where the addictee, at the time of taking the *addictio*, makes it a condition that the slaves shall be his *liberti*. They will then be his[6], and this, by interpretation of the constitution, without any act of manumission by him[7]. But though these and, in any case, those freed by him, are his *liberti*, he cannot impose services on them, since they are not exactly freed voluntarily by him[8].

The main text which tells us that on *addictio* gifts of liberty in fraud of creditors take effect, comes to that conclusion only after argument[9]. It remarks that in favour of this view there is the fact that the addictee has the facts before him, and it adds some obscure remarks as to the effect where the goods pass to the Fisc[10], which will be considered shortly. Other considerations leave no doubt about the rule. No text says or suggests that they do not. Such gifts are declared void in the interest of the creditors[11]. Here they do not suffer. The *heres* himself may not dispute the gifts[12]. We are told that *addictio* bars the action on fraudulent alienation, to which the present case is very near akin, and the reason assigned is *ut rata sint quod (testator) gesserat*, which covers this case[13]. Moreover we are told that the *addictio* had precisely the effect of avoiding the question whether such gifts were valid or not, which it would not do unless it confirmed them all[14].

The exact position of the addictee is not quite clear on the texts. We are told that he is assimilated to a *bonorum possessor*, and that the rights of the deceased, even the *iura sepulchrorum*, pass to him in the

[1] *h. l.* 18.
[2] *Ante*, p. 541. Justinian's changes as to age must be borne in mind, *ante*, p. 555.
[3] 40. 5. 4. 6. [4] *h. l.* 15, 16; probably both late developments.
[5] 40. 5. 4. 14. He would be a latin before Justinian. As to *tutela* of latins, G. 1. 167.
[6] 40. 5. 4. 12; In. 3. 11. 1.
[7] 40. 5. 4. 13. Justinian's recital of the rescript of Marcus makes it appear that the slaves must consent in this case (In. 3. 11. 1) and the Digest text suggests the same. This may be genuine but it is rather in Justinian's way of thought.
[8] 38. 1. 13. 1. [9] 40. 5. 4. 19.
[10] To the effect that if the goods had gone to the Fisc, such liberties would have failed.
[11] 40. 7. 1. 1; 40. 9. 10; *ante*, p. 565.
[12] C. 7. 16. 7. As to the fact that they are void though *heres* enters and creditors do not suffer, *ante*, p. 565.
[13] 42. 8. 10. 17. [14] In. 3. 11. 6.

circumstances in which they would pass to a *bonorum possessor*[1]. His remedies against debtors are thus indicated. We are also told, by Ulpian, that he can be sued on his *cautio*, but that the better view was that he can be sued only thereon, and not by the *actiones hereditariae*[2]. Elsewhere we are told, also by Ulpian, that, *plerumque*, the creditors have *utiles actiones* against him[3]. This might conceivably mean merely that creditors other than the one to whom the *cautio* was given might be admitted to sue on it, and thus not be exactly in contradiction to the other statement of Ulpian. But it is more likely that it is a contradiction, and that it means that creditors could sue him on their claims, but only by *actiones utiles*. This development would be so much on the common lines as to be almost inevitable. It agrees with what is now the accepted view as to actions against the *bonorum emptor*[4]. There is no reason to accuse Ulpian of contradicting himself. This particular text was originally written by him of an entirely different person—the *curator bonis datus*[5]. It is the compilers who apply it to the present case, and in all probability they are responsible for the word *plerumque*. But there is one respect in which the position of the addictee differs from that of the *bonorum possessor*. The title of the latter is purely praetorian: the addictee holds under an enactment of the Emperor. His title therefore is good at civil law. So far as obligations are concerned this is not very material, since these are not transferable in any case at strict law. But as to property it is important. For if the addictee had only a bonitary title he could not free so as to make the slave more than a latin, till the period of *usucapio* had elapsed.

Justinian observes in his Institutes[6] that he has made a complete enactment reorganising and completing the institution. Some of the changes made by this enactment[7] have been stated, but it will be well to set out its gist in a systematic form. It provides:

(i) In accordance with Ulpian's suggestion, there may be *addictio* even after the goods are sold, within one year[8].

(ii) Securities must be given for the debts and the liberties[9]. This is the first appearance of security for the latter: in the other texts there is no sign of it. Probably it was not necessary, there being the same remedies against the addictee as against any other person bound by *fideicommissum*[10]. The security for debts was given as we

[1] 40. 5. 4. 21; cp. 47. 12. [2] 40. 5. 4. 22. [3] 40. 5. 3.
[4] Lenel, Ed. Perp. § 218. [5] Lenel, Ed. Perp. § 224. [6] In. 3. 11. 7.
[7] C. 7. 2. 15.
[8] *h. l.* 1. Justinian remarks that the *actio* Pauliana has made buyers familiar with a rule of rescission within one year, 42. 8. 6. 14, *etc.*
[9] C. 7. 2. 15. 1a.
[10] It is possible that the rules as to conveyance *ut manumittatur*, framed by the same author, were applied.

have seen[1] to a nominated creditor, but it is not likely that he would be burdened with the duty of looking after the liberties. Probably in this case the security, if any was really needed, was given to a *publica persona*, a *tabellio* or the like.

(iii) If security is given for all the liberties, *addictio* may be made, if the creditors agree, on security for only a part of the debts[2].

(iv) A slave may refuse the liberty. He will then be the slave of the applicant, but the *addictio* will proceed for the benefit of the others[3]. If all refuse there will be apparently no *addictio*. Justinian seems first of all to allow a slave to refuse the liberty and then to discourage his taking advantage of the right by providing that if he refuses he shall have for a master, *forsitan acerbum*, the man whom he has refused to have as patron.

(v) There may be *addictio* on an undertaking to free only some of the slaves. But in this case if the estate proves solvent, all must still be freed[4]. It seems thus that if all debts are secured, some only of the liberties may be given, and if all the liberties are secured, some of the debts, but both relaxations cannot occur together[5].

(vi) If several apply together they get *addictio* in common, giving security in common both for debts and liberties[6]. If they apply at different times, the *addictio* will be made to him who first, within the year, gives security for all the debts and liberties. On this matter the text says there had been doubts.

(vii) If there has been a grant to one who promised to free some and a later appears, whose undertaking applies to all, or to more than the first provided for, a grant will be made to him. And so also if there is a third. If the earlier grant has not yet taken effect this will supersede it. But if the first grantee has taken possession, and some liberties have taken effect, he will not lose his right of patronage though the goods and other rights and liabilities pass to the new demander. But all must be within the *annus utilis*[7].

(viii) If no freed slave, or *extraneus*, gives full security, even a slave not entitled to liberty may take *addictio*, with what Justinian calls the *venustum* outcome, that one not entitled to freedom gives liberty to the others. Of course he himself gets freedom. The application here too must of course be within the year[8].

[1] *Ante*, p. 622. [2] C. 7. 2. 15. 1b. [3] *h. l.* 2. [4] *h. l.* 3.
[5] This language and that of the warning in the last rule seems to imply that under this system even slaves freed directly had to be freed by the addictee and became his *liberti*, though by the older rule those directly freed were *ipso facto* free and *liberti orcini*, In. 3. 11. 1.
[6] C. 7. 2. 15. 4; cp. D. 40. 5. 4. 23.
[7] C. 7. 2. 15. 4—7. *A fortiori* if there had been application but no grant.
[8] *h. l.* 5. Justinian calls the enactment *plenissima* (In. 3. 11. 7), but it leaves much obscure. The spirit of the institution is changed: it is not a means of giving effect to liberties in the will, but, to a great extent, of gifts in substitution, with different effects. As we have just seen it seems that no gift takes effect *ipso facto*, but this may not be meant: the law may be hastily drawn.

V. *Hereditates* passing to the *Fiscus*. There are many circumstances under which this may happen, set forth in the title *de iure fisci*[1]. We are not concerned with these in detail, but only with the effect of such an acquisition by the Fisc on liberties given by the deceased. The topic is discussed in close connexion with that of *addictio bonorum*, because when an inheritance lies vacant, any of three things may happen to it: it may be sold by the creditors; the goods may be *addicta* according to the rules just discussed; it may pass to the Fisc.

The general proposition is laid down that wherever the estate goes to the Fisc, all liberties take effect which would have been valid if the *heres* had entered[2]. Other texts say the same as to specific cases. Thus Caracalla and Pertinax decide that if the property passes to the Fisc on account of an unlawful tacit *fideicommissum*, all liberties, both direct and fideicommissary, are due[3]. Julian tells us that if *bona vacantia* go to the *fiscus* under the *lex* Iulia (*scil. de maritandis*), all *fideicommissa* binding on the *heres* will take effect[4]. Gaius tells us that when the *fiscus* acquires under the *sc.* Silanianum, all liberties are good[5]. In another text he says that some have doubted this, and remarks that there can be no reason for the doubt, since in all other cases in which the *fiscus* takes the property, liberties are good[6].

Notwithstanding these strong texts, a different view is now commonly held. In one text it is said by Papinian[7] that the enactment of Marcus Aurelius, for the preservation of liberties, applies if, the will being *irritum*, the goods are about to be sold, but if the goods are taken by the *fiscus* as *vacantia, non habere constitutionem locum aperte cavetur*. Cujas[8] takes these words to mean that where there was no claim by the creditors and the goods were simply unclaimed, the Fisc took the property and all liberties failed. This interpretation appears to have been widely accepted[9]. It seems, however, to be based on a misapprehension as to the purpose of Papinian's remark. Even if the supposed rule were clearly stated in the text, doubt would be thrown on it by the very clear and specific contrary rule stated in the foregoing texts, and, even apart from them, by the fact that the acceptance of it compels us to make an irrational distinction. We know that the right of the Fisc is subject to that of creditors. The goods go to the treasury only in so far as they are in excess of debts: the *bona* are the nett balance[10], a fact expressed in the Edictal rule that the goods are sold, *si ex his*

[1] 49. 14, especially *h. t.* 1. See also 48. 10. 24.
[2] 40. 5. 51; Haymann, Freilassungspflicht, 52.
[3] 40. 5. 12. 2; cp. 34. 9. 16. 2. See also the cases on p. 611, and Ulp. 17. 2, 3.
[4] 30. 96. 1. Esmein, see below, points out that the text does not mention liberties.
[5] 29. 5. 9, *i.e.* those not destroyed by operation of the *sc.*
[6] 49. 14. 14; see also 28. 4. 3.
[7] 40. 4. 50. *pr.* = Pap. Resp. 9. 13.
[8] Cited Esmein, Mélanges, 349.
[9] Esmein, *loc. cit.*; Accarias, Précis, § 475.
[10] 49. 14. 11.

fisco nihil adquiri possit[1]. Ulpian tells us that, if the goods are taken by the Fisc, the liberties will still take effect, by an express provision of the Constitution[2] as to *addictio*, and the words of the enactment as set out in the Institutes say the same thing[3]. This contradicts the interpretation we are discussing. To harmonise the views it must be assumed that the rule of the *constitutio* applied only where the estate was insolvent, so that the Fisc, though it had taken the goods and was liable to the creditors, had no prospect of getting any benefit, but that where there was a nett balance the Fisc could disregard the liberties. So absurd a distinction could only be accepted on very strong textual evidence, which does not in fact exist. It cannot be supported on the ground that the Fisc "comme tout autre successeur ab intestat[4]" can ignore the provisions of the will. The texts cited shew clearly enough that the Fisc cannot ignore the provisions of the will. In fact it is not like any other successor *ab intestato*. In the very case to which this interpretation is made to apply we are told that all legacies and *fideicommissa* binding on the *heres* take effect[5], but they would not be binding on the *heres ab intestato*. From all this it is clear that if the text of Papinian did say what Cujas understands it to say it would be in conflict with such overwhelming authority that it would have to be rejected. But in fact it says nothing of the kind. Cujas assumes that *non habere constitutionem locum* means "the liberties are void." But all it means is that, whatever happens to the liberties, the provisions about *addictio* have no bearing on the case. It by no means follows that the liberties fail: they may, (we have seen that they do[6],) take effect, but it is not by the operation of this provision. There exists another text, already cited[7], in which the same distinction is made in very similar language. Ulpian tells us that in the case of an insolvent estate, the liberties take effect and *constitutio locum habet*. But if *alia ratione* (*fiscus*) *agnoscat apparet cessare debere constitutionem*. In view of the foregoing texts[8] no one can contend that if the *fiscus* acquires the property *alia ratione* (*e.g.*, by forfeiture), the liberties fail. It is in fact the comparison of this text with that of Papinian which has created the difficulty. Papinian says[9] that if the *fiscus* takes the property, *non habere constitutionem locum aperte cavetur*. Ulpian[10] says: *sive iacent bona fisco spernente, sive agnoverit, constitutio locum habet*. The apparent contradiction is avoided by the distinction as to solvency and insolvency above adverted to and rejected. In fact there is no contradiction. The enactment of Marcus Aurelius[11] contains two distinct

[1] *h. t.* 1. 1.
[2] 40. 5. 4. 17.
[3] In. 3. 11. 1.
[4] Accarias, *loc. cit.*
[5] 30. 96. 1.
[6] *Ante*, p. 626.
[7] 40. 5. 4. 17.
[8] *Ante*, p. 626. See especially the very strong language of 49. 14. 14.
[9] 40. 4. 50. *pr.*
[10] 40. 5. 4. 17.
[11] In. 3. 11. 1.

provisions. The first is that in a certain event there may be an *addictio bonorum* to save liberties. The second is that if the Fisc takes the goods there will be no *addictio*, but the liberties will stand good. Papinian tells us, and any reader of the enactment can see for himself, that the constitution expressly provides (*aperte cavetur*) that the rule about *addictio* is not applicable where the Fisc takes the goods. Ulpian tells us that where the goods are taken by the Fisc, as *vacantia*, the second part of the enactment applies, but that if the *fiscus* takes the property on some other ground, such as forfeiture, the constitution has no application. Both these statements are correct and there is nothing in either which contradicts the other[1].

At first sight it might seem that if the *fiscus* is bound to give effect to the liberties, there is no point in *addictio*. There is not, if the estate is solvent. But in these cases it is usually insolvent, and sale by the creditors would destroy all the liberties. In the very unlikely case of acceptance by the Fisc of an insolvent estate, the liberties will be good, but while under *addictio* all would be good, those *in fraudem creditorum* would fail if the Fisc took the estate[2].

It may be noted that if a vacant *hereditas* has been reported to the Fisc, and not taken by it, there may be an *addictio*, and no subsequent intervention by the Fisc can upset it. But if the *addictio* took place before the estate was reported, and it proves solvent, so that the *fiscus* claims it, the *addictio* will be set aside. This would create a difficulty on the view here rejected, as liberties would have taken effect. No doubt it could be met by a rule similar to that in the case of *restitutio* by a *heres* who had refused: the liberties would stand good. But the texts do not advert to any such difficulty in this connexion, and on the view here adopted the question would not arise.

VI. A slave transferred *ut manumittatur*. Where a slave was sold or given[3], to be freed either at once[4], or within a certain time[5], or after a certain time[6], a constitution of Marcus Aurelius provided that if he was not duly freed by the receiver, he should become free by virtue of the original transaction, without more. There was no occasion for decree—*non de praestanda libertate...litigare debuisti, sed libertatem quam obtinueras defendere*[7]. It seems probable that the constitution did not in terms apply to gift, but that this was an early extension, *ex*

[1] See, for a different view and some references, Otto and Schilling's translation, note to 40. 5. 4. 17.
[2] 40. 5. 4. 19.
[3] 38. 1. 13. *pr.*; 40. 9. 30. *pr.*; C. 4. 57. 1, 2; 5. 16. 22, *etc.*
[4] 40. 1. 20. *pr.*; 24. 1. 7. 9; 40. 8. 9; C. 6. 61. 8. 7, *etc.*
[5] 37. 14. 8. 1; 40. 8. 1; 29. 2. 71. 1.
[6] C. 4. 57. 6; D. 18. 7. 10; 24. 1. 7. 9; 40. 1. 20. 2; 40. 12. 38. 1, 3, *etc.*
[7] C. 4. 57. 1.

sententia[1]. The constitution is addressed to Aufidius Victorinus, and it is at least twice described as issued by Marcus Aurelius *et filius, i.e.*, Commodus[2]. The exact words *ut manumittatur* are not necessary[3]. It is essential that the proceedings have been declared *ab initio* to be for this purpose. Thus the mere fact that after the transfer the buyer wrote a letter undertaking to free would not bring the constitution into operation[4]. The direction is good against all successors, operating independently of them, so that one sold to be freed before a certain time, becomes free when the time expires, though in the meantime both vendor and vendee have died leaving no successors[5]. If it is to be done at once the constitution takes effect so soon as the holder, being able to free, fails to do so[6].

As the freedom takes effect whether the receiver frees or not, defects in him are immaterial. Thus where one who had made an express pledge of all his goods, present or future, bought a slave on this condition, the constitution took effect, even though the vendee were insolvent. A debtor to the Fisc could free in such a case, even though insolvent[7]; a text tells us that as the man would be free anyhow, the Fisc loses nothing by his being freed[8]. Under Justinian, slaves given to a *filiusfamilias* to be freed, were free and were not affected by the father's usufruct in *bona adventitia*[9]. The case of a minor owner is dealt with in many texts. The fact that the receiver is a minor is no bar. In one text we are told by Ulpian that the condition on which he receives is a sufficient *causa*[10]. In another Papinian tells us that there is no reason to shew *causa* at all, since he becomes free by the constitution[11]. The latter is the more reasonable rule, and Ulpian himself seems to lay it down in another text[12], but the reasoning there does not look genuine. Where the vendor is a minor, we are told by Marcellus that if he sells and conveys a slave *ut manumittatur*, even with the intention that the freeing shall not be done till the transferror is over

[1] 40. 8. 8; see also Pernice, Labeo, 3. 1. 133, and Naber, Mnemosyne, 22. 443. Haymann (*op. cit.* 35) holds that the application of the rule to gifts on trust to free is due to the compilers. He infers from 39. 5. 18. 1 that Ulpian knew of no such application, since he speaks of the donor as having an action, after the time agreed for the gift of liberty has arrived, when, if the rule applied, the man would be free. But the action is one for recovery, otherwise there could be no talk of bringing it before the time. If in a case of *fiducia* the donor revoked the trust the constitution would not apply (*post*, p. 633) and the action could still be brought after the time fixed. The language of 40. 8. 8 and C. 4. 57. 1 is, so far as this point is concerned, what would be expected if there was an extension. And 40. 1. 20. *pr.* looks quite genuine.
[2] 40. 1. 20. *pr.*; 40. 8. 3; C. 4. 57. 2. Thus its date must be about 178: it has been suggested that there were two of nearly equal date, one extending the other.
[3] Thus *ut libera esset* (C. 4. 57. 3) or even *in libertate moretur* (18. 7. 10) will suffice.
[4] 40. 12. 38. *pr.* [5] 40. 1. 23; 40. 8. 1.
[6] 40. 8. 9. If it is at, or after, or within, a certain time the rule applies when that time has expired (18. 7. 3; 40. 1. 20. 2; 40. 8. 3). If it is *vivo emptore*, or the like, the man is free at the acquirer's death, 40. 8. 4, 8. In *h. t.* 9 Paul is made to say that if it is doubtful whether it is at the holder's discretion or at once, *favor* induces the rule that it is at once, which is defined to be within two months or four if the slave is away.
[7] 49. 14. 45. 3. [8] 40. 1. 10. [9] C. 6. 61. 8. 7.
[10] 40. 2. 16. 1. [11] 40. 1. 20. *pr.* [12] 40. 2. 20. 1; *ante*, p. 541.

20, not only does the constitution not apply, since the rule of the *lex* Aelia Sentia was intended to protect owners of immature judgment, but the whole transaction is void[1]. This is declared to have been provided by senatusconsult[2]. Accordingly Ulpian, quoting Scaevola, says that the constitution has no application if the vendor is under 20, but that it does apply if he is between 20 and 25, except that he has *restitutio in integrum* till the man is actually free. The text adds that the same rule applies where the transferee is a minor[3].

Presumably though the textual authority is not strong, a gift, with this purpose, of a slave who cannot be freed, is void[4].

A gift *ut manumittatur* is permitted between husband and wife[5], perhaps, as Paul says, either *favore libertatis*, or because there was no real gift to the other party involved[6]. It might be at once or *post tempus* or *intra tempus*, a rule which is squared with the law as to gifts between husband and wife by a principle, laid down by Sabinus and accepted by Papinian and Ulpian, that in this case the slave does not vest in the donee until he or she proceeds to manumit according to instructions. It follows that the donee, where it is a wife, cannot free till the time appointed arrives, nor if it was to be *intra tempus*, after this has expired. From this several results follow. As the ownership has not passed out of the *vir*, it is possible for him to free at any time if he wishes: accordingly there is no reason for the automatic liberty under the constitution, which therefore we are told does not apply[7]. The conditions, being entirely different from those in an ordinary gift *ut manumittatur*, would be changed by a determination of the marriage: accordingly it is held that such an event absolutely destroys the gift[8]. Moreover as the gift is not compellable, and does not operate unless the woman carries it out, her position as patron is not quite ordinary. We are told that she can exact *operae*, and that this is not *ex re mariti*, since the promise is made by the man as a *libertus*, and further, that if she takes money to free, it is hers unless it is *ex peculio*, in which case it belongs to the husband[9]. We may also note that as the gift did not operate unless and until she freed, it was a nullity if the slave was one who could not be freed[10]. These rules are not peculiar to this form of gift: they are here worked out in special detail, but

[1] 18. 7. 4; 40. 9. 7. 1. [2] C. 7. 11. 4.
[3] 4. 4. 11. 1. The language of this provision (*libertas imponitur*) has led to the view that it is an interpolation. Gradenwitz, Z. S. S. 23. 346; Kalb, Juristenlatein, 75; Haymann, *op. cit.* 21.
[4] 24. 1. 9. *pr.* depends on the relation of *vir et uxor*. In case of such a *fc.* the receiver need not free, but while Modestinus thinks the gift void, Paul and (apparently) Neratius think it good, 31. 31; 35. 1. 37. Pernice, Labeo, 3. 1. 293, suggests that in one case there is intent to benefit the receiver while in the other it is a mere mandate.
[5] Ulp. 7. 1; C. 5. 16. 22; D. 24. 1. 7. 9; 24. 3. 63, *etc.* [6] P. 2. 23. 2.
[7] 24. 1. 7. 8, 9. There are interpolations but not material, Gradenwitz, Z. S. S. 23. 345.
[8] 24. 1. 8. [9] 24. 1. 9. 1.
[10] *h. l. pr.*

they seem, *mutatis mutandis*, to be equally applicable to other licit gifts between *vir et uxor*[1].

There is nothing to prevent ordinary commercial transactions between husband and wife, and thus these special restrictions apply only to cases of *donatio ut manumittatur*, not to sale with the same intention.

In an ordinary case, the liberty takes effect automatically, at the agreed time and thus children born thereafter are *ingenui*[2]: their position is not affected by any subsequent manumission of their mother, which is in itself a nullity[3]. The receiver becomes patron whether he frees or allows the constitution to operate[4]. His position is not, however, quite that of an ordinary patron[5]. Marcellus says that as the receiver takes him under a trust to manumit he does not confer any real benefit in him, and thus cannot accuse him as *ingratus*[6]. Another text, of Ulpian, seems, however, to imply that he would have such a right if he freed, but not if he allowed the constitution to operate, *cum non sit manumissor*[7]. But the other rule was apparently expressed in an enactment of Severus and Caracalla, which prevents the manumitter from reenslaving the man[8], and this must be taken to be the law, at least thereafter. Whether the man be freed or allowed to become free, no *operae* may be imposed[9]. On the other hand in both cases the patron is protected against *in ius vocatio*[10], will be tutor of the slave, if the latter is a minor[11], and has the ordinary *iura in bonis*[12], this being expressly provided for in the constitution[13]. In the case in which the buyer institutes the man *cum libertate*, an important distinction is drawn. If this is done before the time at which he was entitled to liberty, he is a *necessarius heres*. If it is afterwards, says Ulpian, he can abstain[14]. Paul appears to say that he can abstain in any case[15], but his remarks in an earlier part of the text suggest a limitation to the case where the slave *nihil commodi sensit*, which would agree with Ulpian[16].

Such a gift may be conditional. In one text we have the case of a man who is to be free at the end of three years, *si continuo triennio servisset*. The man runs away before three years are over. Paul holds that he will

[1] *e.g.* 24. 1. 5. 9, 11. It will be observed that as the conveyance is by way of *mancipatio*, this is an instance of *mancipatio* subject to tacit condition or *dies*. But the modality *inest*: it does not spring from the will of a party. The gift cannot operate unless and until the wife is not profited, *ante*, p. 455. There is some difficulty in the rule that if the marriage ends while the manumission is still unperformed, the gift is null, but even this is said, by Gaius, *inesse*, 24. 1. 8. The jurists utilise the *primafacie* invalidity of the gift to produce these results: they could not result from convention *inter capaces*.
[2] 1. 5. 22. [3] C. 4. 57. 3. [4] 37. 14. 8. 1.
[5] Incomplete patronal rights occur in other cases, *e.g.* 37. 14. 3, 5. 1, *etc.*
[6] 37. 15. 3, *in fin.* [7] 40. 9. 30. *pr.* [8] C. 6. 3. 2.
[9] *Ib.*; D. 38. 1. 13. *pr.* [10] 2. 4. 10. *pr.* [11] 26. 4. 3. 2.
[12] 38. 2. 3. 3.
[13] 38. 16. 3. 3. He has the usual control over the marriage of the *liberta* freed ***matrimonii causa***, 23. 2. 45. *pr.*
[14] 28. 2. 71. 1. [15] 28. 5. 85. 1.
[16] *h. l. pr.* The time is that of operation of the will, not of making.

be free at the end of the three years: apparently he treats *servire* as meaning "be a slave[1]." In another case the slave is to be freed after five years and to pay a sum monthly meanwhile. Papinian holds that this is not a condition, but a mere direction as to what is expected of him during his temporary slavery[2].

It has been suggested that the constitution may have provided that the slave freed by its rules should be a latin[3]. There seems to be little evidence for this and it is negatived, as Gradenwitz shews, by a text already cited to the effect that the result is the same whether the man is freed by the receiver or becomes free by operation of the constitution[4]. The same result follows from the texts which say that the stipulation penalty cannot be recovered, since he becomes free by the constitution[5]. Still stronger is the text which says that the constitution itself declares that the man *meus libertus est, et legitima eius hereditas mihi deferetur*. Such language could not be used of a latin[6].

The mechanism of the transaction is not easily made out from the texts. In the time of Justinian it is clear, formal conveyances having disappeared, that any expression of intent either in the contract or in the conveyance, sufficed.

It may be noted that the transaction is sometimes a mere employment, *e.g.* where the receiver is to free at once or *intra tempus*[7], sometimes coupled with a benefit to the donee, *e.g.* where he is to free after a certain time[8], and sometimes a sale in which the price, though real, may be reduced by reason of the modality[9]. In the cases of employment and gift, *mancipatio cum fiducia* would be the appropriate mode, and it is clear that it occurs in some of the texts[10]. It is probable that it was the mode employed in nearly all the cases in which the texts associate the undertaking that the man shall be freed with the actual conveyance[11]. In the case of sale, with which the constitution directly deals, there is nothing to suggest *fiducia*[12]. We have in one case an agreed right of seizure with an alternative money penalty. No doubt the pact associated with the sale may have been sometimes

[1] 40. 12. 38. 3. Cp. C. 4. 57. 1. It is *servire* not *heredi servire*. See *ante*, p. 487.
[2] 40. 1. 20. 3. These are not terms in the mancipation, but in the agreement for sale. The rather inept concluding clause is probably due to Tribonian.
[3] See Gradenwitz, Z. S. S. 23. 347.
[4] 40. 1. 20. *pr.*, 1.
[5] 18. 7. 10; 40. 1. 20. 2; C. 7. 57. 6.
[6] 38. 16. 3. 3. It is hardly likely that Justinian would have omitted the case in his abolishing enactment, C. 7. 6.
[7] *e.g.* C. 4. 57. 2; D. 40. 8. 3; 40. 8. 9; *ante*, p. 628.
[8] *e.g.* 40. 8. 8; C. 4. 57. 1; *ante*, p. 628.
[9] 18. 7. 10.
[10] Lenel shews, Z. S. S. 9. 182, that 17. 1. 30 is from the 13th book of Julian's Digesta, which dealt with *fiducia*, and is probably identical with Fr. Vat. 334 a, which mentions *fiducia*, and he points out that 17. 1. 27. 1 deals with mandate after death and is by Gaius, who expressly repudiates such mandate.
[11] *e.g.* 12. 4. 5. 1; 17. 1. 27. 1, 30; 39. 5. 18. 1; 40. 8. 8; C. 4. 57. 1. But in 45. 1. 122. 2 there is *donatio* and stipulation for a penalty.
[12] In 18. 7. 8, a sale, it is clear that there is no *fiducia*: the *actio fiduciae* would have been obvious.

fortified by a *fiducia* attached to the conveyance[1]. In any case it is clear that the transaction sometimes contained a *fiducia* and sometimes did not.

This fact is material in connexion with the much debated question as to the effect of change of mind on the part of the transferor[2]. Many of these texts tell us that the constitution applies only if the transferor has not altered his mind. Others ignore this point[3]. Most of the texts which speak of a right of revocation have obvious marks of interpolation[4]. Hence have arisen the most diverse opinions as to the history of this right of withdrawal. The texts seem to indicate a historical development somewhat as follows. Before the date of the constitution, if there was a *fiducia* the donor could recall the man at any time by an *actio fiduciae*, and free him, if the receiver had failed to do so, or keep the man, if he had changed his mind. If there was no *fiducia*, but a sale with a *pactum adiectum*[5], there might be agreements for return if the manumission were not carried out, or for a penalty or the like. There is no evidence of any right of pursuing the man in the hands of a third party[6], and it is clear that there is no right of recovery on mere change of mind[7]. The *constitutio* dealt only with this case and provided that the man should be free *ipso iure* when the agreed time arrived. It did not deal with the case of *donatio*, where the difficulty did not exist, but was soon extended thereto in practice[8]. The *constitutio* said nothing about revocation, but it did not abolish the principles of *fiducia*, and thus it did not apply if the donor had revoked the *fiducia*, whether he had reclaimed the man or not. Ultimately the practice grew of allowing revocation in all cases, to the exclusion of the constitution, but this is post-classical and is introduced into the texts by the compilers. It does not of course follow that it was new.

This opinion rests mainly on the following considerations. We have seen that though the *constitutio* did not at first cover fiduciary gifts there is reason to think it was soon applied to them. To put the *constitutio* out of operation is not necessarily to give any right of action, and every text which gives the transferor a right of recovery, or

[1] Yet the remark of Tryphoninus that the constitution makes the man free even though the gift were delayed to death of vendee may be a hint of the ancient doubt whether *fiducia* bound the *heres*, Pernice, Labeo, 3. 121.
[2] See *inter alios*, Gradenwitz, Interpolationen, 146 *sqq.*; Z. S. S. 14. 121; 23. 346; Lenel, Z. S. S. 9. 182; Pernice, Labeo, 3. 1. 134, 262; Monnier, N. R. H. 24. 185; Haymann, Freilassungspflicht, *pass.* All these admit large interpolations. For more conservative views, Karlowa, R. R. G. 2. 772; Heck, Z. S. S. 10. 119. The chief texts are: C. 4. 5. 7. 1, 6; 6. 6. 29; D. 4. 4. 11. 1; 12. 4. 5. 1; 17. 1. 27. 1, 30; 18. 7. 3, 8, 10; 39. 5. 18. 1; 40. 1. 20. 2; 40. 8. 1, 3, 8; 45. 1. 122. 2.
[3] See especially 40. 8. 1; 37. 14. 8. 1; C. 4. 57. 2, 3.
[4] See Haymann, *op. cit.* 25 *sqq.*
[5] Pernice, Labeo, 3. 1. 134.
[6] The *constitutio* applied, 40. 1. 23.
[7] Haymann, *op. cit.* 20, points out that it is possible the man may have had a right to invoke the Praetor before the *constitutio*. He cites 36. 1. 23. 1.
[8] *Ante*, p. 629.

anything which implies it, associates the undertaking with the conveyance, not with a contract of sale[1]. Conversely it has been pointed out that every text that sets out the constitution in detail refers to sale[2], and it may be added that most of the texts which ignore any right of revocation are cases of sale[3]. The general result seems to be that, where the compilers found in the text a reference to a right of recovery *ex fiducia*, they converted this into an *actio ex poenitentia* or the like[4], but if there was no sign of this they inserted, not consistently, but commonly, a provision for excluding the operation of the *constitutio*. That the power of recovery where it existed was independent of the *constitutio* appears from what seems the only text on this matter which mentions both the *constitutio*, and the right of recovery on change of mind. It deals with the *constitutio* in a separate clause and there mentions only the exclusion of its operation[5].

The foregoing conclusions differ from the verdict of Haymann mainly in that they attach significance to the fact that the right of recovery is never mentioned except in the cases which suggest *fiducia* (*i.e.* never in connexion with sale), so that the right of recovery is independent of the *constitutio*[6]. In the main the whole rests on 40. 8. 1. If that is genuine the other texts must be interpolated, and it is impossible to resist Haymann's arguments directed to shewing that they are in fact altered, and the failure of the many attempts to get the text 40. 8. 1 out of the way[7].

Some of the texts raise other questions which call for short discussion. In four texts it is laid down that if the alienor has died without changing his mind, the intent of the *heres* is immaterial[8]. On the view here accepted that the allusions to *ius poenitentiae*, though attributed here and there to the *constitutio*, are really due to the compilers, it is not necessary to say more of this limitation than that there exist obvious analogies which seem to have suggested it[9].

In one text Papinian is consulted on the question whether there is any action in a case in which there was a sale for manumission within a certain time, but before that time arrived the vendor changed his mind, and notified the vendee, who nevertheless freed the man. His somewhat cryptic answer is: *ex vendito actionem manumisso servo vel mutata*

[1] 12. 4. 5. 1; 17. 1. 27. 1, 30; 39. 5. 18. 1. Cp. 12. 4. 3. 2, 3. See Pernice, Labeo, 3. 1. 128.
[2] Haymann, *op. cit.* 36. [3] Some are not, *e.g.*, 40. 2. 16. 1, 20.
[4] See Gradenwitz, Interpolationen, 146 *sqq.*
[5] 12. 4. 5. 1. It is of course much altered.
[6] Gradenwitz, Interp. 169. The case of payment to secure a manumission, which is the subject of many of his texts is on a different footing, *post*, p. 640.
[7] *Op. cit.* 6 *sqq.*, 25 *sqq.* He points out (p. 21) that 4. 4. 11. 1, interpolated as to the answers, contains questions which would be absurd if there was a right of withdrawal in any case.
[8] 18. 7. 3; 40. 8. 3, 8; C. 4. 57. 1.
[9] *Heres* cannot attack his ancestor's manumission as fraudulent (*ante*, p. 565) or his gift, Vat. Fr. 259, *etc.* Is a fiduciary gift revocable by the *heres*?

venditoris voluntate evanuit[1]. This is certainly not the whole of the answer. Probably it was to the effect that if there had been a *fiducia* there would have been a right of claim, but that on the facts the only right is to the enforcement of the contract made. This is ended if the man is freed or if you have notified a change of mind[2].

