THE ROMAN LAW OF SLAVERY

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

BY

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CAMBRIDGE
AT THE UNIVERSITY PRESS
1908
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.
TABLE OF CONTENTS

PART I.

CONDITION OF THE SLAVE.

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>DESCRIPTION</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Definition and General Characteristics</td>
<td>1—9</td>
</tr>
<tr>
<td>II.</td>
<td>The Slave as Res</td>
<td>10—38</td>
</tr>
<tr>
<td></td>
<td>Custodia, 11; Vindicatio Servi, 12; Legatum Servi, 15; Fructus and Partus, 21; Delicts in respect of Slaves, 29.</td>
<td></td>
</tr>
<tr>
<td>III.</td>
<td>The Slave as Res (cont.). Sale of Slaves</td>
<td>39—72</td>
</tr>
<tr>
<td></td>
<td>Interitus Rei, 40; Accessions, 43; Actio ex Empto, 44; Eviction, 46; Andilician actions, 54; Restrictive covenants, 68.</td>
<td></td>
</tr>
<tr>
<td>IV.</td>
<td>The Slave as Man. Non-Commercial Relations</td>
<td>73—97</td>
</tr>
<tr>
<td></td>
<td>General notions, 73; Cognatio servilis, 76; Iniurias to Slaves, 79; Inapacities, 82; Slaves as Witnesses, 86; Criminal Slaves, 91.</td>
<td></td>
</tr>
<tr>
<td>V.</td>
<td>The Slave as Man (cont.). Non-Commercial Relations (cont.). Delicts by Slaves</td>
<td>98—130</td>
</tr>
<tr>
<td></td>
<td>Scope of Noxal Liability, 98; Potestas, 101; Procedure, 102; Noxa Caput Sequitur, 106; Effect of death of Slave, 111; Essential nature of Noxal Liability, 112; Dominus sciens, 114; Existence of minor interests in the Slave, 116; Delict by more than one Slave, 118; Delict in connexion with a negotium, 122; Delict by Slave the subject of a negotium, 124; Interdicta Noxalia, 128; Rules under lex Aquilia, 129.</td>
<td></td>
</tr>
<tr>
<td>VI.</td>
<td>The Slave as Man (cont.). Commercial Relations apart from Peculium. Acquisitions</td>
<td>131—158</td>
</tr>
<tr>
<td></td>
<td>Acquisition of Possession, 131; Usucapio through a Slave, 134; Institutio of a Slave, 137; Legacy to a Slave, 144; Acquisition of Iura in Re Aliena, 152; of Iura in Personam, 154.</td>
<td></td>
</tr>
</tbody>
</table>
Table of Contents

PART II.

ENSLAVEMENT AND RELEASE FROM SLAVERY.

CHAPTER

XVII. Enslavement
- Capture, 267; Slavery by Birth, 267; Enslavement by law of the Empire, 268; Minor Cases, 401; Servi Poenae, 403; Sc. Claudianum, 419.

XVIII. Enslavement (cont.)
- Minor Cases under Justinian, 419; Sale of Children, 420; Libertas Ingrata, 422; Fraudulent Sale of Freeman, 427.

XIX. Outline of Law of Manumission during the Republic
- Nature of Manumission, 407; Census, 439; Manumission Indicta, 441; Manumission by Will, 442; Persons in Libertate tuisuis Praetoria, 444; Exceptional Forms, 447.

XX. Manumission during the Empire. Forms
- Manumission in Ecclesia, 449; Manumission Indicta, 451; Manumission by Will, 450; Adoption, 466; Legacies to Freed Slaves, 470; Gifts of Liberty to Unborn Persons, 476; Soldier's Will, 477.

XXI. Manumission during the Empire (cont.). Manumission by Will (cont.): Dies, Conditio, Institutio, 479-512

XXII. Manumission during the Empire (cont.). Fideicommissary Gifts
- Implied Fideicommission, 515; Conditions, 516; Lapse, 519; Lex Falcidius and Sc. Pecusianum, 522; To whom such gifts may be made, 526; On whom charged, 527; Charged on Receiver of the Slave, 527; Charged on Owner of the Slave, 529; Charge to Buy and Free, 530.

XXIII. Manumission during the Empire (cont.). Statutory Changes
- Lex Iulia, 553; Lex Aelia Sentia, 557; Age of Manumitter, 557; Caesaerianum, 538; Age of Slave, 542; Fraud of Creditor or Patron, 544; Dehiscence, 544; Lex Fulvia Caninia, 546; Sources of Latinity, 548.

XXIV. Manumission under Justinian
- Form, 558; Effect, 555; Age of Master, 555; Consent, 555; Manumission must be nominativum, 556; Manumission of Unborn Person, 557; Manumission must be by Owner, 558; Fraud of Creditors, 559; Irrevocability of Manumission, 560.
Table of Contents

CHAPTER PAGE
XXV. Manumission. Special Cases and Minor Restrictions 578-597

Serus Pigneraticius, 573; Servus Communis, 575; Servus Fructarius, 578; Servus Legatus, 580; Servus Dobulus, 583; Divorce, 594; Conditions against Manumission, 585; Slave of person under Guardianship, 587; Slaves of Corporations, 588; Public Slaves, 589; Cases connected with Criminal Liability, 591; Minor Restrictions, 593.

XXVI. Freedom independent of Manumission 598-608

Cases of Reward to Slave, 598; Cases of Penalty on Dominius, 602; Miscellaneous Cases, 607.

XXVII. Freedom without Manumission. Uncompleted Manumission 609-646

Relief against Failure of Gift, 609; Fideicommissary Liberty Overdue, 611; Addictio Bonorum, 620; Hereditates passing to the Fisc, 626; Transfer ut manumittatur, 628; Servus suis emptus, 636; Payment to secure Manumission, 640.

XXVIII. Questions of Status as affected by Lapse of Time, Death, Judicial Decision, etc. 647-675

Effect of Pact, etc., 647; Lapse of Time in Libertate, 648; Lapse of Time from Manumission, 650; Death, 651; Res Indicata, 652; Mode of Trial of Causes Liberales, 653; Burden of Proof, 660; Condition of alleged slave pendente lite, 661; Effect of Judgment, 666; Claims of Ingenuitas, 672; Collusion, 674.

XXIX. Effect after Manumission of Events during Slavery. Obligatio Naturalis 676-701

Appendix I. The relation of the contractual actions adiectitiae qualitatis to the Theory of Representation 702-706

Appendix II. Formulation and Litis Consumptio in the actions adiectitiae qualitatis 706-712

Appendix III. Form used by Slave in acquisition by Mancipatio, etc. 712-713

Appendix IV. The essential character of Manumission: Iteratio 714-718

Appendix V. Manumission vindicta by a filiusfamilias 718-723

Index 724-735

ERRATA ET ADDENDA

p. 7, n. 4. For 32. 60. 1, 99. 2 read 32. 60. 1, 99. 2.

p. 9, n. 6. For der Juden read den Juden.

p. 12, n. 4. For 5, 1. 20 read 6, 1. 20.

p. 18, n. 9. For xxv. read xxvi.

p. 32, n. 3. For op. cit. read Inst. Jurid.

p. 68, n. 9. Add See also D. 8. 4. 13.

p. 100, n. 4. Add But see Naber, Mélanges Gerardin, 467.

p. 109, n. 5. For 9. 4. 3. 3 read 9. 4. 4. 3.


p. 130, n. 13. Add See also post, pp. 328, 666.

p. 156, n. 3. For 44, 3. 6. 3 read 44, 3; 46, 3.

p. 215, l. 16. For sponsius read sponsio.

p. 248, n. 7. For mere read mere.

p. 311, n. 8. Add See on the whole subject, Marchand, Du Captif Romain.

p. 315, n. 1. For Mommsen read Mommsen, Staatsr. (3) 2. 2. 999 sqq.

Add See, however, now, as to the relations and nomenclature of all those funds, Mitteis, Böm. Privatr., 1. 849 sqq.

p. 322, n. 5. For Mommsen read Mommsen, Staatsr. (3) 2. 2. 1000 sqq.

p. 324, n. 3. For Mommsen read Mommsen, Staatsr. (3) 2. 2. 336.


p. 403, n. 2. For congruent read congrunt.

p. 423, n. 6. Add A study of this institution by Bonfante, Mélanges Yadda, was not available when this chapter was printed.
LIST OF PRINCIPAL ABBREVIATIONS

In. = Institutiones Justiniani.
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 Dosithiana.
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 antientiniani.

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 free1, 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 prohibetur2." 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 subicitur3." Upon this definition two remarks may be made4.

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 assume5, and we are repeatedly told that it is a part of the Ius Gentium, since it originates in war6. Captives, it is said, may be slain; to make them slaves is to save their lives; hence they are called servi, ut servati7, and thus both names, servus and mancipium, are derived from capture in war8.

1 In. 1. 3. pr.
2 In. 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. 159. 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.
The definition appears to regard subjection to a dominus as the essential fact in slavery. It is easy to show 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 Cæsarea.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 peculium.⁷ In fact this definition is not strictly true for any but servi poenae. 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. Modern writers on jurisprudence usually make the conception of a right the basis of their arrangement of legal doctrines. 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.” 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 cedit obligatio.” Judgment against a slave was a nullity: it did not bind him or his master. In the same spirit we are told that slavery is akin to death.¹⁰ If a man be enslaved his debts cease to bind him, and his liability does not revive if he is manumitted. The same thing is expressed in the saying that a slave is pro nullo.¹¹ 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 Florentinian’s 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. Chattels are the subject of ownership: it is immaterial that a slave or other chattel is at the moment a res nullius.¹²

From the fact that a slave is a Res, it is inferred, apparently as a necessary deduction,¹³ 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;¹⁴ 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.¹⁵ 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 Horn (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. ⁵ 6. 1. 44. ¹
⁴ 5. 3. 1. ¹⁰ 60. 17. 30. pr. ⁶ 50. 17. 309. Nov. 22. 9; G. 3. 101. ⁴ 44. 7. 30. pr. ⁸ 7. 28. 8. 1. pr. ¹² Girard, Manuel, p. 92.
⁹ Justinian swept away nearly all the exceptional cases. C. 7. 15. 1; 2b; Nov. 22. 8; 22. 12. ⁴ The objection, that slavery is an “absolute,” not a “relative,” status, is thus of no force against the Roman definition. ¹ⁱ Girard, op. cit. p. 90. “L’aptitude à être le sujet de droits et devoirs légaux.” ¹³ Girard, loc. cit.; Moyle, op. cit. Intro. to Bk 1; etc.

¹ Fr. Doshith. 11; Ulp. 1. 19; C. 7. 15. 1. 2; post, Ch. xxv. ⁶ Warnkoenig, Inst. Rom. Jus priv. § 121; Moyle, ad Inst. 1. 3. 2; Accrias, Précis de Dr. ⁷ Post, Ch. xxi. ⁸ Warnkoenig, Inst. Rom. Jus priv. § 121; Moyle, ad Inst. 1. 3. 2; Accrias, Précis de Dr. ⁹ Other equivocal cases may be noted; 2. 4. 9; 5. 1. 53; 48. 10. 7. ¹⁰ See however 60. 17. 32.
The Slave a Person

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, and the true significance of these words is shown by a text which observes that a slave is not a *persona qui in ius vocari potest*. A text in the Vatican Fragments (also in the Digest) says that a *servus hereditarius* cannot stipulate for a usufruct because *usufructus sine persona constitut 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*. Thus in another text the same language is used on similar facts, but the case put is that of *filius vel servus*. A text of Cassiodorus has exactly the same significance. There are however two texts of Theophilius (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*.

Slavery has of course meant different things at different times and places. 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. 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 causa probatio*, as to the freeman who lets himself be sold as a slave, as to error in status

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1 See Macauley, *Political Theories of the Middle Age* (Gierke), Introd. p. xxiv.
2 G. 1. 199; 1. 121; 3. 189; 4. 185. Vat. Fr. 75. 2. 75. 5. 82 (drawing legal inferences from his personality); G. Th. 14. 7. 3 (rejected by Mommsen); C. 4. 36. 1. pr.; C. Th. 3. 121; Inst. 1. 8. pr.; 3. 17; 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. (#wloc); 31. 82. 3; 39. 8. 23; 45. 3. 1. 4; 47. 10. 15. 44; 47. 10. 17. 3; 48. 19. 10. pr.; 48. 19. 19. 6; 60. 16. 2. 216; 60. 17. 22. pr. See also Bas 44. 1. 11, and Sell, *Notariorum*, 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 coincidentia agent is on the other hand a more 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 is misleading, for the *persona* was not a derivative power of contracting or of being instituted heir.
4 See Brisciauci, *De Verb. Sign.*, sub v. *persona.
5 Nov. Theod. 17. 1. 2: *qua es nec personam habentes*.
6 See *De rebus quaest.* 1. 17. 1. 2.
7 See *De rebus quaest.* 1. 17. 1. 2.
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 \textit{udicatam solv}, there was \textit{restituto in internum}\(^3\). To the same cause are expressly set down the rules as to acquisition through a \textit{liber homo bona fide servens}\(^4\), and the rule that the \textit{bona fide} sale of a freeman as a slave was valid, as a contract, \textit{qua difficile petest dignosc liber homo a servo}\(^5\). The well-known rule that \textit{error comunis facti} us 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\(^8\). 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. \textit{Manus} and \textit{rustica} were, broadly, those engaged in the cultivation of land and other rural pursuits; \textit{urbana} were those whom \textit{pater familias carum se usus seu cultus causa habet}\(^9\), elsewhere defined as \textit{quaetus suppellectilis notitiam gerunt}\(^10\). The cook and the philosopher were alike urban, the land-agent (\textit{vilicus}) and the labourer were alike rustic. This 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\(^11\).

Indeed in the construction of legacies, as the testator’s intention was the point partly on mode and place of maintenance, partly on nature, \textit{[post Ch xxvii] there are other cases in the title De sue re dotum, e.g. 23 3 59 2 9 8 9 5\(^8\). As often the rule was severer in stipulation, where the agreement was void for impossibility 44 7 1 9 40 1 38 3 103. In 18 2 14 3 we are told that sale to \textit{servis alienus} thought free was valid, while one to my own slave was in any case void. \textit{post Ch xxix} \(^5\). C 7 4 2. \textit{post}, p. 64. \(^1\) 1 14 3. This extreme view may be peculiar to Ulpian: \textit{cp Dvo Cassius} 48 34. In English analogous cases have needed express legislation. \textit{See e.g. 51 5 59 Vact. in 28. 7 9 3 61, 8 7 12 39 spp., P. 8 3 65 spp., Wallon op cit Blk 2 Ch xxvii, Blas Slavery in Rome 131. \(^11\) C 5 37 22 2. \(^32\) 99 pr. \(^83\) 7 27 1. \(^84\) 50 16 166.\]
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 empa," 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. 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\(^3\). 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 chattel. Thus it is common in such titles as that on the Aedilician

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\(^1\) E.g. P. 2. 34. 1; D. 11. 3. 1. pr. (the words of the Edict); 23. 3. 39; 48. 5. 6. pr. Homo is of course common. Filius is rare in legal texts.

\(^2\) Marius, op. cit. sub v. Novicius.

\(^3\) 1. 3. 7; h. t. 65. 2. The latter text tells us that a liberal education did not necessarily make him a veterator. Post, p. 37. Veteranus in 29. 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.

\(^4\) Lenel, E. P. p. 443.

\(^5\) See for instance, Wallon, op. cit. Bk 2, Ch. vn.; 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 significuntur: in persona magistram et imperium...in persona servorum. The slave is a chattel, frequently paired off with money as a res. 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. 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 res, i.e. Manumission.

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 which they became res mancipi. 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. On the other hand one of A.D. 168 was by traditio, but this was in Asia Minor, as also was one of A.D. 359. There is indeed, a record of a conveyance of land in Egypt by traditio as early as A.D. 154.

The slave, like any other chattel, might be the subject of all ordinary transactions, 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. 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. But they shew also that this liability did not arise if the slave ran away, 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. The texts bear marks of rehandling, but there is no reason to doubt that the rule they lay down is that of the classical law. It seems to be independent

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1 Q. 1. 120; G. 2. 15.
2 Bruns, Festschr., 1. 388 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. 1. 322. The emendation on the same page is doubtful.
5 21. 1. cas.: 18. 4. 3. 13; C. 4. 23. 2; 4. 24. 2. In late law servi potestas might not be seized (by pignoris eapito) under a judgment. C. Th. 2. 20. 1; C. 8. 16. 7.
6 Lescault (Stud. sulla Responsabilità per Custodia, 1. 8.) 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 Hausen, Baron, and Pernice. See also for discussion and references, Windisch, Pand. § 544. n. 3.
7 47. 2. 14. 5. His right to sue implies the liability.
8 13. 6. 5. 18; 12. 5. 16. pr.
9 See especially 10. 6. 5. 13. Custodia ait periculum ad esse negatur, quare culpa sunt causae praestandam. Can hardly be genuine, since if the risk is with a man his culpa is not material.
10 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 significuntur: in persona magistratum imperium...in persona servorum. The slave is a chattel, frequently paired off with money as a res. 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. 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 res, i.e. Manumission.

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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 sus*. And such a flight is no proof of *culpa* in the commodaturarius. 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*, 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, 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 Gaies, as meaning everything the plaintiff would have had, if restitution had been made at *litis contestatio*. 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. 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. 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. 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*. 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 *improper* may make. 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. He could

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1 Though he is still possessed, *post*, Ch. xii. 6. 1. 1; 6. 1. 5. 3; 6. 2. 11.
2 6. 1. 20. 6. 1. 18. 21.
3 Post, Ch. xv.
4 6. 1. 29.
5 He must give, in respect of the child, the same security as in the case of the woman herself.
6 6. 1. 17. 1.
7 *Ibid.* 6. 1. 21. This cannot be needed in any other case, for though the possessor may have an *actio Aquilia*, the owner has an *actio Aquilia* on his own title.
8 6. 1. 20; 6. 1. 31.
9 6. 3. 38. 29. The form of these texts suggests that the right of a *malae fidei possessor* to make these deductions was of late origin.

...
contemplated is any misconduct of the possessor in relation to the slave, 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 fides* possessor, has learnt that the thing belongs to another. But such a person is now a *malae fides* possessor, and there is no reason to confine the rules of *malae fides* possessio to the case of one who was so ab nudo, a praedoe. But the true solution may not be far from this. A *bonae fides* possessor is one not proved to have been not entitled. The formal notice of claim, involved in the word *contentio*, 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 wholeheartedly 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, 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. 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. If, now, the defendant was already in mora at the time of death, he must account, of course, for moras causa, and for fructus up to the day on which judgment was given, estimated in the same way. It is not clear when a *bonae fides* possessor is in mora. The expression seems to belong to the law of *oblrgatio* and to be out of place in real actions. Its use is further evidence of the insufficiency of the distinction between *bonae* and *malae fides* possessors. Pellat thinks he is in mora from the time when he knew or ought to have known that his title was bad. This is a rather indefinite time and a person so convinced is a *malae fides* possessor. All that is certain is that it was not *litus contestatio*. 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. If the slave has run away, *pendente lite*, the *bonae fides* 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. If the possessor contrived at the flight he is liable as if he still possessed, and on the same principle if he sell the man, *pendente lite*, and the vendee kill him, he must pay the value. 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 not take 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 *interius res* which release the *bonae fides* possessor, noxal surrender must be added. In the *acto furto*, *conductio furtiva*, and *acto 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, and that the *conductio furtiva* was necessarily extinguished if from any cause he became free or was expropriated.

The case of legacy of a slave gives occasion for many rules, the development of which cannot well be made out, owing to the suppressions of Justianus of the differences due to form. 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 *ancestra*, any *partus*. 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.

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1 Pellat, op cit ad 6 1 45. 2 This view is not old as Azo. 3 Pellat, loc cit 6 1 15 3, 6 1 27 2, 6 3 16 pr., 46 7 11. 4 6 1 79. 5 Op cit ad l. 6 The possessor is not necessarily liable if the man die after *litus contestatio*. See n 1 and 6 1 27 2. 7 Savigny thinks that *bonae fides* possessor is in mora only from the time of *presentatio* which imposes an *obligatio* in him. The text in the *Bustula* which seem to confirm this are shown by Pellat to contemplate mora before the *presentatio*, and there is usually no material delay between *presentatio* and *condemnation*. 8 6 1 27 2. 9 6 1 21. 10 Or he fled through *culpa* of the possessor (21 2 21 3). 11 6 1 17 pr. Though the claimant can in appropriate cases, (e.g. if the price is not paid,) take cessation of actions instead. 12 6 1 58. 13 3 212, last 4 3 10, D 13 1 3, 47 2 52 28. 14 The texts give no real help on the question whether, or how far, legates per *uniocontumem* and per *diminutionem* were on the same footing, in the classical law, in relation to the questions now to be considered. See for a discussion and references Fernald, Labbe 2 2 125. 15 30 39, 30 96 2.
on the texts1, 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 quidem3, 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 quality5. 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 seems to imply that Africanus would impose such a case as 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 dedito6.

If a servus hereditis, 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 death7. 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 him8. 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 operum 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 heres9. 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 cited10 it seems that this extreme generality must be an error, even for the time of Justiniun, 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 him11.

If a servus alienus legatus is freed by his owner, the heres is no longer liable1, unless he was already in mora or was in some way privy to the manumission, which is a case of dolus2.

The same is true, a fortiori, if the slave was the property of the testator and was freed by him3. In one text Celsus tells us that if a servus legatus is freed interim, and becomes again a slave, the legacy is good4. 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 — medium tempus non nocet. But the manumission was a complete ademption.1 In later law this was not necessarily so in case of sale4 of the res legata, but manumission is on a different footing: a testator cannot be regarded as having contemplated reenslavement. And the rule cannot be harmonised with the principle that a slave freed is a new man, and if reenslaved is a new man again6.

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 legacy7, 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 reenslavement8. 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 current9.

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

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1 Arg. 32. 3. 1; 6. 1. 66; 29. 5. 1. 4. For other texts see Bufoir, Conditions, 379 seqq.
2 C. 6. 43. 3. 30. 45. 2.
3 30. 56. The same is presumably true of a legatum optionis servis.
4 36. 45. 1. 30. 110. Post. Ch. V.
5 31. 8 pr.
6 30. 108. pr. 30. 39. pr.
7 And of the rules in other legacies 30. 47. pr.; 30. 108. 12.
8 It might be urged on the one hand that the heres is in general only liable for capes 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.
9 30. 35.
10 46. 3. 92. pr.; 30. 29. 16. So if he be a status liber, the heres is discharged by handing him over as such.
11 46. 3. 92. pr.; 30. 29. 16. Post. Ch. xx. The texts there discussed deal only with manumission by will, but manumission under circumstances is a stronger case, since the gift cannot in any case have been ademned.
12 32. 79. 3. 33. 8. 1. 30. 20. 12.
13 46. 3. 98. 8. 34. 4. 36. 1; 45. 1. 63. 5.
14 46. 3. 96. 8.
15 He first expressed the view which Severius and Carrallaca enacted and Justinian accepted that sale of the thing legated did not ademne the gift, unless so intended. Guin is still in doubt (G. 2. 128; 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. 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. 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. But if the heres induced him to commit the crime,
and so is guilty of dolus, he is liable under the legacy. 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.

A legacy giving the legatee an absolute choice (legatum optionis) was
not confined to legacies of slaves, but this seems to be the
commonest case. Such a legacy is said by Justinian to have been
conditional in earlier law; selection by the legatee being the fulfilment
of the condition. 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. 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 servorum is an actus legitimus, 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. Conversely it follows that a conditional choice

1 In. 2. 20. 16. So if he kill him without reason but not knowing of the gift, 36. 1. 26. 2;
45. 1. 93. 2.
2 Ayr. 9. 3. 13; 30. 59. 3; 46. 9. 92. pr.
3 So, 58. 9. So though torture of the man under the St. Silianum, 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. 5. 15. So if servus alienus legatus is captured, apart from dolus heres, he will be liable
if and when the slave returns. 30. 53. 9; 46. 3. 36. 8. This is the effect of postliminium:
4 So, 53. 4. As to the effect of a gift of "my slaves," see 32. 73.
5 U. 24. 14; D. 83. 5. 2 pr. They varied in form (cp. 33. 5. 9. pr.). There might be opting
servo, which, so Pius decided, gave a right to choose three (33. 5. 1).
6 33. 5. passim. And see C. 6. 45. 3 in which Justinian after laying down a rule for all
cases adds without comment a tariff applicable only to slaves.
7 In. 2. 40. 43. Post, Ch. xxiv.
8 50. 17. 77. If indeed the words Servi optio dedito tutori were not originally optio tutoris.
If the illusion is to exercise of the contrary we are considering, it is easy to see why it is confused
and thus not servit. And tutoris dedito could certainly be conditional and so these. In. 1. 14. 3; D. 29. 1. 14.
9 35. 1. 93. 3.

would not bind the chooser. So if the legatee choose a servus
alienus or a liber homo, this is a nullity, and does not consume his
right of choice. 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. It follows that a real exercise of the
option was decisive: in the case of gift per vindicacionem, 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. 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. Another text
emphasises the need of personal choice by saying that the curator
of lunatic legatee could not choose.

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, and Justinian in his constitution, 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. 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. 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
advice. 35. 5. 16, cp. 36. 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. 16.
2 33. 5. 2. 3 35. 5. 9. 1. 2.
3 So, 53. 4. As to the effect of a gift of "my slaves," see 32. 73.
4 In. 2. 40. 43. Post, Ch. xxiv.
5 50. 17. 77. If indeed the words Servi optio dedito tutori were not originally optio tutoris.
6 In. 2. 40. 43. Post, Ch. xxiv.
7 33. 5. 2. 8 33. 5. 9. 1. 2.
8 33. 5. 9. 19.
9 In. 2. 40. 43.
10 35. 1. 93.
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 humanum 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 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.

As in the case of aditus, 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. The time would not 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 had not done, 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 Questiones: it may be that the compilers have made a rule where he expressed a doubt.

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 Justinian, that culpa could not arise in such a case unless there was mora. 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. 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. If he was promised as a statu-liber and the condition is satisfied, the promissor is released. So too if he was duly killed for wrongdoing, or by torture under the Sc. Silaniannum, or earned liberty by discovering crime. But if the torture is wrongly inflicted, the promissor is still liable: it seems that he must be supposed that he could, and ought to, have prevented it. If the man is alienus and is captured by the enemy,

1 C. 6. 43. 3, 1. cp. In. loc. cit. 28. 3. 6. 7. 33. 3. 6. 7. 45. 1. 91. 1. 45. 1. 91. 9.
2 33. 5. 6. 8. pr. 13. 1. 45. 1. 51; 46. 3. 92. pr. 98. 8; 45. 1. 91. 1. 46. 3. 92. 1. 8. 39. 5. 3. 13; 45. 1. 96.
3 45. 9. 8. 5. 45. 1. 91. 1. 45. 1. 91. 2.
4 See Wallen, cp. cit. 3. Ch. ii.
5 The first compares oddity with the rule that sterility might be a redhibitory defect, and still more oddy with the counsels of the writers on res rusticae. 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, rather than any legal principle. Nor were partus accessories. These distinctions had several important results. Thus a gift of an uncilla cum natis did not fail if she were dead, as would one of servus cum peculio. They did not, like fruits, vest in the bona fide possessor. Partus of dotal uncilla did not go to the vir, except where the dos was given at a valuation (dos aemulata), in which case only the agreed sum had to be returned. Nevertheless they share in the qualities of fruits and accessories in many respects.
Legal Relation of Ancilla and Partus

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

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 videntoris. Proculus however held that if she were pregnant of them at the time of the transaction, they must be restored. 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) as a sort of accessory. Further, it could be pledged, sold and even freed before it was born. The first two cases prove nothing, since pledge and sale were possible of slaves not yet conceived. 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: alii antequam nascatur nequaquam prosit; alius non prodest nisi natus. 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.

According to several texts, one of which is an enactment of A.D. 230, 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 it is Paul who tells us the same thing. But, in his

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1 *Digest* 1. 57. 2; 22. 1. 14; 30. 84. 10; 33. 8. 8. 8; 36. 1. 28. 3.
2 *Digest* 22. 1. 14; 33. 5. 21; 33. 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, Salvis Julius, p. 189). In 23. 3 the a-firmo is apparently interpreted, for it is out of place, but it does not clearly exclude mora in the sense of undue delay. 50. 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 *Digest* 36. 4. 5. 8. For further illustrations, see 4. 2. 12. pr.; 5. 3. 30. 5. 27. pr.; 6. 1. 16. pr.; 17. 1, 20. 2. 4. 7. 1; 17. 12. 15. pr.; 60. 5; 90. 91. 7; 45. 36. 10. *Digest* 42. 8. 10. 19–21; 17. 25. 4. *Digest* 42. 8. 25. 3.
4 *Digest* 13. 7. 18. 2; 50. 1. 13; 18. 1. 8. pr.; P. 4. 14. 1.
5 The texts express no limitation. A child unborn is not in the hereditas, pro *Faelcianus* 35. 2. 9. 1.
6 *Digest* 1. 5. 7; 1. 5. 6; 20. 2. 38; 50. 16. 231.
7 *Digest* 1. 5. 7.
8 *Digest* 50. 16. 231. It is however sometimes stated more generally, 1. 5. 56. But this expresses only the fact that the principle applies over a wide field.
9 *Digest* 35. 2. 9. 1.
10 *Digest* 43. 33. 1. pr.
11 *Digest* 43. 34. 1. pr.
12 *Digest* 20. 1. 29. 1; 43. 33. 1. pr.
13 *Digest* 43. 24. 1. *Digest* 20. 1. 29. 1.

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CH. II. Pledge of Ancilla. Rules as to Partus

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, 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 5. The language of the enactment of Alexander 6 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 consentio.

Acceptance of this rule does not end the difficulty. If a debtor sell the pledged thing, it is still subject to the pledge. 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. One, from Julian 8, 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 9. The texts are sometimes harmonised by the suggestion that, while Julian is dealing with a case in which the partus was conceived before the sale, Paul writes of a case conceived after it. But as Vangerow says 10, 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 emporem, since a pledge can cover only property which is in, or grows into, the property.

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1 P. 2. 5. 2. *Fetus vel partus et alia quam pignori data est pignori non est attinetur nisi pro eo inter continentas conveniret.*
2 Dernburg, Pandekten, § 173 n. 8.
3 C. 8. 24. 1.
4 Huschke, Jurispr. Antejust., ad P. 2. 5. 2.
5 Wundescheid, Lehrbuch, § 296a, n. 10.
6 Pandekten, 448; cit. Vangerow, Pandekten, § 370.
7 13. 7. 18. 2.
8 20. 2. 8.
9 43. 33. 1. pr.
10 43. 29. 1. pr.
11 Paul, § 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, absurdes, that sale of an ancilla includes her unborn partus, 13. 7. 18. 2.
12 Buhl, Salvis Julius, 118.
13 Pandekten, § 370.
of the pledgor. This does not explain why Julian allows an interdict, even utile, in this case Vangerow 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), 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.

Usucapio of partus ancillae gives rise to many conflicts of opinion in the texts which have been the subject of much discussion by commentators. 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 causa 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 cases in which the mother was capable of being usucapio, i.e., was not subject to any vitium.

As we are told by Ulpian, the issue are not fruits, and so do not vest in the bona fides possessor, though some texts dealing with these matters group partus with fetus, which are in turn grouped with fruits, and declared to vest in the bona fides possessor. They are not a part of the mother. As they do not vest in the possessor, they must be usucapio independently. If the mother is usucapio 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. If it is born before that date it must be independently acquired, and possession of it does not begin till it is born. So far the texts agree. But there is disagreement as to the titulus of causa by which it is acquired. According to Julian, and apparently Papmian, the titulus is the same as that of the mother. If the mother was being usucapio, pro emptore, so is the child. According to Paul it is by an independent titulus, pro suo. The latter view necessarily leads to the rule that bona fides is necessary at the birth which is clearly the uttum possessiones. And so Paul lays it down. Papmian however holds that good faith at the time of acquisition of the mother is enough. 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 and resting on his rule that the titulus is the same, it may be related with his view that a bona fides possessor did not cease to acquire through the slave, by learning that he was not entitled supervening bad faith was, for Julian, immaterial. Other texts show that this view did not prevail, and it would appear that, in our case too, the other view prevailed, so that in the case of an ancilla non farta, the conditions for usucapio of partus were the same as those for acquisition of fruits by a bona fides 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, 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.

The case is somewhat different where the mother has been stolen, and is thus an ancilla futura incapable of usucapio. The first point...
to notice is that the partus itself may be vitius. and thus incapable of usucapio by any one. If it is conceived before the theft or apud furum, it is furtivus wherever born: it is grouped in this respect with fetus. 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. 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 furum, there is more difficulty. Ulpius tells us in one text that this too is furtivus, wherever born. Elsewhere he reports a view of Marcellus, that if conceived apud furum or furis heredem, and born apud furis heredem, it cannot be usucapte by a buyer from him. In the same text he reports Scaevola as holding that on such facts the partus could be usucapte, as basing the view that it could not, on the idea that the partus is part of the ancilla, and as showing that this would lead to the view that it could not be usucapte even if born apud bonae fidei possessore. This Scaevola seems to regard as a reducere ad absurdum: it is however exactly the view at which, as we have seen, Ulpius himself arrived, in the case of conception apud furum. 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 furtivus, i.e. that it was to be regarded as already existing. For the thief is still "contracting," 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. 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, and the language of Paul and Ulpius in other texts is inconsistent with any such notion.

They treat conception apud heredem furis as being apud bonae fidei possessore, and only exclude usucapio by him because he inherits the defects of his predecessor's possession.

If the child is conceived apud bonae fidei possessore it is not furtivus, and can be usucapte by him on the same titulus as that of the mother. 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. 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. 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. 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. This view is in accord with 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 vasta cannot become clam. The text cannot represent the law.

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

In another text we are told that a bonae fidei possessore can bring the actio Publiciana, for the partus conceived apud eum, even though he never possessed it. This has been explained 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 that for recovery in the Publician it was not necessary, on the words of the Edict, to have possession, but only to shew that your
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 difficulty1.

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. But it may be merely that a doubt might arise as to whether a thing never actually born could be called partus.

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. 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. 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. 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 fides possessor can usucapt partus conceived apud eum7. 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 him8, 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 fides possessor in such a case. The simplest explanation is to treat Paul as still dealing with the case of theft by the slave. But the text gives little warrant for this, and its conclusion is that the same is true if

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Footnotes:
1 The remark perhaps only puts these transactions on a level with sale.
2 See 38. 2. 12; 38. 17. 4. 5; Macbeth, Act v. Se. vii. II. 40 sqq.
3 41. 3. 14. 16. 4 Post. Ch. xxv.
5 41. 4. 16. 6 41. 4. 9. 10.
7 Appleton, op. cit. § 139. He cites other suggestions.
8 41. 4. 2. 14.
9 Appleton, op. cit. § 199. He cites other suggestions.
10 § 111.
30 Damnum by more than one. Distinctions  [PT. I

(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: quapro an cum uulte de occasi agi possit. respondit...igitur si quis servorum vulnus inflixerit eundemque alius ex intervallo ita percussurit ut maturius interfeceret quam ex priori vulnere moriturus fuerat, statuendum est utrumque eorum leges Aquilia tenere*.

(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 second injury was itself mortal. It does not shew that it was mortal apart from the primary injury, this shews that the second injury was not liable. It is noticeable that Julian expresses his rule immediately on the second injury, this shews that the second injury was itself mortal. In the actual case the death occurred at once since the loss resulting from his failure to prove that the second injury was of itself 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.

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 *altus postea examinaverit, ex alio vulnere perit* (11. 3) mean the same as *ab alio ictus decesset, alius...sta percussurit ut maturius interfeceret.* 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. 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.

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1 9. 2. 51. *pr.
2 Pacchioni, Law Quarterly Rev. 4, 180, arg. 9. 2. 51. 2.
3 9. 2. 11. 3. Fornico, Sachbeschadigungen, 180.
4 9. 2. 51. 1. *Idque est consequens auctoritas veterum qui cum a pluribus idem securus ut vulneratum est als appareret nullus ictu præterer non eorum tenere indicercerat.*
5 It seems unnecessary to set out the various hypotheses which all start from one or both of these assumptions. The views of Vangelow, Fornico, Groser and Ferrini are set out by Pacchioni (loc. cit.) who gives also an explanation of his own.

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**CH. II.**

**Theft of Slaves**

The title *De furtis* in the Digest is full of cases of theft of slaves, but so far as it is merely theft, they give rise to few special questions. The rule as to *furti* is will be more conveniently treated at a later stage: here it may be remarked that a *furtivus* was regarded as a thief of himself. If, however, two slaves persuade each other to run away, they have not stolen each other. The reason no doubt is that there is no contrectation, and theft at your mere suggestion is not *op e consilio tuo.* This was certainly the law for Justinian. *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. 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*. 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. According to Gais this was not theft, but gave rise to an *actio in factum* presumably for an indemnity.

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 of a different stage. The Twelve Tables impose, for breaking a slave's bone, a penalty half that in the case of a freeman! The *Lex Cornelia,* which made it capital to kill a man, included slaves in the term *homo*. 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 peculires they are stolen from the master. In the same way if a third person's property is stolen from the slave, the master has *sui furtis,* 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...
liability on the contract would be only de peculio, and his interesse, being measured by his liability, would be similarly limited.

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 columnia. Two cases require fuller statement.

Abduction of slaves, by force or by solicitation, was punishable by the lex Fabia, 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. 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. We are told on the authority of a rescript of Hadrian, that futrum of a slave was not necessarily plagium. 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. To take away, and have intercourse with, an ancilla aliena non nascetur was futrum but not plagium, but, si suppressit, poena legis Fabiae coerctor. Here there was concealment; in fact, plagium seems to be such a futrum as amounts to repudiation of the owner’s right.

It required doctus and thus the act of hiring persons who were in fact fugitivus was not in itself plagium where they had been letting themselves out before. 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.

The lex fixed large money penalties payable to the treasury. Mommsen thinks that in its first stage the proceeding was an actio popularis, tried before the ordinary civil courts. In the later empire it has become an ordinary criminal proceeding, a judicium publicum tried by Praefectus Urbis in Rome, Praefectus Praetorio in Italy, Praesos in a province.

The punishment is capital, varying in form according as the criminal is ingenius, honestior, humilior, libertinus or servus, the commonest punishment being apparently in metallum datio. An enactment in the Code speaks of a penalty payable to the fisc, at least for dealing in fugitives. The extreme penalty is thus reserved for the actual abductor, 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 fugitivus, though it seems to be all based on the lex.

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 judicium publicum. It cannot be much earlier since Ulpian and Paul both speak of money penalties. It is noticeable that the same writers are made in the Collatio to treat it also as a judicium publicum, which would mean that the change was made in their time, and the closing words of the title, in the Collatio, which deals with this matter, are, (op. cit.)

For certain forms of damage to a slave, the Edict provided a special remedy by an action called judicium de servo corrupto. It was an actio in factum, for double damages. The Edict gives it against one who is shown servum(s) recepitse persuasisse quid et dolo male quo sum(s) detereori ficeret. The word corruptio is not in the Edict.
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.\(^1\) 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\(^4\). 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\(^5\). 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\(^6\). The action is in duplum even contra fatorem, i.e. for twice the damage to the slave and loss immediately consequent on the wrong\(^7\). Thus if a slave were induced to destroy documents, the loss caused was chargeable, but not that from later similar wrongs by the habit formed\(^7\). So if he was induced to destroy documents, the loss immediately consequent on the wronge. Thus if a slave were even to receive another's property, the adviser as to what the man took with him, and the offender would be liable to pay twice the value for the corruptio, and twice or four times for the theft\(^8\).

The death, alienation or manumission of the slave, or the return of the property does not extinguish the action\(^9\). Like other rights of action it passes to the heres, though the slave is legated\(^9\), but, as it is penal, it does not lie against the heres\(^9\). Though it is Praetorian and penal, it is perpetual, a characteristic found in some other such actions\(^10\).

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2. 11. 3. 5. pr. 1.
3. 11. 3. 11. 3. 9. 21; a. r. 14. 9; a. r. 14. 14.
4. 11. 3. 11. 3.
5. 11. 3. 11. 3.
6. 11. 3. 11. 3.
7. 11. 3. 11. 3.
8. 11. 3. 11. 3.
9. 11. 3. 11. 3.
10. 11. 3. 11. 3.

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\(^{1}\) Servi Corruptio

It may be noted that Ulpian says of our case, haec actio perpetua est, non temporaria; 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\(^3\), to which it is closely analogous, it was originally in simplicium after a year.

The action was available to the owner, even though he had pledged the slave, and against anyone, even a usufructuary\(^1\). 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 usufructuary even against the owner\(^1\). It was not available either to or against the bonae fidei possessor\(^4\).

The words of the Edict\(^1\) 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 it could not otherwise be reached by existing law. One case is peculiar: we are told, by Ulpian, that, if you persuaded a man, dolo male, to a dangerous feat in which he suffered bodily harm, this action lay. Paul adds that an actio utilis Aquiliana is better\(^7\). The case is clearly not within the lex Aquiliana, 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 Aquiliana were fully developed.

In general, actual damage had to be shown: 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. Gaius is clear that there was no intention to do away with the general rule requiring actual deterioration. It 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...
the slave inutilis sit (\textit{fit}) \textit{ut non expediatur cum 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. 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.

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 \textit{dominus}.

During the Republic there was no legal limitation to the power of the \textit{dominus: iure genetum} his rights were unrestricted. 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. 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.

As early as A.D. 20 rules were laid down by \\textit{senatus consultum}, as to trial of criminal slaves; the same procedure being ordered as in the case of freemen.\footnote{1 Lenel, \textit{Palingenesia}, ad h. 1.}

By a \textit{lex Petronia}, supplemented by \textit{senatus consultum}, 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 \textit{ius gentium} were in force in A.D. 6.\footnote{2 I. 6. 1; G. 1. 62; In. 1. 8. 1. The Jewish law was more favourable to slaves: a result of the "relative" nature of Jewish slavery.\footnote{3 See Willems, \textit{Droit Public Romain}, 298.} Winter, \textit{Stellung der Sklaven bei der Juden}, 33.\footnote{4 See Blair, \textit{Slavery amongst the Romans}, 63 sqq.}}

Moreover, the \textit{decemvirate} of one Iulus Sabinus, he laid down a general rule for such cases. If a slave complaining of ill-treatment fled to \textit{fina 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.\footnote{5 See post, \textit{praetor major res adiuvat causas} in an edict of the Aediles as to castration. See also post, \textit{infra}, \textit{infra}, \textit{infra}.\footnote{6 See Suetonius, \textit{Claudius}, 25.}} The ground might be either cruelty or \textit{infra}, \textit{infra}, which probably means attempt to debauch an \textit{anailla}. It was to go before \textit{Pr. Urbi}, \textit{Pr. Praetorius} or \textit{praeses}, according to locality.

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Claudius provided that if a master, to avoid the expense and trouble of cure, exposed sick slaves on the island of Aesaculpia, the slaves, if 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 \textit{caedis crimine}. But he is not a very exact writer and may have antedated this legislation.

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 \textit{apadones}. Later events show that this legislation was ineffective.

Hadrian appears to have dealt frequently with these matters. He punished by five years \textit{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 \textit{se. Silianum} to those slaves who were near enough to have heard what was doing. He suppressed private prisons (\textit{ergastula}) both for slaves and freemen. He forbade the sale of men or women to \textit{lerones} or to \textit{lanidae} (purveyors for gladiatorial shows), without cause. He increased the severity of the laws against castration, by bringing it under the \textit{lex Cornelia}, with a penalty of \textit{publicatio}. It was immaterial whether it was \textit{libidinis} or \textit{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.

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. On the occasion of a complaint of ill-treatment reported to him by the \textit{praesides}, from the \textit{familia} of one Iulus Sabinus, he laid down a general rule for such cases. If a slave complaining of ill-treatment fled to \textit{fina 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. The ground might be either cruelty or \textit{infra}, \textit{infra}, which probably means attempt to debauch an \textit{anailla}. It was to go before \textit{Pr. Urbi}, \textit{Pr. Praetorius} or \textit{praeses}, according to locality. The
Restrictions on Master's Powers

[PT. I, CH. II]

complaint was not to be considered as an accusatio of the master, 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. The rules as to jurisdiction may be due to later legislation by Severus.

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

Diocletian and Maximian issued a rescript, itself unimportant, but suggesting that at that time (A.D. 285) immediate chastisement was a ground of accusation. 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. He also forbade the exposure of infant slaves.

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 show that Christian churches had superseded fana deorum and also the statue of the Emperor for this purpose, 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.

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

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. 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. Where slaves were so numerous, the traffic in them must have been a most important industry. There is indeed plenty of evidence of this, and of the fact that it was often carried on on a very large scale. Wallon gives a lively account of the usages of this trade, of the tricks of the dealers, of sale de catasata, 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 speaks of the practice of these firms, says that plerumque ita societatem creant ut qui quidam 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. The contract was to be construed as if they had

1. G. J. 53; In. 1. 5. 2; D. 16. 1. 2; Coll. 3. 2. 1.
2. Post, p. 83. 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. C. 3. 56. 5. 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, Ch. ii. in fine, cxxvi. Prohibition of sale to ad bestiam, 16. i. 49.
4. C. 3. 9. 12. 1. 4. 2. C. 9. 14. 1. There were also ecclesiastical penalties.
6. Marquardt, Organisation Financiére, Part III. The old tribunals applied to them as long as it lasted. On fuller regulations for exercising in the Empire, tribunals were set up in the churches: there must be profiscus 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 peculium, 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 profiscus must state nation, age and employment, misdescription involving forfeiture. A minor was excused, and error might be compensated for by double tax (Carcalla, who also excused non report of a trade carried on unlawfully by the massa insita 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 profiscus being needed with various exceptions. See 99. 4. passim; 50. 15. 4. 3. 8; 50. 14. 10. 1 39. 4. passim: C. Th. 11. 3. 2; 23. 16. 8; 18. 4. 4; C. I. L. 4. 4508.
7. 21. 1. 37; h. t. 44. 1.
8. 14. 4. 1. 40. 16. 97 (in some literary texts the dealer is called mercator). The distinction is not important: the actio tributaria though it applied only to slaves who traded with mercator must be understood to cover negotiations, including slave-dealing. 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. 22. 3. 9. In 21. 1. 45. 2 and some literary texts conditiones occurs a collective term.
9. Blair, op. cit. 25. gives an account of the chief centres of the slave-trade.
10. 17. 2. 60. 1.
12. 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.
13. 21. 1. 44. 1.
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. It may be that, when introduced, this was 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.1
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.2

The rules as to *periculum rei venditae* were the same as in other
cases.3 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 empto* would be met
by *exceptio doli*.4 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 *libertas*. Marcellus
remarks that he need not hand over what he would not have acquired
if the slave had not been freed.5 As, in that case, there would clearly
have been no *hereditas*, it has been said 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 21. 1. 44. 1. This action seems to date only from the time of Papinian (17. 1. 10. 5; 19. 1. 13. 25). See
Accrarias, Precios, § 637. It involved solidarity liability, 14. 3. 12. 2.
3 21. 1. 44. 1. If he used *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 having less care than a *bonus pater-
fanalis* would, the vendor was liable. 19. 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 Mackintosh, Law of Sale, ad h. l.

the value of the slave. It is not easy to think this excess was claim-
able, 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.6 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 show that he had ever fled before. 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.7
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.8 Justinian
applies this rule to all subjects of sale.9

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.10 In relation to slaves it is only necessary to say that this
would not include children already born since they are not accessories.11
On the other hand though the *peculium* was an accessory, it was said
to be *exceptum*, and did not pass unless expressly agreed for; if the
man took *res peculiare* with him, these could be recovered.

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. Hence, from
that day, *fructus* of all kinds and *partus* must be given to the buyer.12
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. 44. 5.; 21. 2. 3. But see Windscheid, Lehrbuch, § 389.
3 10. 3. 23. 3.
4 19. 3. 31. pr.; 18. 3. 25. 4; 47. 2. 14. pr.; In. 3. 28. 3. Accrarias, Precios, § 612.
5 Cp. 19. 1. 33. 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; Lüsingein, Custodia, p. 11.
6 18. 1. 62; 47. 2. 14 pr. See 30. 62. 63.
7 Ibid.
8 15. 1. 29; 21. 2. 3. If the *peculium* did pass accessories to it passed as of course, 19. 1. 13. 13.
9 28. 5. 38. 5; V. Fr. 15.
10 2. 17. 7.
Sale: Accessions after the Contract is made [PT. 1]

relative to property which goes with him. 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. If the peculium was sold with him, the buyer is entitled to all accessions to it. On these points the only restrictions to note are, that, though acquisitions ex operis pass, that which is acquired 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. If a sale was conditional, the occurrence of the condition had a retrospective effect in relation to these profits.

 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. 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, and must therefore account for the buyer's whole interesse, which would naturally cover what the slave might have acquired. 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. 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 fact that if the slave had been delivered, his institution would have been void, and all would have gone to X.

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 condutor till the price is paid, the man acquires to his dominus in the interval.

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. Ordinary cost of maintenance he may not charge unless the non-delivery is imputable to the buyer.

Africanus discusses a case of debt from the slave to the master. 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. If the theft were after the sale was delivered, then, on general principle, the buyer would be liable to condicio furtivae only in so far as he or the peculium had received the thing.

Except as to eviction and the Aedilian actions, 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. Labo 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.

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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. Henzer, 19 Ch. D. 612.

2 19. 1. 13. 18.

3 Edict of the Aediles may have contained a provision that on sale of a slave his dress passed, but not armamenta. The chief text is 26. 16. 4, compared with 34. 2. 35. 10. Lecel, Patric. 2. 1177; Ed. Perp. § 299, 12 (Fr. Ed.); Brever (Jurep. Antichad. 2. 446) credits 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, 31. 1. 38. pr. Lecel cites also 34. 2. 28, 24. 35. 9; 15. 1. 25.

4 19. 1. 30. pr.

5 19. 1. 30. pr.

6 Edict of the Aediles may have contained a provision that on sale of a slave his dress passed, but not armamenta. The chief text is 26. 16. 4, compared with 34. 2. 35. 10. Lecel, Patric. 2. 1177; Ed. Perp. § 299, 12 (Fr. Ed.); Brever (Jurep. Antichad. 2. 446) credits 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, 31. 1. 38. pr. Lecel cites also 34. 2. 28, 24. 35. 9; 15. 1. 25.

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142
Sale: Warranty of Quality

Apart from the Edict of the Aediles the vendor was not liable for defects unless he had warranted or was guilty of dolus. 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. The text adds that the buyer can sue at once, though before he could sue on the stipulatio duplae actual damage must have occurred. It was dolose to say recklessly of a man, who was in fact a thief, that he was worthy of entire confidence. 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.

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.

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. 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 condicio indebiti would suffice, 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. Even if the vendor knew the facts, there was no sale, 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 Aedilian actions, were nevertheless brought within the action ex empto in the classical law. 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 notorious, and therefore, the action ex empto being bona fidei, neglect of these duties was actionable therein. When this step was taken is uncertain. It is at least as old as Neratius, and may be older, since a corresponding extension of the Aedilian actions to sales other than those contemplated in the Edict is held by some writers to be as old as Labeo. 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 redhibitio in the actio ex empto, wherever the actio redhibitoria would have lain. 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. 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. 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. Neratius tells us that a vendor, even in good faith, is liable ex empto to deliver a slave who is not fugitimus, which here means fugaz, 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. The reason is unintelligible, and is in fact omitted by the Basilica. 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 fugaz 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, but not, apart from special agreement, where he was addicted to theft.

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

CH. III Edictal Obligations in the Actio ex Empto

46

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. Op. post, p. 43, and A. t. 15. pr.
2 19. 1. 4. pr. The words fur and noxius are usually understood to mean "under some present liability for defect." 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. 15. 1, fur certainly means only given to stealing. Post, p. 45.
3 Cf. 19. 1. 31.
4 19. 1. 15. 8. 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 ad esseare.
5 Ibid.
6 19. 1. 11. 5. Smith v. Hughes, L.R. 6 Q. B. 597.
7 19. 1. 21. pr.
8 19. 1. 6. pr. The reason given is that he has determined that the goods were solutae, being bound ex empto, even in the sale of a servus aliuscum, to give security covering this. The point is the same: the Aediles required a warranty.
10 19. 1. 1. 17. 1, 17. 17. 52. See as to measure of damages, in these cases, post, p. 63.
11 Thus it would cover costs and damages in a real action and the value of what he took with him and others of him induced to run away, 19. 1. 11. 32, 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. 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. This did not prevent its exclusion by agreement: it might be excluded altogether, or made for less or more than duplum, or limited to the acts of the vendor and those claiming under him. 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 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. 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 actio ex empto. 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 stipulatio duplae. 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 Moyer, Sale, 110-115; Mackintosh, Sale, Ed. 2, App. C; Lebel, Ed. Perp. (French Edition), 2, 298 sqq.; Girard, Manuel, 559, 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 jidicei~or needed except by express agreement, 21. 2. 4; A. t. 37. As to apparent contradiction in 19. 1. 19, see Accius, Princ. § 606.

3 21. 2. 37. pr.

4 21. 2. 36. pr.

5 19. 1. 18.

6 Cog. 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; op. 21. 1. 19; C. 8. 44. 6. 6. See also 21. 2. 38 and post, p. 47, n. 3.

7 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. Here it is enough to note a few points. The action on the stipulation could be brought only when eviction had actually occurred; while the actio ex empto might anticipate the interference. The actio on the stipulation is for a certain sum, usually twice the price: that ex empto is for quanti interesse. This will include partus born of an ancilla, a hereditas left to the slave and other accessions. 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.

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. The usual case is that of adverse ownership, but, where the subject was a slave, eviction might occur in special ways. Thus, if a jidicei~or were sold without notice of his status, the occurrence of the condition would be an eviction. So if the slave sold were one whom the vendor was under a jidicei~or to free. So, if he proved to have been free at the time of the sale. 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. The text adds that the same is true of the action actio stipulata. 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, 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.

A somewhat similar state of things arose where the property
was taken by a pledge creditor, by an actio Serviana. Here, however, recovery was held to be eviction. The difference is remarkable, since the creditor’s action does not affect the buyer’s ownership, and indeed we are told that, if he has paid 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. 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 nullus 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. Moreover if the condemnation was due to inuria iudicis there was no claim against the vendor. 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. Failure to recover the man from one who had taken him was equivalent to deprival. 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. 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.

It has been pointed out that these requirements lead to odd results. To claim, as a slave, a man you know to be free, is an inuria, but if it be done to preserve an eviction claim this is a defence. And while a promise to give a man who is in fact free is null, a promise to compensate for eviction on sale of one is good. 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. If, while

1 21. 2. 53.
2 Ibid. The right of action is not destroyed: see ab commissis stipulato resolvit non potest.
3 21. 2. 52.
4 Ibid. 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) a reasonable time before the condemnation (21. 1. 29. 2). This text shows that the stipulation contained a proviso for notice, but as this is inconsistent with the rule that not to give notice was doli it may be that the proviso was inserted in that particular case. For detail as to notice, Moyle, Sale, 117 sqq. Lend thinks the Edict expressly required notice (Ed. Perp. § 296, Fr. Edit.). It applied equally in ex empto, C. 8. 44. 8, 30. 39.
5 21. 2. 54. pr., etc.
6 19. 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; a. t. 21. 2.
7 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 duplus 21. 2. 17.
8 Accarias, Precis, § 607 bis.
9 47. 10. 12.
10 Ibid. 3. 18. 2.
11 Different reason, Accarias, loc. cit.
Partial Eviction

i.e. that it was still available. 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. 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. On the other hand, abandonment of the man (pro derelicto habere) is abandonment of the right.

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. 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.

(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. 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 deprivation 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. 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.

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

(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. This rule looks rational, but it is not

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.