A text of Julian[3], written almost certainly before the constitution, considers the effect of notice given by an agent, and lays it down that if the procurator had good reason, in the misconduct of the slave, for intervening, the receiver is liable if he disobeys the injunction. The text was probably written of *fiducia*[4], and is, it seems, identical with one in the Vatican Fragments[5] restored by Mommsen. It has nothing to do with the constitution. In its earlier form it says nothing about cause for intervention, this limitation being probably due to the compilers[6].

Some texts raise the question whether *animus donandi* is material. Ulpian[7] quotes Aristo, who wrote before the constitution, as holding that if the manumission was to be at a later time there was a gift implied, and the man could in no case be claimed till the time had run. Pomponius is more precise: he remarks that even if the gift is not to take effect at once, circumstances may negative any intent to benefit the alienee[8]. That this text is written of *fiducia* appears from the next following passage[9], where Aristo asks whether in a case in which the element of *donatio* enters there can be *usucapio* if the slave was in fact *alienus*. Pomponius settles Aristo's doubt by saying that there could be, as in the case of *donatio mortis causa*. This suggests *fiducia*[10] for if it was a simple conveyance it is not easy to see reason for doubt. But in one text where the manumission was to be *intra tempus*, the alienor is entitled to reclaim the man at once. Presumably such a form was not here held to imply any intent to benefit the donee. In another it was to be *post mortem*, but here there was direct disregard of notice not to free, which would at once give rise to an action, in the case of *fiducia*. And both the texts seem to deal with *fiducia*[11].

It has been suggested[12] that even before the *constitutio* was enacted it may have been possible for the slave to appeal to the magistrate for an order that the manumission be carried out. In Hadrian's time[13] there seems to have been some enactment on the point, but if such a

[1] 18. 7. 8.
[2] It is still stronger if understood to mean "even if," as Haymann (*op. cit.* 16) takes it, rather than "or if."
[3] 17. 1. 30. [4] Lenel, Z. S. S. 9. 182. [5] Fr. Vat. 334 a.
[6] Haymann, *op. cit.* 48 *sqq.* Not, however, certainly: the Fr. Vat. may be abridged. The rule is not without analogies, though from another point of view. See 15. 1. 46.
[7] 39. 5. 18. 1. [8] Cp. 40. 8. 9. [9] 39. 5. 18. 2.
[10] Lenel, *loc. cit.*; Heck, *loc. cit.*
[11] Haymann, *op. cit.* 16, 35; Gradenwitz, Interp. 168; D. 12. 4. 5. 1; 17. 1. 27. 1.
[12] Haymann, *op. cit.* 20. [13] 18. 7. 10.

right had existed the constitution would hardly have served any purpose. It is clear that stipulations for seizure and penalties were employed, until they were superseded and declared nugatory under the system of the constitution[1]. They were not effective as protections to the slave, but they were better for the late owner than an *actio mandati*, in which it might be difficult to shew any *interesse*. But a *condictio ob causam dati* might have sufficed[2].

It has been said that the rules afford a means of evading the statutory restrictions on manumission. But the texts nullifying transactions *in fraudem legis* prevent this[3]. On the other hand a sale *ut manumittatur*, after, *e.g.*, one day, would seem a ready means of substituting mancipation for *cessio in iure* as a mode of conferring *civitas*, but it would involve loss of the *libertus*.

The form of the rule, which makes the liberty date from the breach of duty without any need of claim[4], puts the man in a rather better position than that of one entitled to fideicommissary liberty. It was perhaps designedly adopted to avoid some of the questions which had given the Emperor's predecessor trouble in that case[5]. The remedy might seem worse than the disease, since it may have often been difficult to determine the earliest date at which it was possible to free. But similar difficulties arose in many other cases, and the texts say very little about them: where the question is one of fact the sources deal very lightly with difficulties of proof.

VII. *Servus suis nummis emptus.* The rules of this matter are based on a rescript of Divi Fratres, *i.e.* Marcus Aurelius and Verus, and therefore date from between A.D. 161 and A.D. 169. The general principle is that a slave *suis nummis emptus* is entitled to claim immediate manumission[6], and if this is not done he can claim his liberty before the *Praefectus Urbi* at Rome, or the *Praeses* of the province[7]. If he proves his case, the Court will order the owner to free, and if he *latitat*, or refuses, will proceed exactly as in the case of an overdue fiduciary manumission[8]. It does not appear that the decree is in any way declaratory: it orders the owner to free. The text last cited says, indeed, that it makes him free from the date of the purchase, but its whole argument is inconsistent with this, and it is most probable that a *non* has dropped out[9]. This view is supported by the fact that no

[1] 40. 1. 20. 2; 45. 1. 122. 2; C. 4. 57. 6; *ante*, p. 71. [2] Cp. C. 4. 6. 6.
[3] Haymann, *op. cit.* 36; *ante*, p. 538.
[4] C. 4. 57. 1. An enquirer is told that he has not to claim, *sed libertatem quam obtinueras defendere*. This does not seem to mean that he will be defendant in any *causa liberalis* (*post*, pp. 654 *sqq.*): this will depend on his apparent position. It is only emphasising the absence of need to claim.
[5] *Ante*, p. 618. [6] 40. 1. 4. *pr.* [7] *h. t.* 5. *pr.*; 1. 12. 1. 1.
[8] 5. 1. 67. [9] Mommsen, *ad h. l.*

text speaks of him as being free *ex decreto* or *ex constitutione*—every text contemplates his being freed by the owner. And there is no text which raises the question of the status of children born before the decree. The fair inference seems to be that if freed they were free from the manumission, and if the holder neglected to free, then they were decreed free as in the case of fiduciary manumission, and the status of children was similarly determined[1].

The expression *suis nummis emptus* is found long before the rules now to be considered were developed[2]. It is not strictly correct, since a slave can have no money: the real point is that it must not be the money of the buyer. So long as he gives only his name, it is immaterial where the money comes from. Thus it may be *ex adventitio lucro*, or from a friend, or borrowed on any form of security. It may even be *ex peculio venditoris*[3]. If, as may be the case, the buyer has advanced the money with this purpose, the right arises as soon as accounts have been squared[4]. It is essential that the sale have been of this *imaginaria* character from the beginning[5]. Accordingly the mere fact that the slave, after an ordinary sale, restores his price to the buyer will not bring the constitution into operation[6]; the point being that the owner must have no ownership but what is taken under this confidential arrangement. Conversely, if it was originally for this purpose, but the slave fails to refund the price, the constitution does not apply. On the other hand if one who has bought under this arrangement pays the money himself before the slave has provided it, this does not prevent the rule from applying, if and when he has been satisfied[7]. It is immaterial how the slave makes up the price, whether by money or by services or in any other way[8]. Where the sale is of this imaginary kind, the mere fact that the buyer agrees with the vendor that he will not free the man does not bar the operation of the rule: the buyer has no real interest[9]. But of course any preexisting bar to liberty, such as conditions on legacy or sale will prevent the constitution from applying[10].

The buyer may be anyone, male or female, private person, city or state, a pupil, or even a slave, there being no personal interest or risk of loss. The text adds the rule that the age of the vendor is immaterial[11].

[1] If the claim failed there might be condemnation *in metallum* or *opus metalli*, or the master might have him back and punish him, by chains *etc.*, not more severely than was involved in *opus metalli*, 40. 1. 5. *pr.*; 48. 19. 38. 4; *ante*, p. 404.
[2] Suetonius, de Gramm. 13, speaks of a slave in the time of Sulla, bought *de catasta, suo aere*, and freed by the buyer, *propter literarum studium*. This is a sort of bargain: the slave is to recoup the buyer out of future earnings. As to sale *de catasta*, *ante*, p. 39.
[3] 40. 1. 4. 1. [4] *h. l.* 5. [5] Not necessarily so expressly stated, *h. l.* 6.
[6] *h. l.* 2; cp. C. 7. 16. 12.
[7] 40. 1. 4. 3, 4. The buyer having, perhaps in order to release the slave, paid with his own money.
[8] *h. l.* 10. [9] *h. l.* 7. [10] *h. l.* 9; *ante*, p. 585.
[11] *h. l.* 8.

Such sales being in their very nature collusive, this rule seems at first sight to provide an obvious means of evading the rule forbidding a master under 20 to free. We have seen that a master under 20 could not sell *ut manumittatur*[1] but this case is essentially different. There no real price need be paid: here there must be a full price. There the freedom is automatic: here it is only after decree, and the Court will see that a full price has been paid. We are told that the reason of the 20 year rule is to guard against damage due to immaturity of judgment[2], and the safeguard seems sufficient.

If the buyer already was part owner, or the owner bought in an outstanding usufruct, the rule did not apply for reasons already stated. But if a fructuary bought the *dominium, servi nummis*, the rule applied[3], a distinction which seems more logical than reasonable. A case rather on *apices iuris* arose where two bought—one with his own money, the other with that of the slave. We are told that the constitution did not apply, unless the buyer with his own money was willing to manumit[4]. One might rather have expected that the rule would not apply, since the whole value of the slave has not been paid *servi nummis*, but the fact that the institution was in favour of liberty may account for the rule laid down. Obviously Justinian's rule for joint owners cannot apply as this would require the nominal buyer to compensate the other owner[5]. Another somewhat remarkable case is put in the next text. If one buys a share of the slave *servi nummis*, and afterwards acquires the rest, *e causa lucrativa*, the rule applies. This gives a very odd result. So long as the acquirer owns only a part of the slave he has the use of him, *pro parte*, though he gave nothing for him, and in fact only holds by virtue of the slave's wish and provision of money. If anyone desiring to benefit him, gives him the rest, he at once loses the whole. This seems to be the work of Tribonian: its grammar is eccentric[6], and it imposes the obligation on an owner, part of whose interest is not of the imaginary kind contemplated by the rule. Other texts state some other complications of no great importance. If A gives T money to buy and free a slave, he can recover the money on notice before the slave is actually bought[7]. This is an application of the ordinary principles of mandate. But if the man be already bought and A does not wish him freed, he can still withdraw, (having paid the money,) taking the slave, whom T is bound to hand over to A unless he is dead or has run away without the fault of T, in which last case, T must promise to restore him if and when he returns to his *potestas*.

[1] *Ante*, p. 538. [2] 18. 7. 4. [3] 40. 1. 4. 11, 12. [4] *h. l.* 13.
[5] *Ante*, p. 577. No doubt full patronal rights, *pro parte*, are reserved to the other owner.
[6] 40. 1. 4. 14: *Sed et si partem quis redemit pars altera ex causa lucrativa accesserit dicendum erit constitutionem locum habere.*
[7] 12. 4. 5. 2. The text gives a *condictio ex poenitentia*, *post*, p. 645.

It does not seem clear that this is compilers' work, though some details are interpolated[1]. The remark towards the end of the next passage that if the giver of the money prefers to have the slave, either the man or the money must be given to him, belongs, no doubt, as Gradenwitz says, to this case. All this looks a little hard on the slave. But it must be borne in mind that the case has nothing to do with the constitution we are discussing. This is merely a piece of philanthropy on the part of A of which he repents before it is carried out: the case to which the constitution applies is that of a purchase made as the result of a confidential arrangement to which the slave is a party—*ut imaginaria fieret emptio, et per fidem contractus inter emptorem et servum agatur*[2]. Of all this there is no indication in the present case: the rule as stated is normal, though one would have expected an *actio mandati* instead of a *condictio ex poenitentia*—a thing probably unknown to classical law.

Some nice points arise where the price is really provided by the vendor, as it might be[3]. It must of course be with his knowledge. Payment out of the *peculium* belonging to him, without his knowledge, is no payment and he can recover the money[4]. It follows that the buyer is not released[5]: the ownership has not passed and there can be no question of any right to demand freedom. A case which might very well happen was that of a slave who gave a mandate to buy him, the underlying intention being that he should be freed. Such a mandate would be absolutely void if there were no such intent, and the *mandatarius* would have no *actio mandati (contraria) de peculio*[6]. If, however, there was such an intention, we are told that if after sale and delivery the manumission is not carried out, the vendor can sue for the price[7], and even, *affectus ratione*[8], on the mandate. The text has been much discussed[9]. As the slave has not paid the price, the *constitutio* does not apply. Papinian seems to mean that the mandate to buy is essentially null, but the resulting sale is not, and the transaction may thus be treated as a sale coupled with a mandate to free the slave bought. If he is not freed there is an *actio mandati*, the difficulty as to *interesse* being met by confining the rule to a case in which the slave is related in some way to the vendor. There is presumably an *actio mandati contraria* for reimbursement if the man is freed. As the mandate is by the slave, *i.e.* to free him if bought, this is *de peculio* and may be useless[10]. But there may be an *actio doli* against the freedman for reimbursement[11].

[1] Gradenwitz, Interp. 166. [2] 40. 1. 4. 2. [3] *h. l.* 1.
[4] C. 4. 49. 7; *ante*, p. 201. [5] C. 4. 36. 1. 2. [6] *Ante*, p. 216.
[7] 17. 1. 54. *pr.* [8] *e.g.* if the man is a natural son.
[9] *e.g.*, Pernice, Labeo, 3. 1. 185; Van Wetter, Obligations, 1. 82; 2. 58.
[10] It is not contemplated as a sale *ut manumittatur*: the consent of the owner was of course necessary for this. [11] Cp. 4. 3. 7. 8.

Diocletian decides a similar problem in terms which seem to shew that he had this text before him[1]. He gives further reasons for holding the mandate to be essentially void[2]. But he says that, nevertheless, the *dominus* acquires an *obligatio*, as the object was to create a right of action not on the mandate, but on another contract, *i.e.* the sale, made on account of the mandate. This explains nothing, but it seems to be used as a reason for generalising the owner's right *ex mandato*, at any rate nothing is said of *affectus*. Here the slave pays *ex peculio* without authority, but ownership is regarded as having passed, which is not impossible. The emperor decides that if the man is not freed, the old owner may sue either for the price, *ex vendito*, or for the man, *ex mandato*, the actions being treated as mutually exclusive. The practical outcome would be much the same. Nothing is said as to the resulting rights if he is actually freed[3].

If the person who bought the slave, *servi nummis*, breaks his faith, so that the man is declared free by the magistrate, he is not patron for any purpose[4]. But even if he duly frees him his patronal rights are very restricted. Such a *libertus* is, we are told, in no respect like other *liberti*[5]. The manumitter is in this case a mere instrument[6]: he has therefore no right to accuse the freedman for ingratitude or to impose *operae*[7]. He can never veto marriage[8]. If the slave is instituted by him, with liberty, he is not a *heres necessarius*, since he was in a position to compel manumission[9]. He has no right of *bonorum possessio contra tabulas*[10]. Yet he certainly is patron[11], and this position has some results. Thus his civil law right of succession is not denied[12], so that he will succeed on intestacy, and if instituted. And he is protected against *in ius vocatio*[13].

VIII. The slave whose master has taken money to free him[14]. This case presents close analogies with both of the two cases last discussed, and it is clear that rules developed as to the enforcement of the liberty here too. But the remarkable state of the texts makes it difficult to say what the rules were, or when they developed. The transaction is referred to in many texts. Of those in the Digest, apparently only two refer to any compulsory completion of the manumission. One of these, by Paul[15], says that the Constitution of Marcus Aurelius as to one sold *ut manumittatur* applies here too, *i.e.* the liberty takes effect automatically. The other, by Papinian, says that in such a case the liberty can be compelled *ab invito*, as in the case of a *servus suis nummis redemptus*, *i.e.* on appeal to a magistrate the owner will be ordered to free[1]. The same conflict occurs in the Code. Here three texts refer to enforced completion. An enactment of A.D. 240, of Gordian[2], says that where a master took money to free his slave at a certain time, and did not free him, the liberty took effect automatically at the time when it should have been given. But two enactments of Diocletian say in very similar language, that on such facts the Governor of the province will make the owner keep his word, *i.e.* the liberty does not take effect automatically[3]. The difficulty does not stop here. Paul, who tells us that the liberty takes effect automatically[4] tells us elsewhere[5] that if the freedom is not given, the money paid can be condicted, *i.e.* the *causa* has failed, and one of the constitutions of Diocletian, which says at the end that the manumission can be compelled, says at the beginning that the money can be recovered if the liberty is not given[6]. Papinian who tells us the liberty[7] can be compelled, tells us also that if the owner does not free, the donor of the money can recover it, and has other remedies[8], but there is no hint that, after all, he can have it carried out if he likes.

What conclusion is to be drawn from all this? The fact that in some cases the money is paid by or on behalf of the slave and in others purely by an outsider suggests a distinction, but it proves useless. In the texts in which the liberty is not given and which ignore the constitutions, the payment is *ab alio*[9], but so it is in some of the cases in which the liberty can be enforced: in most of these it is merely enforceable, in one at least it takes effect automatically[10]. In one of these which contemplate enforcement the money seems to have come from the slave[11]. The fact that the texts which ignore the constitution deal almost entirely with payment *ab alio*, is due to the fact that the question in them is whether the money could be condicted—a point which could hardly arise between master and slave[12]. With the exception just cited the texts which deal with the case in which the money is provided by the slave do not speak of enforcement: they all assume him to have been simply freed. One text speaking perfectly generally says that where the freedom results from the giving of money for it, the patron has *omnia iura patronatus*[13]. So we learn that he could accuse as *ingratus*, which he could not do in the other two cases[14].

[1] C. 4. 36. 1. [2] *Ante*, p. 216.
[3] The case gave the early commentators a good deal of trouble, Haenel, Diss. Domm. 425.
[4] 2. 4. 10. *pr.* [5] 27. 1. 14. 3. [6] 37. 15. 3; cp. 40. 1. 5.
[7] 37. 15. 3; C. 6. 3. 8. [8] 23. 2. 45. 2. [9] 28. 5. 85. 2.
[10] C. 6. 4. 1. 4. [11] C. 6. 3. 8, notwithstanding the language of C. 6. 4. 1. 4.
[12] Cp. 37. 14. 10, 11; 38. 2. 29. *pr.* [13] 2. 4. 10. *pr.*
[14] See for an illustrative surviving case, Girard, Textes, Appendice.
[15] 40. 12. 38. 1.

[1] 40. 1. 19. [2] C. 4. 57. 4. [3] C. 4. 6. 9; 7. 16. 8.
[4] 40. 12. 38. 1. [5] 19. 5. 5. 2. [6] C. 4. 6. 9.
[7] 40. 1. 19. [8] 19. 5. 7.
[9] *e.g.* 12. 1. 19. *pr.*; 12. 4. 5. 3, 4; 19. 5. 5. 2, *etc.* [10] 40. 1. 19; C. 4. 57. 4, *etc.*
[11] C. 7. 16. 8. [12] C. 4. 6. 9.
[13] C. 6. 4. 1; cp. C. 4. 6. 9; 6. 6. 3; 7. 16. 8.
[14] 37. 15. 3; C. 6. 3. 2. Taking money does not destroy *iura in bonis*, 38. 2. 3. 4 (Mommsen).

The manumitter could not exact services, or money in lieu of them[1], but this is a result of the fact that the manumission was not gratuitous: having agreed to free for a certain emolument, the *dominus* has no right to burden the liberty further[2]. An enactment of Diocletian tells us that even though the manumission were done *pecunia accepta*, it could not be revoked[3]. It is hardly credible that if such a gift operated automatically or could be enforced, such a question could have been asked[4]. We are told that a promise by the owner to free when certain services were rendered was in no way binding on him[5], and one would have thought that they would have been on the same level as money. On the other hand, in one text the question is raised whether if one has given money to be freed, and is instituted *heres* with liberty, he is a *necessarius heres*. Ulpian says *puto huic omnimodo esse succurrendum*. If this is genuine[6], guarded as the language is, it puts the person so freed on a level with the other two cases. And the allusion to the matter in Justinian's constitution abolishing latinity[7] is at least consistent with automatic operation of the gift, before his changes.

The case differs in one fundamental point from both the others. There the owner who is to free has no ownership at all except such as is conferred on him, at another's cost, for the purpose of the manumission: here he is the real owner of the slave. The importance of the distinction is brought out in several of the texts[8]. They point out that in our case the manumitter has conferred a real benefit on the man (for the gift of liberty in the beginning depended on his good will), while in the other cases—that of the fiduciary, the person who receives *ut manumittatur*, and him who buys *servi nummis*—they do nothing but lend their services. It seems probable that the whole law of enforcement is post-classical, and that the texts of Paul and Papinian are interpolated. This can hardly be doubted of Paul's text, which Haymann gives good reasons, not all of equal weight, for thinking not genuine[9]. The same is probably true of that of Papinian. Haymann, indeed[10], while shewing that there is alteration, considers the rule authentic but confined to the case of payment by a fellow-slave related to the *liberandus*, the rule being an analogous extension of the rule for *servus suis nummis emptus*.

[1] C. 6. 3. 3. [2] 38. 1. 32, *etc.* [3] C. 7. 16. 33.
[4] The question is surprising in any case: it is perhaps due to local usages. In the extant memorandum from Egypt in A.D. 221 the manumitter agrees that he will not reclaim the slave. See the document, Girard, Textes, Appendice.
[5] C. 7. 16. 36, Diocletian. *I.e.* it cannot be enforced by the slave.
[6] 29. 2. 71. 2. But the form of the remark, its vagueness, and the rather summary manner in which what must have been a difficult question is disposed of, all suggest that the whole passage is from Tribonian.
[7] C. 7. 6. 1. 8. [8] 37. 15. 3; C. 6. 4. 1. They say nothing of enforcement.
[9] 40. 12. 38. 1; Haymann, Freilassungspflicht, 41 *sqq.*
[10] 40. 1. 19; Haymann, *op. cit.* 40.

It is clear that Papinian knew of no general rule[1]. But it is hardly credible that he should have held that a man who bargained with his own slave came under an obligation which would not have resulted from a similar bargain with a freeman. Nor is it likely that he would of his own authority have extended the rule for slaves *suis nummis empti* to a case so fundamentally different. The inference is that enforcement was not known to the classical law. As to the texts in the Code, there is some difficulty. Gordian's text is no doubt mainly due to the compilers[2], but there may be a question as to those of Diocletian[3]. They are both cases of payment by relatives, but the rule laid down is quite general, and though they are years apart the terms of the rule are identical, except that one inserts *favore scilicet libertatis*[4]. Haymann while accepting the rule, but as confined to the case of relatives, shews that this text has been fundamentally altered at the beginning: the other is grammatically defective[5]. The difficulty of principle which Papinian must have seen is less certain to have occurred to Diocletian's adviser, but on the whole, in view of the state of the texts and of the intermittent way in which the rule is recognised in the Digest, it is probable that the whole enforcement is due to Justinian.

The truth seems to be that this institution is an exotic in Roman Law, though the frequency of allusions to it suggests that it was common in later classical times. On the other hand it is a well-known Greek practice. Extant documents give plenty of evidence that it was common for an outsider to provide the price of the manumission without taking a conveyance of the man, retaining a right to his services after the manumission till the money was in some way repaid. Often too it was done in the way indicated by the Roman texts, *i.e.* with no reservation of rights[6]. This suggests that it is an importation from provinces under Greek influence. The case above cited is from Egypt and contains clear evidence of Greek influence. The fact that it is not referred to by the Constitutions which enact compulsion suggests that as a common institution it is of a later day. The probable inference is that the references to compulsion in the Digest are, as is above suggested, interpolated[7].

The money might with the master's consent be his own, but if his own money were used without his consent, an action was available

[1] 19. 5. 7.
[2] C. 4. 57. 4; Haymann, *op. cit.* 42. Apart from textual points of varying importance he remarks that though a time was fixed the automatic acquisition of liberty occurs only on *mora*, which was not the rule of the *constitutio*, *ante*, p. 631.
[3] C. 4. 6. 9; 7. 16. 8. [4] C. 4. 6. 9.
[5] C. 7. 16. 8: *Cum adfirmes placuisse domino tuo ut . . . . vos manumitteret, et te tantummodo liberavit.*
[6] Dareste, Recueil des inscriptions juridiques grecques, Série II, 236 *sqq.* See the discussions at pp. 252 *sqq.*, 273 *sqq.*
[7] As it is uncertain whether a decree was necessary, it is uncertain what rules were applied as to the *ingenuitas* of children.

against the person who paid it, if he was acting fraudulently[1]. Conversely where a slave induced a third party to become responsible to his *dominus* for his value, undertaking to take over the obligation as soon as he was free, and then not doing so, he was liable to an *actio doli*[2].

Most of the texts dealing with the transaction have no reference to enforcement: they lay down rules for it regarded as an ordinary innominate contract of the form "*do* (or *facio*) *ut facias.*" For the most part they present little difficulty and may be shortly stated. If the money has been paid and the liberty is not given, there is a *condictio* to recover it[3], or if he has any interest in the manumission he can sue *praescriptis verbis* for *quanti interest*[4]. The right to condict arises only where there has been some wrongful delay[5]. The death of the slave after *mora* does not destroy the *condictio*[6]. If it was before *mora*, Proculus says generally that there is no *condictio*[7]. Ulpian distinguishes[8]. The loss falls on the slave owner (*i.e.* the money can be condicted) unless some action reasonably caused by the bargain led to the death, *e.g.* the man was killed on the way to the magistrate, or he would have been sold or differently employed but for the bargain. It is likely that a good deal of this is Tribonian[9]. In a case in which the slave who was to be freed ran away, there is a similar discussion of hypotheses[10]. If the owner was going to sell the slave but did not because of this bargain, there is no *condictio*, but security must be given for the return of the money, less any diminution in value of the slave, if he came back. But if the payer still wished him freed, this must be done or all the money returned. If he was not going to sell him, he must return all the money unless he would have kept him more carefully but for the bargain: it is not fair that he should lose both slave and price. Here too Tribonian has clearly been at work[11].

If one slave was given that another might be freed, and after this was done, the slave given was evicted, there was an *actio doli* or *in factum* according to the state of mind of the person who gave him[12]. Conversely if a slave was given to secure the freeing of one who was not in fact a slave, the value of the slave given could be recovered by *condictio ob rem dati*[13]. But where money was promised to secure the freeing of a slave, and he was in fact freed, but by some other person,

[1] 16. 3. 1. 33. On the facts, *actio depositi*. The manumission is apparently completed.
[2] 4. 3. 7. 8. Even where it had not been the master's, he sometimes left it with the slave as part of the *peculium*, 40. 1. 6.
[3] 12. 4. 3. 2; C. 4. 6. 9. Where each agreed to free a slave, and one did while the other did not, there was a claim for the value of the slave freed, 19. 5. 5. *pr.*, 5.
[4] 19. 5. 7.
[5] 12. 1. 19. *pr.*; 12. 4. 3. 3; 19. 5. 5. 2. The wider questions as to the scope of this *condictio* do not concern us. See Haymann, Schenkung unter Auflage, 125 *sqq.*
[6] 12. 4. 3. 3, 5. 4.
[7] 12. 4. 3. 3.
[8] *h. t.* 5. 4.
[9] Gradenwitz, Interp. 167.
[10] 12. 4. 5. 3.
[11] Gradenwitz, *loc. cit.* He remarks that the clause *sed si eligat, etc.*, belongs to the discussion in the next preceding passage.
[12] 19. 5. 5. 2.
[13] C. 4. 6. 6.

the money was still due: nothing was said as to the personality of the manumitter[1].

The agreement was not always that he should be a *civis*. In a recorded case[2] the man was made a latin. The manumitter here was a *civis* who had been a peregrine. Probably in such cases and in manumission *inter vivos* by *libertini* the slave was usually made a latin: otherwise there would have been no mark of inferiority as there was where the manumitter was a *civis ingenuus*.

If the freedom is carried out there can be of course no condiction of the money[3]. But if the slave is not yet freed, and there has been no breach, two texts tell us that there is a *condictio ex poenitentia*[4]. It has been urged by Gradenwitz, not without predecessors, but with new and strong argument[5], that this particular *condictio* is an invention of the compilers. His view has been widely accepted[6], and at least so far as the present case is concerned hardly admits of a doubt. The texts themselves are so expressed as to make certain the fact that they are altered in some way, and they are definitely contradicted on the point[7]. It is not necessary to restate the arguments, or to enter on the wider question, which does not concern us, as to the extent to which the classical law admitted a *ius poenitentiae*.

It may be well to point out the essential differences between these last three cases, which do not seem always to be distinguished with sufficient clearness in current discussion. In the first case—transfer *ut manumittatur*—the transaction is expressly for that purpose and is initiated by the *dominus*. In the case of sale *servi nummis* the purpose is not necessarily express, and the initiative is in the slave. So far as appears the master receives a full price, and is merely a consenting party, who does not stand to lose anything by the transaction. In the first case the manumission is not necessarily, or so far as the texts go, normally, to take effect at once. In sale *suis nummis* it is always so. There is no suggestion in the second case of any right of withdrawal—a natural result of the fact that the initiative is in the slave, and no *fiducia* is imposed, or could be imposed, on the vendee. The various differences of rule which have been treated in this chapter are all fairly deducible from these differences.

[1] 45. 1. 104. A slave promised money for freedom, and when free promised it again: this was good. It was not *onerandae libertatis causa*, but merely deferred payment, 44. 5. 2. 2. There was an *actio in factum* against him if he refused to renew his promise, 4. 3. 7. 8; C. 4. 14. 3. See *post*, p. 692.
[2] Girard, Textes, Appendice.
[3] 12. 1. 19. *pr.*; 12. 4. 3. 3.
[4] 12. 4. 3. 2, 3.
[5] Gradenwitz, Interp. *loc. cit.* See also Haymann, Freilassungspflicht, 57, who points out the irrational character of the right.
[6] See, however, Heck, Z. S. S. 10. 119; Karlowa, R. R. G. 2. 772; Naber, Mnemosyne, 22. 432.
[7] 12. 1. 19. *pr.*

In the third case the manumitter is the real owner of the slave. No text speaks of a postponed manumission[1] (*i.e.* manumission *post tempus*) in this case, though there are cases in which the manumission is to be *intra tempus*. The initiative may be from the slave or an *extraneus*: it can hardly be from the *dominus*. There is no question of *fiducia*, but the money has been handed over for the express purpose[2].

[1] In C. 4. 57. 4 it may well be *intra tempus*.

[2] The case of fideicommissary liberty to a slave the property of the fiduciary, enforced by the *Sc.* Iuncianum, *ante*, p. 613, somewhat resembles the present case. But that legislation rests on the idea that the trust is itself an inchoate manumission (see, *e.g.*, 40. 5. 17, 26. *pr.*, 51. 3), on the fiduciary nature of the transaction, and the sanctity of a testator's wishes. These considerations are not applicable in the present case.

CHAPTER XXVIII.

EFFECT ON QUESTIONS OF STATUS, OF LAPSE OF TIME, DEATH, JUDICIAL DECISION.

In general an owner can free, but no pact or agreement can make a freeman a slave[1], or endow a slave or *libertinus* with *ingenuitas*[2], or make an *ingenuus* a *libertinus*[3]. Acting as a slave will not make a free person a slave[4]. An acknowledgment by a man that he is a slave, whether it be voluntary or compelled, does not make him one[5], even if it be formally made *apud acta praesidis*. Paul's language may confine this rule to the case in which the admission was compelled by fear[6]. But in the later law this restriction has disappeared if it ever existed, and it is most probable that Paul is merely giving an illustration of the circumstances under which such a false admission is likely to be made. In what purport to be two enactments of Diocletian[7], we are told generally, that acknowledgment of slavery *apud acta* or by *professio* is no bar. Similarly, whatever may have been the law under the old system of the Census, a failure to make proper *professio* as a *civis* does not cause enslavement[8]. The fact that a free person has been sold as a slave by his parents, or an apparent owner, or by the Fisc or by rebels is no bar to his claim of freedom[9]. A similar statement is made in an enactment of A.D. 293 as to one who, being under 20, allows himself to be given as part of a *dos*[10]. The same rule is laid down in an enactment of the following year without limit of age where the person sold was not aware of his freedom[11]. An enactment of Constantine[12] provides

[1] 40. 12. 37; C. 7. 16. 10.

[2] C. 7. 14. 8.

[3] 40. 12. 37. Apparent exception under *sc.* Claudianum, *ante*, p. 412. *Transactio* might have been expected to be on the same level as pact, but as to this see *post*, p. 657.

[4] C. 7. 14. 2, 6; 7. 16. 20, 22; 7. 16. 23. That the Fisc has treated a man as *inter familiam fisci* does not make him a slave, P. 5. 1. 3.

[5] C. 7. 16. 6, 15, 23.

[6] P. 5. 1. 4.

[7] C. 7. 16. 24, 39.

[8] *h. t.* 15.

[9] P. 5. 1. 1; C. Th. 4. 8. 6 (= C. 8. 46. 10); C. Th. 5. 8. 1; C. 7. 14. 4; 7. 16. 1, 5, 12.

[10] C. 7. 16. 16.

[11] C. 7. 14. 14.

[12] C. Th. 4. 8. 6. As to the bearing of these texts on the question of sharing price in fraudulent sale, *ante*, p. 432.

that one sold under 20 is not barred, by afterwards acting as a slave, from claiming his liberty. This text raises, however, a distinction not elsewhere traceable. If a person who has actually been freed under 14 allows himself afterwards to be sold as a slave, this is no bar, for he may reasonably have failed to understand the transaction of manumission. But if he was freed after puberty, he cannot be supposed not to know that he is a freeman, and is barred apparently at once from claiming his liberty. This rule is dropped in Justinian's Code[1].

Just as these various facts go but a little way towards proof of slavery, so facts of the same class but of contrary tendency weigh but little in proof of liberty. The fact that a man has been allowed to hold a public office does not exclude the possibility of his being a slave[2]. Letters and acknowledgments of freedom, even from the person now claiming him as a slave, are no bar to the claim[3]. Proof that the father is *ingenuus* is no proof that the child is, since the mother may have been a slave[4], and while the fact that the child was born after his mother's manumission is evidence of his freedom, nothing[5] can be inferred from the fact that his brother is free.

There were, however, some cases in which what may be called extraneous factors did affect a man's status. The most important are the following.

A. Lapse of Time. It seems fairly clear that in the time of Justinian lapse of time in apparent slavery, even though for as much as 60 years, was no bar to a claim of liberty[6]. So far as the classical law is known to us independently of the Corpus Iuris there is no trace of any other rule. It seems, however, from the *interpretatio* of an enactment in the Codex Theodosianus[7], and from Theodore in the Scholia in the Basilica[8], that the lawyers who advised Alaric, and the post-Justinianian lawyers, regarded the rule of *longissimi temporis praescriptio* of 30 or 40 years, laid down by Theodosius for all real and personal actions[9], as being applicable to *adsertiones libertatis*. But no sign of this appears in the Corpus Iuris[10].

[1] C. 7. 18. 3; 8. 46. 10. (Much of C. 7. 18. 3 is from C. Th. 4. 8. 6 as to disposal of the apparent *peculium*.) To begin an action claiming a man as a slave does not affect his position, C. 7. 14. 7. A man is *ingenuus* though born when his parents bore slave names to lead to the belief that they were slaves, *h. t.* 10. Failure to receive the proper *instrumenta*, or loss of them, affects only ease of proof, 4. 2. 8. 1; C. 7. 16. 25; *ante*, p. 453. See for similar rules, C. 7. 14. 10—13; C. 7. 16. 18, 34. Proof that relatives are slaves is not conclusive. See C. 4. 19. 22; 7. 16. 17, 28. [2] C. 7. 16. 11, 38.

[3] *h. t.* 41. That the claimant has described the person claimed as a sister, or has lived on terms of equality, is not proof of freedom, unless it amounts to manumission, *inter amicos*, C. 4. 19. 13; C. 7. 16. 20. Purchase by natural father does not itself free, C. 7. 16. 29. To have repaid the purchaser the price does not free the man purchased, *h. t.* 12. To prove that you have contracted with the man whose *heres* now claims you is no answer, *h. t.* 18.

[4] C. 4. 19. 10. [5] *h. t.* 17. [6] C. 7. 14. 6; 7. 16. 5. 1; 7. 22. 3.

[7] C. Th. 4. 8. 6. [8] Bas. Sch. 48. 24. 1. [9] C. 7. 39. 3, 4.

[10] The rubric of C. 7. 22 is *de longi temporis praescriptione quae pro libertate et non adversus libertatem opponitur*.

There is more difficulty as to the acquisition of liberty by lapse of time. Such a lapse was no protection if the liberty had begun in bad faith, for instance, by *fuga*, which of course would have to be proved[1]. But an enactment of A.D. 300, in Justinian's Code, lays down the principle that long possession of liberty *iusto initio* is protected, and gives the concrete rule based on *favor libertatis*, that 20 years' *bona fide* possession of liberty *sine interpellatione* (*i.e.* not judicially disputed) makes the man free and a *civis*[2]. It may be noted that while the abstract proposition at the beginning of the enactment requires only *iustum initium*, the rule stated in the actual case seems to require good faith throughout the qualifying time. It is probable that the law is not quite in its original state. Another enactment of A.D. 491, which may possibly be genuine provides that a man whose condition has not been judicially disputed for 40 years, is free in any case[3].

But though the law of Justinian's time is fairly clear, the texts make some difficulty as to earlier law. An enactment of A.D. 331[4], which says that prescription does not protect children of a slave mother and free father living in an equivocal quasi-free position with their parents (precisely because it is equivocal, has no *iustum initium*, no gift of substitute or money to the master, or other indication that they were meant to be free) says, incidentally, that the period of prescription for liberty was already fixed at 16 years, by a *lex*. This statute is not extant, and there is no other trace of this term of 16 years. The way in which the rule is stated does not indicate that it was ancient, and it is probable that, as Gothofredus[5] suggests, the reference is to a lost enactment of Constantine. He also suggests, tentatively, that it might conceivably be the *lex* Aelia Sentia, basing this on the fact that the rule that the Fisc could annul a gift of liberty for fraud, within 10 years, is stated in a book of Paul *ad legem* Aeliam Sentiam[6]. But there is no probability that the *lex* dealt in any way with this sort of question[7].

Whether there was any rule on the matter in classical times may be doubted. The law of usucapion clearly did not affect the matter, nor is there any sign of, or probability in favour of, a praetorian form of liberty protected by *actiones utiles*[8]. On the whole it seems likely that liberty could not be acquired by lapse of time in classical law.

[1] C. 7. 22. 1. [2] *h. t.* 2.

[3] C. 7. 39. 4. 2, the general rule of *longissimi temporis praescriptio*. It says nothing of *bona fides*. Presumably *iustum initium* is really assumed.

[4] C. Th. 4. 8. 7. [5] *Ad* C. Th. 4. 8. 5.

[6] 40. 9. 16. 3.

[7] C. Th. 4. 8. 9 (393) says that those who have lived 20 years openly as free in the enjoyment of some public post need no *adsertores*. But this is not prescription for liberty.

[8] To suppose latinity is difficult: the case is not traceable in Justinian's Code (7. 6), and in those cases in which the Praetor protected liberty, the *voluntas domini* was the determining factor, cp. Fr. Dos. 7.

B. Lapse of time after a traceable manumission. A person who has been freed is obviously *prima facie* free and a *libertinus*. It is, however, over and over again laid down that the mere fact of manumission does not bar a man from asserting that he is an *ingenuus*[1]. But it seems clear that, up to the time of Justinian, a *manumissus* could not claim *ingenuitas* before the ordinary courts (*i.e.* those of the Consul or Praeses), unless the whole hearing were concluded within five years from the manumission[2]. There were no exceptions from this rule[3], but if important things came to light (*e.g.* discovery of *instrumenta ingenuitatis*), after the five years were over, it was always possible for the man affected to go to the Emperor[4]. The language of the text shews this to have been an extraordinary measure, but Justinian, regarding it as the mere substitution of one tribunal for another, abolishes the rule, and provides that *ingenuitas* can be claimed before the ordinary courts, without any limit of time[5].

From the other point of view, there is some difficulty in the rules. It is laid down that the *heres* cannot dispute his ancestor's manumission[6]. The scope of this rule is doubtful. The texts make it clear that their basis is the respect due from the *heres* to the *voluntas domini*, and they seem to mean merely that the *heres* might not object on technical grounds (or on account of *fraus creditorum*) to a manumission *prima facie* valid and having the dead man's full and real assent. Probably it did not prevent his opposing the claim of freedom, where the manumission had been compelled by force[7]. The manumission itself was no protection against a third party owner: he could still claim his slave[8]. It is clear, however, from the conclusion of the *lex* that there was some prescriptive period which would protect such a slave[9], but it is not easy to say whether this differed from the period in the case of ordinary apparent liberty. Analogy suggests that in such a case the liberty would be indisputable after five years, if the manumission proceeded from the owner. Rules suggesting this analogy are the following. A man's status could not be disputed after five years from his death[10]. If a will were upset by the *querela* more than five years from the death, all liberties which had taken effect remained valid[11]. Where a will was upset by a son whose existence was not known to the testator, persons freed by the will retained their liberty *favore libertatis*, if they had remained in liberty for five years[12]. So, quite apart from questions of death, where a judgment of *ingenuitas* was retracted for collusion within

[1] In. 1. 4. 1; P. 5. 1. 2; C. 4. 55. 4; 7. 14. 1, 2, 3.
[2] 40. 14. 2. 1; 40. 16. 2. 3.
[3] 40. 14. 4.
[4] *h. t.* 2. 2.
[5] C. 3. 22. 6.
[6] 40. 12. 31; C. 7. 16. 7.
[7] 40. 9. 17; cp. Fr. Dos. 7.
[8] C. 7. 10. 7. *pr.* There are penalties.
[9] C. 7. 10. 7. 2 = C. Th. 4. 9. 1.
[10] *Post*, p. 651.
[11] 5. 2. 9; *ante*, p. 568.
[12] 40. 4. 29.

five years, the man was handed back to his old owner[1]. These last texts shew signs of interpolation, and rather suggest that some such five-year limit was developed by the compilers, for cases in which the manumission, though by the *dominus*, was defective, but that there was no rule other than the ordinary prescription where the manumitter was not the real *dominus*.

C. Death. The mere fact of death does not put an end to questions of status. They may not, indeed, be raised *principaliter* after the death, *i.e.* where that is the substantial issue[2]. But that would be a rare case, for it is usually at bottom a property question. Thus where goods which were part of his estate are claimed as *peculium*, or the status of his or her child is in question, the action may be brought notwithstanding the death[3].

But lapse of five years from the death produces much more effect. The general rule of later law was that a man's status might not be attacked after he had been dead five years[4]. Callistratus tells us that this rule was first laid down by Nerva in an Edict[5]. Nerva's enactment was probably a statement of a general principle which was supplemented by a senatusconsult referred to in several texts[6]. It is clear that the rule is classical, but its application involves the settlement of details, and, for the most part, it is not possible to state the exact origin of each rule.

There are no exceptions from the general rule that a man's status may not be attacked more than five years after his death[7]. For the application of the rule it is essential that the person in question was in undisputed possession of the status at the time of his death[8]. It may be necessary to enquire as to whether the status was in fact undisputed at the death, and if the evidence leaves this doubtful, later times may be looked at[9]. Apparently the prescription is not barred by bringing proceedings within the time before a magistrate who has no jurisdiction[10]. However, if the man died *in fuga*, or *latitans*, he could

[1] 40. 12. 29. 1; *post*, p. 675.
[2] C. 7. 16. 13.
[3] C. 7. 16. 13, 27, Diocletian, but the rule is older. Alexander decided that the question of a man's status was not determined by his death, in an apparent status, but would be heard by the *iudex* who was adjudicating on the property questions, C. 7. 21. 3.
[4] 40. 15. 1. *pr.*, *etc.*
[5] *h. t.* 4. The rescript of Claudius is immaterial to us here: it is to the effect that a financial question must not prejudice one of status.
[6] C. 7. 21. 4. *pr.*, 7, 8. Perhaps the same as an enactment of Hadrian also mentioned, D. 40. 15. 1. 2.
[7] 40. 15. 1. *pr.*; *h. t.* 4. The rule barred even *incapaces* and the Fisc, 40. 15. 1. *pr.*, 2. 1; C. 7. 21. 6. *pr.* The proceeding must be begun but need not be ended within the time, C. 7. 21. 4. 1. Cp. D. 40. 16. 2. 3. The rule applied also to questions of *ingenuitas* and *civitas*, but not to questions of *patria potestas*, C. 7. 21. 2, 5, *etc.* See also C. 7. 21. 4. *pr.*, 7 and the rubrics of D. 40. 15 and C. 7. 21.
[8] C. 7. 21. 2, 4. *pr.*, 6. *pr.*, 7. The rule applies where an action begun before the time is clearly abandoned, D. 40. 15. 2. 2.
[9] C. 7. 21. 6. 1.
[10] *h. t.* 7.

not be said to be living in undisputed possession of his status, and the rule did not apply[1].

It is plain that a dead man's status is not likely to be disputed if he is the only person concerned: it is in connexion with his property and successors that the question will arise. To defeat A's claim to certain property, it may suffice to shew that he claims it, *e.g.*, as *heres* to X, who was in fact a slave. It is this that really needs prevention. Accordingly the rule is stated that even if the man has not been dead for five years, his status cannot be called in question if such an enquiry may affect the status of one who has been dead for that time. This is an odd sort of half-way house. Hadrian provides that a living person's status cannot be disputed if the enquiry will affect that of a person who has been dead for five years[2]. Papinian declares the same rule: the status of a father or mother dead more than five years cannot be called in dispute, by raising a question as to that of a child[3]. Severus and Caracalla also say that if X's patron has been dead for five years, the status of X may not be attacked through that of the patron[4]. In A.D. 205 it was laid down that where X was made *heres* by B, his right was not to be disputed by shewing that B's mother who had been dead more than five years was in fact a slave[5]. The rule is then, not that the status of these living people may not be disputed, but that, if it is disputed, evidence affecting the status of persons dead more than five years will not be admitted[6].

The rule applies only to attacks on status: there is nothing to prevent evidence at any time that the status was better than had been supposed. Marcian, Marcellus and Hermogenianus agree that evidence may be brought at any time to shew that a dead person was really a *libertina* and not an *ancilla*[7]. It is noticeable that these three jurists are very late: it is possible that the rule above stated had been couched in such general terms as to cover, in the opinion of some writers, this case also[8].

D. *Res Iudicata.* This topic will serve to introduce what is essential to a comprehensive view of the topic of slavery, *i.e.* the procedure in claims of liberty and in claims of a man, apparently free, as a slave. Both types of proceeding are called *causae liberales.* They

[1] C. 7. 21. 8. [2] 40. 15. 1. 1, 2. [3] 40. 15. 2. *pr.*
[4] C. 7. 21. 1. [5] C. 7. 21. 2.
[6] The rule attributed to Claudius in 40. 15. 4 may conceivably be the same, but this would give rise to great difficulties of date. More probably it has nothing to do with death, but deals with the matter discussed *post*, p. 671.
[7] 40. 15. 1. 4, 3.
[8] Cases might occur in which the establishment of the fact that A, supposed to be a slave, was really free, might involve the conclusion that another supposed to be free was really a slave, *e.g.* where a mistake of identity had been made. How was this dealt with if both had been dead five years? Probably both would be treated as having been free. Cp. 50. 17. 20.

are civil suits[1], and as is the case with all suits, their form underwent historical changes, and had its own peculiar characteristics.

It is clear that under the system of *legis actio*, the procedure in such cases was by way of *sacramentum.* We learn from Gaius, that, *favore libertatis*, in order not to be oppressive to *adsertores*, the *sacramentum* in such cases was fixed at 50 *asses*[2]. The dominant opinion is that in *causae liberales* the *vindiciae* were always given *secundum libertatem*, which would practically appear to mean that not only the man whose status was in question was *pro tempore* treated as free, but also that the burden of proof was with him who claimed him as a slave. For though in *sacramentum* each side must claim and prove, the *status quo* would it seems be determining if neither proved his case[3].

We are left in the dark as to the mode of trial under the system which superseded that of *legis actio.* It is generally held that the trial was by *praeiudicium*, a view which rests mainly on the fact that we are expressly told that this was so in later law[4]. There is, however, no direct evidence for this in earlier law. The opinion has in its favour the fact that *praeiudicia* had no *condemnatio*, and under the formulary system, when every action sounded in damages, a condemnation in such a case seems out of place. Nevertheless Lenel[5] remarks that it is very doubtful whether it was in fact a *praeiudicium.* He points out that Gaius does not mention it in speaking of *praeiudicia*[6]. His main illustration is *an libertus sit*, a very much less important affair. Further, he points out that a *praeiudicium* as such is essentially a preliminary matter affecting only indirectly the pecuniary interests of the parties. But this is one which directly affects them. We know that it was occasionally called a *vindicatio in libertatem*[7]. He admits the existence of texts which declare it to be a *praeiudicium*[8], and in relation to the text in the Code[9] he rejects as inadmissible the rendering of the word *praeiudicium* as meaning "disadvantage[10]," which would destroy the force of this text. Even if these texts be accepted they would shew only that the process was a *praeiudicium* in later law, after it had become a *cognitio*, and, for Justinian's time, this is generally accepted. Lenel has no substantial doubt but that in the case of a claim *in servitutem* it was an ordinary vindication, resting his view on the fact

[1] C. Th. 2. 7. 3. [2] G. 4. 14.
[3] As to the general question, see Jobbé-Duval, Procédure Civile, 355 *sqq.* The dominant view on the immediate question rests on the accounts of the case of Virginia (D. 1. 2. 2. 24; Livy, 3. 44 *sqq.*; Dion. Hal. 11; Diodor. Sic. 12. 24). The accounts have been much debated (Maschke, Der Freiheitsprozess, and earlier literature cited by him; Lenel, Ed. Perp. (2) p. 367; Schlossmann, Z. S. S. 13. 236 *sqq.*, *etc.*). Perhaps no conclusion can safely be drawn from narratives none of which is nearly contemporary, but Maschke seems to have shewn that it is possible to doubt whether the rule went further than that *vindiciae* were *secundum libertatem* if the man was *in libertate* when the issue was raised.
[4] In. 4. 6. 13; C. 7. 16. 21. [5] Lenel, Ed. Perp. (2) pp. 367 *sqq.*
[6] G. 4. 44. [7] 10. 4. 12. *pr.*
[8] In. 4. 6. 13; Theoph. *ad h. l.*; C. 7. 16. 21. [9] C. 7. 16. 21.
[10] Sintenis, Otto and Schilling, *ad h. l.*; Wlassak, Z. S. S. 25. 395.

that there exist several texts shewing that there was or might be an actual *condemnatio*[1]. It may be doubted whether the process was tried by *formula* for any long time. It became a *cognitio* very early[2], at latest under Antoninus Pius. In the time of Cicero it was still tried by *sacramentum*, and went before the decemviral court[3]. Mommsen thinks on negative evidence[4] (*i.e.* that Dio and Pomponius do not say that they kept it, while they do record the fact in other matters) that Augustus took away this jurisdiction from them. Cuq thinks[5] that it was transferred to the *centumviri*, which gives the same results, since all centumviral causes were tried by *legis actio*. Karlowa says that the citations from Ulpian *de officio consulis* leave no doubt that the Consuls had jurisdiction perhaps concurrently with, perhaps in lieu of, that of the Praetor[6]. He thinks the *consilium* sat and voted—hence such rules as that of the *lex* Iunia Petronia, *etc.*[7]—and that[8] the Decemviri had jurisdiction where an apparent *civis* was claimed as a slave, in other cases either *recuperatores* or *unus iudex*[9]. Lenel considers the formulary process to have continued as an admissible alternative to the *cognitio*, and he cites texts in which the *iudex* appears[10]. It may be doubted whether the *iudex* here is the old *unus iudex* or the magistrate's deputy[11]. The view that the magistrate habitually appointed permanent deputies to try particular types of case, especially outside Rome, probable in itself, would harmonise these texts and those dealing with the closely similar case of the *querela*[12].

In Justinian's time it is of course a *cognitio*. It is sometimes described as a *praeiudicium*, but that means little under the system of pleading then in operation, under which a *condemnatio* need not be for money in any case. Perhaps the chief text means[13] merely that it might be an *actio praeiudicialis*, as it certainly might, *i.e.* a matter to be settled as a preliminary to some other issue, *e.g.* to a claim of a *hereditas*[14]. But it is frequently brought *principaliter*[15], when it is not easy to see anything *praeiudicialis* about it.

We shall see[16] that the *de facto* position of the slave when the question was raised, *i.e. in libertate* or *in servitute*, decided the burden of

[1] 7. 7. 4, 6; 40. 12. 36. There seems no sufficient reason for distinguishing the two cases. A formula *per sponsionem* for a *vindicatio in libertatem* is simple. And see Lenel, *op. cit.* p. 371.
[2] See Girard, Manuel, 102, where the literature is cited.
[3] Cicero, Pro Caecina, 33. 97; Mommsen, Staatsrecht (3) 2. 1. 605; D. P. R. 4. 315.
[4] Mommsen, Staatsr. (3) 2. 1. 608; D. P. R. 4. 318. [5] Cuq, Instit. Jurid. 2. 141.
[6] There was a Praetor *de liberalibus causis* from about A.D. 200.
[7] 40. 1. 24. [8] R. R. G. 2. 1108 *sqq.*
[9] The references to *recuperatores*, however, suggest general competence: see Girard, Manuel, 1104, and Textes, 127. The texts commonly contemplate a plurality of judges, and this may be one of the many precautions to secure a fair decision of so important a matter, 40. 1. 24; Karlowa, *loc. cit.*
[10] Lenel, Ed. Perp. (2) p. 372; D. 5. 3. 7. 1, 2; 40. 12. 8. 1, 2, 9. *pr.*, 23. 2, 42.
[11] See 40. 12. 41, *iudex qui de libertate cognoscat.* [12] Girard, Manuel, *loc. cit.*
[13] In. 4. 6. 13. [14] *e.g.*, C. 3. 31. 8.
[15] *e.g.*, 37. 10. 3. 2, 6. 3; 43. 29. 3. 7; 40. 12. 4. [16] *Post*, p. 660.

proof. The fact might be doubtful and there was an edictal machinery for a preliminary enquiry on this point[1]. So far as can be gathered from the Digest[2] this was also a *cognitio*. Whether this was the case in classical law cannot be said. As Wlassak says[3], the question of fact might have been referred to an *arbiter* by the magistrate who had charge of the case.

The action has a good many preliminaries, a fact alluded to in the various texts which use the expression *sollennibus ordinatis* in this connexion[4]. The first point to note is that a person whose status is doubtful cannot *postulare in iure*, and therefore the action is brought, or defended, on the part of the person concerned, by an *adsertor libertatis*. This is expressed by the well-known rule that among the few cases in which it was possible *lege agere, alieno nomine*, was that *pro libertate*[5]. The *adsertor* was something like a *procurator* or *cognitor*, but under exceptional rules, somewhat favourable to liberty. Thus it was no objection to an *adsertor* that he was disqualified by *turpitudo* or the like from acting as *procurator*, unless indeed the Praetor thought fit to reject him on his own authority, as suspect[6]. If an *adsertor* abandoned the case, the whole matter might be transferred to another, but if the one who abandoned the case did it without good reason, and in order to betray the claimant, he would be dealt with *extra ordinem*[7]. There is an obscure enactment in the Codex Theodosianus, which may mean that if a second assertor presented himself when there was one already, he was admitted to the suit, but was liable to a severe penalty in case of failure[8]. It is plain, however, that in the later Empire there were difficulties in procuring *adsertores*: Constantine legislated elaborately on the matter[9]. He provided that if one in apparent liberty were claimed as a slave and could find no *adsertor*, he was to be taken about his province (*circumductus*) bearing a label, shewing that he needed an *adsertor*. If he failed to get one he would be handed over to the claimant. But if afterwards he could secure an *adsertor*, he could renew his defence, retaining the advantage that the burden of proof was on the other side. If at that hearing judgment was in favour of the alleged slave, he was entitled to claim, by way of compensation, a *servus mulctatitius*, although if the slave were a woman and had a child during the hearing, though his fate would be determined by the judgment, she could not claim one for him[10]. If the alleged slave died during the

[1] Lenel, Ed. Perp. (2) p. 371. [2] The chief text is 40. 12. 7. 5.
[3] Wlassak, Z. S. S. 25. 395. [4] C. 7. 16. 11, 15; C. 7. 19. 5; C. 8. 44. 18.
[5] In. 4. 10. *pr.*; G. 4. 82. [6] Fr. Vat. 324.
[7] P. 5. 1. 5. See also C. Th. 4. 8. 8 *in fin.* An *adsertor* acting in bad faith was liable for *calumnia* on a high scale, for one-third of the value of the slave, G. 4. 175.
[8] C. Th. 4. 8. 8. So understood by Gothofredus. But this part of the *lex* may refer to a second claimant of the slave.
[9] C. Th. 4. 8. 5. [10] C. Th. 4. 8. 4.

hearing the case went on and the *servus mulctatitius* went to his *heres*. If the claimant of the slave died, and his *heres* continued the suit, there would be the same penalty, but not if he withdrew. If the *adsertor* acted at his own risk, guaranteeing return of the *peculium* in case of failure, he was entitled to take security for the possible penalty[1]. The text says that this *circumductio* is a substitute for the idle proclamation. It may thus be assumed that until this time, if an *adsertor* did not appear there was a proclamation in court. It is probable that the whole legislation is part of the protection of the weak against the *potentiores* which is so marked a feature of legislation in the later Empire[2]. The word *proclamare* appears in the Digest in the expression *proclamare in* (or *ad*) *libertatem*, the regular expression for the case of one *in servitute* claiming liberty[3].

To the rule requiring an *adsertor* in all cases an exception was made in A.D. 393, by Theodosius, who provided that if a question of status was raised against one who had been living *in libertate* for 20 years, irrespective of *bona fide* origin of the condition (*iustum initium*[4]), and had to the knowledge of the claimant held some public office without objection during that time, he could defend his liberty without an *adsertor*[5]. Under Justinian the need for an *adsertor* was wholly swept away. He provided that the person concerned might appear personally and that if the claim was one *ex libertate in servitutem*, he might appear by procurator, though not in the other case. Under the new system, the *peculium* and other property which may be affected by the result is to be assigned to safe keeping by the *iudex*, at least in the case of a claim *ex servitute*. Those who can give a *fideiussor* must do so, but if the *iudex* is satisfied that this is impossible they must give a *cautio iuratoria*[6]. Before Justinian it is not clear what the law as to security was. His enactment shews that he altered the law on the matter and suggests also that the earlier rules were more severe than those established by him. So far as *peculium* and similar matters were concerned, his language seems to imply that the *adsertor* had had to give security for these in all cases. The same consideration would cover the case of the man himself, which suggests that the same rule applied there. It is true that the analogy of the ordinary real action suggests that it was only where the *adsertor* was defendant that security needed

[1] C. Th. 4. 8. 5.
[2] See Monnier, N. R. H. 24, pp. 62 *sqq*.
[3] As to the history of this expression and the extent to which the form *Proc. in libertatem* is interpolated, see Gradenwitz, Interp. 101; Z. S. S. 14. 118; Wlassak, Grünhut's Zeitsch. 19. 715; Schlossmann, Z. S. S. 13. 225. Schl. thinks *proclamatio* was originally an appeal to the bystanders for an *adsertor* (see the story of Virginia, and the rules as to *vindex* in *manus iniectio*) but that in the sources it is merely setting up his claim.
[4] *Ante*, p. 649.
[5] C. Th. 4. 8. 9. So explained by the *interpretatio*, but time and service may be alternatives: if not it is not clear whether the service must have been throughout the time.
[6] C. 7. 17. 1.

to be given[1], and so Wlassak holds[2]. But the reason assigned by Gaius for requiring security, *i.e.* that the defendant is in possession of the disputed thing, applies in every case of *adsertio libertatis*, since, as we know, the man was in all cases *pro libero* during the hearing, whether the alleged *dominus* was plaintiff or defendant. Wlassak also considers it possible, though not proved, that no security was exacted if the man was *in libertate voluntate domini*, and he attaches to this hypothesis the discussion in two texts, which are concerned with the question whether in given circumstances a man can be said to be *in libertate voluntate domini*. But it is not easy to see why the fact that the *dominus*, either in error or out of kindness, had allowed the man to run loose, should have deprived him of his right to exact security. Wlassak, however, seems right in refusing to apply these texts to the hypothesis of an informal manumission. They appear, however, to admit of another interpretation, elsewhere considered[3].

Causae liberales were required—*favore libertatis*[4]—to go before *maiores iudices*. In the provinces this would be the *Praeses*[5]. The *Procurator* Caesaris had no jurisdiction in such matters[6].

A *causa liberalis* was not a fitting subject for arbitration, and if one was submitted, *ex compromisso*, to an arbitrator, he would not be compelled to issue a *sententia*[7], and probably his decision if given would be in no way binding. It must be borne in mind that his decision would not in any case be a judgment: it might give a right to an agreed *poena*, but it did not prevent the question from being again raised[8]. The law as to the effect of a *transactio* on such a matter is not quite clear. In one text, a constitution of Diocletian, we are told that no *transactio* between a *dominus* and his slave could be in any way binding on the *dominus*[9]. On the other hand we are told that Anastasius provided that *transactiones* as to status should be good and should not *titubare*, merely because they decided for slavery[10]. Elsewhere Diocletian had decided that pact could not make a slave free, *nec his qui transactioni non consenserunt quicquam praeiudicare potest*[11]. This seems to be an allusion to a case in which a mother had, under a compromise, been admitted to be free, her children remaining slaves, or some case of this kind[12]. Nothing in Diocletian's enactments[13] suggests a positive force in a *transactio*, but it would seem that a little later such compromises were made, and were regarded as binding on the parties

[1] G. 4. 89, 96.
[2] Wlassak, Z. S. S. 26. 400.
[3] *Post*, p. 661.
[4] 4. 8. 32. 7.
[5] C. 3. 3. 2; 7. 14. 1, 9; 7. 16. 11, 15.
[6] C. 3. 22. 2. Whether the rule of 315 requiring cases in which the Fisc was concerned to go before the *Rationabilis* applied to *causae liberales* is not clear (C. 3. 26. 5). The older rules of Hadrian and Marcus Aurelius requiring fiscal officers to be present (49. 14. 3. 9, 7) are unnecessary in that case, but in the Digest they may be anachronisms.
[7] 4. 8. 32. 7.
[8] 4. 8. 29, 30; P. 5. 5a. 1, *etc.*
[9] C. 2. 4. 13; cp. *h. t.* 26.
[10] C. 2. 4. 43.
[11] C. 7. 14. 8; cp. C. 2. 4. 26.
[12] C. 2. 4. 26.
[13] C. 2. 4. 13, 26; C. 7. 14. 8.

so far at least as the result was in favour of liberty. The practical outcome of the enactment of Anastasius[1] seems to be that a *transactio* would now be valid, to the extent of preventing the owner from claiming the man as a slave, or in the converse case, of preventing the man from claiming liberty against that defendant or claimant, but not beyond[2]. There is no sign that the rule was carefully worked out: it does not appear in the Institutes or Digest, and in the Basilica where the matter is discussed[3], the rule is made out that *transactio* is effective, after *litis contestatio* in the *causa*, but not before.

Causae liberales might be tried and decided on privileged days, not open for ordinary litigation[4]. If the claim was one *e libertate in servitutem* it must be tried at the domicil of the alleged slave[5]. If it was *e servitute* it would be at the domicil of the alleged *dominus*[6].

Under the system of *legis actio* the person in question was of necessity present, and the *adsertio* appears to involve his presence in any case[7]. The machinery by which it was compelled is not very clear. The interdict *quem liberum* was not available because this assumes freedom, and to decide it would prejudge the *causa liberalis*[8]. We are told that the *actio ad exhibendum* was available to one who wished *vindicare in libertatem*[9], but it is not easy to see the pecuniary interest needed[10]. There is no need for compulsion where the man himself is raising the question. The Institutes mention an *interdictum exhibitorium*[11], for the production of one, *cuius de libertate agitur*. It is not mentioned by Gaius from whom the next interdict mentioned, *libertum cui patronus operas indicere velit*[12], seems to be taken. Lenel does not appear to think that the Edict contained such an interdict. It may be a late introduction, perhaps alternative to *actio ad exhibendum*, perhaps designed to meet the objection that an *adsertor* had not the pecuniary interest, which, according to the Digest, the *actio ad exhibendum* required[13].

At least after Constantine, the case could be continued and decided in the absence of one party[14]. Justinian's enactment abolishing *adsertores* provided that if the alleged slave failed to appear for a year after summons by the claimant, judgment should go against him[15]. But there is nothing to shew, apart from this, that action could ever have been begun in his absence.

[1] C. 2. 4. 43. [2] See *ante*, p. 647. [3] Heimbach, 1. 726.
[4] 2. 12. 3. 1. [5] C. 3. 22. 3.
[6] *h. t.* 4. One *dolo malo in libertate* is treated for this purpose as *in servitute*, *h. t.* 1. Justinian seems to contemplate a double jurisdiction by providing that one who having begun suit in one jurisdiction starts another elsewhere, forfeits any right in the man, C. 7. 17. 1. 3. The text suggests that one is brought *ex divali iussione* in what would not otherwise be a competent jurisdiction. [7] Varro, de l. l. 6. 64; cp. Accarias, Précis, § 797.
[8] 43. 29. 3. 7. [9] 19. 4. 12. *pr.* [10] *h. t.* 13.
[11] In. 4. 15. 1. [12] G. 4. 162. [13] 10. 4. 13.
[14] 40. 12. 27. 2; C. 7. 16. 4, 40. Presumably of the man himself, though he is not a party.
[15] C. 7. 17. 1.

Subject to the possibility of being already barred by *res iudicata*[1] anyone interested in the matter may raise the question of a man's status. The normal case is that of one claiming to own him, but a usufructuary may bring the action[2]. It is presumably barred to one who may not *postulare in iure*, and a freedman cannot bring it against his patron, but, apart from these cases, exclusions do not seem to be numerous. A pupil can bring it against his *tutor*[3], but not *tutores* and *curatores* against their former wards. A husband can dispute the status of his *liberta* whom he has married[4], as, indeed, a manumitter could in general prove his manumission invalid[5].

On the other side the natural person to move is the alleged slave himself, and he can choose his *adsertor* freely. But, though he is not inclined to move, others may do so on his behalf, even against his will. Thus we learn that if he assents to the slavery to annoy his relatives, his parents may bring a *causa liberalis*, whether there is *potestas* or not. So children can for their parents, and even cognates can, for the slur extends to them. So too can 'natural' relatives, *e.g.* the parents of a freedman[6]. In general the right applies to all *necessariae*, *i.e.* related or connected people[7]. If the person concerned is mad or *infans*, not only relatives, but other people, may proceed[8]. A patron has an interest in the freedom of his *libertus* either on the ground of succession or on that of *operae*, and can thus bring a *causa liberalis* on his account[9]. The man's consent is immaterial[10], and thus the patron may do it even where the man himself has sold himself into slavery[11], though not, presumably, where the man himself would be barred. It must be added that, if there are several relatives or patrons claiming to act, the Praetor must choose the most suitable[12].

We shall have to deal later with cases in which the *causa liberalis* may have to be postponed owing to the existence of other questions with which it is connected. But Ulpian tells us that there are constitutions which provide for postponement, if necessary[13], even where it stands alone, and that Hadrian provided that there might be such postponement in the case of an *impubes*, if his interests required it, but not if he was sufficiently defended[14].

[1] *Post*, pp. 667 *sqq*.
[2] 40. 12. 8, 9. In later law, perhaps not in classical, pledge creditor, *h. t.* 8. 2.
[3] C. 7. 16. 35. [4] 40. 12. 39. 23; P. 5. 1. 8, 9.
[5] The status of one made *limenarcha* may be attacked by the appointing authority, C. 7. 16. 38.
[6] 40. 12. 1—3. Even a parent who has sold the child may afterwards proceed, C. 7. 16. 1.
[7] Dirksen, Manuale, *s.v. necessarius*. If there is no one else, female relatives or a wife may proceed, 40. 12. 3. 2.
[8] *h. t.* 6. A *miles* may proceed for *necessariae personae* (*h. t.* 3. 1).
[9] 40. 12. 3. 3, 5. *pr.*, 12. 5. [10] C. 7. 16. 19. [11] 40. 12. 4.
[12] *h. t.* 5. 1. [13] 37. 10. 3. 2.
[14] *h. l.* 5. He attributes a similar rule to Divi Fratres, 40. 12. 27. *pr.* Augustus provides that where mother and child are claiming before different judges the mother's case must be tried first. Hadrian says it must be so tried in any case unless they are taken together, 40. 12. 23. 2.

Whether the claim is *ex libertate* or *ex servitute* the action is essentially the same, but in the former case the man is defendant, while in the latter he is plaintiff and is thus under the burden of proof[1]. Upon this matter very precise rules are laid down. If the alleged slave was *in servitute* or *dolo malo in libertate* at the time the issue was raised, the claim is *ex servitute* and the burden of proof is on him[2]. If his *de facto* status is uncertain, the edict provides that there shall be an enquiry whether he was *in servitute* or *in libertate*, and if the latter, then whether it was or was not *dolo malo*. If it was, he is treated as *in servitute*[3]. There was evidently a good deal of discussion as to what was being *in libertate sine dolo malo*. Julian cited by Ulpian[4] lays down the simple rule that one who thinks he is free and acts as if he were free satisfies the rule. Varus is cited as making what purports to be a modification, but is in fact no more than a fuller statement. He says that even if the man thinks he is a freeman, so long as he acts as a *fugitivus* and hides, he is not *sine dolo malo*: indeed one who acts *pro fugitivo* acts *pro servo*, and in fact is not *in libertate* at all. Gaius adds[5] what seems to mean that if he fled so as to hide from his master, and then in his distant place acted *pro libero* he is still *pro fugitivo* and at any rate not *in libertate sine dolo malo*. It follows, as Ulpian says, that a freeman may be *dolo malo in libertate*, and a slave may be so *sine dolo malo*[6]. In fact, anyone who without fraud lived in liberty, and, with or without good reason, thought himself free, was *bona fide in libertate* and had the *commoda possessoris*[7], *i.e.* is not under the burden of proof[8]. But just as a man might be *in libertate mala fide*, so he might be *in servitute mala fide*. Two texts which leave something to be desired on the point of clearness seem, when fairly read, to mean that if one *bona fide in libertate* were about to be claimed as a slave, and the intending claimant, as a preliminary, seized the man and kept him in confinement, this would not settle the burden of proof, but that if it were substantially a claim *ex libertate*, it would still be so: the claimant by this act of brigandage would not have acquired to himself the position of defendant[9].