In the case of an undivided part, there is difficulty. Ulpian appears to put all of either kind of part on the same level. Papinian gives the actio duplae on eviction of an undivided part. Pomponius says what comes to the same thing. A buys a slave. X brings viuidictum communum 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, 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. It may be noticed that in all the mancipations of slaves by way of sale, of which a record has come down to us, the stipulation says partem. 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 partem 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.

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.
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. No doubt it is equally true of earnings, for the
vendor is bound to hand over all he has received; and one whose
delivery has been vitiated by eviction is as if he had not delivered
at all. He holds this view though Ulpian quotes him as not holding
that the partus and fructus were sold. 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
status both for usucapion and in relation to the rule in legacy as to duae
lacrativae causae. 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
usu-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.

The law as to liability of the vendor for defects in the thing sold
was completely remodelled by the Edict of the Aediles. The compre-
prehensive 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 fujitivus or erro
or noxa non solutus, allowing redhibition or actio quanto minoris
according to circumstances. It applied apparently only to sales in
open market. As recorded by Ulpian, perhaps from Labeo, the Edict
is not limited in application to sales in open market, and the require-
ment 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
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
ex soenis dolo malo vendidisse dicitur.

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. 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. The promise gave a strictam 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.

The warranty could of course be expressly excluded, in part or
completely, and Aulus Gellius tells us that in sales in market overt
it was customary for owners, who would not warrant, to sell the slave
ipsei, 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 continent or after. We are told that there was no redhibition
in simpliciis venditionibus. This epitome 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 facts, and means that
agreements were usual under which the buyer could not
come into possession of the slave. Some texts cited to
shew that when the other came into existence this
was certain: the

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1. 21. 2. 3.
2. Actio, pp. 41 sqq.
3. 19. 3. 3.
4. 21. 2. 41.
5. 20. 62. 41; 21. 73. Actio, p. 34.
6. 21. 2. 42. 43. In discussing eviction we have said nothing of the connexion with the actio
in duplum against the auctor, the actio auctorialis of commentators. The connexion is certain:
the use of the stipulation spread from tractio to tractio (Vasro, de Re Rust. 2. 10. 5). As
Lenel shows (Ed. Perp. § 290), the actio auctorialis 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 manipulations 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 stipulatio scientia auctoris.
7. Beckmann, Kaufl. 1. 123. 375 sqq. The rules of eviction were applied to transactions analogous
to, e.g. giving in solutio (C. 8. 44. 4); satisfaction of legisvls generalis (21. 2. 50); permanenio
(C. 8. 44. 25) etc. But not to mere donatio, apart from agreement (C. 8. 44. 3).
8. Actio, pp. 41 sqq.
9. 21. 1. 11. As to the development of this Edict: Karlova, R.R. G. 2. 1290 sqq. Beckmann,
Kaufl. 1. 397.
where the defect was not such as to affect the value of the slave. On the other hand it was immaterial that the vendor had no knowledge of the defect, and thus the redhibitory actions do not necessarily exclude ex empto.

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 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 Mæsarius Sabinus. The remark which Gellius describes Caelius as quoting from Labeo is credited by Ulpian to Sabinus himself. 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. Aulus Gellius 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. The texts do not usually distinguish: they say that a defect does or does not prevent a man from being sanus.

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

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1 21. 1. 34. 6, 10. 10, 10. 5. 12. 1, etc.
2 21. 1. 1. 2.
3 9. 4. 2. 2.
4 40. 4. 2. 2.
5 40. 4. 2. 2.
6 21. 1. 1. 7.
7 21. 1. 1. 7.
8 21. 1. 1. 7.
9 21. 1. 1. 7.
10 The expression morbus sancius from the XII Tables is considered in two texts and its meaning discussed (see 21. 1. 65. 1; see also 42. 1. 60; 56. 16. 113). But as Ulpian and Pomponius say, the matter is one of procedure: it does not concern the Edict in which the word sanctius does not occur, 21. 1. 4. 5.
11 21. 1. 1. 8; h. t. 4. 6.
12 21. 1. 8. 1; h. t. 4. 6.
13 21. 1. 8. 1; h. t. 4. 6.
14 21. 1. 8. 1; h. t. 4. 6.
15 21. 1. 10. 10; h. t. 5. 5.
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90 21. 1. 1. 7.
Arrius Menander, speaking of military discipline, says that to be an erro is a levis delictum, while to be a fugitivus is a gravius. But there is something misleading in this: the attitude of mind is different.

III. Noxa non solutus. 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. As we have seen, the word noxa refers to private delicts sounding in damages, not to criminal offences.

IV. Quod dictum promissumve cum veniret fisset. 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. 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. 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. 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 constanza et gravitas of a philosopher. The dictum might be the denial of bad qualities, or the affirmation of good. It might cover any sort of quality, and was obviously most useful in relation to mental and moral qualities. Many dicta are mentioned in the title, besides those already instanced. In one text we have the curious warranty that he was not a body-snatcher, due no doubt to temporary and local conditions. In some of the recorded cases of actual sales, we find a warranty

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1 42, 16, 4, 14.
2 21. 1. 1.
3 21. 1. 18. While the Edict says only noxa, express agreements usually said furtus non est. See the manipulations recorded in Brunus and Girard, loc. cit. There is indeed some evidence for it in the Edict, 21. 1. 16. Post, p. 99. 21. 1. 1.
4 21. 1. 15. pr. 3. If intended to deceive they might give a. doli. 21. 1. 18. pr., where there are other illustrations. So also auctor does not mean a first class actio (a. l. 1). The statement that he has a pecudium is satisfied however small the pecudium may be (a. 2. 2). An artifex is a trained man, not necessarily highly skilled (21. 1. 19. 4).
5 21. 1. 17. 30.
6 21. 1. 4. 4.
7 Abarious, active, watchful, careful, saving, not a gambler, had never fled to the statue of the Emperor, not a for, which means that he had never stolen even from his master, 21. 1. 15. pr., 19. 3. 21.
Other defects. Nationality

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 Edictual actions. It is said that it is *aequissimum* to declare the facts, and in reference to one of them the Edict is mentioned: 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.

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.

XI. One who has been sold *ut exportetur*.

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, 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. 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: it was, in particular, presumptive evidence of their fitness or unfitness for certain employments. 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. It is assumed by Lenel 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.

[Note: further text follows...]

CH. III. Sale of Slave with other property

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 *vicarius*. Here if the main thing is redhibitable, so is the slave, though he be in no way defective. But, for a defect in an accessory slave, the right of redbition 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*). So Ulpian, agreeing with Pomponius; and Gaius, in saying that if *omnia mancipia* are to go with a *fundus* they must be guaranteed, 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. Any thing however may accede to a man, *e.g.* the *vicarius* may be worth more than the principal slave.

Presumably where the right of redbition 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.

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

The actions given by the Edict are the actio redhibitoria, and the *actio* *quanto minoris* (otherwise called *aestimatoria*), 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. But if the slave were quite worthless, *e.g.* a hopeless imbecile, it was the duty of the *index* to order refund of the price and return of the man even in this case. The actions are available, on the words of

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 Marquardt, Vie Privee, 1. 290. Many slaves were captivi and the possibility of *post-barratia* might be important.
7 Wallenop, op. cit. 2. 61.
8 50. 15. 4. 5. In most of the recorded cases of sales the nationality of the slave is stated. There is an exception in a. d. 139 (Brunn, op. cit. 288 sqq., 326; 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.
9 Cf. Ch. 12. 4. 4. 3. 4. 1.
10 Ed. Pomp. § 65. It is not clear whether he thinks the same of those last discussed.
11 21. 1. 1. 2.
the Edict, to the heirs and all universal successors, and, though they are in a sense penal, they lie against the heirs. This is because they are purely contractual, (for they do not depend on any wrongdoing,) and for the same reason the action is de peculo if the vendor was a slave or person in potestas (the slave returned being reckoned in the peculium at its real value).

On the actio quanto minoris there is not much to be said. It is not actually mentioned in the Edict as cited by Ulpian. During the six months the buyer has his choice between the two actions; thereafter he is confined to order return of the man. There is a separate action on each defect, and entitles him to recover the difference between the price he paid, and above, this might be the whole price, in which case the what he would have given had he known the facts. As we have seen above, this might be the whole price, in which case the index 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.

It was for the buyer to prove the defect. In such a matter the evidence of the slave himself, taken in the ordinary way, by torture, was admissible, 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. 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.

The action was not available so long as the contract was still conditional: the index 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.

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1. 21. 1. 10. 5, 28. 5. 48. 5.
2. 21. 1. 23. 4. 57. 1.
3. If a slave bought and his master brought redhibitoria, he had to perform in solido what was required of the buyer in the action—an application of a wider rule, 21. 1. 37. 2. Post, Ch. xi.
4. 21. 1. 1. 1.
5. F. 2. 17. 6; D. 31. 1. 48. 1. 48. 2. 61. See Lensel, Ed. Perp. § 293. 3.
6. 21. 1. 34. 16; 31. 2. 32. 1.
7. 22. 3. 7.
8. 21. 2. 5. 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 factum suo. Post, p. 96.
10. 21. 1. 48. 7.
11. 21. 1. 43. 9. 10. Post, Ch. xv.
12. 21. 1. 23. 7. 60.
13. 21. 1. 23. 1. 60.
14. 47. 2. 17. 2.
15. 48. 1. 48. 7.
16. Actio Pauliana.
17. 21. 1. 1. 1.
18. 21. 1. 43. 8; C. Th. 3. 4. 1 (=C. 4. 58. 5). The text says the rule is to apply non solvere in barbaris et etiam in provinciis suis servatus. 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 post-tosanction, and it had been argued, a silentio, that it was not so with provinciales. He gives him back talis quisque: he need not warrant him non solvere 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 fur Bender, 169.
19. 21. 1. 33. 1.
20. 21. 1. 24. Instances are: earnings while in possession of buyer or recovered by him from some other possessor, ligatures 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.
21. 21. 1. 43. 5. post, p. 80.
The deterioration for which he is to account must, by the Edict, be after delivery. It may be physical or moral. *Familia*, for this purpose, includes slaves, *bona fide serventes* and children, 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. It is immaterial to the liability whether it were *dolo* or only *culpa*. 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. 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. 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*, 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.

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. 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 future, damages in any pending action about the slave, whether he receive them, or, *dolo or culpa*, fail to do so.

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 rehbited, had made away with, or taken with him on running away, expenses of medical treatment, cost of training, damages paid in a noxal action, and the value of any thing he had stolen from the buyer, but not the cost of maintenance, since he had the man’s services in return for that. 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, 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*.

The Aediles require the buyer to do his part first: the render being made in *iudicio* and under the supervision of the *iudex*, who will issue no condemnation till it is done. 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.

The general effect of the *actio redhibitoria*. being to undo the transaction as far as possible, no promissio is given to the distinction between a vendor who knows and one who is ignorant. In the *actio quanto minoris* the buyer recovers the difference between price and value at the time of sale. 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 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 *nitus*. In another there certainly was a warranty: *tenetur ut avrum venditd praecedit*. In another text Pomponius makes the warranting vendor liable for the whole *interesse* whether he knew or not. And in the text last above cited, he is quoted as saying down the same rule with Labeo and Trebatius in opposition to Julian. The texts may be harmonised on the view that where the Edictal duties are enforced the vendor if ignorant was liable only for the price.

...
warranty is not expressly stated: it is however suggested by the words, hardship 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 penal2; though, so far, they are no more penal than other contractual actions. And while we are told in one text by Ulpian3 that the vendor is condemned unless he pays what is ordered by the Edict, another, by Gaius4, 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. Lenel5 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 out6 that this jars with the whole nature of the action as elsewhere recorded, and with the fact that the stipulatio as to sita says nothing about duplum. 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. 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.6

Karlowa7, 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 duplex, 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.8 To reach this result, he repudiates the directly contrary evidence of the existing recorded sales, in all of which the undertaking as to defects is simple, while the stipulation on eviction is in duplum in all but one case. He passes in silence the significant rubric of the title on eviction, (de evictiominibus et duplici stipulatione), and the evidence from Varro9 as to usage: indeed he holds that there is no reason to think the edict followed usage. He quotes two texts in which Ulpian4 and Julian10 say that, if the vendor refused to take back the man, he need pay no more than the price and accessions, as showing that, if he did take him back, he would have to pay double, whereas what they mean is, as the context shows with certainty, that, if he took him back, he would have to pay both price and any damnas.

Pernice11 thinks that the concluding words of the text of Gaius 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, 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 actio acceptum, there is no actio redhibitoria, but the buyer has an actio in factum to recover the price. The merits of the redhibitory are not considered: the vendor has acknowledged the slave to be defective by taking him back12. It is essential that he has been actually taken back: a mere agreement for return is not enough. Conversely the vendor can bring an ordinary action ex vendito, to recover any damage13. We are told that in the buyer's action he must have handed back all accessions before he could claim14. It is also said that the fact that the slave is redhibitor is a defence to any action for the price15. If there was an agreement for return on disapproval at any time or within a fixed time this was valid16. The claims are the same as in the ordinary actio redhibitoria: indeed the action is called by that name17.

1 See on these texts Pernice, Labo, 2, 2, 245 sqq.; Dernburg, Pandekten, 2, § 100.
2 21. 1. 23. 4.
3 21. 1. 29. pr., et actione venditore sita non possestat, condemnabilir et.
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. 38. 4; cp. 21. 1. 31. 22 sqq.
9 The a. redhibitor s is available against heres, 21. 1. 23. 5.
10 R.R.G. 2. 1293 sqq.
11 21. 1.
12 See e.g. Girard, Manuel, 562.
13 See e.g. Girard, Manuel, 562.
14 21. 1. 23. 5.
15 21. 1. 29. 3.
16 21. 1. 29. 5.
17 21. 1. 45.
18 5, 1. 18.
19 21. 1. 31. 17.
20 21. 1. 31. 19.
21 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, 4. 1. 29.
23 4. 58. 4.
24 21. 1. 23. 8.
Actio Redhibitoria: Flight or Death of the Slave

We have said that the buyer, desirous of recovering the price, must restore the slave. 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. But the rule developed if there was no culpa in the buyer, and the vendor had sold scientia, there might be an actio redhibitoria, the buyer giving security that he would take steps to recover the slave and hand him over. Manumission of the slave by the buyer, says Paul, at once ended the aedilician actions. This rule is remarkable and is elsewhere contradicted—such rights were not destroyed ex post facto. It is commonly settled down to the fact that he is now a freeman, incapable of being destroyed ex post facto. It is commonly said that the buyer, desirous of recovering the price, must restore, but it ought not to affect the connexion, unless he restore or the failure is without fault or privity of him or his.

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 as by providing no doctor, or an inefficient one. If there was no need to estimate his present value. We are told that they survive 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. The meaning of this statement is not too clear. It is sometimes said that the rule is that he must give the value of the slave in his stead. 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.

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 redhifted 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 as it certainly was one of the first to be considered. But it was not the decisive point in classical law. Africanus 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. Ulpian and Paul lay down the rule that sale in a lump sum does not exclude redhibito of one, apart from these special cases. 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. 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 redhibito de omnibus, but these words are generally rejected.

(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. If one of the heirs has done damnun he is of course liable in solidum for it, arbitrio judicis, and if it has been paid by a...
common procurator there will be an adjustment by *udicum familiae erossunda*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. Similar rules apply to an original purchase in common neither can redhibit alone.2. 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 share4.

(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 obligatory 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. As in English law the inconvenience was felt, and one instructive text shows 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 *Tuilk 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, who had notice, was bound to observe the restrictions, which were pure negative, not on the impossible ground of an obligation, but because to disregard them was not enjoying the property that another should do or not do.8

The new imposition of a penalty gave the late owner no right to seize the slave. He went to the Fisc10. But it was usual to agree for a penalty to *exportetur*, or the like. This condition was regarded as imposed entirely in the interest of the vendor, who could therefore remit it.11 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: 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 *res perseverat*, but a *poena*. This could not figure in an *actio ex vendito*. This is Papinian's earlier view,12 but in an adjoining text 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. 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. One would have expected to find some necessary relation between the amount of the penalty in our case and the reduction in the price.

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: a slave could not impose liabilties on his master in that way.

The restriction was a bar to any manumission in the place before export. An act was therefore void: but it did not prevent manumission, *ante fides ruptam*, elsewhere19, and it appears that if the man returned after manumission, the Fisc seized and sold him into perpetual slavery under the same condition.

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1 21 31 9 It seems from the language of this text which Upian gives on the authority of Pomponius that the single procurator was matter of convenience not of absolute rule
2 21 31 6
3 21 31 7, 8 Nor could one alone compel delivery: the vendor has a lien till he is wholly paid
4 21 31 10 *Itud*
5 Stipulations are found in which the promissor undertakes for himself et cae ad quos ad redhibit (c. 32 37 3). The reference is to the heres
6 *Tuilk v. Moxhay*, 2 Pls. 774
7 1 27 5 Probably even here the grantor to A could not have enforced it
8 As to *real* effect, *Hering*, Études Complètes 8 62
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. It applied though the slave had been transferred to another person; 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. 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.

II. An ancilla sold ne prostituatetur. 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. The Digest tells us nothing as to the effect, in classical law, of a mere proviso, ne prostituatetur, without more. After Marcus Aurelius the woman became free. If there were an express agreement that she was to be free she became so, under earlier law, however informal the agreement was: it was a quasi-manumission depriving the buyer of his rights on the sale. The vendor was her patron. The effect was the same, by a provision of Vespasian, even though she had been resold without notice of the proviso.

If there had been merely a stipulation for a penalty, then, apart from the question of liberty, this could always be recovered. 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. The penalty was recoverable only from the promisor, but it applied even where the actual wrongdoer was a second assignee, even without notice. If a right of manus iniectio had been reserved, this was effective, at any rate after Hadrian, as against any owner of the ancilla. If on a first sale the agreement was that she was to be free, 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. 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.

III. One sold ut manumittatur, ne alterius servitutem pateretur, 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. 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. A text of Scaevola's seems at first sight in direct conflict with this principle. 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. 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 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 Hadrian appears as saying that in such cases the slave was not free until manumitted.

Hadrian required the magistrate to declare the woman free, the vendor being still her patron but with limited rights, 2 A. 10; C. 4, 56. 1; on similar principles Severus and Caracalla provided that, if a right of manus iniectio reserved was released, for money, the woman was free. 40. 8. 7.

18. 7. 9.

Post, Ch. xxv.

18. 7. 9. 60. 8. 6. Prostitution under colour of service at an inn was a fraud on the law.

C. 4, 56. 3.

2 C. 4, 56. 1.

20. 2. 34. pr.

21. 2. 34. pr.

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IV. One sold *ne manumittatur*. As we shall see later, the effect of such a provision was to make the slave incapable of manumission. 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. 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.

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1. The rule covered gifts and devises, 29. 5. 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.
4. In another text, on another point it is said *cum suis si manumiserit nihil agat*, *tamen hæres erit*: *serum est eum esse manumissatum*. But this is a case of satisfying a condition on institution: it was conditional on his freeing a *serus hereditarius*, 29. 7. 20. 1. Labeo is doubtless influenced by *favor libertatis*, and the desire to save an institution. The text continues: *Post additionem, libertas...consuls* etc. It may be doubted whether this is from Labeo.

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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. 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. 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. 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.

Both at civil and praetorian law, slaves *pro nullis habentur*. This is not so at natural law, *quia quod ad ius naturale attinet omnes homines aequales sunt*. We have already noted some results of this conception, 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 *Juno Quiris*, and similar propositions might be laid down as to other...
worships. 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), 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.

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.

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. They are mainly directed against Judaism and heresy, and their dates and characteristics show that they were enacted rather in the interest of the section of the Church that was then dominant, than in that of the slave.

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 oportum, and they could offer, and take, effectively, a conventional extra-judicial oath.

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. 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, was available even where the person buried was a servus alienus. 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, but it is necessary to say something as to the connexion of

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1 See Marquardt, Culte, s. v. Religionsz.
2 See C. Th. 16.4.5; Ann. 11.7.14.6 sqq.
3 Pr. 9. 16. 5. 62. 4. 54. 8. 63. 3. 4.
4 Ann. 12. 4. 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.
5 Wallon, ‘Stellung op. 65.
6 See C. Th. 10. 4. 5; 15. 5. 40. 6; 62. 4. 54. 8. 63. 3. 4.
7 3. 45. 3. 4.
8 E. 12. 2.
9 11. 7. 2. 2. Thus the Praxtor speaking of unlawful burial says ossa hominis, not liber hominis, 11.7.2. 2.
10 11. 7. 14. 6 sqq.
11 Darenberg et Saglio, Dictionnaire des Antiquités, s. v. Lex Collegii.
12 3. 4. 1. pr. The funds were thus the property of the corporation.
13 Bruns, loc. cit. 348; Wallon, op. cit. 3. 451.
14 Antiq. p. 27.
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. We have seen that the classical law regarded sale to a leno as a reasonable mode of punishment. Debauching a man's ancilla was an iniuria to him, and might be furtum, 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 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. Rape of an ancilla aliena was made a capital offence by Justinian, but it did not involve forfeiture, as that of a freewoman did. 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.

Far more important in law and more fully recorded is the gradual recognition of servile cognition. 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, that slaves lived together in permanent connexion between them, or between slave and free could be no more than contubernalium, and thus enslavement of either party to a marriage ended it. Accordingly, infidelity between slaves could not be adultery, and though a slave could be guilty of adultery with a married freewoman, it was not possible for an ancilla to commit the offence, or for it to be committed with her. 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, but Paul warns us that though these names, and the expression "cognition," are used, they are without significance for the law of succession. So Ulpian tells us that the rules of cognatic succession apply to non-servile cognition, nec enim facile usum servilis videtur esse cognatione. Diocletian says shortly that servus successores habere non potest, and applies the principle in two cases. So, even in late law, the title on legitimation makes it clear that an ancilla could not be a concubina for this purpose. This is an enactment of Constantine, who had already made it severely punishable for decuriones to cohabit in any way with ancillae: 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.

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. 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. Paul tells us that it must be understood to include the uxorises of such slaves, 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. 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. 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.

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 C. Th. 15: 8: 2; C. 11: 41: 6.
2 Ante, p. 37.
3 C. 9: 13: 1c. In earlier law it was dealt with as via, 48: 5: 30: 9.
5 47: 10: 15: 15.
6 Wallon, sp. cit. 2: 180: Marquardt, Vie Privée, 1: 265; Erman, Servus Vicarius, 442 agg.
7 Ulp. 6: 5.
9 53: 2: 45: 6; C. 5: 16: 27. As to Capires, post, Ch. xiii.
10 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 sinner was not punishable as such. P. 2: 36: 16; C. 9: 9: 24.
12 33: 7: 19: 4; But not a slave who rented the land from his master.
14 38: 10: 5.
15 C. 6: 39: 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; t. 9: 9: a child born of a freewoman and a slave in sparsus and cannot rank as his father's son, though the father be freed and become a decurio, C. 6: 55: 6.
16 48: 5: 30: 9. The unions were to have no legal effects.
17 Jews, Winter, op. cit. 44: 45; America, Cobb, Slavery, 245: 246.
18 33: 7: 12: 7.
20 P. 5: 6: 38.
bonae fidei possessor, or to the usufructuary, or, in the case of dotal slaves, to the vix, are largely based on recognition of the claims of nature. So, too, it was laid down by Constantine that in suidicum familiae everscundae, or communis 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. 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.

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

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 savoratio of a father, without leave of the Praetor, applied to fathers who were slaves at the time of the birth. 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.

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 an 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. Trebatins 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. Sameola and Tryphoninus lay 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.

Justinian took a more decided step. He observes that the rules of proximity in honorum 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 freedwoman, or an ancilla has children by a slave or freedman, 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. 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.

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

The fact that an actio inuiriurum 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.

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. Even a municipal magistrate

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1. 33. 88. 12. At the time of the fe. in the text, donee is still a slave, but it is post mortem legatum; and donee is to be freed by heres: else he is thus free at dies omen of the fe. The point of the allusion to the l. Faustus is that if she claimed under the second will she would suffer a deduction of ½, 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 quasi-marital relation before manumission, and is not designed to give rights to those who would have been saporii had their parents been free. The enactment of Diodianus still held good (C. 6. 59. 4, note, p. 77). But while the classical lawyers contemplated only interpretation of wills, Justinian gives rights on intestacy. And though he is discussing parental rights, the words of the In. are wide enough to cover the case of impensal cohabiting with slaves.
4. Nov. 22. 9. 10.
5. Nov. 16. 11. 88. 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 seruus, and being freed they continue together and connexion is not broken, the connexion is marriage and the fund a dos. This, indeed, shows that if two free persons were living together the question—marriage or not—was one of fact: the facts stated are evidence of affecto matrimonii.
6. 47. 10. 15. 33.
7. 6. 1. 13. pr.; 47. 1. 3. 4; 47. 10. 15. 34. Authorization by tutor curato or procurator was enough, 47. 10. 17. 1. To exceed remum was not act insanes, 4. 1. 42.
might be liable if the flogging were excessive. But any reasonable beating, corrugendi vel emendandii animo, was not contra bonas mores, and so was not within the Edict. Intention to insult the owner was not needed: it is incorrect to say that it was presumed: it was not required. The action lay servii nomine. It seems probable, however, that intention to insult the dominus might be alleged in the formula, and proved, 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 aliius factum esse dixerit causa cognita iudicium dabo, a provision which besides covering all other kinds of insult appears to include the contrivance of verberatio by a third person. 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. 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 servii nomine, the latter action being available if there was no such intention. This is expressly stated in one text, 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

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1 47. 10. 15. 39. Details, a. r. 72.
2 47. 10. 15. 38.
3 47. 10. 15. 35; C. Th. 12. 1. 39. Thus while a rehusiting buyer need not return ordinary damages for contumia, since they were for the lexmes to him, he must where it was for verberatio or quae commodo, it is, in relation to the slave, an acquisition through him, 31. 1. 43. 5; 47. 10. 29. and, 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. castigation of a slave, 9. 2. 27. 28. The Edict of the Aediles gave an alternative remedy, apparently in quadruplium. Lenel, Ed. Perp. § 295. 11.
8 47. 10. 15. 35.
matter what may have been the intention of the speaker. It follows that the master will have no action *suo* or *servum 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 servus*. There can be no ordinary *actus iniuriae* under the general Edict, because there was no intention to insult. 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 *actus iniuriae*, 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 *servum*. When the case is different with *verberatio* and *quaesitio* there, at least in the opinion of the later jurists, the feelings of the slave himself are considered. 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 cognitae *nullius 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. All the texts which expressly mention it are from Ulpian. It has all the marks of a purely juristic creation.

Of the slaves’ 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*. The liability of slaves on their delicts was recognised at civil law. But we are told that they

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In *Inciupia to Slaves* [PT. I]

*Incapacities of Slaves*

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1. 47 10 pass.
2. 47 10 1, 5 spectat ad nos, C. 9 35 8, *davm habent intentionem*. The action did not pass on alienation or minimisation of the slave 47 10 29.
3. C. Th. 12 1 69 *servum corporis quod statum est in serva pro hominum, 47 10 15 35 haec estiam et servum servorum paenitet est.
5. *condemnation* produced *svfamam* even where the person directly insulted was a slave (C. 2 11 10). If both insulted and insulted are slaves, no *svfamam* (47 10 18). The *actio iniuriae* 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 iniuriae* with one for *dominus*, there was dispute among the jurists. See 47 10 15 46, 47 7 32 34 pr. 41 1 55, 5 3 5 1, 19 3 14 14 48 5 6 pr. etc. The master has no special connexion with the case of slaves. See Gerard, Manuel 396, Fearn, Labour, 2 1 45.
6. The dominion view seems to be that the actions were cumulative.
7. 50 16 162.
8. 44 7 14.
9. 44 7 44.
10. 50 17 52 pr.
11. 15 1 41.
12. 44 7 14 12 13 pr. The fact that the obligation was not *curas* made it worthless in many cases. A master’s promise to free a slave meant nothing (C. 7 16 36). A promise to give security was not satisfied by offering a slave unless the circumstances made the master liable: soluta: 46 3 3 post Op. 28 1 28.
13. G. 1 119.
14. 26 1 4 15.
15. 28 1 16 19.
16. 24 1 20 7.
17. Thus is subject to the rule already mentioned as to error *communis* (C. 6 23 1). They could not, of course, be the same in its terms. See 28 1 28.
18. 41 1 5 4 3 7 2 40 1 28 pr. G. 8 179.
19. 28 1 22; 2 11 13, 50 17 107.
20. 2 11 5 pr. 13. If they did so promise when supposed to be free, new security could be demanded. It was no case for the rule *error communis* factum to make the master wholly liable, was unfair to him. To make a liability only of *peculium* was unfair to the other. To make the slave liable was meaningless 2 1 8 2.
21. 1 4 4 1, C. 3 41 5, C. 3 1 6, 7.
22. Similarly *compromissum* by *servum* in null.
Incacity of Slaves in Procedure

an excepi dolis. 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 excepi pacti consensu. The distinction is not unmeaning: whether there had or not had been a pact was a question of fact: whether there had been dolus or not left more to the index. They could not interrogare in iure or be interrogated to any purpose. As they could not be parties, so they could not sit in judgment. We are told that they could not act as 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.

There were other less obvious cases. Slaves could not be custodes ventris against supposititious children, 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. 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.

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, 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. For similar reasons, though they could not have procurators in lawsuits, they might have adserteres.

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CH. IV

Incacity of Slaves in Procedure

(and later procuratores) in causeis liberales. 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. 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: instaurandum quod ex conventione extra iudicium defertur referre non potest. Another text says: si servus meus delato vel relato et iure iurante tauer: puto dandum mibi actionem vel exceptionem propter conventionem. The last words show 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 was 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. 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. 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, i.e. to notifications to the fisc of property to which it has a claim (such as bona vacantes), 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. Delatio of crime was a form of blackmailing, which called for...

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1 Post. Ch. xxvii. A slave could formally begin proceedings for a libelus to the Emperor on murder of his master. The case is exceptional, and moreover, the denouncing slave could possession was held on behalf of absent master, but where the judge was to hear even his slaves, C. Th. 4. 22. 1 = C. 8. 5. 1; C. Th. 4. 22. 4 (96). Slaves could not appeal on behalf of absent master, but where the judges were to hear even his slaves, C. Th. 4. 22. 1 = C. 8. 5. 1; C. Th. 4. 22. 4 (96). Slaves could not appeal on behalf of absent master, but where the judges were to hear even his slaves, C. Th. 4. 22. 1 = C. 8. 5. 1; C. Th. 4. 22. 4 (96). Slaves could...
repression as early as A.D. 20; but an information, if proved, does not seem to have been punishable in ordinary cases. But even for crimes slaves were forbidden to inform against their dominii. It seems that Constantine allowed no exceptions, but ordered the slaves to be killed in all cases crucified unheard. Several enactments toward the close of the century except maiestas, and Justinian's Code omits this prohibition in Constantine's enactment. And the Digest, laying down the general prohibition as to fiscal causes, and crediting it to Severus, 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.

The capacity of slaves as witnesses requires fuller treatment. As a rule their evidence was not admissible in civil cases. 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. We have no limitative enumeration of the cases in which their evidence was admitted. 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. 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, 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 cases in which their evidence was admitted. Justinian speaks of the admissibility of the evidence of slaves in the case of hereditas, but only in cases of theft. Perhaps, therefore, it may be supposed that the Digest only repeated an earlier enactment. In these cases the law required not only the examination of the slave, but also the examination of the will. The Digest also speaks of the examination of slaves in the inventory of a will, but it is not certain whether slaves were allowed to give evidence of the correctness of the inventory made by the testator.

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was to be in reason and this was for the judge to determine. 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.

It is frequently laid down that a slave is not to be examined for his dominus, or one jointly owned for or against either master. As to evidence against dominus this is a very ancient rule. Tacitus, speaking of A.D. 16, alludes to it as based on vetus senatus-consultum. According to Dio Cassius, Julius Caesar solemnly confirmed the rule. Cicero in several passages refers to it, basing it not on the doubtful-ness 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. Tiberius even disregarded it altogether.

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. A text from Papinian quotes Hadrian as holding such evidence admissiblen. On the other hand Paul speaks of the evidence as excluded, and an enactment of A.D. 240 speaks of this as an old established rule. 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. Ownership shown as a fact, whatever its origin, barred the quaestio. Nor could those who had formerly belonged to him be heard. Bonae fidei possession equally barred the evidence. It was not merely excluded: it was capitally barred. It may be added that evidence without torture was equally inadmissible. The exclusion applied also

to slaves owned by father, child, or ward, except, in the last case, in the actio tutela.

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. The slave of a corporation could be heard against its members: they did not own him. 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. 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. The Digest appears to limit this to the case where the acquisition is after the case has begun.

So Paul says that a slave manumitted to avoid torture can still be tortured. The Digest in an extract from a work of Ulpian lays down the same rule, attributing it to Pius, and adding, dummodo in caput dominus non torquetur. If a slave under torture did incidentally reveal something against his master, it was laid down by Trajan that this was evidence, and Hadrian speaks, obscurely, in the same sense. Elsewhere, however, Hadrian and Caracalla are credited with the contrary view, and we are told that the opinion of Trajan was departed from in many constitutions.

Severus and Caracalla say that such evidence is to be received only when there is no other proof. Paul declares that it is not to be listened to at all. In A.D. 240 this is declared to have been long settled, and, the enactment of Severus and Caracalla having been inserted in the Digest, in a somewhat altered form, 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, and to slaves of near relatives and wards, are late: the original rule having applied only to actual owners.
There were some crimes to which the rule did not apply. Cicero speaks of corruption of Vestal Virgins, and *coniuration* as exceptions. It is, however, remarked by Mommsen that these republican exceptions speak of corruption of Vestal Virgins, and revenue. These exceptions are constant (except for a short time under the Emperor Tacitus, who abolished them) and are repeatedly reaffirmed. Other exceptions are mentioned. Several texts mention regressing, i.e., creating an artificial scarcity in food supplies. Hermogenius mentions coinage offences. Constantine allowed the evidence where a woman cohabited with her slave, and also laid it down that a slave might be tortured, to discover if his master had prompted him to run away to a third person in order to involve him in the liability for receiving *fugitivum*. The evidence was not admitted in ordinary crimes of violence. 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, are the result of the *Sc. Silianianum*, and the complementary legislation.

Paul 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 he tells that in absence of proof of earlier flight, *servi responsioni credendum est: in se enim interrogari non pro domino aut in dominum vadetur*. 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 owners, whether the accuser was a relative or not. It might be a slave of the accused or of the husband or wife of the accused. 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. The accuser and the accused must both be present. 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. Even if they deny, they still become public property, that they may not profit by any lie. So also do slaves of the accuser, but not slaves of *extranei*, since in their case the reason does not exist. If the accused is acquitted he or she can recover from the accuser, apart from *calumnia*, the estimated single value of the damage. If he is condemned, the surviving slaves *publicantur*.

The general proposition that slaves were liable for crime needs no proof. 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. They must be tried where they had offended, and the *domina*, (who could defend by himself or a procurator) must defend there, and could not have the case removed to his own province. 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. Slaves might be tortured on suspicion, and there was an *actio ad exhibendum* for their production for this purpose. They might

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1 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 *sigillum* (48. 19. 4. 17) or incest unless adulterous 48. 5. 40. 8; 48. 19. 5. Val. Max. 6. 8.
2 Coll. 4. 11. 1; 4. 12. 8; C. Th. 9. 7. 4; C. 5. 17. 6. 6; 9. 3; D. 48. 18. 1. 11, or of ascendants or even strangers if employed by the accused, 48. 5. 28. 6. or one in whom be or she had a usufruct, or *h. f.* possession: it might be a *statuteux* or use to whom servile and personal 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 48. 5. 28. 11. 12. 13. 12. 14. 48. 5. 28. 15. 16. Cond. ex lege. If the slave is accused double his value may be payable, 48. 5. 28. 17.
4 48. 5. 19. 6.
5 From late-Justinianian sources: *Pl decisions* (Coll. 14. 3; C. Th. 9. 16. 1); crimes of violence *Caes. Comper* (C. Th. 9. 21. 1) *C. C. Th. 9. 21. 3; Coll. 14. 3; C. Th. 7. 18. 2; 48. 5. 9. 9. 3. A fiscal offences and *Dolution* (see *p. 85*). 12. 12. 14. 50. *etc.* C. 1. 12. 4; 9. 24. 1; D. 2. 1. 7. 1; 48. 9. 1. *pr.* 48. 6. 4. 2; 48. 10. 1. 13. *etc.,* *n. d.* *n. d.* 14. 7. 1. 16. 2; anyone in fact can defend, 48. 1. 9; 48. 19. 10.
6 48. 1. 9; 48. 19. 19. Though his ownership remained he could not free, *post*, Ch. 235. 10. 4. 20.
not, however, be tortured till the accuser has signed the charge, and
given the usual undertakings. One to whom fideicommissary liberty
was due was not to be tortured till the confession of someone else had
raised suspicion against him. Servi hereditatis 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. So
a slave might be tortured on suspicion of adultery with the wife, she
being tried first to avoid praemunict. 

In capital charges whoever was defending must give security nullo
satis, otherwise the slave would be kept in chains. The rules of pro-
cedure and general principles are the same as when the accused
is a free man, 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 shown by the fact that it is thought
necessary to say that, after trial, it is the slave, not the defender, who
is condemned. If one does not, the court will not sentence at
once, but will try the issue, and in such a case the slave is allowed,
ex necessitate, to plead his own cause—ut ex vinculis causam diceat.
In like manner slaves could not appeal though others could for them
The connexion, 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 fugitivus. It was capital for a slave knowingly

to offer himself for military service. Slaves might be capitally punished
for bringing claims at law against the Fisc, in certain cases. Slaves or
libertus were punishable for aspersio to the decuronate. Slaves were
capitally punished for cohabiting with their mistresses. In some cases
delation was punishable in a slave where it would not have been so in a
free man. Conversely there were crimes for which a slave could not be
tried, owing to the punishment or to the definition. Here the hetero-
genature of the criminal law is brought into strong relief.

Venusius tells us that slaves can be accused under any law except
those imposing money penalties, or punishments, like relegato, not
applicable to slaves, such as the lex Iulia de vi privata, which fixes
only money penalties, or the lex Cornelia murrarum, for the same
reason. But in this last case he says durior es poena extra ordinem
vamograph. He also tells us that the lex Pompeia de parrociwi does
not, on its terms, apply to slaves since it speaks of relatives, but that,
as natura communis est, it is extended to them. On the other hand
we are told by Callistatus 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 deict, and one which might have
been expected to be generalised. For sepulchra violatio a freeman incurred a fine. a slave was punished, extra ordinem.

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

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1 Pliny Epist. Traj. 30, but the Digest while excluding danooes of many kinds does not lay
2 Now Thoel 17. 1 Apparently temporary
3 C. Th. 9 9 11, 9 11 1 Extended to liberti, Nov. Anthem 1. Elaborate rules as to
4 punishment of women
5 Ante p. 91
6 But see post, p. 94
7 Forfeiture of of bona Though not personally liable they might be the homines coact,
8 48 7 2
9 48 12 4 The lex Cornelia de falsus covered slaves who in will wrote gifts of liberty to
10 themselves and by interpretation those writing gifts to their domes, 48 10 15 2
11 48 2 17, 48 3 2
12 48 12 3 (Sc Cottanius, A 20). Those barred from accussing a freeman of adultery
13 cannot accuse a slave. But Donnait provided that general pardons on occasion of farsus did
14 not apply to slaves who were undefended. 48 2 2, 48 10 16. Minor differences, e. g. C 9 4 6 2, 3.
15 48 2 2
16 49 1 13, 18
17 Post, Ch. xii
18 49 19 19
19 48 3 2, 39 5 25 1
20 48 2 2
21 49 1 13, 18
22 48 3 2, 39 5 25 1
Criminal Slaves

A Sc. Silianum, apparently of the time of Augustus, confirmed by a Sc. Claudianum and a Sc. Pisianum, and again by an Oratio of M. Aurelii, 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.

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; not, for instance, slaves who were in a remote part of the property, or on another estate. If it occurred on a journey, those with him, or those who had fled, might be tortured, but if none was with him the Sc. did not apply. Those partly his might be tortured unless at the time protecting another owner. Slaves freed by the will might be tortured, but with caution. Tranjan added even inter vicos libri, with issue annul aurei.

The power extended to slaves of children not in potestas, to slaves castrensia peculii, and, by a Sc. of Nero, to those of wife or husband.

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.

But it did not apply to slaves of the mother where a child was killed, nor of sover where vir or uxor was killed. 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.

The difficulty is that he is not and never would be the heir. Scaevola decides that the Sc. applies, probably because the slave is the property of the hereditas, which represents the deceased father. 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 alien.

1 29. 5; A. 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.
4 Spacialis, Hadrianum, 18. 11.
5 Except suspects on other grounds, 29. 5. 1. 26, 30; P. 3. 5. 7.
6 P. 3. 3. 6; D. 29. 5. 1. 31.
7 29. 5. 3. 4. No might those subject to plegire or usufruct, or statibus, or those conditio legi. But no torture of those to whom sc. of liberty was due unless suspected, nor did it apply to slaves.
8 29. 5. 1. 12; F. 8. 5. 5.
9 29. 5. 1. 11.
10 29. 5. 1. 10. And killing of foster-child did not bring the Sc. into operation, 29. 5. 1. 10, 16.
11 29. 5. 1. 3.
12 The reason in the text cannot be right (quia exstinctum legitum et libertas est). The will might not fail: there might be other hereditas.
The basis of the liability was that they did not render help, *armis, manu, clamore et objecu corporis*. 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. The *lex* Cornelia gave a money reward for revealing the guilty slave. Though the heir was accused the slaves might still be tortured. The *Sc.* applied only to open killing, not to poisoning and secret killing, which the slaves could not have prevented: it must be certain that he was killed violently. 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.

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. But as failure to help was the ground of liability there were several excuses. Thus, unless circumstances showed them to be *doli capaces*, child slaves might not be tortured, though they might be threatened. Nor could those be tortured who did their best though they failed to save. If the master lived some time and did not complain of the death, the *quaestio* would not be continued for the purpose of discovering the murderer. 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. It should be added that even the master's dying accusation was not proof entitled the authorities to proceed at once to *supplicium* without further evidence.

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 provided that the will should not be opened till the *quaestio* had been held (i.e. all necessary inquiry made), with a penalty of forfeiture to the Fisc, and a further fine. The will was not to be opened, no *adito* was to be made, or *bonorum possessio* demanded, till the *quaestio*, 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. There was an *actio popularis* (half the penalty going to the informer) against any who opened the will before the *quaestio* had been held. If some slaves ran away and the will was opened and they were freed by it they could still be tortured.

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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. Daerse, N. R. H. 15. 569.
4 29. 5. 22. 2.
5 h. t. 3. 17. 1. 29. 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. 36. 11. Many details of these matters are omitted, and see post, Ch. xxv.

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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. 34; P. seems to hold that there might be torture in case of poisoning.
6 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.
7 P. 3. 5. 4; D. 29. 5. 1. 29. 29. The text observes that the Sc. does not apply.
8 h. t. 14.
9 h. t. 1. 32. 39.
10 29. 5. 1. 29. 29.
11 h. t. 34. 35.
12 h. t. 3. 2. 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.
13 h. t. 1. 38. 2.
14 h. t. 3. 2. 8.
15 h. t. 3. 2. 39. Slave so handed for supplicium was not in the *hceditas pro Falcidia*, 35. 2. 3. 39.
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 composition covers with the historical origin of this liability: it is enough to say 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 composition covers

\[\text{money composition comes to render of the slave loses all trace of its original vindictive purpose, and the money composition comes to be regarded by some of the jurists as the primary liability. But the system as we know it was elaborated by the classical jurists, who give no sign of knowledge of the historical origin of the institution, and whose determinations do not depend thereon.\}\]

The XII Tables distinguish between *furtum* and *noxa*. *Furtum* here means *furtum nec manifestum*, (the more serious case was capital punishment,) and *noxa* no doubt refers to the other wrongs—mainly forms of physical damage—for which the Tables gave a money penalty. 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

\[\text{ch. v] Scope of Noxal Liability}\]

his forms of security on sale, uses the formula, *furtis noxisque*, 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*, and though Pomponius speaks of a duty to promise *furtis noxisque solutum esse*, 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 *injuriam*) in the Edict.\(^4\) In *damnun* 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.\(^5\)

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*. 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.\(^6\) 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 *indicia publica*), e.g. *furtum manifestum* under the XII Tables, noxal surrender was allowed. But it has been shewn\(^7\) that while one of these texts\(^8\) refers to the *actio doli*, which was certainly noxal in appropriate cases, the other\(^9\) though it refers both to criminal proceedings and to noxal actions does not suggest that they are overlapping classes.\(^10\)

The system applies to the four chief delicts, and to the various wrongs which were assimilated to them by *actiones utiles*, etc.\(^11\) 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 us vocatus*, there was a noxal action.\(^12\) If my slave built a structure which caused rain to injure your property, my duty to remove it was noxal.\(^13\) There

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\(^1\) Holmes, Common Law, 9 sqq.; Deering, Geist, d. R. E. § 11 a; Girard, N. R. H. 12. 21 sqq.
\(^2\) Id. 1. 65.
\(^3\) BRUNO, op. cit. ii. 65. 
\(^4\) Id. 1. 288 sqq.
\(^5\) Id. 1. 65.
\(^6\) BRUNO, op. cit. ii. 65. 
\(^7\) Id. 1. 46.
\(^8\) G. 4. 73; In. 4. 8. pr.; 4. 17. 1; D. 5. 3. 20. 5; 9. 4. 1; 42. 1. 6. 1.
\(^9\) 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.
\(^10\) BRUNO, Foutias, i. 38.
\(^11\) Holmes, Common Law, 9 sqq.; Deering, Geist, d. R. E. § 11 a; Girard, N. R. H. 12. 21 sqq.
\(^12\) Some said *noxas* 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, Rody, de usufructua, 137; Mohnsen, Strafrecht, 7.
Scope of Noxal Liability

was a *populara actio sepulchris violat.* 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 dolis* was noxal, if the matter in which the *dolus*
was of the kind which gives rise to noxal actions, but *de peculo,* if it
was a matter which ordinarily gives rise to the *actio de peculo.*3
Although *murara* was an ordinary delict, and thus gave rise
to a noxal action, it does not seem that this was the usual course.
Probably the many cases involving a slave by a slave were ordinarily
so small that there would be no question of noxal surrender,4 and another
occurred was of the kind which gives rise to noxal actions, but
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It arises also in some private delicts, *e.g.* damnum in turba, *incedendum, murara.*6
The *actio populara sepulchris violat.* was ordinarily in *serum,* but, as we have

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1 47 12 9 11
2 3 9 4 17 43. One text suggests that this was the proper way (47 10 9 3)
though we are told elsewhere (6 17 4) that what might be a light matter if done by a free
man might be serious if done by a slave *civitas consensu et persona*
3 47 10 17 14. C Th 13 3 1 (921) provides that if a slave results on the person of a professor, his master must
throw 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 the ruler released. In the *Const.* it appears in the code (C 10 93 6),
these provisions are omitted
4 47 10 17 6
8 47 8 14 15, 47 9 1 pr.
9 47 12 8 11
10 4 4 24 3
11 64 7 5 5
12 47 3 42
13 Post Ch x
14 Exceptional cases later
15 10 4 3 7
16 50 16 215
17 Lenes. *ed.* 1§ 58. This seems to follow from the structure of 50 16 215 The contrary
opinion of Gumm is due to his line as to the nature of the *interrogatio* to be considered
18 9 4 2 9, 47 2 17 3
19 9 4 22 pr.
20 9 4 23 1 3

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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 exehbendum,* for the production of the slave, and 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 an *actio ad exehbendum* for production of the
*servum,* and the plaintiff could then point out the one on account of whom he
wished to proceed. The liability depends not on the mere fact of
ownership but on *potestas,* which is defined as *praesentis corporis copiam
facultatem* and again as *facultatem et potestatem exehbendi ex usu.*

*Noxal Liability.* *Potestas*

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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. Many texts speak of it as being, an eius sit, i.e. on the question of ownership. There are others which assume it to be, an in potestate habet. And there is at least one which may be read as implying that they mean the same thing. The most probable view seems to be that now adopted by Lenel. 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. 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 show that the Edict, Si negabat, giving alternative courses where potestas is denied, refers only to absent slaves. 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. 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. 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 delictione. 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 will have to be stated in the systematic account of the action which must now be given.

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 siti. 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. Any alienation of him to a person out of jurisdiction or to a potestor whom it might be difficult to bring before the court, was a breach of this undertaking. Noxal surrender was not, (though Ofilius thought otherwise,) for the liability still attached to the man, on the principle, noxal caput sequitur. (It must be noted that in all these cases the security is only donec iudicium accipiat, 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 statutifer before, satisfied the promise, since the possibility of his becoming free was to have been reckoned upon.

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. If he does this he is absolutely released, though there exist minor rights in the man. 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. Thus an outstanding usufruct is no bar, and the usufructuary cannot recover him without paying litis aessimatio to the surrenderee, provided the surrender was in good faith. The effect of the transfer is to make the transference owner of the slave. Thus if it be to the usufructuary the usufruct is ended by confusio, the fact that the slave dies after surrender is of course not ordinarily replaced damages or surrender. 2. 9. 1. 2. 50. 16. 215; 9. 4. 21. pr., 33. 29, which Eisele thinks interpolated. (Z. S. S. 13, 124.) II. 1. 92 (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.

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. 5). But as the text shows, 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 continuance equivalent to denial. Naber, Mommasey, 39, 156. The person interrogated may ask for delay, since his answer may have serious results. 11. 1. 9.

2 2. 9. 1. 1. 3. Ibid. 2. 9. 1. 1.

3 2. 9. 1. pr.

4 2. 9. 6. The same was true in true cases of freedom: he could still be used. This did not hold in inanis since the fact that he was free would prevent the corporal punishment which here ordinarily replaced damages or surrender. 2. 9. 5. Anot., p. 100.

5 50. 16. 215; 9. 4. 21. pr., 33. 29, which Eisele thinks interpolated (Z. S. S. 13, 124.). II. 1. 92 (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.

6 9. 4. 15; In. 4. 8. 3.

7 9. 4. 14; In. 4. 8. 3. 9. 4. 29. See also post., pp. 104, 106.

8 7. 1. 17. 2; 9. 4. 21. pr. So where the slave was pledged, 4. 3. 9. 4. As to these texts, post., p. 187.

9 4. 8. 3.

10 7. 4. 27.

11 In. 4. 8. 3.

12 Z. S. S. 9. 4. 15; In. 4. 8. 3.

13 It is for the Institutes say (4. 8. 3) that the slave was entitled to freedom, quia praetorius intro ductus, when he had wiped out by earnings the damage done—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.

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. If this is refused condemnation follows, with the alternative of surrender. If it is taken, the action is lost, but this does not bar a future action based on a new potestas, beginning after the oath was taken. The alternative course is to take an action, sine noxae deiditione, there and then, which imposes obligation in solidum, but is lost unless actual present potestas be proved or loss of it, dolo malo. This action on denial of potestas may of course be avoided by withdrawing the denial before litis contestatio, and as it has a certain penal character it is not available against the heres of the denier. If the defendant did not deny potestas, Vindius held that he could be compelled either to appear with the slave to accept a judicium, (judicium sibi promittere) or, if he would not defend, to give security to produce the man, whenever it should be possible. 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 bonus fidet 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, ussu praetorii. This releases the defendant, and as in the case of an indefensum, gives the holder the actio Publiciana. But on the return of the dominus, the Praetor may, for cause shewn, give him leave to defend. 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. Moreover, in the absence of the dominus, anyone interested, for instance a pledgee or usufructuary, might defend the slave for him, and would have an actio negotiorum gestorum against him. And such persons, like the owner, might, if they were absent in good faith, come in later and defend.

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 now liable, and if he is sued the dominus is released. His liability is as great as that of the dominus, but he must give security indicium solvi as he is not the real principal. Payment by him before litis contestatio would release the dominus, as well as payment under the judgment. 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. The receiver by the surrender acquires the actio Publiciana, and if the dominus replies by an exceptio iusti dominii, he has a replicatio doli.

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 communis divindendo, i.e. if it is damage to some common thing. And if both sue together the judge may order surrender to both, in common.

The intentio of the formula in noxal actions states the duty as being either to pay or to 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. It follows that the actio indicati is only for the money: if this is defended the right of surrender is lost. But surrender after condemnatio does not release, if there are any outstanding rights in the man, such as usufruct, and the plaintiff can sue by actio indicati, without waiting for actual eviction, unless the outstanding right is extinguished.

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

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1 11. 1. 8, 20 or the future dominus in case of servus hereditarius, h. t. 15. pr.
4 These rules apply in any case in which, without the necessity of an exception, a defendant could not possibly be owner. 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. 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 subjects.
6 9. 3. 20. 5. If before judgment he has promised to pay or surrender, the action on his promise of course allows him both alternatives.
7 42. 1. 4. 8.
8 46. 5. 69. Perhaps surrender of him as statutus sufficed, but it is not clear that the text which says this (9. 4. 12) refers to surrender after condemnation.

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fraud. 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. The action lies, whether some other person is liable or not, e.g., when the slave was simply told to run away. 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 and the plaintiff who has elected to take one liability cannot fall back on the other. 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, exceptio doli posita. 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, since as we have seen this ductio of an indefensores would have released, had it been done before litis contestatio.

The principle, Nova 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 rehabit is noxally liable, and, as he might have surrendered, he can recover from the vendor no more than the price. This minimal cost of surrender he can recover, whether he actually defended the slave, or surrendered him on a clear case. 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.

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: 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. A bona fide 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, and so will anyone who takes possession of him. If a servus noxius is captured by the enemy, the right of action revives on his return. If a cives becomes a slave after committing a wrong his dominus is liable.

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. Moreover, it is finally extinguished if the slave comes into the hands of one with whom the action could not have begun: 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. 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, though as we have seen there is a right of indemnification, with the alternative of leaving the slave with the buyer, noxae nomine. Even though the sale be annulled, the slave being ineptus, there can be no actio furti.

The case of legacy of the slave gives rise to some distinctions. Gains, 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.

Julian, dealing without a legatum per vindicutionem, says that in a case of theft before aditio, there is an ordinary noxal action. 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 tells us that if he is noxally defending such

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1 G. 4. 77; In. 4. 8. 5; 47. 3. 3; C. 14. 4. 4.
2 I d.; In. 4. 7. pr.; 4. 7. 1; 47. 2. 65; P. 2. 31. 8. It avails against heres, but true dominii.
3 G. 9. 4. 24. 2. This is all that the word perpetua seems to mean. juxta mortis causa of a servus noxius was a gift only of what he was worth as such, 39. 6. 16. 5.
4 13. 6. 21. 1; 47. 2. 65; P. 2. 31. 7. 8, 9.
5 Unless he “contrict” afterwards, 47. 2. 17. pr.; 1. 4. 78; In. 4. 8. 6; C. 3. 1. 1; 4. 14. 6.
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.
7 47. 2. 16.
8 Ibid.; G. 4. 37; G. 4. 78; In. 4. 8. 6.
9 Gains tells us that the Proculians had held that the action revived when the confusion ceased—a rule which would have most inequitable results.
10 47. 3. 17. 1; 4. 1. 62. 2.
11 47. 2. 68. 3.
12 11. 30. 70. pr.
13 G. 9. 40, a fortiore if it was after aditio. In 47. 2. 65 Neratios gives the rule and the reason.
14 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 indiciis, 9. 4. 14. 1. As to heri’s duty of warranty as to seacer, ante, p. 16.
a slave who is a statuliber, and the condition is satisfied during the

*indicium*, 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.

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 exception *rei in indicium 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 *indicium* to him. This way of putting the matter

shews that the action was one and the same: it was only the *indicium*

that was transferred—the intervention of the Praetor being needed to

make the necessary changes in the formula. In like manner the

ordinary noxal action and that *sine noxae deditione against dominus

scias* were really one and the same, so that the plaintiff could pass

freely, *pendente iudicio*, from either to the other. 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 *indicium* 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*. In another it is

*quasi decessum sit*. *Translatio indicii* 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 indicii*, 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. It is

laid down, on the authority of Sabinus, Cassius and Octavensus, that

the heres, noxally sued, may surrender the *indicium*, and is thereby

released, as having transferred all his right, being required, however,

to give security against any act of his, whereby the man may become

free. 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. On the Proculian view, which allowed

revival of noxal claims when the *confusio* ceased, 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 (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). This rule has been

remarked on as exceptional, ss, in other cases in which the ownership

passes, the defendant is not released from his obligation to pay the

damages. This seems to be the law in the case of death, and it is

clearly laid down for the case in which the slave is evicted, while the

noxal action is pending, and for that in which a slave is noxally

surrendered while another noxal action is pending. 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 *adserllo libertatis* while

a noxal action is pending: he says that the noxal *indicium* becomes

*inutilis*. 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. 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. And in the case in which he

is noxally surrendered to A while B's noxal action is pending, though

djudgment will go for B, there is no

1 9. 4. 14. 1. 2 40. 7. 9. pr. 3 CP. 47. 2. 62. 9. 4 9. 4. 14. 1—18. 5 97. 2. 62. 2, post, Ch. xxii. 6 Koschaker, Translatio Indic. See also Girard, Manuel, 1966, and post, App. iv. 7 Koschaker, op. cit. 199 sq. 8 9. 4. 15; 40. 7. 9. 2. 9 9. 4. 15.

with translato iudicui. in the case of death where this was inco-


ceritable, 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 statuister, etc., since here translato was
quite feasible. it is true that in case of eviction there has, in strict-
ness, been no divesting fact, the legal ownership is unchanged, but this
is equally true of the case of the slave declared free in adexitu liber-
tatis. in the case of noxal surrender the solution was not release, but
refusal of actio vidicta. 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 sabinius took the progressive side, but
which was hardly complete even in the time of ulpius.

some details are necessary to complete the general account of the
action. it must be defended where the wrong was done. compen-


satio is allowed, at least in justinian's time. upon surrender the sur-
renderer normally becomes owner, but not if the surrendrer was not
owner, or the slave was duc tus because the dominus was absent or
refused to defend or surrender. in such a case the surrendere uste pos-
sident, and has the publician action, whether he knew, or not, that
the person sued was not the owner.

there is a curious text dealing with the excepto dom, in which
ulpius, 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. 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 inter-
mediate 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 noxal, and judgment on the undicato-
cium comes first, the slave need not be handed over till security is given for
what may have to be paid on the noxal claim, while if judgment in the

1 3 2 42 2 16 2 10 2
4 6 2 5 6 4 6 1 1 28

it may be convenient to group together the rules as to the effect of
dearth of the slave during the proceedings. if the slave died before
the action was brought, or before litus contestato, the dominus was released,
even though he had dolo male ceased to possess, at the time of the
death, unless indeed he was already in mora in accepting the
vidictum. 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. it appears therefore that death
of the slave would not release. an imperfect text of gaus seems to
thrust this case, and the question whether the surrender of the slave
death would suffice. the autun commentary on gaus 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. 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
law as to death after condemnatio, and what was the rule in case of
death, pendente vidicta. 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, is probably correct. it but
cannot be derived with certainty from anything said in the sources,
and it represents an increased burden on the dominus. as to death
after litus contestato, but before judgment, it may be assumed that the
rule was no severer in classical law, and that thus a corpse might be

2 6 3 8 4 2 1 105
9 8 1 5
8 1 2 3
2 6 3 8 4 2 1 105
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2 6 3 8 4 2 1 105
surrendered, and the view is most widely held that in later law death did
not release. 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. 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 it is said that one who has accepted a iudicium,
on account of a slave already dead, ought to be absolved, quia desit
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, 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. But these texts lose much of their force
in view of the well-known rule that dolus pro possesione est.
(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. But as we shall
shortly see the obligation differed in ways from an ordinary
alternative obligation.

There has been much discussion among commentators as to the
essential character of noxal liability as contemplated by the classical
lawyers. Is the master’s liability personal or is he merely defending,
as representative of the slave, primarily liable? That a slave is in
tworthily liable for his delicts is shown by a text which says that
he is liable, and
-ing that he could not himself be
sues. This has led some writers to hold that the master’s liability is an as defensor of a person who cannot
defend himself, an opinion which finds indirect support in the texts.
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. Other texts expressly describe the action as defensor servii.

2 The owner can recover, ex Aquila, the amount he will have to pay owing to inability to
surrender and can code his actions in lieu of surrender, 9. 2. 37. 1: 9. 1. 16. So we are told
that de pauperia is extinct if the animal dies before litis contestatio—whereas it implies that it was not ended
by death after 9. 1. 1. 13.
3 9. 4. 42. 1.
4 9. 4. 42. 4.
5 9. 4. 26. 1.
7 Windscheid, Lehrbuch, § 856.
9 48. 7. 14
10 Sall, loc. cit.
11 Sall, loc. cit.
12 See, p. 106.
13 9. 4. 38; Sell, op. cit. 76.
14 47. 3. 19.
15 Girard, loc. cit.
17 Roby, Roman Private Law, II. 48.
18 9. 2. 39. 3.
19 9. 4. 39. 3.
21 Nothing turned on the distinction: it may have been more readily regarded as representative
as it was of no logical ground for personal liability.
22 Former view, Girard, N. H. H. 11. 440; latter, Sell, op. cit. 11 sqq. It is an old topic.
23 Haezel, Dissensiones Dominorum, 188.
24 48. 1. 1.
25 Ante, p. 106.
26 48. 1. 6. 1; 47. 2. 62. 5, etc.
27 Ante, p. 90.
surrender in the forefront, and treat payment as subordinate. But the view that surrender is facultative, \(\text{(in solutione)}\) cannot now be held, for Lenel has shown that the \textit{intentio} sets forth the payment and surrender as alternatives. Girard infers that it is a case of alternative obligation accordingly, so that the \textit{intentio} and the \textit{actio} are two different \text{obligation} and cites several texts as stating so. But since impossibility of one alternative did not release from the duty of satisfying the other, and death of the slave did release the \textit{dominus}, he considers that it was only after \textit{litis contestatio}, when death did not release, that it became alternative. To this it has been objected that the \textit{intentio} cannot express any kind of obligation different from that which was due before, and that in a true alternative obligation the index would estimate the value of the creditor's right, and fix the \textit{condemnatio} accordingly, so that the \textit{ea res}, the money condemnation, would not exceed the value of the slave. In our case it might do so: it was the \textit{litis contestatio} which a freeman would have to pay for the wrong.

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

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

\begin{enumerate}
\item 9. 4, 2, 2; 9. 4, 2, pr., etc.
\item Ed. Perp. 106. He shows 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.
\item loc. cit. Lex Aquilia, § 10. 1, 1, pr.; G. 4, 71; In 4, 8, pr.
\item Dernburg, Pand., 2, 79; Savigny, Oblig, § 38; Van Wetter, Oblig, 1, 208.
\item Kipp, 2, S, S. 10, 397 sqq., reviewing Girard.
\item 9. 4, 1, 2, pr., etc.
\item In 4, 6, 81.
\item \textit{locale cit.} He cites 3, 2, 40, 4. Other cases, post, p. 129. Sell, op. cit. 169, Accurias, Précis, § 896, thinks them arbitrarium in special sense, and cites two texts (9. 4, 14, 1, 19, pr.) which show that in some cases there was room for glossen \textit{indecis}. Ante, p. 107.
\item 9. 4, post., C. 3, 41, 2.
\item P. G. 4, 49; C. 3, 41, 4; 9. 4, 2, 3, 5, etc. As to cond. furtivis, C. 3, 41, 5. In riparia, fully liable for men \textit{coniicii} by him, 47. 8, 2, 4. So under L. Cornelia where slaves to his knowledge took up arms to seize a property by force, 45. 3, 3, 4. The rules penalising writing gifts to himself covered dictating them to a slave, 46. 10, 16, pr. \textit{Postumus} to danger of passers could hardly be an instance, 9. 3, 5, 10.
\item 47. 10, 17, 7.
\item 9. 4, 2; 47. 6, 1, 1; 47. 10, 9, 3.
\item 12. 10, 2, 3.
\item 9. 4, 2, pr., etc.
\item In case of failure to prohibit would survive against the slave in that case, but in all delicts, the \textit{诨res} was not liable. The personal liability and the noxal liability were essentially one, and thus one liable in \textit{solidum} could be sued noxally. If the slave was alienated before action the buyer became noxally liable, while the vendor was still liable in \textit{solidum}. If the former was sued, Ulpian cites Pomponius as holding that the vendor was released. Though the obligation is one the parties are different. If the slave was freed there is some difficulty as to his liability. If he had obeyed his master's \textit{iussum}, he was excused as being bound to obey, unless the thing was so serious that even a \textit{dominus} ought not to be obeyed therein. Celsius thought that if it were a case of personal liability, it could not be noxal, (a view clearly negative above) and that thus if the \textit{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 \textit{leges}, e.g. the \textit{lex Aquilia}. And Ulpian, who tells us these views of Celsius, remarks that mere absence of prohibition was no excuse in any case, and that the opinion generally held was that due to Julian, i.e. that the rules of the XII Tables, and the words \textit{noxiam noxii}, applied to the later \textit{leges} as well, and thus in all delicts, if the owner's participation was short of absolute \textit{iussum}, the slave was liable and remained so after manumission. The \textit{obligatio in solidum} burdens the \textit{dominus}, but does not release the slave. It must be noted that \textit{iussum} here means command, not, as in many places, authorisation.
\end{enumerate}
If a slave has committed several delicts against the same or different persons, the master is released by delivering him under the first judgment, e.g. where he stole a man and then killed him. This seems to lead, from the rules already stated, 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, and though it looks odd in later law, it is not irrational.

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, and that in no case is the pledgee (or precario tenens) noxally liable. 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 duxus, 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.

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*, surrender by whom, even before condemnation, releases him, and ends the lesser right by confusion. 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 usufructuary, 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 usufructuary, in whom there is a usufruct, to the condition that the usufructuary, or cede the usufruct to the old owner, at once, without waiting for actual eviction.

Three texts create difficulties in the application of this coherent scheme. One seems to give an action against the usufructuary in the first instance. 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. A second text seems to subject the owner’s right to surrender one, in whom there is a usufruct, to the condition that the surrender is sin 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 usufructuary for any damage to his interests that the surrender may cause. The third text is a more serious matter. It observes that if an owner hands over a pledged slave *per iudicium* 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. This is a surrender between *litis contestatio* and *condemnatio*.
Delict by more than one Slave

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. It is a possible conjecture that the surrender was after condemnation; the word absolutus having been wrongly used for officio iudiciis liberatus. 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.

If a delict is committed by several persons, each is wholly liable: judgment and execution against one do not bar action on the delict and execution against one do not bar action on the delict against the others. 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. 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 hominis coactis. There was certainly a noxal action, expressly mentioned in the Edict. The adjoining text shows that this was not an express provision of the Edict. The adjoining text observes that the noxal surrender will be only of those who are shewn dolo feceisse; not, that is, of slaves among the homines coacti who may have been acting innocently.

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. On the other hand Ulpius allowed it on equitable grounds, if the damage had been done merely culpa. And Gaius allowed it generally, because it might be

1. Ante, p. 177, n. 1. 2. See 5. 3. 20. 3. The next part of the extract is corrupt: the preceding part is treated by Gadenitz as interpolated (Interp. 144). Our text is incorrect in the Florence. See also Perini, Labeo, 2. 1. 209. As the fraud is that of dominus the noxal character of the actio needs explaining. The point is that the actio dol. 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 pledges on the same level as fructuary, giving him no liability but a right to defend. The only notable difference is that if he refuses it and is barred, his pledge is ended (sullum est pignus cuius per accipitrum desegratur), while unfructuous, as a substantive has, continues technically till it is destroyed by non-use. 9. 4. 32. 1. 26. 6. 27. 30.

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

8. Cicero, Pro Tullio, 3. 7; 13; 31. D. 47. 6. 2. 14; 50. 16. 40 (which is from that book of Ulpius's Commentary which deals with this matter); 50. 16. 165. 3. Lestl, Ed. Perp. § 167. Op. F. 5. 6. 3.

9. 47. 6. 6. 10. 1. 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.
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. 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. 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.

There were special rules in the case of Publicani. Two separate Edicts dealt with their liability for acts of employees, 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 ademptum vi and damnnum, done in the course of collecting the revenue, by the publicanus, or his employees, and the other with furturnum, not necessarily in the actual course of collection. 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 furturnum and damnnum. As to the actual content of the liability, Karlowa 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 ademptum did not apply to the provinces. He infers from a comparison of some texts, really inconclusive, that the familia in the Edict as to furturnum 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. He thinks that the action under the Edict as to ademptum was not penal, but the whole content of it as recorded is opposed to this view. He thinks that, in the case of furturnum, the action sine noxae deditione was only against the owner, while in the other it was certainly against any of the publicani.

The rules as to the case of ademptum 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, in the course of the collection, any socius vectigalis being liable. The action was for twofold within a year, in simplicium after a year, 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. Though the term familia usually covers all slaves, it applied in this case only to persons employed in the collection. 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. They might not be defended in their absence, but if they were produced there would be an ordinary noxal action. 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.

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. How far these rules may be extended to the Edict as to furturnum is uncertain. That it was an independent Edict is shown 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 of publicanum. It provides for an action sine noxae deditione, in the case of furturnum by the familia publicani, if the wrongdoer is not produced, whether it was in the collection or not. It is probable from the allusion to publicanorum factionis that it applied whether they were slave or free. It can hardly fail to have been penal, and probably the penalties were those of furturnum. The publicanus remained liable though he sold or freed the slave, and even if the slave ran away. The text adds that if the slave is dead the publicanus is freed, since he has not the quaestor's authority to produce the slave or slaves, or of the ordinary action instead. It is reasonable to expect that, in the collection, the liability would be in some cases fourfold. If several publicani, liable only pro parte, and, so enacted Severus and Caracalla, for any deficit not recoverable from the others, 39. 4. 6. The action being penal lay against heredes only to extent of his profits, 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.

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

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1 I.e. his share of what the late owner could have recovered apart from this Edict.
2 39. 4. 1. pr.; a. t. 1. 12.
4 loc. cit.
5 He points out that in the few words on the Edict as to theft, nothing is said as to free employees, 39. 4. 2. 2; cp. 39. 4. 1. 6.
6 This rests merely on the use of domina in the singular, 39. 4. 1. Lenel, loc. cit.
7 39. 4. 1. Under colour of the abolished pignoris capio.
liability in *solidum* for what they had received, *salvum for*, without reference to such *dolus* or *culpa* as an ordinary contractual action would have required. 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. The action was not delictal or penal: it was perpetual and available against the *heres*. 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. But there was a further liability which more nearly concerns us. There was an action in *factum* against such persons, for any theft or *damnnum* committed by their employees in the course of the business, beyond their liability for goods they had insured. The action was delictal: it involved proof of the theft or *damnnum*, and it was in *duplum*. It was *perpetua* and availed to but not against the *heres*. 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*. If it was his own slave, the liability was noxal, and thus it may be presumed that death released.

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 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. 4. 9. 6. 1.

As to theft there was a special Edict (47. 5): as to damage the action followed the same rule, but there may have been no Edict. Lusil, *op. cit.*, § 76.

4 47. 5. 1. pr. 4. 6 4. 9. 7. 1. 47. 5. 1. 2; In. 4. 5. 3.

5 4. 9. 7. 4; In. 4. 5. 3.

6 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. 7. 4). In the other it is said that some consideration is due to one afflicted with a had slave (4. 3. 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. Lusil however (Ed. *Phil.* 193) attributes the restriction to an express provision of the Edict, being led to his view by the form of Ulpian's remarks.

7 Tho 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 *Ius bonorum negotium* was applicable 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.

8 Reff. Accarise, *Précis*, § 865. We are not here concerned with the barring effect of one action on the other. Girard, *Manuel*, 397.

CH. V] Delict in connexion with Master's *Negotium* 123

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 peculo*. 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 *ingenuinus* 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,) that he would be free from liability on handing over the slave. This is the view that prevailed. 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*. 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 depositer. 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*. Thus where the slave of the *commodatarius* stole the thing the owner had no *actio furti*. If the *commodatarius* stole it, the *commodatarius* was liable *ex commodato*, and had therefore an *interesse*, giving him *actio furti* against the *commodatarius*. 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*.” 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.

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. 12. " 47. 2. 69. 5. 2 Coll. 12. 7. 9; D. 47. 1. 2. 3.

3 4. 9. 7. 4; 47. 2. 54. 1. 47. 2. 54. 2. 4 Coll. 12. 7. 7. D. 9. 3. 27. 9. 11; 19. 2. 11. pr. Paul notes that where slaves let with a *commodatarius* stole the thing the owner is liable noxally but not *ex contractu*. Their act is no breach of the contract, 19. 2. 45. pr. 4 4. 3. 250-

5 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*.

6 19. 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. 31. 21.

7 47. 2. 54. 1.

8 Montu, De *furtis*, 75 assumes the claims to be equal. There seems no warranty for this.
their right was not considered. 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, that an insolvent borrower had not the actio furti, (though Justinian speaks of ancient doubts) 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. The abnormal right was allowed only if an 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.

(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 delict. 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 delictual 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. 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. 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, the theft up to the value of the slave, and if the wife knew of his quality, he might be sued on it later.

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 pignoratitia contraea) an indemnity, subject to a right of pro noxa deeditione, 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. Of the texts on which this rule is based one is claimed, by Lenel, as relating to the actio fiduciae. 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.

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. 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

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1 47. 2. 12. pr. 14. 12-15. The holder is precluded to the by the theft but he had no actio furti. 47. 2. 14. 11.
2 47. 2. 12. pr. 27. 1. 1-2.
3 C. 6. 2. 29.
4 e.g. 47. 2. 12. pr. si solendo non est ad dominum actio reedit; In. 4. 1. 15; D. 47. 2. 54. 1. rem subsquant et solendo est, sqq. A positive interesse used exist only at the time of the theft. 47. 2. 46. pr.
5 If the negotium did not impose a liability for cautus (e.g. deposit) the holder had no actio furti. G. 3. 307; In. 4. 1. 17. If the slave was stolen from a slave of deposits an ordinary noxal action arose.
7 The fact that no delictual actions lie directly between them is no bar to an action servi nonnec.
8 21. 2. 21. 2.
9 19. 1. 11; 21. 1. 23. 8; ante p. 107.
service should not be an expense to him. If the mandatarius was careless in trusting him unduly, this was culpa and barred his remedy. These are the views of Neratius, Africenus, Gaius and Paulus. Most of the texts are contextualized with the case of the rehiding 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. 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, Africenus, 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. As in pignus, these texts are from the same part of the same work. One is referred by Lenel 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.

In the case of commodatum, there is difficulty. Africenus 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 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. But Paul, in another text, after remarking that it is doubted (queritur) whether, on such facts, the contraria actio suffices, and whether there ought not to be actio furti noxalis, adds that, procul dubio, the commodator 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. 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 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, in which case indeed the double conveyance was still necessary in his day, and he is not cited as discussing the other cases.

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.

Two texts only seem to deal with the case where the thief's slave had made the contract, as to himself. They relate to cases under the Edict as to nautes, curpons, 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 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, 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. 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, but that in the case of his own slave the liability was noxal. 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.
of the slave. 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 Laboë, 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. 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. Hence the liability is noxal, and follows the slave. But in the case of the lex Aquilia, if sciente domini, 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.

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 bonus fidei possessor, for since he has not potestas he is not noxally liable for him. He cites Julian in support, and Paul also holds the owner not liable. And the liability of the bonus fidei possessor is laid down in many texts which seem conclusive, though one text of Justinian in his Code hints a doubt. It so happens that an opposite rule is laid down for damnum on both points, by Julian, Marcellus and Ulpian. If a slave occidit, the owner is liable and the bonus 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 factually 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.
be unsatisfactory by Girard, and they need not be stated in detail here. Among the older explanations are those of the Basilica, (shared as to the case of *fuga* by the *lex* Romana Burgundionum 3, and formerly by Lenel, who now admits its insufficiency 4,) 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 Marseilles 6. Grueber 2 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 7, 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 *damnum*. 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 dominus, competet* 6. In support of his view he cites the words (applying them to the *lex*), *verba efficiunt ut cum notae deditione damnet*. 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* 12 adds, *quasi dominus*, as if this needed emphasis here. It may be further noted that in one text 10 the difference between *furti* and *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 n o c a l i s* 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. Silianianum* 13.

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

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**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

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1 Novus, 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 Ed. Terc. (French Ed.) 1. 180.
4 9. 2. 17. 23.
5 Accarz (Précis 2. 1648) gives another explanation. The slave is the instrument. The *bonae 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.
6 *Lex* Aquilia, 92.
7 9. 2. 11. 5.
8 9. 4. 19. 1.
9 9. 4. 26. 3, 27. 1; 11. 1. 16. 1.
10 11. 1. 8.
11 40. 12. 24. 4.
12 29. 5. 1. 12.
13 Lenel declares it unacceptable (loc. cit. n. 5). Kipp rejects it for inherent improbability.
14 Z. S. 10. 399 sqq. (a review of Girard’s essay).
15 For a doubtless exaggerated instance, Petronius, Sat. 59.
16 4. 3. 4. 3.
17 13. 63. 2.
18 17. 2. 18.
19 17. 2. 50.
20 41. 1. 10. 2; 41. 2. 1. 12. 38; 41. 3. 44.
21 As to what is involved in scienz, post. p. 135.
22 41. 2. 1. 5. 5. 12. 8. 34. 41. 1. 44. 5; P. 6. 6. 1.
Acquisition of Possession through a Slave

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? 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, 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 possession 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 in A. It is generally agreed that the text, making the effect depend on the will of the slave, is not good law for the classical age.

The notion that one could not acquire possession through one he did not possess, 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. Where any inconvenience did arise the rule was readily set aside. 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 in the rule, that a man in apparent slavery could acquire nothing for himself.

1 See Salkowski, Slavenerwerb, 165. 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. xvii. 41. 2. 19.
3 Theing, Besitzw.s., 267; 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 chaos in other parts of the text Paul says post.
4 41. 3. 31. 2.
5 Where a causas libertatis 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 Ulpian, possession, though it is clear there had been doubt. He justifies the rule by the case of the fugitus, but this is not sound. The fugitus is still possessed and his case provides not the reason, but the excuse, 40. 12. 25. 3; post, Ch. xxvii.
6 50. 17. 18.
Acquisition of Possession through a Slave

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. Therefore, where a slave buys, the dominus has possession pro empto or pro suo. If a slave is deiectus, the master, though he knew nothing of the expulsion, has the interdict de vi.

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. So in general an action lies against the master for things detained by the slave. 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 malae 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. But the case of actual possession 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. 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 was no great difficulty in the law of acquisition of property, inter viron, a slave by a slave. The text, however, is our foundation.

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

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 was 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." 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. It must be remembered that usucapio results from possession, 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, 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, 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. 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 usucapio: causa possessionis durat.

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

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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; op. 28. 3. 67. But this controversy has little to do with slavery.

2 41. 3. 8. 1. Eum qui suo nomine nihili usucapere potest ne per seruam posse Pedius sit.

3 41. 4. 2. 11. 12. Hadriam, Pund. 17. 193.

4 2. 1. 33; 41. 2. 3. 3.

5 See ante, pp. 130 sqq.

6 41. 2. 1, 10, etc.

7 In 2. 5. 5. D. 41. 1. 10. 1.

8 In 2. 5. 5. D. 41. 1. 93. If a slave buys, his master has the Publician, 6. 7. 10. If he finds treasure it is as if the master had found it, 41. 1. 68, 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 adiuvatio or cession in tute\(^2\), 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 \textit{metu}, acquires for his old master\(^6\). The point is that, though mancipatio transfers dominium even in this case, the former \textit{dominus} still has the slave in \textit{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 \textit{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 \textit{dominus} is not necessary. (The view that the slave must consent seems to rest on a false definition of tradition, as transfer of \textit{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 \textit{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 \textit{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 \textit{condictio}. If he expressly said that he intended to convey the thing to

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1. 39. 5. 10; C. 4. 27. 1.
2. G. 2. 87; 2. 96; 3. 167; U. 19. 18.
3. e.g. 41. 1. 20. 2.
4. 30. 86. 2.
5. G. 2. 88. \textit{What a \textit{servus peculii contrarissius} acquires is the son's, not the father's}, 49. 17. 19. 1. See also Es. 6. 16; 19. 13. 18. \textit{Auto}, pp. 42, 43.
6. P. 1. 7. 6.
7. 4. 2. 9. 6. \textit{See} Huschke \textit{ad P. 1. 7. 6.} As to the actual form used by the slave in \textit{mancipatio}, see \textit{post}, App. III.
8. \textit{Auto}, p. 158.
10. Post, Ch. xvi. The inconveniences which might result from acquisition without consent could not have been avoided by abstaining, but a more effective protection was found in a rule that the liabilities which might result did not attach till ratification, \textit{post}, p. 155.
11. 41. 1. 37. 6.
12. 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, \textit{post}, p. 155.
13. 39. 5. 10; C. 4. 27. 1.
15. e.g. 41. 1. 20. 2.
16. 30. 86. 2.
17. G. 2. 88. \textit{What a \textit{servus peculii contrarissius} acquires is the son's, not the father's}, 49. 17. 19. 1. See also Es. 6. 16; 19. 13. 18. \textit{Auto}, pp. 42, 43.
18. P. 1. 7. 6.
19. 4. 2. 9. 6. \textit{See} Huschke \textit{ad P. 1. 7. 6.} As to the actual form used by the slave in \textit{mancipatio}, see \textit{post}, App. III.
20. \textit{Auto}, p. 158.
22. Post, Ch. xvi. The inconveniences which might result from acquisition without consent could not have been avoided by abstaining, but a more effective protection was found in a rule that the liabilities which might result did not attach till ratification, \textit{post}, p. 155.
23. \textit{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, \textit{post}, p. 155.
The gift is to the master whose the slave is at the time of entry: intervening alienations are immaterial. Where a servus alienus was instituted, afterwards conveyed to a servus hereditarius and then usucapied by an extraneus, the institution was still good—media tempora non nocent. 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. 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. 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. intestabilitia) 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, 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.

As a hereditas may involve liabilities the slave cannot effectively enter without the authorisation (iussum) of the owner. We have a good deal of detail about this iussum. It must precede the entry: ratification did not suffice. This is due to the fact that aditio is an actus legitimus, and does not admit of what is in effect a suspensive condition. 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. So, if the slave is alienated before the entry, the new master is not bound by the old iussum. It may be in any form, e.g. by letter or messenger. It may even be nuta, in the case of a dumb, but not mentally defective, dominus.

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1. 29. 2. 71. 1. *Ambulat cum dominio, Inst. 2. 11. 2.*
2. 29. 6. 2. As to f. 56. pr., see post, Ch. xx.
3. 29. 2. 82.
4. Ulp. 22. 12; D. 28. 5. 31.
5. G. 2. 89; Ulp. 22. 13; C. 28. 7. 8.
6. 29. 1. 26. 1; k. 7. 65. 4 (last clause Tribonian).
7. Ulp. 19. 12; 22. 13; C. 8. 27. 3; D. 41. 1. 10. 1, etc.
8. 29. 2. 25. 4; 36. 1. 67. pr.
9. 25. 3. 2. 1; 50. 17. 77. No entry before iussus, but a condition on the institution can be so satisfied, quia ex facto nemo fraudatur. The satisfaction is no part of the entry, 35. 3. 2. 1.
10. 29. 2. 47. Or an authorising tutor die before the entry, h. k. 59. If the iussum change his mind, or is abrogated, there can be no entry under the old iussum, h. k. 29. 14. 15.
11. 29. 2. 62. 1.
12. 29. 2. 25. 4, 36. 1.
13. 29. 2. 25. 3.
14. 29. 2. 25. 3.
15. 29. 2. 25. 4; 36. 1. 32.
16. 29. 2. 3. 82. 10.
17. 29. 2. 25. 4; 36. 1. 32. 42. 67. pr.
18. 36. 1. 67.
19. 29. 4. 1. 3; C. 6. 34. 3. 2. in fin.
*dominus* continued long in enjoyment, in any case, this should be a valid *gestio*: a somewhat untruthful presumption of the consent of the slave. The rule in *fideicommissa* is different: the *dominus* himself can accept*. *Bonorum possessio* may be applied for by anyone for anyone, and thus, no doubt by the *dominus*. But, we are told, the consent of the slave is needed as in *aditio*. 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, that a *dominus* cannot himself repudiate the slave’s institution; it is clear that he cannot repudiate a *fideicommissum*. On the other hand, he can repudiate a *bonorum possessio* to which the slave has a claim. 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*.

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*. 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*. 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*. This preference is applied in all such cases where a man obtains a *hereditas*, *omissa causa testamenti*. But in our present case it is a recognition of duality, for a man cannot be simply substituted to himself*.

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 Falcidian is, in the case of distinct charges on different heirs, reckoned separately for each heir*. 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 *institutor* who acquires also as *substitutus*.

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1 29. 2. 6. 3.
2 29. 2. 6. 4.
3 36. 1. 67. pr.
4 29. 2. 13. 3. 18.
5 29. 2. 13. 3. 18.
6 29. 2. 13. 3. 18.
7 30. 9. 1. 3.
8 29. 2. 138; 38. 9. 1. 3.
9 38. 7. 4. 7.
10 See ante, p. 157, for some illustrations of this.
11 29. 4. 25.
12 29. 4. 25.
13 29. 4. 6. 6. pr.
14 30. 6. 10. 7.
15 30. 2. 21. 1.
16 See *e.g.* Vangerow, Pand. § 535; Windscheid, Lehrb. § 633, n. 8.

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**CH. VI**  *Institutio. Distinct personality of Slave*

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*. 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* 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*, 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*. It is not easy to see the necessary *dolus malus* on these facts*. 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*.

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* tells us he must enter again for the second, and it will pass with him if he is freed or alienated before entry*. This is one of a group of texts which have given rise to much controversy*. 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*. No fresh entry is needed even if there is a coheir*. In our case*, 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*. That it should vest in the new owner seems consistent with principle. The conditional share is certainly not acquired till the
condition is satisfied and at that time the old owner is no longer owner.
Since nothing remains even momentarily in the slave, 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 Ulpius
which applies the rule that entry for one share is entry for all, and
declares, as it is commonly understood, 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 Ulpius 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 impedes "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. They
treat this as the fact which bars: if they had taken Paul's view the
question could not possibly have arisen.

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. 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.
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. Where knowledge is
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. 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.

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 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, 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 says that where a child instituted proved to be suppositus,
the inheritance was taken away, quasi indiguo. 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, who on
the authority of Severus and Caracalla, uses similar language—aufere-
rendam 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 and thus are mere illustrations of
falsa causa treated as condition, and of little weight in the present
connexion. On the whole the view of Savigny 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 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
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 is satisfied on
the facts and the substitute is admitted. But there is nothing to
exclude the institutus, and thus they share. The reasoning requires

1 29. 2. 13. pr. 2 29. 2. 79. 3 29. 2. 55. pr.
4 Saikowski, loc. cit. 5 28. 6. 3. 8. 1.
6 A patron's son has a right to open a promise, and to take in heres, 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. 246; Inf. 2. 20. 33; D. 35. 3. 20; 36. 2. 17. Cpr. 30. 25. 9. pr. See Macheliard,
Dissertationes, 600.
8 See, e.g. 31. 92. 2.
9 29. 2. 36. 36. A furious could not accept a hereditas or direct his slave to enter, nor
could his curator authorise his entry, 29. 2. 65. 90. pr. As to the ways in which this difficulty
was met, see, e.g. Accaria, §§ 345, 465. But if the slave were instituted, he could enter, no
doubt with consent of curator, 29. 2. 65. If a beneficiary has been directed to pay money to a
slave heres, it may not be paid to his master, 30. 1. 44. pr.
10 G. 2. 190. 11 29. 2. 30. 7.
14 28. 2. 14. 2. 15.
15 35. 1. 72. 6. In fact a contrary inference might be drawn from them.
17 98. 5. 41.
18 A substitution is essentially a conditional institution.
19 The decision is exactly similar to that given by Galus (3. 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, but the decision does not deserve the severe language which is sometimes used of it.  

The case may be compared with one considered by Severus. 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. 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.

The main principles in the case of legacies and fideicommissa singularum rerum are much the same. A legacy sine libertate to the testator's own slave is invalid. A gift to A and one to his slave, though they are distinct legacies, are one for the purpose of the lex Falcidiana. Gifts to servi alieni depend on the testamenti factio of the master, and are in the main equivalent to gifts to him. The rules as to the admissibility and construction of gifts sine or sine libertate are, in classical law, as in institutions. 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. A legacy without liberty to the testator's slave, not legated, is void, and ademption of the liberty is ademption of the legacy. Acceptance of a legacy to his slave bars the dominus

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1 50. 17. 12; see 28. 5. 2, 32. 1; 38. 6. 4. 2, 24; 50. 16. 118. 243; 50. 17. 17.  
2 e.g. Vangerow, loc. cit.; Girard, Manuel, 839.  
4 The text is applying the rule that if one of co-owners institutes the slave, all go to the others, post, Ch. xvi.  
5 As to error in legacies, post, p. 151.  
6 28. 1. 16; 30. 63. 2.  
7 50. 34. 9.  
8 30. 53. 2; 35. 2. 46. 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 fortores a legacy) to a slave of a deportatus went to the Fisci, 32. 7. The domus might be burdened with fideicommissus, 30. 11.  
10 34. 4. 20. See ante, p. 137.  
11 34. 8. 3.  
12 30. 34. 9. 102; 34. 4. 92. 1. Money was left to X with a fideicommissum to a slave of testator. Both were void, 31. 88. 18.
the foregoing case would, it seems, have presented itself to the jurists who held that legatum optionis was conditional. 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.

A simple legacy to a slave of the heres is bad ab initio by the regula Catoniana. 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. There had been disagreement as to these rules. Servius declared all such gifts valid, perhaps ignoring because, whether, that the legacy would fail only 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.

Another text raises new hypotheses. A legacy deemed under a condition is regarded as given under the contrary condition. 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. 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 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. How if a gift, originally conditional, becomes simple by satisfaction of the condition, viso 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.

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. 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. But the text says not a word about the regula Catoniana, and it is clear, on an unbiased reading of it, that Paul is talking of a legacy which he regards as absolutely valid, and in no way dependent on alienation or manumission of the slave. It is a strong proof of the slave's individuality: cum enim, says the text, servus alieno aliudique testamento damus, domini persona ad hoc tantum inspicitur ut sit cum eo testamento facito. Ceterum ex persona servi est 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 viso testatore id alienaueris, or the like.

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. 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 dvo 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, 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

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1. *Legacies to Slaves* [PT. I]

2. *ibid.* p. 18; Machelard, Dissertations, 595.

3. *ibid.* 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 cedunt, 33. 5. 11.

4. *ibid.* 32. 3. 244; *ibid.* 3. 20. 33.


6. *ibid.* 30. 30. 4; also, 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 legateses, 36. 3. 7.


8. *ibid.* 34. 1. 10.

9. *ibid.* 34. 1. 10.

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1. *ibid.* 35. 1. 89.

2. *ibid.* 34. 1. pr.; *ibid.* 3. 2. 106; *ibid.* 3. 20. 10.


the dominus is not discharged by a payment, invitum eo, to the slave. This is indeed a recognition of individuality, but of a very different kind: it expresses the principle that a slave cannot bind his dominus. A legacy to a slave, post mortem dominii, is valid, says Gaius. It goes to the heres even though the slave is freed by his master’s will, since dixit edict 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. If a slave is legated and the will contains a gift to him cum moritur ipsae servus, this is valid. It is not obvious why there was any doubt. The text adds by way of reason: propere qua re moriencor servi, id quod ipsa legatum erit ad cum cui ipsae legatus fuerit perseruerat sit. There may have been doubt as to whether this was a conditional legacy, which might fail because it did not vest in the life, of the legatee, but Pappian and Ulpius are clear that there is no condition.

Where a will was set up by honorum 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. 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, extinxitur Pamphilii legatum, quia non esset in hereditate qui optari possit. But if T repudiates P can choose. For though by the manumission two distinct persons 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 lays down strange doctrine. The case is one of legatum generis, for dies cedit before choice, and T vindicat2 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. The text may have been altered, but, even so, it is difficult either to restore the

CH. VI

Ademption of Legacies

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 eae vertitur3 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 himself4 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. 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. 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. So too there may be a legacy to a freed slave, and alienation of the slave is an ademption of the gift of liberty. Express ademption of the gift of liberty destroys the legacy to him, for the legacy has come into a position in which it could not have begun. But it does not seem that sale of him would necessarily do so, at all events in late classical law. Thus Paul6 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 ademption 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. 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: superiusca scriptura non nocet legato. The distinction between the two cases is that while you can contemplate repurchase you cannot contemplate reenslavement, nec enimfas est eiusmodi casus expectari. If he is reenslaved, he is a new man. This distinction

1 C. 8. 42. 10.
2 Post, p. 163. This text adds, after the statement that the legacy is still valid, the words, et maxime si ignorant num factum esse. If this is limiting, 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 sunfruct to a slave post mortem non est. V. Fr. 57. Whether, in classical law, an ordinary legacy to him post mortem non est is not stated. It is hardly “within the mischief” of the rule.
4 50. 397. 1.
5 36. 3. 4; 35. 1. 79. pr.
6 37. 3. 8. 2. The existence of idemcommittus factum involved forfeiture: Trajan provided that the beneficiary could keep half if he informed the Fisc, but he could not avall himself of this if the idemcommittum were to his slave, 49. 14. 35. 8. See ante, p. 143. Even if we treat it as l. options, it is so better: the text makes T capable of making the legacy vest in his favour after he has freed P, a thing impossible.
7 Note the expression dies esserit, the absurd version given for the fact that, if T chooses, P is barred, and the accumulation of hypothesise. See Eisele, Z. S. S. 7. 19 sqq.
8 So also by the words si T vindicaretur, extinxitur Pamphilii legatum.
9 30. 10. 1.
10 34. 3. 1. In. 2. 30. 12.
11 34. 4. 31; 37. 5. 2. 5.
12 Post, Ch. xx.
13 34. 4. 31; post, Ch. xx.
14 34. 4. 36. pr.
15 18. 1. 6. pr.; 34. 2; 45. 1. 83. 5.
Ademption of Legacies

is overlooked by Salkowski, who regards the distinction drawn as sophistical. 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.

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. This implies that ademption, 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, 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. 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. 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. The only illustration we have is that of a legacy of a praedial servitudo 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.

A text of Maecianus says: servitus servo praeventi habentis recte legatum, which seems to mean that the rule did not apply if the fundus were in

1 Skalvenerwerbung, 32, n. 59.
2 A simple ademption, leaving the slave in the possession of the testator, would destroy the legacy (32. 5. 36. 4), not however by reason of the regula Catoniana. Gifts to a slave of the testator are bad whether simple or conditional (32. 5. 37; 30. 108; G. 5. 37. 4), and the regula does not affect conditional gifts, 34. 7. 3.
3 34. 4. 27. pr.
4 See post, Ch. xx.
5 Cujas, cited Fohr ad h. l.
6 Cujas, cited Fohr ad h. l.
7 See post, Ch. xx.
8 3. 5; 45. 1. 17; V. Fr. 56.
9 30. 2. 105.
10 Skalvenerwerbung, 32, n. 59.

CH. VI] Acceptance and Repudiation of Legacies

the slave's peculium. Mommsen1 disbelieves the text and adds 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, 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. A converse case is considered by Ulpian. 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. 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.

It is stated by Paul 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. The reason why legacy was put on this footing seems to be that is repudiare potest qui et acquire potest, and a legacy to a slave, according to the doctrine which prevailed, 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 agnoscore or repudiare. In fideicommissa, there is no such transition of ownership: the property passes only on restitution. 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 condicio for recovery.

As to the acquisition of servus in re aliena, the only cases as to which we have any authority are those of ususfructus and the like. We have
seen that, except in case of peculium, a slave cannot acquire a praedial servitute by will. He can acquire it inter vivos, and ususfructus, usus, habitatio, and opera servorum can be acquired by him in all the ordinary ways. As a slave's possession is his master's, so is his enjoyment of a servitute. 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 ususfruct, whether to a slave or not, vests only when the heir enters.

The reason, credited by Ulpian to Julian, is: tunc enim constituitur ususfructus cum quis iam frui potest. If the slave were dead at that time, the gift would of course fail. But, in the classical law, the usufruct failed at once whenever the slave died, if it had been left *pure, per vindicationem*. 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. 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.

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 ususfructo*, the usufruct is based on the *persona* of the slave, but that if the legacy of the land was conditional, it is *ex persona dominii*. 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. 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 *aditus*, and would have been a normal acquisition *ex testamento*, through the slaves. But the same point would not arise in a direct legacy of ususfruct. The

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2. 7. 1. 6. 2. 3; 7. 8. 17; 36. 2. 9; V. Fr. 82. If a slave demands a *peculium*, rentableness *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. 29. 13. See ante, p. 134.
3. 82. 1. 6.
4. 43. 19. 3. 4.
5. *7. 3. 1. 2*; V. Fr. 60.
6. 1.
7. 3. 1. 26; V. Fr. 60.
9. V. Fr. 82. Creation of usufruct in a slave in whom you have a usufruct does not affect it.
10. 4. 13. 2. It was looked at in both ways. Roby, *de usufructu*, 42.

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**CH. VI**  Acquisition of Ususfruct. *Ius Accrescendi* 153

usufruct, even where it is left conditionally, comes to the master directly through the slave. And the principal text is quite general.

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  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. 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. 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. 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. Accordingly if it is left to two of a man's slaves, the owner has *ius accrescendi*, as we have just seen. 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 emphasizes the individuality of the slave and also expresses the idea of continuous acquisition. In the legacy of a usufruct to a slave however owned the acquisition is a single one made by him. Thus if it
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, deduc-
to usufructu. Here all are agreed that the heirs will have no ius accres-
cendi. Julian assigns as the reason: videri usufructum constitutum
non per concursum divisum—an obscure expression which must mean
"originally created in partes," since it is added that this agrees with the
view of Celsus, that there is ius accrescendi only where it was
divided concursum, in duobus qui solidum habuerant.2 Celsus and Neratius
apply the same rule in the case of common owners who mancipate,
deducnto usufructu.3 There is no acrual. 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, deducnto usufructu,
there is no ius accrescendi on lapse of the part acquired by either slave,
but the legatee of the land gets the benefit.4 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:5 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.6

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
a division.7 Justinian8 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.9

In relation to iura in personam, the governing principle, that a slave
can better our position but cannot deteriorate it, has many obvious
illustrations. The slave has the power of stipulating ex persona domini
and the right vested in the dominus. He acquires in veto, even vetante,
domin, even where it is an acquisition involving liabilities. 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 conductio for repayment, or release, as
the case may be. 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. It is
indifferent whether the slave names himself or his master or a fellow-
slave or no one. His stipulation, dominus aut extraneo, is valid: his
master alone can sue, but the extraneus being regarded as solutionis
causa adjectus, payment can be made to him.10 On similar principles
an acceptatio taken by a slave on his transaction, or his master's, bars
action against the latter. 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, and a slave cannot make a
stipulation which would not be good in substance if made by his master.11
He cannot stipulate for a praelud servitute, unless the master has the
praediiion to which it is to attach. 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.12 The rule seems illogical, but its
illogility 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. A slave's contract is, for the purpose of
jurisdiction, made at his domicile, rather than his master's. There is a
very important rule that quae facti sunt non transunt ad dominum.13
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

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1 V. Fr. 70. D. 7. 2. 1. 2. 2 Mommsen ad n. 1.
3 V. Fr. 79. 79; D. 7. 2. 1. 4; 7. 2. 3. pr.
4 7. 2. 3. 1; V. Fr. 80. 81.
5 V. Fr. 75. 8. See above.
6 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
mentally mentioned: the right of one to take in all case of lapse being a result of the rule:
mens pro parte testamenti.
7 C. 3. 38. 17; A.D. 531.
8 D. 7. 2.
9 30. 17. 183.
10 41. 1. 10. 1; 45. 1. 38. 17; In. 3. 17. pr.; C. 3. 114; 4. 194. 5. As to etius miles, 49. 17. 16. 3.
11 12. 1. 31. 1; 45. 1. 62.
12 45. 3. 40.
13 45. 1. 45. pr.; 45. 3. 1. pr.—3. 15. Just as a dominus stipulating for his slave acquires to
himself, 45. 1. 59. 40. 45. 3. 180; 45. 3. 28. 2; C. 8. 37. 2. Slave's stipulation for an extraneus
suum is of course void, 45. 1. 3. 9. 30; C. 8. 38. 14.
14 45. 3. 13. His stipulation domino et extraneo gave rise no doubt to the same questions as
did that of a freeman sedi et Titio. As to common slaves, post, Ch. xvi.
15 40. 4. 11. pr.
16 45. 3. 36. Or one in a derelict hereditas, 45. 1. 73. 1.
17 Thus he cannot stipulate for a freeman or a praedio legitimatus (16. 1. 27. 1) or for what
is his master's (45. 3. 9. 3 pr.) or post mortem dominus, In. 3. 19. 13.
18 45. 3. 7. 11; V. Fr. 56.
20 5. 1. 19. 3. At least if he was lawfully there.
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. 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.

If a promise to pay to me "or to the slave of T." it is no discharge to pay the money to T: he is not the *solutionem causa adiectus* 1. But the maxim, *quae facti sunt non transunt*, 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 *abi 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 stipulates, the words are to be so construed. 2 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. 3 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 *libertas* 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 Celsius, and similar rules are expressed by Ulpian and Papinian. 4

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. 5

Justinian's enactments as to *cautiones* shew that the same principles were applied in the case of other unilateral contracts. 6

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1 In 3, 17, 2.
2 45. 1, 76, pr., 141 pr. 1
3 35, 1, 44. 1. So in stipulation to pay to a slave, 46, 3, 36. 7. A slave, to be free on paying to a servus *licere*, could not pay to the *dominus* except with consent of the servus, 35, 1, 44, pr., 36, 3, 36. 7, 96, 7, post, Ch. xxi.
4 45. 1, 38, 3—9.
5 e.g. 45. 1, 130.
6 38, 1, 10, pr.; 45, 3, 3, 18, 1, 39.
7 The logical difficulty in this playing fast and loose may have seemed too great.
8 C. 8. 37, 14.

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16 2. 3, pr.
2 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.
3 12, 1, 31, 1.
4 21, 1, 51, Africanius; see also 18, 1, 12, 13. In 21, 1, 51 he says, disagreeing with Julian, that even in special mandate the slave might bar action. The text is from the *Quaestiones*. It was no doubt disputed.
5 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, 47, 4, t. 3.
6 21, 2, 99, 1.
7 *Post*, Ch. xxi.
8 40, 7, 6, 6.
9 *Post*, Ch. xxi.
10 17, 1, 22, 8; C. 6, 2, 1.
against my will I can sue the commodataris. 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.

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. If he pay under a fideiusssio duly authorised, the owner will have actio mandati. But if there was no authority to alienate the money, there can be no such action.

If in order to benefit me, X paid under a fideiusssio I had undertaken, I was entitled to recover the money from the principal debtor: it was as if I had paid. If the fideiusssio had been by my son or slave, and the intent was to benefit me and not me, I had, says Ulpian, quoting Marcellus, 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.

Rights ex delicto are acquired in the same way. Thus the master has actio fuerti for what is stolen from his slave. If it was a thing borrowed by the slave the master is entitled to actio fuerti so far as he is liable de peculio. If my slaves are ejected I am entitled to the interdict quod vi aut clam. Work done against my slaves' opposition or concealed from them entitles me to the interdict. But 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 restitution 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 debit imputare, cur rem minori commissit.

To alienation of the master's property his consent was always necessary. With that consent, which might be by ratification, or by a general authorisation if wide enough in its terms, the slave could alienate anything. He could not of course make a cessio in iure, because this was in form litigation, 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. Julian 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. Without authority, the slave was powerless: he could not transfer dominium. 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 fori. Money lent, citra voluntatem, could be vindicated, as could money paid by a fugitive slave for the concealment of himself or his theft.

Similar rules applied where, having authority, he exceeded it. Where A owed B 10 ex fideicommissio and 10 on an independent obligation naturalis, and a generally authorised slave paid 10 expressly towards the whole debt, 5 could be vindicated, as a general authority

CHAPTER VII.

THE SLAVE AS MAN. COMMERCIAL RELATIONS APART FROM PECULIUM. LIABILITIES.

1 13. 6. 14. If the latter knew that the slave had no business to do it, there would be fuerti as well. Where on similar facts the commodataris pledged the thing, the pledgees 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.
2 12. 1. 11. See p. 129.
3 17. 1. 12. 3.
4 46. 1. 19. As to difficulties of the regimen peculii, post, Ch. viii.
5 17. 1. 13. 1.
6 47. 2. 52. 9.
7 44. 7. 56.
8 43. 24. 3. pr.
9 44. 16. 1. 22.
10 44. 3. 11. 23.
11 43. 16. 1. 22.
12 4. 4. 3. 11. 23.

1 21. 2. 29. 1. No requirement of form: an endorsement of the cautio sufficed, 45. 1. 126. 2.
3 15. 1. 46; 46. 9. 94. 3.
4 46. 1. 41. 1.
5 41. 3. 1.
6 41. 3. 8.
7 41. 3. 9.
8 41. 3. 10.
9 41. 3. 11.
10 41. 3. 12.
11 41. 3. 13.
12 46. 1. 19.
13 4. 4. 4. 5.
14 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 excuses 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 immovable, no change has occurred in the relation of the domus 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 detentor, the dominus has the

\[\text{loss of possession by act of slave} \quad \text{[PT. 1]}\]

Interdict unde \(v\), whether he know of it or not\(^9\). Conversely, if his slaves are left in possession of the land, the owner has not been delectus, even though he himself has been expelled, unless indeed they have passed into the possession of the delector, as would result from their being bound or acting at his orders\(^10\).

Mere momentary absence with no intention to abandon is of course immaterial\(^11\). The same applies to true 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\(^12\). But in the case of intentional abandonment there was a conflict. Pomponius and Africanus tell us that possession is lost. Paul and Papinian hold that it is not lost till a third party has entered. The dissidence cannot turn on anything peculiar to slaves, for both Paul and Papinian speak of slaves or colonus, though it chances that the texts which declare possession lost speak only of colonus. 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.

If the possession has passed to an adverse possessor the texts are agreed that possession is lost. 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\(^13\). 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. Thus Papinian tells us that knowledge was not required\(^14\), while he says that, of sallus aedera, which are possessed only annum, the possession is not lost till knowledge, since, till then, the annum exists. 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 annum.

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

\[\text{loss of possession by act of slave} \quad \text{[CH. VII]}\]
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. 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. A rehiring buyer is indeed liable for damage done by his family, but this is by virtue of an express rule of the
Aedilician Edict.

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. But this lacks preci-
sion: 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, and Labeo in that of a mule
killed by the negligence of a slave let on hire, lays 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 Proculeus who
holds that the master is liable on the contract, subject to a right of
abandoning the slave instead of paying damages. This text is in the
Collatio. As inserted in the Digest, it gives as law the view of
Proculeus and omits that of Sabinus. On the other hand Paul 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, 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.

Another text, by Paul and Ulpian, 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: nova or not is a question of fact, 22. 1. 92 pr.
2 18. 1. 18. 1. The slave might be liable if fired, ep. 4. 3. 7 pr.
3 9. 1. 25. 1.
4 44. 4. 17.
5 18. 6. 12.
6 19. 2. 60. 7.
7 9. 2. 37. 11.
8 19. 2. 45. pr.
9 13. 6. 10.—12.
10 9. 2. 11. pr.
11 4. 4. 17.
12 44. 4. 17.
13 44. 4. 17.
the *dominus* would not assent to such redelivery, 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. 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: *aliaquin consequens erit ut etiam si tu ipsa servus meo eam donaveris, invito me libereris. quod nullo modo recipiendum est, quando ne solutone quidem invito me facto libereris.* There is no *solutio* without consent of the person entitled: 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, but not without any authority: in that case they acquire a new right to the master, without *ipso iure*, destroying the old. 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, *novando animo*, this is a mere nullity: it is as if the stipulation had been a *nullo* and the old obligation is unaffected. This is said quite generally and seems to exclude even the case of *iussum*, and the titles in the Digest and Code 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. In a similar way, though he can take an *acceptatio*, he cannot give one, even *iussu domini*.

A slave can give a good receipt for money paid to him, at least if he lent the money under authority both to lend and to receive, 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. A gave B’s slave a mandate to

CH. VII] Slaves Contract apart from Peculium

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*. 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 *sine naturali* he was a man like another. Hence the rule: *servi ex contractu civili non obligantur, naturaliter obligant et obligantur*. Thus his promise creates a *naturalis obligatio*, but this *obligatio* which, as we shall see later, survives manumission, affects only himself, not his master. 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 *iusseum*, 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*. The rule in *strictius 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. 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.

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1 16, 3, 11.
2 25. 1, 44, pr.—3. If a man undertakes to pay to A or the slave of T, the payment may not be to X. So a condition of payment to the *heres* in not satisfied by paying his master.
3 30, 108, 1.
6 46, 4, 11, 1. *G. S. 8, 41.*
7 46, 4, 22.
8 93, 4, 109, 2.
9 46, 9, 19.
10 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. *S. 1, 122, 1.*
(ii) Ulpian tells us that if a slave quasi tutor egerit, Severus provided that a iudicium utile lay against the dominus, 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. The explanation seems to be this. The actio protutelae was fictitia, though we do not know the exact form. 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.

We pass now to the four actions above mentioned.

A. Actio Quod Iussu.

By the Praetor’s Edict, the dominus was liable in solidum on an undertaking of his slave of either sex, made iussu eius. No special form of authorisation was needed: it might be general or special, by mandate or by ratification. There is indeed one text which seems to suggest that ratification was not enough, but it does not say so and another text shows that ratification sufficed. Endorsing the slave’s chirographum sufficed, and this looks like an authorisation to the third party, not to the slave. There are a few that do not make this presumption, but none expressly contradicts it. It is now almost universally held that a communication to the slave can never suffice to create the liability, unless it involves

1 27. 5. 1. Called in the texts actio protutelae, a. t. 1. pr. 6, 6. Ulpian.
2 G. 15. 15.
4 15. 4.
5 16. 1. 15; C. 4. 26. 15; 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 notarum, 50. 12. 2. 1. See Sell, Noetlreich 31. n. 2.
8 15. 4. 1. 1. Thus manus or surdus could authorise, 45. 1. pr.
9 15. 4. 1. 2.
10 15. 4. 1. 6. The language of the text is suspicious: si quis rurum habetur... in cos datas.
11 15. 3. 2. 2.
12 Drehmel (Actio quod iussu, 63 sqq.) 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... in e verso, as quidem... in e verso, that the words are due to the compilers (see Eisele, Z. S. S. 7, 15 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 Mandy, Familienübersicht, 2. 554 sqq.; Boly, Rom. Pr. Law, 2. 122; Drehmel, 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. § 492 n. 6.
16 Windscheid, loc. cit.; Karlowa, R. R. G. 5. 1105.

CH. VII] Quod Iussu. Notice to Third Party

an indirect communication to the other party. It may be remarked that this requirement of communication to the third party is nowhere expressly asserted. Gaius indeed observes that the third party contracts with a view to the liability of the dominus. 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. Moreover this communication could not have occurred where the actio quod iussu was made possible only by ratification. Such expressions as iussu dominii cum servorum contractum est are common and imply that the authorisation is communicated to the third party. But elsewhere the action is given si voluntate domini servus emit 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, 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 fìlius famìlias or slave acted as a nauta, the paterfamilias was, by the Edict, liable in solidum for his receptum, if he received voluntate eius. 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.