[1] C. 4. 19. 15; C. 7. 16. 5. 2. [2] 22. 3. 14; 40. 12. 7. 5.
[3] *Ib.* Apparently the burden of proof that he was *in libertate* was on him, 40. 12. 41. *pr.* Proof that it was *dolo malo* would be on the other side. It does not seem certain that the words *dolo malo* were actually in the Edict. This would make the enquiry in C. 7. 16. 21 unlikely, and Ulpian seems to find it necessary to explain that *in libertate* means *in libertate sine dolo malo*, 40. 12. 10. But he may be explaining only his own words. As to the mode of trial of this preliminary issue, see *ante*, p. 655.
[4] 40. 12. 10. [5] *h. t.* 11.
[6] *h. t.* 12. *pr.* He gives illustrations. An infant really free but stolen was *bona fide in servitute*. Not knowing his freedom he ran away and hid: he was *dolo malo in libertate*. One brought up as free, or freed under a false will which he thought good, or by one who was not his *dominus*, is *in libertate sine dolo malo*, 40. 12. 12. 1, 2.
[7] 40. 12. 12. 3.
[8] *h. t.* 4. The critical date is that at which application is first made to the court.
[9] 22. 3. 20; C. 4. 19. 15.

It is, however, nowhere said that a man could not be *in libertate sine dolo malo*, except in the cases laid down in the foregoing texts[1]. Two texts which have never been conclusively explained[2], discuss the question whether a particular man can be said to have been *in libertate voluntate domini*. It has been shewn by Wlassak that they cannot be applied to the question whether there has been an informal manumission, since there is no evidence of any *animus manumittendi*. He applies them to another hypothesis, elsewhere considered[3], but it may be suggested that their application is, possibly, to our present topic. They give perfectly good sense if they are understood as resting on the view, which may well have been held by some jurists, that a man was *in libertate sine dolo malo*, if he was in that position *voluntate domini*. The fact that in one of the cases the event under discussion happens after the *ordinatio litis*, is not material. If a man who had not been *in libertate* became so *sine dolo malo* after *ordinatio litis*, the only effect would be, if the classical law as to security was, as we have supposed[4], to shift the burden of proof, a matter involving no change in the mechanism[5].

Caracalla provided that there could be no proclamation *in libertatem* until proper accounts had been rendered as to past administration[6], so that from his time onward this must be regarded as another preliminary to the action.

The completion of the organisation of the case brings another and very important rule into play. As soon as the *lis* is *ordinata*, the man ceases to be *in servitute* if he was so before, and is treated pending the hearing as *liberi loco* or *pro libero*[7]. The origin of this rule is doubtful. It is sometimes said to be based on the rule of the XII Tables that *vindiciae* were to be *secundum libertatem*, and the fact that the rule is treated by Gaius as merely traditional—*volgo dicitur*[8]—which shews that it is not edictal, does not shew that it is not based on the XII Tables, since in any case it is a mere evolution from the supposed rule and not itself an express provision. It must be noted that its scope is less than that of the older rule: it has no relation to the question of proof. A person claiming *ex servitute* is *pro libero*, but must prove his case[9].

The rule applies from the moment when the *lis* is *ordinata* or *inchoata* or *coepta*[10]. The exact point of time meant by these expressions is

[1] No text gives any other case, but in the illustration in 40. 12. 12. 1 it is difficult to see why a point is made of the concealment if the state of mind was decisive.
[2] 40. 12. 24. 3, 28. [3] Wlassak, Z. S. S. 26. 391 *sqq.* *Ante*, p. 657. See Buckland, N. R. H. 32. 235. [4] *Ante*, p. 657.
[5] It does not appear that the question of *dolus malus* or not could be disposed of by oath, though this is allowed where a *libertinus* is claiming *ingenuitas*, C. 4. 1. 6. In C. 4. 19. 20 the effect is considered of the presence or absence of *instrumenta emptionis*.
[6] 40. 12. 34. [7] 4. 6. 12; 40. 12. 24. *pr.*, 3, 25. 2; C. 7. 16. 14.
[8] 40. 12. 25. 2. [9] See, however, Maschke, *op. cit.* 34.
[10] 4. 6. 12; 40. 12. 24. *pr.*, 25. 2; 43. 16. 1. 21.

nowhere indicated[1]. Karlowa thinks the cause is *ordinata* at the moment at which the distribution of parts is determined[2]. Cujas thinks it is at the absolute beginning[3], but the expression *ordinata* seems to imply that some matters have already been arranged[4].

The effect of this quasi-liberty is indicated in many texts. Thus a *tutor* can be appointed to the person in question, and the appointment will be valid or not, according as he is judged free or not[5]. He may not be put to the torture on the question of his liberty[6]. He may have actions even against his alleged *dominus*, lest they be barred by death or lapse of time[7], Servius holding that in all *actiones annuae*—the only ones in which in his day the point would have been material—time began to run from the moment the *lis* was *ordinata*[8]. This must presumably apply only where it is *ex servitute*, and thus the rule forms some support to the view that the *ordinatio* is the distribution of parts. If he wishes to sue a third person, we are told that the question whether the *lis* is *ordinata* or not is immaterial, lest any person liable to action have the power to postpone such action by getting someone to raise a question of status. Any judgment will be valid or void according to the result of the *causa*[9]. The main argument of this text is not very clear. This last rule seems to refer to the case of one claimed *e libertate*, while as we have seen the primary rule itself can hardly have any bearing except on the case of a claimant *ex servitute*.

The rule is, or may be, somewhat different if it is sought to make him defendant in an action. We are told that if the *dominus* (*i.e.* the other party to the *causa*) wishes to sue him in any personal action, the action will proceed to *litis contestatio*, but the hearing will be suspended till after judgment in the *causa liberalis*, according to the event of which the *iudicium* will proceed or be useless[10]. So if a third party wishes to charge him with theft or *damnum*, he must give security *se iudicio sisti* lest he should be in a better position than one whose status was not in dispute, but the hearing must be postponed to avoid prejudicing the *causa liberalis*[11]. So, if his alleged *dominus* is charged with *furtum* committed by him, and he *proclamat in libertatem*, the trial is postponed so that it

[1] See as to *lis inchoata*, Fr. Vat. 263; Cons. 6. 8. 9; see Roby, R. P. L. 2. 402. It is clear that this expression sometimes means *lis contestata*.
[2] Karlowa, R. R. G. 2. 1112. [3] Cujas, Observ. 18. 23.
[4] See the language of 40. 12. 24. 2. It does not seem probable that the time is that of *litis contestatio*, at whatever time in the proceedings that occurred, as to which see Girard, Manuel, 1004.
[5] 26. 5. 17.
[6] 48. 18. 10. 6. If one liable to torture on any matter claims to be free, Hadrian rules that this must be settled before torture, *h. t.* 12.
[7] 40. 12 24. *pr.* [8] *h. t.* 24. 1.
[9] *h. l.* 2. He may have procurators in business or litigation and may be a procurator, 3. 3. 33. 1.
[10] 40. 12. 24. 3. The text remarks that this does not prejudice the *causa liberalis*, and the man is not *in libertate voluntate domini*, *ante*, p. 660.
[11] 40. 12. 24. 4.

may be transferred to him if he is really free, and the *actio iudicati* may go against him[1]. So an interdict *unde vi* brought against him, while he is proclaiming, can result in a judgment of restitution after he is declared free[2]. The difference of rule may be only apparent, since the main text dealing with action by the man does not say that it is to be fought out before judgment in the *causa*, and emphasises the importance of getting it as far as *litis contestatio*[3].

But the rule that he is *pro libero* has limitations. Thus a person whose *status* is in question may not enter any *militia*, whichever way the claim is made[4]. If a person claiming *ex servitute* does so become a *miles*, he will be expelled, and as the text says he is to be treated like other slaves[5] he is presumably liable to capital punishment if he proves to be a slave[6]. Our text adds that a *miles calumnia petitus in servitutem* is not expelled, but *retinetur in castris*[5]. As it would be impossible to say whether there was *calumnia*, till the *causa* was decided, the rule deducible from the texts would seem to be that a man claimed *e libertate* was not expelled from a *militia* unless and until declared a slave, but that no such person could become a *miles* pending the *causa*.

The law as to his relation with his master presents some difficulty. Gaius tells us that he still acquires to his master if he really is a slave. He adds a doubt for the case of possession, since he is not now possessed by the *dominus*, but disposes of it with the remark that there is no more difficulty in this case than in that of a *fugitivus*, by whom his master can certainly acquire possession[7]. It may, however, be remembered that a *fugitivus* is still possessed, and though this doctrine was disputed, and rests mainly on the authority of Nerva *filius*, a Proculian[8], it is certainly held by Cassius and Julian[9], leaders of the school to which Gaius belongs. Paul discusses the matter in two texts[10], the conclusions of which are that in a claim *ex servitute*, where there is no suggestion that the man was *in libertate* before the issue was raised, the *dominus* continues to possess the man unless he is declared free. So also if he has run away, but has been away for so short a time or in such a manner that he has not before his capture established himself *in libertate*. But if he has definitely attained the position of apparent freedom, and on capture, or without capture, raises, or is ready to raise, the question of status, the master no longer possesses him. It is clear that for Paul the decisive point is the definite and express repudiation of the master's authority. This is more than is involved in *fuga* or even in acting *pro*

[1] *Ibid.* See also 9. 4. 42. *pr.*; Koschaker, Translatio iudicii, 220.
[2] 43. 16. 1. 21.
[3] 40. 12. 24. *pr.* Nothing is said as to actions *in rem*, in which, as to claims *e libertate*, the risk must have been the same.
[4] 49. 16. 8. [5] 40. 12. 29. *pr.* [6] 49. 16. 11.
[7] 40. 12. 25. 2. [8] *Ante*, p. 270. [9] 41. 2. 1. 14.
[10] 49. 2. 3. 10; 49. 3. 15. 1.

libero, and we have seen that even in that case many jurists thought the master lost possession[1]. Paul does not actually consider whether possession could be acquired through such a man: probably it could where the master still possessed, and could not where he did not[2].

It is clear that there were disputes. Traces of these are left in the case of an acquisition which required *iussum*, where that *iussum* was given and disobeyed. Justinian discusses the case in which X, claiming freedom from A, is instituted by B. A orders him to enter but he refuses. A cannot treat him as his slave: he is *pro libero*. Can any penalty or pressure be imposed? Justinian tells us there had been much doubt on this matter and he decides it by what he calls a subtle distinction. If in the institution the man was described as the slave of A, he can be made to enter and in that case whatever the issue of the *causa liberalis* he will get no benefit and incur no risk. If he was instituted as a freeman he will not be compelled to enter, whether the *causa liberalis* were *e libertate* or *e servitute*; the *hereditas* will await the issue, and he will enter at his master's *iussum* or, if he likes, on his own account, according to the result[3]. In the first case the decision may result in an acquisition by A through a slave in whom he had no right or possession.

The issue affects only the parties, and thus does not decide the status of anyone else. Thus if a woman's status is being tried, the decision of it will not determine the status of her children born before the hearing. But Constantine enacted that if a child were born to her during the *causa*, it should have the same fate as the mother, *i.e.* its status would be governed by the decision in her case[4].

Though the person whose status is in question should die *pendente lite*, other matters may ultimately be affected by the decision. Thus he may have made a will, or the man who bought him may have a claim for eviction against the vendor. Accordingly the *adsertor* is bound to go on with the case, and in Justinian's law, *adsertores* being abolished, the buyer can take up his claim, and require the vendor to prove the slavery[5].

The *lex* Iunia Petronia provided (A.D. 19) that if the *iudices* were equally divided the judgment must be in favour of liberty, though in other cases of equality it would be for the defence[6]. There were also

[1] *Ante*, pp. 270 *sqq.*, where we have already considered the shifting views held on this point, so critical for any theory of possession. Paul's texts may represent uncertain views. See Koschaker, Translatio Iudicii, 220.

[2] The master may be in other positions than that of owner, a point material in all these questions of acquisition.

[3] C. 6. 30. 21.

[4] C. Th. 4. 8. 4 = C. 7. 16. 42; cp. C. 7. 16. 17. 1.

[5] C. 7. 17. 2; 7. 21. 3. Burden of proof on vendor, in conformity with the rule where a slave bought claims liberty, C. 8. 44. 21.

[6] 40. 1. 24. *pr.*; 42. 1. 38. *pr.*

many constitutions directing them to decide in favour of liberty if the evidence seemed equal[1].

If the judgment is against the slave it will be simply *eum servum esse*[2]. But if it is in his favour the form of the proceeding affects the judgment. If he is defendant, and the plaintiff fails to prove his case, the judgment is *eum servum* (*Agerii*) *non esse*, *i.e.* that he is not the slave of the plaintiff. If the person claiming liberty is the plaintiff, the judgment will be *eum liberum* or (*ingenuum*) *esse*, which besides that it bars the defendant, puts the plaintiff into the position of one *bona fide in libertate*[3]. A result of this distinction is stated in a text which says that if the person claimed desires to take the burden of proof on himself he is to be allowed to do so; the point being that, if successful, he will get a more satisfactory judgment[4]. In one text we are told that if judgment goes in favour of the alleged slave because the claimant of him does not attend, the effect is to bar the claimant, but in no case to make the man an *ingenuus*. Ulpian thinks indeed the wiser course in such a case is to give the man his choice of a postponement, or a hearing there and then. If he chooses the latter and wins, the judgment will be *eum servum* (*Agerii*) *non esse* but not *ingenuum esse*. This can injure no one but the absent claimant. If, however, the man is claiming *ex servitute*, there should be an adjournment, to avoid a judgment *eum ingenuum esse*, unless, as Hadrian is reported as saying, there is some special reason, and a very clear case[5].

If the *dominus* wins he need not accept damages, but may take away the slave[6], and conversely, damages to the slave, in lieu of liberty, are inconceivable, since they will not go to him, and, moreover, liberty is not capable of estimation in money[7]. But the pleadings may entitle him to an *actio iniuriarum*, or *calumniae*. To found such a claim the attack on his status must have been unjustified and *improbus*, *i.e.* made in knowledge that it was unfounded. Paul tells us that those trying such cases (in his day they were *cognitiones*) might punish *calumnia* with exile[8]. It was immaterial which way the action was brought[9]. It was *iniuria* to call a freeman a slave[10]: *a fortiori*, if, when called on to support the allegation, the person so speaking failed to do so[11].

[1] 40. 1. 24. 1. Paul cites Pomponius as saying that if one *iudex* takes refuge in a *rem non liquere*, the others, agreeing, can give judgment, since in any case the majority decide, 42. 1. 36. As to the *iudices*, *ante*, p. 654.

[2] C. 8. 44. 18.

[3] *h. t.* 21; C. 7. 19. 5, 6; C. 9. 35. 10. His proof must shew how he is free and thus may shew his *ingenuitas*, *post*, pp. 672 *sq.*

[4] 40. 12. 39. *pr.*; P. 5. 1. 6. As to absence of a party, *ante*, p. 658.

[5] 40. 12. 27. 1. [6] *h. t.* 36. [7] 50. 17. 176. 1.

[8] P. 5. 1. 7; D. 40. 12. 39. 1; 47. 10. 12; C. 7. 16. 31. [9] 47. 10. 11. 9, 12.

[10] *h. t.* 1. 2.

[11] C. 9. 35. 10. But a buyer continuing to oppose the claim in order that he may recover the eviction penalty, which he might not be able to get if he let the case go by default, was not liable *ex iniuria*, 40. 12. 26; 47. 10. 12.

The alleged slave on getting judgment will be able to recover any property which the soi-disant *dominus* has detained[1]. There may obviously be difficulties as to what this amounts to. In general one would suppose he would in any case take all but what his holder could claim to have acquired as a *bonae fidei possessor* of him. But there is a dark text credited to Paul, which says that a certain *senatusconsultum* provides that he shall keep only those things which *in domo cuiusque intulisset*. It is not clear whether this means brought in with him or took away with him[2]. The statement looks like a rule of thumb way of avoiding the difficult questions which might arise. Taken in conjunction with the cognate rules we have already considered[3], the text, if it is to be taken as genuine, seems to imply that where possession of a slave ended by a *causa liberalis*, the traditional rules as to acquisition were set aside. But as to what the rule really was we have no information beyond this meagre text[4].

The rights created would not necessarily be all on that side. The late master might well have claims against the quasi-slave for damage done to him in various ways. Gaius and Ulpian tell us that an *actio in factum* lay against the man for *damnum* done by him while *bona fide* possessed by his putative master, the former expressly limiting the action to the case of *dolus malus*[5]. Lenel holds[6], on account of the remark of Gaius[7] that the existence of the limit *certum est*, that the limitation to damage done *dolo malo* was not in the Edict. He seems indeed to think the limitation non-existent in classical law, since the illustration given by Ulpian is certainly not one of *damnum dolo datum*[8]. But this seems to be an interpolation: it purports to be a case of *damnum* to the possessor and is in fact nothing of the kind. And it speaks of the holder as *bona fide dominus*, which hardly looks genuine. There is no such remedy for *furtum*, perhaps because the possessor, being noxally liable for him, for theft, cannot have an action for theft by him[9]. For this purpose the holder is *pro domino*. The limitation to the case of *dolus* may mean no more than that the special remedy was aimed at misconduct.

Paul tells us[10] that in the actual *causa liberalis* the *iudex* may cast the man in damages for theft or *damnum*, and there is no limitation to *dolus*. He is speaking of a *cognitio* and in all probability of wrongs done pending the *causa*. There is no difficulty in the claim for *furtum* here as the possession has ceased. It does not seem that under the formulary system the *iudex* would have had the same power[11].

[1] C. 7. 16. 31.
[2] 40. 12. 32. The words *in domo cuiusque intulissent* are commonly taken to mean brought into the master's house, and to express the ordinary rule as to acquisitions *ex re* or *operis*.
[3] *Ante*, p. 664.
[4] See *post*, p. 674.
[5] 40. 12. 12. 6, 13.
[6] Ed. Perp. (2) § 181.
[7] 40. 12. 13.
[8] 40. 12. 12. 6.
[9] *Ante*, p. 107.
[10] 40. 12. 41.
[11] See Girard, Manuel, 705.

In addition to any claim against the man who has recovered his freedom, the putative owner may, as we have seen, have an eviction claim against his vendor, if he continues the *causa* to judgment[1]. If, however, the judgment is in his favour, he can in an appropriate case proceed for *calumnia* against the *adsertor* or any other person who set up the claim on behalf of the slave[2].

There are other results, outside the field of *obligatio*. There is a general rule that any person who attacks a testator's status forfeits any benefit under his will[3]. On the same principle, a patron of full age who claims his *libertus* as a slave has no *bonorum possessio contra tabulas*[4], and one who so claims the *libertus* of his father cannot claim, *unde liberi patroni* or *contra tabulas*[5]. If the attack was begun before the patron was 25 the penal consequence does not result, whether it was he or his *tutor* or his *curator* who made it[6]. It does not result if the claim is abandoned before judgment, or if, where a judgment is actually gained, wrongly, in the patron's favour, he learns the truth and allows the apparent slave to go free—*in libertate morari*. Even where the patron is excluded, his children not in *potestas* are not affected, at least after a rescript of Divi Fratres[7]. Most of these texts are expressed of the *patroni filius*, the commonest case, but the rule is equally applicable to the patron himself. It is edictal and thus does not directly affect civil law rights of succession, but they are no doubt sufficiently provided for under the general rule above stated, laid down in, or in connexion with, the *lex* Papia Poppaea.

The effect of the judgment on the man's status has already been incidentally considered, but it is necessary to examine it more in detail.

(*a*) Where the judgment is in favour of the man whose status is attacked. The main rule is that the judgment finally bars that particular claimant: he cannot proceed again[8], and there is no *restitutio in integrum*, or rescission even on the ground of minority[9]. There may of course be an appeal, and as the court which tries the case is the highest, the appeal is to the *Auditorium*[10]. We have already considered the case in which the judgment is rescinded after five years[11]. One text, of Macer[12], tells us that if my *libertus* is adjudicated the slave of another, *me inter-*

[1] C. 8. 44. 18, 21, 25.
[2] G. 4. 175.
[3] 34. 9. 9. 1. The rule applies only where the claim is *e libertate*. The other is unlikely, Ulp. 20. 11; D. 28. 1. 14, 15.
[4] 38. 2. 14. *pr.*
[5] *h. t.* 9, so where the claim is of a share or of any right involving slavery, *h. t.* 16. 1, where the claim is *e libertate*, *h. l. pr.* It does not apply where the claim is merely to secure the eviction penalty, *h. t.* 30.
[6] *h. t.* 14. 1, 2.
[7] *h. t.* 16. 2—4.
[8] C. 7. 16. 4, 27.
[9] 4. 3. 24; C. 2. 30. 4.
[10] C. 2. 30. 4; 7. 16. 4.
[11] 40. 12. 29. 1; *ante*, p. 650. A man who has won in a *causa liberalis* brings a claim against his late claimant. The defence is raised that he is the slave of a third party. There can be no *causa liberalis* between these parties, but the judge in the action will look into the matter, C. 7. 19. 4. There is of course nothing to prevent a claim by the alleged owner.
[12] 42. 1. 63.

veniente, the effect is to bar me from any claim. The case is given as an illustration of the rule that one is barred by a judgment which is the result of his assent whether he is an actual party or not. In what capacity the patron is contemplated as intervening does not appear: it may be that he is *adsertor*.

We have seen that the claimant of the man may appear by *procurator*. There is here some risk, since *res iudicata* against a *procurator* is not necessarily so against his principal. And as there is virtually a claim of ownership in all cases, the security *de rato* is always exacted, though in general it is given only by the plaintiff's *procurator*[1].

The barring effect is only that of an ordinary judgment, and thus no one is barred who would not be barred by a judgment, and the bar applies only to claims under the old title, and not to a new title acquired from a third person, in no way affected by the judgment. Where judgment had been given for the slave, and the real owner of the slave, after the judgment, made the defeated litigant his *heres*, it was clear on the authority of Labeo and Iavolenus, that the old judgment was no bar[2].

(*b*) Case in which the judgment was against the person claiming liberty. Merely bringing a claim, and abandoning it, has no effect on status either way[3]. Texts dealing with the effect of judgment are few and are in at least apparent conflict. Gaius says that sometimes a claim may be renewed *ex integro*, as, for instance, where a condition is now satisfied which was not so at the first hearing[4]. The nature of the illustration shews that in the opinion of the writer, the decision was final between the parties. On the other hand Cicero says[5] that where the Decemviri had decided wrongly on such a case it could be renewed as often as was desired—a solitary exception to the general rule as to *res iudicata*, based on the view that none could lose his liberty without his own consent. Quintilian in one text speaks of *adsertio secunda*, the case having been heard before[6], and in another of *secunda adsertio*, tried before other *judices*[7]. Martial[8] speaks loosely and allusively of a third or fourth hearing which is to have a decisive effect. Finally Justinian in his constitution[9] by which he abolishes the need of *adsertores*, declares that the *leges* which formerly required such cases to be examined a second and third time are for the future to be out of application. He adds that the requirement was due to the absence of an appeal which he has now provided, and which, in turn, *ad secundam inquisitionem minime deducetur*, by colour of the aforesaid laws. With this collection

[1] 3. 3. 39. 5. For the remedy where the alleged *dominus* does not ratify the intervention of a *procurator* on his behalf, so that he can again claim, see 46. 8. 8. 2.
[2] 40. 12. 42. It should be noted that a judgment, *eum ingenuum esse* (*ante*, p. 665), has the advantage that thereafter he is *in possessione ingenuitatis*.
[3] C. 7. 14. 7. [4] 40. 12. 25. 1. [5] Cicero, de domo, 29. 78.
[6] Quintil. Inst. Orat. 5. 2. 1. [7] *Id.* 11. 1. 78. [8] Martial, Epig. 1. 52.
[9] C. 7. 17. 1. *pr.*

of statements telling a similar story, but differing in details, it is not easy to say what the law really was. One hypothesis is that up to the time of Justinian there was a right in the defeated claimant of liberty to bring the matter up again, either as often as he liked, or for a limited number of times, and that Justinian provided a regular system of appeal, and suppressed the rule, inserting the text of Gaius in a modified form so as to make it represent the current law[1]. Schlossmann[2] observes, with reason, that the text of Gaius looks perfectly genuine, and he distinguishes. He thinks that Justinian, Cicero, and Quintilian, are considering a claim *e libertate*, and laying down the rule that this case could be brought up again if the decision was against liberty, while Gaius is certainly dealing with one *e servitute*. But there are some difficulties in this, perhaps in any, solution. It is not advisable to attach much weight to Cicero's text[3]. He bases his rule on the ancient tradition that *civitas* could not be taken away, but if lost at all was always voluntarily resigned, a principle of which little is left in the Empire. His allusion is to a rule which differs materially in substance from that suggested by the other texts. He speaks of a privilege by which one who has, so to speak, become a slave by judgment, may yet repeatedly make his claim to liberty and *civitas*. Justinian bases the rule he is abolishing on certain *leges*[4], and the language of Martial[5], Quintilian[6] and Justinian seems rather to refer to a necessary precautionary repetition which every *adsertio* had to go through, and none of these texts contains any hint that the rule was confined to the case in which the alleged slave had been defeated. Moreover Justinian's abolition of a rule which gave an alleged slave several chances, if that is what he did, is an odd provision to call a *clementior terminus*. This all points to a conjecture that there was a rule, of which the source is now lost, requiring all *adsertoriae lites* to be gone through twice (or more) before different *iudices*[7], before a decision was come to. The whole thing would be one trial, and would amount to *res iudicata* whichever lost[8]. Such a rule would be a natural descendant of the principle invoked by Cicero. It avoids the apparent conflict created by the text of Gaius, and it gets rid of another difficulty observed by Schlossmann[9]. Constantine, in his enactment as to *circumductio*[10], provided that the slave handed over to the claimant by decree of the magistrate, for lack of an *adsertor*, could renew his claim if he ever found an *adsertor*. There is little point in

[1] 40. 12. 25. 1. So Bethmann-Hollweg, cited Schlossmann, Z. S. S. 13. 228.
[2] *loc. cit.* [3] Cicero, de domo, 29. 78.
[4] C. 7. 17. 1. *pr.* Probably not the XII Tables; see his similar language in C. 3. 22. 6.
[5] Epig. 1. 52. [6] Inst. Orat. 5. 2. 1; 11. 1. 78.
[7] See Quint. Inst. Orat. 11. 1. 78. *Parte victa* in this text does not imply defeat of the *adsertor*.
[8] C. 7. 14. 5 appears to refer to a case not proceeded with. [9] *loc. cit.*
[10] C. Th. 4. 8. 5; *ante*, p. 655. It is possible that the repetition was not required in all cases.

this if he could always do so, since there is no reason to suppose the decree more binding than a judgment. But it is quite intelligible on the view here adopted. It must, however, be admitted that it does not express the same law as that Cicero is discussing: it is necessary to the present contention to suppose that his principle was superseded by express legislation, providing for exceptionally careful trial.

There might be more than one claimant. It is clear that persons claiming lesser rights, such as usufruct or pledge, can raise a *causa liberalis*, although some one is already doing so as owner[1]. In such a case both claims are sent to the same *iudex*, and it is immaterial whether the lesser right is claimed through the same owner or another[2]. If claimants of usufruct and ownership are acting together and one is absent, Gaius doubts whether the case ought to proceed, since the one present may be injured by the carelessness or collusion of the other. He, or more probably Tribonian, settles the point by saying that one case will go on without prejudice to the other, and, if the other claimant appears soon enough, the same *iudex* will hear them both, unless the litigant who appears late has some objection to that *iudex* on the ground, *e.g.*, of enmity[3]. So where two are claiming common ownership a senatusconsult provides that they shall ordinarily go to the same *iudex*. But if two claim separately, each *in solidum*, this is not necessary, since there is not the same danger of a conflicting decision[4].

If there are two claimants of a common ownership and, for some cause, their cases are not tried together, it may happen that one loses and the other wins. What is the result? Gaius asks the question if the victory of one ought to benefit the other, and says that, if you hold that it does, then the defeated one can sue again, meeting the *exceptio rei iudicatae* by a *replicatio*. If it does not benefit him, to whom does the share go? Does all go to the one who gained the action? Does part vest in the opposite party to the suit? Is it a *res nullius*? Gaius appears to think it all vests in the winner[5], the reason assigned being that a man cannot be *pro parte* free. In form, Gaius is merely settling the question what is to happen if we reject the view that it may go to the loser. It is to be presumed that he does reject this view, though he does not exactly say so[6]. Julian discusses a similar case[7]: that of two separate claimants *pro parte*, and opposing judgments. The text remarks that the best plan is *eo usque cogi iudices donec consentiant*, but it does not appear how or by whom this is to be done. If it proves

[1] 40. 12. 8. *pr.* [2] *h. t.* 8. 2. The claims might be hostile.
[3] *h. t.* 9. *pr.* [4] *h. t.* 8. 1, 9. 1.
[5] *h. t.* 9. 2, he will have an *actio utilis* to recover it.
[6] 40. 12. 9. 2. Ulpian gives a like decision in the somewhat similar case of a free man selling himself to two men, one of whom knows of the fraud (*h. t.* 7. 3), but here the loser is a wrongdoer. [7] 40. 12. 30.

impossible, Sabinus Cassius and Julian agree that all goes to the winner, since it is absurd to talk of a man being half free. The possibility of the loser benefiting by the judgment is not considered. The text adds that, *favore libertatis*, the man is to be free, paying a fair proportion of his value to the winner. Mommsen thinks this last remark is Julian's, but the contrast between this and the earlier part of the text, and the nature of the rule itself strongly suggest the hand of Tribonian. The remark in the beginning of the text that the *iudices*, who have already given judgment, are to have pressure put on them, *donec consentiant*, may be from the same source.

The question of liberty might be entangled or combined with some other question. We have already had occasion to advert to the general rule as to pecuniary causes, not connected with *hereditas*: they are to be suspended so as not to prejudice the *causa liberalis*[1]. If by chance such a case has been tried first it must not be allowed to produce any prejudicial effect[2]. The rule is illustrated in many texts, of which the majority are in one title of the Code. Where A has a complaint against B, who alleges that A is a slave, the Praeses decides the *causa liberalis* first, and then, if the man is declared free, proceeds with the other matter[3]. An accusation is made against a woman. It is claimed, but disputed, that she is an *ingenua*. The *causa liberalis* must be brought first, in order that it may be known how she should be punished[4]. A *causa liberalis* is pending: the alleged dominus seizes something said to belong to the man claimed as a slave. It is clear that the *causa* must be tried before the *furtum*, and if it is *e servitute*, no rule is necessary. But if it is *e libertate*, he must give the thing back, security being given *rem salvam fore*. If no security can be obtained, the thing must be given to a *sequester* till the decision, an allowance being made, if necessary, out of it, for the man's expenses. If it was stolen before any question of status was raised and, a decision being given that the taker is bound to return it, he raises the question of status to avoid doing so, he will have to restore it without any security[5].

On the same principle, if a *hereditas* is claimed, the question of the testator's status, if raised, must be settled first[6], though an interdict for the production of his will may issue meanwhile, as this can have no prejudicing effect[7]. Where a man is claiming an inheritance, and his claim is disputed on the allegation that he is a slave, but his freedom is

[1] Laid down as a general rule by Claudius, 40. 15. 4.
[2] C. 7. 16. 2. [3] C. 7. 19. 1.
[4] *h. t.* 3. Other illustrations shew that it was immaterial whether the *causa* is first set up and the other issue raised before it is decided, or the question of status is raised as a reply to a claim: in both cases the *causa* must be decided first. See, *e.g.*, C. 7. 19. 5, 6; C. 9. 35. 10; D. 40. 12. 24. 4; 9. 4. 42. *pr.* These last are noxal cases: as to certain questions of procedure herein, *ante*, p. 108.
[5] C. 7. 19. 7, *fin.* [6] C. 3. 31. 8. [7] 43. 5. 1. 7.

not claimed under that will, the *causa liberalis* must be tried, and the will may not be used as evidence that he is free[1]. A similar rule is laid down in the Code, but the text goes on to say that if a claim for a *hereditas* is pending, and the defence is raised that the plaintiff is really a slave, a *causa liberalis* is to be set on foot. But, it seems, the action for the *hereditas* is to proceed and if judgment is now given for him in that action, he need prove no more in the *causa liberalis*. The point seems to be that as he is really *in libertate* the burden of proof is not on him. The text is obscure[2] and it may mean that the court will decide the issue of status incidentally[3].

Where the liberty is claimed under the will, new rules apply. The validity of the will must be decided first: this is provided by senatusconsult, to avoid prejudicing that question by the decision of the *causa liberalis*[4]. Thus if the testator has been killed the *causa liberalis* will not be decided till the cause of death has been investigated[5]. Of course, *res iudicata* on a point arising out of the will will not affect the liberty[6]. Trajan provides that a *causa liberalis* must be postponed till a pending *querela* is decided[7], but Pius lays it down that there need be no postponement to await a *querela*. He enacts that where a man, freed and instituted by will, has his status disputed, and is in *de facto* possession of the *hereditas*, he can refuse to meet the *liberalis causa* on the ground that he is prepared to meet, first, claims affecting the validity of the will. This, says Pius, is because the other side can at once hasten matters by bringing the *querela*. But, if he is not in possession, a reasonable time must be allowed him in which to bring the *hereditatis petitio*, and if he does not, the *causa liberalis* will proceed[8].

The matter might be further complicated by the Carbonian edict. If the claimant is alleged to be a supposititious child, and in fact a slave, the Carbonian edict requires the whole matter to be postponed till he is *pubes*. But this has nothing to do with the *causa liberalis*: it would be equally true if he were not alleged to be a slave[9].