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. It would seem to follow that it is not essential that it be known even to the slave. 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 iussum dominii contractum est, but this impersonal form proves nothing. Honorius (C. Th. 2. 31. 1 – C. 4. 26. 19) 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 is intended to exclude is pretended iussum based on words which do not amount to authorisation.
2 15. 4. 70. 3 Schlossmann, Köhler Festgabe für Herder, 299; 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; 66. 1. 10. 2; 18. 1. 68. pr.; see also 37. 1. 5. 4.
8 4. 9. 3. 3.
9 14. 6. 4. 5.
10 The two main texts against the requirement (15. 4. 1. 6; 15. 3. 5. 2) are both suspicions, 15. 4. 1. 6 is not conclusive on the whole view that communication to the third party was not needed. Haennel, Diss. Domn. 524. Vangerow thinks (Pand. § 249) that the use of the word iussum shows that communication to the slave is what is meant. Drehmel thinks the iussum might be to the slave, but the third person must have heard of it. Op. cit. 56, 59, 110. Post, App. x.
The liability applies only to contracts of his own slave, and not of those acquired after the transaction, 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. Thus becoming surety for the slave did not suffice: this was acting as his own. 

The iussum is revocable in all cases up to the time when the contract is actually made. It does not exclude the actio de peculio though quod iussu is always valid.5 To lend at a higher rate, the master owed 6½,3. If a slave, authorised to borrow at 6½,3, sold to B, the master is not bound. The iussum must be exactly followed. Thus if a slave, authorised to borrow at a higher rate, the master owed 6½,3. If a slave, authorised to sell for 10 sold for 8, the master could vindicate the thing and there was no exception, without indemnification. These texts shew no trace of the dispute which existed on similar points in relation to mandate,14.

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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. In one text the separate individuality of the slave is very clearly brought out. If he is in partnership, iussu domin, 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 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 against a dominus or domina who appoints a person of either sex, slave or free, to manage a business.8 It applies to all transactions of the business, and is in solidum, quasi iussum. The institor may be a servus alienus, 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.9 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. The liability rests on the voluntas of the dominus,10 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. The liability is perpetual and extends to the heres.11

1 15. 3. 5. 2. 2 8 15. 4. 2. 2 12 15. 4. 1. 5. 4 14 15. 4. 1. 9. 4 Not a procurator scelenteranus. 7 14. 5. 18. 11 e.g. Dernburg, op. cit. 2. § 14. See Windscheid, op. cit. 849; Maudry, op. cit. 2. 563.
15 Dredorfer, 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 sed foedus est nuncius. He seems to regard the action as excluded because the sed foedus est nuncius: 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. 17 15. 4. 1. 5. 20 G. 4. 74; In. 4. 7. 5. 22 G. 4. 35. 9. 18 46. 3. 32. In. 46. 3. 32. We are not told the effect of insanity. Probably the analogy of mandate suffices. 19 18. 1. 63. pr. Nor a pledge in an authorised contract, unless this too was authorised, 15. 4. 3. 20 Ibid. 19 17. 1. 5. 4. 21 G. 3. 161; In. 9. 36. 8.
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. 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. As to transactions, vacante hereditate, the heres, even impubes or insane, is liable to any creditor who did not know of the death, and, according to transactions, he allow him to continue his management, for future transactions. The fact that actio institoria is available does not bar other actions to which the transaction may give a right, e.g. redhibitoria. But if rightly brought it necessarily excludes the actio tributoria since, that refers necessarily to res peculiare, this refers to dominica merx.

The liability is only on those transactions connected with the business to which the man was appointed. This rule plainly leads to one appointed to buy, was enough, and if the creditor knew that the money is so spent. A loan of oil to one appointed to deal in oil is good, 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 pledge. 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. Novation of the obligation destroys the actio institoria, the obligatio being no longer that contemplated by the appointment. The liability may be limited in various ways. Thus a number of institors may be required to act together, or dealing with a particular person may be prohibited by notice to that person, or they may be required to contract only with security. 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. Any other conditions imposed on the power 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. In like manner the liability may be limited, or barred, by notice over the shop door. This must be plain and in a conspicuous place, and couched in a language locally known. But if it is duly set up it is immaterial that a contracting person did not see it.

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. 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.

Lenel 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. 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, 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. They are writing long after Julian. It is thus easy to see why

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Notes:

1 14. 3. 5. 18. 6. 9. 10. 17. 2. 2 14. 3. 17. 2. 4 14. 3. 17. 2. 4 14. 3. 15. 2. 6 14. 3. 11. 7. Post. App. 17. 7. 7 14. 3. 5. 9-11; G. 4. 71; En. 4. 7. 2, not confined to operations in any one place, 14. 3. 18. 8 14. 3. 12. 9 14. 1. 7. 2. 14. 3. 5. 15. 10 14. 3. 15. 11. If arca was taken and not returned by an institor to sell, the master was liable. 14. 3. 11. 15. 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. 14. 3. 19. 12 14. 3. 13. pr. As to the point of sita consecrata raised by the text, see post, App. 11. 13 14. 3. 15. 1. 14 14. 3. 11. 5. 15 14. 3. 11. 6. 16 14. 3. 17. 1. 17 14. 3. 17. 14. 3. 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. 14. 3. 1. 2. 4 14. 3. 1. 2. 5 14. 3. 11. 5. 12. It is a vicarium who is appointed. As to the resulting questions see 14. 1. 5. pr. The matter is fully discussed, post. Ch. 1. 6 Ed. Perp. 5. 102. 7 14. 3. 12. 8 14. 3. 11. 12.
he calls the action in this case utilis. In the next text1 another exceptional case is considered, and there too Julian is cited as holding that, though on the facts the actio 
sinstitoria was excluded by consumption, an actio utilis lay. Here too the institor was a slave. This is hardly a 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 time2, 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 taken4. But no text anywhere hints that it is an essential of liability that the third party know of the appointment, and 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: ignitor praeposito certam legem dat contrahentibus5. It is the appointment, not notice, which creates the situation contemplated by the Edict. Moreover, unless the praeposito 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 leges vel interventu cuiusdam personae vel sub sigillo voluit cum eo contrahri vel ad certam rem? Aequissimum erit id servari in quo praepositus est6. 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 third party should have known that the contract related to the business to which the institor was appointed? The dominant view is that this was necessary, that it was not enough that it had to do with the business, but the parties must have also contemplated this. Karlowa7 supports this view, partly on the ground that the words, si eius rei gratia cui praepositus fuerit contractum est, 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. Mandry8, 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 Schlossmann9. They are not conclusive either way. He observes of the texts, that one 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, that another depends on understanding permixit to mean "expressly authorised," which it need not mean, that in another there was in fact no existing authority, and that in the others the transaction is of an ambiguous nature. Of the texts cited in reply, one shews that there was no communication of the agency, and that this of itself is plainly not regarded as fatal to the action10.

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 Karlowa11 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 praeposito, 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 texts12 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 praeposito. The right conclusion seems to be that it was necessary to show that the transaction

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2 See the opening words of 14. 3. Mayer, op. cit. 96.
3 See Karlowa, R. R. G. 2. 1128; Schlossmann, Kieler Festgabe für Ihering, 217 sqq.
4 Actio, p. 171.
5 14. 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 the case 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.
7 See also 14. 3. 5. 13. 4. 25. 5.
8 See Karlowa, R. R. G. 2. 1128, 9.
9 14. 5. 11.
10 Loc. cit.
11 Kieler Festgabe für Ihering, 219 sqq.
12 As to G. 4. 70, ante, p. 167.
13 C. 5. 39. 3. 7 131. 1. 12. It seems to mean the contrary.
14 14. 3. 5. 9. Nor is the impersonal form conclusive.
16 14. 1. 1. 7. 14. 8. 5. 16-7 pr., 18. pr., 19. pr.
17 14. 3. 13. pr.
Actio Exercitoria

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 insititoria he must be able to show that it was. This he may do by showing that it has been applied to shop purposes or that its application thereto was expressly contemplated.

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 insititoria, and therefore later, though it is described as even more necessary. The general principle is that the person who is receiving the profits of a ship, (whether the owner or not,) called the exercitor, is liable in solidum on the contracts of the person placed in command of the ship, (who is called the magister naves,) if the ship was to serve a commercial purpose and the contract was within those purposes for which he was appointed. 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. Authority is the limit of liability. Voluntas of the exercitor must be shown, not merely scientia. 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. 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.

A magister must be in command of the whole ship. 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. Their power may be so limited that all must act together. A contract by one of the sailors does not give rise to this action: they are not authorised to contract. The liability covered, however, ex utile nave navigantium, the contracts of a deputy appointed by the magister, even though the exercitor had

1 14. 1. 1. 2. 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 favor of the existence of this requirement. See post, App. 1.
2 14. 1. 1. 10.
3 14. 1. 3. 7. Magister might be male or female, slave or free, proprius or alienus, even an impetus. D. 14. 1. 1. 4.
4 14. 1. 1. 7. 9. Or a loan to pay a debt incurred for such a purpose. h. 1. 11.
5 14. 1. 20. 6. pr.
6 14. 1. 12.
7 14. 1. 9—10.
9 h. 1. 2. In delict the rule was different. Ib.; 4. 9. 7. 3; ante, p. 122.

CH. VII] Actio Exercitoria. Complex Cases

forbidden this, or any, deputy. In this point this action differs from the actio insititoria, 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. The case of my slave who is your magister gave rise to questions as in the actio insititoria. 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 insititoria this was allowed only as a last resort: here it exists only, extra ordinem, at the discretion of the praezes. 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.

The exercitor himself may be man or woman, pater or filius, slave or free. If he be a slave or filius familiae the paterfamilias is liable in solidum, if the exercitor is voluntate eius. There is mention of a difference between this, and the rule in insititoria, due to the greater importance of the present case. But in fact the text lays down the same rule for both, i.e. that it is voluntate, the liability is in solidum, but if only sciente domino, it is either tributoria or de peculo et rem verso. If such an exercitor is alienated or dies, the liability continues as in the case of a magister, and is not subject to an annual limit, as de peculo is, but this rule applies only where it is not in fact itself an actio de peculo, as we have seen it may be.

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, and, if he is a servus alienus, his owner. In like manner if a filius familiae appoints a servus peculiaris, or a slave a vicarius, as exercitor, the paterfamilias is liable only de peculo 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. 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
was an ordinary actio quod ius su, and that the text supports the view that knowledge of the authority was not necessary in that action.

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, irrespectively of consent or even knowledge. The action is not subject to an annual limit, on the death of the slave, and is available against the heres of the dominus. It is regarded as the personal responsibility, and it is considered in the action before the question of peculium.

The main question is: what is versio? We are told that a versio is what is handed to the master or spent on purposes necessary to him or ratified by him, or disposed of at his orders however wastefully, or, generally, used in such a way as would give a procurator a right of action. The texts give us many illustrations. To spend the money in a normal way on the master's property is a versio, but not useless and unauthorized ornamentation of his house. Money paid to a creditor of the dominus is a versio, 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. An acquisition may be in part versum, and so subject the dominus to this liability only in part.

Thus, if unnecessary slaves are bought as necessary, they are

1 Of several exercitators, each is liable in solidus (14. 1. 1. 25; h. t. 2. 3), whether one is master (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 master, he has actio exercitatoris against the others, 14. 1. 5. pr., perhaps utilius, arg. 14. 8. 11, 8. 12). But if they are actually working the ship together each is liable only pro rata. Where each is liable in solidus, there is adjustment by pro aequo.

2 15. 1. 3 or accidens. 15. 3. 1. pr., 7. 4; C. 4. 25. 1, 2; In. 4. 7. 4; P. 9. 9. 1
3 15. 3. 3. 1; C. 4. 26. 3; Greg. Wk. 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. 1. 1.
7 h. t. 3. 6.
8 h. t. 3. 2.
9 15. 3. poss.; In. 4. 7. 4; P. 2. 9.
10 15. 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, performed by the slave in a funeral in which the dominus was interested, these are versum; 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 condicio vendae, h. t. 3. 1. 10. pr.
12 [e.g. h. t. 7. 1.]
13 h. t. 10. 4; In. 4. 7. 4.
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. This is Ulpian's view, and in accord with principle: for the time being, both were versum, and the destruction of one or both makes no difference. But, in the next text, Gaius says the dominus is not liable to both; the first person who sues gets the benefit, on no difference. But, in the next text, Gaiusa says the though here there would be creditor, and even though the master knew this to be the likely result, the actio has once ceased, so that on the whole the modified theory of enrichment, which also has many supporters, 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, and this text is taken as an authority for the gestio theory. But the context shows 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 pecularis, and that the transaction is on the same footing as the case where the master sells a res pecularis and keeps the price. This is a dolo malo removal from peculium, and so leaves its amount unaltered as against creditors.

It is usually said that versio is enrichment, but this needs some limitation or explanation. An addition to the peculium is an enrichment of the master, but it is not a versio. The law regards the peculium as distinct from the master's property: that only is a versio which increases the latter fund. The expression, locupletior factus, is commonly used to express the condition of liability resulting from enrichment. It is not used in this case in the formal statement of the obligation, though it is incidentally. 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, as it does in other cases. When

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1. 15. 2. 10.
2. 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.
3. 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. t. 7.
4. 15. 3. 1. 2.
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 make it. h. t. 10. 7. 6.
6. h. t. 9.
7. e.g. money paid to creditor, or in perishables which are consumed, h. t. 3. 3. 5. 10-11. pr. etc.
8. Windscheid, Lehrb. § 499; Dernburg, Fund. 2. § 14; Mandy, op. cit. 2. 467 sqq., etc.
9. 14. 3. 17. 4; 15. 3. 5. 3. 6. 8.
10. h. t. 3. 5.
11. Some texts confuse this distinction, but raise no real difficulty. See h. t.
12. 3. 3. 56. pr.; 12. 6. 14; 60. 17. 306.
13. 15. 3. 1. pr.
14. e.g. 14. 3. 17. 4.
15. 3. 5. 36. pr.; 5. 5. 36. 40. pr.; 11. 3. 4. 1.
18. 15. 3. 1. pr.
19. e.g. 14. 3. 17. 4.
20. 15. 3. 1. 2.
21. 3. 5. 36. pr.; 5. 5. 36. 40. pr.; 11. 3. 4. 1.
22. 15. 3. 10. 6.
23. 15. 3. 10. 6.
24. 15. 3. 1. 2.
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29. 15. 3. 10. 6.
30. 15. 3. 1. 2.
31. 15. 3. 10. 6.
32. 15. 3. 1. 2.
33. 15. 3. 10. 6.
34. 15. 3. 1. 2.
35. 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.
36. 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. t. 7.
37. 15. 3. 1. 2.
38. 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 make it. h. t. 10. 7. 6.
39. 15. 3. 10. 6.
40. 15. 3. 1. 2.
41. 15. 3. 10. 6.
42. 15. 3. 1. 2.
43. 15. 3. 10. 6.
44. 15. 3. 1. 2.
45. 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. The expression, locupletior factus, is commonly used to express the condition of liability resulting from enrichment. It is not used in this case in the formal statement of the obligation, though it is incidentally. 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, as it does in other cases. When
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. 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. 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 negotium gesto. But the words are in a nisi clause, of suspicious form, 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, the text which states it 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 negotio gesto, 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. Here, 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.

Mandry distinguishes between "direct" versio, where the thing was in peculium, and "indirect" versio, where the thing, having been in peculium, is transferred in some way to the patrimonium. He observes that in several cases of such transfer there is no versio, 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 gesto, or the like.

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1 15. 3. 2. 3. pr. (considered by Von Tuhm, op. cit. 78 seqq.). Your slave lets me to me a vicissato: I make him instarior, and in that capacity he sells to you. There is a versio. But there has been no gestio on your behalf, 14. 3. 11. 6, 12. If I give notice to you not to give credit to a certain slave, my instarior, and you do so, your actio instauria against me is barred. But if I have received the thing and do not return it there is a replicatio dolii, i.e. I am liable for the versio, though there is no real gestio, 14. 3. 17.; op. cit. 3. 5. 7. 3. 2 15. 3. 10. 7.
2 15. 3. 10. 2. Here at donee potest fitius solvita dam 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. 609.
3 15. 3. 3. 2.
4 op. cit. 2. 925 seqq. in brev. cit.
5 15. 3. 5. 6, 7, pr. etc.
6 15. 3. 6. etc. Acto, pp. 176, 7.
7 15. 3. 5. 9 etc.
8 15. 3. 5. 3.
9 Post, p. 219.
10 15. 3. 6.
11 But the course of thought may not be that of the original writers.
12 Von Tuhm, op. cit. 198. holding a special form of the gestio theory, thinks causas nexus necesse, but the texts inconclusive.
If the \textit{versio} is direct there is no difficulty: It is only where the thing has been for a time in the \textit{peculium} that the question arises. In relation to this the idea that the creditor must have contemplated the \textit{versio, ab initio}, has little, \textit{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, 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 \textit{Neratius} (in a passage which can hardly be interpolated) the case of a son who bought a \textit{toga}. The son died, and his father applied the \textit{toga}, thinking it was his own, to the purposes of the funeral. The text adds that if the circumstances were such that the \textit{pater} was under a duty to buy a \textit{toga} for the son, the \textit{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 \textit{Ulpian}, citing and limiting the views of \textit{Mela} and \textit{Pomponius}, discuss the case of a son who, having borrowed money, applies it to the purposes of the funeral. The text adds that if the date of the money is from the purchase; if not, from the funeral.

The question of the relation of this action to the \textit{actio de in rem verso} 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 \textit{actio de peculio}, and the question arises whether it had an independent existence; whether

\begin{itemize}
  \item[1] See e.g. 15. 3. 7. 4.
  \item[2] Notwithstanding the well-known text: \textit{in re naturae acquisim est mensum cum alterius detractione et natura fuerit incomplectorem}, 50. 17. 206.
  \item[3] 15. 3. 19.
  \item[4] \textit{k. t.} 7. 5-9.
  \item[5] 15. 8. 3. pr., 3. 1, 5. 5, 3. 7. 8, and especially \textit{k. t.} 10. 10. See also \textit{C.} 4. 26. 3. 7. 12.
  \item[6] \textit{In.} 4. 7. 3. 5. See also \textit{Greg.} 3. 7. 1, which, like the text in the Institutes, implies that if the facts would give \textit{de peculio}, any later \textit{versio} would give \textit{de in rem verso}.
  \item[7] \textit{e.g.} 15. 3. 10. 6 sqq.
  \item[8] P. 2. 9. 1.
\end{itemize}

\textbf{CH. VII} Relation between the Negotium and the Versio

was given for the purpose of the \textit{versio}. In the Digest, 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, but there are texts independent of Paul. \textit{Ulpian}, in a case of loan of money, says that there is an \textit{actio de in rem verso} if the money was lent for the purpose. In the immediately preceding text he seems to lay down a similar rule in a case of acquisition of goods. But all that 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 \textit{Africanus} seems, though not very clearly, to require it in a case of loan of money. In the next text \textit{Neratius} discusses a case in which goods have been bought expressly for the \textit{dominus}, and \textit{A} has become surety for the price. He holds that \textit{A} has no \textit{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 \textit{A} is clearly regarded as material. If now we examine the texts which really treat the intent of the third party as material, 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 \textit{Neratius} says, identity of what was received with what was \textit{versus}. 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 \textit{versio}, and the \textit{versio} follows, the identity of the money received with that \textit{versus} is assumed. This view is confirmed by the fact that in the case where the question is whether the lender of money to buy goods, and the supplier of the goods, have both in certain events the \textit{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 \textit{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 \textit{actio de peculio}, and the question arises whether it had an independent existence; whether
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 Tuhrl 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. He explains 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 more than a *peculium*.

But it cannot be both an obligation and a *facultas solvendi*, and the rule is in fact in conflict with his general theory. 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*, or for even the *peculium* did not exist, because either the *peculium* had been ademe without *dolus*, or the slave had ceased to be the defendant's and the year had passed. 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 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*, 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*. 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, 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—dictos et *cuius pecunia in rem versa est debet, ut ipse ubiorem actionem habeat*.

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*, 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. When the *peculium* is extended to cover debts to it, this utility is lost, and 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 Tuhrl, however, while he notes these changes, 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. 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 available only to the creditor whose property has been *versum*.

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2. He cites Baron as holding the same view. See Bekker, Z. S. S. 4. 101.
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). Mandler takes the same view, *de in rem verso* having a separate basis in enrichment (op. cit. 2. 466). Thus dealing with the question shews that the Edict gave only the one formula (Ed. P. 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. 1. 30, pr.*—As to which last, post, Ch. xvi.
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
interest in connexion with the general theory of *condictio*. The text has
been the starting-point of a great mass of controversy. 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 Juliana.

A text in the Institutes* tells us that what could be recovered by
any of these four actions could also be recovered by direct condictio.
This proposition, which has no equivalent in Gaius, has a little support
from two texts in the Digest*, one at least of which has a prima facie
look of genuineness*. 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*. 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*.

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3 See, e.g., Von Thun, op. cit. 287, p. 47.
4 12. 1. 29; 14. 8. 17. 4. 5.
5 See Mandry, op. cit. 2. 296. He cites the earlier literature. See also Girard, Manuel, 666.
6 12. 1. 29.
(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, cultivating a farm of his, non fide dominicae, sed mercede ut extranei coloni solent. A master leaves to his slave "the money I owe him," and this is valid, being construed naturaliter.

(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 peculiarii, 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. 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, constituted, when they were recognised, a very important factor in the peculium. 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.

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, of a universitas iuris. But, as he

CH. VIII

General Character of Peculium

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. In the case of claim of a slave, if the slave died, the action must continue, to determine whose was the peculium. A stolen res peculiaris ceased to be furtiva on getting back to the peculium, and conversely, if a slave handled his res peculiires with fraudulent intent, they did not become furtivae till they reached a third person. Upon manumission of a slave, inter vivos, whether vindicta or informally, he took his peculium, unless it was expressly reserved. 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 mandatlis...actionibus. 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. 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. 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. 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, and he was not
released from debts due to the dominus. 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. 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.

The reason for the distinction between the two cases, a distinction of old standing, is not stated. The peculium is res hereditaria, 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 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.

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. 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. 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. 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. On the other hand, in his action to recover it, he must vindicate the specific things: there was no general action like hereditatis petito, nor indeed a vindicatio of the peculium as such, as there was in a legatum grex. 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 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. 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, 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. The text of the Institutes above cited 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. 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 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

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1 33, 5. 5, 5. 8, 9, 7; In. 2, 10, 18.
2 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18. 191
3 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
4 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
5 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
6 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
7 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
8 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
9 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
10 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
11 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
12 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
13 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
14 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
15 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
16 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
17 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
18 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
19 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
20 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
21 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
22 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
23 33, 5. 3, 8, 8, 1, 7; In. 2, 20, 18.
peculium at the time, and it is probable that this was the case. We hear of legacies of "all my slaves with their peculia!" 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, though there are cases recorded of gifts by fideicommissum. 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." Accordingly Karlowa 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 damna-tionem. Mandry, 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.

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 thing. 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, but not an action analogous to hereditatis petitio. Such an action would however be an expression 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, a restriction which would make the action meaningless here. And whereas the heres, by aditio, has become seized of all the rights in the hereditas, we know that the legatee of peculium has not acquired the rights of action: he cannot "intend"

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on contract, or the like, and even on
noxae which are already in
udicio
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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, though the debt accrued after the death of the testator. 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. 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. This appears to be a rule of construction, resting on no general principle. Accordingly Ulpian observes 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. 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, show 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. The rule cannot safely be inferred from the general principle that peculium is the same, whether

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1 33, 8, 17, 18, post, p. 922. Not on delict not yet before the court: nosa caput sequitur.
2 33, 8, 5, 19, 1, 26, 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.
5 See Mandry, op. cit. 2, 188 sqq.
6 23, 8, 23, 1.
7 See n. 2.
8 33, 8, 19, 2.
9 op. cit. 2, 193.
10 33, 8, 6, 1.
11 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.
12 33, 8, 10.
13 33, 8, 6. Where the peculium was left to the slave, and there was a gift to wife of "all my peculium," in the peculium went to the slave, 33, 8, 15. Cp. h. c. 21; 32, 73, 5. As to

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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. 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. As it is said by Papinian: id peculium ad legatum pertinet quod in ea causa moriente patre inventum. The conception of peculium, as meaning, not exactly the peculiari 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. 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 viindicatio peculi per hanc adictionem. The point is that as the legacy is a gift of the peculium, which is in fact a certain proportion of each peculiari 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 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, 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. 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 peculiari res. 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.
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 vicarius, or of ancilas cum notis. 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.

Any slave may conceivably have a peculium, even an impubes or a furiosus. 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.

It is essential that the peculium have been assented to by the dominus, and thus, though the slave of a pupil or of a madman may have a peculium, it must be in the first case the result of a concession by the father, and in the second of a grant during sanity; neither the death nor the insanity of the master suffices to destroy the peculium if it remains in the hand of the slave. A tutor cannot authorise the grant of a peculium, 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). This is surprising since the tutor can give administratio peculii, iussum, and such authorisation as will give the actio in tutoria, while his knowledge suffices for the actio tributoria. Mandry 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, 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

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1 Post, pp. 201, 214.
2 See Caq. Institutions, 1. 325.
3 15. 1. 6; 7. 1. Kallow, op. cit. 2. 118. Mandry shews (op. cit. 2. 82) that the slave's consent was not needed.
4 15. 1. 4. 1. The point being that the slave must have control: it must be re non verbis. 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 the sort of thing the dominus commonly allows to be in the peculium it is so without his express knowledge in each case.

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. It will include the peculium of a vicarius, which itself may come from many sources. On the other hand, nothing acquired by a maleficium, committed against the dominus or another, can possibly found, or be in, a peculium. And it is important to note that a slave is not, for any purpose, in his own peculium. 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. 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
not such clothing as is merely handed to him to be worn on state occasions or when attending on his master. But a peculium may consist of claims as well as of res corporales, and it may be created by a gift of nominis and nothing more. That these can be only claims from third parties is not absolutely certain on the texts, but Mandry 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. He cites a text showing that the fact that the transaction was in the slave's name suffices.

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 occurred which would make a payment of the debt or interest to the slave a valid solutio. He cites a text showing that the fact that the transaction was in the slave's name suffices.

(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, 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, 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 property, and the illustration given is of a meruit to him, respectu mariti. 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. 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. In view of this text, and since a slave freed inter vivos takes his peculium with him unless it is expressly reserved, Mandry 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 dispossess himself. And though the

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1) See ante, p. 197. 15. 1. 4. pr. Cit. 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 actum 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 its source, its consent would not exist, unless the case were within peculii causa. In view of its origin.
3) Mandry, op. cit. 2. 113 sqq.; Karlowa, op. cit. 2. 113 sqq.; Pernica, op. cit. 1. 149 sqq.
4) Karlowa, op. cit. 2. 113 sqq.; Pernica, op. cit. 1. 149 sqq.
5) 15. 1. 6. 5, 19. 1. 39; 23. 3. 99, pr. cit. 15. 1. 5.
6) 15. 1. 69.
7) 15. 1. 89.
8) 15. 1. 9.
9) 15. 1. 9.
10) Dos given to a familiae familiae by an estraneus is in peculio, 24. 3. 22, 29, 25, pr. cit. 15. 1. 49.
11) 26. 2. 5. 7. (loc. cit.)
expression, *opus 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 singularari, utilitatis causa*, to acquire possession for the dominus without the latter's knowledge. 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, 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. Thus a man cannot usucap a thing his slave has taken in bad faith. 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. If a res peculianis 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. 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 peculo, 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.

As to *iura in re aliena*, there is a slight difficulty. We have seen 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...

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**CH. VIII** *Alienation of Res Peculiares: Administratio*

*Peculium*, he could acquire a right of way to it even by legacy. The case has already been discussed: it is enough to say that this is only one of a large number of exceptional rules applied *utilitatis causa*.

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. 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. 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. Apart from such variations the general rule was that *administratio* was necessary for any alienation or pledge of property, and that of itself it did not validate alienations by way of gift. It authorised payment of a debt of the peculium, with the effect of transferring the property, discharging the debt and so releasing any security. Any alienation without, or in excess of, authority was void: it did not give *iusta possession*, to one who knew of the defect: such a person might indeed be liable for theft. Even a receiver in good faith, though he could usucap, had no *accessio temporalis*.

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 *octium in rem*, if it were in *re peculian*. So a master who would not release a person who had stolen a thing under another oath, the taking of which would give the other party an advantage, could himself take the contrary oath, originally offered, or offered back, to him.

Some cases need special discussion.
(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 vindicable\(^3\). 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 conflict. Ulpian, in two texts, discusses the case of a Jiliusfamilias who has repaid money borrowed in contravention of the Sc. Macedonianum. In one case the money is vindicable\(^5\); in the other there is a conflict. The argument leads plainly to a vindicatio\(^6\), 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 shows 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 show 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 obligation on the slave\(^11\), and we know, further, that ususapio 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 peculiare without administratio, a rule which he thinks may have been cut down by Proculus\(^15\). He does not advert to the text just cited\(^16\) 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\(^17\). And though he gives a vindicatio where a son has lent money, contrary to the Sc. Macedonianum\(^18\), it is likely that here there was such an animus.

(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 this 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. 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\(^8\), 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\(^9\).

(c) Novation. It is clear on the general tendency of the texts that a slave with administratio can novate debts, but not without it\(^10\). 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\(^11\). 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 credits. If the

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1. Mandry, op. cit. 2. 93; Karlova, op. cit. 2. 1132. 12. 2. 21.
3. 12. 6. 35.
4. 14. 6. 3. 2.
5. 14. 6. 3. 2.
6. 14. 6. 3. 2.
7. 14. 6. 3. 2.
8. 14. 6. 3. 2.
9. 14. 6. 3. 2.
10. 14. 6. 3. 2.
11. 14. 6. 3. 2.
12. 14. 6. 3. 2.
13. 14. 6. 3. 2.
14. 14. 6. 3. 2.
15. 14. 6. 3. 2.
16. 14. 6. 3. 2.
17. 14. 6. 3. 2.
18. 14. 6. 3. 2.
19. 14. 6. 3. 2.
20. 14. 6. 3. 2.
21. 14. 6. 3. 2.
"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. 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.

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.

It is clear that administratio did not allow donatio. 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 forbade recovery, it seems clear from texts already considered that the intent of the slave was not material. 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. It must also be remarked that administratio did not authorise alienation in fraud of creditors. The text, which refers to fictifamilias 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 peculiare, and the foregoing rules apply.

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\(^1\) 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. 302.  
\(^6\) See however, Mundy, op. cit. 2. 109.  
\(^7\) 39. 5. 7. 2, 3; 42. 8. 12. See Mundy, op. cit. 2. 110. The rule as to m. c. donatio can hardly apply to slaves.  
\(^8\) 42. 8. 12.  
\(^9\) 15. 1. 4. 6.  
\(^{10}\) Alienation under contract may give rise to counter obligations: so far as these are enforceable by action this will be de peculio, 21. 1. 28. 4, 57. 1.
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 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.

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 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.

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. 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, that the action is based on the Edict, 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 duntaxat de peculio, or the like.

The liability is in a sense not of the master but of the peculium. 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. It does not depend on voluntas dominii, and thus it is not barred by the master’s prohibition to trade, or by the fact that he is a pupillus. 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. Other results of the view that it is a liability dependent on the peculium may be noted. A fideiussor for a dominus

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1 cp. cit. 9 sqq.; 163 sqq.
2 Acta, p. 191. That a potential future peculium could be regarded as existing is clear from 15. 1; 7. 5; at least for later law.
3 Acta, pp. 196, 199. 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.

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1 15. 3. 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 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 shows that it is not a case of representation: the slave is dealing on his own account.
4 31. 1. 57. 1. Apart from domus.
5 42. 4. 3. 1. If does not depend on potestas, in the sense in which noxal actions do: the only interrogatio is, if any, an peculium apud cum sit, 11. 1. 9. 8.
6 15. 1. 30. pr.; 34. 3. 5. 2.
on a liability de peculio was liable only de peculio. A dominus who handed over the peculium, without fraud or delay, was entitled to release from a pending actio de peculio. But this view of the liability was attained, like most juristic developments, only gradually. Thus a text on interrogatio has evidently been handled by the compilers, and that on the liability, though there be nothing in the peculium, records a doubt. We are told 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 a house from which something is thrown, there is nothing in peculio, 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. 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 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. 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, 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. 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 question whether there is anything in peculio is material only at judgment.

The transaction giving rise to the actio de peculio must be a negotium: 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. 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, gives an actio de peculio. It is held by Mandry 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 there have no bearing on the law of this action. But there are some cases which raise difficulty. In one text we are told that where a slave received property in fraud of the payer's creditors without his master's knowledge: 

15. 1. 8, ante, p. 100. 8 Mandry, op. cit. 2. 234 sqq.

1 For slaves the chief case is condicio furriae, 13. 1. 4; 15. 1. 3; 19. 1. 90. pr. As to its quasi-contractual nature, Monro, De furta, App. 1. There was de peculio on a judgment for a son's delict, based on the contractual view of licit contestatio, 9. 4. 82; 15. 3. 11. For this and another case, Koschaker, Translatio Iudicii, pp. 199, 194.

2 For the same level, see pp. 207, 206, n. 7.

3 Similar questions arise as to the consumptio of the naturalis obligatio by litis contestatio in this action. 

4 15. 1. 30. pr.; 43. 3. 5. 2. 

5 4. 2. 16. 1; 43. 3. 5. 2. 

6 4. 2. 16. 1; 43. 3. 5. 2. 

7 15. 1. 90. pr.

8 See n. 4.

9 See op. cit. 2. 239 sqq.

10 15. 1. 3; 19. 1. 90. pr.

11 4. 9. 9. 4. As to this text see ante, p. 116. Further illustration, 4. 9. 3. 3; 47. 2. 42. pr.
Some cases give rise to an alternative between our action and no sal surrender, on principles which are not altogether clear. Ulpian cites Pomponius as saying that the action in factum against a minor is, in the case of his slave, magis noxialis, although the actio de peculio is also available. This seems to be a compromise due to the doubtful nature of the relation between the minor and his master, at least in later law, and the relation being not strictly contractual, since the minor is not civilly liable, and there is no locatio. Misconduct is in essence delictal, since the action lies only for the delict, and thus it is not in the nature of the relation between the minor and the master that the minor is to make his master's position worse. There is no actio de peculio. The essence of restituto is that each party is to be restored to his original position, and the jurist's rule is that a slave is not to make his master's position worse. 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. The essence of restituto is that each party is to be restored to his original position, 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.

Pomponius mentions a case in which a slave of the heres steals a res legata, and sells it, and he gives the opinion of Attilius, that there is an actio in factum against the master, claiming either no sal 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 conductio furtiva de peculio. The mention of sale is made to exclude the possibility of any contractation after entry. There is thus no actio furti or conductio furtiva, since the legatee is not owner, and it is a res hereditaria. 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. The decision is thus a juristic expedient, not very logical, to provide for a causa omissionis 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.

1. 11. 4. 3. 6. 2. Though a wage be paid, 11. 6. 1. 3. 4. 4. 3. 24. 3. 4. h. l. 4. 5. C. 2. 3. 8 etc. There is not necessarily any delict in the matter, 4. 4. 15. pr. 24. 1. 6. 30. 48. pr. 8. 47. 2. 57. pr. 24. 15. 3. 11. 47. 19. 3. 8. Cp. the case of manus, 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 arising quasi-contractual relation: hence a further limitation to the peculium, as a slave may not make his master's position worse.

- 15. 1. 1. 4. 2. C. 4. 36. 11. Op. 15. 1. 1. 3. 27. pr.; Maudry, op. cfr. 1. 345 sqq. 3. Negotium gestio by a slave, or, in re peculiari, for a slave, 3. 6. 5. 8; P. 1. 4. 5. A slave acting as tutor, 27. 1. 2. 15; 15. 2. 22. pr., as to which case, post, p. 217. 4. 15. 3. 27. 5. C. 5. 1. 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. 13; 19. 6. 60. 7. Deposit, 15. 1. 5. pr.; 16. 3. 1. 17. 42. 8. 6. 12. Commodum, 13. 3. 4. 5. Maturum, 4. 3. 20; 15. 1. 4. 3. In. 4. 7. 4. 26. 13. 19. negatives only good bona, on the facts. Hadinis. Dianwm. Dom. 183. Constitution by slave, 15. 3. 1. 3 (as to constitution by master, 15. 3. 1. 2). Pledge or precarium to him, 15. 5. 1. 30; 43. 36. 13. Societas, 16. 2. 9. pr. Contract by slave exercitor, 4. 9. 7. 6. 14. 1. 1. 20. 15. 13. 6. 21. 1. 47. 2. 13. 4. where there would be no difficulty if de peculio were available. See also ante, cfr. 1. 577. 16. 1. 1. 2. In. 4. 7. Rub. 19. 15. 1. 4; 19. 1. 24. 2. 17. C. 2. 3. 8 etc. He illustrates by cases of donus (4. 3. 7. 9; 15. 6. 5. 8; 16. 3. 1. 43). calga (47. 2. 14. 10. 32. 3. nova (47. 2. 14. 10. 32. 3. 40. 1. 49), and destruction of the thing (45. 1. 91. 8). 18. Post, App. ii. 19. 45. 1. 3. 5. 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 the case of sons the rule is so expressed, and there are evidences of the conditions are different from those in the case of a slave. No doubt in an appropriate case there would be an actio de peculio. For mora, causing discharge of the obligation, the actio utilis would suffice, and there seems no reason for imposing any liability at all in respect of culpa.2 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 need not have been in any close relation to the action lies, generally speaking, on any contract of the slave; but the words of the Edict and its nature is determined thereby. That the point is important in relation to release of one by act of the father the fund

1 See n. 7; 46, 1, 49, 30 sqq.
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 (46, 1, 49, pr.), and there is analogy for restitutio actionis, 46, 3, 38, 4. Fully discussed by Maudry, op. cit. 2, 309 sqq.
3 M. holds that there was a remedy here too but the texts do not bear this out, op. cit. 2, 309 sqq. As to dolus in relation to the fund available, post, p. 219, and as to another special case, post, p. 219.
4 Macchiard, Obi. Solid., 416; Van Wetter, Obligations, 1, 290 sqq.; Maudry, op. cit. 2, 309 sqq. The point is important in relation to release of one by act of the father.
5 A slave with authority, but without, could discharge a debt by payment (ante, p. 159) and a slave could take an acceptatio (ante, p. 155). His pact, ne peteteret, quod in rem or in the name of dominus was a good defence to an actio de peculio (2, 14, 17, 7, 18, 21, 8). And with authority he could delegere debitoris, 15, 1, 45, 1. As to novation of his liability, see post, p. 216.
6 3, 5, 8, 13; 15, 1, 27, 8. 15, 1, 29–1, 47, pr. 10 Post, p. 229.

CH. IX] Actio de Peculio ex ante gestis 213 somewhat opposed to this. Only three texts seem to raise the point. One says that an adrogator is liable de peculio quemvis Sabinus et Cassius ex ante gesto de peculio actionem dandum non esse existimant. If this refers to contracts by the adrogatus it is conclusive for later law, since a civil 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 alius potestate est et negotium gestum erit. 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. 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: there is no actio de peculio. But this text is so obscure as to be quite inconclusive. The third 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.

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, there are others the facts of which are such as to exclude this knowledge, and this is not made an objection. And it is impossible to apply the notion of reliance on the peculium to the case of condictio furvaria.

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
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. 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 an unauthorised pledge or precarium by a slave.

(b) Judicial and quasi-judicial proceedings. As a slave cannot take part in such matters, 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. 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 iuris iurisandorum. This is called ius iurisandum necessarium and a slave can have no part in it. 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 iuris iurisandorum, or as the case may be, an action in which the issue is only the taking of the oath. This is ius iurisandum 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 judicata, 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. Ulpian however holds that if he offer an oath and it is sworn there is no actio de peculio, as there would be in the case of a son. If the money is not due it is in effect a gift. Paul hints doubtfully at a contrary view. Quidam et de peculio actionem donandi dominum si actori detulerat servum iuris iurisandorum. edem de filiofamilias dicenda erunt. This, being merely obligatory, would not depend on administratio. Again he says: Servus quod detulit vel iurati servetur, si peculi administrationem habitat. 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.

(c) Promises by slaves. There is difficulty in this case, since texts dealing with such promises are few. But so far as primary obligations are concerned (i.e. apart from surety and expromissio) there are several texts which show that they can be made by slaves, so as to give an actio de peculio, subject to the ordinary restrictions on stipulation. As they have a power derived from the dominus they can even promise in the form: Spondeo, but as their sponsis is void at civil law and gives only a praetorian right of action it is doubted by Gaius 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, 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, not if it is given in a matter in which neither he nor dominus has any interest. There must be a iusta causa interveniendi. So also in the case of mandate operating as surety. Any ordinary mandate gives actio de peculio. But, in mandatum qualificatum, there will be actio mandati de peculio if the transaction affects the peculium, but not for an independent voluntary act of surety.

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—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 indicium solvi. This was ante litem acceptum. 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.
2 9. 14. 30. 1; 45. 1. 121; 46. 2. 12. 1; 46. 1. 56. 1; 46. 4. 8. 4.
3 Thus in the case in 12. 5. 5. they would be void.
4 45. 2. 12. 1.
5 G. 3. 119.
6 2. 14. 30. 1; 30. 6. 8. 4.
7 1. 14. 30. 1; 15. 1. 3. 5. 3. 6. 47. 1; 46. 1. 19–21. 2.
8 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.
9 e.g. 14. 8. 12. As to mandate to buy himself, post, p. 215.
10 e.g. where he gives X a mandate to pay on behalf of a creditor of the peculium.
nullity. But in no case can it produce the usual effect of expromissio: it can never novate the existing debt. 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, and though it gives an actio de peculo, this is because it would have been a contract verbis if he had been free. Sabinus 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 peculo is available, since the creditor evidentely means to accept this liability instead of that of the debtor. 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 peculo, for there may be, 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 tells us that a slave's unauthorised mandate, for this purpose, is null, and gives no actio de peculo. The reason is that the Praetor cannot be supposed to have contemplated contracts of this kind quo se ipsi malae ratione dominis auferrent. Diocletian 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 dominii, 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 peculo. 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. Ulpian cites Pomponius 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 copi me servum recipere quem in perpetuum alienari volueram.

There are a few texts which suggest that a master is not liable for this purpose. See Pand. 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. 1

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1 G. 3. 176, 179. In. 3. 29. 3; D. 15. 1. 50.
2 See Macchelard, Oblig. Naturalis, 168 sqq.
3 Gaius, in saying that his promise no more novates than if it had been stipulated a suillo (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 See below.  
6 Post, Ch. xxvii.
7 17. 1. 54. pr.
8 17. 1. 19.
17. 1. 54. pr.
18 12. 6. 11.
19 Machelard, cit. 286, sets it down to the natural obligation of a father to pay his son's debts.
20 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 suus on the transaction the defendant may set off a claim in full, though any action by him would have been limited to the peculium. So, if a slave has bought, the dominus, if he wishes to redhibit, must give back all
21 The fact that the peculium is not relied on is immaterial.
22 46. 3. 19, 34. 5.
23 14. 3. 1 pr.; 2. 8. 9. 2.
24 2. 14. 30. 1.
26 15. 1. 22. pr. Ante, pp. 211, 213. Cp. 27. 5. 1. 2.
27 Post, Ch. xxxix.
28 15. 1. 30. 1.
29 Post, Ch. xxxix.
30 G. 3. 19. 34. 5.
31 D. 12. 6. 11.
32 Ch. vii. 214.
accessories in solidum, and he cannot sue *ex empto* without having paid the price. 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 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. But payment to another creditor is not *dolus*, as the principle of the action is that there are no priorities. 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. 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. 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, 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.

The effect is not to make the act done void: the thing is not *in peculio*, but its value *peculio imputatur*. 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.

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. It is curious to find this rule in what is essentially a contractual action. 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 *index* 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.

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1 21. 1. 57. pr.
2 15. 2. 1. pr. Lenel, Ed. Perp. § 104. 1.
3 *e.g.* establishing the *peculium* or part, conniving at the slave’s so doing with the *peculium* as to damage the prospects of creditors, destroying the property or putting it to non-peculium 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. 31. 1. 2. The same rule is applied to the *dolus* of anyone under whom he holds.
6 4. 3. 15; 44. 4. 23.
7 *Ante*, p. 176.
8 15. 1. 21. pr.
9 15. 1. 21. pr. See Mandry, op. cit. 2. 403.
10 15. 1. 31. pr.
11 15. 1. 31. pr. See Mandry, op. cit. 2. 403.
12 15. 1. 30. 6. As the amount of the *peculium* is not in issue, *ademit contextio* in no way fixes it: the *index* must take into account *dolus* after that date, 15. 1. 21. 2.
Debts to Peculium added to Fund

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. 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 indicate the thing, or bring the action ad exehibendum. This indeed is what Africanus tells him to do. Apart from fiducia the liability is not expressed in the formula: it results from juristic interpretation. Thus, notwithstanding the general words of the main text, it applies only to dolus taking the form of non-restitution, and only to the actions in which that point arises.

We have seen that the peculium may consist not only of peculiaria res, but also of debts to it. 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, and thus are, e.g., included in a legacy of it. 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, but not necessarily at their face-value: allowance is to be made for cost of recovery and risk. 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, the whole peculium can be destroyed by his mere wish, so we learn that he can release himself from any debts, though he cannot thus make himself a debtor. For this result there must be what would be a debt in causa civili: a mere acknowledgement sine causa will not suffice. 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.

Such debts must be connected with the peculium, but they may be from the dominus himself, or from any fellow-slave who has a peculium, and, in the last case, it is immaterial whether they are from delict or contract. The adjoining text, however, says: Si damnum servio dominus dederit, in peculio non imputabitur, non magis quam si subripuisset. The context suggests that what is contemplated is damage to or theft from the peculium. But such acts would amount to dolus 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 peculiiari.

In arriving at the nett peculium there is another important step to be taken. The dominus may deduct all debts due to him. No such deduction is made for debts due to third persons: the principle of the action is, occupantius melior solet esse condicio. But he may deduct debts due to persons in his potestas, since such debts are, on ordinary principles, acquired to him. 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.

Debts so deductible may have the most various origins. Any form of contract which was open to slaves might base such a deduction. 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. One text is considered by Mandry to raise a difficulty in this connexion. A slave agrees by pact for a sum to be paid for manumission, and then finds a res to promise it to the dominus. Mandry regards this as a case of expressio novating the natural obligation of the slave. This would make a pact capable in itself of creating a natural secondary. But the contract of the res 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. Payments made on behalf of...
the slave are deductible if they would have created obligation apart from the slavery. 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. 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.

We are told that the dominus is not entitled to deduct the cost of curing the slave, in illness, because rem suam potius legit. 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. 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.

For delictal penalties in respect of wrongs to the dominus no deductions can be made: 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. 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. 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. 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

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 or, or damage to, the master's property, there is a claim, in simplicium, in the nature of condicio furtiva, and also for the damage. An illustration given of this is damage to a fellow-slave, but we are told that if a slave kill or injure himself, there is no deduction. 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. 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.

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. Thus the heres may deduct for debts due to himself before he became owner of the slave. Mandry remarks that these texts show 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. It was agreed, however, that if the heres did become owner he could deduct for damage done, by the slave, to the hereditas inaeuna.

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, just as he could if the master himself had been the debtor. 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.

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1 15. 1. 9. 8, 11. 1.  2 15. 1. 11. 1.
3 15. 1. 9. 8. 10. Money received by serva on behalf of dominus may be deducted if dominus raely, if not it is an indebitum and the debtor may deduct. 15. 1. 11. 2.
4 15. 1. 9. 7.
5 3. 5. 5. See however, Windscheid, Pand. § 431. Van Wetter, Oblig. 3. 306.
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 he is potius non servus. 15. 1. 9. 7.
7 Mandry, op. cit. 1. 352. 8 Ibid.; Karlowa, op. cit. 2. 1144.
9 15. 1. 11. pr.; 33. 3. 8. 16. So could payments to avoid suavem in possession of aedes peculiacum which threatened adjoining property—a matter closely akin to nominal liability. 15. 1. 22. 23.
10 15. 1. 11. pr.
in view of the lex Falcidia. 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.

Ulpian tells us that the right of deduction is to be applied only, si non hoc aliunde consequit potest. Mandy\(^7\) shows 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\(^2\), 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\(^5\). It may also be pointed out that the word potest\(^1\) 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\(^2\). 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\(^6\). Hence it follows that if nothing is actually taken from the dominus, the debt to him still exists, and consequently the deduction can be made again if an action is brought\(^6\).

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\(^6\), and we have an illustration of privilege in the claim of dos\(^1\). But there is a text\(^10\) which seems to put the claimant of dos in a better position. It observes that the wife has a privilege in an action of recovery of dos, over other creditors, and adds, et si forte domino aliquid debet servus, non praefertur mulier, nisi in his tamquam rebus, quae vel in domino datae vel ex dote comparatae, quasi et habeas.

\[\text{Debts to Dominus deducted from Fund} \quad \text{[PT. I]}\]

\[\text{CH. IX}\] \text{Debts to Dominus deducted from Fund} 225
dotes sint. This text has been supposed to raise a difficulty, 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 shows that it contemplates something narrower than the ordinary privilege. It confines the claim to specific res doles, 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\(^5\).

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? 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\(^1\). 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\(^3\). 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 praemissen. 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 tigitur et quasi sibi eum solvere cum quis de peculio agere conabitus\(^8\). We have, however, seen that deductio is in no sense a solutio, and the words have rather a Byzantine look about them. The
real origin was forgotten in the later classical time: these are mere constructions.

The *actio de peculio* is always in *personam*, and therefore 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. The action *meliorum facit causam occupantia*, 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. 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. 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. But judgment or payment releases, in effect, only *pro tanto*: the creditor may renew his action till complete satisfaction. 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*.

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. B can conduct the man from A, while A can sue B for any loss he incurs on the transaction by the slave, *ex negotio gesto*. 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 conduct 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 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 pettio* 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. The action will not be *de peculio*, since *hereditatis pettio* 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*), the action will be limited as if it were *de peculio*.

If a slave sells, the *actio redhibitoria* is *de peculio*. The text adds: *in peculo autem et causa redhibitionis contrinhibitur*, and goes on to explain this obscure expression in terms which shew that *causa redhibitio* 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. 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. 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.

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.
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.

The year runs, according to the Edict, from the time quo primum de ea re exeripundī potestas erit. 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, and then only if the claim is already actionable. The liability is essentially de peculio, and thus there must have been an unaddeed peculium at the time of the death, etc., and it must have remained with the former owner. It covers this, and what has been fraudulently removed therefrom. It is subject to the ordinary additions and deductions for debt, except that the defendant cannot deduct for debts incurred since the alienation. So long as the liability exists the fund is regarded as capable of increase by accretion, etc., and it must have remained with the former owner. It covers all cases of “peculiar” liability.

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. Thus the intentio says nothing as to the limit of a year: this point is raised by exceptio. As the defendant may not have the peculium it has been thought that the formula contained words expressing this requirement. 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 bona fide possessor or usufructuary.

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. 

\[\text{(a) Transfer of the slave, inter vivos, by sale or gift. All alienations are on the same footing: 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. The liabilities are distinct. Thus the alienee is not accountable for dolus by the alienor, 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. 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. Neither, if sued, can deduct any debt due to the other, though the alienor can deduct debts due to himself, even before the acquisition, on which he has de peculio against the old owner. 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. 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. 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.}

Action against one does not, in practice, bar action against the other for any balance due, no matter who was sued first. According to Proclus, Ulpian and Paul, the plaintiff may choose which he will sue, and cannot sue both at once: he must rest on his right to sue again for any balance, 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.

But a text of Gaius says: Illud quoque placuit, quod et Julianus probat, omnino permittendum creditoribus velit in partes cum singulis agere, vel cum uno in solidum. As the adjoining texts both deal with sale, this is sometimes held 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 non
Manumission of Slave: Liability de Peculio

The text deals with a case in which 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, and not the peculaires res is the peculium. 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. 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 that and not the price of the slave is not peculium. If it were of any importance, and went with the man, it was not allowed to pass as retaining it. The old owner is liable to the actio annalis. If the heirs succeed to both the slave and the peculium, the liability for debts accrued before the sale: those subsequent have no relation to his position as owner: his remedy is de peculio.

(b) Manumission inter vivos. If the peculium is retained, the old owner is liable to the actio annalis. 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. 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.

(c) Transfer on death. 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, quite apart from any division of res hereditariae. 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. 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. Ilud 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.

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. Each heir is liable only pro parte and can deduct only what is due to him. Each is liable for dolus so far as he has profited, and absolutely for his own. 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. Here, too, any of the heirs may be creditors, but, as they are not common owners they may have de peculium inter se. Such a creditor must, presumably, allow for the peculium which has come to him. It may be added that the slave himself, if he is a heres, is liable de peculio. There can be no personal liability in the freedman: his contracts do not become actionable against him by his manumission. 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. In the case of manumission it might be supposed that the actio de peculio was inapplicable to him, since it presupposes

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1. C. 3, 36. 6; D. 11. 1. 18.
2. 15. 1. 33. 34.
3. 15. 1. 32. 2.
4. He could have deducted before delivery, and can recover by cond. indeb. et cr 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 pecullares, and the creditor cannot proceed against the buyer at least on account of the old peculium.
5. 15. 1. 28. 3, 37. 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. 4. 7. If it were sine peculio, the new owner is not liable, the old one is liable to the actio annalis.
6. 15. 2. 1. 7.
8. See, however, C. Th. 2. 32. 1 (C. 4. 26. 13. 4).
9. Death of the slave leaves the actio annalis and nothing more, 15. 2. 1. pr. As to the special edit for emancipated sons etc., see Lenel, Ed. Perp. § 104.
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. 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. This is subterfuge: if the economic or "beneficial" state of things is to be decisive, the peculium was never his at all.

B. ACTIO TRIBUTORIA.

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. 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 mercer, according to the above-mentioned principle—vocatio in tribunum. 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 arbi
er to carry out the distribution. 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. 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, and that, as the dominus and the other creditors are vocati, the summoner must be the Praetor. The acceptance of this view raises another question. If the vocatio is by the Praetor, it is contained in the Edict (set in operation by a creditor), as Lenel seems to hold in his conjectural restoration, or does it require a subsequent act, a decretum of the Praetor, as is held by some writers? The Corpus Iuris contains no evidence of any such decretum, but it is very faintly suggested by the language of Theophilus,
Actio Tributoria: Requirements

with it. 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. This is denied by Mandry, who thinks objective connexion enough, 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. 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 exercito were to the master's knowledge. We are told that the dominus comes in velut extraneus creditor, and that debts due to him, or to a person in his potestas, or to any master if there are several, 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 perdidi.

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. 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. The fund available for distribution covers not only stock and its proceeds, but tools of trade, sicarii employed in the business, and debts due to it. 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. In the same way a creditor with a pledge can enforce it against the other creditors. 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 In 4. 7. 15, 16; 4. 7. 8. 2 Or on this view a casual transaction with one who afterwards turned out to be managing such a business would not suffice. 3 See post. App. I. 4 Ulpian speaks of creditors giving credit to the merc: he does not speak of the dominus. 5 On this view a casual transaction with one who afterwards turned out to be managing such a business would not suffice. 6 See post. App. I. 7 Ulpian speaks of creditors giving credit to the merc: he does not speak of the dominus. 8 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. This is denied by Mandry, who thinks objective connexion enough, 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. 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 exercito were to the master's knowledge. We are told that the dominus comes in velut extraneus creditor, and that debts due to him, or to a person in his potestas, or to any master if there are several, 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 perdidi.

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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, 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. The demand
of one creditor does not compel others to come in: 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 reckoned. 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.

It is in carrying out the distribution that the dominus may incur
liability to the actual actio tributoria. More failure to carry out his
duty properly is not enough: there must have been dolus. Liability
does not arise if the act was done by mistake and not persisted in after
discovery of the error. Of course dolus may take many forms. One
text on the nature of the necessary dolus raises a curious point. Labeo,
deciding a doubtful point, observes that if the dominus denies, cuiquam
debet, this is such dolus as justifies the action, for which view he, or
Ulpius, gives the reason aliquan 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.

If the slave of an impubes or furiousus trades, sciente tutore vel
curatorc, 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. Pompontius thinks he is liable, but

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1 h. t. 7. 3. 12. The language negates the hypothesis that the method was similar to that
in homomund vendita.
2 P. M. 4. 9. 2.
3 Mandy, op. cit. 2. 457.
4 See, e.g., h. t. 5. 10. 7, pr. Probably security for possible refund was always taken.
5 The case was not likely to arise.
6 Dolus, h. t. 7. 3.
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 A. 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 lite contrectu?
12 14. 4. 3. 1. The rule differs in form, though perhaps no more, from that laid down in de
peculio, ane, p. 318.
13 14. 4. 2. 4.
14 h. t. 7. 5. 8.
15 31. 8. 16; ane, p. 292.
16 14. 4. 9. 2.
17 See the literature cited. Mandy, op. cit. 2. 450.
18 14. 4. 7. 2.
19 Karlowa, op. cit. 2. 1163.
20 14. 3. 1. 47.
21 14. 4. 5. 1.
22 op. cit. 2. 1163.
23 Leuel, Ed. Farc. § 195.
24 14. 4. 7. 3.
Ordinary actio adiectitiae qualitatis, of like nature with the rest, and this seems the better view.

Between this action and that de peculio the creditor must choose, for having sued by one, he cannot fall back on the other. 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. On the assumption that the action is not barred, the defeated party may recover by peculium, and hence the vocatio delictal may deduct, the fund may be so much increased as will more than counterbalance this.

Presumably the action exhausts the claim to the then existing meser, 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 insitoria (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.

Nothing important turns on the point, as it does not help us to reconstruct the formula of which we know nothing. Lencel, Ed. Perp. § 103. The action has a certain penal character. The defendant must account for all that he would have handed over apart from what was still due from the slave, tributam, to the same extent as there was no counterbalance this. 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 vocatio and a contractual action, the one does not necessarily bar the other, as to any excess recoverable by it.

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CHAPTER X.

SPECIAL CASES. SERVUS VICARIUS. S. FILIIFAMILIAS. S. IN BONIS. S. LATINI.

We are told in the Sources that servorum una est condicio. 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 successors 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 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 so be explained away. Such are that of the statutiber, 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.

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 traces...
Servus Vicarius: not an accessory

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 one1 which refers to the acquisition of property by a vicarius, though others mention vicarii vicarii2. 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. 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 peculium4.

As the peculium is de facto the property of the slave, so, necessarily, is his vicarius. This conception is allowed to determine points of wills in a striking way. Ulpian quotes Pomponius as saying that a gift of servi mei will not include vicarii1. 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. Alfenum says that if his peculium is left to a freed slave, and the will also contains a gift to X of omnes ancillae meae, this last does not cover ancillae in the peculium4. Here the rule really is that the specific gift takes precedence of the more general1. Where a slave and his vicarius were freed and given their peculium, 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 owner1. All these, being constructions of wills, show what was the common mode of speech which the testator was likely to have used, and the rule goes no further. Erman3 indeed seems inclined to consider it as more

1 15. 1. 31. 2 e.g. 33. 8. 6. 3; 33. 2. 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 advocatus that vicarius was an accessory.
In a legacy of servi cum vicarius, the legacy of vicarius is good, though servus be dead. In 2. 20. 17; D. 33. 8. 4. If the slaves on a farm are pledged, vicarius not employed are not included, 20. 1. 32.
5 22. 72. 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 Colens as holding that this did not cover vicarii servus (33. 7. 12. 44; cp. 20. 1. 32), a rule which is somewhat obscure.
9 op. cit. 435.

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 not1. In one text, 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 Trebatus agree that L gets only a quarter. That is, the special gift is not contemplated as destroying the general gift: each covers half. Pothier4 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, testa 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 vicarius4. 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. That part of V which S does not take goes to T, who thus will take more than half. They are in fact coniunctas to a certain part of V. This they divide. T takes the rest5.

Another text says that a legacy of vicarius includes one of his peculium7. This is so contrary to principle, and to express texts, that it gives rise to doubts. The opening and concluding clauses are regarded by Gradenwitz as interpolated8. 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 slave8.

Except for one unimportant chance allusion9, the texts seem to be silent as to acquisition and alienation by vicarius. 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 servus in rem, and rarity seems the only explanation of the silence of the
Acquisitions by Servus Vicarius

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. This would result from iussum, and perhaps, though this is not so clear, from acquisition nominativum to him. The ordinary results of his operae will go to servus ordinarius. 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, but so they would acquisitions ex operis. The relation is more like that of usufructuary and owner, and 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, since the dominus certainly has a real right in the slave. We know that for acquisition of possession in re peculiari, the knowledge of dominus is not needed, and no doubt an analogous rule applies here. The difficulties which arise in connexion with bona fide, and similar matters, in relation hereto, can be judged from those which arise in the case of an ordinary slave. 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.

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, 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 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. The principles of concessio peculii were fixed, as we have seen, 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, but this is not true of specific alienations under an existing administratio.

The peculium may consist wholly or in part of property given by the owner of the ordinarius. 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, 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 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

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1 Erman, op. cit. 452—456.
2 18. 1. 3.
3 Post, Ch. xvi.; cp. 33. 8. 22. 1.
4 49. 17. pass.
5 Ante, p. 200.
6 Ante, p. 135.
7 Ante, p. 125. 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 13. 1. 6.
Actio de Peculio Vicarii

Peculium 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 times¹, 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 peculium², authorising exercitio by the vicarius³, having knowledge of his trading⁴, and benefiting by versio in rem eius of his acquisitions⁵. 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 actio 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 existence⁶. The next text⁷ applies this principle to legacy of peculium ordinarii, and elsewhere⁸ 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 another⁹. 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 deductedⁱ⁰, and, conversely, debts from them are added so far, in the case of ordinarius, as his peculium will go. Erman points out¹¹ 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 ordinarii¹².

It is also held by Erman¹³ 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, non hoc alio modo consequi potuit¹⁴. It may be doubted indeed whether it could be dolus to pay

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¹ 14. 3. 12; 15. 1. 19. pr.; 15. 3. 17. 1.
² Pompomius treats it as the normal case, 15. 1. 4. 6.
³ 14. 5. 1.
⁴ 15. 3. 17. 1.
⁵ 479, 479.
⁶ In. 4. 7. 4; G. 4. 73; D. 15. 1. 17. In 33. 8. 9 the same principle is applied to legacies.
⁷ 15. 1. 17.
⁹ 15. 1. 11. 6.
¹⁰ 15. 3. 17. 2.
¹¹ 33. 8. 16. 1.
¹³ 15. 3. 16. 2.
¹⁴ This is all Erman means, though he once speaks of vicarius as actually in his own peculium (p. 479). Affolter seems to treat this as Erman's real view, Z. S. S. loc. cit.
¹⁶ 15. 1. 11. 6.
¹⁷ 14. 1. 1. 22.
¹⁸ 15. 1. 17. 39. 2.
¹⁹ 15. 3. 17. 1.
²⁰ 15. 3. 20.
²¹ 15. 3. 20.
²² 15. 3. 10. 7, 8.
²³ 15. 1. 19. pr.
²⁵ 15. 3. 17. 1. It does not mention debt of vicarius.

Actio de Peculio Vicarii
peculium, not take it away. There seems no reason to think Africanus adopted after the death of the contract, ended with the peculium ordinarii. Whether that endured obligations established by him. It does not mean, as the peculium of he left it, it was still peculium. All that is needed is that he does the form ea suppos', that the peculium vicarii, and therefore all liability on ordinarius, and is therefore subject to the limitation attaching to is here brought on the knowledge of cases were rare, and it may be that the discussion is mainly academic. An impression of the same sort is left by the one text6 which deals with is here brought on the dominus. 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 supposed1, 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 away1. 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.”

The meagreness of the textual authority 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 text6 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 actio in this connexion deals with a vicarius who was told that if vicarius exercet by authority of ordinarius, the same result of course follows5. The only text deal-
Servus Vicarius. Noxal liability [Pt. 1

other way is, for analogous reasons, a little indirect. 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 vicarit on the mandate to him to settle. It then adds: pretiumque quo emisti in rem tuam versum videri poterit eo quod debitor servi tua factus esset. 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.

The law as to noxal liability for a vicarius is not quite clear. Africanus tells us 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 vicarit, 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 that 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 that dominus is liable, as si is exercitor liber et hic vicarius servus eius esset ut de peculio servi tui ad noxam dedere vicarium damnatur, 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 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, 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, which, as Lenel says, 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, 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 defect 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 Filiiifamilias.

Of this slave there is little to be said. So far as we are here concerned the servus castrensis peculi is the slave of his immediate master. No doubt the same is true for servus quasi castrensis, but authority is lacking.

On the other hand, slaves of a peculium prefectitum are in much the same position as vicarius. The few differences are indicated by Erman, the most important one being that the various actions adiectivae 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 iussa, exercitoria, insititoria, would be available, while de peculio and tributoria were not, and must be brought against the pater. This leads to the odd result, 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 iuslex 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 iussa, de peculio, de in rem verso, and tributoria a requirement that defendant have potestas over the slave.

1 Lenel, who holds that the actio insitioria was always utilis where insitioria 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 Thurn, De in rem verso, 260 sqq. It may be noted that the text is another authority for direct actions on account of vicarius.
3 See Mommsen's text.
4 The part we have considered is oddly expressed, and the final clause besides being corrupt more repetition.
5 Ante, p. 122.
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 it is post-classical. According to the main statutes 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

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 Iunia8 expressly enacts that the tutor of a latinus impubes manumissus shall be he who had ius quiritium before the manumission, 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. The quiritary owner could not free him9. 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 inheritances2. Perhaps he could be instituted as a servus alienus could, and then if the ownership had ripened, he would be necessarius heres. He if he were instituted with other heirs it seems that he would become a Latin, if, and when, some other heir entered3.

1 C. Th. 8. 18; C. 6. 60.
2 C. Th. 8. 13. 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 fn.
4 C. 6. 61. 8. 6. 6. 6. 8. 6.
5 Ulp. 1. 19; G. 1. 167.
6 Ulp. 19. 50; G. 1. 54; 2. 88; 3. 166. Even, so some taught, though he stipulated or received by manumission 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, Peregrini.

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 connection 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 claim1. This at least seems the natural inference from the texts dealing with gifts to the Latin himself2.

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 gift3. 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 he might sue or be sued4, 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. 119; 2. 275.
2 G. 1. 25; 2. 219 etc.
3 Arg. Ulp. 17. 1; 20. 8; 22. 3 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 suis heres. Even the development of ius abstinendi does not affect this, and the rules as to the acts of slaves, where there is a suis heres whose taking is still doubtful, are nowhere fully dealt with.

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, but dominii loco habetur; sustinet personam domini. In three texts it is actually described as dominus. But of these one says, dominus ergo hereditas habebitur, after having said, cum dominus nullus sit huius servi; in the second the words, hoc est dominae, are, evidently, an insertion; the third, 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 multa partibus turis quo dominio habetur; in plerisque personam domini sustinet. 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 suis captivus, and of a postrema omnia may have been similarly dealt with, but there is no authority for applying the theory of the hereditas iacens to them. See Proculine, Laeco, 1. 306 sqq. As to peculium castrum, post, p. 225.
2 47. 19. 6; 48. 16. 2.
3 11. 1. 15. pr.
4 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.
9 46. 8. 17. 2.
10 9. 9. 1. 10.
11 48. 19. 2; 18. 1. 3.
12 48. 19. 3; 19. 5. 30. 1.
13 41. 1. 34. 9.
14 41. 1. 34. 9; In. 2. 14. 2; Theoph. ad h. 1.
15 14. 2. 17. 2.
16 9. 2. 19. 3; 11. 10. 2.
17 9. 2. 19. 3; 11. 10. 2.
18 9. 2. 19. 3; 11. 10. 2.
19 9. 2. 19. 3; 11. 10. 2.
20 9. 2. 19. 3; 11. 10. 2.
21 9. 2. 19. 3; 11. 10. 2.
22 9. 2. 19. 3; 11. 10. 2.
23 9. 2. 19. 3; 11. 10. 2.
24 9. 2. 19. 3; 11. 10. 2.
25 9. 2. 19. 3; 11. 10. 2.
26 9. 2. 19. 3; 11. 10. 2.
27 9. 2. 19. 3; 11. 10. 2.
28 9. 2. 19. 3; 11. 10. 2.
29 9. 2. 19. 3; 11. 10. 2.
their tortures has taken an oath of good faith. But they cannot be tortured against one who, having given security, has obtained possession of the hereditas: domini loco habebitur.

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, and does not pass to a new dominus, except by cession, 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. Unless it can be said to be inherited, this seems to make the hereditas represent the heres. This inadequate justification is eked out by another. We are told 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, and in fact the explanation will do only for damage, not for destruction, unless the lex means by "owner," one who never was owner. 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. If he is killed by another person, similarly, we are told, the legatee can have no action, though the heir has. But if it were merely damage, the legatee on acquiring the slave can call on the heir to cede the action. For theft of the slave the ordinary rules of ex pilatio hereditatis are applied. 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. 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.

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. 3. 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. 38. 2 the point is the same: has the possessor validly entered? 6 See 36. 1. 68. 3, and 47. 10. 1. 6. 7 Monro, Lex Aquilia, ad h. 1. 8 The text observes that any other rule would cause intolerable injustice. But an actio in factum might have sufficed.

10 4. 3. 2. 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, 30. 8. 2. Pud say (36. 1. 68. 2) that if there were a fideicommis, and a slave was damaged, the action did not pass to fideicommissarius, as it was not in bona defacti. As Pumilia remarks (Sachsbesch. 189) this denies merely the ipso facto passing of the action. He thinks the hereditas does not refer to damage after aditio, but this is far from clear and does not seem material. So far as the heres's right is concerned, the same rule applied to servus crimini, 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. 3. 69—71.

13 47. 10. 1. 6. 7. 14 Ante, pp. 78, 80.

CH. XI] Delicts by Servus Hereditarius 255

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. Analogous rules apply if the slave, freed pure, does the act before the entry of any heir. If he is freed conditionally, special rules apply which will be considered later. 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. If such a slave steals from one of coheirs before aditio, there can be no actio furis, but the matter is adjusted in the judicium familiae erosicundae, the simple value, or in the alternative the slave, being allowed. If he is left per damnationem, he belongs for a time to the heir, who can thus have no actio furis.

If a servus hereditarius takes res hereditatis, since these cannot be stolen, there can be no noxal actio furis, though there may be actio ad exhibendum. 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 annus utilis. The reason assigned for the creation of this action is that there can be no noxal remedy, and he knows he is in no danger of being punished as a slave. Provided his act was dolos, for negligence is not enough, the nature of the wrong is immaterial. 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. Even if the liberty is fideicommissary, and unconditional, this action lies, as the man cannot be treated as a slave. But it does not lie if there is any other delictal remedy, though it may coexist with a vindicatio, or other action ad rem perseguendam. If the slave is freed only conditionally, since he can in the meantime be punished as a slave,
the action does not lie, even though the heres does not know of the wrong till he is free, 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. 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, 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 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. 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. Moreover the alteration of 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. 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: his acquisitions of whatever kind belong to it, and therefore go to the heres postea factus, even though the slave is legatus. What he acquires is reckoned in the Publician, quasi ipse possedisset, whether the dealing was peculii 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. 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. Papinian tells us, in one text, that if such a slave begins tenere pecullari causa, usucapio does not begin till aditio, for how, he asks, can that be usucapted, which the deceased never possessed? In another text he tells us that if such a slave comparat, usucapio begins to run, but this is singular iure. This is so like Papinian's own way of looking at acquisition of possession pecullii causa, as allowed on utilitarian grounds, and not based on principle, 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, so that the denial would apply only to extra-peculiar acquisition.

Legacies and institutiones can be made to a servus hereditarius, owing to the rule that servi persona insuscipienda est et in testamentis. But though he can be instituted, he cannot enter. In quibus factum persona operaevae substantiae desideratur nihil hereditati acquiri potest, and therefore, quia adire jubentis domini persona desideratur, heres expectanda est. 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. The institutio depends on its validity on the testamenti facio 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.

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. Hence arise some difficult cases. Acquisitions by legacy or stipulation, by a

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1 47. 4. 2. 2 47. 4. 1. 4. 3. 3 47. 4. 1. 1. 47. 4. 1. 15. 4 47. 4. 1. 5. 5 47. 4. 1. 6. 6 ad 4. 1.
7 The action cannot lie against legatese, for if it is a debt purely due from peculium (15. 1. 27. 1). heres should have deducted and can now contest (ante, p. 229). If it be regarded as necess.
9 41. 2. 1. 5. 44. 7. 16. 10 41. 3. 45. 1. 11 41. 4. 3. 41. 2. 44. 1.
12 41. 5. 3. 32. 1.
13 It is surprising that the titles dealing with possessory interdicts do not discuss dispossession of servus hereditarius.
17 5. 3. 1. 65. 31. 82. 2. 18 5. 6. 2. 21. 1. 53.
19 41. 1. 61. pr. 20 Where a heres contest, 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.
21 49. 6. 55. 31. 55. 1. 22 49. 17. 14. pr.
that in the meantime the property does not belong to anyone, which is inconsistent with the notion of pendency, as applied elsewhere.

Gifts of usufruct to servus hereditarius create difficulties. They cannot be completely acquired because usufructus sive persona constituit non potest. For the same reason, such a slave cannot stipulate for one, even conditionally. But there may be a legacy of usufruct to him, and as the persona is necessary, heres expectandus est; it does not cede till entry of the heir, so that there can be no question of its failing then, quasi mutato domino. The aditus here mentioned is that on the hereditas to which the slave belongs: the rule is independent of the fact that legacy of usufruct does not cede till entry under the will by which it is created. In a certain will a slave is legated. Before aditus, 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.

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 servus hereditarius cannot be attributed 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. But another text, 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 show the case contemplated to be that of acquisition of res hereditariorum after entry, i.e., solely a question of possession since ownership in such things is acquired by the fact of entry, the slave having course of effect under the hereditas in the technical sense. Other texts, which show 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.

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1 See Otto and Schilling ad h i. See also post, Ch xvi
2 41. 1 61. 1
3 Vat. Fr. 55, 60, D 45 4 26, ex praestis vides accept stipulato quanto petitis ca ea succipimus sit
4 Di. 7. 3 15 1 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 doublet but this seems to be the sense. There was another difficulty. Acquisition is by servus hereditarius were divided among coheirs (post Ch. xxv). But no part of this a usufruct could be separated from the person to whom it was given—see a persona vix esse potest. It could not be divided by the legatee in familiae successione, if the heir would not hold it in common, he must arrange for enjoyment and compensation with security 10 2 16. 16 pr. Text doublet
6 45 2 45. 41 1 18. As to common slaves, post, Ch xvi
7 41 2 1 35.
to us. And where A is heres pro parte and a slave is legated to him, he can, on adatvo, acquire by that slave possession of a fundus hereditarius. 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 ure heredidarius. When it is remembered first that the rule is an ancient one, 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 expressly to possession, and, thirdly, that hereditas was susceptible of possession and usucapion in early law, it seems safe to regard the rule as applying properly to acquisition of possession alone.

Even so limited, what is the rationale of the rule? No doubt difficult questions might arise in the absence of such a rule, 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. 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 possession of the dominus or of another slave would have affected no change in possession during the life of the ancestor, or while the hereditas was usus. 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 contracts by a servus hereditarius. It is laid down that he cannot contract in the name of his late owner there is no such person. 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. Cassius, Gaus, and Modestinus are reported as holding that he can do so, on the ground, in the case of the first two, that adatvo relates back. But the weight of authority is the other way we may take the rule as being that he cannot. Of course he can make a stipulation or pact in rem, or in the name of a fellow slave, or of the hereditas, or with no name at all. 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.

The hereditas is released by an acceptatvo to such a slave on a promise by his deceased master.

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 fideusus, it is not clear when time begins to run. Javolellus holds 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. Venenulus 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 Fumia. 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 peculo on transactions by servus hereditarius, e.g. sale, though he may deduct, as a debt due to the dominus, any damage done to the hereditas. In quod usus, analogy suggests that a contract made after the death of a dominus on his usus, does not bind the heres in solidum, as usus, like mandate is in most cases revoked by death, at least as against one who knew. The same question arises in connexion with actio institoria. Ulpian says 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, 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

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1 2 14 27 10 4 8 18 2 28 4
2 14 27 10
3 8 17
4 2 1 16 6
5 41 2 1 16 6
6 41 2 1 16 6
7 41 2 17 6
8 41 1 41 1 3 18 2 12 1
9 3 37 1 11
10 45 3 28 4 35
11 Ante, p. 222 3

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CH. XI

Contracts by Servus Hereditarius

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1 14 3 17 1
2 14 3 17 3
3 14 3 17 3
4 14 3 17 4
5 14 3 17 5
Contracts by Servus Hereditarius

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 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 hereditaria. And they would have the actio negotiorum gestorum contra virum against him, since there is nothing on the facts involving any disqualified fraud. But, directly, they would acquire nothing through him.

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. 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.

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? 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.

VII, Servus Dotalis.

The special rules relative to servi dotales are due mainly to the peculiar double ownership in dos. We know that the vir is owner, 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. On the other hand, the wife has a definite though postponed interest in the dos: quemvis in bonis mariti dos sit, non lenitatis est. 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 a right: he has vindicatio, even from the wife, 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 show 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 Sours yield apparently only one text dealing with the matter: it tells us 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 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 usoris. The vir has the ordinary powers of owner, and thus can manumit, and becomes the patron of the libertas. 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 ill-treatment of him, even though he habitually illtreats his own slaves.

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. Partus ancillarum are not fruits, and thus are dotal and do not belong absolutely to the vir. 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, the rule applying equally if the wife has the choice between the slaves and their value. If the vir manumits a slave the iura in bonis

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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 negotio gesto. The man not having received the money as heres, familias erexit suos 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 15. 1. 78. 1.
4 Probably not on the contract, but on the delict: nisam caput sequitur.
5 Verecundus (34. 9) might bring the rules into operation.
6 His liability for this wrongful conduct is not affected by the rule that he need show in relation to res dotales only diligentia quos suos.
7 15. 1. 19. 1; 24. 3. 67. As to what is ex operis, post, p. 347.
8 25. 2. 43. 2.
10 15. 1. 3. 1.
11 22. 3. 10. 2; 4. 1. 69. 9, which remarks that a pact varying this and making them common, would be void as a gift between vir and uxor.
12 As to the history of this notion of sale, Bechmann, Dotalrecht, 2, 188.
Acquisitions by Servus Dotalis

will normally form part of the dos. This is inevitably so, if the
manumission is without consent of the wife; but there are other
possibilities. If the wife assents, and intends a gift to her husband,
then, since gifts between them are allowed manumissandi causa,
the slave is in fact the husband's and the dos has no claim on the iura
patronatus.

The husband's right to fruits depends on the existence of the mar-
rriage, 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. As
to legacy, hereditatis, and, probably, other gifts, acquired during the
marriage, there is an apparent divergence of opinion. We are told by
Julian 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. And Paulus seems to say that any land left to a dotal slave is
dotal. On the other hand, Pomponius holds that such things are
dotal, si testator noluit ad maritum pertinere. And Ulpian says that
the gift is not dotal, si respectu mariti heres sit institutus vel ei legatum
datum. And Julian himself says 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 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.
The true view of the texts seems to be that such things are as a general
presumption, in the dos, 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.
But it is still possible that this application of the conception of acqui-
sition ex re was a novelty in Julian's time.

We are told, 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
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.

A single text 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. 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 opera, and goes to the dominus, who should
therefore bear any loss. The title 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. Moreover so far as fungibles in the peculium are
concerned, 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.
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.
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 rela-
tion 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

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1 For details and other cases, post, Ch. XX.
2 For the title see Servus Dotalis.
3 A servus acquisitus.
4 24. 3. 61.
5 24. 3. 65.
6 24. 2. 45. pr., 1.
7 24. 3. 58.
8 24. 3. 31. 4.
9 24. 3. 58; 23. 5. 3.
10 Ante, pp. 124 sqq.
11 24. 3. 47; 24. 3. 31. 4.
12 24. 2. 45. 4.
13 Demangeat, Fonds dotal, 180 sqq.
14 24. 2. 45. pr., 1; 24. 3. 58; 23. 5. 3.
15 1. 19. 1; 23. 3. 65; 29. 2. 45. 4.
16 24. 3. 58.

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slaves in his employ, even though his right in them were only a res in personam. All these cases seem to be of praetorian origin.  

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. It is sometimes held, 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 contrary rule, that a slave hired to serve as institor or magister navis could acquire contractual rights through them, they had appointed 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.

**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. The tenens is not noxally liable, and has no actio fugitiva unless the slave be stolen, at any rate until the interdict is possible. It is not surprising that we find little mention of the rights and liabilities of precario tenens, and, probably, is liable on his contracts only when any other reason to think a servus alienus was often so appointed.

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1. E.g., the edicts as to extortions by familia publicani, and as to liability of navae, copiones, etc. *Azo.,* pp. 120 sqq.
2. § 14. 3. 12; 14. 1. 5 pr.
3. Salaun, Slavenwet, 80. He gives a striking picture of the inconveniences.
4. 41. 1. 22. 7. 8. 20. It did, however, happen. See e.g. 14. 3. 11. 8.
5. 43. 26. 10. 9. 4. 22. 1.
6. Unless such liability was barred by something in the origin of precarium, which some writers connect with *Citientia*, 47. 2. 90. See Ihering, Geist, § 19.
7. 41. 1. 22.

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**CHAPTER XII.**

SPECIAL CASES (cont.). SERVUS FUGITIVUS. S. PRO DERELICTO. S. POENAE. S. PENDENTE USUFRACTU 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. This means that he has never been a fugitivus in the above sense. It is a breach of this warranty, if he be fugus, given to running away—which is itself a punishable offence. 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. 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. It is not essential that he be off the property of his master, if he be beyond control, and thus one who hides in order to run away when he can is a fugitivus. He does not cease to have been a fugitivus by renouncing his intention, e.g. by attempting suicide. It is not essential that the flight be from the dominus in physical possession: it may be for instance from a pledge creditor, or from a commodatarius, or a teacher, if he do not run to the master. Flight

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2. C. Th. 1. 1. 6.
10. Conversely it was in itself no fugus to run to these places or to hide from punishment, or to attempt suicide. *Ibid.,* *h. l.* 4.
Fugitivi Police Regulations

ch. XII. Restrictions on Sale, etc. of Fugitivi

to fight in the arena must be returned. 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. Labeo held that an erro was a fugitive for this purpose, but the child of a fugitivus was not.

It was theft to conceal a fugitivus or aid him to escape. There was a punishment for mala fide maintaining fugitivus in claims of liberty. 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. Though it was the duty and interest of persons to point out the whereabouts of fugitivus 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 used for it was not a turpis causa.

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, these rules being partly contained in, and partly based on, the lex Fabia. There were of course some necessary relaxations of these rules. Thus coheo edes and common owners might reckon such slaves in the division, and it was not uncommon to agree for the sale of a fugitivus, the agreement not to take effect till capture. Instructions to a fugitivus (a person who catches slaves for reward) to catch and sell him, were valid.

A fugitivus is still possessed by his owner—he is the only res se movere, possession of which is not limited by control. Various reoso.
are assigned in the texts for this odd-looking rule: ne ipse nos privet possessionem; alioquin per momenta servorum quos non viderimus interire possessionem, or because he may have the intention of returning, which other res se momenta have not, or, utilitatis causa ut implementur usucapto.

The doctrine seems to have been definitely laid down by Nerva Elia, though he appears to allude to earlier authority. Girard considers it to be a merely empirical rule of classical law. But though the above-cited texts show 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.

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. 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.

Probably the later law is that laid down by Paul, that we do not cease to possess him by his acting as a free man. Yet Paul himself lays down a rule 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, that we cannot acquire possession through one who is possessed by another. A text of Ulpian and Celsus to the effect that a slave possessed by no one can acquire possession for one who 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 to begin, a causa liberalis, which might quite change the situation. It might be possible to harmonise some of these texts on the view that a man pro libero se gerens is not necessarily in libertate, this state of things arising only on cessation of the owner's possession. 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 show 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:

A fugitivus is a fur suæ, and thus cannot be usucapted, even by a bonae fidei possessor. We have already considered the rule in the case of partus ancilae furtivae.

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. 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 alius. 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 elecção est heredi committenda quotiens moram non est facturus legatarius. 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.

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—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. The difficulties of this

1 As to the special rules in a pending causa liberalis, post, Ch. XXVIII.
2 41. 2. 10.
3 Post, p. 338.
4 47. 2. 61; Ch. 6. 1; In. 2. 6. 1, etc. A protection to dominus.
5 Ante, p. 24. Where such persons cannot be usucapted, the holder has no Publicians.
6 2. 9. 5.
7 30. 106 pr.
8 30. 47. 2.
9 Ante, p. 16.
10 47. 8. 2. 25.
11 6. 2. 15.
Acquisitions by Fugitivi

[PT. I]

text, which has been much discussed, do not here concern us1; in any case, it shows that acquisition is not barred by the fact that the slave is a fugitivus2.

Of the authority is doubtful3 that the slave does not acquire possession for his dominus, unless the latter knows of it, or has authorised it, or it is in re peculiari4. We have seen, or been told, for the authority is doubtful5, 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 aedem it nutrit6, 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 peculiare, 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 him6, and Pomponius appears to hold the same view7. But Ulpian tells us that possession can be continued through such a slave, and Paul accepts the view, which he credits to Cassius and Julian, that a dominus can acquire possession through a fugitivus, sicur per eos quos in provincia habemus8. These names suggest a school controversy. Hermogenianus adopts the same view with the characteristic limitation, "unless he thinks he is free.9"

All are agreed, on the other hand, that we cannot possess through him, if another person possesses him10. But what is the exact force of Julian's parallel, sicur per eos quos in provincia habemus1? 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 show that this was a special rule, in re peculiari11. But if we are to suppose the acquisition of possession by a fugitivus to the dominus to require knowledge of 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, Proprietate Fecundariene, § 82.
2 Where my slave, a fugitive quoad facsim, and so not in my possession, acquired money and bought slaves with it, and I received them from the vendor with the slave's consent, I had actio mandata against T on my slave's mandate. If it was not with the slave's consent, I had actio empto against the vendor. The obligation was acquired though he was a fugitive, 17. 1. 22. 9.
3 Ante, p. 305.
4 Ante, pp. 193, 2.
5 Ante, p. 305.
6 41. 2. 14. 7 6. 2. 15.
7 41. 2. 14, ante, p. 193.
8 41. 2. 14, ante, p. 193.
9 44. 8. 8, 42. 2. 14, ib. An.
10 6. 2. 15.
11 Ante, p. 163.

Acquisitions by Fugitivus in libertate

CH. XII

convenience: it is only the language attributed to Cassius and Julian,1 which raises difficulty.

If the fugitive in libertate moritur, we are told by Paul that we do not acquire possession through him. This may mean one who is in such a state of apparent freedom, as exceeds what is implied in pro libero se gerere, but we are told the same thing by Hermogenianus of the slave in fuga who thinks himself free, a phrase which for this purpose means no more than pro libero se gerere. Julian says2 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,3 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-solutio to him. 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. 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 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,4 we are told only that an obligation is created. It need not have been mutuum: it may well have been a condicio based on consumption. Ulpian5 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 exibiendum or condicio sine causa, according to the discharge (as it has been made away with in bad or in good faith).6

1 41. 2. 14. 2 41. 3. 31. 2. 3 Ante, p. 270. 4 41. 2. 50. 1. 5 46. 3. 19. 6 46. 3. 19. 7 12. 1. 11. 2. See also 12. 1. 13.
8 Presumably all authority is revoked iuspo facio by the flight, without express withdrawal. It may also be assumed that there is no actio institutus, or good reason on transactions by a
Servus pro Derelicto

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 fugitivus. 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. 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. 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. This is so not only in connexion with uncapio, 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 derelictus was at one 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.

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. Here, however, we are concerned with the normal case, in which a slave abandoned by his owner remained a slave.

The developed Roman law permitted complete abandonment of ownership in slaves, at any rate so far as the advantages of ownership were concerned. As to what amounted to a derelictus, this was a question of fact, which had few rules peculiar to the case of a slave. There must be intention to abandon, coupled with an actual casting

fugitivus: the case is not mentioned. There may be de peculio (15. 1. 8. 52. pr.), and, though it would need rather improbable facts, de in re libera. Tractatio is probably barred.

Noxal liability, ante, p. 129.

1 As to rules in a case librarum, post, Ch. xxvii.
2 E.g. 15. 1. 8. 52. pr.; 41. 2. 10; 41. 3. 31.
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 adoption.

4 In 45. 3. 36 both forms appear.
5 41. 7. 2. 1; 9. 4. 36. 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, 36.
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 infaens.
9 C. 8. 51. 1.

CH. XII] Servus pro Derelicto: Acquisitions: Delicts 275

off of possession, and thus mere refusal to defend on a capital charge did not amount to a derelictus. 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. As he had no derivative capacity, and the institution of slaves depended on the testamentum factio of their dominus, it would seem that any institution of such a person would be void, though absence of ius copiandi in the dominus did not prevent the institution, but allowed the slave to enter if alienated. But our case is not discussed. And while we are told that corporations could not be instituted, we are told that if the slave of a municipality was instituted, and was alienated or freed, the institution could take effect. For Justinian's own law this would hardly seem worth stating, since municipalities could then be instituted. 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 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 incaepae 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. And Javolenus says servus hereditarius can be instituted quasvis nullius sit; an implication that an ordinary servus nullius could not be instituted.

The rule, nasa caput sequitur, protected the former master against liability for past or future delicts. On the other hand, delictus did not destroy any rights of action the master might have acquired on account of delict committed in respect of the slave, any more than it would rights of action, on contract, already acquired through him. As to liability on past contracts, on derelictus the actio de peculio would become annulata, but any other existing edictal actions of this class would not be affected, as they are perpetua. It must be supposed that the former dominus would not be liable on any contract made after the delictus, 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 45. 1. 9.
3 41. 7. 8; 45. 3. 36. After occupatio by a novus dominus acquires for him under ordinary rules.
4 38. 5. 31. pr.; U. 22. 9.
5 29. 3. 82.
6 U. 22. 9.
7 29. 9. 23. 1.
8 C. 5. 24. 19.
9 22. 1. 5. 9.
10 29. 2. 35. 3.
11 38. 5. 53; cp. Al. f. 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 29. 5. 35. 2.
12 Add, p. 106; D. 9. 4. 36. 1.
13 47. 2. 46. pr. in f.
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 commodarius 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 the 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 Kuntez,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 servitus 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.2 Two remarks may however be made.

In Justinian's latest law, every abandonment seems to have been a manumission.3 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 exceptioally treated in such a matter,4 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 e.g. Urt. 54; G. 2. 14. Other texts show that the relation of usufruct to dominium was disputed among the classical lawyers. E.g., de usufructu, 42.
2 Post, Ch. xvii.
3 10. 17. 509; Nov. Just. 22. 12. For some effects see 10. 1. 18. 6.
4 48. 18. 12. The peculium remained with the former owner, C. 9. 49. 1.
5 48. 19. 8. 12. If in temporary penaela, expiration of sentence freed them from all results, so that, as Divi Prates laid down, they could take any form of gift if released when the aediles under which the gift arose was entered on, 48. 19. 83. 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 (C. 1. 8. 13) or whipping (b. t. 38. 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. See C. 9. 47. 13.
6 40. 9. 34. 2. Details, post, Ch. xxvi.
practical result being that the gift was not caducum, and did not go to the fisc. 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.5

Tutela on either side was destroyed by condemnation. Children of any condemned woman would be slaves, subject to some exceptions, favoro libertatis, to be later considered. They would not however be servi poenae, but ordinary slaves, capable of receiving fideicommissary gifts of liberty. 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, by providing that they might be sold by the public authority. 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 confugire.6

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. 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. 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 insiditoria, if the man still acted in that capacity, any freeman or servus alienus might do. His liability on past contracts would not be affected so far as the actions quod iussu, and de in rem verso were concerned. The actio de peculio would presumably become annalis, subject to the rules already stated. To the actio tributoria he no doubt remained liable, if he retained the peculium. 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. 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. 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.7

XIV. SERVUS INFORMALLY FREED BEFORE THE LEX IUNIA.

The state of facts here referred to will be considered later. 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. 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 domum, 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. It follows that the relations of master
Pledged slave freed by debtor

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. 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. 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.

1 In 50. 17. 126. 1 we are told: *locupletio non est factus qui libertum aequirit.* 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*, and thus a legacy of my slaves includes those I have pledged, but not those pledged to me. The debtor retains the *actio servi corrupti*. The pledged slave is treated for the purpose of the *Sc. Silanianum in all respects as if he had not been pledged*. But there are many respects in which the creditor’s interest comes effectively into play.

If 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. 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*. 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 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
Theft of a pledged slave presents difficulties; they have nothing to do except with slaves but cannot be left undiscovered, as one or two of the most difficult deals with slaves. Many texts show clearly that the pledge creditor has actio furti if the thing is stolen, even by the debtor, and that he will himself be liable to the action if he exceeds his right. 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 res majus, or only diligentem exactam praestare. And two texts of Ulpian, in one of which there is an appeal to older authority, seem to start from this point of view, but the first shows that there is an interesse independent of obligatio, and the words from hoc sta to competere 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, thus, limitation dates from the later Empire. What Pomponius approves is the earlier part of the text. In the other, the words tem locatur pignorserve accepta may be interpolated, but, indeed, the whole text looks corrupt.

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.

Interpolatoinem, 86 eqq 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.

13 7 22 pr., 47 3 14 16, 15 pr., In 4 1 14, 4 9 2, etc.
13 7 3, 44 4 5, 47 2 2 2 6 11 pr., 4 2 20 203, P 3 19, etc.
13 7 4 5, 47 3 2 2 7, 5 6 pr., 46 74, C 9 33 3, etc.
13 7 13, 11 14, C 3 18 9
13 4 24 5 8, In 3 14 4
47 9 14 6, 10, 47 2 14 5

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, Perenna, Labbe 2 1 346, Lehmann, 2 1, Stift 9 110, Reumann, 67 1, 34.) 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 in a few cases, it was no longer to be distinguished from the obligation diligentiam maximum praestare. This development explains such texts as speak of custodiam diligentem (e.g., 13 6 5 3) and the like. But there is room for difference of opinion as to the date of this change. Perenna attributes it to the influence of Julian. Reumann is, in general, of the same opinion, but considem that in regard to pignoros the change is of the later Empire, since Diocletian still distinguishes in this connexion between culpa and custodia. And Ulpian and Reumann make the same distinction in other connexion (P 2 4 3, D 19 1 36, 47 2 14 6, etc.), but Reumann regards as more historicum Remesam. But that kind of remanssae, more characteristic of Tribonian than of Ulpian or Paul, and as they state the distinction clearly it is likely that the law of the time admitted it. It seems highly probable that the assumptions in most cases of the liability custodiam praestaret in that of a development of the later Empire, except in the case of commodatam, which had special rules. It is to be observed that nearly all the texts which state the newer doctrine are confined in form (e.g., 18 6 3 1, 18 6 3, 3, 3 1 6 10, 47 2 14 12, 14 12, 47 8 22, 23).

47 2 14 6
10 Deducit in the case of commodatam are plentiful 18 6 5 6, 47 2 14 16, and many in
C 6 2 22
10 13 6 21

But many texts give the action in that case and none denies or doubts its existence. Again, in all cases except where the thief is the debtor, the creditor must set off what he recovers against the debt, while in the other cases of interesse based on obligation, the plaintiff keeps what he recovers. Again, if the right were based on obligation, the creditor's action would exclude that of the debtor, but, here, both parties have the action. Ulpian tells us indeed, that there had been doubts as to the creditor's action if the debtor were solvent, but himself holds, with Julian, Pomponius and Papman, that he has an interest in all cases a rule for which the Institutes give the reason, quia expedet ex pignori potius incumber quam in personam agere. 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. 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 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, 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, 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 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 thus us retentionem which bases his actio furti. 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. Paul's texts giving a right to recover the whole value do not seem to have been retouched they may perhaps be based on a recognition of the right resting on
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, 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, on the analogy of pledge.

In one text already mentioned, 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*. 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*. It may be added that the *actio ad eehibendum* lies against the creditor and not against the debtor: he has no power of producing the man*

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*. 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*. 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 usucapit things of which possession had already begun*

The creditor must not misuse the thing pledged and thus if he prostitute a pledged *ancilla*, the pledge is destroyed*. Unusual expenses may be added to the charge, and thus, if a pledged slave is 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*. 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*. 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*.

**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 *fiduciarium*. Thus a legacy of “my slaves,” by the debtor, did not cover those he had so conveyed*. And what such slaves acquired in any way was the property of the *fiduciarium*. 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*, having however the same right of charging expenses as the creditor in a *pignus*.

Moreover, a thing given in *fiducia* could be left *per preceptum*, 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*. 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**. But this is, as Gaius observes, a still further extension, for technically such a slave is not in *bonis debitorius*. 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*.

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1 49. 15. 12. 12.
2 15. 7. 25. Paul, wrongly attributed to Ulpian. See Lenel, *Pahng. ad h. i*. Originally written of *fiducia*.—3 *Ante*, p. 116. Apart from agreement the pledge did not cover *peculium* wherever acquired, 20. 1. 1. The case of *partus* of pledged *ancilla* has already been considered. *Ante*, p. 20. 4 *P. 2. 6. 69.* 5 3. 6. 69.
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. 3. 20. 13, 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 *procuriam* or *locatium* or commodation: 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, 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. 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. 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.

The main principle as to their position is that till the gift of liberty takes effect in some way, they are still slaves of the heir, for all purposes. Thus they may be examined under the Scc. Silanianum and Claudianum, if the heir is killed. Children of an ancilla statulibera are slaves of the heir. 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, legitated, delivered by traditio, adjudicated, and even usucapted, but always carrying with them their conditional right to liberty. They may be pledged, but arrival of the condition destroys the creditor's lien. A usufruct may be created in them. They may be noxally 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 abolition. 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. So, too, a statuliber can acquire for the hereditas.

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: the heres may do nothing to make their position worse. 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. 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. A legacy of optio servor or legatum generis does not give the legatee a right to choose a statuliber, so long as the condition is possible. 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.

Where his value is material a statuliber is reckoned at his value as such, e.g., in actio furti and condicio furtiva, 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. A text of Julian deals with a similar question in relation to condicio furtiva. If a thief, or his heir, is sued by the owner, the transaction ceases to exist, e.g., a stolen slave dies, the plaintiff is still entitled to judgment. But Julian says that if a slave, 1

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 prohibited the payment without hurting the liberty. Post, Ch. xxi.
2 31. 11. pr. 3 40. 7. 98. 1.
4 Ante, Ch. xxii.
5 As to cases in which the gift took effect without satisfaction of the condition, post, Ch. xxi.
6 U. 2. 2; 30. 10. 1. 26. pr. 7 29. 5. 1. 4. 40. 7. 16; C. 7. 4. 3.
7 30. 8. 9; 40. 7. 6. 9. 1; U. 2. 3; C. 7. 9. 15; etc. The condition may be such that alienation destroys the eschatia, e.g., 'to be free if my heres do not sell him,' 40. 7. 30. A sale may be with or without pecunia, 40. 7. 3. 7. 6. 37. 35.
8 20. 1. 13. 1.
9 33. 2. 20.

287 Statuliberi. Privileged Position

CH. XIII] Statuliberi. Privileged Position

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left conditionally, is stolen, the _here_ 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. 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. The same reasoning might have applied here. In another text Ulpian says the same thing 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, 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), 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. But Modestinus and Ulpian say 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, 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. It deals

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1. See ante, p. 287, n. 12.
2. 13. 1. 3.
3. 47. 2. 52. 29.
4. Lehrbuch, § 801.
5. 10. 4. 7. 7. See Pellat, De rei vind. 236.
6. 40. 7. 29. pr. Gains and Ulpian say that a _statuliber_ may at _sermo coerens_. 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. 3; ante, p. 336; post, Ch. xxxv.
7. 48. 18. 14; 48. 19. 9. 16.
8. See Pothier ad h. l.
9. 40. 7. 9. 2.

CH. XIII] Sales of Statuliberi

of course only with the case of a promise of a particular man, who must be taken _talis qualis_. Thus Africanus tells us that if a man _hominem promiscuit_, 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 or not, there is an _actio ex empto_. But subject to the ordinary rules as to notice, there is also the ordinary remedy _evictionis nomine_, i.e. the express or implied _stipulatio duplæ_. 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_.

(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_. 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 _index_ 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_. 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.

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1. 46. 3. 38. 3.
2. 40. 7. 9. 1.
3. 21. 2. 39. 4; 46. 2. 51. 1.
4. 44. 2. 7.
5. 21. 2. 69. 5.
6. 21. 2. 69. 2.
7. 44. 2. 7.
8. 21. 2. 69. 4.
9. 44. 2. 7.
(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. 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. 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. 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.

(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.

All these liabilities depend on prejudice to the vendee. We have already seen this, in the case of the liability ex empto: the same rule is laid down for the liability evictio nomine. Thus where the condition was si Titus consul factus fuerit, but on the sale the condition declared was si navis ex Asia veniret, and this latter event occurred first, there was no liability at all. Africannus 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. 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

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CH. XIII] Sales of Statuliberi. 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. 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, and it is not always

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1 Mumm. ad h. 1. 2 Post, Ch. xxii. 3 Pr. 15. 5. 4 Post, Ch. xxii. 5 49. 15. 12 pr. 6 40. 7. 10. 7 40. 7. 10. 8 H. t. 54. 1. 9 H. t. 69. pr. 10 H. t. 69. 4. 11 H. t. 69. 2. 12 H. t. 54. 1.
the case that there is a war persons who are found in a State with which Rome has no agreed friendly relations are hable to be made captives, though there is no declared war1 But if it is a war it must be one with a foreign people2 Those taken by pirates or robbers, or in civil war, remain free3

If captured by the forces they become, it is clear, the property of the State4 Whether under any circumstances they belong to an individual captor is not clear5 Where they become the property of the State, they do not necessarily become servus publics populi Romani In many cases they are given freedom6 Often they are sold, sub hasta, or sub corona7 Some are made servus 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 servus publics, being set to meaner labours, and often, no doubt, intended to be sold in course of time8

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, 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 law9

So far as the dongs 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 him10 The possibility of postliminium does not affect the matter, any more than the possibility of manumission does in other cases11 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 not

1 a t 5 2 See Sueton Tiberius, 37 So captures might be made by unauthorised raids on such territories
2 49 15 24
3 48 15 16, Livy, 36 47
4 Girard, Maunu, 261 The rule of the foreign capturing State would not necessarily be the same
5 36 15 5 21 1 24, C 7 14 4
6 17
7 Marquardt, Vie Privee, 1 136
8 See Mommsen Daut public 1 275, Staatsrecht (3) 1 241, as to the rights of the general command See also Blair, Slavery among the Romains 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

CH XIII] Position of former property of Captivus

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 suspense1 There is no conflict of opinion, and the rules are assimilated to those applied in the case of transactions by a servus hereditarius2 No doubt the rule applies to all cases of direct acquisition3 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 meantime Paul and Pompianus are clear that the property is not in the captivus4 On the other hand Javenensus says that in retinendo ura singularia ura esse5 And Diocletian6 and Justian7, 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 not 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 Justian, a fact which has led some writers to doubt its authenticity8 It authorises action on behalf of those apud hostes, perhaps a popularus actio9, for the case of spoliation But it probably plays 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 honorum appointed in their interests, who gives security to a public slave10 This curato does not seem to have been an ancient institution It is mentioned only by Diocletian and Ulpan11 the latter speaking of it as a well recognised institution12 There is no trace of it in the Edict Moreover, while it is clear that such a curator can sue, and be sued, as defensor13 Papian 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 Diputation (45 1 73 1, 45 3 18 2, 49 15 1, 22 1 2), legacy (49 15 22 1), constitutum and acceptatione (13 5 11 pr 46 4 11 3), negotiarius ad negotiarius (3 3 19 3), captivus (3 5 22 2), though there could be no entry on such an instrument in the meantime, 49 15 12 1
2 3 9 3 45 1 73 1, 45 3 25, 49 25
3 49 15 12 1 22 1 2
4 3 5 18 5, 9 2 4 1
5 31 27 5 1
6 C 8 50 3
7 T. Thespius ad 1 See Pernice, Labeo, 1 378 and the literature there cited
8 Pernice loc cit
9 C 8 50 3
10 C 8 50 3
11 C 8 3 3 D 4 6 15 pr, 26 1 6 4 27 3 1, 18 17 7 30 See Cuz, Institutions, 2 172
12 4 6 15 pr
13 C 8 50 3, D 27 3 7 1
stipulation. Ulpian sees no such difficulty in an analogous case. 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 honorum venditio in the case of a captive debtor, but the creditors could apply, under the general edict, for the appointment of a curator bonis. 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.

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. Thus his possession is a new one, a fact which may be remarked, says that the fiscus is peculiaris, held at the time of the capture, or subsequently received. According to Labeo's view, 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 there is a difference of opinion if the case of a slave, since his capacity is purely derivative, and there is a difference of opinion if the

The law of family relations is governed by the same principle. Paul indeed says 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. Thus no tutor can be given to one whose poter is captive, and (though there were doubts) Ulpian holds that such an appointment is not merely suspended in operation, but absolutely null. 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. Consideration of the purposes for which a tutor is appointed will show that any rule of suspense would cause intolerable inconvenience. But if a person otherwise entitled to legatum tutela is a captive the person next entitled is not left in; a praetorian tutor is appointed, and thus though we learn that the old tutela is recoverable by postliminium, this cannot be retrospective.

As we have seen, a captive does not lose his rights of succession, 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. In many other ways his existen
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.
Tertullianus, just as she would have had to get a tutor appointed to an
impubes, not captive1. 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 hereditas3. But a child born in
captivity to a captivus is no relative to him apart from postliminium4.

It is clear that capture of either party dissolves a marriage, and
that it is not restored by postliminium, but only by renewed consent5.
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 divorce6. 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 doubtful7. The cesser of
marriage is recognised. Thus his mother must apply for a

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1. 38. 17. 23. 30. 2. 29. 3. 21. 1. 3. 49. 15. 25; C. 8. 50. 1. 4. 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. 9. 8. 2.
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. The captive's children become sui iuris and though for Gaits it is doubtful from what date their independence is regarded as beginning, he stands alone in this doubt. Ulpian indeed says merely that they become sui iuris. But the Digest is quite explicit, and the texts do not seem to be interpolated. Tryphoninus says that on the death of a captus his children are sui iuris as from the day of capture. Julian lays it down

that what a son of a captive stipulates for, or otherwise acquires, is his own if his father dies still a captive. 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. 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. 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. 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 sibi, 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. One case is peculiar. We are told by implication, by Paul, that where a slave is captus, the actio de pecuio 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. We are told explicitly by Ulpian that his will becomes vratum on his capture. As he is a slave he cannot make a will in captivity, 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 fiduciam, because, as time at the making of them he had not testamentum factum. Whether, in very early law, succession to such a person did not exist at all cannot be said. Perhaps the relief developed para passu with the notion that a captive suffered captus demanu maxima. However that may be, it was provided, directly or indirectly, by a certain lex Cornelia, that the succession to such a person should be regulated as if he had died in cinta. The exact nature and scope of this provision cannot be clearly made out from the texts. The rule is sometimes stated as a direct
provision of the lex. Sometimes it is called the *beneficium legum
Corneliae*, sometimes the *fictio legum Corneliae.* While many texts
speak of the rule as creating a *hereditas,* others do not use this expres-
sion, 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.* It is widely held that the
rule is not a direct provision of the lex, 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 filiis,* 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. For this reason there seems to be no evidence what-
soever, 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.

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. It is also most probable
that it was in the form of a fiction, and, from Ulpian's language, that
it did not speak of *heres* or *hereditas.* Thus Paul tells us not that the
lex but that the *fictio legum Corneliae et heredem et hereditatem facultatit*
was spoken, though elsewhere both he and Papinian used more unguarded language.

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 *Cornelia* the state of things is to be that *quae futura esset in lu de quorum hereditatibus et tutelis constabulabunt in hostium potestatem non pervenissent.*

Paul says it confirms wills, *legitima tutelae et legitimae hereditatis.* 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 Ulpius's purist

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**CH. XIII. Succession to Captivas: lex Cornelia**

objections, which do not in the least require that the whole rule be one
of juristic inference. 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. 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. The *tutela* is *legitima.* Karlowa 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 *captis damnatis.* More probably it
was *tutela* over *libera.* The lex enabled the children to claim *tutela*
*liberae patronae,* 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, that the case was to be
treated as if he had died at the moment of capture. 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 submissions the working of the rule is fairly simple, and

Its general effect is that the succession is to go to those who would
have had it if the deceased had never been captured; there being a
right to enter as soon as it is known that he is dead; and if there are
no *heredes* under the lex, the property goes to the State. It is only
will which is made before capture which are thus validated. The will can
produce no more effect than it would if it 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. The validation of the will does not amount to post-
liminum, 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 *sparsus,* the father being regarded as having died at the moment
of capture. If a *filius familias dies apud hostes,* the rule applies.
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 familiae. If a child, captured with his parents, returns, but they die in captivity, he has a right to succession by the lex Cornelia.  

The effect of the rule, on pupillary substitutions, is discussed in several texts some of which give rise to difficulty. 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. 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. 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, 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. If the father dies 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: he has, in law, predeceased his father, and that destroys pupillary substitutions.  

There is difficulty in the case where both are captured. There are two texts, both obscure. Papinian says:  

_Sed si ambo apud hostes et prior pater decedat, sufficit 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 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 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, 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:  

_Si pater captus sit ab hostibus, max filius, et ibi ambo decedent, quamvis prior pater decedat, lex Cornelia ad pupillati substitutionem non pertinet._

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 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 post-liminium. He can thus have acquired nothing by hereditas or otherwise. Thus there is nothing on which the substitutio can operate. 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, 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. The only thing certain is that Scaevola did not write it as it stands.  

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1. Faber, cit. Mühlenbruch, loc. cit.  
2. Halounert, cit. Mommsen, ad h. l.  
5. 29. 6. 28; 49. 15. 10.  
6. 29. 6. 29; 49. 15. 10.  
7. E. M. 29. 6. 29.  
8. Tractatus vulgarius would operate.  
10. But Mühlenbruch accepts both texts.
The next topic for discussion is postliminium. The prisoner of war, 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. He must actually have returned to the territory or to that of a friendly State, though it matters not how he effects his escape, whether by evasion, vi aut fallacia, by dismissal, exchange or recapture. He must have returned as soon as it was possible for him to do so. He must come to stay, not having any intention of returning to the enemy. 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. 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 ignominios and intestabiles for not keeping their promise.

Discreditable circumstances might bar postliminium. Thus, one who had surrendered when armed had no postliminium. One who had been deditus by the pater patratus had no such right, though apparently this had been doubted. 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, 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, since there could be

1 Festus, s. v. Postliminium. Or postliminio redire, a form expressing the result rather than the rule.
2 49. 15. 9. 13. 3 C. 6. 50. 5. 12.
3 49. 15. 12. pr.
4 h. t. 5. 2. 12. 9. 26.
5 postliminiu.
6 h. t. 5. 3.
7 Anul. Gell., Noc. Att. 7. 18. In the case of Menander, a Greek slave, who had been freed and made a Roman citr, 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 citizen. Cicero (Pro Balbo, 39) 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 citr 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 civitates are not the same thing. See however Durenberg et Saglio, Dict. des Antiq., s. v. Postliminium.
8 49. 15. 17.
9 49. 15. 4.
10 de Orat. 1. 181.