Claims of *Ingenuitas e libertinitate* are not within our real subject, but they are so closely connected with it, and so similar in principle, that it may be well to say a word or two about them. We have already seen

[1] 5. 3. 7. 2, Pius. Probably declaratory. [2] C. 7. 19. 2. It may be corrupt.
[3] Gaius tells us (40. 12. 25. *pr.*) that if a *legatum optionis* is left to a man who is claiming liberty, *aliunde*, the same rule applies as if it were a *hereditas*. The question is whether he can be compelled to exercise the *optio*. We have already discussed the doubt and Justinian's solution in the case of *hereditas* (*ante*, p. 664); the rule is to apply here, *mutatis mutandis*.
[4] 5. 3. 7. *pr.* [5] 40. 12. 7. 4.
[6] Thus where an action claiming a legacy has been lost, this is immaterial in the *causa liberalis*, as *res inter alios acta*, 44. 2. 1; C. 7. 16. 2; cp. C. 7. 19. 2.
[7] 5. 3. 7. *pr.* [8] *h. l.* 1.
[9] 37. 10. 3. 11, 6. 3. We have already seen that in any case the trial may, for cause shewn, be postponed to puberty, 37. 10. 3. 11; *ante*, p. 659.

that no such claim could in any case be made, after a lapse of five years from a traceable manumission[1]. Such cases would normally arise in connexion with property questions, and, apparently, they were always tried by *praeiudicium*[2]. Suetonius speaks of a recuperatory procedure[3], but probably the reference to *recuperatores* was made only when, as in the case he records, the claim was *e latinitate*. The earliest traceable case of one is of Nero's time, where the forced nature of the transaction suggests a *cognitio*[4]. Gaius speaks, however, of a *formula*[5], and Justinian uses language with the same implication[6]. But it is clear from the language of Diocletian, who directed it to be tried without any deputy, by the *Praeses*, that this was already a possible mode of trial[7]. It was of less social importance than a *causa liberalis* and thus, though there is no evidence about arbitration, it is clear that it might be decided by *iusiurandum*[8]. Though a pact could not give *ingenuitas*, it is clear that a *transactio* would bind the patron to regard the man as an *ingenuus*, though it would not bind any other person[9]. We have seen that *ingenuitas* could not be disputed after a man's death[10], though the question might be raised to shew that an apparent *libertinus* was really an *ingenuus*[11]. Conversely, one who had allowed himself to be sold and had afterwards been freed could not claim *ingenuitas*[12]. In the case of unwillingness, of the party directly affected, to proceed, others might act for him as in a *causa liberalis*[13], and if, a decision having been given against him, he declined to appeal, his *paterfamilias* might do so, within the proper time, as if it had been his own case[14]. The burden of proof, says Ulpian, is on him if he is claiming *e libertinitate*, and on the claimant if it is *ex ingenuitate*, but if he wishes to take the burden of proof in order to obtain a more favourable judgment, he is to be permitted to do so[15]. Elsewhere he tells us that if the man admits being a *libertus*, but alleges that he is a *libertus* of another person, the ordinary *praeiudicium* will be given whichever party asks for it, and that in such a case the burden of proof is always on the patron[16]. There seems little

[1] *Ante*, p. 650.
[2] 40. 14. 6. Based on the Edict, In. 4. 6. 13. See Lenel, Ed. Perp. (2) § 141.
[3] Suetonius, Vesp. 3. [4] Tac. Ann. 13. 27; D. 12. 4. 3. 5.
[5] G. 4. 44. [6] In. 4. 6. 13.
[7] C. 3. 3. 2; cp. C. 4. 1. 6; 7. 14. 5. [8] C. 4. 1. 6.
[9] C. 7. 14. 8. [10] 40. 15. 1. 3. At least after a *pronuntiatio* of *ingenuitas*.
[11] *h. l.* 4.
[12] 40. 12. 40. Mommsen. The case might be tried in absence of a party, duly summoned, but in case of absence beyond seas there might be nine months delay to allow of his appearance, C. 7. 16. 40; C. Th. 2. 7. 3 = C. 3. 11. 7.
[13] 40. 12. 3. 3. [14] 49. 4. 2. 2.
[15] 22. 3. 14. As to amount of proof, we are told that *instrumenta* and *argumenta* are to be used, as *soli testes non sufficiunt*, C. 4. 20. 2. This rule, which may have applied to *causae liberales*, has many possible meanings which are discussed at great length by the early commentators (see Haenel, Diss. Domm. 406). No doubt here as in *causae liberales*, lost *instrumenta* would suffice, C. 4. 19. 20. The loss would be proved by *soli testes*. Probably the rule means no more than that the oath of his friends that he was *ingenuus* would not suffice.
[16] 40. 14. 6.

reason for the exception if the claim is *e libertinitate*, which perhaps it would rarely be.

Pending the hearing he is in the position in which he apparently was when the issue was raised[1]. The judgment will be *ingenuum esse* or *non esse libertum Auli Agerii*, according as he or the claimant had the burden of proof[2]. There was a right of appeal[3]: apart from this there is no evidence of any right or need of rehearing[4]. As between the parties it was a *res iudicata*, and *pro veritate* however false[5]. And thus in the case of Paris where the judgment was glaringly false and compelled by the Emperor, he could recover what he had paid to secure his manumission[6].

It is clear that property relations would need adjustment. Paul and Pomponius tell[7] us that the successful claimant of *ingenuitas* could keep what he had acquired unless it was *ex re manumissoris*, but must return what was *ex re*, together with gifts from him, and of course what had been taken without his consent. Both of them are commenting on the words of a senatusconsult which dealt with the matter, shortly stated elsewhere as enacting that *quae de domo manumissoris habent ibi relinquant*, words which there too are explained as covering even legacies by the late owner to the *libertus* as such[8]. A rule of this kind was necessary, in view of the fact that all that such apparent *liberti* acquired was their own, while their position in their supposed patron's household gave them opportunities of acquisition through him, and in matters which really concerned him, somewhat to his detriment, and such as they certainly would not have enjoyed as *ingenui*. The rule is not, here, open to any such objection as that which can be made to it as applied to claims of *ingenuitas ex servitute*[9].

These claims of liberty and *ingenuitas* were of course mere nullities if there was no *iustus contradictor*, *i.e.* the other side made no genuine claim to be patron or *dominus*[10]. But, apart from this there was obvious room for collusion, and there were severe rules dealing with this possibility. In one text we are told that where a slave committed *stuprum* with his *domina*, and was by her collusion, with a pretence of captivity, declared free and *ingenuus*, this was void[11]. And Gaius says that anyone who proved that a *causa liberalis* had been gone through collusively, and the man declared free, had a right, by a senatusconsult of Domitian's

[1] C. 4. 55. 4. [2] 22. 3. 14. [3] 49. 4. 2. 2.
[4] C. 7. 14. 5 does not speak of rehearing. [5] 1. 5. 25.
[6] 12. 4. 3. 5; Tac. Ann. 13. 27. [7] 40. 12. 32; 40. 14. 3.
[8] C. 7. 14. 1.
[9] *Ante*, p. 666. It is quite possible that the whole allusion to slavery in 40. 12. 32 is interpolated. It may be added that a *libertinus* who loses his case does not lose his position as a *libertinus*, C. 7. 14. 13, and it is an *iniuria* to attack *ingenuitas* without reason, *h. t.* 5.
[10] *h. t.* 1. [11] C. 7. 20. 1.

time, to claim the slave[1]. In the case of claims of *ingenuitas e libertinitate* texts are more numerous. A *senatusconsultum* Ninnianum provided penalties for such collusion, and a reward for the detector[2]. Marcus Aurelius seems to have legislated freely on the matter. He provides that collusion as to *ingenuitas* can be shewn at any time within five years from the judgment[3]: the *quinquennium* being *continuum*, but not running till the person whose collusion is in question is *pubes*, as, otherwise, since he could postpone the case, the proceeding might be rendered impossible. It is enough that it be begun within the five years[4], and time does not run to bar the real patron, if the original decree was given without his knowledge, *alio agente*[5]. The collusion may be shewn even by an *extraneus*, if he is a person who is qualified *postulare pro alio*[6], and if several come together to shew collusion there must be an enquiry to see which is the proper person on grounds of *mores*, age, and interest[7]. We are told by Hermogenianus that a judgment in favour of *ingenuitas* can be retracted for collusion only once[8]. This remark may mean that it can be attacked only once[9], but this is open to the objection that it would provide a way to new collusion. As the same judgment could hardly be retracted twice, it is possible that the meaning may be, that if, after a decree has been "retracted" for collusion, the claim of *ingenuitas* is set up again, and the decision repeated, there can now be no further attack on the ground of collusion[10].

When the judgment is retracted, the detector becomes patron[11], and the original patron loses all patronal rights[12]. The man becomes a *libertinus* again, but only from the decision[13], for this is not an appeal, and the *res iudicata* is *pro veritate* till rescinded. He loses the *ius anuli aurei*, if he had it before the collusive decree[14].

The normal case is of course of one patron and we hear little of the more complex case. Papinian, however, discusses the case of one declared *ingenuus* by the collusion of one of his patrons, the collusion being detected by another. He decides that the alleged *ingenuus* loses the *ius anuli aurei*, and certain *alimenta* due to him from a third patron[15], and it may be presumed that for the future two parts of the *iura patronatus* vest in the detector.

[1] 40. 16. 1. Ninnianum? C. 7. 20. 2. [2] C. 7. 20. 2.
[3] 40. 10. 2; 40. 16. 2. *pr.* [4] 40. 16. 2. 1—3.
[5] 40. 14. 1, 5. [6] 40. 16. 2. 4.
[7] *h. t.* 5. 1. [8] *h. l. pr.*
[9] Otto and Schilling, *ad h. l.*
[10] Death of the man affected ends the matter, **40. 15. 1. 3.**
[11] 2. 4. 8. 1. [12] C. 6. 4. 4. 6. [13] **40. 16. 4.**
[14] 40. 10. 2. [15] *h. t.* 1. 1.

CHAPTER XXIX.

EFFECT AFTER MANUMISSION OF EVENTS DURING SLAVERY. NATURALIS OBLIGATIO.

THE rules affecting this matter are of gradual development: they are, in the main, a result of three principles, not wholly consistent with each other, and are themselves modified by the increasing recognition of the individuality of the slave. The three principles are:

1. *Noxa caput sequitur*, a rule applied to delicts[1].
2. In matter of contract, the slave *naturaliter obligat et obligatur*[2].
3. The slave on manumission becomes a new man (and on re-enslavement, another man again[3]). The change is analogous to *capitis deminutio*, but it does not amount to this, as a slave has no *caput. Servile caput nullum ius habet, ideo nec minui potest*[4]*: servus manumissus capite non minuitur, quia nullum caput habet*[5].

So[6] far as concerns delicts to the slave, there is not much to be said. The only one which can well be conceived is *iniuria*, and we are told, emphatically, that he can have no remedy for that after manumission[7]. A theft of the man, or *damnum* to him, is a delict against his *dominus*, with whom the right of action remains, notwithstanding manumission of the slave[8]. If the slave stolen or injured were instituted and freed by his *dominus*, he would presumably acquire these rights of action as he did others. This is implied by two texts which deal with an exceptional case[9]. We are told by Ulpian, Marcian and Marcellus that if a slave who has been injured is instituted by his *dominus*, with liberty, and then dies, his *heres* will have no *actio* Aquilia. Marcian gives as the reason the fact that the case is now in a position in which the right of action could not possibly have arisen. Marcellus cites from Sabinus the reason that the *heres* could not have an action which

[1] *Ante*, pp. 106 *sqq*. [2] 44. 7. 14. [3] 46. 3. 98. 8.
[4] 4. 5. 3. 1. [5] In. 1. 16. 4.
[6] As to servile cognation, *ante*, pp. 76 *sqq*.
[7] 47. 10. 30. *pr*. As to delicts to the *peculium*, *ante*, p. 194.
[8] 47. 2. 46. *pr*. So of *damnum* to the man, 9. 2. 15. 1. [9] 9. 2. 15. 1—16, 36. 1.

would not have been available to the deceased. The reasons are the same: a man cannot have or transmit an action for his own death. The reasoning implies that he would have had an action for injury short of death, or for theft. There may be actions for injury to[1], or theft of[2], a freeman. There is thus no reason why the instituted slave should not inherit the action. The text of Marcellus goes on to say that if the slave instituted after injury, who died, had had a *coheres*, the *coheres* would have had the action[3].

The law as to the liability after manumission for a delict committed against a third person without the master's authority presents little difficulty. The general rule is that a slave who commits such a delict is liable, personally, and remains so, by virtue of the rule, *noxa caput sequitur*, after he is freed. As Ulpian says, *servi ex delicto obligantur et si manumittantur obligati remanent*[4]. The word *remanent* shews that it is the same obligation: there is here no question of a *naturalis obligatio* distinct from the *obligatio civilis*, and surviving the manumission. It may be remembered that *capite minuti* were still liable for their delicts[5]. But though he may thus be liable for *furtum*, he is not liable as a *fur manifestus*, even though he is found with the thing, for though it is the beginning of his liability to action, it is not the beginning of the theft[6]. The rule applies not only to what are expressly called *delicta*, but to anything which created a noxal obligation. Thus it applies to cases of *dolus*[7] and *opus novum*[8]. Here, as elsewhere, the liability for *dolus* depends on the absence of another remedy. Where a *libertus* contracted *in fraudem patroni* with a certain slave, and the slave was afterwards freed, the remedy was not against him but against the *libertus*, he being the person whose fraud is contemplated in the *actio* Faviana[9]. Pernice[10], while he recognises that the liability of a slave for a delict committed under *iussum* existed in the republic, considers that his liability in the same way for what he did without *iussum*, was an introduction of Labeo. This way of putting the matter seems to be due to his thesis of the gradual recognition of the capacity of a slave independently of his master. But this view has no *a priori* probability. It does not really make any less demand on recognition of the slave's individuality, which, for that matter, was already so fully recognised

[1] *h. t.* 13. *pr*. [2] 47. 2. 14. 13, 38. 1.
[3] 9. 2. 36. 1. *Pro parte*, see the Gloss. [4] 9. 4. 24; 44. 7. 14; G. 4. 77; P. 2. 31. 8.
[5] 4. 5. 2. 3. Liability after manumission for *furtum*, C. 4. 14. 4; D. 13. 1. 15; 47. 2. 44. 2, 65; *Damnum*, 9. 2. 48; *post*, p. 680.
[6] 47. 2. 7. *pr*. [7] 16. 3. 21.
[8] 43. 24. 14. An owner, misled by his slave as to the latter's qualities, sold him. The buyer freed him. The freedman is liable *de dolo*, unless the fraud was such, and so connected with the sale, as to avoid it, 4. 3. 7. *pr*. One entitled to freedom who allowed himself to be sold to a *bona fide* buyer was liable when freed to the *actio in factum*, *ante*, p. 433; D. 40. 5. 10. 2. One who prostituted an *ancilla peculiaris* could be noted after he was free, 3. 2. 4. 3.
[9] 38. 5. 1. 24; cp. 4. 3. 1. 8—5. [10] Pernice, Labeo, 1. 119.

in criminal and religious law[1], that, long before Labeo, nothing new was involved in a recognition of his personal capacity for delict. Moreover liability for what was done *mero motu* corresponded to a much greater need. In the other case, there was always, after the manumission, the liability of the master, and he would prove, in most cases, the better defendant: in this case the master would absolutely destroy any chance of compensation to the injured person by freeing the slave, if the man's liability were not recognised. And, as we have seen, this manumission need involve no loss to him: he could agree for a payment. The texts on which Pernice mainly rests his view do not really support it. That of Alfenus[2], which is a little confused, and deals with both crime and civil injury, hints at no difference of principle, and says *quamvis domini iussu servus piraticam fecisset, iudicium in eum post libertatem reddi oportet.* This implies clearly that the liability was more obvious if there had been no *iussum* by the *dominus.* The text of Ulpian[3] in which Labeo is cited as having laid it down that a man is liable after manumission for *iniuria* committed *iussu domini,* argues that he has committed a *noxa,* that *noxa caput sequitur,* and that he ought not to obey his master in everything, *i.e.* that obedience to *iussum* is not necessarily a defence. Here the rule that *noxa caput sequitur,* even to freedom, is treated as a standing rule, and liability for what is done without *iussum* regarded as the more obvious. What Labeo laid down, perhaps for the first time, was that *atrox iniuria* was one of those things in which it was no excuse to the *manumissus* to plead his master's authorisation or command.

In one case there is a special praetorian remedy, an *actio annalis in factum,* for twofold damages, *i.e.* where a slave, freed by the will, deals in any way with the estate so as to lessen what will come to the *heres*[4]. The reason for the existence of this remedy is that he has not committed *furtum*[5], since the act must have been after the death of the *dominus* and before any entry[6]. As he will be free at the moment of entry the *heres* will be able to do nothing to him, unless indeed he so "contrects" after the *aditio,* as to make himself guilty of *furtum*[7]. It is essential that he has been guilty of *dolus* or at least of *culpa lata*[8]. In strictness the action is available only if there is an immediate gift of liberty[9]; it is, however, immaterial whether it is direct or fideicommissary, since it is clearly laid down by M. Aurelius and others that a simple fideicommissary gift is not to be delayed on merely pecuniary grounds[10].

[1] *Ante,* pp. 73, 91. [2] 44. 7. 20. [3] 47. 10. 17. 7.
[4] 47. 4. 1. *pr.* [5] 47. 2. 69. [6] 47. 4. 1. 2, 8.
[7] *h. t.* 1. 1.
[8] *h. t.* 1. 2, 8. The action is available only in absence of any other remedy (*h. t.* 1. 16), but covers all kinds of injury to the interest of the *heres,* details *h. t.* 1. 10—15.
[9] *h. t.* 1. 3.
[10] 47. 4. 1. 7. As to the arbitration mentioned in the text, *ante,* p. 520.

Thus the action ought not to be available at all in cases of conditional manumission, and so the law is laid down by Gaius and Ulpian[1]. But elsewhere both Ulpian and a writer as early as Labeo[2] lay it down that, even in the case of conditional liberty, the action is available if the liberty supervenes very soon after the wrong was done.

A wholly different rule applies where the delict was committed against the slave's master. Here the *dominus* can bring no action against the slave after he is free[3]: in such a case *noxa non sequitur*[4]. If a slave stole from one of common owners the same rule was applied: there was no noxal action[5]. On the other hand it must be noted that in all these cases, if the man, after he was free, dealt with the thing he had stolen from his master, the ordinary liabilities for *furtum* arose[6]. The basis of this rule excluding action where the wrongdoer is or becomes the property of the injured person is not very clear. In most texts it is made to rest on the fact that there can be no *iudicium* between a man and his own slave[7], and on the consideration that one who can punish has no need to take legal proceedings[8], and the reason for its non-existence after alienation is put on the ground: *neque actio quae non fuit ab initio nata oriri potest*[9]. Mandry observes that these merely formal grounds would have been set aside if there had been no deeper reason. He concludes that it rests on the complete absence of legal effect in a delict, between master and slave, expressed in some texts by the statement that there is no obligation at all[10]. This might well be the basis of the Proculian distinction, since in the case of delicts to one who afterwards became *dominus* there certainly was an obligation to begin with. But this itself may be said to be little more than a formal ground, for the lawyers saw no difficulty in finding an *obligatio,* where there was a *peculium,* even to give an indemnification for delict[11], so far as the *peculium* would go. There was, however, no need to extend the conception: to have given an *actio* in the present case would have satisfied no economic necessity[12], and as it would have involved giving a noxal action against an alienee, it might have caused great injustice and abuse.

Fresh considerations arise if the master was in any way privy to the action of the slave he has since freed[13]. There is a general rule or maxim

[1] 47. 4. 1. 3, 2. [2] *h. t.* 1. 3, 4; *h. t.* 3. See also *ante,* p. 255.
[3] 47. 2. 17. 1; G. 4. 78; C. 4. 14. 6. There seem to have been disputes.
[4] C. 3. 41. 1. A rescript of Severus mentioned by Ulpian (4. 4. 11. *pr.*) must have been declaratory. The school dispute as to the case of acquisition of the wrongdoer by the injured party after the fact shews that the main rule was older, 47. 2. 18; G. 4. 78; In. 4. 8. 6; *ante,* p. 107.
[5] 47. 2. 62. *pr.*; *ante,* pp. 107, 374. [6] 4. 4. 11. *pr.*; 47. 2. 17. 1.
[7] See Mandry, Familiengüterrecht, 1. 354 *sqq.*
[8] 47. 2. 17. *pr.*; 47. 4. 1. 1; see Mandry, *loc. cit.*
[9] Mandry, *op. cit.* 1. 358. [10] *e.g.* G. 4. 78.
[11] *Ante,* p. 223. [12] As to the case of a duty to free, *ante,* p. 520.
[13] *Ante,* pp. 114 *sqq.*

several times expressed that as a slave is bound to obey his master, he is not liable for what he has done under orders, though his master is[1]. But the exact limits of this exemption are not easily made out. It is probable that the law changed from time to time. The rule in crime may not have been in all respects the same as that in delict. The master's privity may in a given case have been something less than actual command. The act done may have been so serious as not to allow the excuse of obedience to the *dominus*. These factors are combined in the texts dealing with the matter.

Notwithstanding some loose language of Celsus, cited and corrected by Ulpian, it is fairly clear that we need consider nothing short of actual command: the master, *sciens, qui non prohibuit*, is personally liable but in no way excuses the slave[2].

The rule as recorded by Alfenus Varus at the end of the republic was that a slave is not excused by the order of his master in anything in the nature of a *facinus*. So, later, Paul[3] says that a slave must not obey his master *in facinoribus*, and Ulpian says[4] that slaves are excused for obeying their masters in matters *quae non habent atrocitatem*. But as to the exact position of the line between *atrocia* and trivial things it is not easy to be precise[5]. Ulpian quotes Labeo as holding that *iniuria, iussu domini*, rendered the slave liable after liberty—*noxa caput sequitur*[6]. It is probable that Labeo was speaking of *atrox iniuria*. Conversely Ulpian agrees with Celsus that command of the master excuses the slave for wrongs under the *lex* Aquilia[7]. Perhaps the true inference is that the distinction between *facinora* and lesser matters was not clearly defined at any time, and there was a tendency to narrow the exemption[8].

The remedies against the master and the slave are alternative, and thus if the master is sued, the freedman is released, not it would seem *ipso iure*, but by an *exceptio rei iudicatae*[9]. We have already considered the case of freedom supervening while a noxal action against the master is pending: the action was transferred, but there is, as we saw, much controversy as to the form of the transfer[10]. The matter of delict may be left with the remark that obedience to a *tutor* or *curator* is on the same level as obedience to a *dominus*[11].

[1] *e.g.* 9. 4. 2. 1; 35. 2. 13; 50. 17. 169. *pr.*
[2] 9. 4. 2. 1; *h. t.* 5, 6. As to distinction between *sciens* and *iubens*, *ante*, p. 114.
[3] 25. 2. 21. 1. [4] 43. 24. 11. 7 = 50. 17. 157. *pr.*
[5] Alfenus gives as *facinora* (44. 7. 20), piracy, homicide, *furtum*, and *vis*, if there was *maleficium* in it, not a mere squabble in a claim of right.
[6] 47. 10. 17. 7. [7] 9. 4. 2. 1.
[8] See Pernice, Labeo, 1. 118, and Mandry, *op. cit.* 1. 383; D. 9. 2. 37. *pr.* and 50. 17. 169. *pr.* are too general.
[9] 47. 8. 3; cp. 47. 2. 84. 1. It is not obvious why he should be released at all. Ordinarily where two are liable for a delict, judgment against one does not release the other. 9. 2. 11. 2.
[10] *Ante*, p. 108. See Koschaker, Translatio iudicii, pp. 199 *sqq*.
[11] 43. 24. 11. 7 = 50. 17. 157. *pr.*

The very similar rules in criminal law have already been considered[1]: all that need be said here is that if a criminal slave is freed and afterwards condemned, he is punished as he would have been had he been still a slave[2].

In relation to acquisition of property there is not much to be said, inasmuch as these transactions are, usually, so to speak, instantaneous. Acquisitions during slavery go to the master, even though *ex peculiari causa*. Those after liberty go to the man himself: the transition from slavery to freedom does not affect the matter, though there might be difficulties of fact as to the capacity in which the freedman received the *res*. *Mutatis mutandis*, the same is true of alienations. There are, however, a few exceptional cases. We know that a slave's possession *in re peculiari* is the master's[3]. If, however, he continues to possess secretly after he is free, his *peculium* not having been given to him, and his master subsequently gets the thing back, there is no *accessio possessionum*[4]. He is another man[5], and his possession is not dependent on, but adverse to, his master. The question arises whether if a slave acquires a *res* in good faith for the *peculium*, and is in process of usucapting it, and is freed and retains it secretly, he can complete the usucapion. If he receives an acquisition *ex re peculiari*, after he is freed without *peculium*, he does not usucapt: the *initium possessionis* was not in good faith[6]. Probably the decision would be the same in our present case, for it is only on freedom that he himself acquires possession: the earlier possession was his master's.

It is in connexion with wills that the most important questions arise in this matter. It is clear that an *alienus servus* instituted and freed during the testator's life can acquire the *hereditas* for himself[7]. The same rule applies to legacies and *fideicommissa*[8]. The extension of the principle to cover changes of status after the death and before entry, or *dies cedens*, is due to the desire to avoid intestacy. Its extension to legacies in the same case with no special reason is an instance of a common practice which we have already observed. The general rule here laid down is illustrated by some complex cases[9]. There were two *heredes*. A slave was left to one of them and money to the slave. The slave was freed *vivo testatore*. He acquires the whole legacy, although it might appear that the gift ought to have been valid only as

[1] *Ante*, p. 94. [2] 48. 19. 1. 1. [3] *Ante*, p. 200.
[4] 41. 2. 13. 8. [5] 46. 3. 98. 8. [6] 41. 4. 7. 2.
[7] G. 2. 189; Ulp. 22. 12, 13; In. 2. 14. 1.
[8] 30. 114. 10; 36. 2. 5. 7; Ulp. 24. 23. The fact that he is a new man is disregarded: the will operates only on death, being ambulatory till then.
[9] A is instituted and substituted. He enters, is enslaved and, later, freed. He can still take under the substitution, 28. 6. 43. 3. A legacy is left, *in annos singulos*, to a slave. If he is freed he still acquires: the gift cedes every year, 36. 2. 12. 2. A slave is legated and freed *inter vivos*. A later codicil gives a legacy to him: it is good, 30. 91. 5. A slave is left to T and money to the slave: there may be a valid *fc.* to give the money to the man when free, 30. 91. 4.

to half, inasmuch as it was, as to half, a legacy to the *heres*, of what would have been his in any case, and it could not convalesce by the manumission or alienation of the slave, by reason of the *regula* Catoniana. But Julian overrides these points by remarking[1] (by way of proof that the whole vests *in persona servi*) that, if the *heres* to whom he was *legatus* had not entered, he could have claimed the whole from the other. The point for us, however, is the small one, that the intervening manumission leaves him entitled to claim[2].

These rules preserving the provisions of a will are in sharp contrast with those applied on intestacy. We have already seen how far servile relationships were recognised after liberty[3]. Here we need consider only the effect of enslavement followed by manumission. The rule is clear and simple. One who is made a slave does not on manumission reacquire cognatic rights[4], and, conversely, his relatives will reacquire no rights of succession to him. His mother has ceased to be his mother, though the text indicates that there had been doubts which were ended by a rescript of Caracalla[5]. The same rule applied where the lapse into slavery occurred after death and before entry on the *hereditas*[6]. Several texts deal with the matter of testation from the other point of view. A person uncertain of his status, even though really freed or *ingenuus*, could not make a will[7], and, consistently, a will made by a slave could not be valid, even though he were freed before he died[8]. The same rules applied to *fideicommissa*, at any rate so far as they were contained in wills. If, however, a slave makes a *fideicommissum* without a will, and dies free, Ulpian appears to say that his *fideicommissum* is valid, as operating only at his death, provided he has not changed his mind[9]. The rule is a remarkable one. There is no hint that in classical law a person who could not make a will could make a *fideicommissum*. The language of Justinian as to codicils is opposed to such a view[10], and Gaius[11] mentions no such point in setting out the existing and the obsolete points of difference between legacies and *fideicommissa*. Ulpian[12] lays down a rule that those can make *fideicommissa* who can make wills. There is no sign that it is enough if the maker is qualified before he dies. Our present text is also from Ulpian. In other parts of it he says that *deportati* and those uncertain of their status cannot make *fideicommissa*, because they cannot make

[1] 30. 91. 2.
[2] As to the case of two institutions of a slave, see 29. 2. 80. 2; discussed *ante*, p. 141. As to the case of legacy of the slave and legacy to him, and ademption, see 34. 4. 27. 1; 18. 1. 6. *pr.*; *h. t.* 34. 2; discussed *ante*, p. 149.
[3] *Ante*, p. 76. [4] 38. 8. 7. [5] 38. 17. 2. 2.
[6] *h. t.* 1. 4. An apparent exception stated in the text only confirms the rule: a *servus poenae*, *restitutus*, is reintegrated in all his rights, *ante*, p. 411.
[7] 28. 1. 14, 15, Pius *rescripsit*. [8] 28. 1. 19.
[9] 32. 1. *pr.*, 1. Yet he is another man, 46. 3. 98. 8. [10] In. 2. 25. *pr.*
[11] G. 2. 284 *sqq*. [12] Ulp. 25. 4.

wills[1]. A later passage in the text observes that if a *deportatus* does make a codicil and is *restitutus indulgentia principis*, the *fideicommissum* will be valid *si modo in eadem voluntate duravit*[2]. But this case is less significant than ours, since such a complete restoration would restore the validity of a will[3]. The style is rather that of a legislator, and the rule may be from the compilers[4].

Apart from *naturalis obligatio*, questions may arise as to payments to the man, after he is free, in respect of transactions during slavery[5]. Where a slave was appointed to collect debts and continued collecting them after he was free, this might be *furtum* in him[6], but if the debtors were not aware that he was free the payment was a good discharge, though the original transaction was by the *dominus*[7]. If it had been a transaction of the *peculium*, the payment discharged, even though the payer did know of the freedom, if he did not know that the *peculium* had been adeemed[8]. If he did know this, his handing over the money did not discharge his debt to the *dominus*: it was not a payment but a *donatio* to the freedman[9]. On the same principle we are told that, if there was in all respects good faith, return to the man of a thing deposited by him discharged the obligation, though he had been freed[10]. The rule is old: Paul cites Alfenus as saying that the test question is whether the transaction was either *peculiaris* or with consent of the master. If it was either, the money may be paid to the slave after freedom, provided there is no circumstance from which the other party ought to infer that the *dominus* did not wish it to be so paid[11]. So again, Ulpian rests on the authority of Sabinus the rule that good faith means ignorance that he has been freed[12]. There is here no case of *naturalis obligatio*, but this rule, like the recognition of such *obligatio*, is a result of the acceptance of the fact that a slave[13] is at natural law a man like another.

In the region of contract and the like the basis of the law is the conception of the slave as capable of *naturalis obligatio*. The exact method and period of the recognition of this principle have been much discussed, but they are points on which there can be little more than conjecture. The recognition is doubtless connected with that of debts to and from the *peculium*. Such debts were recognised even between slave and master, in republican times[14], but it is unlikely that any general theory of natural obligation of the slave is so old. Pernice[15] is

[1] 32. 1. *pr.*, 2. [2] *h. l.* 5. [3] 28. 3. 6. 12.
[4] Vangerow justifies it, arguing from the words *quasi nunc datum* (Pand. § 540), on the view that, at least originally, a *fideicommissum* needed no form, and its *initium* might be regarded as occurring at any moment, *e.g.* death, if the maker has not changed his mind.
[5] *Ante*, pp. 158, 163, 202. [6] 46. 3. 18. [7] *Ibid.*; 12. 1. 41.
[8] 46. 3. 18. [9] 41. 4. 7. 2; cp. 17. 1. 12. 2.
[10] 16. 3. 11. [11] 46. 3. 35; as to 44. 7. 14, *post*, p. 699.
[12] 16. 3. 11. [13] *Ante*, p. 73. See Machelard, Obligations naturelles, 188.
[14] 15. 1. 9. 3; Mandry, *op. cit.* 1. 370. [15] Pernice, Labeo, 1. 150 *sqq*.

of opinion that it is a development of the imperial lawyers and unknown to Labeo. He is inclined to see distinct origins for the recognition of *naturalis obligatio* in the slave. In relation to the *dominus* he thinks it is merely the recognition of a long existing practice. As regards *extranei* he considers it the result of a gradual change of doctrine, as the result of which the *heres*, and not the *libertus*, was made liable *de peculio* on earlier transactions[1]. The point is that this had the effect of completely freeing the *libertus* from any liability, and the theory of *naturalis obligatio* came in to modify this. This appears to be practically another way of saying that the *obligatio* was most important as between slave and master during slavery and at the moment of release, while in relation to *extranei* it was most important after the man was free. Hence as against the master it is closely related to the *peculium*: as regards *extranei* it soon frees itself from this association. In each case it satisfies an obvious economic need[2]. The case of the slave is the most frequently treated case of *naturalis obligatio*, and is in all probability the original[3].

Whether Pernice's distinction be treated as fundamental or not, it is clear that the two cases, subserving different needs, develop on somewhat different lines, and they can best be treated separately.

A. Transactions between the slave and his master. Such obligations can of course exist during the slavery[4]. They constitute additions to, or deductions from, the *peculium*, for the purpose of the *actio de peculio*[5], and it is not easy to see any other importance they could have[6]. We are repeatedly told that there may be natural debts between slave and master and that they are reckoned in the *peculium*[7]. It must be remembered that a debt to the *dominus* took precedence of other debts[8]. Thus where the *res peculiares* were worth only 10, and the slave owed his *dominus* 10 and an outsider 10, the *res peculiares* belonged to the estate of the *dominus*[9]. But there was no debt unless there was a *peculium*. Thus where a slave A owed a slave B, of the same *dominus*, certain money, B could not claim anything on that account from his *dominus*, until A had a *peculium*[10]. Such obligations may arise from any transaction[11], even from payments in lieu of noxal

[1] *Ante*, pp. 230 *sqq*.

[2] Mandry remarks (*op. cit.* 1. 344) that 12. 6. 13, which says that payment of *fideiussor* of a slave's debt is irrecoverable, because the slave is naturally liable, is giving the motive of the rule in the guise of a consequence. On the question whether *naturalis obligatio* is the expression of a new philosophy of legal duty, see Machelard, *op. cit.*, Généralisation, and authorities there cited.

[3] As to this and the various uses of the word *naturalis*, see Gradenwitz, Natur und Sklave, 3, 26, 27, 35, 41.

[4] 33. 8. 16. [5] *Ante*, pp. 220 *sqq*. [6] Mandry, *op. cit.* 1. 157.

[7] 15. 1. 7. 6; 33. 8. 6. 4. [8] *Ante*, p. 221. [9] 35. 2. 56. 2.

[10] 15. 1. 7. 7. The *peculium* is left to a slave: he need not deduct debt from his *vicarius* to the *dominus* unless the *vicarius* has a *peculium*, 15. 1. 18. The word debt is used though there be no *peculium*, but the debt has only a potential existence.

[11] Payment by debtor of *dominus*, *h. t.* 11. 2; *promissio*, *h. t.* 56; loan, *h. t.* 49. 2.

surrender[1], *etc.* It is clear from this case that though for the time being the only importance of the debt is in relation to the *quantum* of the *peculium*, the transaction itself need have no relation to that fund. On the other hand, there is no text declaring indebtedness of the *dominus* to the slave except in connexion with a *peculium*, mentioned or assumed. Mandry shews that all the texts involve payments or the like by the slave, inconceivable without a *peculium*[2]. From this he infers not only that the debt had no importance except in relation to *peculium*, but also that no such debt could arise except out of a transaction in connexion with it. But there seems no reason for laying down any distinction in principle from the rule in the converse case. The only difference is that it is not easy to formulate a case in which a slave could become a creditor of his *dominus*, except in dealings connected with his *peculium*. The existence of a debt either way is declared by Pomponius to be estimated *ex civili causa*[3], an expression which he explains, by the remark that a mere entry in account of a debt, when there had been in fact no loan or other *causa*, will not make one. He does not appear to mean that the test as to addition or deduction is the question whether the state of things is such as between independent persons would have created an *obligatio civilis*, but rather that it must be such as would have created an obligation of some sort. The writer is considering the relation of *dominus* and *extraneus creditor* in an *actio de peculio*, and lays it down that the *dominus* cannot deduct from the *peculium*, or the creditor claim an addition, for anything but a real debt[4]. We are told elsewhere that the *dominus* was a debtor only as long as he liked, and could destroy his debt to the slave by merely cancelling it[5]. This is not inconsistent. It would leave a liability to the creditor *de in rem verso*, or under the *doli mali* clause in the edict *de peculio*[6]. It must be remembered that we are here considering only the rights of a creditor[7]. Two illustrative cases, slightly complex, but not otherwise difficult, may be taken from the texts. A slave exacts money from a debtor to his master. Ulpian, citing Julian[8], remarks that here, if the *dominus* ratifies the act, there is a debt from the slave to his *dominus*. If, however, the *dominus* does not ratify, the slave is not a debtor to him. He has collected an *indebitum*, which could be recovered by *condictio indebiti de peculio*. Obviously the debtor might not recover *in solidum*. It must be supposed on the one hand that there had been no circumstance justifying the debtor in supposing he might pay the slave, and on the other that the slave was

[1] *h. t.* 11. *pr.*; 33. 8. 16. *pr.* [2] *Op. cit.* 1. 157, 374. [3] 15. 1. 49. 2.