CH. XIII] Postliminium: Conditions 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. 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. 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 spurias: if he and both parents come, he is a filiusfamilias.

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 eadem bello, i.e. before the conclusion of peace. This view seems to rest mainly on three texts. Pomponius tells us that a captive si eadem bello reverus fuerit postliminium habet. Paul says that if a man returns during indultiarum tempus, i.e. during an armistice, he has no postliminium. Finally he tells us 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: indulciae 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. 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, 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
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. It may be added that while we have reference to agreements that there shall be no postliminium, after the peace, we have none the other way: what we have are agreements that prisoners shall be allowed to return, which is a different matter. As Karlowa says, 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. But the reason shows 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 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. For his it is proposed to read non vi, which this drastic measure is defended as being necessary to account for the words: quod ideo placuisse Servius scribit, quia spem revertendi esse 7, and this expression clearly represents the same conception involved in the notion of pendens of rights, already considered. It is, says Paul, ac si nunquam ab hostibus captus sit, and this expression clearly represents the classical law. It is, says Festus, ac si nunquam ab hostibus captus sit, and the same conception is to put the captive in the same position as if he had never been stolen in the meantime, and probably the same is to actio Aquila. It may also be supposed, though the texts are silent, that he is noxially liable for what has happened in the meantime, or a more extensive effect is retrospective. It is, says Justinian, semper in civitate fuisse, and this expression clearly represents the classical law, and the same conception is involved in the notion of pendens of rights, already considered. 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 juris for what has been stolen in the meantime, and probably the same is to actio Aquila. It may also be supposed, though the texts are silent, that he is noxially liable for what has happened in the meantime, or a more extensive effect is retrospective. 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made, and securities taken, by his son or slave¹, and, in general, he is in the position of one succeeding to a hereditas inaequalis¹.

The questions as to the effect of postliminium, on the marriage of the captivus or of his child, and on tutela, have already been discussed². 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 born³. 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 succession⁴. But if the mother alone returns, with the child, the father dying captive, the child has no succession to the father dying captive, the child has no succession⁵. But if the mother alone returns, with the child, the father dying captive, the child has no succession⁵. It is thus connected only with the mother, to whom it stands in the relation of any other child sine patre⁶. It is noticeable that no text mentions the case of the father returning with a child born in captivity, the mother having died before the child was born⁷. It is thus connected only with the mother, to whom it stands in the relation of any other child sine patre⁶. Indeed since the marriage ended at capture, and the mother regarded as having been born in wedlock.

His will made before he was captured is valid⁸. 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 postliminium⁹. On the other hand, he or his slave may be instituted, and if he return he may make or order the necessary entries⁰.

¹ 44. 3. 4; 45. 1. 73. 1; 45. 3. 18. 2, 25; 46. 4. 11. 9; 49. 15. 22. 2. ² 9. 2. 48; 45. 1. 73. 1. ³ 49. 15. 8. 23. Analogous restitution if the mother alone was captus and returned, Arg. C. 8. 60. 14. So if a child was captus alone and returned he regained his rights of succession, C. 8. 60. 9. ⁴ C. 8. 60. 1; cp. 36. 17. 1. 2; 49. 15. 9. 25. In 49. 15. 9 the words mean that the parents have returned. See also 36. 15. 1. 1. ⁵ C. 8. 60. 1. ⁶ C. 8. 60. 1; D. 49. 15. 25. ⁷ C. 8. 50. 15; D. 58. 17. 1. 3. ⁸ C. 33. 5; In. 2. 12. 5. ⁹ 50. 8. 32. 1. ¹⁰ 49. 15. 12. 2.
a thing useful in war, since he can be employed in carrying messages or assisting, and in many ways other than actual fighting. No reason is assigned for this limitation. In any case the rule has the odd result of discouraging the private capture 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, but a slave transfuga does revert to his master. This is only in the latter's interest. If he has been a statuliiber, and the condition has arrived during his absence, he loses the benefit of it; 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.

(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.

Apart from those points the case is simple. If other conditions are unchanged, not only does his owner's right revive, but so do minor rights, such as usufructs. If he was a servus poenae before, he is one still. A servus furtivus, captured, recaptured and sold, remains a res furtiva, incapable of usucapiio by the buyer. If he was a statuliiber, he is a statuliiber still, but if the condition has arrived during his captivity he gets the benefit of it. A legacy of him or to him or an institution of him before or during the captivity is effective on his return. Apart from those points the case is simple if other conditions are unchanged, not only does his owner's right revive, but so do minor rights, such as usufructs. If he was a servus poenae before, he is one still. A servus furtivus, captured, recaptured and sold, remains a res furtiva, incapable of usucapiio by the buyer. If he was a statuliiber, he is a statuliiber still, but if the condition has arrived during his captivity he gets the benefit of it. A legacy of him or to him or an institution of him before or during the captivity is effective on his return. Moreover the captivity has operated no diminutio: he is eadem res, and thus an exceptio rei indicatae, which applied to him before the capture, applies to him still. If he has been pledged before capture the creditor's right revives.

1 C. 1. 3. 48. Neither they nor any one else having Falciadian rights.
2 Nov. 190. 8.
3 Nov. 121. 10.
4 Nov. 119. 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. 86.
6 36. 16. 1. 4; 49. 15. 12. 14. 20. 2.
captured from the enemy; though at a certain cost. 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 re-
cover it.

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,
and yet we know that the captive has not yet postslinimum from his
victivity in which he was a slave. The practical meaning seems to be
that the lien in itself has no en slaiving 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 obosequium to
the redemptor. The disabilities under which he suffers are not the
result of the lien, but of the fact that he has not yet postslinimum.
He can serve no militia. Apparently he cannot validly marry. 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. A child redeemed with the
mother is under the lien. An enactment of Diocletian lays it down as
undisputable law that a child born to a woman under such a lien is not
itself subject thereto. But Ulpian seems to imply that the pledge
covers such issue, and Tryphoninus must have been of the same
opinion, at least where the person redeemed was originally a slave.
But this is only a case of the dispute already considered as to whether
partus is covered by pledge. 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. The
better view is that in later law the pledge covers the partus, though
the classics are not agreed.

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 redemptor, the person who takes

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1 49. 15. 16. 12.; 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, A. r. 20. 1.
3 C. 8. 50. 1.
4 C. 8. 50. 2.
5 C. 8. 50. 3.
6 C. 8. 50. 4.
7 C. 8. 50. 6.
9 Ante, p. 23.
10 Ante, p. 51.
11 The lien has priority over other charges over the redemptor, and over any right of
punishment: the fisc does not claim one in metallum datum without paying off the lien, 49. 15. 6,
12 16. 17.
13 49. 15. 9.
14 C. Th. 5. 7. 2; C. 8. 50. 20.
15 See, e.g., 49. 15. 7.
16 49. 15. 9, 11, 13.
17 Hence such expressions as: naturalia papyri samulam, vinculo quodam, C. 8. 50. 2;
D. 38. 1. 20. 1.
18 49. 15. 10. 1.
19 49. 16. 8.
20 49. 16. 12.
21 49. 16. 16.
22 49. 15. 12. 18.
23 49. 12. 20. 2.
24 49. 15. 21. 1.
25 49. 15. 16. 1. 4.
26 49. 15. 12. 19. 9; C. 8. 50. 17. 20. 2, etc.
27 49. 15. 12. 7.
28 49. 12. 12.
29 Post, p. 315.
30 49. 15. 19. 9; C. 8. 50. 17. 20. 2.
31 G. 8. 50. 2, etc.
32 So as to children born apud redemptorem, 49. 15. 12. 18.
33 Post, p. 314.
34 Karlowa, loc. cit.
35 D. 38. 1. 20. 1.
36 49. 16. 1. 4; 49. 15. 15; 49. 16. 8; G. 4. 32; Dirksen, Manasse, s. v. usucapio.
37 49. 15. 12. 19. 9; C. 8. 50. 17. 20. 2, etc.
38 49. 15. 12. 7.
It may be ended also by tender and refusal of the redemption money, or by any remission of the debt, which, however informal, cannot be revoked. It is no doubt on this principle of remission that it is ended by the redeemer’s marrying the captiva, indeed we are told that remission results from cohabitation with her. The same result follows from his instituting the captive as his heir. The pledge is ended, and the right to the money forfeited, if the redepositor prostitutes, knowingly, the woman redeemed. It seems further that, at least in later law by a constitution of A.D. 408, 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, 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, so that it is clearly the later law, a doctrine more favourable to the successors.

The death ends the pledge: the redepositor 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. 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 ended, and the right to the money forfeited, if the redepositor is pro parte 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 communis dividundae. 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 redepositor.

For convenience the right of the redepositor 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. We have no information as to what this constitution was. Karlowa, 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 constituto Rutiliana, which Julian applies to the alienation of a woman’s property without tutoris auctoritatis; the form of the allusion, here too, being such as to suggest that it had no special application to that case. 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 constituto fecit cives Romanum dominum habuit?

Whatever its nature, the effect of the constitution is to set up an exceptional state of things. There is an ownership in the redepositor, 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.

\[\text{814 Redemptio for a Price: Lien, how ended [PT. I}\]

\[\text{In fact a pledgee can pay off the lien, and add the sum to his charge, just as a creditor with a subsequent charge can confirm it by paying off a prior incumbrancer. Apparently the lien cannot be paid off pro parte by one of common owners, but if all pay their share, or one pay the whole in the name of all, the lien is at an end; in the latter case the payment will come into account in the actio communis dividundae. If he is acting for himself or for some of the others, then, as to their shares, the lien is at an end, and the common ownership restored: as to the others it is an assignment of the lien, and the payers are in the place of the redepositor.}\]

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The redeemptor 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. 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. How if he is a redeemptor, as to whom none of this is true? Tryphoninus says the man is free on payment to the redeemptor. But in ordinary cases he cannot pay it out of any peculium but that which passed with him. There is no such peculium here. Whether the redeemptor 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, favores libertatis, to pay it out of any part of his peculium, except what is acquired ex operis or ex re redeemptoris. This is a sort of rough justice: it must not be understood to imply that the redeemptor (and owner) acquired only what a bona fide 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, the owner might acquire it. This is a sort of rough justice: it must not be understood to imply that the redeemptor (and owner) acquired only what a bona fide possessor would have acquired.

This topic leads the jurist to another. If the redeemer can usucapit, 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 redeemptor will free, or will merely release his right, and cause the man to revert to his original dominus. Clearly the redeemptor, in the case in which time has barred the old owner’s claim, can free, and Tryphoninus observes 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. xxvi.
2 Ante, p. 289.
3 49. 15. 12. 8.
4 49. 15. 12. 9.
5 49. 15. 12. 11.
6 Post, Ch. xxvi.
7 49. 2. 71. pr.
8 loc. cit.
9 49. 15. 12. 2.
10 If the slave was incapable of being freed before capture he is so still in the hands of the redeemptor, 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.

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 servus publicus populi Romani applies in strictness only to those belonging to the people, and not to servus fiscalis. 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. 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.

2 Ulpian, cit. 1. 392; Halkin, Esclaves Publiques, 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 servus publicus applied.

CH. XIV] Servi Publici Populi Romani 319

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, 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, show a tendency to extend to their private property, while still retaining the advantages of private ownership, the same privileges as exist for the Fisc.

These gradual changes of attitude make it impossible to say with certainty whether a particular rule which is applied by classical law to servus publici populi Romani is or is not in later law extended to servus fiscalis or to servus 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 servus publici by the mere fact of capture, but only by their being devoted to the permanent service of the public. It is this limitation of the name which accounts for the fact, noted by Mommsen, that there is no trace of female servus publicus.

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.

Servii 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 libertae. Mommsen holds 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 show that

1 43. 9. 2. 4.
2 49. 14. 6. 1; In. 2. 6. 14.
3 Livy, 26. 47.
4 Mommsen, op. cit. 1. 367; Staatsrecht 81. 392; Halkin, Esclaves Publiques, 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 servus publicus applied.
5 loc. cit.
such connexions did occur and were avowed, though clearly they were open to objection on many grounds. In one inscription we have a memorial set up to a libertina, by, inter alias, his patron, and his father who is a servus publicus. In another we have a man called Primitivos, apparently therefore a slave, setting up a memorial to his father who was a servus publicus. In another we have a servus publicus setting up a memorial to his son Neptunalis, apparently a slave. Halkin cites other inscriptions of the same type. 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 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

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. In many cases however they appear with only one name, a circumstance which may indicate that they vested in the State otherwise than by purchase.

Public slaves, while forbidden to wear the toga, seem to have had a special costume. The lex Julia Municipalis alludes to assignments by the Censor of sites for dwellings for the members of their former family which most of them bore, commonly terminating in ianus, and recording the name of their former owner. In many cases however they appear with only one name, a circumstance which may indicate that they vested in the State otherwise than by purchase.

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During the Republic servii 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. It is not possible to go into their various employments. In connexion with some of these employments, though not it seems with all, the slave received an annual stipend, or rather

But mere temporary employment on public work did not entitle them to rank as servii publici. Thus Livy tells us that 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.

So far as private law is concerned we hear little of servii 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, the other half, and all if they were intestate, reverting without doubt to the State. As to acquisitions by the publicis, rights and liabilities on his contracts, and onal 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. 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 peculium. 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 maintenance--cibaria annua--paid annually from the aerae. Savings on this were doubtless among the sources of their peculium.

In the Empire the field of employment of servii publici rapidly

1 Flury, Litt. Traj. 31; Halkin, op. cit. 115.
2 16. 2. 19; C. Th. 8. 5. 56.
3 16. 2. 19.
4 Livy, 26. 47; Polybius, 10. 17.
5 Gladiators were not public slaves, but often those of private owners, aspirants to office, or of Oriental birth. The surviving praetextatinian juristic texts contain no allusion to servii publici populi Romani.
6 Acta, pp. 163, 4, and, as to certain contracts by them, post, p. 322.
7 C. I. L. 2. 2318.
8 C. I. L. 2. 2308.
9 C. I. L. 6. 2331.
diminished. Mommsen could find no trace of any such persons outside the capital, after the founding of the Empire. 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. 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.

But as will shortly appear, all this later legislation has no direct bearing on the Emperor and of the publics. Forbids the employment of slaves therein. But as will shortly appear, all this later legislation has no direct bearing on the Emperor and of the publics.

There are however a few texts in Justinian's compilations in which the servus publicus seems to be referred to. We are told of three cases in which security may be taken by a public slave in what is as

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two names; and one who is described as a 

servus, which, as her husband is not named, may mean, not the wife of a 
vilicus, but one herself exercising that function. Servi Caesaris sometimes married freewomen, but more usually ancillae, often, it is likely, ancillae Caesaris. Thus many servi Caesaris are so by birth: vernae Caesaris are common in inscriptions. Persons so described are no doubt, usually, the offspring of a serui Caesaris and an ancilla Caesaris not in his peculium. If she were in pecudia, the child would not be technically a servus Caesaris, but a vera servi Caesaris: 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, and this may be the reason for stating the obvious rule that they may not manumit their vicarii. If the ancilla is not a vicaria, but a serva Caesaris, the child is a servus Caesaris and may be a vera.

Of the various employments of servi Caesaris it is not necessary to say much. 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. 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. Those who concealed or abducted slaves belonging to these workers were 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 gynaecae or textrina.

Servi fisci or fiscales are those employed on the business of the Fiscus. This term excludes on the one hand slaves who have merely become the property of the Fiscus by forfeiture or condemnation, those which belonged to estates forfeited for secret fideicommissa, those whose masters have died without heirs—mancipia voga—and those belonging to estates on which the heirs have refused to enter, and on the other hand those belonging to the patrimonium or to the privata res Caesaris. But there are many texts which show the close similarity which existed between these classes. Some have already been noticed. The Fragmentum de iure Fisci hardly seems to distinguish between them.

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. 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 remarks that their right was much the same as that of filii familias in their peculium castrense. But they had no power of manumission. Nothing is known as to the mode of reckoning of this half.

Some Emperors reserved to themselves a power of punishment in excess of what was allowed to private owners, 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. 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. 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. Trajan indeed provided that with slaves of the Fisc,
the provincials should not contract at all under a penalty of, apparently, twice any resulting loss. 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 servii fiscales from reporting to the treasury in money matters: it was in fact their master's business.

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 servii privatae res 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.

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. There was legislation about the same time requiring the presence of the rationalis both in civil and in criminal cases, but so far as criminal cases were concerned this was dispensed with in A.D. 398. For the capital, at least, Theodosius and Valentinian laid down, in A.D. 442, 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.

1. Fr. de i. p. 6.
2. P. 5. 13. 2; ante, p. 85.
3. 1. 19. 1. 2; 49. 14. 46. 8.
4. 1. 19. 1. 2; 49. 14. 46. 8.
5. C. Th. 2. 1. 1.
6. C. Th. 2. 1. 1.
7. C. Th. 2. 1. 1.
9. We shall see (post, p. 417) that the rules as to freewomen cohabiting with servi alieni were specially strict in the case of servii fiscales.
10. 1. 19. 1. 2; 47. 14. 46. 8. 11.
12. Servi Fiscales

[PT. I]

CH. XIV

Servii Publici of Municipia

XXI. Servii Publici of Municipia.

These are really only an instance of the wider class of servii universitatis. But as practically nothing is known of special rules affecting servii of other forms of corporate bodies, servii collegiorum, and the like, and as the slaves of municipalities played a very important part, closely analogous to that of the servii populi Romani, it seems convenient to treat them separately. Such slaves are the property of the community, not of the individual citizens or corporators. Thus they can be tortured for or against such persons, and, after manumission, they are not liberti of individuals, and thus can bring legal proceedings against them without servia, though they cannot proceed against the corporation without it. Heavy penalties are imposed on those who use slaves of the municipality for their own purposes. The illogical exceptions recently discussed are not such as to create any real difficulty: they are recognised as mere subterfuges. 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. Ulpian and Gaius indeed tell us that the application of the epithet "public" to the property of anything but the State is incorrect, 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. 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. It is clear on the evidence of juristic texts and inscriptions brought together by Halkin, that there are female slaves of towns, that these intermarry with the male slaves, and that the class of servii publici (civitatis) is recruited by birth. Children born into the class are themselves described as publici, so that, as here used, the name has no relation to their service.

They are employed in much the same ways as servii publici populi, but even more freely, since they serve in some cases as military guards. They are employed in financial administration: even the responsible position of action is ordinarily filled by a slave. There is the same
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. They receive pay, or rather maintenance allowance. They have peculium, which is the property of the municipality. Halkin is of opinion 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. But this is not conclusive. Such persons are frequently members of collegia, 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. On the other hand, the fact that their peculium belongs to the community is emphasised 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. It is noticeable that in the case of servi Caesaris to whom there is some evidence that the privilege extends we are clearly told that half of their peculium is their own.

They can acquire for the municipality with all the ordinary results. Thus a traditio to a servus publicus entitles the municipium to the actio Publiciana. According to the old view, municipalities cannot possess, quia universi consentire non possunt. 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, peculiari. This recalls the exception to the rule that a man cannot possess through his slave without his own knowledge. But it clearly carries the exception further, as in the case of captivi. Even the implied authorisation involved in the gift of a peculium 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 exception, even in late law. But convenience, which dictated the whole institution, needed a further step. Ulpian lays down the rule in general terms, that municipia can possess and usucapt through slaves. No doubt, in non-peculiar cases, the animus was provided by praepositi administrationi.

The corporation acquires through its slave’s stipulation, and thus he can take the various cautiones on its behalf. 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. 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.

Nerva provides that legacies may be made to civilitates. In the classical law towns and other corporations cannot be instituted heirs, for two reasons. They are regarded as incertae personas, 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. As we cannot institute the ciuitas, neither can we its slave, for we can never institute the slave of one with whom we have not testaments factio. To this rule the classical law admits few exceptions. A senatusconsult allows them (and thus their slaves) to be instituted by their liberis, and honorum possessio can be claimed under such a gift or on intestacy. The entry will be at the order of a praepositus. Again, though Hadrian forbids jideicommissa in favour of incertae personas, Ulpian records a senatusconsult allowing them in favour of municipalities. He tells us also that certain deities can be instituted. Classical law seems to have gone no further, so far as general rules are concerned, though there are traces of special concessions of testaments factio to certain coloniae.

In one text it is said that slaves of a municipium or collegium or decuria instituted and either alienated or freed, can enter. 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

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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 50. 16. 17. pr.
4 C. l. l. 10. 4687.
5 Ante, p. 75.
6 Ulp. 20. 16.
7 Fr. de i. Fasci, 6a.
8 41. 2. 1. 29.
9 Ante, p. 300.
10 Ante, p. 294. There also capacity and possession in the principal are both ignored.
11 15. 1. 60; 41. 2. 1. 5.
12 16. 2. 19; 40. 3. 3.
13 op. cit. 187.
15 Procud. dubio. 50. 16. 17. pr.
16 Ante, p. 392.
17 6. 2. 3. 6.
18 Ibid. 19 41. 2. 15.
20 41. 2. 1. 15. As to possession by municipia, per alium, 10. 4. 7. 3; 50. 12. 13. 1; Mommsen, Z. S. 36. 41.
21 41. 2. 2. 45. 3. 3; 22. 1. 11. 1.
22 4. 3. 10.
23 15. 4. 4.
24 Vat. Fr. 388.
26 Ulp. 22. 5. See however ante, p. 392, and Mommsen, Z. S. 25. 57.
27 Ulp. 22. 9; D. 28. 5. 31. pr.; 30. 12. 2.
28 Ulp. 22. 9.
29 38. 3. 1.
30 Ulp. 22. 5; D. 36. 1. 27. Paul.
31 G. 2. 192; D. 28. 6. 30. See Accarias, Précis, § 332.
32 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. We know that where the slave of one without tui capiendi is instituted the gift may take effect if he is alienated, 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. As to other corporate bodies, we gather from an enactment of Diocletian that some collegia could be instituted by special privilege. Several enactments authorised gifts to churches and charities, and finally Justinian abolished the rule forbidding institution of incertae personae altogether. Wherever a body can be instituted, no doubt its slaves can.

CHAPTER XV.
SPECIAL CASES (cont.). BONA FIDE SERVIENS. SERVUS MALA FIDE POSSESSUS. SERVUS FRUCTUARIO, 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, and that there are texts which expressly make the bona fides attach to the possessor.

As to what is involved in bona fides a few words are necessary. Gaius tells us there must be a iusta possessio. This appears to mean that iusta causa is required. On the other hand it is immaterial that the slave is furtivus. 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 bona jidei possessor for our purpose in the course of events. Broadly speaking a bona 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 bona jidei possessor. 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. 23. 6; 11. 3. 1; 24. 1. 19. pr.; 41. 1. 23. 3. 34. 57. 45. 3. 19.
2 21. 1. 45. 3; 39. 4. 12. 2; 41. 1. 25. 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. 55.
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 bona fidei possessor has ceased.
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. 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 in 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, necessarius, 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). 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, this must be due to the fact that he does not take it as heir, but as acting for his supposed master. 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 points out that it dispenses with possession altogether as a

1 C. 8. 45. 30.
2 Julian (21. 2. 25. 2) allows a man to acquire for his holder, notwithstanding supervening bad faith, and Ulpian (41. 1. 28. 1) contradicts this in terms which show that there had been dispute. See Salkowski, op. cit. 162-4 and the texts he cites.
3 Ante, p. 358.
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.

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, 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.

It is a bona fide possessor who acquires; possession is necessary. To this general rule circumstances induced the admission of an exception. In discussing servi hereditarii 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 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 fide posse

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5 Ante, p. 163.
6 10. 2. 9.
7 Cp. C. 3. 36. 18, 20.

332 Bona Fide Serviens: Possession [PT. I

333 Bona Fide Serviens: Possession

CH. XY] Bona Fide Serviens: Possession

333 Bona Fide Serviens: Possession

1 C. 8. 45. 30. But in both these there is the assumption that the heredes still possess.
2 Thus though the holder may possibly accept a servus alienus (41. 1. 10. 6), he cannot be 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 23. 78. 1.
4 Vat. Fr. 207. 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 servum. Silanians and Claudians, 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. The fructus of a slave are fructus civiles, earnings and the like, differing in character from fructus naturales. 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 extantnes is due to Justinian, 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, 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. 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.

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: 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.

On the other hand, he is not entitled to the actio servi corruptil, probably because the words servum alienum in the Edict are regarded as imposing on the plaintiff proof of ownership, though Ulpian gives two other reasons, namely, that nihil eius interest servum non corrupsum, 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 iniuriam in the wrong is plainly in contumeliain eius, though an iniuria is primarily regarded as against the dominus.

It is clearly laid down that a bonae fidei possessor has an actio furti in respect of the slave, but the basis of his interesse is not clearly defined, though the rule is at any rate classical, and may be republican. The right does not turn on the interruption of usucapion, since it is immaterial that the res is vitiosa. His interest is not regarded as a part of ownership, since what he recovers is not deducted from what the owner can get, as is that which the usufructuary recovers. The Institutes tell us that the bonae fidei possessor has the action "like a pledge creditor," and Javolenus tells us that the interesse depends on his possession. But, as we have seen, 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 shows 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, but in the corresponding passage of the Institutes, the words referring to bonae fidei possessor are omitted, 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, and citing Julian, allows it to a donee from a non-owner only if he has a right of detention, propter impexnas. This is tantamount to refusing it to a donee as such, for even a commodatarius has it against the dominus on such facts. 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. 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. 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. 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.
For damnum to the slave the bonae fidei possessor has an actio in factum, based on the lex Aquilia, even against the dominus. 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 nihii cuZpa interest sermon non corrumpi. 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. It is consistent with this that the text speaks only of occitio, not of lesser damage. But another limitation, generally received, 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. 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. 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.

1 9. 2. 11. 8, 17. A liber homo bona fide servire has it in its own name when the subject has ceased, 9. 2. 13. pr.
2 11. 2. 17.
3 Pernice, Sachbeschäd. 196, and literature there cited.
4 9. 2. 17.
5 Pernice, loc. cit.
6 6, 3. 53. The rule in 6. 1. 17 is differently explained. See ante, p. 12.
7 Girard, Maconel, 901 sqq.
8 Ante, p. 263.

CH. XV] Noxal Liability of Bonae Fidei Possessor

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, and, if he gets possession, can be sued by the Publician action, the exceptio iusti domini being met by repeticio doli mali. A bonae fidei possessor when sued by the dominus, can set off the cost of noxal defence. Where the bonae fidei possessor is liable the dominus is not, subject to questions of dolus. 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 noxal only, 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.

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 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.
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; nor does Justinian allow it against an owner by a former bonae fidei possessor, for what was done during the possession. 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.

(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 steals in the interim, if he never in fact returns to either? Apparently, not. The word retentio shows that the rule applies only while actual potestas lasts. The question is suggested, by way of digression, whether the rule that is liable so long as "retention" lasts, the owner as soon as the slave gets free all through there can never have been any real question of noxal liability.

The rules and the cause for the difference have already been considered: (i) Justinian's enactment says nothing about damnum. We have already seen that here the texts lay down an entirely different rule. The rules and the cause for the difference have already been considered:

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CH. XV] Contractual Liability of Bonae Fidei Possessor

here it is enough to say that the limitation of Justinian's enactment is an important confirmation of the views held by Girard.

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 servis. 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. Of quod iussu we are merely told by Marcellus and Ulpian 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, and for like reasons he does not seem to have a conditio. 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. 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. 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. 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.
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. 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. Elsewhere Ulpian perhaps holds for complete liability as between two bonae fidei possessores, and Papinian lays down this rule as between owner and possessor. 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 passage reveals, say that, if the creditor contracts in view of the whole peculium, and has no means of determining the different causae, there is room for the view of what is supposed to be the tenor of the Edict. The intermediate views are equitable compromises. It is clear that the bonae fidei possessor: it is not impossible that, as originally written, it expressed the view that the person primarily interested must be sued first.

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. 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, but only propter rem et 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 lays down the rule 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.

We now pass to acquisitions through bona fide serviens. This topic has been thoroughly worked out by Salkowski, 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, possesso and iura in personam. 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.

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. 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. 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. 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.

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.

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1. Papinian's language does not look like application of a general rule: quoniam creditor electissent, si alter habeat tamen in proposito dominio case convenientum. In 3, 5, 5, 8, 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 de peculio (note, p. 216): here there is de peculio, but on the loan.

2. Salkowski, op. cit. 36; Appleton, Propriété Prétoriennne, §§ 81 sqq.

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3. 15. 1. 22, pr.
5. 15. 1. 32, pr. 50, 3. See post, App. ii.
6. 15. 1. 87, 8. Salkowski, op. cit. 259, discusses this text, but treats it as dealing in part with transactions between serviens and possessor.
7. 15. 1. 50, 3.
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 labour⁴. It involves essentially the acquisition of a right *ex operis servii*. 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 hire⁶. 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 servii*. This is said by Gaius, Pomponius (quoting Aristo), Celsus, Paul, Ulpian, Modestinus⁵. 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 *iusuu possessoris*, cannot this be regarded as *ex operis*? This doubt is suggested by Aristo (through Pomponius)⁶, 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 *iusuu possessoris*, a *reductio ad absurdum* of the view. Accordingly Julian, the only weighty authority who claims that 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, *iusuu possessoris*, might be regarded as an acquisition *ex re*.

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1 7, 8, 12, 6, 14, pr.; 18, 6, 17. *They are fruits, deducit imperium*. See Salkowski, *op. cit.* 118. *He notes one text in which acquisition *ex operis* is referred to the immediate operari, I, 1, 23, 1.*  
2 Mandate for an *honosarium*: acquisition from a *societas* to which the slave has contributed labour: acceptance of a contract for work, by the slave.  
3 G. 2, 22; In 2, 2, 4; D. 6, 1, 20; 28, 2, 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.  
5 29, 2, 45, pr. *aditio hereditatis non est in opera servillī; 29, 2, 45, 4, ut intelligat* *non opera āuis nulli acquirere sed ex re met.*  
6 Salkowski, *op. cit.* 150.  
7 41, 1, 63. 3 deals with fructuary, but doubtless applies equally here.  
8 In. 3, 1, 39.  
9 It is always *ex re*, never in the plural.  
10 41, 1, 33, 3.  
11 This case is rare.  
12 2, 14, 19, pr., 59; 46, 4, 11, pr.  
13 *op. cit.* 132 sqq.
Institutes, and thus is a mere general statement which might admit of exceptions. It is confirmed in the same general form by Pomponius, quoting Aristo. But Paul remarks that a gift given indistinct to a bona fide serviens goes to the dominus, which implies that expression of intent might divert it to the possessor. And Ulpian, in a text which has been retouched, after expressing some doubts, appears as saying that donationes, mortis causa and inter vivos, are acquired to the possessor if intent to benefit him was shewn. 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 hereditatis. 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 to the acquisition to the patrimony is concerned in a more definite way than by the mere fact that it would be better off for the acquisition.

Salkowski discusses 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, where the need is not so great, or to pledge creditor or to precario tenens. He thinks that in usufruct acquisitions were at first limited to operas. Acquisition of rights through servus fructuarius was first allowed in the normal case—usufruct created by will. According to Ulpian the rule was extended to all usufructs by Pegasus. Ex re grows out of ex operis: traces of connexion appear. 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. Then acquisition ex operis gets narrowed down to cases of employment in trading, and it is recognised that ex re is uti not frui. Salkowski remarks that there is little indication of development of an a posteriori juristic basis for these acquisitions. 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 bona fide possession and usufruct as independent rights inrem, 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 inrem: this has been achieved by more recent jurisprudence. And as the right of the bona fide serviens of a slave is a development from bona fide serviens 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 bona fide serviens, i.e. in the case of hereditatis petitius, 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 bona fide serviens.

(i) Hereditas. The bona fide serviens 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. But if he was a liber homo, Trebutius 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, and the texts show that this view prevailed. Velle non creditur qui

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1 G. 2. 22; In. 2. 9. 4; D. 41. 1. 10. 3. 4. 2 G. 1. 19. 3 1. 22. 4 29. 2. 45. 5 This principle would cover the case of acceptatia 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. 6 Salkowski, op. cit. 130. 7 1. 31: 7. 8. 18. 3; 41. 1. 49, all dealing with s. fructuarius, but equally applicable here. 8 41. 3. 44. pr. 9 Op. cit. 132 sed. 10 41. 3. 44. pr. 11 3. 7. 19. 7. 12 41. 1. 19.
obsequitur imperio patris vel dominii. Thus entry, merely usus, does not bind him, but entry sine usus, or where he was willing to enter apart from ussum, does. 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 acquirit, attamen si voluntas testatoris evidens apparent resitutuendam eam hereditatem. The words, which are interpolated, seem to mean that if intent to benefit the possessor was clear then whether the liber homo entered sponte or usus, or the servus alienus entered ussum domini, the person who acquired the hereditas would be under a fideicommissum to hand it back to the bona fide possessor. It would have been simpler, as Salkowski remarks, to allow the possessor to acquire where intent to benefit him was clear. Salkowski doubts if the text be interpolated, 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 statutliber, was personally bound if he entered even ussum. This might make one engaged in a causa liberalis hesitate to enter even ussum. Justinian accordingly provides that if in the will he is described as servus Titi, he must enter on ussum, 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 intent 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, 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 ussum, 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. He holds also that if bona fide serviens liber enters after his freedom is clear, there can be no question of restitution, for this would give bona fide possessor greater rights than those of a real owner, who can claim

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. 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. The difficulties which might arise as to usufruitio and consumption of such things do not here concern us.

(iii) Possessio. Possession can be acquired for us by persons bona fide possessed by us, within the causa, and, if it is in re peculiari, without our knowledge. 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 usucapit. An owner cannot possess through one who is possessed by another. It is odd that Ulpian in one text 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.

(iv) Contract. Here too the general principle applies; he acquires to the bona fide possessor ex re eius et ex operis. The nature of the contract is in general immaterial, mutuum being not often recorded. The only topic for discussion is the rule that even within the causa what cannot be acquired to the possessor goes to the dominus or to the man himself. The rule appears to be an extension by Julian of an analogous rule in the case of servus communis. The case contemplated is that of a stipulation for what is already the property of the bona fide 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

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1 41. 1. 10. 3, 19. 2 Salkowski, op. cit. 170 p. 1. 41. 2. 23. 5. 4 Salkowski, op. cit. 164 pp. 3 41. 1. 10. 3, 19. 4 Salkowski, op. cit. 170 p. 1. 41. 2. 23. 5. 41. 4. 7. 8. 41. 2. 1. 6: 50. 17. 118: and thus a captive is not restored retrospectively to possession by postmanumtion. 41. 2. 23. 5. 5 Thus a pledge debtor cannot acquire possession through a pledged slave, though the creditor cannot, 4. 1. 15. Salkowski, op. cit. 166, 7, finds traces of an older view, according to which any possession gave the holder possession of what was held by the person possessed. But this is not classical or later law.
6 41. 2. 4. 7 For some texts creating difficulties in the rules as to servus aliis possessori, see ante, p. 270. 8 G. 8. 164; In. 3. 28. 1; Ulp. 19. 21; C. S. 35. 11; D. 12. 1. 41. 9 The interpretation, institution, deposit, etc. P. 29. 3. 2; D. 12. 1. 41; 18. 5. 9; 16. 3. 1. 27. 10 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 fraternus.
11 Post, p. 639.
tells us¹ that if a bona fide serviens stipulates for something that is his, within the duæ 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 causæ 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 says² that even if it is extra causæ the possessor will acquire on such facts. This contradicts the general rule and makes the possessor capable of acquiring beyond the causæ. It has been proposed to omit a non, which would make the text orthodox³, but entirely empty. More acceptable is Salkowski's view⁴, that it is a mistake of logic would seem to require division. The text is clear and emphatic.

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 re⁵. If the stipulation was not nominatio 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 mith 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 consider the thing from A². 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 A³.

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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. 5.
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 jurisprudent (nunc quidem), or with the nature of stipulation: ex processi invenit, 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.
⁷ 19. 1. 24. 1.
⁸ With B's money, bought a thing for A. A's action is negotiorum perstorum de peculio. In 12. 1. 31. 1 the same case is discussed and alternative remedies are considered. Anet, p. 226.

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Purchase of freedom with peculium is a common case. A bona fide 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 dominus², or, if the man was really free, can be condicted by the payer³. 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 ingenius⁴? 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 valid⁵. The money has become the property of the bona fide 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 condemnatio. 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 suspense⁶.

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 acquiring⁷. 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 does⁸. If he stipulates iussu possessoris but ex re allerius, he acquires to his dominus, quia iussum domino coharet. It has not the same privative or negative effect as nominatio⁹. If he stipulates ex re possessoris, iussu domini he acquires for the dominus¹⁰. 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 effect¹¹. Logic would seem to require division. The text is clear and does not seem to be interlaced: the result is more symmetrical than

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¹ 15. 1. 60. 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 fructuarium.
⁷ 7. 1. 25. 1. 45. 3. 1. 92. 99. 30. 31.
⁸ 7. 1. 25. 1. 43. 1. 37. 5; 45. 3. 39. Salkowski cites also 45. 3. 1. 5. 36. pr.; 46. 3. 96. 7.
⁹ 45. 3. 31. 32. pr.
⁰ 7. 1. 20. 3.
¹¹ Salkowski, op. cit. 199.
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 fructuariai 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 conditio.

Transactions between the possessor and the serviens in which no other person is concerned (i.e. within the causa) can have no legal effect except so far as they may affect the amount of the slave's peculium (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 causa. But if the contract with possessor be iussus 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. 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. 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. 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 the meaning de peculio of Cassius, who must have died fifty years before. He calls him Gains master. The remark may be from the compilers and refer to Gains.

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 iussus or 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 servitii necessitate. But the view which prevailed was that if there was authorisation there was actio mandati, and otherwise there was negotiorum gestorum. Thus Pomponius says he is liable to me omnino, 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. Elsewhere Pomponius lays down the same rule for commodatum, saying nothing expressly of the connexion with res possessoris. 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 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 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 spends money on res peculias 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. 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. 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. 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 show 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 shows that he is dealing

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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 Gains master. The remark may be from the compilers and refer to Gains.
2 7. 1. 25. 5; 45. 1. 118. pr.
3 See 7. 1. 25. 5. As to acquisition in suspense, post, p. 366.
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 estranseus.
5 45. 1. 118. pr.
6 cp. op. cit. 265.
with a conclusion forced on him by logic: *quid aliud dici potest quoti minus 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 possessoria*, the *serviens* has no rights: from this point of view the transaction is one between a master and his slave. Whether he necessarily had an act for his master, his act can hardly be regarded as intervention *ex re*.

In these matters the expression, *ex re possessoria*, is used in a way which may cause confusion. When we say that a *possessor* acquires on a slave's contract *ex re possessoria*, 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*. 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 possessoria*. 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. 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.

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**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. There are texts which equally deny possession to any *mala fide* holder of a *liber homo*. 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*. Africanus says we do not possess him because we have not *aninus possidiendi*, 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. Paul appears to hold that what is incapable of being commercially dealt with cannot be possessed, which would cover *bona fide* possession. 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. 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*, and might come within the provisions of the *lex Fabia*.

There are some cases of possession which are neither *bonae fidei* nor *mala fidei*. Such are those of *precario tenens* and pledge creditor. There are others which are more like *mala 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 *mala fidei possession*. 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, 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 *futum*
makes a *mala fidei possessor* usually a *fui*, though not always. But for our purpose this is immaterial.

A *mala 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*, or *servi corrupti*, though no doubt he is liable on both these.

He is liable noxally for wrongs by the slave. The reason given by Gaius is that it would be absurd that a *bona fidei emptor* should incur this liability and the mere *praeclu* escape. A sufficient reason seems to be that the *mala fidei possessor* has the *potestas* on which in classical law the liability depends.² 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. 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*.³ On the other hand, it is surprising to find that a *mala fidei possessor* has *furti noxalis* against the owner. 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.⁴ 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 *dominium* would profit by them: *plerumque enim eius generis servorum furtis peculia eorumdem augmentur*. This is a poor reason: it gives a *mala fidei possessor* a profit which is at least as undesirable.⁵

It is surprising also to find that there is no authority as to the liability of *mala fidei possessor* on the slave's *negotia*. *Mala fidei possession* 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 *insitoria*. Apparently he will not be liable to the *actio quodtussus*.⁶ There will of course be *de peculo* against the *dominus*, and if the *peculium* is insufficient, it may be that there is *de dolo* against the *possessor*.⁷ Such a slave may well have a *peculium, de facto*, belonging to the holder. There seems to be no *tributoria*, and

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¹ 47. 2. 12. 1. ² 9. 2. 17. ³ 11. 3. 1. ⁴ 4. 5. 12. ⁵ 47. 2. 66. ⁶ 11. 3. 1. ⁷ 4. 3. 6.

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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.⁸

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 *censurae*, 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.⁹

The law as to acquisitions is simple and is fully stated. The *possessor* can acquire nothing, whether he is a thief, one who holds *vi clam aut preario*, or one whose possession began in good faith so that he is usucaptis.¹⁰ In like manner an heir who knows the man is *alienus* can usucapt, but cannot acquire through him.¹¹ 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 *mala fidei possessor*, that she (or he) can acquire nothing and must restore everything obtained through the slave, legacies, *hereditates, partus*, etc.,¹² 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.¹³ It seems that a *mala fidei possessor* cannot.

(b) Things indirectly acquired through the slave must be restored. Thus where a *mala 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*.¹⁴

(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, and a contract, *nominatim furi*, cannot be acquired to the *dominus* and so is simply void.¹⁵

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¹ There can hardly be *de in rem vexa*: delivery to the slave vests the thing in *dominus*, and its application to a purpose of the holder's still leaves the owner a *indicatio* or a *conditio*, according to circumstances. ² There must be limitations. If it is wholly *ex vet possessor* (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 Penicullus, Labeo, 2. 1. 376, as to the possibility of a different view as to possession among the earlier lawyers. ⁴ 41. 1. 22. 25. 1; 45. 3. 14. ⁵ The fact that in general the liability of *m. f. possessor* in *sindicatio* is greater than that of *f. possessor* has nothing specially to do with slaves. See ante, pp. 12 sqq. ⁶ 41. 1. 40. ⁷ 24. 1. 28. 5. ⁸ 24. 1. 19. 1. ⁹ 12. 6. 55. ¹⁰ 45. 3. 14. ¹¹ There do not stipulate by the slave for a servitude to attach to a *peculium* of the *possessor* would be equally void. 8. 1. 11; 40. 1. 140. 2. 66.
XXIV. Servus Fructuarius.

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, 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. 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.

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. The rules under the Sec. 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. The danger must have been equally great, but the senatusconsultus speaks of dominus, and usufruct 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. 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. A usufruct may be validly created in a slave conditionally freed, or in mad, infirm or infant slaves; 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 from the annual value of his fructus, etc., 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.

An owner cannot of course be fructuary also, and thus if the usufruct 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. This confusio is rather remarkable, as the slave never belonged to the heres, who, in analogous cases, is treated as never having been owner. 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. 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 dividendo. Of course a usufructuary cannot become owner by usuquepio, not because he has not the necessary animus, for he might have it, but because he has not possession but only quasi-possession. 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 usufruct. The result is nowhere stated. It seems clear however, that if T accepted the usufruct, knowing that the slave was included his possession would become, as a matter of construction, the usufructuary his heir and leave the slave to another. The result is nowhere stated. It seems clear however, that if T accepted the usufruct, knowing that the slave was included his possession would become, as a matter of construction, the usufructuary his heir and leave the slave to another.
for a fixed time: in the case of a slave, it may be till manumission; and there is no difficulty in creating a usufruct of a statutoris.

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. The fructuary can compel the man to work, can teach him an industry, and can employ him in it. But he must not set him to inappropriate services, such as may lessen his fitness for the work for which he has been trained, 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. 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. If he torture the slave, he is liable to the servius corruptus and iniuriarum. 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 plenusima coercitio so long as there is no dolus. Neither has actio iniuriarum against the other for more castigation of the slave, though dominus may have the action against the fructuary, and the converse is apparently true. In general an insult to the slave is regarded as against the owner unless it is plainly in contumeliam fructuarit. If the slave be stolen, both have actio furti, based on their interesse: the owner may have it against the fructuary and vice versa. In the same way each may be liable to the other for servius corruptus, the fructuary’s action being utiles. The same rules apply under the lex Aquilia.

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.

The usufructuary has noxal actions for furtum, servius corruptus and iniurias, and presumably by an actio utiles for damnum. Surrender frees the dominus and ends the usufruct by confusion. The dominus

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1 7, 4, 15. No doubt acceptance of such a usufruct avoided question as to assign to the usufructuary. 2 Stat. Ch. xxv. 3 33, 2, 30. If a usufruct was created as the result of an ordinary sale, there would be a difficulty as to who acquired the usufruct. 4 See, e.g., set a libraris to work as a mason, a musician as porter, etc. V. Fr. 72. 5 V. Fr. 72 as read by Huschke. See however Mommsen, ad h. l. The rule is not in the Digest, such fights being obsolete. 6 Foot. p. 406. 7 7, 1, 23; 11, 3, 1, 6, 20. 8 7, 1, 16. 9 7, 1, 17, 1. 10 47, 10, 13, 38. 11 47, 10, 15, 46—48; In. 4, 4, 5. 12 47, 3, 35, 47, 2, 46. 1. 13 47, 15, 1, 46, 6. 14 7, 1, 16; 11, 3, 9. 1. 15 7, 1, 17, 3, 66; 9, 2, 11, 10, 12. 16 It has been suggested that if the slave is killed the usufructuary receives the whole value, having a quasi usufruct in it. 17 Fruct. Aquila, 45. 18 4, 4, 18; 11, 3, 14, 5; 47, 2, 43, 12; 47, 10, 17, 9. 19 7, 4, 27; 9, 4, 18.
and one has been sued, the plaintiff may proceed against the other or others till satisfaction. Nothing is said here as to deduction of what is in the peculium of the fructuary really concerned, as there is communi dividundis between fructuaries.

It may be added that the liability de peculio lasted as in other cases for one year from the expiration of the interest.

Usufruct of a slave, as of anything else, may be lost by non-use, and there is a rather puzzling text in which the question is raised whether if the slave runs away, this involves non-use, so that by acquisition by long possession is often treated as equivalent to use. And uti fructuarius 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, 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. And uti without frui is enough to preserve usufruct. 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, 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 indicate a hazy view of the matter, seems rather to be due to the fact that there is no 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, 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 fructuarius, 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.

Such infant slaves as are mentioned above can hardly be lost by non-use, other than adverse possession. 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.

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. In relation to acquisition through servus fructuarius, 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 servii: all else goes to the dominus, the fructuary having no interest in it. A few remarks are needed on cases of special interest.

Inheritance and legacy. We have seen that after some doubts it was settled that bonae fides possessor could not acquire such things through the slave. The same principle was generally held in case of servus fructuarius. Most of the doubters speak only of bonae fides possessor, but Labeo thinks that usufructuary would acquire if testator intended to benefit him. Salkowski thinks this must be accepted as

1 15. 2. 19.
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, servus fructuarius, 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, 64. pr.; 7. 7. 6. 1.
6 71. 1. 37. 2.
7 29. 2. 45. 3; ante, p. 342.
8 7. 1. 21. He puts legacy in the same position.
9 15. 2. 1. 9.
10 15. 3. 7, 7.
12 V. Fr. 89 in fin.
servus fructuarius: acquisitions

[pt. i]

362

the law of Justinian's time, as the texts show that they have been handled by the compilers. But this seems very doubtful in view of the large number of texts which contradict it. 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. Here it is perfectly clear that in the later law the fructuary would acquire if the intent of the donor was to benefit him. Releases to the slave for the fructuary are valid as being ex re. Gifts by fructuary to the slave are dealt with as in the case of the bonae fidei possessor. 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.

(c) Possession. Possession can be acquired, within the two causae, for the fructuarius, and through this possession usucapio may operate, subject to the ordinary rules as to knowledge of the principal in matters not within the peculium. In relation to usucapio there seems no reason to distinguish, as Kuntze seems inclined to do, between servus fructuarius and bonae fidei servienti. There had been some doubt, mentioned by Gaius and rejected by Paul (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 tenatur et plurimum ex iure possessio mutuatut*. Kuntze 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 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 bonae fidei serviens, we get the rule that what he cannot acquire to the fructuary the slave acquires to the owner, even within the causae. 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 concerned and thus cannot be acquired to him: it goes therefore to the owner. 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 bonae fidei serviens. If the stipulation is nominativum domini or iussu domini, even ex operis or ex re fructuarii, it is the owner who acquires. If, on the other hand, he stipulates nominativum fructuarii, not within the causae, the agreement is null: the dominus cannot acquire in contradiction of its terms. If it is at the iussum of the fructuary, the dominus can acquire. The same principle is illustrated by the rule that if the stipulation is domino aut fructuarii, 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. On the other hand if he stipulates domino aut fructuarii, 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.

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.

(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. No doubt, as Salkowski says, 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." The case seems exactly the same, though Salkowski holds 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 e.g. 29. 2. 45. 3; 41. 1. 47 (Julian); a. f. 25. pr. (Upian); 41. 1. 10. 3 (Gains); G. 2. 92; In. 2. 9. 4. None of these texts speaks of intent.
2 Ante, p. 543.
3 46. 3. 22; 25. pr.; 41. 1. 49.
4 Ante, p. 541; 46. 4. 1. pr.; V. Fr. 72.
5 Ante, p. 344; 7. 1. 31; 7. 8. 16.
6 Ante, p. 347; Salkowski, op. cit. 164 sqq.
7 41. 4. 7. 8; G. 2. 94.
10 op. cit. 34.
11 op. cit. 34.
12 op. cit. 34.
13 Ante, p. 547; D. 7. 1. 55. 3.
14 Ante, p. 547; D. 7. 1. 55. 3.
been acquired when it was made. Fitting’s view¹ 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 suspense². Neither
fructuary or dominus can redevelop, for this would be to abandon rights
which may not be his³. There can be no actio ex empto⁴. 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
decisive⁵. There can be no condicio furtiva⁶. There is no actio
Aquilia⁷, at any rate unless there is some mistake of fact as to whether
the price has or has not been paid⁸. On the other hand, on the principles
already laid down the vendor can bring an actio ex vendito de peculio
against either¹, and condamnation, if for the full price, will end the
suspense. Salkowski thinks it will end it in any case if there is no peculium, apud alterum¹⁰. But if the owner has paid half de peculio,
and the fructuary then pays the other half, they will own pro rata¹¹.

(b) Termination of the suspense by payment. The thing vests in
the owner of the money¹². Only one text deals with this matter in
detail¹³. 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 possi-
bilities. 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 payment¹⁴. 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 jurors are

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¹ Cited by Salkowski, op. cit. 199.
² 21. 1. 43. 10.
³ Salkowski, loc. cit. There is the possibility of mistake as to whether the money was paid
or not.
⁴ 7. 1. 12. 5.
⁵ Salkowski, op. cit. 402.
⁶ No text deals with furti or sera corrupti. A buyer who has not paid is liable for culpa
levens, and therefore may have actio furti. Serre corrupti is specially for the owner (ante, p. 29): he
has not this action, but can no doubt claim cession of actions.
⁷ Ante, p. 359.
⁸ loc. cit.
⁹ Salkowski considers further complications where vendor delivers the things not to slave
but to owner or fructuary before or after payment.
¹⁰ 19. 1. 24. pr.; 41. 1. 43. 2.
¹¹ 7. 1. 25. 1.
¹² 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
(46. 1. 84) and Ulpian himself (12. 1. 19. 2; 46. 2. 29). The result in the text would follow if
he bought "domino aut fructuarii," since here he can acquire only to one, and it is impossible
on the facts to say which. See ante, p. 363, and post, App. not.
¹³ See also 96. 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 4. 2. 1. 8. 1.
¹⁴ 7. 1. 25. 1.
¹⁵ op. cit. 211.
¹⁶ 80. 58. 1; G. 2. 185.
¹⁷ For similar cases and resulting remedies, see Salkowski, op. cit. 385.
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. Salkowski thinks that if it was for a lump sum the usufructuary acquires the whole, and dominus must conduct his share. The text he cites does indeed refer only to annos singulos, but it does not exclude the other case. Paul definitely includes it. 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 that for the years during which the usufruct lasts, the fructuary acquires, but for the later years transit ad proprietarium stipulatio semel adquisita fructuarius. 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 diminutio and restored by virtue of repetitio. This is to state the rule, not to explain it. Kantze thinks it involves the notion that the obligation is really rooted in the slave, and passes with him. But as Salkowski observes 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, 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. 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. 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 stipulation as divided. This does not meet Ulpian's language, but that is very confused, and as Papinian shows 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 servientes. 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. In such things fructuary is treated as dominus, 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. One case looks exceptional. If the slave stipulates for the usufruct in himself, he acquires this to the dominus. The Gloss regards this as made with the fructuary, and Salkowski 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 dominus. This artificial view is open to objections. It contradicts the general rule just cited, which says that all such things are void nisi nominatim dominus. To say that because it would be invalid in any other form it is to be construed as if it were nominatim dominus is to reduce these words to an absurdity, and they are stated in the adjoining paragraph. 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. 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. It is thus covered by the rule that what cannot be acquired by the fructuary goes to the dominus, even within the causae.

If the slave's contract with the fructuary be iuves domini, or nominatim domino, or if it be extra causae, 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. If the slave deals with dominus, the agreement is null if extra causas, even though in the name or at
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 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 dividendo suffices. If the text refers to contracts within the causae, it breaks the rule that promises to the fructuary in such matters are null. If it refers to matters not within the causae, the limitation that he cannot sue if there is the means of satisfaction though between common owners is implied in the text last cited. Salkowski assumes it to refer to the promises to the fructuary in such matters are null. If it refers if the slave has a

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, 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, nominatum domino, and dominus has lived or stored property in it. It is absurd that the fructuary should be compelled to recoup himself at the expense of the slave. Only if the peculium is insolvent is anything like justice done, for the slave is a slave in possession of his own property, when the debt of his own money, when the slave is his slave. He has an actio de peculio against dominus. 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. Gaius and Paul and Julian say that he must allow for what

he has in peculio if he sues the vendor. 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, that there can in no case be actio de peculio against dominus on such a contract.

XXV. Servus Usuarius. Operaee 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. The case of the slave shows 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 operaee servii. The usufructuary 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. He has an interesse for actio furti. He is never mentioned in connexion with noxal rights and liabilities, so that the rules are no doubt the same as in usufructus. Subject to the fact that his field of acquisition is less, the texts in the actiones honorariae are as in usufruct. He can acquire a release by acceptation in the same way.

As to acquisitions there is a marked difference. The usufructuary is entitled ati and not frui. Hence he can acquire ex re and not ex operis, acquisition ex re being a form of ati. It is possible for the slave to have a peculium in relation to usufructus, and acquisition in connexion with this is ex re. We have seen that employing a slave in business is ati, not

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1 15. 1. 19. 2. 2 45. 1. 118. pr. 3 op. cit. 228.
4 Ante, p. 324. 5 45. 1. 13; A. t. 19. 1. In the first illustration there might be de in rem verso, not in the second.
6 15. 1. 11. 8. 7 15. 1. 2. 8 See Aemilius, Præcis, § 281. 9 7. 8. 14. pr.; 46. 3. 29. 10 7. 8. 16. 2.
fruuit; hence he can be employed as insitor and his contracts in that capacity will enure to the usuary. 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 usuirii. 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. But Gaius tells us that he may take money from the slave in lieu of services. 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 proceeds, 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. 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. The rights of personal enjoyment in this case are as in usus, 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.
(iii) It is not lost by capitis diminishio, or by non-use.
(iv) It is not lost by death of the beneficiary, but passes to the heir. 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 usufructs the man.