[4] 15. 1. 11. 2, Ulp., *naturalia enim debita spectamus in peculii deductionem*.

[5] 15. 1. 7. 6. Probably interpolated. [6] Pernice, Labeo, 1. 155; *ante*, p. 218.

[7] The natural obligation will revive if there is a new *peculium*, and see *post*, p. 690.

[8] 15. 1. 11. 2.

acting in good faith, so that there is no noxal action. A converse case is quoted by Paul from Neratius[1]. My slave makes an *expromissio* to me for my debtor. I can deduct the amount of the debt from the *peculium* in any *actio de peculio*. Nevertheless, as a slave's promise is not a *civilis obligatio*, and is, *qua* verbal contract, a nullity, the old *obligatio* is not destroyed: there has been no *novatio*[2]. Paul remarks that if the *dominus* deducts the amount of the *expromissio* in any *actio de peculio*, this makes the original debt vest in the *peculium*; Neratius thought it possible that the mere *expromissio* might have made the claim against the original debtor vest in the *peculium*. This seems the more reasonable view: the *peculium* would be increased by the amount of this claim, and reduced by whatever amount was still due to the master on the *expromissio*. Here, as elsewhere, mere *deductio* would not be payment to the master[3].

There are many texts which appear to deny any obligation to or against slaves. Some speak in general terms: *in personam servilem nulla cadit obligatio*[4]*; servus ex contractibus non obligatur*[5]*; dominus cum servo paciscens ex placitis teneri et obligari non potest*[6]. These texts are really laying down a rule in general terms which were no doubt correct before the introduction of *naturalis obligatio*, but which in later law are true only of *obligatio civilis*[7]. The transition is shewn by a text of Ulpian[8] which says that slaves cannot owe or be creditors, and that in using language implying that they can, we rather point out a state of fact *quam ad ius civile referimus obligationem*. The rule of later law is more clearly laid down by Paul[9], who tells us that *servus naturaliter obligat*, and by Ulpian himself[10] in the well-known text *ex contractibus* (*servi*) *civiliter non obligantur sed naturaliter et obligant et obligantur*. It is this habit of using language expressing the old principle, too wide for the contemporary state of things, but correct as applied to the actual case under discussion, which explains and enables us to harmonise texts in apparent conflict, dealing with specific types of transaction. Thus Paul tells us that sale to a man's own slave is no sale at all[11]. Ulpian says there can be no sale between father and son[12]. But elsewhere he says that where the *dominus* buys from the slave there is a sale though the *dominus* is not bound[13]. There is no conflict:

[1] *h. t.* 56.
[2] G. 3. 119, 176, 179. Nor will the debtor have an *exceptio doli*, since the state of the *peculium* may make it impossible to bring the right of *deductio* into effect, and as in practice the creditor can renew his action, the benefit is in any case rather illusory. See the case in 2. 14. 30. 1; *post*, p. 693.
[3] *Ante*, p. 224.
[4] 50. 17. 22.
[5] 44. 7. 43; cp. G. 3. 104.
[6] C. 2. 4. 13.
[7] Mandry, Familiengüterrecht, 1. 343 *sqq*. Could *votum* create a *naturalis obligatio*? 50. 12. 2. 1.
[8] 15. 1. 41. So Julian, 46. 1. 16. 4.
[9] 12. 6. 13. *pr*.
[10] 44. 7. 14.
[11] 18. 2. 14. 3.
[12] 18. 1. 2.
[13] 14. 3. 11. 8.

each text is giving on its facts a correct decision. Paul means that there is no such sale as is contemplated by an agreement, in a contract of sale, that it is to be void if the vendor can sell to another on better terms before a certain day (*in diem addictio*): it is not such a sale as involves alienation[1]. Ulpian in his first text means that there is no actionable contract: in the second, that though this is so, there is a sale for certain purposes, *e.g.* in the sense necessary to give a *iusta causa usucapiendi*: there was a *naturalis obligatio* to deliver the thing.

Texts dealing with *novatio* give a similar series of apparent conflicts. Gaius tells us that a *stipulatio* from a slave is *inutilis*, whether the promise be made to his *dominus* or to another, and, in conformity with this, that if a slave stipulates, *novandi animo*, the old obligation stands *ac si a nullo postea stipulatus fuissem*. This is because *novatio* needs a verbal contract, and a slave's promise cannot have that force. *Novatio* is a civil law conception, and at civil law there is no action on a slave's promise. Another expression of Gaius, which may be that of Servius, *quia cum servo agi non potest*, expresses the effect of a slave's promise more correctly[2]. The difference between this view and that of later law is as to the essentials of novation. As Theophilus says, there is a *naturalis obligatio*, but this does not novate[3]. We have just considered the effect of such a transaction[4]. *Fideiussio* gives rise to similar but somewhat greater difficulties. We know that there may be *fideiussio* on any obligation, natural or civil[5]. Accordingly there may be *fideiussio* on a slave's *naturalis obligatio*, to his master or another[6], and we are told that the very slave whose debt is in question may be the interrogator on behalf of the master[7]. On the other hand if the obligation is the other way round, *i.e.* if the slave has stipulated from his master, we are told that a *fideiussor* is not bound, the reason assigned being that a surety cannot be liable for and to the same person[8], a rule frequently laid down[9]. It is remarked by Pernice[10] that the reason is unsatisfactory, since it would be equally true in the converse case. He is inclined to see the reason in a refusal to recognise the reality of a debt from his *dominus* to a slave[11]. But there is no reason to base the difference of treatment of the two cases on a rigid conservatism which would ignore the reality of an obligation which was in practice familiar. The reason

[1] Mandry, *op. cit.* 1. 152.
[2] G. 3. 104, 176, 179; In. 3. 19. 6; 3. 29. 3. Gaius refers to an older exploded view, of Servius Sulpicius, that there was *novatio*, with the result that in practice the right was destroyed.
[3] *Ad* In. 3. 29. 3.
[4] 15. 1. 56; *ante*, p. 686. See Machelard, Obligations naturelles, 165 *sqq*.
[5] 46. 1. 16. 3.
[6] 15. 1. 3. 7; 46. 1. 56. 1; G. 3. 119; In. 3. 20. 1.
[7] 46. 1. 70. 3.
[8] *h. t.* 56. 1.
[9] *h. t.* 71. *pr*.; 46. 3. 34. 8.
[10] Labeo, 1. 156.
[11] See also Machelard, *loc. cit.* For texts expressing refusal to recognise such obligations, see Gradenwitz, Natur und Sklave, 27.

assigned by the text is sufficient. It is hardly correct to say that it would apply equally to both cases. Where a *fideiussor* promises to a *dominus* on behalf of a slave, the transaction is real and intelligible. The *dominus* has a right against the slave's *peculium*, which may be made effective in an *actio de peculio* brought by any creditor of the slave, against whose claim a mere *ademptio* of the *peculium* would be no protection to the *dominus*, by reason of the *doli mali* clause of the edict. There may be no certainty of making it effective in this way, the *peculium* being already overloaded with debt to the *dominus*, or the slave, with *administratio*, having paid away all the liquid assets. Thus the *fideiussio* acquires something to the master. But in the other case, though the *naturalis obligatio* of the master to the slave is valid, the promise of the *fideiussor* to the slave on behalf of the *dominus* acquires nothing to the slave, but can operate only, if at all, in favour of the *dominus*. For, as we shall see shortly, rights acquired by a slave, by contract with *extranei*, vest absolutely in the *dominus*, and do not create any *naturalis obligatio*, in the ordinary sense, in favour of the slave[1]. Thus the surety's promise to the slave to pay the master's debt to him is in effect nothing more than a promise to the master to pay on behalf of the master to the master: it is for and to the same person in a sense in which this cannot be said of the converse case[2].

The situation is fundamentally changed by a manumission of the slave. So far as his rights are concerned, the resulting state of things is simple. The general rule is *quod quis dum servus est egit, proficere libero facto non potest*[3]. His right, such as it was, against his *dominus*, has no significance except in relation to his *peculium*, and, if he does not take that, there can be no question of any right[4]. If he does take the *peculium*, the natural obligation persists, and if the former *dominus* pays the debt he cannot recover[5]. In one text a curious rule is laid down. Ulpian says[6] that a *servus heres necessarius* who claims *bonorum separatio*, and does not intermeddle with the estate, can claim to keep a debt due from his master to him. Under such circumstances he cannot be entitled to his *peculium*, for it is part of the estate. But if he is not so entitled, there is no debt to him. Even though there were such a debt, he would be merely a creditor, and, assuredly, not entitled by virtue of what is a mere *naturalis obligatio*, to any priority over other creditors with claims at civil law. It has been suggested[7] that the debt must be one which became claimable only after the death of the

[1] 44. 7. 56; *post*, p. 698.
[2] It should be noted that the *fideiussor* has in any case an *actio mandati de peculio* against the *dominus*, 15. 1. 3. 7.
[3] 50. 17. 146; cp. 2. 14. 7. 18.
[4] The right of recovery by *statuliber* who has paid more than he was *dare iussus* is only an apparent exception, 12. 4. 3. 6; 40. 7. 3. 6.
[5] 12. 6. 64. [6] 42. 6. 1. 18. [7] Machelard, *op. cit.* 194.

dominus, e.g. where the *dominus* had taken a *hereditas* at some earlier date, with a conditional legacy to the slave, such a legacy being capable of taking effect, now that the slave has become *sui iuris*. The explanation is hardly satisfactory. The money is spoken of as a *debitum*: there is no suggestion of the sum having only now become due. Moreover the difficulty would still remain. There might be other legatees of the old *hereditas* still unpaid, but there is no hint of their having such a privilege. In the case supposed, they, and the slave legatee, would have been entitled to *bonorum separatio* against the creditors of the deceased heir of their testator[1], but that would apply only to the goods which formed part of the originally inherited estate, and could not have amounted to a general right of preference in the whole estate of the present deceased[2]. But a more serious objection is the general form of the language, which is not such as would have been used if such a remote hypothesis, as that suggested, had been in the writer's mind. He could hardly have thought the words *si quid ei a testatore debetur*, an apt form by which to describe a sum which was never in fact due from the master. On the whole it seems probable that it is a hasty Tribonianism, laid down without much reference to principle.

We have seen[3] that if the slave does not take his *peculium* his natural right against his *dominus* ceases on his manumission. This is not necessarily the case with his liabilities[4]. If he does not take the *peculium* he cannot be sued for *reliqua*[5]. If he does, it is subject to debts to the master[6], not actionable, but such that if he pays he cannot recover[7]. It is to be presumed, though we have no information, that his *fideiussor* is still liable. His position is awkward: he cannot sue the slave, his real principal, and his remedy *de peculio*, hardly worth anything in the circumstances, expires in any case in a year. He is in the position of one whose principal is insolvent, though in fact both slave and master may be wealthy.

The slave's liability comes into question mostly in connexion with his responsibility for past administration[8]. The texts need careful consideration. Where a slave, who has been engaged in administration for his *dominus*, is freed without his *peculium*, he cannot afterwards be sued for anything due on account of the *actus*[9]. If he is freed *directo*, there is a right to vindicate property in his possession, and if he is freed by *fideicommissum*, though the fiduciary must free without delaying the manumission on merely pecuniary grounds, an *arbiter* will

[1] 42. 6. 6. *pr.*
[2] There is the same difficulty if we treat it as an expression by Tribonian of the new rule as to a legatee's general hypothec.
[3] *Ante*, p. 688. [4] Cp. 12. 6. 38. [5] C. 4. 14. 5.
[6] 33. 8. 10. [7] 46. 3. 83. [8] 3. 5. 16.
[9] 3. 5. 44. 1, 16; 34. 3. 28. 7; 40. 5. 19. *pr.*, 37; 44. 5. 1. 4; C. 4. 14. 5.

be appointed, under rules already considered, to enquire into what is due. If this claim is satisfied, he need not fear further liability, apart from any benefit under the will[1]. We know that in all cases of manumission there is a general duty to render accounts, and if the investigation shews that moneys have been made away with in such a way as to create a liability, the amount can be deducted from any legacy[2]. There seems to be no text expressly dealing with the case in which the *peculium* is left to the man, his administration ceasing on the manumission, and the loss not being discovered till the *peculium* has been received by the legatee. As debts to the *dominus* automatically reduce the *peculium*, it might seem that the amount could be recovered, so far as the *peculium* would go, by a *condictio indebiti*[3], and this is suggested by at least one text[4]. But most of them contemplate *retentio* as the obvious and only remedy. In fact to allow a *condictio indebiti* in such a case is to give an action to enforce a *naturalis obligatio*. It will be remembered that, apart from actual conveyance, the legacy vests in the legatee the ownership of the proper fraction only of each *res peculiaris*, so that *communi dividundo* is available. The texts to be considered in relation to the next point shew that, so far as this retention is concerned, the liability is estimated on the analogy of an ordinary *negotiorum gestio*, and extends to faults committed at any time during the *administratio*, irrespectively of the then state of the *peculium*. But no text extends it beyond benefits received under the will[5].

There is more difficulty in the case in which the freedman continues the administration which he began as a slave. He is of course liable in full for any misdoings after freedom, and there is a further rule, almost inevitable. If a transaction begun before, and continued after, he was free, is such that its parts cannot well be disentangled, all can be sued upon[6]. There are, however, some texts which seem to contemplate a wider liability in the case of a continued *administratio*. Paul cites[7] from three Proculians (Proculus, Pegasus and Neratius) a somewhat subtle doctrine. They say that a man who began to administer as a slave, and continues when free, is bound to shew good faith. At the moment when he became free, he knew that any further action was barred by the freedom. He ought then and there, before taking the

[1] 40. 5. 19. *pr.*, 37; 47. 4. 1. 7.

[2] 34. 3. 28. 7. Though during slavery the natural obligation to the master has no importance except in connexion with *peculium*, it has a potential existence apart from that fund. A legacy is given to an *actor* who is freed. *Reliqua* may be charged against it though there be no *peculium*. See *ante*, p. 684.

[3] It was only in a narrow class of cases that *condictio indebiti* was refused in case of legacy, G. 4. 9; In. 3. 27. 7.

[4] C. 4. 14. 5.

[5] 3. 5. 16—18. 1.

[6] 3. 5. 16. A slave bought a site and built on it. The house fell. After he was free he let the land. In an *actio negotiorum gestorum* only the *locatio* can be considered.

[7] 3. 5. 17, 18.

peculium, to have debited himself with whatever losses had been caused by his fault at any time (*a capite rationem reddendum*, says Sabinus), and taken only the balance. Not to do this was a breach of his duty as a *negotiorum gestor*, and he is thus liable to an action, *ex negotiis gestis*, for the resulting loss, *i.e.* for what would have been saved had he then made the deduction. Neratius seems to require him to make the same allowance even out of after acquired assets[1]. Paul adds from Scaevola[2] the proposition that the maxim of Sabinus must not be understood to extend the liability beyond the then content of the *peculium*, or to enable the master *revocare in obligationem* losses incurred in slavery. This appears to repudiate the rule of Neratius of which there is no other trace, and which squares ill with the general language of the texts above cited[3]. The case differs from that of the ordinary *negotiorum gestor* with which it is equalised, in that the debt in that case was a full *obligatio civilis*. The action allowed by Proculus is to enforce a *naturalis obligatio*.

It is possible to release the slave even from the liability which attaches to him in the accepted doctrine. But it is also possible to increase the liability by special undertaking of the *manumissus*. He may specially promise *operae*, or money, or full compensation for waste during his slavery. A promise of this kind must be made or confirmed after the freedom is attained. Such a promise is valid and is not upset by the rule which forbade agreements *onerandae libertatis causa*[4]. These last are defined by Ulpian and Paul as such as are not *bona fide* intended to be enforced, but are to be held *in terrorem* over the *libertus* to be exacted if he offend, and so to secure obedience[5]. In the same way if a manumission was given on account of an agreement to give money, a promise to pay it, made after the man was free, is absolutely good, and not regarded as *onerandae libertatis causa*[6]. It is clear that the promise must be confirmed after freedom, whether it is for money or service. The rule is clearly laid down by Ulpian and Venuleius, though the latter shews that there had been doubts[7]. An enactment of A.D. 222[8] lays down, however, a different rule. Where a slave had promised money for liberty, and there was

[1] 3. 5. 17, 18. *pr.* The case is compared with that of a *negotiorum gestor* who fails to debit himself with a liability which has since become time-barred: he must make good the loss.

[2] 3. 5. 18. 1.

[3] As to the view that the freedom may not be burdened with old debt, see Machelard, Obl. Nat. 184.

[4] 44. 5. 1. 4.

[5] 44. 5. 1. 5, 2. 2. Agreements breaking the rule are not necessarily void, but there is an *exceptio*, see 44. 5, *passim*. But a *societas libertatis causa* between patron and *libertus* is absolutely void, *h. t.* 1. 7; 38. 1. 36. It is perhaps a fraud on the '*lex* Iulia *et* Papia,' from a treatise on which one of the texts comes, 38. 1. 36.

[6] 44. 5. 2. 2.

[7] 38. 1. 7. *pr.*, 2; 40. 12. 44. *pr.*; *ante*, p. 442. Venuleius is clear that the oath puts only religious pressure on the man.

[8] C. 4. 14. 3.

no stipulation after liberty, it is said *adversus eum petitionem per in factum actionem habes.* The rule is strange and the language is at least unusual. If this is to be taken as law, it may be that, as Savigny says[1], it was treated as an innominate contract *facio ut des*, the intervening manumission being ignored. But this does not shew why it is ignored, and the rule is so inconsistent with that found in the other texts, that it seems most likely, in view of its clumsy language, that in its original form it advised a petition to the imperial court. Other texts shew the difficulty that was felt in dealing with this sort of case. A slave induced X to promise money for his freedom, undertaking to assume the liability after he was free. This he did not do. Pomponius, quoted by Ulpian, lays down the rule that the third party who promised has an *actio doli* against the *manumissus*, and if the patron has prevented the *libertus* from accepting the liability, the promisor has an *exceptio doli* against the patron[2]. This assumes that there is no other action, a point which Ulpian makes clear. Here the *dolus* is after manumission, and it must be remembered that *dolus* is a delict. A further difficulty arises if the slave has committed *dolus* to his *dominus* before he is free. We know that in general no action lies[3]. What is to happen if the manumission was itself procured by fraud? There can be no restitution, even though the manumitter were a minor, except by Imperial decree *ex magna causa*[4]. Several texts tell us, however, that when the owner was a minor, there is a remedy against the dolose slave. One gives an *actio doli* against him[5]: another gives *vel actio doli vel utilis*[6]. Another says that an indemnity can be obtained *ab eo cuius iuris dictio est, quatenus iuris ratio permittit*[7]. The *actio utilis*, whatever it may mean, may perhaps be neglected. It appears therefore that the later classical law allowed an *actio doli* on such facts. Yet as we know, and as one of these texts expressly says[8], no action lies to a master against his freed slave for a delict committed during slavery. The result seems to be a very strong recognition of the principle that the *actio doli* is available where a wrong has been done and there is no other remedy[9], eked out by the fact that the injured person is a minor[10], and by the consideration that the *dolus* may be said to have been committed at the very moment at which liberty was obtained. The amount recoverable is the *interesse* of the manumitter—what he would have had had the manumission not occurred[11].

[1] Savigny, System, Beilage IV *in fin.*
[2] 4. 3. 7. 8.
[3] *Ante*, p. 107.
[4] 4. 4. 9. 6, 10.
[5] 4. 3. 7. *pr.*
[6] 4. 4. 11. *pr.*
[7] C. 2. 30. 2.
[8] 4. 4. 11. *pr.*
[9] 4. 3. 1. 1.
[10] All the texts dealing with such *dolus* of the slave and most of those dealing with *dolus* of a third party, seem to discuss cases in which the owner is a minor. See the references, *ante*, p. 570.
[11] 4. 4. 11. *pr.* No deduction for the problematical value of the man as a *libertus*, 19. 5. 5. 5; cp. 50. 17. 126. 1.

B. Transactions between the slave and *extranei.* Most of the questions of principle which arise in this connexion have necessarily been discussed by anticipation—a fact which enables us to deal only briefly with some of the points.

In general where a slave contracts with an *extraneus*, he acquires the right to his master, and conversely, the *extraneus* will have, or may have, the *actio de peculio, etc.*, against the master. But the *naturalis obligatio* of the slave is something distinct from the rights represented by these rules. So far as a liability of the slave is concerned, this may certainly exist independently of his *peculium*: the transaction may have had no relation to that fund: there may indeed have been no *peculium* when it was made[1]. Some texts suggest it as arising where there could be no *actio de peculio.* Thus X stipulated from a slave of B for what was due from T to X. Gaius says, on Julian's authority, that if the slave had a *iusta causa interveniendi*, so that the *expromissio* gave X an *actio de peculio* against B, X is barred from suing T by the *exceptio pacti conventi*, but not if there was no such *causa interveniendi* or if he thought the slave free[2]. The debt is not novated, even in the first case, for the slave's promise is not a verbal contract[3], but the facts are construed as a pactum *ne a T peteretur.* It will be noticed that this effect differs from that in a case already considered in which the *expromissio* is to the slave's own master[4]. There the benefit to the person to whom the promise was made, the master, was unreal if the *peculium* was solvent: it depended on the possibility of making certain deductions for which there might never be occasion: here the promisee has in any case acquired an *actio de peculio.* In this case it can hardly be doubted that the slave would be under a *naturalis obligatio* whether there were an *actio de peculio* or not. In another text a *filiusfamilias* is liable under circumstances which give no *actio de peculio* against his father[5].

The independence of the obligation is shewn by the fact that there may be pledge or *fideiussio* for the slave's natural obligation independently of that *de peculio.* Thus, if a slave, having *administratio peculii*, gives a pledge for his natural obligation, this entitles the owner to regain possession of the thing pledged by an *actio pigneraticia utilis*[6]. It must be assumed here that there was also a "peculiar" obligation (as would ordinarily be the case), since otherwise the power of *administratio* would not have authorised any, even partial, alienation[7].

[1] The *actio de peculio* lay on such facts: the *naturalis obligatio* can hardly be narrower. Mandry, *op. cit.* 1. 374; Illustrations, *ante*, p. 212.
[2] 2. 14. 30. 1; *ante*, p. 215.
[3] *Ante*, pp. 215, 685.
[4] 15. 1. 56; *ante*, p. 686.
[5] 15. 1. 3. 11. See also 46. 4. 8. 4, *et tolluntur etiam obligationes honorariae si quae sunt.*
[6] 12. 6. 13. *pr.*
[7] *Ante*, pp. 201 *sqq.*

The case of *fideiussio* for such an obligation is considered in several texts. It may be either only for the *obligatio honoraria*, in which case it is *dumtaxat de peculio*, or for the natural obligation, in which case it is *in solidum*, whatever the state of the *peculium*[1]. An *actio de peculio* does not release the *fideiussor* on the natural obligation, the obligations being distinct[2]. Such a *fideiussio* may even be created after an *actio de peculio* has been brought, *quia naturalis obligatio, quam etiam servus suscipere videtur, in litem translata non est*[3]. Though payment discharges both, they are *plures causae*[4].

But though they are distinct obligations the money due is the same and payment will put an end to both. And the *naturalis obligatio* must in every case be at least as great as the *obligatio honoraria*. These points are illustrated in several texts. Thus if the slave pays, out of the *peculium*, having the necessary *administratio*, it is a valid *solutio*, even though an *actio de peculio* is pending, and the *dominus* will be released by the payment[5]. Conversely if the *dominus* pays under an *actio de peculio*, this releases the *fideiussores* of the slave's obligation, Africanus observing that the one payment has ended the two obligations[6]. The same result follows from an *acceptilatio* to the slave. Thus Paul says that if I have given an *acceptilatio* to the slave, the *actiones honorariae* become *inutiles*[7], and Ulpian says *et servus accepto liberari potest, et tolluntur etiam honorariae obligationes si quae sunt*[8]. Ulpian gives as the reason why both parties bound by an obligation are released by an *acceptilatio* to one: *non quoniam ipsis accepto latum est, sed quoniam velut solvisse videtur is qui acceptilatione solutus est*[9]. It seems that *acceptilatio* could not be effectively made to the *dominus*. Ulpian's text, in which he says that *acceptilatio* to the slave releases the *dominus*[10], begins with the remarks that *acceptilatio* to a son releases the honorary obligation of the father, and that *acceptilatio* to the father would be a mere nullity. Then he adds *idem erit in servo dicendum*. This is followed by the rule that the slave can take *acceptilatio*. One might expect *a fortiori* that the other part of the rule is to apply, for while it might be contended that the obligation of father and son could conceivably be regarded as one, since both are civil[11] (*i.e.* actionable), it

[1] 46. 1. 35. [2] 46. 3. 84; *post*, p. 695. [3] 15. 1. 50. 2.

[4] 46. 3. 38. 2. X lent money to S the slave of Y, who freed him. S then became *fideiussor* to X. If this was for the *obligatio annalis* it is good, but if for the natural obligation it is null, for a man cannot become *fideiussor* for himself. If he becomes *heres* to a *fideiussor* of the natural obligation or *vice versa*, both obligations persist, one being natural and the other civil, though in the case of a *filiusfamilias* there would have been merger, both being civil, 46. 1. 21. 2. See *ante*, p. 217 and *post*, p. 696. See also App. II.

[5] The slave's *fideiussores* are released, 12. 6. 13. *pr.*; 15. 1. 50. 2; 46. 3. 84.

[6] 46. 3. 38. 2. [7] 46. 4. 11. 1.

[8] 46. 4. 8. 4; cp. 34. 3. 5. 3. There is no *obligatio de peculio* if the slave no longer owes. The converse is not necessarily true, *post*, p. 697.

[9] 46. 4. 16, *eiusdem obligationis participes*; cp. G. 3. 169; In. 3. 29. 1; *post*, p. 697.

[10] 46. 4. 8. 4.

[11] Cp. 5. 1. 57; 15. 1. 3. 11.

is clear that those of slave and *dominus* are not. One is natural: the other civil. Moreover the promise of the son is a verbal contract, while that of the slave is not, but has only the force of a pact, so that the *acceptilatio* cannot be in essence more than a pact[1]. The fact that son or slave can take *acceptilatio* for the father creates no difficulty[2]: they are mere expressions of his personality for the purpose of acquisition, but the converse is not true.

There is some difficulty about informal releases. The *dominus* can take a *pactum de non petendo*, but this will not release the slave[3]. On the other hand the liability of the *dominus* depends on the existence of that of the slave, and thus any pact which releases the latter will release the *dominus*. The *acceptilatio* to the slave is no more than such a pact[4]. But a slave's express pact, *ne a se peteretur*, is in strictness meaningless. The rule arrived at is that if the slave takes a pact *in rem, e.g. ne peteretur*, this destroys the natural obligation and thus gives the *dominus* also an *exceptio pacti*, but if he agrees *ne a se (servo) peteretur*, this is in strictness a nullity. Paul seems to have reluctantly allowed an *exceptio doli* to the *dominus* in such a case[5], and we must presume that the slave's obligation is destroyed. In like manner it appears that a pact to the *dominus, ne a se servove peteretur*, would destroy the natural obligation, though strictly it means nothing so far as the slave is concerned[6].

It is clear that merely bringing an *actio de peculio* does not release the slave or his *fideiussor*. But Pomponius tells us[7] that where an *actio de peculio* has proceeded to judgment, *fideiussores* for the slave have an *exceptio rei iudicatae*. This would be more intelligible if the *fideiussio* were for the *obligatio honoraria*, but this case is not commonly called a *fideiussio pro servo*, and if it be understood of the *obligatio naturalis* the rule conflicts with those just laid down and with their reason, *i.e.* that the *obligatio naturalis* has not been brought into issue[8]. The texts which deal with this question[9] have recently been very fully considered by Erman[10]. Most of them clearly express the view that the natural obligation and that *de peculio* are not *eadem res*, and this may

[1] But Ulpian elsewhere (34. 3. 5. 2) cites, and it seems approves, Julian's view that if the father has a legacy of *liberatio* of the son's debt he should be released by pact lest the son be also released. This implies, in its context, that *acceptilatio* to the father would be effective and would release the son. He may be thinking of *novatio* followed by *acceptilatio*.

[2] *Ante*, p. 154. As to *pactum de non petendo*, 2. 14. 17. 7—18.

[3] 34. 3. 5. 2; cp. 2. 14. 17. 7.

[4] His promise is not a verbal obligation which is essential to true *acceptilatio*, *ante*, p. 216.

[5] 2. 14. 21. 1, 2.

[6] Arg. 2. 14. 21. 2. *in fin.* A slave's pact *ne a domino peteretur* gave an *exceptio* whether the original transaction was by the slave or the master, *h. l.* 1.

[7] 44. 2. 21. 4.

[8] 15. 1. 50. 2.

[9] 15. 1. 50. 2; 46. 3. 38. 2, 84; 44. 2. 21. 4 *etc.*

[10] Mélanges Appleton, 203 *sqq.*, esp. 266 *sqq.*

be justified on obvious practical grounds[1] And if, as Julian holds, a natural obligation in the actual defendant can survive an adverse judgment[2], *a fortiori* would it survive in the case of another person This is not the only case in which a *fideiussor* can be taken for a natural obligation surviving *litis contestatio*[3] All this makes it difficult to understand the text which makes the judgment release the slave's *fideiussor*, and this not *ipso iure*, as might have been expected, but *ope exceptionis*[4].

The last point is perhaps unimportant in the Digest where the distinction no longer exists Apart from possible interpolation[5] it may perhaps be explained on the ground that the *exceptio* was not excluded by the presence of *ipso iure consumptio*[6] The more serious conflict remains It may be set down to a difference of opinion, readily conceivable on such a point, preserved in the Digest by oversight[7] The view that here the judgment was an absolution, while in both the other texts it was a condemnation, has met with some acceptance Kruger[8] supposes that there was no *consumptio* and not an ordinary *exceptio rei iudicatae*, but a "positive" *exceptio rei contra A A iudicatae* This is an appeal to the "praejudicial" effect of judgment And Erman observes[9] that there is no sign of such an *exceptio* in classical law Affolter[10], taking the same view of the judgment, holds that it is an ordinary *exceptio*, based not on a real identity, but on a "synthetic" identity resting on a relation of premiss and consequence Judgment for the debt would not prove the natural obligation, but judgment that there was no debt would disprove it This view Erman is inclined to accept[11], but it is much the same as the other, in effect it requires the same enquiry into the content of the judgment, for only a judgment denying the transaction altogether would negative the natural obligation And it is difficult to see how the nature of the judgment can affect the identity of the *res*, for this identity, however defined, is something already existing[12] Here too the texts give no evidence of any such function of the *exceptio*[13], in fact it seems that every

[1] Cp the case of *constitutum*, in which bringing the praetorian action did not destroy the other obligation, 13 5 18 3, *vetus dubitatio*
[2] 12 6 60 cp *h t* 28 [3] 46 1 8 3 See Machelard, Obl Nat 363
[4] 44 2 21 4 See App II
[5] Erman, *op cit* 269, remarks that *excipiendum est* is an unusual form He cites in support of its genuineness 3 5 7 2 *Agi non posse quia exceptio r i opponenda est* But this is strictly speaking self contradictory and the last clause is probably Tribonian
[6] So Erman *op cit* 298, citing 44 7 34 1
[7] As to the possible influence of the actual form of the *fideiussio* see Erman, *op cit* 270 *sqq*
[8] Kruger Processualische Consumption, 200, cited Erman, *op cit* 204
[9] *op cit* 288
[10] Affolter, Institutionensystem, 279 *sqq* , cited Erman, *op cit* 290 *sqq*
[11] *loc cit*
[12] Affolter s view cannot rest on the principle *non bis in idem*, for there was the risk of an adverse judgment, whether one was given or not
[13] Such distinctions are plentiful in relation to *iusiurandum*, where the matter could be tested more readily, see, *e g* , 12 2 26 But there is here no question of *consumptio*

argument which Erman urges against the view which he rejects applies equally here[1].

Of the *naturalis obligatio* to the slave we hear little during the slavery Everything he acquires is acquired to the *dominus*, who can sue on his contracts[2]

The slave's natural obligation survives manumission Thus, if after he is free, he promises to pay the debt, this is not a *donatio* but a *solutio*[3], and if he pays it he cannot recover[4] But it is still only a *naturalis obligatio*, and thus a *manumissus* cannot be sued on his contract made as a slave[5], even as a *statuliber*[6], unless he has acquired the liability *de peculio*[7] or the like, on account of his still having the *peculium* Here too we have, however, to except the case in which a transaction, begun when he was a slave, is completed after manumission, and its parts are not readily separable. In that case he can be sued on the whole transaction, though it does not appear that this anomalous rule can have any application beyond *mandatum* and *negotiorum gestio*[8]

In the case of deposit there is a difficulty Where a thing is deposited with a slave, Ulpian quotes Marcellus as saying that, after he is free, he cannot be sued on his contract of deposit, and it is necessary therefore to fall back on other actions[9], *e.g. vindicatio* or any delictal actions which may arise. But Paul cites Trebatius as holding that if he still has the thing it is he who must be sued and not the *dominus*, though in general action does not lie against the *manumissus*[10] It is clear from the preceding clause[11] that he is not referring to the liability *de peculio* Mandry[12] appears to regard this as resting on the principle already mentioned of a continuing *negotium* not separable in its parts[13]. But this leaves the conflict with Ulpian and Marcellus, and the mere

[1] Given natural obligation the slave's obligation is a premiss, not the consequence of the *obligatio de peculio*, as Affolter and Erman make it It may exist without the *obligatio de peculio* the converse is not true
[2] 15 1 41 As to the meaning of the words *servi ex contractibus naturaliter obligant* (44 7 14), *post*, p 699
[3] 39 5 19 4
[4] 12 6 13 *pr* as ordinarily read I lend to your slave, buy him and free him if he now pays me the payment cannot be recovered 46 3 83
[5] P 2 13 9 C 4 14 2 [6] C 4 14 1
[7] *h t* 2, D 15 1 3 1, 15 2 1 7, 14 4 9 2
[8] 3 5 16 17 Africanus says (46 1 21 2, *ante*, p 694) that if the liability of *fideiussor* and the natural liability of the former slave fall on the same person by inheritance both persist, so that if the civil obligation *perit* the money is still due under the other obligation *naturaliter* Machelard (*op cit* 176) thinks the word *perit* contemplates a loss by defect in procedure, leaving a natural obligation which would merge in the other But the text contemplates a survival which would serve a purpose here it would not He cites Cujas as holding that it is a case of *fideiussio ad tempus*, but he remarks that there the civil obligation has not perished it subsists but is met by an *exceptio* He notes that it cannot be a case of *fidepromissio*, expiring in two years for the principal debt is a *mutuum* But *novatio* followed by *acceptilatio* may perhaps be contemplated, for though *acceptilatio* is a quasi payment, it is not a payment and it does not appear to be anywhere said that it would destroy an independent natural obligation
[9] 16 3 1 18 [10] 16 3 21 1 [11] *h l pr* , 1 *in fin*
[12] *op cit* 1 395. [13] *Ante*, pp 690, 696

continuing to hold a thing is a very different matter from continuing to look after business relations, as in the other texts. He suggests also that it may rest on grounds of utility, but this is an unlikely basis for a rule which dates from Trebatius. It may be suggested that the view, established as it was in pre-classical days, fails to distinguish between contract and quasi-contract in obligation *re contracta*. If the obligation is regarded as resting not on any agreement, but on the mere holding of the property, it is easy to see that Trebatius may well have regarded the liability as continuing. If it be contended that this ignores the fact that the text itself regards the rule as exceptional, the answer is that the concluding words, *licet ex ceteris causis in manumissum actio non datur*, are not from Trebatius, or probably even from Ulpian[1]. It is likely that Trebatius was not discussing the *actio depositi* in its developed form at all[2].