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1 Ante, p. 343.
2 7. 8. 30.
3 Io. 2. 5; 3; D. 7. 8. 12. 6. 14. pr. See Salkowski, op. cit. 113.
4 7. 8. 13.
5 33. 2. 1. 9. In estimating its value, cost of maintenance must be deducted and nothing allowed for service of incapables or premiurn affectioius.
6 7. 7. 6.
7 7. 7. 5.
8 7. 7. 1; 33. 2. 2.
9 7. 7. 6.
10 33. 2. 2.
11 7. 1. 17. 2; 33. 2. 2.
12 7. 7. 1; 33. 2. 2.
13 7. 7. 5.
14 7. 7. 6.
15 7. 7. 6; 33. 2. 2.
16 33. 2. 2.
CHAPTER XVI.

SPECIAL CASES (cont.). S. COMMUNIS. COMBINATIONS OF DIFFERENT INTERESTS.

XXVI. Servus Communis.

Regarding 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 whom I own a share. They are reckoned, each owner. The rights of ownership are necessarily somewhat cut down in view of the wrongdoer’s own in a sense—a fact which is allowed to bar any action. But even here Ulpian inclines to allow the action if the reception was not easy to see why the relation makes any difference, since the act is acquisition through such slaves.

For damnum to the slave by one of the owners the others have the actio Aquilia, pro parte. For injuria 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. 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, and from the fact that, in furturn, action by one owner did not bar action by the other, we may infer that the rule was the same. In the case of injuria the rule is laid down that, for striking by a third person, each owner has the action. But if the person who did the beating did it by consent of one whom he thought sole owner, there is no actio injuriarum to anyone: if he knew there were other owners he is liable to all except the one who consented. There is an at least apparent conflict in the texts as to the distribution of damages. In the Institutes 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, 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. 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.

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.

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: habeas divisionem non recipit. It is, however, in the discretion of the iudex to order a surrender to the owners jointly. In these cases, if he has been surrendered to one, the matter can be adjusted in the actio communis dividendo.

For delict by a common slave 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,
owner in the actio communi dividundo, 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.

The case is different where one of the owners was scientia. Such a person is liable in full with no power of surrender. Some complications arise from the fact that while he is so liable, the other owner is none the less noxally liable. If the scientia is sued there can be no surrender, but the ignorans is freed1. If the ignorans is sued and surrenders, then notwithstanding the general law as to consumption of actions, the scientia can still be sued for any difference between the value of the slave and the domini persecuto, which presumably means the damages for the delict, and not the damage done2. 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. 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. If the ignorans has surrendered he has no claim except in respect of deterioration. 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. If the scientia 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. But in another text Paul says that on such facts he can recover nothing: sui enim facti poeunam meruit. 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 damnarem patiatur. In case of iussum the innocent owner is entitled to complete indemnity, and if sued can claim a complete refund from the iubens. 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, from the use of the word poena, that when Paul says he can recover nothing, he means nothing but half the value of the slave, the

quoting Sabinus, he was defending totum suum hominem, and he cannot be allowed to defend in part: this is not defensio at all. But while joint tort feasors are not released by proceedings against one, a different rule applies here: since it is essentially one delict by one man. Satisfaction by one of the owners discharges them all, e.g. if with the consent of the others he surrenders the man or if he pays the claim. Action against one releases all the others on surrendering, and for this rule applies here: since it is essentially one delict by one man. Against one releases all the others on surrendering, he prefers to pay, he can sue his co-owners for their share, of the others he surrenders the man or if he pays the claim. The demand being made by actio communi dividundo. 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. 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.

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. 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. 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. 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.

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, that one co-owner cannot have a noxal action against another. The case is not without a remedy: the wrong must be allowed for by the other
Delict by Servus Communis: Scientia Domini

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: 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 limits noxal liability, and provides that the owner, while he can free himself by surrendering all the slaves concerned in a delict, the Edict 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 scientia 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 scientia may be sued for the rest of the damages.

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 praetor action against the dolose owner, in solidum. 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.

If one of common owners sued ex noxa falsely denies possession the liability is in solidum against him but not against the other: no doubt here too the detailed rules are the same.

If all the domini were scientes, we learn that each of them is liable in solidum, quemadmodum si pluris deliquissen, and action against one does not release the others. 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. The language used is precisely that employed where the liability of one is independent of what is paid by the other. 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 show some confusion between scientia and iussum.
2 Aste, p. 138.
3 47. 6. 5.
4 47. 6. 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, 8. 4. 39. pr.
6 11. 1. 17.
7 9. 4. 5. pr.
8 9. 2. 1. 12; C. 4. 8. 1.
9 9. 1. 11. 2.

CH. XVI] Servus Communis: Contractual Liabilities

would be meaningless. Sell1 thinks that payment by one discharges all, but that there is no right of regress, a refusal which he shews not to be inconsistent with discharge by one payment, by citing the case of dolus by two tutors. But this release is a rule special to dolus and other cases where the claim is for indemnification merely. 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.

We have seen that noxal actions do not lie for delicts by the slave against one of his masters. 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. This circumstance confirms the view taken above as against that of Sell, since the scientia is treated as amounting to a separate delict.

Where a common slave acts as exercitor, all the owners who consent are liable in solidum, 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. The same rule applies to instdicta, 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 communis dividundo or pro socio. In the actio quod iussu none are liable but those who command, but they are liable in solidum. So also none is ordinarily liable to the actio de in rem verso except for what is versum to him. It is said however in the next text that there is an exception to this. 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; quid enim dicimus si peculium servum ab altero ademptum fuerit. And Paul adds, ergo hae quae sit pro peculo apu non potest. The rule is remarkable: the explanatory comment is obscure. Marcellus seems to mean that the actio de peculo

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1 op. cit. 207.
2 Arg. 9. 4. 17. pr.
3 27. 3. 14; b. t. 15.
4 Giraud, Manuel, p. 745.
5 4. 3. 1. pr. See also ante, p. 376, n. 2.
6 So Sell, loc. cit.
7 Ante, p. 374.
8 9. 2. 37.
9 The word used is voluntas. But in this connexion knowledge with failure to prohibit is said to be voluntas, 47. 6. 1. 1.
10 If one owner is a copius and uses the slave his absolute liability for theft, etc., by the slave exists as against co-owners as well as externi: it has no relation to ownership. But there is no personal delict and the liability is rather unreal, as he can claim compensation in communis dividundo, 4. 9. 6. 1. Ante, p. 129. There might of course be no claim in communis dividundo, e.g., where the slave was hired talis qualis.
11 14. 1. 4. 2. 6. 1.
12 15. 3. 13. 2. 14.
13 15. 3. 1. Though as we shall see each owner is liable de peculo for the whole fund.
14 Post, p. 376.
15 15. 3. 14.
16 Presumably communis 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 analogical 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, since this enables the creditor to recover by one action instead of compelling him to bring two. This explanation requires, what is 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. 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.

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, and the peculium may be either a joint fund or in distinct funds. 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. As the owner sued is liable over the whole fund, he is entitled to deduct debts due to other domini, and the liabilities may be finally adjusted by communi dividendo. The enlarged liability depends on the existence of this right. But an owner in respect of whom there is no peculium, though he can be sued de peculio, cannot be made to bear any part of the burden in the ultimate distribution. The action for contribution can be brought immediately on condemnation de peculio: it is not necessary to have actually paid. We are not told expressly the basis of adjustment, but several texts show 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. If the peculium does not suffice to pay all, the action can be brought again, and as in the case of

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1 Von Trier, 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. 32. This text is Julian's, and shows that the present rule as thus explained, cannot be due, as Von Trier supposes, to him. It is possible that some part of the hypothesis of Marcellus has dropped out. See Von Trier, loc. cit.
4 14. 4. 3. pr.; 15. 3.
5 15. 1. 1. 2; and for several cases, 15. 1. 16.
6 10. 3. 8, 4, 9, 15, 25; 14. 3. pr.; 15. 1. 11. 9, 27, 8, 51.
7 10. 3. 8, 4, 15; 15. 1. 11. 9, 15.
8 15. 1. 25. A and B have common property including a slave. A sells his share of the property to C. A creditor sues C de peculio. C is not liable to the extent of A's peculium, as he has no interest in the payment of the debt. If the creditor sues B within the annus ultus, 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.
9 15. 1. 12.
10 15. 1. 12.
11 10. 3. 15.
12 10. 3. 15.
13 15. 1. 27, 8.
14 10. 3. 15.
15 It must be remembered that acquisitions were common: there might however be a further adjustment, post, p. 386.
16 Post, App. 11.

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CH. XVI] Servus Communis: Contractual Liabilities

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.

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.

The right to claim contribution being completed by the condemnation to the peculium 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.

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.

The common liability extending over the whole, with the right of contribution, rests on the fact that it is a common fund, all the destines of which ought to be common; if therefore the peculium 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.

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 communis dividendo.

The law as to acquisition through common slaves is rather complex: the general rule is that acquisitions are common, pro parte, whether inter vivos or on death, and even where they are ex re unius ex dominis, though here they have to be accounted for. So if I promise two things to a common slave, each owner is entitled to half of each, unless they are "fungibles." This community of acquisitions could be avoided by the

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2 15. 1. 28.
3 15. 3. 9.
4 14. 4. 3. pr.
5 15. 1. 15.
6 "Elaborately worked out by Salkowski, op. cit. Ch. 1. Most of the following remarks are based on this book.
7 6. 3. 55, 167; In 8. 28, 31; D. 16. 3. 1. 31; 80. 50. 91. 41. 1. 45; 43. 3. 5, 27. In 12. 1. 13. 2 the money must be common.
8 In communis dividendo, 10. 3. 24; 41. 1. 45.
9 46. 3. 39. A common slave could stipulate for what none of the owners could, e.g., a right of way to a common farm, 8. 8. 19. See Zur Nieben, Miss perceptum verba, 35.
use of apt words. Thus if the acquisition was nominatim for one or more that one or more acquired the whole. So if the acquisition was at the viusum of one, though the matter is disputed, the rule is laid down that he alone acquires: viusum is equivalent to nominatim for this purpose. Further there are cases, in which one acquires alone apart from viusum or nominatim, mainly dependent on the principle that what cannot from any cause be acquired to one goes to the others pro rata. But the application of all these principles is full of difficulties.

The effect of nominatim 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 nominatim 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 fact that the named one acquires the whole is due to 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 nominatim of one master necessarily excludes the others. The principle that the named one acquires the whole is due to the principle that what cannot be acquired to one goes to the other. Each of his owners is his owner and can thus acquire all his acquisitions. If he stipulates nominatim for the owner to whom the thing belongs already the stipulation is a mere nullity. In one text we are told by Papinian 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. The text adds that if he stipulates for the same part sibi dari, this is void, presumably as being an absurdity. Elsewhere Ulpian says 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 other 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 nominatim applies to all kinds of transaction, to stipulation, mancipation, traditio, emptio, mutuum, and even acceptatio, which, as being a release from debt, is a form of acquisition. Gaius applies it to quodlibet negotium.

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 in dominica. 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 nominatim will have no effect except to exclude those not named: the nominatim 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 nominatim will have no legal effect. So Ulpian decides. 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. As Salkowski shews, 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. 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 nominatim has only a private effect, a point which Salkowski seems here to overlook.

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. 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. Julian seems to hold that, as a stipulation ex praesenti vires accipit, there must be no uncertainty in the original

1 Taking in proportion to their share in him. G. 3. 167; In. 3. 36; D. 41. 1. 37; 45. 3. 5.
2 45. 3. 2. 6.
3 7. 1. 25; 5; 41. 1. 23; 3.
4 45. 3. 3. 8. 4.
5 41. 1. 37.
6 45. 3. 28. 2.
7 41. 1. 22.
8 Post, p. 599.
9 Salkowski, op. cit. 88.
10 G. 3. 167; In. 3. 39; D. 41. 1. 37; 3.
11 45. 3. 2.
12 41. 1. 37; 3.
13 This may have been written of mancipatio.
14 45. 3. 38; 3.
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 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*. Ulpius 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 adiectus*.\(^5\) 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 private 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 fideissor he stipulates for the same payment "to A or B, *domini*. This is valid, B is only *solutionis causa adiectus*; the point is that as a fideissor 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,\(^7\) and where on these rules one acquires or is excluded unfairly, the matter is adjusted by *comuni dividendo* or *pro socio*.\(^8\)

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1. Salkowski, op. cit. 84, objects to Ulpian's reasoning, but hardly takes enough account of this point and of the fact that *nominatio* is private merely: it simply bars those owners who are not named.
2. 54. 1. 15. pr.
3. 41. 1. 23. 3.
4. 45. 3. 98. 1.
5. 45. 3. 1. 6.
6. 45. 3. 11. It may also be Julian's view.
7. Servus Communis: *Acquisitions*: *Nominatio* [PT. 1]
8. 45. 3. 16. pr.
9. 41. 1. 23. 3.
10. 45. 3. 25. 3.
11. 45. 3. 6. 7. pr.
12. See Salkowski, op. cit. 96, 98.
13. See Salkowski, op. cit. 91 sq.
14. Gaius and the Proculians treated it as having no effect. TITIO, or is excluded unfairly, the matter is adjusted by *comuni dividendo* or *pro socio*.
16. 45. 3. 25. 6; 45. 3. 5. 7. pr. See Salkowski, op. cit. 93, 98.
17. 7. 1. 25. 6; 45. 3. 5. 7. pr.
18. See Salkowski, op. cit. 91 sq.
19. Either in his name or without this instruction.
20. 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.

(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. 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. 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.

(ii) Hereditas. If a common slave is instituted his masters are entitled pro portione. 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. 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 dominii do not order entry within the period allotted. Each owner has a separate tempus delibrandi, which of course may not be the same in all cases. 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. 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. 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. But Sceaevala says that the substitute will take the share of any owner who

... does not authorise entry. 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.

(iii) Legacies, etc. The general rule is simple: a legacy to a common slave goes to his owners pro portione. 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. This is the rule in cases where a legacy is left to persons on such a condition—enumeratione personarum videri esse divina—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. 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. On the other hand, a senatusconsultum 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 falum must be struck out, and the whole gift is void. A word cannot be pro parte et non scripto. Upon the question of accrual, the dispute is clearly brought out. In a legatum per vindicationem to two persons coniunctim or disjunctim if one refuses the other takes all, each being entitled in solidum—partes concurreu fient. How if the legacy was to a common slave? Here on the Proculian view reported by Celsius, there is no accrual, non enim coniunctim sed partes legatus,—nam si ambo vindicarent, each will have the part he had in the slave. That is to say that each is not entitled in solidum, and limited to a share only by concurrence. 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, that if one of the common owners refuses, the other gets it all, notwithstanding that they take pro parte dominica, and not...
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 whenius servus est cuius persona in legato spectatur, non debet perire portio. It is curious to find Julian, who holds that a servus communis in case of legacy quasi duo servi sunt, cited as authority for this view which seems to contradict him.

(iv) Possession. There is little to be said here. Possession by one of common owners is possession by all. This must be nomine omnium 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 ius possessum a thing held by a common slave till he knew the slave had it. In general we acquire possession through a common slave, sicut in dominio adquirendo, 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. 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. It is immaterial whether it is ex peculio unius or with his independent property, not held by the slave. Where an owner hands over property to a common slave on the terms that it is to remain his, and the slave buys the land with it, the land is common. Adjustment by communi dividundo is of course a remedy for any injustice: 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

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1 Vat. Fr. 75. 3–5; cp. 7. 2. 1. 2 and 31. 40 which Šalkowski regards as possibly illustrating the same view.
2 30. 81. 1. He limits it: in hanc causam. The text refers only to usucruct, but the reasoning and the rule that the gift is only pro parte are not so limited.
3 Šalkowski, op. cit. 33–44.
4 41. 2. 42. pr.
5 41. 2. 1. 7. See also post, p. 387.
6 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.
7 10. 3. 24. pr; 41. 1. 37. 2; 45. 3. 29. 1. 45. 3. 27.
8 41. 3. 37. 2.
9 There must be difficulties as to this adjustment, where the slave has pecusia of all his owners and is actively dealing with all of them. See Šalkowski, op. cit. 70–73.
10 39. 2. 49.
11 12. 1. 2. 4. Šalkowski, op. cit. 68–70.
12 45. 3. 4. 2.
13 21. 1. 31. 8.
14 h. 1. l. If a common slave is sold there is redemption pro parte: the effect would not here be to force part ownership on one who was not common owner before, h. l. 10.
15 41. 4. 2. 5.
16 Šalkowski, op. cit. 46–64.
17 Ante, p. 133.
18 41. 2. 1. 7.
19 39. 5. 19.
20 43. 4. 1. 2.
himself, he would acquire for me not for himself. On the other hand, Julian¹, 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 him, 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 nominativum, 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 strongly².

Our two texts have been discussed and explained from time immemorial. None of the explanations has been accepted as solving the problem. 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. 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 be on the face of it be common. For there is no in usum 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 owner³. 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 him⁴. 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 point⁵.

¹ 41. 1. 37. 6.
² 45. 3. 28. 3. So also it is not in usum, for the slave does not receive any in usum.
³ See Salkowski, op. cit. 56 sqq. for explanation and references to literature.
⁴ Salkowski, loc. cit.
⁵ See, e.g., 41. 4. 6. jur.; C. 4. 26. 4.
⁶ Ulpian says nothing of authority to deliver to the slave, but as S. shows (op. cit. 57) the structure of his argument requires it.

CH. XVI] Acquisitions of Servus Communis to one owner 389

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 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 in usum, 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 ². 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 ³. If he mentions the land to which it is to belong, then it attaches to the owner of that land, wholly and alone ⁴.

(b) Where one owner is about to marry and is promised to the common slave. Here the rule can apply only if the words used, or the circumstances, show what marriage was in view ⁵.

(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 ⁶.

(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 shows (op. cit. 99) that the rule is one of great antiquity (28. 8. 12). It is stated many times (In. 3. 17. 6; D. 41. 1. 20. 3; 45. 3. 7. 1. 19, etc.). The following remarks are mainly from Salkowski.
⁴ 45. 3. 37.
⁵ 45. 3. 7. 1.
⁶ 45. 3. 7. 1. 19, etc.
⁷ Though it be a part of himself, 45. 3. 19. 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. 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. 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 Procopian and later view, only one half. The Sabinians treat such a stipulation as one, with a name uselessly added.3

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. Here too we have Julian to deal with, and it is probable that he regarded it as two transactions, otherwise, as Salkowski says, the authorisation being pro parte null, the gift ought to have been valid only pro parte. This seems the only case mentioned.4

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 tassa 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. 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 acceptatio for B from A. This is quite valid. If a common owner

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1 45. 3. 1.
2 Salkowski discusses (op. cit. 106 seq.) 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 46. 8. 12.
4 G. 3. 103.
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 same being a fidius 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.
8 45. 3. 2. 10. 1. See Salkowski, op. cit. 85.
9 46. 4. 8. 2.
10 46. 3. 2. 9. 1. See Salkowski, op. cit. 85.
11 46. 3. 2. 10. 1. See Salkowski, op. cit. 85.
12 46. 4. 8. 2. No authority on other contracts.
13 46. 4. 8. 2.
14 Salkowski discusses (op. cit. 106 seq.) 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.
15 46. 8. 12.
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17 S. (op. cit. 112) discusses the case of a man who writes a legacy to a man of whom he is part owner: the same being a fidius 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.
18 45. 3. 7. 1.
19 45. 3. 2. 10. 1. See Salkowski, op. cit. 85.
20 46. 4. 8. 2.
21 46. 4. 8. 2. No authority on other contracts.
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. 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 cedentia. 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. This, as Salkowski says, 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. 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, 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 communione sed ob suam partem. 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. 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.

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, and,

1 33. 5. 11: P. 3. 6. 4. 2 33. 5. 11. 3 33. 2. 49. pr. 4 Op. cit. 29. 5 Jots. pp. 390, 391. 6 Ulp. 28. 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 execus sale 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 pror communiionem, 33. 2. 49. pr.

CH. XVI] Coheredes as joint owners conversely, if there are several heirs to a vendee, they cannot redhibit unless all consent, 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. As they must sue together in the actio redhibitoria, Pomponius thinks it best for them to appoint a common procurator ad agendum. 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, the others can claim for the damages in the iudicium familiae eriscundae.

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 eriscundae for simple damages, or surrender. Each heir is liable noxally, and if he has defended, and rightly paid, he can recover pro parte in the same way.

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 communis dividundo, and as the iudicium familiae eriscundae can be brought only once, this may not be available for distribution of loss. Moreover on general principle, debts are divided pro rata among the heirs. Thus, while common owners may be liable in solidum, ex inapedo, the heirs not holding the slave are liable only pro parte. 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. If the slave himself is one of the heirs, he is liable to be sued as such, de peculio, but he cannot be liable personally as a son would be. Coheredes can sue each other de peculio (though common owners cannot), but, apart from ownership of the slave, only like other creditors, pro parte. 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. So in the actio de in rem verso a heres is liable only pro parte for what was resum to the deceased, though he is of course absolutely liable as to what he himself has received.
XXVII COMBINATIONS OF THE FOREGOING INTERESTS.

The texts deal mainly with questions of acquisition, and they are fully discussed by Salkowski: 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 usufructuaries 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 usufructuary or a bonae fidei possessor acquire beyond the two causes. 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 profata. 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. 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. As to acquisition ex re, there is some difficulty. What the slave acquires ex utrisque they take pro parte, unless he expressly names one, or it is iussus unius, in which case all goes to that one, subject to adjustment by iudicium communi dividundo (utilis). 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. But apart from iussus or nominatio, what exactly is meant by pro parte? In proportion to their interest in the slave, or, as Salkowski thinks, 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 iussus or nominatio, the other can acquire nothing. But does all go to the other usufructuary, 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 usufructuary. An earlier view limits it in the way suggested. Scaevola is cited as holding both views. The doctrine which prevailed is rested on the view that the dominus cannot be concerned, as it is ex re fructuarii, and that what one usufructuary 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, and making it in any way dependent on the division of the usufruct. The other view fails to take account of this distinction. There was never any doubt that if it was iussus or nominatim to the one whose res it was, he acquired the whole.

(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 usufructuary, nor than any bonae fidei possessor can acquire. 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, 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. It would seem from what has been said that the usufructuary 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 usufructuary can hardly acquire possession ex re, for the slave is in the adverse possession of someone else. If the slave stipulates, ex operis, nominatim for the usufructuary, this will exclude the possessor. But it does not seem that it ought to entitle the usufructuary, for that he should acquire the whole of it as the result of nominatim implies that he would have acquired some of it, apart from nominatim. Salkowski, however, takes an opposite view on this last point, on the ground that the usufructuary could have acquired ex operis but for the concurrence of the bona fidei possessor, which is excluded by the nominatim. This gives nominatim 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 in which Paul says, Sub
Joint owner also a Usufructuary [PT. I, CH. XVI

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: he cannot have acquired less because he was also a bonae fidei possessor. Paul ignores either the common ownership or the iussum. The common owner must have acquired in solidum, subject to adjustment. 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.

1 ante, p. 383.  
2 The matter of the stipulation is doubtful on the text: the obscurity does not affect the present point.  
3 Famulæ evisciudae 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 seu 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 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. Gaius speaks of the rule as to birth as being iure gentium: 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 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. 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.  
3 G. 1. 82 sqq.  
5 1. 5. 5. 1. Marcian.  
4 ante, pp. 294 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 tua gentium—"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." 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.

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 ingenues. 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.

(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, 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 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 gives some support from Gaius' allusion to those apud quos talis lex non est: Huschke adds that any such general rule as this would render meaningless the above provision of the Sc. Claudianum. The suggestion Latine, 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. There is little trace of the rule in later times, a circumstance which further 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. So in A.D. 215 a woman who has married a slave thinking him free is informed that her child is ingenues. 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.

(c) In A.D. 468 Anthemius 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, was one that if the mother were free at any moment between conception and birth, the child is free. The rule seems to have begun in an isolated humane decision of Hadrian, 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 favore libertatis: it is common law. It may not indeed be necessary to appeal to favore 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. 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 libertatis provedit, non nocere possunt. Non debet calamitas matris nocere eii qui in ventre est. It must be noted that Gaius cites a current opinion which would in part except from this rule the case of a creta Romana who was enslaved ex Sc. Claudianum. A child of which she was already pregnant was on this view a slave if volgo conceptus, free if ex iustis nupris.

(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. Domn. 185.
4 Nov. Anthem., 1. No trace of this rule in Justinian's law.
5 P. 2. 24. 3.
6 In. 1. 4. prc.; C. 9. 47. 4.
7 L. 5. 18; Giraud, Manuel, p. 93.
8 G. 1. 93.
9 1. 5. 29; 38. 17. 3; 50. 16. 231.
10 P. 2. 24. 3.
11 5. 2. 3. Specially illustrated in the case of capturi and servi poeni, 1. 5. 18; 39. 17. 2. 3; 46. 23. 4. A condonatum is kept till her child is born: ie he is then ingenues, C. 9. 47. 4. She may not even be tortured, 46. 19. 3; P. 1. 12. 5.
the condition is satisfied, it is free even if the mother never actually became free, owing to captivity or condemnatio. 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 postilium, even though the child was not conceived till the captivity had begun. It is unlikely that this is also the case where the mother has been condemned there is in that case no principle of postilium to help it out. There never was a time during gestation in which there was a spes libertatis.

(c) Gaius tells us that, by the doubtful lex Latina already mentioned, male issue of a slave and an ancilla whom he thought free was ingenius; Vespasian repealed this rule, though he left the other.

(d) By a Sc Silvanus 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. If, during the delay thus caused, an ancilla, freed by the will, has a child, Justian decrees, settling certain doubts, that if the will ultimately takes effect, the child so born is an ingenius.

(e) If the mother is a slave at the time of the birth, but already entitled to her freedom under a fidicuscommunum the child is an ingenius if the delay is due to the fault of the fidicuscommunus, the mother having demanded the manumission, but not if it is an unavoidable or purely accidental delay. 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, 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. These cases will arise again for discussion.

(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 a fidicuscommunum.

(g) If there is a direction that freedom is to be given to an unbom person, Justian decrees, settling doubts that the child shall be free, whether the mother is still a slave or not.

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1. See references in Brittlebank, 347, and in Droz, 345.
2. See references in Mommsen, 347, and in Brittlebank, 347.
3. See references in Mommsen, 347, and in Droz, 345.
4. See references in Mommsen, 347, and in Droz, 345.
5. See references in Mommsen, 347, and in Droz, 345.
6. See references in Mommsen, 347, and in Droz, 345.
(d) A judgment debtor might ultimately find himself sold into slavery. The position of the indicatus 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.

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 dedicticii. 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. We are not told how they were to be dealt with if brought by their purchaser within the forbidden area. In the later law dedicticii altogether disappear, and Justinian, remarking that no trace of the class is left

(b) Liberis expositi. Children exposed did not become slaves in classical law. But there was a time, during the later Empire, in which a harsher rule prevailed. Constantine enacted that one who gratuitously reared a boy (or girl) who had been exposed in 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. 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, consuctione. 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. Justinian provided that no one who reared a child should expose him to any right to claim him as a slave or adscriptitus, but that such a child should retain his status as an ingenuus.

(c) Colonii 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 libere congruent merito servile condemptionis compellantur implere. 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, which was obsolete under Justinian, must be mentioned here, but will be treated in connexion with the general case of sanguinolenti.

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 capitium dominatio maxima, and became a slave. It was essentially capital punishment, and the capitium dominatio had all its ordinary results. It occurred at once on the final condemnatio, when there had been no appeal, or when an appeal had been decided against the accused, or in some cases when the Emperor had confirmed the rejection of the appeal. 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.

It was not every capital punishment which reduced the criminal to penal slavery. Anything which deprived him of civitas was capital: 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 civitis sunt but not quae iuris gentium. Such a punishment was deportatio. Opus publicum perpetuum, which meant road making and the like, was on the same level. It was an ordinary way of punishing the lower class of freemen, but it could not legally be applied to deostriones on the one hand or to slaves on the other.

1 402  Modes of Enslavement Iure Civili  [PT. II

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were proscribed and aquae et fumus interdicto. It was essential to servus poenae to be lifelong, and thus it did not result from condemnation to castigatio or vindex. Even condemnation to perpetual chains did not involve it, for though such punishments were not unheard of, they were always unlawful. Imprisonment was not a recognised mode of punishment. carcer ad contínuos homines non ad punendos habet debet. Its essential purpose was the detention of persons accused of crime. And though condemnation to work in the mines was a typical case of penal slavery, condemnation to help the miners (ad minsterum metalliícorum), or even ad metallum, for a term, was not servus poenae, and thus children born to women so condemned were free. The most usual form of penal slavery was that resulting from condemnation in metallií or ad opus metallií, the latter being a little lighter in the matter of chains. These were essentially perpetual, and if the sentence was expressed in terms which made the punishment temporary, it was construed as minsterum metallií. If the sentence were expressed in terms which made the punishment temporary, it was construed as minsterum metallií. and thus it did not result from condemnation to castigatio or vindex. Even condemnation to perpetual chains did not involve it, for though such punishments were not unheard of, they were always unlawful. Imprisonment was not a recognised mode of punishment. carcer ad contínuos homines non ad punendos habet debet. Its essential purpose was the detention of persons accused of crime. And though condemnation to work in the mines was a typical case of penal slavery, condemnation to help the miners (ad minsterum metalliícorum), or even ad metallum, for a term, was not servus poenae, and thus children born to women so condemned were free. The most usual form of penal slavery was that resulting from condemnation in metallií or ad opus metallií, the latter being a little lighter in the matter of chains. These were essentially perpetual, and if the sentence was expressed in terms which made the punishment temporary, it was construed as minsterum metallií. and thus was not servus poenae. There was no system of tacket-of-leave, but Antoninus Pius provided that old and infirm prisoners might be released, after 10 years' service, if they had had the leisure to look after them. Another form of penal slavery mentioned in the Digest is ludum servorum. 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 was really penal slavery. But it was perpetual, and the Digest is clear on this point. A death sentence also involved penal slavery for the interval between sentence and death. This is not quite so empty a statement as it appears. The Roman law had a number of forms of execution, e.g. beheading, ad gladium (or ad ferrum) tradzitzo, crucifixion, burning (of late introduction), etc. Even condemnation to death sentence also involved penal slavery for the interval between sentence and death. This is not quite so empty a statement as it appears. The Roman law had a number of forms of execution, e.g. beheading, ad gladium (or ad ferrum) tradzitzo, crucifixion, burning (of late introduction), etc. Even condemnation to death sentence also involved penal slavery for the interval between sentence and death. This is not quite so empty a statement as it appears. The Roman law had a number of forms of execution, e.g. beheading, ad gladium (or ad ferrum) tradzitzo, crucifixion, burning (of late introduction), etc. Even condemnation to

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1. P 5 17 2 Coll 11 7 4
2. C Th 10 12 1 C 11 44 1 J. Th. Hofstede thinks he forbade gladiatorial shows altogether, arguing from the word ominoso but the next lex treats such shows as still in existence and G. quotes from Memmius an account of them at Antioch in 259. Probably as a punishment this was never common. 3. Theodoretus Hist. Eccl. cit. Hofstede, loc. cit.
4. P 5 par. Coll 11 par. 5. C Th 9 18 1 (= C 9 20 16) etc. 6. Const. 1 12 3 C 9 47 12 D 23 1 8 4, 48 19 13 39, 49 1 b 10 4 1, 49 18 1 3
7. Coll 11 7 4. Constantine's enactment (C Th 9 18 1) that for offenses under the lex Falita a freeman should be made to fight as a gladiator on the terms that before he could defend himself he should be gladio consumptus in reality a direction to execute per gladium. 8. C 47 11, 14 2. See ante p 227
9. C Th 9 4 24 = C 9 49 10
10. 48 8 16 which exempts persons holding any præmum. See also 48 19 27 12. 11. The sunus coelestis metallií or minsterum metallií faveum burning with beasts etc. 12. Statutory rules fixing minimum delays. Memmianus, op cit 912
13. 48 19 29 Statutory rules fixing minimum delays. Memmianus, op cit 912
Penal Slavery: Special Cases

The goods of a person capitally condemned were forfeited to the

down by Hadrian that a death penalty was not to apply to a <decurio>
except for parricide. 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. In any case it is clear that these persons could
not be ordinary <servi poenae>.

<Maltes> 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
they were not punishable by <decurio>. Nothing is said of <parentes>, and the privilege
may not have applied to remoter issue.

Other privileged classes are mentioned who could hardly become
<servi poenae>, but we have no details. There is, however, at least in
later law, a general rule. We learn that, by various Imperial enact-
ments, <honestiores> were not liable to <fustigatio>, and also that those who
were not liable to <fustigatio> were to have the same <reverentia> as <decuriones>
had, and so could not be condemned in <metallum>. 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. But there are many cases in which, while <honestiores>
are killed, or condemned in <metallum>, <honestiores> are deported, or even merely
<relegati>, which involves no <capitae demanu>.

In one text a similar distinction is drawn between <ingenios> and others, and in another
it is between slaves and free.

The goods of a person capitally condemned were forfeited to the

Fisc; but this <publicato> occurred only on final <condemnatio>, not on death
pending appeal, unless the prisoner committed suicide in order to avoid
liability for crime such as would involve forfeiture. 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>. 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, 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 condem-
nation and she had assented to the father's receiving the <dos>, the Fisc
could claim it if she had not, it was her property. All this shows
that what was forfeited was what was his own, including, however, what
had fallen to him after the condemnation. It must further be noted
that collusive or gratuitous alienation after the accusation would not
save the property so dealt with, 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.

This rule of forfeiture was subject to restrictions, dating from the
classical law, in favor 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 nati> 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. Any
children conceived before the condemnation were entitled to share, and
even children adopted in good faith before the accusation.

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 48 19 15 cp 48 22 6 2 Monssen (op cit 1036) adds maessenatas
2 48 8 16
3 48 16 3 1 49 18 1 3 A <malea condemnatus> for a military offence, though to death, is
not a <servus poenae>. He can make a will 29 8 6
4 C 9 47 5 A <malea> loses his protection if he becomes a <transfuga>, 49 16 3 10 Special
liabilities of <malitos> 48 19 14 88 11 12 49 16 poenas
5 Biskops, C Th 16 2 12, Senatorii, C Th 9 40 10 As to <classicum> and <illusio>, C Th
9 1 1 C 3 24 1, and D 48 8 16
6 48 19 25 2
7 Monssen observes (Strafrecht 1086) that though the rules are expressly laid down merely
for deficiencies 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 <decuriones> less unpopular; other applications are secondary.
8 48 19 5 8 e cp 5 50 1, 5 51 1 1 ete
9 P 1 24 5, 5 19 1, 5 21 1, 5 25 1, 7 (=D 48 19 88 7), 5 26 1, Coll 8 5 1, 12 5 1
10 P 15 30 2, 5 23 14 (=D 48 19 38 5), 5 23 19, 5 25 7, 5 25 3, Coll 1 7 2, 21
11 5 14 2 2 ep C Th 7 18 1, D 48 19 38 8
12 P 5 23 1, Coll 8 4 2 <Plebes tonoers>, Monssen, Strafrecht 1085
13 C Th 9 18 1 (=D 48 19 10)
14 P 5 22 2 As to the line between <honestiores> and <humbles> see Monssen loc cit

CH. XVII] Penal Slavery: Forfeiture

1 C 49 8 4 P 5 12 12 D 49 20 1 pr. Apparently the clothing of the criminal was
so disposed of by the executive in its service. 48 30 8. <Publicato> is part of the different
penalties. It does not result from the man's vesting in the Fisc; he does not see ante,
P 277
2 48 30 11 pr
3 P 5 19 1, C 9 50 1 9
4 48 21 3 1
5 The <dos> and <donatia propter nuptias> of the criminal were not forfeited. See on these rules,
C Th 9 42 1, 5 10 15 5 16 24 24 49 9
6 48 20 1 4
7 48 20 10 1
8 48 20 1 5
9 48 20 1 5
10 This could not occur in case of a <servus poenae> as his enslavement
destroyed the power of acquisition 49 14 12
11 49 1 48 14 20 20 11
12 49 1 4 11 11 7 pr. It is liable to creditors of the estate (49 20 10 1 pr C 49 15)
13 and conversely it can claim from debtors thereeto 49 14 8 8 6 21
14 48 20 1 pr
d. 7 1 2 Of course nothing acquired through the crime was included h 7 4
4 A woman entered <eunus poenae> on the <hereditas> of one she had poisoned. Antomusus Praos declared
this forfeited though it was never here il. These rules were to be all imperial. They can
hardly be juristic and there is no reference to any <lex> or <se> or <edit>
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 Calistratus in terms which suggest that part only went to them, though it may be that by A.D. 241 the whole was available. 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 maestas and magic in which even liberi were to get nothing. Two years later this was repealed: all was to go to the Fisc in all cases. In 366 it was enacted that children were to have all the goods except in case of maestas. In 380 Theodosius I legislated comprehensively on the matter. His enactment dealt, in terms, only with damnati interfector, 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, brothers and sisters, and in particular to emancipated and uterine. No one else was to exclude the Fisc. In 383 he included postumi, probably to settle doubts. In 421 all claims were suppressed except those of parents and children. In 426 Theodosius II seems to have suppressed all claims but those of filii, who were to have half. Justinian accepted this enactment, changing filii to liberi and giving the language a more general form: as Theodosius wrote it, it might have referred only to a special case. He also accepted the rule admitting emancipati and postumi. This represents the law of his time till 535 when he gave all the property to successors, suppressing any claim of the Fisc. Three special cases need mention.

(a) Women. If a woman was condemned her children could claim nothing. The rule is expressed as one of undoubted and, apparently, ancient law. This exclusion is shown by Paul's language to have been 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. 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 damnatio 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 maestast.

(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. This purports to be from Paul's book on the matter. Another text, from Macer, applies a similar rule to liberi patroni 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. 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 ingenii took only half: the reasoning shews that the exclusion was only from the part the patron would have taken.

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, 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 restitution 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
Penal Slavery: Effect of Pardon

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 *indulgentia*; he was not liable to old actions.6 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 judgmente*, was allowed to do so.7 This last rule is no doubt Tribonian's: it juts 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.8 One who had been a slave did not on pardon revert to his old *dominus*. 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 law9; as also does a rescript of Valerian.10 He was now an ordinary slave, capable of receiving fideicommissary gifts of liberty, and presumably of being sold.11 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* 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 *status liber revocatus* would still be free on the occurrence of the condition.12

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

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1. *Servus 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. Fliny, *Litt. Nat.* 31, 32. In the early empire the Senate usually gave the pardon. Mommsen, *Strad. Zeit.* 484.
2. C. 9. 51. 5. 9.
3. Presumably to citizenship, though in a case in C. 9. 51. 3 this is expressedly given.
4. C. 9. 51. 3.
5. *A. i. 4.* See post, as to *restitutio*.
6. *h. t.; D. 44. 7. 30.*
7. *C. 9. 51. 5.*
8. *C. 9. 51. 8.*
9. See post, as to *restitutio*.
12. *45. 5. 24. 5.*
13. *Arg. h. i. 5.*
15. *45. 5. 24. 5.*
17. C. 9. 51. 3. A mere gift of money by the Emperor on his pardon produced no such effect. *ib.*
18. It does not follow. That he should receive his goods without liabilities is unjust to his creditors. *ib.*
19. C. 9. 51. 3.
20. *ib.*
but very slight verbal changes, a circumstance which is unfortunate in view of its rambling and obscure character.

In 536 Justinian by a Novel, advertting 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.

(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 lived with the slave of another person after notice (denuntiatio) by the owner that he forbade it, she, and the issue, became his slaves; (2) that, if the owner consented, she could remain free ex pacto, the issue being slaves. 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. The text of Tacitus cited above says that there might be an agreement that she should be a liberta. A point of status seems to be left to private agreement notwithstanding the maxim: Convictio privata neque servum quemque neque libertum facere potest. The fact is that these are not mere private agreements: they are confirmed by the Senatusconsultum.

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, and the third denunciation had, by an enactment of A.D. 317, to be in the presence of seven Roman witnesses. One constitution speaks of the three denunciations as expressly provided for by the Sc. Claudianum, but it is at least equally probable that it was a juristic interpretation of the word perseveratio, which is used in comments on the Sc., and may have been contained in it. The enslavement was completed by a magisterial decree, following the third denunciation. 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 uictum sententias, language which suggests a construction of the lawyers.

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. In 331 he reverses to the rule of 314, declaring that no denunciations shall be needed. 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. 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. A law of 365 seems to show that the three denunciations had gone out of use again.

In 308 Honorius and Arcadius again assert the need of them.

We are nowhere told expressly what becomes of her property. The Institutes say that she loses liberty et cum libertate substantiam, which, does not prove that her dominus gets it. Another text says that if liberty is lost with capitis minorum there is actio utilis against the dominus for the debts. 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. captiudus. The only other view possible is that it goes to the natural heirs as on death: servatum mortalitati comparandum. But though this gets a certain support from the expression successio miseraeitas, 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 actionem utiles already mentioned, and also to noxal actions.

Many of the texts speak of the woman to whom these rules applied as serva Romana, and Gaius seems expressly to limit the rule to this case. It is clear that it applied also to Latinae: Paul puts them on
the same level. The later law seems to have been still more severe, and the enactments in the Codex Theodosianus speak simply of mulieres liberae. The text of Tertullian already cited 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; while another, of 294, denies that such cohabitation could give the owner of the ancilla any right of succession. This seems to mean that someone had the 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 there applied only to women.

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. Nor does Ulpian, in his Regulae. Nor do Suetonius and Tertullian. Justinian's general repealing enactment mentions no special rule about children. The allusion in the text of Tacitus deals only with agreements as to the mother's status. Gaius says that some thought that, apart from agreement, children already conceived were free if ex iuris nuptiis, slaves if volgo concepti. The language of the much later Epitomator of Gaius suggests that he thought this was the law. 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, 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. This doubt ultimately led to legislation, in an enactment of 314, which provided that the filius should be slaves. This was confirmed in 366. An enactment of 320 provides that if it were a fiscal slave the child would be a Latin.

There remain for discussion several cases in which complications might arise owing to the position of one or other of the parties.

(a) Cases of tutela. If the slave was the property of a pupillus the tutor could denounce, while if he was the slave of a woman in tutela she herself could do so. The latter part of this text is imperfect, but the form it seems to imply that the pupillus himself could not denounce.

(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 denounced. 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. If the slave was in a castrense peculium the ancilla acquired on the son's denuntiatio was also therein. This text was written before the introduction of peculium quasi castrense: no doubt the rule must be extended to this and also to bona adventitiosa.

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. But if she continued the cohabitation after she was sui iuris the ordinary rule applied. If, however, she was acting under the usum of her father she became a slave on denuntiatio, since, says Paul, fathers can make their children's position worse. The word iubere here cannot mean command but authorise: it is incredible that the father could have power to order such a connexion. 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
for the maternal relation prevented the right of denunciation from arising.

(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. But a patrona, so long as perpetual tutela lasted, could not lose her rights by assenting without the auctoritas of her tutor. If the woman's patron did not know, she became his slave and she could never be made a civis by manumission by him. From the wording it seems that he could make her a Latin, and that if she were sold to 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 if the owner from exercising the analogous right. If the slave belonged to the woman's patron the union produced no such legal effects. 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. 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.

(e) Municipal slaves. The few texts show 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 she 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. The concluding words of a law in the Codex Theodosianus show that improvidus error, vel simplex ignorantia, vel detentia 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. The enactment of 362 confirming the need for three denunciations was not to apply to slaves of municipalities.

(f) Fiscal slaves. There were special rules of a somewhat similar character for servi fiscalia. 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, and confirmed by the fragment, de iure fisci, which speaks of libertae Caesaris coniunctio effectae. 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 on account of the superior dignity of fiscal slaves; these were, not usually, married freewomen, 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. 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 de denunci 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. The law of 320, 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, confirming the need of three denuntiationes does not apply to the case of fiscal slaves.

(g) An obscure enactment of 415 refers to the Sc. Claudianum and seems to provide that if the woman was descended from a descario 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. At the end of the constitution it is said that serviactor sive procurator is to be burnt. Another enactment had provided that any servus actor of a municipality who cohabiated at connexion between a descario and an ancilla aliena was to be severely dealt with. The aim of this is to secure successors to

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1 P. 2. 21 a. 16.
2 P. 2. 21 a. 6.
3 Huscike, ad h. l.
4 P. 2. 21 a. 7.
5 Ulp. 11. 27.
6 P. 2. 31 a. 11.
7 C. Th. 12. 1.
8 Suetonius, loc. cit.
9 P. 2. 21 a. 14.
10 Universi consensus non passum, ante, p. 329.
11 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, proprius secus insinuatae, 22. 6. 9. pr.
12 C. Th. 4. 12. 5.
13 See references cited Gothofredus, ad h. l.
14 Fr. de i. Fisci, 12. Text corrupt.
15 De i. Fisci, p. 324. The Fr. de i. Fisci does not distinguish between fiscal slaves and others of Caesar.
16 P. 2. 31 a. 9.
17 C. Th. 4. 12. 3.
decumiones 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, 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 that it was not to be inserted in the Digest at all. The abolishing enactment says nothing about that, and in point of fact the Digest does contain by oversight at least one reference to the abolished rule. The enactment in the Code retains a punishment for the slave concerned.

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. Th. 9. 9. 1 = C. 9. 11. 1.
4 16. 3. 27. The words nullus...factus 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.

(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. 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.

(c) Slaves sold for export and freed. The Vatican Fragments 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, 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.

1 C. 7. 17. 1. 2. Post, Ch. xxviii.
2 Post, Ch. xxviii.
3 As to this see ante, p. 69.
4 C. 7. 17. 1. 2. Post, Ch. xxviii.
5 A sententiaconsult, 49. 16. 1.
6 Vat. Fr. 6.
The same rule is laid down by Severus and Caracalla. Some details are necessary to complete the statement. The power of seizure (magnus 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. 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. If the buyer instead of exporting him, frees him in the State, the manumission is void and the vendor has the right of seizure. 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. 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. 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.

(d) Young children sold under pressure of poverty. It was a rule of the developed Roman law that a father though he had, at least in theory, a jus 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 aestimatim. He adds that therefore the father cannot pledge them, or give them in mortgage, and might be terrorised into remitting the prohibition. Accordingly the Fisc makes the matter in hand and sells the man as above.

CH. XVIII] Sale of Children under pressure of poverty

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), and in 329 he says that this is law established by earlier Emperors. 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. 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.

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. But traces remain in the Codex Theodosianus which show 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 a petitum, should have no claim to remuneration. This is not in terms confined to sanguinolentis and may indicate a practice of selling older children. 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%. 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...
and had been recognised as legal. There is no such right under Justinian.

The language of these last two laws shows 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 slave, but as the law also speaks of the buyer as dominus and possessor, 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. Justinian’s own enactment as to reversion in Justinian’s Code that the institution continued to exist.

There remain two cases of much greater importance.

(e) The libertus ingratus. The general principle of this matter is set forth in the Institutes 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 dedicatio, there were up to the time of Justinian two kinds of freedmen, cives and latini; 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 accompanied by temporary exile. 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 slavery were not exercised.

1 It became the rule of West-Gothic law, Z. S. S. Germ. Abth. 7. 288; 9. 45. Traces of the practice are in the Code and Novels, Mittels, op. cit. 365.
2 C. Th. 3. 3. 1; C. Th. 6. 10. 1 = C. 4. 49. 2.
3 C. Th. 5. 10. 1; Val. 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 liberti expositi, C. Th. 3. 5. 3, and ante, p. 402. It should be noted that Constantine gave the same right of repurchase or substitution where the servus nullius was a slave, C. Th. 5. 10. 1. But in 419 it was provided that, as such a claim was unfair to the rearer, this right should be conditional on payment of double value and all charges (Const. Sirn. 3). 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 freedborn children.
7 For another exceptional mode of enslavement under Justinian see post, Ch. xxvi at beginning.
8 In. 1. 16. 1.
reserved for that accomplished censor morum, Commodus, to lay down the general rule. He is said by Modestinus to have enacted that on proof that liberti had treated their patrons with contumely, or struck to the potestas of their patrons, and, if that did not suffice, they were to be restored to their former condition. If a master had taken money from his own slave, or a friend, as the price of freedom and had freed him, the father had the right of accusation as if he had emancipated him. All this merely illustrates the rule that it is the person who is substantially the owner 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. Hence he cannot accuse one who was bound by fideicommissio to free, or whom he had bought with the “slave’s own money” and freed, or one conveyed to him on a condition that he would free him, and this whether he actually did free him or the slave acquired his freedom under the Constitutio Marci. All these cases turn on the fact that though the manumitter is technically patron, 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. But his position is exactly that of one who has taken a legacy of the slave’s 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 to involve personal intervention of, at least, the accused—the general rule of capital charges. But the very enactment of Severus and Caracalla on which this obvious precaution is based allows a procurator to appear on either side, by way of exception. 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 obequium, for though this is ingratitude, it cannot lead to enslavement, and we are further told 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. Of a servus castrensis freed by the son he is patron and he can therefore accuse, but of any slave freed by him, usus patris, the master has the right of accusation as if he had emancipated him. 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. Hence he cannot accuse one who was bound by fideicommissio to free, or whom he had bought with the “slave’s own money” and freed, or one conveyed to him on a condition that he would free him, and this whether he actually did free him or the slave acquired his freedom under the Constitutio Marci. All these cases turn on the fact that though the manumitter is technically patron, 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. But his position is exactly that of one who has taken a legacy of the slave’s 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

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1. See n. 11—15.
2. See n. 11—15.
3. See n. 11—15.
4. See n. 11—15.
5. See n. 11—15.
6. See n. 11—15.
7. See n. 11—15.
8. See n. 11—15.
9. See n. 11—15.
10. See n. 11—15.
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. But as it does not exactly come under the words of the Constitutio, and is clearly an extension, favore libertatis, 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. It hardly needs statement that the act basing the accusation may be done only indirectly to the patron, e.g. refusing to undertake the tutela of a son of his. 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, and Diocletian provides that as freedmen owe reverentia to the filii patroni these can accuse them for ingratitude. Marcellus lays down a similar rule for filii et heres. In 423 a wider rule seems to have been laid down, giving the right of accusation to any heres of the patron, 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 that they cannot accuse, but have ordinary actions (injuriam, 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, and again to liberi patroni. In spite of the generality of the words in the Code, 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. 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 the fact that slave and free cannot be distinguished by inspection. Author-#

1 Probably not, however, till the time of Justinian, post, Ch. xxvii.
2 Note the language of 40. 12. 9. 1 and 40. 1. 19.
3 The right of accusation is perpetual, but it is lost if the intending accuser ceases to be patron, 49. 9. 30. 3.
6 5. 6. 3. 12.
7 Nov. Val. 25. 1.
8 58. 16. 12. 40. 9. 30. 3.
9 37. 15. 5; 40. 9. 30. 3.
10 1. 16. 9. 3; 37. 14. 1. But these texts are not clear. They may be read as merely giving the patron right in respect of acts done to liberi. This is clearly the meaning of Nov. 78. 2
11 Jullus.
12 40. 9. 30. 5.
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. 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. 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. 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, filius etiam qui postea nati fuerint servitutis, quoniam illius delicta parentum non nocent quos tunc esse ortos consideravit dum libertate illi poterintur. The only way in which this can be made intelligible is to refer this provision to manumissiones. 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.

(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.

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. 2 = C. 6. 7. 3.
2 C. 6. 7. 3. 1. They are not to have the benefit of their mother's freedom between conception and birth. Ante, p. 356.
3 The allusion to the consentium seems to show that this was originally a rescript dealing with a special case.
4 18. 1. 5; ante, pp. 5. 6.
Fraudulent Sale of Freeman

If, having been sold under 20, he shares the price after he has reached that age, then the rule barring claim applies to him.

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, though it is difficult to apply the notion of sharing price to these transactions. 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.

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 stataliber. 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. 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 liber homines without any restriction to civis, and though it is not expressly so stated, it is clear that no such restriction existed. Thus in the chief enactment

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1 In. 3. 4; D. 1. 5. 11; 4. 9. 4; 40. 14. 12. 2. 12; C. Th. 4. 8. 6; C. 7. 18. 1. Male or female. D. 40. 13. 3; C. 7. 18. 18.
2 In. 1. 16. 1. 3 C. 7. 18. 5. 4 40. 12. 7. 6.
3 40. 13. 5; 40. 12. 7. 2. 4 40. 12. 7. 2. 5 13
4 40. 13. 5; 40. 12. 7. 2. 6 Post, Ch. xvii.
5 Other parts of the text are interpolated, Graef's, Intep, 101.
6 4. 4. 3. 4. 7 4. 1. 2; F. 1. 7. 2.
8 E.g., against an adrogatus in the matter of debts.
9 The fact that he was a wrongdoer might have barred restitution in any case, in the absence of nactus, 4. 4. 9. 2; 4. 1. 7. 1.
10 This is sufficient: the texts which say that there is restitutio in cases of status mutatio 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. They have no bearing on the present case. 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

CH. XVIII] Fraudulent Sale of Freeman 429
in the Code on the matter, the rule is applied, even though he be a

civis. 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. We have seen that private agreements could not make a man a slave

or a libertus 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. 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 cases of enslavement iure civili.

In most of the texts, though not in all, the offender is not described as re-enslaved but as forbidden proclamare in libertatem. 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, i.e. he became free again without manumission. From the fact that this is in the Digest it is likely that it was a general rule for later law. 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 and liberti ingrati, 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. It is called a status mutatio, and restitutio in integrum is refused on that account. It is a capitis deminutio maxima. Manumission is the normal mode of release, and on manumission the man is a libertinus, not an ingenuus, and this is noteworthy, as one might have thought that manumission ended the punishment. But he is barred from claiming ingenuitas even after manumission. Again if a woman is so sold her children born during her slavery are slaves. Such a man is the subject of dominium. It is clear that it is true slavery, and the point could be raised without

exceptio as a reply to an adsercio libertatis.

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, and one in the Syro-Roman law book), 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, 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. Another tells us that Hadrian laid down such a rule. In the Code, legislation on the matter is referred to by Gordian, who treats it as an existing institution. Paul treats the matter in a work on the Sc. Claudianum, and Pomponius speaks of it as to be looked for in Senatusconsulta. 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, 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. 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
Edictal origin. 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 is on *restitutio in integrum*, and this matter comes in incidentally. Paul's Book 50 and Ulpian's Book 54 are on a topic in which this matter would naturally come if it were in the Edict, i.e., *de liberali causa*, 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, were transferred to the Edictal group from the Sabinian to save time.

Examination of the texts raises another question. It is clear that in Justinian's time, sharing the price was essential. It is made the test as early as Gordian, and even Hadrian is cited as regarding it as necessary. Yet many of the texts do not mention this requirement. This of itself would mean little, as they could have discussed the matter without advertizing to this difficulty if the requirement had existed. The only Roman text independent of Justinian says nothing of this requirement. 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. A text which says that a *miles* allowing himself to be sold as a slave is capitally punishable says nothing of this requirement. It may be added that, while some texts speak of sharing the price, others speak simply of receiving it. On the other hand it is perplexing to find price sharing mentioned in every one of Ulpian's texts. So too the age rule is not treated uniformly. Some texts do not mention it. Others speak merely of *maior* and *minor*. All this suggests that the rule as we have it in the

*CH. XVIII* _Fraudulent Sale: Development of the rule_

**Digest** is the result of an evolution. 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. 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, the more drastic remedy was introduced apparently by Senatus consulta, which specified the cases in which *proclamatio* was refused. They were at least two, price sharing and desire to exercise the function of actor. 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*. 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, 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. It covered any possible case in which a *dolo malo* allowed himself to be sold as a slave, not covered by the other rule. Ulpian so expresses its scope, 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. 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.