As to rights arising out of the slave's transactions, it is clear that these remain with the *dominus*. What he does as a slave *proficere libero facto non potest*[3]. Actions acquired to the master remain with him, notwithstanding manumission of the slave[4]. This holds good even though the contract was so framed, by condition or the like, as to postpone the actual acquisition or right of action to alienation or manumission: *initium spectandum est*[5]. Where a slave conditionally instituted came to terms with creditors, as to dividend, before satisfying the condition, it was held that his pact made while he was a slave was not available to him after he was free. After doubts, Marcellus came to the conclusion that he had an *exceptio doli*[6]. The reason for the doubt may be that the *dolus* was committed to the man as a slave, and he can have no rights arising out of such a delict[7]. The difficulty may have been got over by regarding the *dolus* as consisting in the refusal to recognise the agreement after the man was free[8]. But to give an *exceptio doli* in such cases is to go a long way towards doing away with the rule that what he does in slavery *non potest proficere libero facto*. Marcellus adds a remark that if he had been instituted *pure*, and agreed before intermeddling, this would have been effective: he was free at the time, and as a result of the pact has lost his right of *bonorum separatio*, which must be claimed before he touches the property[9].

If the slave takes the *peculium*, he may of course have the right to have the actions attaching to it transferred to him, but this is no real exception[10]. The same is true of the conditions under which a payment may be validly made to a *manumissus* under a *negotium* conducted

[1] Kalb, Juristenlatein, 66.
[2] For some remarks on the text see Savigny, System, 2. 141 and Beilage IV (2. 426).
[3] 50. 17. 146.
[4] 44. 7. 56.
[5] 16. 3. 1. 30; 45. 3. 40; 50. 17. 18.
[6] 2. 14. 7. 18.
[7] *Ante*, p. 676.
[8] Cp. 4. 3. 7. 8; *ante*, p. 692.
[9] 42. 6. 1. 18.
[10] 33. 8. 19. 1.

while he was a slave[1]. The rule gives him no right to claim such payment, nor does it release him from a duty to account to his former owner. But these rules as to *solutio* are not without importance in this connexion. For if, in view of the foregoing principles, the question be asked, what is meant by such statements as that *servus sibi naturaliter...alium obligat*, or *naturaliter obligat* (*et obligatur*)?, the rules as to *solutio* seem to afford the best answer: in the principal text they are expressly based on the natural obligation[2].

Another question which has given rise to some controversy is that why the obligation of the slave remained natural after manumission, and did not become actionable. Schwanert[3] gives the plain reason that it was natural before, and that there is nothing in the act of manumission to make it actionable. To this Pernice[4] objects that it is not consistent with other opinions of Schwanert, but that is no objection to the opinion standing by itself. Savigny[5] says it is because, as the slave's contract was made in view of the *peculium*, which has gone to the *dominus*, it would be unfair to make him liable to an action. But this, as Pernice remarks, would equally negative a natural obligation. On Schwanert's solution, Pernice makes the further observation that it is a sophism, by which he presumably means that it is little more than giving the rule as a reason for itself, the real question being: why was this so? Why was not the manumission treated as creative of some type of action? But this is hardly surprising. The creditor contracts in view of the facts: to have given him an action against the slave as well as, in ordinary cases, against the master would have been to give him a great advantage which he could not have anticipated when he made the contract. Sell[6] takes much the same view as Schwanert: he rests the rule on the fundamental principle of procedure: *neque enim actio quae non fuit ab initio nata oriri potest*[7]. Pernice himself seems to rest it on the view that the whole conception of natural obligation of the slave was a late development, not thoroughly worked out. In fact the reason why a particular step in advance was not taken by jurisprudence cannot often be answered on juristic grounds: no doubt in this case the *actio annalis* met all needs. It must be observed that any such development would be unique: there is no other case in which an obligation which was natural owing to defective capacity of the debtor, became civil when that incapacity ceased. But the different cases of natural obligation have so little in common that this counts for little.

[1] *Ante*, pp. 158, 163, 203, 683.
[2] 44. 7. 14. Machelard, *op. cit.* 186, shews reason against inserting *meo* before *servo*. See Gradenwitz, Natur und Sklave, 35.
[3] Naturaloblig. cited Pernice, Labeo, 1. 150.
[4] *loc. cit.*
[5] System, 2. 426, cited Pernice, *loc. cit.*
[6] Sell, Aus d. Noxalrecht, 34, 35.
[7] 47. 2. 17. 1.

A more promising enquiry may be: why is the obligation of the slave *ex contractu* natural *ab initio*, whether his *dominus* is liable or not, while his obligation *ex delicto* is civil in all cases[1]? The distinction is allied with the well-known and ancient rule: *nemo delictis exuitur quamvis capite minutus sit*[2]. Both appear to rest on the close relation between delict and crime. A slave was always liable to punishment by judicial process for crime. Criminal law had a religious basis, and the fact that a man was a slave, or had, since his act, changed his status, could not protect him against the wrath of the gods. This connexion is very clearly shewn in one set of rules. The language used in discussing the question whether a slave is liable, after his manumission, for a delict committed at his master's order, is identical with that used in determining whether a slave is criminally liable for what he has done under the same conditions. Some of the texts do not distinguish the two cases[3].

All natural obligations were not necessarily enforceable to the same degree. We have seen that those with which we are here concerned admitted of pledge and *fideiussio*, and that a payment was not recoverable as an *indebitum*. But all these involve the consent of the slave. A question arises whether the obligation could be enforced against him by *compensatio*. No text answers the question either way. Savigny[4] thinks *compensatio* was applicable, on the very doubtful evidence of a text which says that one who is directed to pay and be free can *compensare*[5]. But, as Machelard[6] points out, there is here no question of *compensatio* in the judicial sense; and a rule introduced *favore libertatis* cannot be extended, without authority, to a somewhat contrary effect. Machelard thinks compensation inadmissible as being contrary to the tendency shewn in the texts dealing with *negotiorum gestio* to release him from any liability for things done in slavery[7]. Mandry[8] takes a similar view, citing the same and other texts which indicate the tendency against compulsory methods[9]. He observes that, in texts which seem to have a different tendency, there is always some fact after the freedom accounting for the liability[10]. This seems the most probable view. The fact that the *dominus*, in handing over the *peculium*, could deduct for what was due to him on a natural obligation is clearly very slight evidence for the contrary opinion. Such debts were on an entirely different footing from those to outsiders. They were *ipso facto* deducted from the *peculium*. This fund being the creature of the master's will was automatically lessened by their amount. A legatee

[1] 44. 7. 14.
[2] 4. 5. 2. 3.
[3] *Ante*, pp. 91 *sqq.*, 108, 678 *sqq.*
[4] System, 1. 60.
[5] 40. 7. 20. 2.
[6] *op. cit.* 183.
[7] 3. 5. 17, 18.
[8] Mandry, *op. cit.* 1. 380 *sqq.*
[9] 3. 5. 16, 18. 1; C. 4. 14. 5.
[10] 3. 5. 14, 16; 4. 3. 7. 8; C. 2. 18. 21; 4. 14. 3.

of the *peculium* could not vindicate the *peculiares res* except subject to a proportionate deduction for these. Nothing of the sort was true of debts to outsiders[1]. One text observes: *etiam quod natura debetur venit in compensationem*[2]. It has been shewn[3] that this text refers to the obligation resulting from a partnership with a slave. The allusion is no doubt to the adjustment in the *actio pro socio*. Thus even where the *societas* is continued after freedom and the adjustment takes place then, it is not a question of true *compensatio*, of setting off a debt on one obligation against another, but of the interpretation to be given to the agreement of *societas*. It is in fact laying down the rule that even such natural obligations as cannot be used by way of *compensatio* must in such a case be brought into account.

It has been noted that the fact that the transaction gave no right to the *actio de peculio* did not prevent the arising of a natural obligation[4]: it is indeed in the absence of this action that the right would be most valuable. Its importance may easily be exaggerated: a right which was available only after manumission, and then not by action or set off, cannot have been very highly valued by creditors. It does not appear from the texts that a slave could so contract as to exclude the natural obligation. Classical law would perhaps have treated as a nullity the provision in his agreement that he was to be in no way personally liable. Whether any notice would have been taken of his proviso that the creditor was never to claim except by the *actiones honorariae* cannot be said, but on the analogy of what followed from a subsequent *pactum de non petendo*[5], it seems likely that an *exceptio doli* might have been allowed.

In this chapter it has been assumed that a normal slave has been normally freed. There were other cases, which have been discussed in their places. Such are the captives returning with *postliminium*[6], the *servus poenae plene restitutus* or pardoned *ex indulgentia principis*[7]. In the case of the slave freed by the public authority by way of reward or of punishment to his master[8], there is little authority: probably the rules were normal.

[1] *Ante*, pp. 193, 221 *sqq.*
[2] 16. 2. 6.
[3] Lenel, Paling., *ad h. l.*
[4] *Ante*, pp. 693 *sqq.*
[5] *Ante*, p. 695.
[6] *Ante*, pp. 307 *sqq.*
[7] *Ante*, pp. 410 *sq.*
[8] *Ante*, pp. 599 *sqq.*

APPENDIX I.

THE RELATION OF THE CONTRACTUAL ACTIONS *ADIECTITIAE QUALITATIS* TO THE THEORY OF REPRESENTATION.

THESE praetorian actions appear to be a partial correction of what looks like a glaring injustice[1]. By the civil law a *dominus* acquired freely through his slave, but was in no way liable on his transactions. Doubtless the injustice had not been so great as it might appear, for in earlier law the slave was not the important instrument of commerce he afterwards became. Moreover in sale to a slave the ownership did not pass till the price was paid, so that the vendor could recover the thing by *vindicatio*, while the *dominus* could not enforce the completion of an unfulfilled undertaking to the slave without tendering what was due[2]. In fact a well-known analogous case suggests that the difficulty was the other way. When the *lex* Plaetoria allowed minors to set aside their agreements the result was that no one would deal with them[3]. Here, also, this may well have been the real difficulty: if any commercial use was to be made of slaves, a remedy against the *dominus* was essential[4]. So soon as these actions were evolved the slave became a much more useful person. He may be said to have fulfilled much the same function as the modern limited liability company. A person who has money to invest, and does not himself want to engage in trade, can invest his money in shares in such a concern. He runs a certain risk but he knows exactly how much he can lose. The slave owner in entrusting the slave with a *peculium* does much the same thing: his position is in one respect better since, if things are going wrong, he can always put a stop to further losses by withdrawing the *peculium*. It is not always possible to sell shares.

Whichever side suffered, and however the injustice may have been limited, these actions may be regarded as progressive stages in the adjustment of the matter. The Romans never reached any comprehensive principle which would cover all cases. It cannot even be said with certainty that any one principle underlies all these actions. It is not possible to be sure how the

[1] Cp. 50. 17. 206. [2] See *ante*, p. 157. [3] See Girard, Manuel, 227.
[4] So, in English Law, the remedies against infants are designed in their interest, not in that of creditors.

Praetor and his advisers looked at the matter, what need, exactly, he set himself to satisfy, what considerations would be most likely to define his rules, and what analogies would be likely to present themselves to his mind. For moderns the matter is simple; the notion of representation can easily be made to cover the whole ground. But it is not easy to apply this to the classical law of Rome. As has been said by Mitteis[1] our law is so saturated by the conception of representation in contract that we find it difficult to admit a legal system which ignores it. Yet it is common knowledge that the classical law did not admit of representation, to create liability in contract, at least (to beg no question), apart from these actions. Nevertheless, the opinions held by modern commentators on them make a constant appeal to this principle. No doubt all notion of representation is not to be summarily rejected. But in view of the intensely personal nature of obligation in Roman law, evidenced by a number of limitations which modern law rejects[2], it is difficult to believe that the Romans built up these actions on any theory of representation, and still more so to suppose that that theory was the one held in any particular modern system. This last point is not unimportant. In relation to the *actio institoria*, Karlowa remarks[3] that the fact of the appointment must be known to the third party, as an unknown principal could have no juristic importance. This consideration would not be convincing to one who was familiar with the English law as to the rights and liabilities of an undisclosed principal.

As we have seen[4] it is almost universally held that in the *actio quod iussu* the *iussum* must have been in some way published to the third party. The texts indeed are far from proving this. They suggest that this was, as it would naturally be, the common case, but no more. But modern law usually requires[5] that, for the third party to have an action against the principal, there must have been some form of notice that he was in the background, and this has at least helped in the acceptance of that requirement for Roman law. Yet, as we saw in discussing the action, there is no presumption to be drawn from analogous cases in favour of this view. The fact is that the rules of the action are based on the words of the relative edict, interpreted in the light of current habits of thought. There was no theory of representation to be utilised. Notice would not make it more or less reasonable that a contract between A and B should bind C. And if the analogy of acquisition of *iura in rem* involving liabilities had occurred to the jurists it might have led them to the idea of notice to the person liable, but not to that of notice to the person claiming[6].

In relation to the *actio institoria* and the *actio exercitoria* there is a similar tendency. The question whether notice of the appointment was necessary had, it appears, some importance in modern German law till the enactment of

[1] Stellvertretung, 9.
[2] See, *e.g.*, *ante*, pp. 162 *sqq*. The power of acquisition through a slave has little or no relation to agency. It is independent of authorisation: the slave seems to be contemplated rather as a mere receptacle or receiver.
[3] R. R. G. 2. 1128, 9. [4] *Ante*, p. 167.
[5] See, *e.g.*, Bürg. Ges. B. §§ 164, 171; Mourlon, Code Civil, 3. 489. [6] *Ante*, p. 155.

the new Code, for, if notice was necessary, the rule went no further than that of the Handelsgesetzbuch which had within its field superseded the Roman law. But if the third party could sue though he had made the contract in ignorance of the *praepositio*, the rule still existed and might be applied in German courts. Accordingly there has been controversy. But the dominant view has been that the contract must have been made in view of the *praepositio*. We have already seen that there is no warrant in the texts for that[1]: this is indeed usually admitted, and though texts are freely cited they are always reinforced by fixed juristic principles which in the view of the writer compel this conclusion. Thus, Lenel, who states the edict in terms which do not seem to express any such requirement[2], discusses the matter elsewhere[3], and proceeds to set and to answer the question: did this praetorian action assume a state of facts in which a modern lawyer would see agency? He holds, no doubt correctly, that the edict says "*cum institore gestum erit eius rei nomine cui praepositus fuerit*," and infers that the third person must therefore have known of the *praepositio*. But at most the words only shew that he must have known of the business not of the *praepositio*, and this is a different matter. After discussing some other texts, already considered, he goes on to say that general considerations lead him to the conclusion that notice was necessary[4]. We must consider, he urges, the need the Praetor was satisfying, the existing practice to which he was giving a legal sanction. He says that masters were in the habit of honouring such contracts in certain cases, and those cases were what the Praetor protected. These, he says, were the cases in which the third party knew that the affair concerned the principal, for it was only in that case that failure to honour the contract would affect the principal's credit, and thus only in that case that he had been in the habit of honouring the contract. This conjectural argument is imperfect, since the failure to honour the contract would affect the credit of the business, whether it was known to belong to him or not. Lenel goes on to say that to require only objective connexion would be to create an impossibly wide extension of the *actio de in rem verso*, but this contention, like the former, only goes to shew that the third person must know that the affair concerned the business, not that he must know that behind the actual dealer there was a principal or, still less, an identified principal. And this last is what at the beginning of his article he sets out to prove. Indeed he seems to regard the points as the same, but it is clear that this is not the case[5].

Dernburg[6] thinks the requirement rests on the "Wesen der Sache," since one who does not know of the agency trusts the agent, and there is no reason for giving him an advantage he did not contemplate when he made the contract. Doubtless there is some reason in this if we think of the matter in terms of agency (though our English law ignores the point), but that is precisely what we are not entitled to do. In fact in such a case what the

[1] *Ante*, p. 173.
[2] Ed. Perp. § 102.
[3] Iherings Jahrbücher, 24. 134 *sqq.*
[4] *op. cit.* 142.
[5] The distinction is clearly brought out in 14. 3. 17. 3.
[6] Pand. 2. § 13, n. 13.

third party trusts is the show of capital. Karlowa, besides making the same assimilation of the trade with the *praepositio*[1], says that the principal, standing behind, of whom the third party knows nothing, could have no juristic importance. Mitteis[2] does not confuse the two kinds of knowledge, but, admitting the uncertainty of the texts, concludes that knowledge is necessary, because subsequent discovery that there is a principal behind ought not to benefit the third person. For the present purpose all these positions are substantially the same.

Among the vexed questions arising in connexion with the *actio de in rem verso* there are two which raise a similar point. Will the action lie only where a free man would have an action on *gestio*? Must the third party have handed over the property in view of the intended *versio*? These have been fully discussed[3]. Here it is enough to say that the widely held affirmative opinions rest in the main not on the texts but on a certain modern theory of representation.

All this seems somewhat misleading: it is not in the law of agency that we must expect to find the hints which will help us to solve the question. No doubt it is practical needs that have created the law of agency on the lines followed in most continental systems, but in view of our English practice these cannot be called so inevitable that no other lines can be imagined. It must not be forgotten that the *actio de peculio* is the original one of these actions, and it may fairly be regarded as in a certain sense supplying the type, but there is scarcely a principle of the law of agency which this action does not defy. We are told indeed that the other party contracts in view of the *peculium*[4]. But the action lies even though the contract (or all contracts) were prohibited by the *dominus* to the knowledge of the other party[5]. It lies against a master who acquired the slave only after the contract and who knew nothing of it[6]. It appears even that it lies though the contract was made even before there was a *peculium*[7]. No doubt these rules were gradually reached[8], but so, in view of the words of the Edict, must those have been which are attributed to the other actions. It is not easy to see why in one case the liability should have been steadily widened while in the other it was being artificially narrowed. No doubt it might be contended that it was precisely the limitations set on these actions which called for an extensive interpretation of the Edict *de peculio*. But while this hypothesis might fairly be used to explain a divergence of practice apparent on the texts, it is a different and less legitimate course to use it as evidence of a divergence which the sources nowhere indicate. Indeed the supposed narrow interpretation is negatived by the texts. If the right of the third party rests, in the *actio institoria*, on the knowledge of the authorisation, it is difficult to see how the rule is arrived at that he has the action even though the principal was to the third party's knowledge dead when the contract was made[9]. The actions *de in rem verso* and *de peculio*

[1] R. R. G. 2. 1128, 9; *ante*, p. 173.
[2] Stellvertretung, 25 *sqq.*
[3] *Ante*, pp. 179 *sqq.*
[4] 15. 1. 19. 1, 32. *pr.*
[5] 15. 1. 47. *pr.*
[6] 15. 1. 27. 2, 42.
[7] See Mandry, Familiengüterrecht, 2. 133.
[8] *Ante*, pp. 212 *sqq.*
[9] 14. 3. 17. 3.

are one: why should it be supposed to have embodied such a notion as *negotii gestio* in the one case, while in the other it excluded it so completely that, to prevent enforcement against the master of obligations utterly opposed to any possible interest of his, it was necessary to fall back on the view that the Praetor could not have been thinking of such contracts[1].

With regard to the *actio institoria* the views that are here combated start, rightly, from the principle that in interpreting the scanty words of the Edict it is necessary to consider what the need was that the Praetor set himself to satisfy. But in considering this question the writers above cited seem to treat it as equivalent to another question: what might the third party reasonably expect? What were his moral rights? They consider, indeed, another question also: what did the commercial interests of the principal require? But this is the same question: it is his interest for the credit of the business to satisfy the reasonable expectations of the third party. How will the matter stand if we formulate our question in another way and ask: what risks should a master who provides his servant with the means of trading, and gives him his authority to trade, be reasonably expected to undertake? To the question so stated a very different answer is possible. We may notice that in the *actio tributoria* where there is *scientia* but no authority the liability of the master is a little increased, and the increased liability is due to his knowledge, and not to any knowledge of the facts by the creditor[2]. It is clear that the extension depends on a conception of the master's duty rather than of the creditor's right. Similarly in English law a principal is liable on a contract made by his authorised agent though the agent did not disclose the fact that there was a principal. In the same way it seems most probable that in the *actio institoria*, where there was general authority and provision of capital, as opposed to mere *scientia*, the liability of the master *in solidum* was independent of the creditor's knowledge of the facts[3]. This is also the conclusion that we considered to be indicated by the texts, as we did also in the *actio quod iussu*, where there was authorisation of a specific contract.

APPENDIX II.

FORMULATION AND *LITIS CONSUMPTIO* IN THE ACTIONS *ADIECTITIAE QUALITATIS.*

THESE intimately connected topics have been the subject of much controversy in recent years. No generally accepted solution of all the problems has been produced. In the following paragraphs space allows of no more than a general account of the matter.

The most accepted view as to formulation is that of Keller[4]. He holds that in the *actio de peculio* the *intentio* was *in ius*, with a fiction of liberty,

[1] *Ante*, p. 214.
[2] *Ante*, p. 233.
[3] See Ulpian in 13. 3. 1. *pr.*
[4] Litis contestatio, 432.

where the contract was by a slave, and assuming of course that the claim is one which ordinarily gave an *intentio in ius*. This view is adopted with new argument by Lenel[1]. For ordinary *formulae in ius* the suggested form is the simplest way in which to raise the issue, all that is needed being a change of name in the *condemnatio*, and the fiction of liberty in the case of a slave. It is clear on the texts that there was a fiction of liberty[2], and this would not be needed in a *formula in factum*. And a text dealing with the novation of the obligation strongly suggests that the *intentio* was *in ius*[3]. But the chief argument is the *ipso iure consumptio* which appears in some of the texts[4].

The *intentio* thus framed, stating the transaction between the parties, brings into issue the whole obligation, but we know that the defendant could not be condemned beyond the extent of the *peculium* and any *versio*. It is not quite clear how this restriction was expressed in the *formula*. It has been supposed that there was a *praescriptio* limiting the issue[5], but the language of many texts[6] leads Lenel to the opinion, now usually accepted, that there was a *taxatio* in the *condemnatio—dumtaxat de peculio et in rem verso*, or the like[7].

From this formulation it would follow, since a *iudicium* is none the less *legitimum* because the liability is praetorian[8], that the action once brought could not be renewed except by some form of praetorian relief. But the texts tell a confused story, a fact which is not surprising, since there were disputes on points which might have been expected to affect the matter. The jurists were hardly agreed as to whether the master could be said to owe at any moment more than was then in the *peculium*[9]. There was disagreement as to whether the natural obligation of the slave was *eadem res* with the praetorian obligation of the master[10], and there are other signs of doubt as to the exact nature of the *res* intended in the proposition that after *litis contestatio* in a *iudicium legitimum in ius* there could be no new *formula* for *eadem res*. Further, we have to do with texts edited after the *formula* and *iudicia legitima* had disappeared. When it is added that there is not yet unanimity on the point of formulation, and that the view has recently been broached that notwithstanding Gaius, the expressions *actio praetoria* and *actio in factum* mean much the same thing[11], it is easy to see that we cannot expect a very simple tale from the texts. One fact does tend to simplify matters: a text of Ulpian, citing Julian, and dealing with the case of action against one of two persons liable, declares that where one is only liable for a

[1] Ed. Perp. (2) §§ 102, 104; Girard, Manuel, 663. Gradenwitz (Z. S. S. 27. 229 *sqq.*) doubts the possibility of the crude fiction: "si liber esset," and supposes a fiction of manumission at the date of the transaction.
[2] 19. 1. 24. 2; 45. 2. 12.
[3] 14. 3. 13. 1.
[4] Lenel, *loc. cit.*, states and discusses the views of Mandry (Familiengüterrecht, 2. 259) and Brinz (Pand. 2. 203), who argue for a *formula in factum*, and of Baron (Adject. Klag. 136 *sqq.*), who supposes an *intentio* expressing a duty (*dare oportere*) in the *dominus*.
[5] Bekker, Aktionen, 333, 341 *sqq.*
[6] In. 4. 7. 4b; D. 5. 1. 57; 15. 1. 41; 15. 2. 1. 10; 18. 4. 2. 6; 19. 2. 60. 7; 23. 3. 57; 24. 3. 22. 12; 42. 8. 6. 12; C. 4. 26. 12.
[7] Ed. Perp. (2) § 104.
[8] G. 4. 109.
[9] *Ante*, p. 217.
[10] *Ante*, p. 695.
[11] Pokrowsky, Z. S. S. 16. 7.

part, action against him releases the other, but on equitable grounds the Praetor restores the action[1]. This text, much suspected on linguistic grounds, is now proved by the discovery of a scrap of the original to be in the main genuine, the word *rescissorium* having been omitted[2].

Prima facie, the simplest case is that of renewal of the action against the same defendant, *aucto peculio*. Ulpian tells us that the action lies[3]. Paul, dealing with the case in which the *peculium* is insufficient, observes that security cannot be claimed for subsequent accessions, though it can be in the *actio pro socio*, giving as his reason for the difference, that in *pro socio* the defendant owes the whole amount[4]. The parallel is pointless unless further *actio de peculio* was barred at strict law. Erman indeed[5] takes a very different view of this text. According to him Paul and Plautius are not concerned with *consumptio*, but exclude the *cautio* only because, as the *dominus* owes only *de peculio*, there can be no question of *consumptio* beyond this, so that the *cautio* is useless. Paul's language is indeed ill chosen if he was thinking of *consumptio*. It is ill chosen in any case. But the point of the parallel with *pro socio* is the fact that there is *consumptio*. The gist of the allusion is that, though the cases are alike in this respect, they differ in that in the case of the *socius* there is a civil *obligatio* for the whole, while in the other there is no obligation but that stated in the Edict, and that does not exceed the *peculium*. Elsewhere Ulpian tells us on the authority of Labeo[6] that where the *actio annalis* has been brought in error and lost on grounds which do not negative the debt, and it afterwards appears that the slave was not dead, the plaintiff is to be allowed to sue again. Earlier in this book[7] the view was expressed that this was due to independence of the obligations, but it seems rather to be a case of restitution for error: there is no word of an increase in the *peculium*, and, apart from error, the claim would certainly be barred as to the existing *peculium*. The text thus does not bear on the present point. There is, however, a sharp conflict between Paul and Ulpian. Many ways of dealing with it have been suggested. The simplest view is to suppose that *non* has been struck out from Ulpian's text[8]. Gradenwitz remarks[9] that this text is the only one which having spoken of a right of action as once exercised, with the emphatic word *semel*, goes on to say clearly that it can be renewed. This of course is far from conclusive, and while it is true that a *non* is easily dropped, it is also true that it is an important word not to be lightly introduced to create a harmony which does not exist. Accordingly it has been said[10] that there was a difference of opinion as to the extent of the *consumptio* operated by the *litis contestatio*, some jurists holding that the whole obligation, being expressed in the *intentio*, was consumed,

15. 1. 32. *pr.* Erman, see below, has held its doctrine classical.
[2] Z. S. S. 27. 369. Much of the controversial literature is rendered obsolete by this discovery. Apart from the literature cited by Lenel, Ed. Perp. (2) 278, n. 2, see Keller, Civ. Proz. n. 927; Karlowa, R. R. G. 2. 1142; Pokrowsky, Z. S. S. 20. 115; Ferrini, Z. S. S. 21. 190; Affolter, Institut. 214, 280 *etc.*; Gradenwitz, Z. S. S. 27. 229; Erman, Servus Vicarius, 498; Mélanges Appleton, 203 *sqq.*
[3] 15. 1. 30. 4.
[4] 15. 1. 47. 2.
[5] Mélanges Appleton, 241.
[6] 15. 2. 1. 10.
[7] *Ante*, p. 227.
[8] Ferrini, *loc. cit.*
[9] Z. S. S. 27. 229.
[10] Erman, Mél. Appleton, 229, following Affolter.

others, *e.g.* Ulpian, that the liability and the *consumptio* were only to the extent of the existing *peculium*. There is nothing *a priori* improbable in this, in view of the fact that there might well be, and in fact were in other connexions, doubts as to the exact nature of the *eadem res*, further claim on which was barred. It might well be held that what was barred was what might be effectively claimed in that action. The *intentio* is not the whole *formula*. A *praescriptio* could limit its consumptive force[1], and some may have thought a *condemnatio* might do so, particularly in view of the fact that the only existing obligation is that expressed in the Edict, limited to the *peculium*. But we know from Gaius[2] that in ordinary cases a limited *condemnatio* did not in fact limit the consumptive effect of the *intentio*. No doubts appear on this point, and, except for the text of Ulpian, there is no text suggesting limited *consumptio* in case of the renewed *actio de peculio*, *aucto peculio*. It may be noted that Papinian holds the whole *obligatio* to be brought into issue[3], and that the jurists who refuse *condictio* for payment in excess of *peculium*[4], are not authorities for the view expressed in Ulpian's text as it stands[5]. They shew that these jurists thought the Edict created a natural obligation for the whole, beyond the actionable obligation to the extent of the existing *peculium*, not that they held that there was an actionable obligation after *de peculio* had been brought. There were other cases in which a natural obligation survived a judgment[6].

On the whole the more probable view seems to be that in classical law the action was not renewable without relief, and that Ulpian[7] either wrote *non potest* or, more probably, added a requirement of *restitutio*[8]. In another case in which the question was of the renewal of action in regard to the same *peculium*, so that there is no doubt of the *consumptio*, Ulpian, in declaring that the action may be renewed, does not expressly mention *restitutio*, but uses the equivalent expression, *permittendum est*[9]. The same conclusion is deducible from the rule that in the case now to be considered of claim against one owner, after action against another, the plaintiff might proceed as if the earlier *iudicium* were rescinded and could recover not only what existed, but further accessions, not being bound to sue the other as at the time of the first action[10]. The language is significant and it is Ulpian who is speaking.

In relation to the renewal of the action against another person there are several cases to be considered. In those of common owners, and *coheredes* who have succeeded to the slave, either could be sued for the whole, was liable to the extent of the whole *peculium*, and could deduct for debts due to the other[11]. As we learn that of two owners he could be sued in respect of whom there was no *peculium*[12], the rule was no doubt as in the last case, and it would be immaterial whether the renewed action was against the same or another owner.

[1] See, *e.g.*, 21. 1. 48. 7.
[2] G. 4. 57.
[3] 15. 1. 50. 2.
[4] 12. 6. 11; 34. 3. 5. 2; *ante*, p. 217.
[5] See, however, Erman, Mélanges Appleton, 229, 242.
[6] 12. 6. 60. *pr.*; *ante*, p. 696.
[7] 15. 1. 30. 4.
[8] Cp. 3. 5. 46. 1.
[9] 15. 2. 1. 10.
[10] 15. 1. 32. 1.
[11] 15. 1. 11. 9, 27. 8; *ante*, p. 378.
[12] 15. 1. 12.

It is odd to find another rule applied as between two fructuaries or *bonae fidei possessores*, since they had the same remedies as common owners for adjustment[1]. But Ulpian, quoting Julian, tells us in a suspected text, now proved, by discovery of a fragment of the original, to be substantially genuine[2], that neither could be condemned for more than he held, or deduct except for what was due to himself[3], that suing one freed the other, and that on equitable grounds a remedy was given by *restitutio actionis*. In fact there was a change of view as to the fructuary's liability *de peculio*[4]. The earlier lawyers held him liable only so far as he acquired. On that view the present question could not have arisen, except in a common undertaking. Then the view appeared that the acquirer must be sued first, and that is the rule from which the present text starts, since Julian, who favoured that view[5], is the source of this text. When the rule was accepted that either could be sued on any contract, the present restriction became unnecessary. But as between owner and fructuary Justinian's rule is still that the fructuary can be sued primarily only for what concerns him, but the action is restored against the owner and *vice versa*[6]. There is no *communi dividundo* between them. A similar limitation of the right of action and deduction, with *restitutio actionis*, occurs in the case of *coheredes* liable only to the *actio annalis*[7], but here the division is due to the express provision of the XII Tables.

In the case of vendor and buyer, within the *annus utilis*, the rule applied is due to the fact that neither, if he is sued, and has paid in full, can recover from the other. Thus, though either can be sued for the whole, he is liable only to the extent of the *peculium* he holds. Though the other is freed, the claimant has *restitutio actionis*, to recover any balance still due[8].

The relief is sometimes called *restauratio* of the old action[9]. There are signs of dispute as to the effect of this. Strictly it might seem to restore the action only against the old defendant. This would be useless in the present case. Some seem to have held that it only went so far as to give the claimant what he could have recovered in the earlier action if the present defendant had been a party. The view which prevailed was that the *condemnatio* would be based on the present state of the *peculium*[10]. It is in fact *restitutio in integrum*. It is elsewhere called *rescissio iudicii*[11], which expresses the same idea. It has been said that this makes what has been paid an *indebitum*[12]. But the debt is not rescinded: what was paid was due and cannot be recovered. Nor indeed is the old judgment rescinded: the new judge is merely directed to proceed as if the matter had not been before the court.

We have assumed that the earlier action has proceeded to judgment. But there are cases of *translatio iudicii*, in which a pending action is transferred. If a *dominus* dies, pending the action, the *iudicium* is transferred

[1] 10. 3. 7. 6, 7.
[2] 15. 1. 32. *pr.*; cp. Z. S. S. 27. 369 and D. 15. 1. 19. 1.
[3] 15. 1. 15.
[4] *Ante*, p. 339.
[5] 15. 1. 37. 3; *ante*, p. 340.
[6] 15. 1. 19. 1, 37. 3.
[7] 11. 1. 18; 15. 1. 14. 1, 32. *pr.*
[8] 15. 1. 30. 5, 37. 2, 47. 3.
[9] 15. 1. 32. *pr.*
[10] 15. 1. 32; cp. 12. 2. 26. 1.
[11] 15. 1. 47. 3.
[12] Ferrini, cit. Erman, Mél. Appleton, 355.

to the *heres*. Is this mere succession or *rescissio iudicii*? The point might be very material, as, if the claim were liable to be barred by time, the second action, regarded as a new one, might be too late. The material texts do not deal with slaves: it is enough to say that Koschaker has shewn[1] that it is a mere case of succession. He has also shewn, however[2], that no inference for the identity of the two *iudicia* can be drawn from use of the term *translatio iudicii*. The point has already been considered in connexion with noxal actions[3], and the view adopted that transfer of a pending noxal action against the slave, freed, or against a new owner, is a case of mere succession. Koschaker takes a different view[4], at least in the case of the man himself. He shews that Ulpian calls the noxal *iudicium inutile*, while Paul says the *iudex* must *transferre iudicium*[5]. As a void *iudicium* cannot be transferred, he holds that the second must be new. Admitting the possibility of disagreement, he yet thinks that Paul agrees with Ulpian. It is quite possible, however, that Ulpian agrees with Paul, merely holding that there can be no valid judgment against the alleged *dominus*. But in view of the doubts which certainly existed[6], no stress can be laid on Ulpian's mode of expression.

We have hitherto assumed that where *litis contestatio* has occurred, what is consumed is the *obligatio* stated in the *intentio*, limited sometimes by *praescriptio*. This agrees with the language of the texts[7] and accounts for the rules arrived at. But the matter is less clear when we turn to the other *actiones adiectitiae qualitatis*. The *intentio* being the same in all cases the bringing of one action ought to bar any other except for relief, and this is the result deducible from most of the texts. All possible combinations are not represented, and, apart from the institutional books, Ulpian is the sole authority. We learn that *de peculio* and *tributoria* barred each other[8], and that *de peculio* barred *quod iussu*[9]. As to *de in rem verso* there is a text which seems to imply that it did not bar *de peculio*, and is so treated earlier in this book[10]. But it is more probably a case of praetorian relief against error in the *actio de peculio*, ignoring the fact that there has been a valid trial of the same issue under the *de in rem verso* clause.

Another text raises another apparent difficulty of the same kind. A *filiusfamilias* accepts a *iudicium* as *defensor* of his father in an *actio de peculio*, as it seems, on his own debt. The effect is to release his father. This, we are told, is a *versio*, to the amount of the *peculium*[11], even before judgment. This excludes the possibility of the view that it is in the *actio iudicati de peculio* that the *versio* is made effective. But any new action is presumably barred. Von Tuhr shews reason for supposing the action to be one by the surety *iudicatum solvi*, which the *defensor* must have had[12]. On this view the text has nothing to do with *consumptio*.

[1] Translatio Iudicii, 239 *sqq.*, in opposition to Krüger, Z. S. S. 15. 140.
[2] *op. cit.* 15. The distinction is, however, sometimes brought out, *e.g.* in 5. 1. 57.
[3] *Ante*, p. 108.
[4] *op. cit.* 220.
[5] 9. 4. 42; 40. 12. 24. 4.
[6] *Ante*, p. 109.
[7] G. 4. 53, 68, 107 *etc.*
[8] G. 4. 74; Inst. 4. 7. 5; D. 14. 4. 9. 1.
[9] 14. 5. 4. 5.
[10] *Ante*, p. 228.
[11] 15. 3. 10. 3.
[12] Actio de in rem verso, 147.

In relation to the *actio institoria* (and *executoria*) there is difficulty. It is clear that the primary obligation is brought into issue, for it bars action against the representative, and is said to lie *ex persona magistri*[1]. And it bars another *actio institoria*, where the first was lost through a mistake as to the business for which the loan was made[2]. But the same writer, Ulpian, says in the same context, that if *institoria* has been brought on what is in fact a *peculiare negotium*, and thus lost, the *actio tributoria* is still available[3]. This seems to mean that *institoria* does not bar *tributoria*. Erman[4] is inclined to explain the texts as expressing a difference of view, some jurists holding the primitive (Proculian) view that *intentio consumitur*; others taking all the conditions of the *condemnatio* into account, the claim being barred only where all are identical. He cites certain texts in support, but they refer to real actions[5], where there is no question of the *novatio necessaria* produced by *litis contestatio*[6]. And the frequent appeal to *restitutio* shews that it was not in this way that relief was found. It is possible in view of the language of the texts that Ulpian allowed *restitutio*, and that the present form of the text is due to the compilers[7]. There is, however, another possibility. The *formula* of the *actio tributoria* is uncertain. It differs from the other actions in that the liability depends on the master's *dolus*. It is not certain whether the bar of *de peculio* by *tributoria* depends on *consumptio*[8], or on fairness[9], or on express provision, as is suggested by one of the texts[10]. If the *formula* alleged an obligation of the *dominus* other than that of the representative there is no reason why it should not survive so far as *consumptio* is concerned. This would explain why *tributoria* is mentioned and not *de peculio*. But this solution seems to require that it be *dolus* not to admit, in the *tributio*, a debt now reduced to, at best, a *naturalis obligatio*.

APPENDIX III.

FORM USED BY SLAVE IN ACQUISITION BY *MANCIPATIO*, ETC.

In an essay in the Zeitschrift der Savigny Stiftung for 1905 with the chief thesis of which we are not here concerned[11], Professor Eisele makes some interesting remarks on the form of *mancipatio*. As Gaius shews[12], it contained in ordinary cases, two members; first an assertion of ownership in the acquirer, and secondly, what looks like the chief operative part, *esto mihi empta hoc aere aeneaque libra*. With the odd fact that at the time when the

[1] 14. 1. 1. 17, 24. [2] 14. 3. 13. *pr.* [3] *h. t.* 11. 7.
[4] Mélanges Appleton, 234 *sqq.* [5] 44. 2. 9. 1, 18; 46. 8. 8. *pr.* [6] G. 3. 180.
[7] The action was just that one not confined to the household relation. Lenel (Ed. Perp. § 102) shews that the fact that the contracting party was a representative was prominently stated, as he thinks in a *demonstratio*. But it is difficult to suggest a formulation which, resting on this idea, shall leave intact the *actio tributoria* (14. 3. 11. 7) while destroying the action against the representative (14. 1. 1. 17, 24).
[8] Mandry, Familiengüterr. 2. 448, 9. [9] Karlowa, R. R. G. 2. 1163.
[10] 14. 4. 9. 1: *cum scit sibi regressum ad alium non futurum.*
[11] Z. S. S. 26. 66 *sqq.* [12] G. 1. 119; 3. 167.

assertion of ownership is made it is not true we need not here deal[1]. Our difficulty is to see how far the form was modified if the acquisition was by a slave. It is clear that he could say *hanc rem domini mei ex iure Quiritium esse aio*[2]. But he did not always say this, as there might be doubt as to the person to whom he acquired, *e.g.* in the case of usufruct[3]. Eisele thinks that he said *meum esse aio*. This is improbable on the face of it, and cannot really be made to agree with the remark of Gaius that the reason why he could not claim in a *cessio in iure* was that he could have nothing of his own[4]. Eisele supposes that Gaius is really referring to incapacity to appear in court, but that is not what Gaius says, and it is scarcely credible that he could have expressed himself as he does, if slaves had been constantly using that exact formula in *mancipatio*. Eisele adverts to the well-known rule laid down, *e.g.* by Julian[5], that a slave could stipulate *sibi dari*. But Julian is also clear that a slave cannot stipulate for a right for himself[6]. A way out is found by understanding such words in a loose, *de facto*, sense[7], but this resource is useless in the case of such words as *meum ex iure Quiritium esse aio*. On the other hand the form absolutely requires the naming of someone in whom the right is to vest.

A text already briefly considered[8] discusses the case of a slave who buys a thing and pays for it by handing over a bag containing twice the price, half being his owner's, half his fructuary's[9]. Ulpian decides that there is no transfer of the money, so that the property is not acquired to either. It is hardly possible that in this case he can have named both, since the naming of each would have had a privative effect[10] on the other, as to half, so that each would have acquired half and it would have been indifferent which money was paid first. He can hardly have named no one. The decision would conflict in a quite unnecessary way with principle, and indeed with Ulpian's own views[11]. But the result in the text would appear to follow if he had said *domino aut fructuario* and there was no evidence other than this payment as to whether it was or was not within the *causae*. It is analogous to a *stipulatio* "to A or B," both being *domini*. It is of course an improbable form, but there are many similar illustrations: the whole case is imaginary. These events never happened[12].

[1] See Wlassak, Z. S. S. 28. 71 *sqq.* Nor need we consider whether *est* or *esto* is to be preferred in the second member.
[2] G. 3. 167. [3] 7. 1. 25. 1. [4] G. 2. 96.
[5] 45. 3. 1. [6] 45. 1. 38. 6 *sqq.* [7] *h. t.* 38. 3—9.
[8] 7. 1. 25. 1; *ante*, p. 364.
[9] It is for the purpose of the text indifferent whether the transfer of the thing bought was by *traditio* or by *mancipatio*.
[10] *Ante*, p. 380. [11] *Ante*, p. 364.
[12] See Eisele, *loc. cit.*, and Buckland, N. R. H. 32. 226. Absurd as looks the form, *Hanc rem Titii aut Seii ex i. Q. esse aio*, it does not seem to conflict with anything that is known of the rules of *mancipatio*. If T was *dominus* and S a stranger, it is not unlikely that there may have been speculative discussion on the question whether the insertion, *aut Seii*, vitiated the transaction or was mere surplusage. And the decisive effect of payment in connexion with the theory of the two *causae* (*ante*, p. 364) makes the case suggested one of speculative interest, though hardly of practical importance. But the transfer may have been by *traditio*, or the expression may have been used in the contract of sale.

APPENDIX IV.

THE ESSENTIAL CHARACTER OF MANUMISSION[1]. *ITERATIO.*

To analyse the conception of manumission so as to express it in terms of other institutions is perhaps impossible. It has an obvious affinity with conveyance, and Vangerow[2], treating it as essentially an act of transfer, deduces from this character its main rules, so far as they are concerned with latinity. But though this affinity is clear, it is no more than an analogy, and it is not alone. What was given to the man was not *dominium* over himself: no man has that. The *lex* Aquilia gave no action to a man for personal damage, precisely for this reason. It is true that Vangerow[3] holds this text[4] of no force in this connexion; he says that what Ulpian means is that the *lex* applies only to ownership of things in the ordinary sense, and this does not cover his ownership of himself. But what Ulpian says is that the man has no *actio* Aquilia, because he is not *dominus* of his members. That is, his right is not *dominium*. That it is analogous to ownership is true, but this does not justify Vangerow's inferences. Personal independence is not ownership of one's person[5]. We know that manumission by will is not a legacy[6]. What is conferred is liberty with citizenship. If the analogy with transfer of ownership were identity, or had been the most prominent factor in the minds of the lawyers, we might have expected a development of mancipation with safeguards; we should have looked for discussion of the question whether one freed informally or under 30 (thinking he was older), would acquire *libertas ex iure Quiritium* by one year's usucapion. The modes employed *inter vivos* are not those of ordinary conveyance. *Census* has little relation to them, and though manumission *vindicta* is in all probability a case of *cessio in iure*, it must be noted that that form is usually employed, precisely because the subject of the transaction is not *dominium*. It is true that Schlossmann holds that *cessio in iure* is the primitive conveyance and that *mancipatio* is a development from it[7], but though there are early references to *cessio in iure*, there seems to be no evidence earlier than Gaius for its use in conveyance of a specific thing. The text of Varro[8] sometimes cited may refer only to *cessio in iure hereditatis*.

What passes to the man is not what belonged to the master: his liberty and *civitas* are not subtractions from those of the *dominus*. There are other cases in which *cessio in iure* is applied in the same way: the *potestas* which is acquired by the *cessio in iure* which is the last step in *adoptio*[9] is not identical with the right which is destroyed. The cases seem parallel: what

[1] See Wlassak, Z. S. S. 25. 84 *sqq.*, 28. 1 *sqq.*; Karlowa, R. R. G. 2. 128; Rabel, Z. S. S. 27. 290 *sqq.*; Vangerow, Latini Iuniani, §§ 16, 28—30.
[2] *loc. cit.* [3] *op. cit.* 70. [4] 9. 2. 13. *pr.*
[5] Karlowa, *loc. cit.* [6] *Ante*, p. 466.
[7] Schlossmann, Cessio in Iure und Mancipatio.
[8] Varro, R. R. 2. 10. 4. [9] G. 1. 134.

is released is something other than what is acquired. Rabel[1] holds this to be a disregard of logic, intelligible in adoption, but not admissible in manumission. But it is clear from the doubts as to the effect of an attempt to cede usufruct to an *extraneus*[2], and as to *cessio hereditatis* by a *necessarius*[3], and perhaps still more from the rule that *cessio* after entry released debtors to the estate[4] and from that as to the effect of attempted *cessio* by a *tutor cessicius*[5], that there was no very certain logical doctrine, as to the juristic nature of *cessio in iure*.

Manumission is not transfer of *dominium*: it is creation of a *civis*, and release not merely from ownership, but from the capacity of being owned. This seems a better way in which to express the matter than to speak, as Karlowa does[6], of the acquisition of personality. The Romans of an early age did not so think of the matter, still less would they have felt Karlowa's difficulty that if the slave is a mere *res* he cannot acquire, and manumission is an impossibility. This sort of subtlety is of a later time, as is his solution that the man acquires by virtue of a derivative personality, based on that of his master.

Manumission *inter vivos* is probably due to the Pontiffs, who applied such analogies as presented themselves and, so far as their activity is known, do not appear to have been bound by a very strict logic[7]. In the case of *census*, there is no element of conveyance, and in manumission *vindicta* it is rather the fact that the case is not one of *dominium* which prompts the use of the form. It has indeed been contended that this is not a case of *cessio in iure*[8], but a comparison of the accounts of the two transactions[9] shews the closest similarity. It is true that there are differences: the prominence of the *festuca* is the most important. But nothing is more to be expected than distinctions of detail expressive of the particular application; there is no reason to treat them as shewing a difference of underlying principle, and it must be noted that we have a description not of *cessio in iure* in general, but of *cessio in iure* of the *dominium* in a specific thing.

There is no doubt difficulty in the question whether *cessio in iure*, and therefore manumission *vindicta* is properly called a piece of fictitious litigation. Discussion of that wider question is not in place here. It has recently been thoroughly examined by Wlassak[10]: he declares against this view, holding that it is *ab initio* not an act of litigation, but of release by the *dominus* with official sanction, given in the form of *addictio*. He shews reason for thinking that there was no *addictio* where a defendant in a real action refused to defend, or admitted his liability; indeed he denies the applicability of the notion of *confessio* to a real action, and considers that the form *ad-dicto* shews that what is done is in supplement to the act of another[11].

From this point of view the question whether it is fictitious litigation or not is rather a matter of words. Wlassak suggests that it is of the essence

[1] *op. cit.* 325. [2] G. 1. 30. [3] G. 1. 35 *sqq.*
[4] *Ibid.* [5] Ulp. 11. 7. As to death of *cessicius*, see Rabel, *loc. cit.*
[6] *loc. cit.* [7] G. 1. 134, 2. 53.
[8] See reff. in Wlassak, Z. S. S. 28. 1—3. [9] See G. 1. 24, and *ante*, p. 451.
[10] Z. S. S. 25. 84 *sqq.* [11] Z. S. S. 25. 91.

of a "Scheinprozess" that the true drift of the proceedings shall be concealed from the parties or the public. But this is hardly essential: our own "common recovery" was assuredly fictitious litigation, though everyone was aware that it was a mere device of conveyancing to enable a man to convey what in fact he had not. It is not deceit, but evasion of legal difficulties, at which the transaction aims. Wlassak has made it extremely probable that the *addictio* is a characteristic part of the *cessio*, and does not occur in real actions even on admission of the claim. It indicates that what is in hand is not true litigation. The nature of the transaction is evident from the beginning, and in that sense it may be said to have nothing fictitious about it. But this is to ignore the equally notable fact that it borrows the form of a *causa liberalis*, the *vindicatio* and the *assertor*, and is plainly based thereon[1]. The question as to the exact significance, and place in the proceedings, of the master's touch with the wand, and as to the essentiality of the blow on the cheek, *etc.*, are matters on which the evidence permits little but conjecture. And even on Wlassak's view, that *addictio* is characteristic, it is not possible to say with certainty whether it is, as some say, a mere recognition by the magistrate, or as others say, an act of grant by the magistrate[2], or as he holds, and, as it seems, with much probability, an act of sanction. But on the view here taken of the nature of manumission, these points are of small importance. If conveyance, gift of *civitas*, release from the position of a *res* are all present to the minds of the framers, and these are by no means slaves to logic, any one of these analogies may be the determining cause of a particular part of the form without entitling us to draw any inferences from the existence of that detail, as to the real nature of the transaction.

The law of *iteratio* might be expected to provide a touchstone for some at any rate of these opinions. The texts are few and somewhat obscure[3]. Vangerow[4], starting from his view that *manumissio* is essentially conveyance (and *iteratio* must of course proceed from a quiritary owner), holds that there may be *iteratio* after informal manumission, though the original manumission was before the slave was 30, and after manumission by the bonitary owner, in each case by the quiritary owner for the time being, even a transferee or heir. He refutes the opinion of Bethmann-Hollweg and others[5], who hold that only the original quiritary owner can iterate, not his heir or assignee, and not even he, if, before the first manumission, the man was in the bonitary ownership of another. He shews that this last view is plainly contradicted by the texts[6] and that the textual support of the others is only apparent[7]. But he holds that one who has formally freed a man under 30 cannot iterate, as he has by the formal act abandoned the *ius Quiritium*, though circumstances prevent the slave from acquiring it. He does not distinguish between *vindicta* and will. He accounts for the language of Ulp. 3. 4, which requires

[1] Livy, 41. 9.
[2] See the reff., Wlassak, Z. S. S. 25. 104 *sqq*.
[3] The chief are G. 1. 35, 167; 2. 195; Gai. Ep. 1. 1. 4; Ulp. 1. 12; 3. 1; 3. 4; 11. 19; Fr. Dos. 14; Vat. Fr. 221; Plin. Litt. 7. 16; Tacit. Ann. 13. 26.
[4] *loc. cit.*
[5] Reff., Vangerow, *op. cit.* 152.
[6] G. 1. 167; Vat. Fr. 221.
[7] Ulp. 3. 4, *fuit*, and Plin. Litt. Traj. 105.

the man to be 30 at the first manumission, on the ground that it is only of a slave first freed over 30 that the proposition he lays down as to *iteratio* is true generally. The texts[1] seem to leave no doubt as to the justice of his view in the case of informal manumission of a man under 30. Indeed since iteration in this case dates from before the *lex* Aelia, any other view requires this law or the *lex* Iunia to have contained an express provision forbidding *iteratio* in this case. But his opinion as to formal manumission seems less certain. The textual authority is small: there is only the doubtful inference from Ulpian[2], and some indications in Gaius 1. 35, so defective that reconstitution of the text is hopeless. On the other hand it must be admitted that while there are texts speaking of *iteratio* as applicable to junian latins generally[3], there is none which unequivocally applies it to a latin freed *vindicta* or *testamento*.

Vangerow bases his opinion mainly on the view that as manumission implies ownership, it is impossible where there has been a formal manumission, since the formal act of conveyance, though the provisions of the *lex* Aelia prevent it from giving *civitas*, produces nevertheless the other effects of which it is capable. Thus it causes the *dominium* to pass out of the manumitter, though it does not pass to the *manumissus*. He supports this view by reference to the cases above mentioned in which *cessio in iure tutelae*, *ususfructus* and *hereditatis*, were treated as depriving the *cedens* though the primary purpose was not realised. But, apart from the fact that these texts shew evident signs of dispute, they appear to turn, not on the principle invoked by Vangerow, but upon the notion that *cessio* is an acknowledgment in court that the *cedens* has no right. This could have no bearing on manumission by will[4]. It may be observed that in some cases, and in the opinion of some jurists, the *cessio* might be pleaded by persons who were not parties to it[5], and it is also noticeable that in every recorded case it is used as a defence to a claim set up by the *cedens*. It may also be noted that Vangerow's theory leads to the result that if an owner under 20 manumitted *vindicta*, though the manumission did not take effect, it would be impossible for the owner ever to make the man a *civis*. For the texts do not say that his act is a nullity but only that the statute bars the freedom[6]. Indeed on Vangerow's view it seems that the man should have become a *servus sine domino*, for it is not merely the *ius Quiritium* which is affected by a *cessio in iure*. Analogous difficulties arise in the case of manumission by will. As we have seen, it is by no means clear that a manumission *vindicta* could make a man a latin in classical law[7], and it may be that this is the real reason of the silence of the texts. As to manumission by will Ulpian tells

[1] G. 1. 167; Vat. Fr. 221.
[2] Ulp. 3. 4, referring only to latins over 30.
[3] Ulp. 3. 1; Fr. Vat. 221.
[4] The rule of accrual when a common slave is freed *vindicta* or *testamento* by one owner (*ante*, p. 575) may seem to throw doubt on this. But the principle on which this accrual rested was very doubtful. Some thought it operated even in informal manumission. The view which prevailed seems to have been that it was confined not only to a formal manumission but to one which satisfied all the requirements of manumission (40. 2. 4. 2). Justinian observes (C. 7. 7. 1. *pr.*) that, as to the rules of accrual in this case, *multa ambiguitas exorta est apud veteres iuris auctores*.
[5] G. 1. 35; Ulp. 11. 7.
[6] Reff., *ante*, p. 542.
[7] *Ante*, p. 543.

us expressly that the *lex* Aelia treats a man manumitted under 30 by will as if he had been freed informally, which he would hardly have said if there was the fundamental difference that *iteratio* was impossible in the case of the former. The result seems to be that any Junian latin could, when he was over 30, be made a *civis* by *iteratio*, by the person in whom the quiritary ownership of him was now vested. But it is an open question whether in classical law a person freed *vindicta* could be a latin.

APPENDIX V.

MANUMISSION *VINDICTA* BY A *FILIUSFAMILIAS*.

It is clear that manumission *vindicta* was a *legis actio*[1]. It is also most probable that a *filiusfamilias* was incapable of *legis actio*. It appears to follow that he could not free *vindicta*, even *iussu patris*. Yet this power is repeatedly credited to him, and is nowhere expressly denied. On the texts as they stand there is therefore something like an absolute contradiction.

There seem to be two ways of dealing with the matter, assuming the truth of the proposition that a *filiusfamilias* cannot *lege agere*. One of these is that of Mitteis[2], to refer all the texts which do not specify the form to the informal methods and to treat the others as in some way interpolated. The other course is to accept the texts and to treat their rule as one more case in which the character of the process was disregarded. The following pages state as briefly as possible the grounds on which the present writer has held[3], and holds, this the better view.

The relaxations stated on p. 452 are no doubt for the most part merely evidences that the process was not really regarded as judicial. Some can hardly be so disposed of[4], but they are much less important than the texts directly touching the question, of which the chief are set out and discussed in the following pages.

I. Schol. Sin. 18. 49 (Krüger): ...ὁ ὑπεξούσιος ὡς μὴ ὢν *legis* ( ) δεκτικὸς οὐ δύναται *in iure cedere* ἑτέρῳ τὴν ἐπιτροπήν.

This text leads Mitteis to reject all the others. He infers that in the judgment of Ulpian a *filiusfamilias* could not *lege agere*, and that thus all the texts which speak of him as freeing *vindicta* must be in part post-classical. Fifth century greek scholia are not perhaps the best evidence of what Ulpian said, and it may well be that the rule is Ulpian's, the reason the scholiast's. But admitting that it is in effect Ulpian who speaks, the text is but a doubtful starting-point. It gives an odd result. The *tutela* in

[1] *Ante*, p. 451.
[2] Mitteis, Z. S. S. 21. 199; 25. 379; Röm. Privatrecht, 1. 2. 11.
[3] N. R. H. 27. 737.
[4] 40. 2. 8; 40. 2. 23.

question must be *legitima*, for Ulpian allows only *legitimi tutores* to cede[1]. The case is thus one of a patron, *i.e.* a *miles* or former *miles*, who can, as we know, free *vindicta*. The proposition thus is: certain persons who can certainly free by *legis actio* cannot cede the *tutela* acquired by the manumission, because they are incapable of *legis actio*. This is at least something like a contradiction, and such a text seems hardly clear enough to put all the others out of court.

II. P. Sentt. 1. 13 a. *Filiusfamilias iussu patris manumittere potest, matris non potest.*

This text is perfectly genuine and thus ought to cover all cases of manumission *inter vivos*. Mitteis considers it arbitrary to apply it to manumission *vindicta*. It seems more arbitrary to understand a tacit limitation to manumissions which produce only a truncated result. The effect is to make the text give a misleading result, which Paul elsewhere carefully avoids. In view of the language of P. Sentt. 4. 12. 2, it is difficult to understand our text of a manumission which did not give *iusta libertas*. It is one thing to state a general rule ignoring exceptions: it is another to lay down in general terms a rule which does not apply to the normal case at all.

III. C. 7. 15. 1. 3. In this enactment Justinian extends the power of authorising manumission to ascendants of either sex in respect of any descendants. He says he is abolishing the old restrictions of persons, but he says nothing of any extension in point of form. The first case he names is *per iudicem*.

IV. 37. 14. 13, Modest.; 40. 1. 16, Idem; 40. 1. 22, Papin. These texts are general and if written as they stand must fairly be applied to all manumission *inter vivos*. They may have been abridged, but there is no sign of this, and, at least as to 40. 1. 16, the reference to manumission *vindicta* is strongly suggested.

V. 38. 2. 22, Marcian. *Si filiusfamilias miles manumittat, secundum Iuliani sententiam...patris libertum facit: sed quamdiu, inquit, vivit, praefertur filius in bona eius patri. Sed divus Hadrianus Flavio Apro rescripsit suum libertum eum facere non patris.*

This text, adduced by Mitteis, deals with a *miles* and is not strictly in point. Its only importance is that its language shews the practice to have been older than Hadrian's enactment[2], and that as it is not easy to see how the father can have been thought entitled to the goods of such a man otherwise than by descent, the manumission must have given *civitas* and thus been formal. The possible but uncertain inferences need not be entered on.

VI. 40. 1. 7, Alfenus Varus. This text mentioned by Mitteis has been so maltreated that little can be inferred from it. What can be made of the *libertus* who becomes a slave again at the end of the text? The fragment seems of little importance in the present connexion[3].

VII. 40. 2. 4. *pr.*, Julian. *Si pater filio permiserit servum manumittere et interim decesserit intestato, deinde filius ignorans patrem suum*

[1] Ulp. 11. 6, 8.
[2] See 37. 14. 8. *pr.*; 38. 2. 3. 8 and *ante*, p. 459.
[3] *Ante*, p. 459.

mortuum, libertatem imposuerit, libertas servo favore libertatis contingit, cum non appareat mutata esse domini voluntas, sin autem ignorante filio vetuisset pater per nuntium et antequam filius certior fieret, servum manumisisset, liber non fit. nam ut filio manumittente servus ad libertatem perveniat durare oportet patris voluntatem: nam si mutata fuerit non erit verum volente patre filium manumisisse.

This text has been profoundly altered. It does not express Julian's view[1], and some at least of the talk about *voluntas* seems to be due to Tribonian. It is difficult to see why it should have been placed under the heading *de manumissione vindicta*, unless originally written of this, since it contains no reference to form. Mitteis holds that it was written of informal manumission, mainly it seems, because *h. l.* 1 was. The force of this is weakened by the fact that *h. l.* 2 was certainly written of formal manumission, and, if contiguity is decisive, settles the question the other way for the whole *lex*. There is indeed little reason to think that *h. l.* 1 was written of informal manumission. The needlessly duplicated talk about *voluntas* looks like Tribonian seeking a reason good for all manumission. And though, as Mitteis has elsewhere shewn[2], it is dangerous to be dogmatic as to what Julian cannot have written, he can hardly have written the reasoning put before us. He is supposed to have said that when Titius declares *inter amicos* that he frees a man, whom he thinks, in fact, to be the property of another, but who is his own, *verum est voluntate domini servum manumissum esse*. But that is not the case: the needed *voluntas* is not present. He intended a joke to deceive the man or his own friends: *lex enim Iunia eos fieri latinos iubet quos dominus liberos esse voluit*[3]. On the other hand, as applied to manumission *vindicta* the decision is perfectly sound. As has been said by Wlassak[4]: "bei allen Formalgeschäften des alten Rechts, so auch bei der manumissio vindicta, die rechtliche Geltung unabhängig war vom Dasein des durch die Wortformel...der Partei angezeigten Willens." This is surely what Julian is laying down. There are other texts which shew that formal acts produced their effects irrespective of state of mind[5], and others which shew that, apart from form, the transaction was null in such a case of mistake unless there was a real *voluntas* which the transaction realised[6]. Some of them refer to informal manumission.

VIII. 40. 2. 10, Marcian. *Surdi vel muti patris filius iussu eius manumittere potest: furiosi vero filius non potest manumittere.*

It is not easy to see why this text is placed in this title, unless it was originally written of manumission *vindicta*. Here too there may have been alteration: apart from this its general form would have been misleading. Mitteis observes that it was of course necessary to mention here and there the powers of *muti* and *surdi*, and he cites three other examples. It may

[1] 40. 9. 15. 1; *post*, p. 722. [2] Z. S. S. 27. 369.
[3] Fr. Dos. 7, 8.
[4] Z. S. S. 26. 403. As to the interpolation of this text he agrees with Mitteis.
[5] Cp. P. 1. 7. 6, 8; G. 4. 117.
[6] 17. 1. 49; 29. 2. 15; 22. 6. 9. 4; 41. 1. 35; 40. 9. 9. *pr.*, 17. 1; 40. 12. 28; 41. 2. 4. 15; In. 2. 20. 11. See also Buckland, N. R. H. 32. 236.

not be altogether insignificant that in two of these[1] the limit of the power is clearly stated, while in the third[2] the negative form of the proposition makes this unnecessary.

IX. 40. 2. 18. 2, Paul. *Filius quoque voluntate patris apud patrem manumittere potest.*

As it stands this text is conclusive. Mitteis holds that there has been alteration and that Paul actually wrote: *Filius miles apud patrem, etc.* There is no evidence of change and indeed that remark seems hardly worth making. The point actually made is more important. If the manumission was *voluntate patris*, it was his own manumission and he was judge in his own cause. The words *voluntate patris*, redundant as they look, are essential to the statement of this point.

X. 40. 2. 22, Paul. *Pater ex provincia ad filium sciens Romae agentem epistulam fecit quae permisit ei quem vellet ex servis quos in ministerio secum hic habebat vindicta liberare: post quam filius Stichum manumisit apud Praetorem: quaero an fecerit liberum. respondi: quare non hoc concessum credamus patri ut permittere possit filio ex his quos in ministerio haberet manumittere? solam enim electionem filio concessit, ceterum ipse manumittit.*

Mitteis supposes the compilers to have here interpolated the references to form, though they have omitted to do so in the other texts in this title which we have discussed. He considers the expression *apud praetorem* ill placed and redundant in view of the word *vindicta* earlier in the passage. But the expression is inserted precisely because the authorisation was to proceed in a certain way, and the statement shews that the direction was followed. The form *vindicta liberare* is the usual classical form[3]. In 40. 1. 15 and 45. 1. 122. 2 it is clearly genuine, but it does not seem common in the Digest. In our text the words have all the appearance of being a quotation from the letter.

XI. 40. 9. 15. 1, Paul. *Iulianus ait si postea quam filio permisit pater manumittere filius ignorans patrem decessisse manumisit vindicta non fieri eum liberum, sed et si vivit pater et voluntas mutata erit non videri volente patre filium manumisisse.*

Mitteis supposes the compilers to have interpolated the word *vindicta*. It is not clear why they should have so done. If the original text contained no reference to form the insertion would be misleading. If it did, it would be still more misleading to strike out that reference and also insert the word *vindicta*, though to do either without the other would be reasonable. The chief positive sign of interpolation is the fact that, in the Florentine *index*, the corrector of the MS. has altered a heading *ad legem* Iuliam, and made it Iuniam. I have suggested that the corrector was wrong, as he was far from infallible, and though Mitteis attaches no weight to this, the suggestion may not look quite absurd to one who will look at the surroundings of the correction at the place where it occurs. That is the Florentine *index* and not in the inscription of this *lex*. It is not indeed certain that it refers to

[1] 3. 3. 43. *pr.*; 29. 2. 5. [2] 39. 5. 33. 2.
[3] G. 1. 17, 18, 44; P. 4. 12. 2; Fr. Dos. 10. Cp. Brissonius and Dirksen, *s.v. liberare*.

the same book. There is no sign of correction in the inscription. It must be observed that the mistake, if it is a mistake, occurs twice quite independently, and that there is no trace but the correction in the *index* of any writing by Paul on the *lex* Iunia. Moreover this text has not been generally overhauled, for it retains a view of Julian's, which is elsewhere set aside[1]. And the word *vindicta*, useless or worse under Justinian, may have served a purpose in the original. An informal manumission would be null if the authorising *pater* were dead, but some may have doubted if this was equally true where a *legis actio* had been gone through without notice of the death. It is easy to see many complications which Julian's decision avoids.

Mitteis observes also that there is no known *lex* Iulia which deals with manumission. The *leges* Iuliae *iudiciariae* must have given occasion for the discussion of those quasi litigations which were still tried by *legis actio*, of which manumission *vindicta* was one. It is always difficult to say what a book may have contained.

XII. 49. 17. 6, Ulpian. *Si militi filiofamilias uxor servum manumittendi causa donaverit an suum libertum fecerit videamus, quia peculiares et servos et libertos potuit habere, et magis est ut hoc (?) castrensi peculio non adnumeretur, quia uxor ei non propter militiam nota esset. plane si mihi proponas ad castra eunti marito uxorem servos donasse ut manumittat et habiles ad militiam libertos habeat potest dici sua voluntate sine patris permissu manumittentem ad libertatem perducere.*

The concluding words imply without actually saying it that where the slave was not in the *peculium castrense*, the *filius* with the father's consent might have done what he is contemplated as doing without it if the slave is in the *peculium castrense*. And this is so to free a man as to make him *habilis ad militiam*. This must be formal manumission since a latin would not be qualified.

Texts in general terms, and thus applicable to latins, have not been cited, except where they contain something to suggest that they were intended to refer to formal manumission, and no doubt some relevant texts have been missed. Some, discussed elsewhere, have been omitted[2], as having less weight than I had attached to them. No text in the Digest can be absolutely conclusive for classical law, since there may always have been alteration. But these seem rather a strong body, and if their force for classical law is to be destroyed it must be by the assumption of systematic interpolation, of which there is in many cases no trace and in most of these no purpose. The texts are in all parts of the Digest and the compilers never seem to have made a mistake: they have left so far as appears, no trace, no suggestion, of the older doctrine. They are not often so exact in their workmanship. And the main reason for this opinion is a fifth century Greek scholion which does not directly deal with the point and is itself in somewhat

[1] *Ante*, p. 719, no. VII.

[2] 28. 2. 51. 1 (which, as Mitteis says, may have to do with *matrimonium iuris gentium* though this seems unlikely) and 40. 9. 16. 5, in connexion with which the distinction relied on in my discussion is far from clear on the texts.

self-contradictory form. After all there is a presumption in favour of the genuineness of a text even in the Digest.

I venture to suggest that Professor Mitteis in studying these texts is giving them an importance they do not deserve in relation to his general theory. He has shewn us how inadmissible the idea of representation in formal acts was to the classical lawyer. But the foregoing chapters shew that *favor libertatis* led to the doing of things, the acceptance of interpretations, and the laying down of rules, quite inadmissible in other branches of the law. *Nec enim ignotum est quod multa contra iuris rigorem pro libertate sint constituta*[1].

[1] 40. 5. 24. 10.

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