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1. L. 5. 5. 1. Explained away by Girard (loc. cit.) as a reference to confirmation by *secc* etc., and by Karlowa (loc. cit.), who observes that the contrast is with *secc usus*.
2. *4. 4. 9. 4; 40. 12. 7; 4. 6. 23.
5. *C. 7. 18. 1.
8. *40. 13. 3.
12. *See also C. 7. 16. 16, and Syrische Rechtsbücher, locc. cit.
13. *C. Th. 4. 8. 6, pr. 40. 12. 14—22.
14. *4. 4. 9. 4; 28. 3. 6. 5; 40. 12. 7. pr., 40. 13. 1. 1; C. 7. 18. 1.
16. *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 ways of the *Syrische Roman Law* book are 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.
17. *1. 5. 21; 40. 12. 23. 35; C. 7. 18. 1.
18. *40. 14. 5. pr.; C. Th. 4. 8. 6.
22. *C. 12. 23.
23. *C. Th. 4. 8. 6.
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. 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 caput deminutionis maxima, for this is declared to result wherever liberty and citizenship are lost, and it is mentioned expressly in several cases, e.g. those of servus poenae, libertus ingratius and fraudulent sale. These are, of course, the most important cases in later law. For earlier law it is stated for rather than complete.

caput, which was abnormal, has already been considered. The remainder, the principle is summed up in the remark that supervening slavery is akin to contractual and quasi-contractual law. He has no caput, or what seems to be the same thing, his caput has no ius. The text is extremely obscure. The Fisc acquires, though it does not own the man. 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. 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 irrestitum by enslavement. Death avoids any gift to the person who dies, by a will not yet operative (subject to some exceptions), and so does enslavement, qua servitus morti adsumitur. 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. It destroys all rights resulting from cognation or affinity. We are told that iura sanguinis cannot be destroyed by any civil law, 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: nox caput sequitur. 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 servus 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, the man’s own liability being extinct. Another text tells us that there is an actio utile against the dominus and if it is not defended in solidum, there is missio in possessionem of the goods of the former freeman, a rule analogous to that in the case of adrogatio. This implies that the property goes to the dominus, which is no doubt the case under the Sc. Claudianum, 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 ipsa ture. The case is differentiated from that of honorum empor in that there he has no civil law right; his succession is edictal, and thus his actions are indirect. None of our cases is edictal, subject to what has been said above as to the case of res Slavement for ingratitude.

Altogether different considerations arise in relation to servus poenae. Here, in general, the Fisc acquires, though it does not own the man.

\[anteh p. 281 sqq.\]

\[anteh p. 281 sqq.\]
There seems no reason to distinguish this from other cases in which the Fisc takes a succession. On this view all that need be said is that the Fisc takes the estate subject to its debts. The creditors can make their right effective by bonorum venditio. 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. We must remember however that a share of the property goes to the children (and at some dates to other successors). 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. So also where the man was a decurio, and part goes to the children (in some cases) and part to the curia. 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. 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. 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. 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.

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 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. 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, which manumission differs in several ways. Dereliction does not make the man free, it merely makes him a res nullius. Moreover manumission leaves many rights in the master, and there is no such thing as partial dereliction. 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. We have seen that the Roman conception of slavery was subjection to ownership, actual or potential: a slave was a human res. Manumission is an act emanating

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1 The omission of this case in 49. 11. 1 is due to the fact that here no nuntiatio was in question.
2 49. 14. 1. 11, 12, 17, 37; Lenel, Ed. Perp. § 212.
3 49. 20. 6, 10; c. 9. 49. 5.
4 49. 14. 3. 8, 6; pr. 21.
5 49. 14. 3. 3, 8, 6, pr. 31.
6 C. Th. 9. 42. 2, 6, 5, 10, 23.
7 C. 9. 49. 10 = C. Th. 9. 42. 24.
8 C. 9. 49. 5.
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.; restitution servorum pecunae, ante, p. 411; servusnullius, reverting to ingeniosae, ante, p. 422; redemption of person who fraudulently sells himself by return of price, ante, p. 430.

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1 1. 5. 4; In. 1. 3. 1.
2 9. 2. 13.
3 41. 7. 2.
4 A. C. 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, but it is from the notion of destroying all possibility of being owned. It does indeed confer rights 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 *ingenius* is a freeborn person who has never been in lawful slavery. One who has been a slave is, on release from that position, a *libertinus*. The law favours freedom on the one hand but guards the purity of *ingenius* on the other. An *ingenius* does not cease to be one by being sold by his father, or by manumission from apparent slavery, or by being treated in any way as a slave, wrongly. Even a declaration by the man himself under pressure that he is not an *ingenius* does not deprive him of that position. Adverse decision does not prevent repeated assertion of liberty, though a decision in favour of liberty may prevent its being again disputed. In the same way a man cannot become a slave by lapse of time spent in apparent slavery, though he may be free by prescription. All these are evidences of the favour shewn to liberty: *infinita est aetematia libertatis*. On the other hand, though a *libertinus* may be adopted, at any rate by his patron, he does not thereby become an *ingenius*, so far, at least, as rights in relation to third persons are concerned.

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 *ingenius*. With this case we shall not deal.

(ii) It is possible in certain cases, already discussed, for a person to be a *libertus* without having been a slave.

(iii) It is possible for one who has been validly enslaved to become a *libertinus* on again becoming free.

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 general principle that in doubtful or ambiguous cases it is best to follow the more liberal view. Liberty being of immeasurable value and *omnibus rebus favorabilior*, the principle is naturally laid down that in doubtful questions affecting liberty, *secundum libertatem respondendum est*. 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, 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. All manumission is regarded as an institution of the *ius gentium*. It is a *datis libertatis*: *liberatur* (*servus*) *potestate*. 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*, become *cives*. In the Digest he speaks of the patron's rights as a return for having made *cives* of the slaves. 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.

Of these modes of manumission there are three.

I. Census. 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...
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, \textit{olim manumittabantur censo}.

Gaius, however, writing somewhat earlier, speaks of it in several texts as if it still existed\(^1\). The Fragmentum Dositheum of about the same date as Gaius discusses it as a living institution\(^2\). But in several other texts in the Fragment, where we should have expected to see it side by side with \textit{vindicta}, it is not mentioned\(^3\). This circumstance and the known facts of history\(^4\) 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\(^5\), is in essence a list of \textit{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: \textit{censu profitebantur}\(^6\). The assent of the owner is shown: \textit{iusse or consensu domini}\(^7\). The Censor inscribes the name on the list of cives. On each of these three requirements there is something to be said\(^8\). The \textit{professio} mentioned is the formal presentation of himself which each \textit{civis} was bound to make to avoid the penalties falling on an \textit{incipiens}\(^9\). The \textit{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\(^10\). It is an authorisation to the slave, not to the Censor, and its informal nature is expressed in Cicero's description of it as \textit{consequentibus}\(^11\). 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\(^12\). No juristic text actually mentions the entry on the roll as an essential, but Cicero does\(^13\), and the very name of the institution and the language of the other texts obviously take it for granted\(^14\). The Censor could no doubt refuse to enrol the man.

\(^1\) Ulp. 1. 8.  \(^2\) Q. 1. 17, 44, 138, 140.  \(^3\) Fr. Doss. 5, 17.  \(^4\) Fr. Doss. 11, 19, 15.  \(^5\) Mommsen, Röm. Staater. (3) 2. 1. 415; D. P. R. 4, 98.  \(^6\) Fr. Doss. 17. In early times it was frequently less.  \(^7\) Fr. Doss. 17.  \(^8\) Ibid.; Cicero, De Orat. 1. 183.  \(^9\) Fully discussed by Degenkolb, Befreiung durch Census, 3–14, of which work much use has been made.  \(^10\) Ibid., p. 403.  \(^11\) Degenkolb treats it as essential but not as part of the form. It is in this way that he explains release from \textit{mancipium} without consent of the holder.  \(^12\) Cicero, loc. cit.  \(^13\) Livy, 41. 9.  \(^14\) Cicero, De Orat. 1. 183.

CH. XIX

Manumission Censu

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 \textit{ex iure quiritium} of the manumittor\(^2\), 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, \textit{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, \textit{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 \textit{civis}: it is a fictitious renewal of an entry, and the Censor is recording the fact that the man is a \textit{civis}, not making him one. Strictly indeed he is only recording the fact that the man has claimed to be a \textit{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 \textit{lustrum condidit} in the old sense. There are no signs of manumission before him as Censor: the whole institution is at an end.

II. \textit{Vindicta}. This is a "fictitious" application of the procedure in a \textit{causa liberalis}. If a claim of liberty was made on behalf of a man...
alleged to be wrongfully 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. Used as a mode of manumission it was essentially a case of cessio in ture. The adsertor libertatis who, at least in later times, was often a factor, 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. As it was an actus legitimus, no condition or suspension was possible: by addition of dies, or condition, actus legitimi in toto vitantur.

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 it may be assumed that the actual presence of the dominus was needed, though the oath there referred to was a temporary matter. 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. Breach of the undertaking would expose the freedman to penalties.

III. Testamento. Gratuity 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. The origin of the institution is not certainly known. 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 legesat clause, a power afterwards restricted in divers ways. So Ulpian, in an imperfect

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1 As to its working in an actual claim, post Ch. xxviii.
3 Ulp. 1, 7; G. 1, 17; Roby, Rom. Priv. Law, 1, 36.
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, a. l. 1.
8 Ante, p. 452.
9 40. 12. 44. 2.
10 Post, p. 460.
11 Fully discussed, Appleton, Le testament Romain, 86 sqq.
12 50. 15. 120.
13 Ulp. 1, 9.
14 O. 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 vindicationes, 30. 198. 3.
15 Ulp. 4. 35.
16 Post, p. 461.
17 Ulp. 2. 7; P. 4. 14.
18 Appleton, loc. cit.
Manumission by Will

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 res 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. 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. 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. So also it fails in an ordinary case of testamentum destitutum, where, apart from collusion, no heir enters. 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 inheritance—omissa causa testamenti. Other cases of this type will be considered later.

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.

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. Such declarations were void in early law. But, towards the close of the Republic, the

1 Accarias, Precis, § 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 successoribus, post, pp. 505 sqq.
3 h. 12. 12; D. 40. 5. 94. 11.
4 C. 7. 2. 12.
5 40. 4. 25. pr. Post, Ch. xxviii.
6 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.

CH. XIX] Persons in libertate tuitione Praetoris

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, in libertate tuitione Praetoris esse, in libertate domini voluntate morari (or esse). The texts are explicit that, notwithstanding the declaration, they were still slaves (manusliberi servri, non esse liberi, ex iure quiritium servri), 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. 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 servri, and goes on to speak of the master as patronus. And the Frug. Dositheum speaks of him as manumissor and patronus, and says that the person so dealt with, omnia quasi servus acquirerebat manumissori. But it must be remembered that these texts were written a century and a half after the lex Junia 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. Moreover voluntas domini spectat, 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. 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
been the practice of the Praetor. The age of the slave was immaterial. The master must be one who held the slave in bonis, but he need not be the quiritary owner. If the slave were common, the declaration of the praetor was the practice of the Praetor. The age of the slave was granted on informal manumission under such circumstances as would have led the Praetor to protect de facto liberty. 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. Wlassak, in the course of an exhaustive article, 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 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. 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. He discusses 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 hold 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 which raise the same suggestion are referred by Wlassak to another matter.

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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. 28. 367 sqq.
7 In. 1. 5. 1; 1. 5. 8; 3. 7. 4; C. 7. 6. 1.
8 He cites (op. cit. p. 604) as mentioning it Pseudo-Dion., ap Paul. Sam.; G. Ep. 1. 1. 2; Lex Rom. Burg. c. 44; Theop. ad Inst. 1. 5. 4. It is not in the Digest or in the comprehensive C. 7. 6. 6.
9 It may be noted that in the record of manumission inter amicos which we possess (Girard, Textes (3), Appendixe) the witnesses are not named and do not sign as in the recorded manumissions (Girard, op. cit. 785, 506 sqq.).
10 P. 391.
12 Post, Ch. xxviii. That such transactions as those recorded in Suetonius and the Declamations, Quir. cit., should have been thought valid by anyone shews how little any notion of form enters into the matter. In dealing with Latinus Iunianus 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.

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CH. XIX] Gifts of liberty in a Praetorian Will

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 honorarium 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, 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. 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.

Some peculiar cases of manumission, perhaps exceptional in form, are mentioned by other than legal writers. Festus, in two passages, refers to manumissionem 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 manumission 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 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. 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-
mission. 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 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 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, 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. Wissak objects to the view that it is an adrogation on the ground that a slave could not have appeared in comitibus. 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, and it may be doubted whether so severe a logic can be safely applied in such a case. In any case the institution is not important to us for it leaves no trace in the classical law.

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1. See the literature cited by Girard, Mazarin, 116. See also Dareste, Recueil des Inscriptions Grecques, Série 2, pp. 284 sqq. For various opinions as to the nature of the Roman institution, see Vangerow, Latini Iuliani, 59.
3. Merele, ad Inst. 1. 11. 12; Vangerow, op. cit. 62.
4. In. 1. 11. 12.
5. 1. 5. 37; 1. 7. 46 etc.
6. Z. S. 28, 387.
7. The effect of the transaction is to make him captus; it is not so in the case of a woman.
8. The declaration aequa aequo 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.

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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 manumissions 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.

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 Censu.

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.
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. The next constitution, five years later, also addressed to a bishop, provides that such a gift of liberty before the priests shall give citizenship. The rule is mentioned in the Institutes, and in the paraphrase of Theophilus, but it does not seem to be mentioned in 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, which has been lost, and which may be earlier than those we possess: this imports the same suggestions. There is a rule requiring bishop and priests to be present.

(b) It would seem that under the original rule cictitas was not conferred. The enactment of 321 first speaks of this and calls it citsitas 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.

(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.

(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 slave to be over 30 years of age. The presence of the slave is not indicated as necessary.

(f) Such manumissions are not subject to the rule as to the age of the slave which is laid down by the lex Aelia Sentia. 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.

3. Vindicta. The general character of this process has already been described. 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. This counter-vindicatio, if such it is, does not occur in ordinary cesso in iure, and Karlowa 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 there were several points 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 in relation to manumission sacrorum causa as showing 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. Karlows regards the magistrate's addicio 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 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. He remarks that in later times the whole appearance 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 Ante, p. 441. 4 Karlowa, loc. cit. As to the significane of the various steps see post, App. iv. 5 Festus, s. r., manumitti. 6 See the references in Karlowa, loc. cit.; Willems, Droit Publ. Rom. 144, 145; Rozy, Rom. Priv. Law, l. 36.
Form of Manumission Vindicta

(i) The process is so plainly a modification of a true adsertio liber-tatis 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 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.

(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. 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.

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 the classical age. Ulpian notes, as apparently a new relaxation, that the lictors can act as assertors, but it must not be inferred that the presence of the lictare is unnecessary. Macrobius quotes from 1

4 See however Wlasar (Z. S. S. 35. 102 seq.) 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 adsertio. See post, App. iv.
5 But often in non-juridic. See ante, p. 451, n. 8.
6 i.e. for maintaining the rule, which applied generally in legis actio.
7 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.
8 40. 2. 23.
9 Manumission sacramus case (ante, p. 447) is here disregarded.
10 Sat. 1. 16. 23.
11 See however Wlasar (Z. S. S. 35. 102 seq.) 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 adsertio. See post, App. iv.
12 But often in non-juridic. See ante, p. 451, n. 8.
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14 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.
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18 See however Wlasar (Z. S. S. 35. 102 seq.) 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 adsertio. See post, App. iv.
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20 i.e. for maintaining the rule, which applied generally in legis actio.
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25 See however Wlasar (Z. S. S. 35. 102 seq.) 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 adsertio. See post, App. iv.
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27 i.e. for maintaining the rule, which applied generally in legis actio.
28 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.
29 40. 2. 23.
30 Manumission sacramus case (ante, p. 447) is here disregarded.
31 Sat. 1. 16. 23.

CH. XX] Manumission Vindicta: Who may preside

litigation. Constantine allows it to be done on Sundays, and the 14 days round Easter, while excluding lawsuits. Later legislation follows apparently the same lines, though manumission is not mentioned. 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.

It is the practice in all manumissions to give instrumenta manu-missions, which it is not necessary for the son of the manumitter to sign. It is hardly necessary to say that several can be freed together if present.

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), and he mentions Consul, Praetor or Proconsul, these being the magistrates most commonly mentioned in connexion with it. But this must be understood to include legati Caesaris, who govern imperial provinces, and are in fact praetors: thus a number of texts speak merely of Praesides. 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. 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. As to the power of his legatus, there is some difficulty. Paul definitely says that there can be manumission before him. Marcellus says that there cannot, because he has not talem jurisdictionem. Ulpian agrees, quia non est apud eum legis actio. It seems clear however that the legate may have the legis actio, 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, but as the reason assigned is that he cannot delegate a jurisdiction he has not acquired the restriction may not apply to this case.

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
Manumission Vindicta: Quasi Judicial

Roman people. Constantine lays it down that there may be manumission apud consilium nostrum: this is a form of the judicial activity of the Emperor in council.

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. The Praeses may act even though the parties are not domiciled in his province, a rule laid down by the sc. Articuleianum. Either consul or both can conduct the manumission.

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.

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. 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, either by himself or by authorising his filiusfamilias to free on his behalf. Thus he is at least in point of form judge in his own cause. In the same spirit we are told that he may be tutor and authoriser of a pupil who frees before him. 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. 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. 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 collega. 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 judicial manumission before an equal collega: the dominus, in the later classical law, may 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. But there is another more practically important result. An actus legitimus is vitiated by any express dies or condition. 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: nonnullam tamen actus (legitimi) tacite recipiunt quae operata comprehensa vita 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 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. 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 show 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, except in relation to manumission mortis causa, as to which there is one text which requires careful examination. This text remarks that a slave can be freed mortis causa, in such sense that quemadmodum si vindicta eum liberaret absolute, scilicet quia mortuus est putet mori eius expectabitur.
Manumission Vindicta: Conditions

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. 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. 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*, 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 land speak of *vindicta, mortis causa*, not revocable as other *dono 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, no doubt the effect of transactions by him, e.g. alienations and acquisitions, or affecting him, e.g. *usuacipio*, will be determined retrospectively by the event. But in the case of the *mors causa*...
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 surnius.

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. The effect is to make the former slave the libertus of the paterfamilias. The authorisation may be such as to give him a choice among the slaves. But though carried out by the son it is essentially the father's manumission, and thus though the son be under 20, no cause need be shewn: the father's consent suffices. 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. 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. 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 leges 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), 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. The present writer has discussed the matter elsewhere: as a treatment of it is necessarily somewhat lengthy, he has placed in an appendix a statement of the reasons which led 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.

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. In another text a similar case is discussed by Alfenus Varus, 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. Before that time it seems that the pater would have been patron, the son having preference in the legacy, as a part of the peculium, whether it was before the will was made or after. Similar rules apply, by a rescript of Hadrian, to any servus castrensis peculis. The filius who manumits is patron, having iura in bonis, and the right of accusing for ingratitude. The pater has no such right, such slaves not being reckoned in his familia, at least inter vivos. On the same principle if the pater institutes a servus castrensis peculis, the son is heres necessarium. The manumission of such slaves gives rise however to one knotty question, but this will be considered in connexion with manumission by will.

We have already discussed the rule that on manumission inter vivos, the peculium goes with the man unless expressly reserved.
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, 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. It must be an express gift, and the legitima verba, liber esto, liberum esse iubeo, 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. Not only must the gift be express, it must be peremptory—words expressing mere desire, such as iubeo, do not suffice. It must also be nominatio, a rule which Gaius attributes to the provisions of the lex Fufia Caninia, to be considered later. But a correct description is enough. Thus Paul tells us that quis ex illa ancilla nascetur, or a description of the office he fills, is enough. He adds that this is a regulative provision of the sc. Orphitiamum, 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, but a mere error in name will not bar the gift if it is clear who is meant: falsa demonstratio non nocet. 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 express and therewith, and thus the technical rule ought not to apply. It has no connexion with the rule that caduca go with their onera. 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.

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. It might be supposed that favus 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: it is another to accept as gifts of

1 C. 6. 36. 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.
4 G. 7. 2. 14.
5 40. 5. 41. pr.
6 G. 2. 339.
7 Post, Ch. XXIII.
8 34. 5. 10. pr.
9 40. 4. 54. pr.
10 5. 20. 25. Justianus says that even under the old law a legacy to an incerta 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 personas, see post, p. 477.
liberty what may not have been so intended, and this is the meaning of the refusal to recognise implied gifts. Several texts show this. "Let X not be free unless he renders accounts of liberty what may not have been so intended, and this is the doubtful whether the gift is direct or fideicommissary, the tendency of the mother was free," is not a gift of liberty if he even if he does. "I leave Stichus 10 because he was born after the first effective one which operates. But if one gift is direct and other by fideicommissum, Marcus Aurelius enacts that he may choose in which way he will have it. 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 which way he will have it. 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. 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, shows 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. 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

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1 40. 4. 50. 2.  
3 40. 4. 39.  
4 40. 4. 9. pr. (ipse reponsus); 40. 4. 15; 40. 5. 34. 2; 40. 7. 37. See the case of a gift inter vivos, ut manumittatur, post, Ch. xxvii.  
5 40. 4. 10; 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.

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misled by the case in the immediate context. But similar language is found elsewhere. Marcial uses the same form in a text which looks genuine, and Paul uses similar language, 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.

For the gift to take effect the slave must have been the property of the testator, both at the death and at the date of the will. This is a result of the analogy between this case and that of legacy per vindicationem. We have already considered a text which treats aditio and not death as the critical date. 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.

From the same analogy results the rule that he must be the quirity property of the testator, not merely bonitary. The testator must also be bonitary owner: the bare nudum ius Quiritium gives no right to free. A buyer cannot free even if the slave has been delivered, unless he has paid the price or given security. 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 statutubur by the heres: in that case there is a valid gift which the heres cannot destroy. With this rule can be compared another, 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.

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 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. 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. A heres, damnatus to hand over a slave of his own, can free him, though he will be liable for his value. A text of Paul is in direct contradiction with this, but it seems probable that the case originally contemplated was one of a slave of the testator conditionally freed. 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. Though he is owner, we are told that this was only favore libertatis.

The fact, that if a son with a peculium castrensse 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 peculi castrens, 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. Ulpian 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.

Of a rule stated above it is said: inter libertatem et legatum quantum ad hanc causam nihil distat. Gifts of liberty resemble

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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 mandatautor to buy, in the days of double conveyance, could free the slave, C. 7. 10. 2.
2 40. 4. 80.
3 30. 112. 1.
4 40. 9. 28.
5 7. 10. 2.
6 36. 1. 26. 2.
7 Foot, pp. 558 sq.
8 A less liberal view was held where liberty was not in question, ante, p. 258.
9 40. 4. 39; cp. 34. 4. 39. 1.
legacies in many ways, and they have a close affinity to legata per
vindicacionem. Thus gifts of liberty post mortem heredis, or pridie
mortis, and the like were void, as such legacies were. A slave attempt-
ing to upset a will loses a gift of liberty under it. Such a gift may be
subject to dies and conditio, 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. Accarias points
out 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. Although a legacy given poemae nomine was void,
there was doubt in the case of a gift of liberty, though Gaius treats
the doubt as absolute and puts them on the same level. Justinian allows
such penal gifts, striking out the condition, if it is in any way improper.
Thus a legacy to a woman provided she did not marry was good and the
condition was struck out. But if a slave was left to a widow to be free
if she married, the whole disposition was good.9 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. 10 The sc. Neronianum had no relation to gifts of liberty: it
hardly could have.

Like legacies, gifts of liberty may be ademempt. though there may at
one time have been doubts of this.11 In general the same principles are
applied as in case of legacy. Ademption of liberty is of course adem-
ption of any gift to the slave, for a legacy without liberty to a
ferus pro prouis is a nullity. If several slaves of the same name, e.g. Stichus,
are freed, ademepito of liberty to Stichus adeems all the gifts as in

1 0 G. 2. 333; Ulp. 1. 20. 9 34. 9. 5. 15.
2 G. 2. 300; Ulp. 2. 1; post, pp. 479 sqq.
3 30. 94. 3; G. 2. 229, 230, etc.
4 Prisc. § 56, citing 50. 17. 106.
5 A gift of liberty could not be ademempt pro parte, 34. 4. 14. 1. One who had liberty alone
could not be burdened with adememptions, though set down in the will as in lieu of opetus, 30.
94. 3. 85. As to freedom on condition of payment of money, post, p. 496.
6 G. 2. 343.
7 35. 1. 62. 3. 63. pr.
8 35. 1. 96. 2; post, p. 668. 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 valid, the widow and the
second donee would share.
9 G. 2. 197, 212, 218; Ulp. 24. 11; Vul. Fr. 85. Other differences between legacies and
libertates, post, pp. 465, 491, 493.
10 e.g., 39. 5. 38. 4. 34. 4. 96.
11 See G. 34. 4. 22; Ulp. 2. 1; post, pp. 465, 491.
12 e.g., 50. 1. 8. 4. 34. 5. 59; 34. 6. 1.
13 34. 3. 32. 1.

CH. XX]  Ademption of Gifts of Liberty  467

legacy. A gift of liberty or a legacy left so uncertainly, is void:
ademepito is handled the other way, presumably because it intro-
duces uncertainty into the gift. A curious difficulty is raised as
to ademepito a condition. If a gift of liberty is conditional, can the
condition be ademempt? 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 datum but adscriptae. Ulpian thinks it
best to ignore this verbal distinction, and to treat them as ademempt.12
Ademption is not necessarily by declaration in express works: it
may be implied from certain dealings with the slave. An express
ademepito must no doubt be in the form required for ademepition of
legacies, and, in general, the tacit ademptions are of the same kind.13
The chief are the cases of alienation and legacy of the slave.
Alienation of the slave is ademepito of a gift of liberty to him,
with a possibility of revival,14 and ademption of the gift of liberty is
ademepito of a legacy to him. There is however a distinction to be
drawn. S was given freedom and a legacy. He was sold and then the
liberty was ademempt. Paul says that though the ademempt was un-
necessary, since the sale had ademempt 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 ademempt this would revive the gift. Thus the
vendee will not get the legacy. This implies that the mere sale,
though an ademempt of the liberty, would not necessarily have ademempt
the legacy, the rule just stated being confined to express ademptions
which have the effect of making the legacy a gift to servus propruis
without liberty, and thus void. The sale of the slave might be regarded
as mere translatio of the legate.15 Paul's text continues with the case
of a man freed by will, then freed inter vivos, and the liberty given
to him by the will ademempt by codicil. This ademepito is an absolute
nullity, for though you may contemplate repurchase, you may not
contemplate reenslaving, 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
ademempt, this ademepito 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 Ulp. 5. 1. 26; post, p. 496.
3 34. 4. 3. 9; 35. 1. 53.
4 Girard, Manuel, 916. Testator directed a slave to be free if he paid testator's debt to X.
5 There was no debt: this was a gift pure. If testator paid the debt after the will was made, this
was an ademempt, 35. 1. 72. 7. S. persevering impossibility was not treated as voiding
the condition, post, p. 482.
6 34. 3. 32. 1.
7 34. 4. 32. pr.
8 k. t. 26. pr.
9 Marcellus discusses the form, S liber esto ni mens est, followed by an unconditional legacy
to him. S is sold. The buyer will take the gift: the words ni mens est, expressing what
would be law in any case, imply that the legacy is to be good even though mens non est, 35. 1. 47.
10 34. 4. 25. 1.
of itself adeemed that gift. But an effective express adeemption of the legacy of him would have done so. If instead of being freed he had been sold, an express adeemption of the legacy to him would not be a nullity: the gift might otherwise take effect in the alienes.

An obvious mode of adeemption is by making a legacy or fideicommissum of the slave, but as a gift of liberty may be an adeemption 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.

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. 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. 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 adeemption: 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. On the other hand if the slave is legated, and freed ex die, the legacy of him is void. quia diem venturum certum est. This inevitable definite determination is inconsistent with a gift of ownership of the slave. 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 praegaleatum to one of the heredes, and in the last case, whether the praegaleate enters on the inheritance or not, the liberty taking effect on the death of T. 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 morturum Titium certum est. The explanation seems to be that Papinian applies the rule, and Julian does not, that dies incertus in testamento facit conditionem. Julian regards the gift as ex die merely, and so annulling the legacy.

In another text we are told that there was a dispute as to the effect of the words: Stichum Atti do lego, et, si is ei contum 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. 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.

In a long and obscure text, of Scaevola, the effect of the following words is discussed: Titius heres esto. Stichum Muevio do lego: Stichus heres esto. Si Stichus heres non erit, Stichus liber heresque esto. If T had entered no question would have arisen. 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 grando. The gift of liberty, coming after, destroys the legacy of S.
and thus Maevius takes nothing and Stichus is free and heres. Scaevola quotes Julian as holding the same view. 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. 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 Julia et Papia. The case in view is no doubt that of a disability under the lex Julia de adulterinis, and the expression ademption implies that it is a supervening disability. The point is probably that it is not to be treated as a caducum. The jurist’s correction of his language may be no more than an effort at substitution. There can be no question of revival, but, regarded as one adeemed, then, 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 may presumably take effect. The ademption of liberty may be conditional, the effect of which is to subject the liberty to the contrary condition. 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. 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. 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, 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 libitum, 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 is a legacy to the testator’s own slave. 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 peculiare. 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. It is essential that the legacy be accompanied by a gift of liberty: if it is not void and it is not validated by the man’s getting liberty in any other way post mortem and before aditio. The rule has no connexion with the regula Catoniana, which does not apply to legacies which vest only on aditio.

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 holds the fideicommissium 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. 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.

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. 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, or if in fact it is still unfulfilled at the aditio, though it need not have been. 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 vivō testatore. This harsh rule is a result of the regula Catoniana. As the legacy in this case vests at
death it is not protected by the rule which excludes the *regula in legacies which vest only on *aditio, and it would certainly have failed if the testator had died at the time of making the will.

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, Callistatus holds the legacy good, if the condition applies to it also, but not otherwise. Where a slave is directed to give 10 to the *hres 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. Where a slave is freed conditionally and receives a legacy *pura, 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 *irrursum. 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 *hres give S my slave 10, and if he serves my *hres 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. But of course the terms of the legacy might exclude this resource.

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. This does not mean that he can enforce the payment of *alimenta, but that the *hres who has

paid them can charge them against his *coheredes, and they can be claimed by the person interested in the slave in the meantime. 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 *hres who paid them, from him who had the slave at the time of payment. 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 *hres to give a maintenance allowance at once. This is equivalent to a gift of *avaria, and it is expressly enacted by Severus and Caracalla that such a direction is binding on the *hres.

Where the will said, "let S be free and let my *hres give him 5," he gets the legacy though he is freed *inter vivos. This is in accord with what has been said. 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." 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 depriving the *hres—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, 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. 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: *hereditas, the decision really is that the testator meant this.

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

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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 adulterinis, till after the *aditio, 31. 76. 4, post. Ch. xlv.
3. 34. 1. 32.
4. *ad. 1. 86. pr. So if there is a *fideicommissum subject to the same condition as the liberty, and the *hres frees the man *pendente conditione, he is entitled to the *fideicommissum when the condition occurs, 33. 1. 66.
5. 28. 3. 36. 4.
6. 35. 1. 32. pr. In 40. 7, 28. 1 Juvencus 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 is *tempus libertatis coacedit assidu. He corrects by saying that mere accessions go, unless taken away by the *hres. The legate ought however to be wholly bad. Fohlien (ad h. 4.) supposes the legacy conditional and explains these words as meaning, unless it is expressly given to the slave 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 *hres deems the *peculium he does not destroy the legacy but only prevents additions to it.
7. 33. 1. 16.
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, 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. 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. 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.

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. 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.

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. 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. We are told by Hermogenianus that

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 statu liber moriens fuisse videbitur. Two remarks suggest themselves. If he is absolutely freed and dies before entry of the heres, it is Papinian who tells us 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. But here we are told he is to be valued as a dying statu liber, i.e. at a mere nominal sum. This may however conceivably mean the same thing, since we know that in the settled practice a statu liber is taken at his full value subject to readjustment if the condition occurs. But it is plain that the clause sed quanti... videbitur implies something different from heredi perissae, 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 as a statu liber, and that failure of the condition was not to disturb that estimate. 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.

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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. 34, 1, 36, 3.
4 h. t. 28, 3. Africannus, to the benefit of that legatee as against others. Ulpius is probably dealing with the same aspect of the matter in h. t. 66. pr.
5 h. t. 63, 1, 73, 4.
6 In this clause the fruits received by the heres will be charged against the quarter and the slave reckoned temporarily at his full value, h. t. 66, 3, 66. pr.
7 h. t. 62, 3, 66. pr.
8 h. t. 38, 3.
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 favour of the legacy, the rule applied must be that already stated towards the three-quarters

persons, directly the case might be. 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 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.

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unborn slave or of a usufruct in one are allowed. But in earlier law this could be only by damnatio (or perhaps sinendi modo if the slave were alive at the death), not by vindictio. But gifts of liberty in the form of damnatio could not have been valid except as fideicommissa. It is on the whole more likely that such gifts would be regarded as gifts to the slave. They vest only on aditio, and the language of the texts in other respects favours this view. The result is the same. Gaius tells us that gifts of liberty to incertae personae are bad. 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 shows, they are not incertae personae, but postumi alieii, a class usually kept distinct. Legacies to such persons are void, and it is likely that liberties are equally so.

The gift takes effect at the moment when any heir enters under the will, 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. 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. 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. 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.

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. The following may be noted.

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The institution of a slave implies a gift of liberty: indeed even a legacy to him does, and this though the legacy be conditional. Words implying that the slave has already been freed constitute a gift of liberty if there is no error; e.g. Fortunato libero meo do legisam in libertate esse iussi. Liberty may be given before the institutio, and post mortem herediss. There is a difference in treatment where the institutus and substitutus died before entry.

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 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 esto, they are construed as meaning “at the end of a year”. If the words are ad annos, they are treated as supervacua. 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 if he pays at once. 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, 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.

**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 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 esto, they are construed as meaning “at the end of a year”. If the words are ad annos, they are treated as supervacua. 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 if he pays at once. 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, 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.

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1 *Ante*, p. 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, 45, 4, 49; 40. 4. 41. To be free post annos, means, favore libertatis, at the end of two years, 40. 4. 41. 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. 41. 2.
the rule. 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. 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 libecit is valid and ex d1.

Dies incertus is on a different footing. Dies incertus both an and quando is a condition and will be considered later. 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, that dies incertus conditionem in testamento facit, and the proposition is confirmed in many texts. 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 idea is carried over 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, 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. 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. Others are Papinian, Ulpian and Paul. On the one hand, Julian, while he admits the rule in the case of institutions, denies its applicability to a gift of liberty. 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, 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.

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, 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 basis which exists in our case. The question whether certain words are to operate as a condition or not depends 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. But Labeo is speaking of a gift si moritur, and though the difference between cum and si would not be conclusive to a classical
jurist, 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.

It may also be said that the Code contains an enactment of Diocletian, extraneum quum morietur heredem scribi placuit, which seems to show 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. 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. 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 Accrias does, that the text really means that the rule applied to both cases: the word extraneus must have been 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. The distinction is exact as a matter of words, and Ulpius has no doubt the same point in mind when he says that such a modality appellatur conditio. A condition is essentially incertus an. Elsewhere, Papinian, Ulpian and Julian ignore this distinction, 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 cadens. It does not seem indeed that the distinction involves any difference of effect.

Condition is a somewhat complex matter. A condition is a future 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 his accounts whether such a direction is given or not. Where slaves are to be free if they attend in alternate months to the sollemnia 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. Where one is to be free "sio tamen at" he stays with the heir so long as the latter is a iuvenis, and, if he does not, ture servitutis tenetor, this too is only a direction to be carried out after the man is free. 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 liberta libera esto. This is not a condition: she is free, apart from evidence of intention, though she has no children or they cannot from any cause be freed. 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.

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 statutiliber under it. Thus, "to be free when I die," or "to be free if I do not veto it by codicil?" or the like: these are not conditional. "To be free if he pays what I owe..."
to T is no condition if there was no debt to T. If there was a debt and the testator has paid it, the condition is treated as having failed: it was in fact an ademption. 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,” and *qui sine offensa fuerunt liberi sunt*. Although, as the rest of this text shows, the words refer entirely to the past, the gift is called conditional, but the man is not a *statu-liber* even though there be some delay, before it is clear whether he is free or not. 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*. 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 *statu-liber*. A slave freed in fraud of creditors is a *statu-liber* till it is certain whether they will avoid the gift or not.

Impossible conditions are struck out—a Sabinian extension of the rules as to institutions, accepted in later law, and it may be assumed that the same was true as to illegal or immoral conditions, though texts seem silent. Impossible conditions are those impossible in the nature of things. 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. Such a gift is on a level with one *cum morietur*, 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. Some conditions so treated...

1 35. 1. 72. 7. 28. 7. 2. 1. 40. 4. 5. 11.
2 In the preceding text, *pror nullque manumentis* is not treated as conditional, 40. 4. 51.
3 40. 4. 7.
5 40. 7. 9. 14; 28. 16. 3. 5; 40. 9. 31.
6 In 3. 13. 11: To which *natura est impedimento, ut si cadam dies tepetere*.
7 40. 7. 4. 1.

CH. XXI] Impossible Conditions. Negative Conditions 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 *faver libertatis*. The view is Paul’s, who comes to the same unfavourable conclusion, rather more rationally, on the words, *liber esto, si heredes esse desierit*. 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.

Some conditions would doubtless avoid the gift: in general they are those which would avoid an institution. 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, whereas we learn elsewhere that gifts by will in such a form are void, though they can be effectively made in a disguised form, e.g. *si Maenius Capitolium ascenderit*. 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. As in case of legacy the gift might be at the discretion of the donee himself.

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 *caustio* 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. On the other hand if there was no such intent, the words...
were construed also by Julian favore libertatis, as if they were "if he does not do it at the first opportunity," 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 conditions iuris iurandi. 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 partim fuerit conditionis. Such conditions are invalid in institutions and legacies, 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. Clearly not, for he is not free, and if it were struck out from the legacy alone, the legacy would be void. If the legacy is under a condition of swearing, the condition is allowed. Where a condition of swearing is remitted and the condition is not to give a merely praetorian title. Thus where the condition of liberty given to a woman was "to be free when my debts are paid." They must be paid: it is immaterial so far as the freedom of which the man is free on the same condition, it is applied separately to each, if this is possible and will save the gift.

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. The service must be personally rendered, and 100 operae means 100 days' work. 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.

Satisfaction of the condition is all that is needed. 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. 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. 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. 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."
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. If the act is indivisible, both are free if one has done it. If there are two different gifts the *statuliber* may choose the easier (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; 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 *contingent*, i.e. "if he do this and that," he must satisfy both.

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, *pecunium 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, but personal service, such as to teach his child, remains with the *heres* though the man be assigned. 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. 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.

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.

(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 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, 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.

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 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. 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.

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.

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. 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."

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1. 40. 4. 13. 2.  2. h. l. pr.
3. 35. 1. 31. pr, 87–89.  4. 35. 1. 35; 40. 4. 5.
5. 40. 4. 42. 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 dies* 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. Op. 44. 4. 14. pr.; 40. 4. 59. 2.  6. 40. 7. 6. 5. The rule is as old as the XII Tables, A. 1. 29. 1. See Appleton, Le Testament Romain, 86.  7. 40. 7. 6. 7, which shows a more complex rule in relation to the condition of rendering accounts.  8. 40. 7. 7.  9. h. l. 39. 5.
10. 40. 5. 22. pr; 6. 5. 33. 5; 7. 2. 8. Brunetti, Dies Incertus, 160; post, p. 491.
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. 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. This of itself would show that the rule has nothing to do with the modality being treated as *dies* in this case.

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; in gifts of liberty the other view is taken, *favore libertatis*, and the gift takes effect. 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* resulting from *favore 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.

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. 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 gift is good, the reference to the daughter being ignored.

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 *logos*. In case of legacy the gift fails, 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. 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 *favore 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 Sei* she will take the legacy though she marry without his consent, and even though he be dead, *vivo testatore*. 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. 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 nihilum forest*, words which show that some special reason was needed and that in ordinary cases the gift would have failed. Pomponius, however, while dealing with this case applies the same rule to a legacy, *si cum manumissises*, where the man died *vivo testatore*. His reasoning uses language appropriate to prevention, *quia per te non statut quomuis pervenut ad libertatem*, a principle which, as we shall shortly see, ought not to be applied with such 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*.

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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 cesses* is not considered. Probably the gift is good, arg. 40 7 26, pr.
4 45 1 31 fin., h. t. 94 pr., 40 7 30, 4, C 6 4 4
5 35 1 94 pr., 40 7 22, 23 pr. Ulp. 2 6  The decision in 35 1 112 1 is a forced separation of the conditions, *bene plus interpretatio*
6 40 7 20 3  Where the gift was *aditio* *reddidit cum constanterus ad libertatem* his liber esto, and S died after the *aditio* without rendering accounts, Paul appears to doubt if there is any necessary concomitance, 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 83.
7 Julian cited by Amurtius as a very ambiguous passage thinks the gift is distinct but under the same condition, so that the woman can satisfy it, 40 7 31, 1.
8 50 104 1, 45 1 72 7, 8, 40 5 41, 16, 40 7 26 1, ante, p. 484
9 In some of these cases it is an act to be done.

1 28 5 4 6 4  40 7 28 pr., 39 4
2 35 1 31.
4 b. 7 26, pr.
5 30 5 4 2, 30 5 7, 30 1 72 4, 20, 3
6 Other texts, Pothere d. D. 35, 1, *x*
7 50 5 3  Pothere (ad h.) supposes this rule to apply where it is a condition not involving cooperation of another person.
8 40 7 28, pr. Bufonius, *op. cit.* 91, shows that Ulpian in 9 2 23 2 holds that the condition has failed in such a case. He cites and refutes recommendations by Vangerow and others B himself holds that 30 5 4 2 deals with *modus*. But on its terms it does not. But, where one is to be *hors*, 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, thus, as appears from the hypothesis cited in support, is why the gift is good, 29 7 8 7. *Ante*, p. 483.

Bufonius, *op. cit.* 50
The view stated above as that of the later classics was not accepted without dispute, of which the texts show 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. This last view may, of course, possibly mean merely that Trebatius has a derisory gift in mind. Pomponius 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) 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 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. 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.

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.

Further, the thing done does not amount to prevention, unless it was done with a view to prevention; 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.

The general rule on the matter is that, where the *statuliber* is prevented from doing the act which 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, or one to whom or with whose cooperation it is to be done, or any third person: it is enough that someone prevented fulfilment. It may be noted that the rule in *hereditas* and legacy is not so wide: it releases only in the first two cases.

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.

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. In the same way, if the act would necessarily take time, *e.g.* to do so many days' work for the *heres* or another, to go to Capua, to go to Spain and gather in the crops, or to make a series of periodical payments, 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 directed *servire heredii* for a time and was manumitted or sold by the *heres*, he was free *ex testamento* at once. 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. 39. 4. Joveneus considers Labeo right in principle but says that a more liberal view is accepted.
2 40. 7. 39. 4. Aetn., p. 488.
3 35. 1. 6. 1.
4 Hae, p. 489.
5 The rule as to the effect of impossibility in wills is Sabinian, G. 3. 88.
6 Cq. Pothier, ad 40. 7. 3. xx.; Bufnir, op. cit. 228; Vancerow, Paud, § 455.
7 *Quomunque statuliber conditionem pararet, Ulp, 2. 5.; quomunque statuliber conditionem praestare possit, Festus, s.v. statuliber; s[n]emo cos impediat, 40. 7. 3. pr., and the like, 40. 4. 55; 40. 7. 81.
8 40. 7. 39. 4. Aetn., p. 488.
9 With or without the cooperation of another person.
10 Ulp. 2. 3.; Festus, loc. cit.; D. 35. 1. 24, 57, 78; 40. 7. 3. 13, 4. 16, 17, 23. 1; 50. 17. 161.
11 Or his guardian, Ulp. 3. 6.; D. 35. 1. 78; 40. 7. 3. 30, etc.
12 40. 5. 55; 40. 7. 3. pr.
13 39. 7. 3. 11; 50. 92; 35. 1. 14, 21, 51; 96. 2. 5. 5; 50. 14. 176.
14 Consistently with all this, if one *heres* prevents a payment on which liberty is conditioned, the *statuliber* is free, 40. 7. 8. 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. 603.
15 40. 7. 3. 14. 1.
16 34. 1. 57; 40. 7. 3. 15. 4, 20. 5.
17 35. 1. 4; 40. 7. 3. 14.
18 As to a difficulty in 40. 4. 41. 1, post, p. 499.
19 40. 7. 3. 15. 17.
20 In classical law the manumission would commonly make him only a *latin*; in no case would it make him *libertas orcinus.*
to elapse. One text purports to give the reason, 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 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 statute only when he intentionally does not fulfil the condition: in all other cases of prevention by persons or by intention does not fulfil the condition, he was a slave. The condition adds, as we have seen, to the obligation on the slave, but a good deal turns on the wording of it. If it was merely reliqua reddere, 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. 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. 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. Where it is si rationes diligenter tractasset videbitur this means videre poterit. If a time is set within which the account is to be rendered, and by its fault it is not done at the expiry of the time, he has not satisfied the condition. As we have seen, if the condition is to account within

There remain for consideration two conditions of exceptional importance.

(c) Rationes reddere. The importance of this condition is shown by the frequency of its appearance in the Digest. It is found also in a surviving Roman will. Though, as we have seen, all freed slaves may be called on to render an account 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 is to render 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.

The condition practically means that he must state and account for all moneys that he has had to administer. He must make his account in good faith and with due care, though a mistake, even negligent, is not a breach of the condition. 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. He must state all needful details, going over his account books, and giving a proper account of matters not in writing. The condition covers the whole field of administration, not merely trading. 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. He has not merely to render an account: he must hand over the reliqua, i.e., all property of the estate in his possession. 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, but not losses resulting from casus. What is required is a true and just account and render: the law prescribes no exact steps. 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, 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, and a deputy appointed to receive the account. 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.

The condition adds, as we have seen, to the obligation on the slave, but a good deal turns on the wording of it. If it was merely reliqua reddere, 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. 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. 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. Where it is si rationes diligenter tractasset videbitur this means videre poterit. 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. As we have seen, if the condition is to account within
30 days from the death, and the aditio is not till later, the liberty does not fail, as it is not his fault. Titius by his will 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, 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.

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. So if the heres is in mora in receiving the accounts, the slave is free if he tenders them and the balance. 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 account is not till later, the liberty is not a donatio, no matter by whom or to whom it is given. Here, the text says, as in alienation of property, the act is an independent mortis causa copia.

(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 dabat or cum decem dare poterit are equivalent forms.

1 40. 7. 58. pr. 2 40. 7. 40. 7. 4 Mommsen, ad h. l. 8Mommsen, ad h. l.
9 The text adds, but the words look like Tribonian, that there is a general presumption in favour of the statuliber. 5 40. 7. 53. 1. 10 Mommsen, ad h. l. 7 As to si rationes reddiderint cum contubernali sua liber esto, ante, p. 490. The words are clearly capable of many interpretations. 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.

CH. XXI] Condition: Payment of Money

Money paid under such a condition is a mortis causa copia, though it is not a donatio, no matter by whom or to whom it is paid. 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 copia, it is not necessarily acquired hereditario iure. If, however, it is ex bonis mortuis (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. So too it counts towards the half that an orbis may take. 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 copia. If it is paid from outside—not ex bonis mortuis, the lex Falcidia has no application to it. There are, however, cases in which it seems to be doubtful whether it is ex bonis mortuis or not. According to Ulpian, if the slave acquires the money only after the death, it cannot be said to be ex bonis mortuis, and so will not be imputable. 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. Apparently Ulpian's view would exclude all acquisitions to the estate after the death—which certainly was not the law for his time.

Money validly paid under the condition is of course irrecoverable. But if it was not due it can be recovered, like an indebitum. The remedy will be condicio 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. It is not strictly an indebitum in any case, and it is treated mainly under the head, possibly a creation of the compilers, of condicio causa data causa non secuta. If there is no condition and he is really
free, and he has paid it out of his own money he can condici it1. 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 vindicate2. And supposing the payment was not his in good faith, here too if he has been 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 condicio3.

Procclus lays down the same rule for the case where the will is not valid: money paid ex peculio to an outsider can be vindicated4. 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 invenius. He can recover by condicio if he has paid out of what he has acquired otherwise than ex operis or ex re possessoria. If it did come from that, he was merely giving the heres what was his already1. In all these cases there is no real divergence of opinion, but in another case there is. In a will a slave 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 view4. 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 that the condition not having been adeemed, perhaps not having been adeemable5, exists, and he has acted under the wrong gift6.

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 the presence of the actual slave7. The whole must be paid8. 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 purpose1. If a time is fixed, the payment must be within the time1, which runs from aditio if the will is not explicit2, and even "thirty days from the death" is reckoned from the aditio, at least if it is necessary so to do to save the gift6. Where a man was to be free on paying 10 a month for 5 years, he is not free unless he pays it every month7. The heir's refusal of one payment does not release the statu-lerber from the others, though, as it deos from that one, and the heres may not change his mind, the same money may be offered when the next pay-day comes8. These texts point out, as we have already seen, that such directions involve dies as well as condicio. 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 money3. 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 other9 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 elsewhere10. Altogether it is difficult to credit this view to the classical law.

The giving must make the alienus owner of the money: thus it may not be stolen money11. 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 absolute12. It need not take the form of an actual traditio to the heres. We have just seen that release of the payment sufficed14. 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 free15.

If it is payable to the heres, the commonest case, since it is payable

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1 12. 4. 3. 6. 2 7. 8. We do not discuss the point that here he is holding 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. 3 12. 5. 3. He adds that where it is paid to extraneus by a third person the master of the slave is the true person to condici it but that it is benignior and utiliaris to let the actual loser sue directly. 4 12. 6. 37. pr. 5 12. 4. 3. 7. 6 Ante, p. 467. 7 12. 4. 3. 7. Pomponeius may have introduced the rule there stated. 8 Ante, p. 467. 9 12. 4. 3. 6. 10 12. 4. 3. 7. pr.
to him if the will does not say to whom it is payable, we are told in several texts that it may be paid to heres heredis, the rule being due to Hadrian. The point is that the personality of the payee is not imported into the condition, favore libertatis, for in legacy it is. 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, though the contrary suggestion is found in a remark of Julian reported by Ulpian, already considered. The rule is the same even if the heres is named by name. He cannot pay it to a pupillus heres without the auctoritas of the tutor, a rule laid down rather on grounds of analogy than on strict principle, for it is not the payment of a debt. If the words are hereditatis dato, they take pro rata, but if they are mentioned by name they take partes viriles. The text seems to indicate that if they are called heredes and also named they take pro rata. If one heres renounces the institution the payment is to be made wholly to the other, 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.

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 is no heir, to the other, who is only entitled to his share, which may be satisfied with the same money.

It may be added that a payment to the heir is retained by the legatee even though he hands over the inheritance under a fideicommissum and even though he entered only under compulsion. Ulpian tells us that if the payment was ordered to be to an extraneus, and he became heres, the payment would be made to him non quasi in extranei persona, sed quasi in heredise. The point appears to be that it might be imputable from the point of view of the lex Falcidia.

We have seen that, on alienation, conditions dando go to the alienee, while services remain with the heres. 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. The rule applies not only to sale but to all transfers of dominium, e.g. under gift or legacy. And the heir of the acquirer succeeds to the right as heres hereditatis does. But it must be an alienation of dominium: conferring a usufruct on a third person does not entitle him to receive the payment. On successive alienations the right passes to the last alienee. 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. A buyer of a part must be paid a proportionate part of the money. If the alienation is after payment of a part, the rest must be paid to the alienee. 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. 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, 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, 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: corte statuliber quin domino dare debet non est dubium. The use of the word debat shows, 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 hereditatis.  

\footnote{\textit{ib.} 8, pr. 23, pr.}
turio, 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 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. 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 incoherence is swept away if we adopt Krüger's emendation and read heredes for his early in the text. 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. 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 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.

Whether the money is to be paid to the heres or to an extraneus, it can always be paid out of peculium. The statuliber can of course pay it, if he prefers, from other sources, but not out of moneys entrusted to him and not forming part of the peculium. 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. Even though he is alienated sine peculio, he can still pay it ex peculio. 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. 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.

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 opera or ex re redemptoris, but he will still be subject to the lien of the redemptor.

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. If it is to be paid to a coheir and one heir refuses to allow the payment, the man is free. 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. 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. If, having been dare tuus, he is alienated sine peculio, there is no prohibition, until he actually is prevented from taking the money.

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

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1 40. 7. 39. 2  
2 Unless testator has expressly directed that operae may be counted towards it, A. t. S. 14. pr.  
3 A. t. 3. 7. 40. 7.  
4 A. t. 36. See also Pdup. Resp. Fr. 9. 17 (Krüger).  
5 40. 7. 17  
6 49. 15. 12. 11.  
7 12. 4. 3. 9; 35. 1. 110; 40. 7. 1. 90. 8.  
8 40. 7. 5. 4.  
9 Refusal or its equivalent by guardian of heres has the same result, A. t. 10.  
10 1. 2.  
11 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.  
12 40. 7. 11. 13. 4. 1. 7.  
14 40. 7. 12.  
15 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, A. t. 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. 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. Some others use argument which involves the same conclusion. 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. On the other hand Paul gives us Julian's opinion that even in this case he makes the receiver owner. Both these texts appear to be genuine: they show 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. That of Julian and Javolenus rests on the fact that the payment is authorised by the will under which the testator's whole intentions. Nevertheless the remark has rather opposite rule, that a slave cannot alienate peculium even if the receiver to whom it was to have been made, adversus heredem in factum actione agere potest, ut testatoris pararetur. It is certain that this is from Tribonian. The expression in factum actione agere is no more than suspicious, as is the remark that the payment would be testatoris parare. 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

part of an extract many other parts of which have been convicted of interpolation.

The fact that a slave is instituted as so free and instituted is a necessarius heres, i.e. he is heres without entry, and has no ius abstinendi. 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 made up with the institution and failing if it failed. It is essential that the man belong to the testator. 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, 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. If at the time of the death the owner is without testamenti factio, the whole thing is of course void. 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. He must have been the testator's at the time of the will, though part ownership at that time is enough. 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. 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. 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.
Cases of error in this matter are scantily dealt with. If I institute and free a *servus alienus*, supposing him mine, his owner takes. 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*. 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.

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 lie in the least depend. 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. 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.

*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 *infra* may be a substitute, or substituted to a substitute, or even a pupillary substitution. This rule is accepted *utilitatis causa*, at least as to pupillary substitution. The point is that the testator is making him *necessarius heres* to someone.

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 *puppilus*. This rule is accepted *utilitatis causa*, at least as to pupillary substitution. The point is that the testator is making him *necessarius heres* to someone 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, and also that a slave made a pupillary substitute is in effect a *status liber*; 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. Strictly he cannot be a *status liber* as he acquires his liberty from himself. 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*. 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*. In like manner it seems from some obscure provisions that as a slave is instituted in order that he shall bear any resulting *infra*, he is an *infra*, and thus brothers or sisters can bring the *querela* against him. The will may thus be upset, but the slave retains his liberty.

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 *aes 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 *infra* 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. 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. Pegasusianum*. He handed over the whole *hereditas*, but only the first of the two slaves was entitled. 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...
would not be in fraudem creditorum¹. 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 inheritance². 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 creditors³.

It may be noted that one who is barred from liberty by any enactment other than the lex Aelia Sentiae cannot be a heres necessarius. The provision of this lex frees him from the restrictions created by the lex itself, but not from any other⁴. 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 creditors⁵.

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 Pretor for detecting his master’s murder, he is not a heres necessarius, but on satisfying the condition he can take the inheritance if he wishes⁶.

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 his in eo mutetur successionis⁷. A person to whom fideicommissary liberty is due is a quasi statuliber⁸, and the heres cannot make his position worse. Thus his position as a necessarius heres must depend on the non-arrival of the condition⁹. 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 29. 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. 3. 89. h. t. 84, pr.
⁴ h. t. 84, pr.
⁵ Utilis because there is no actual fraud, 42. 8. 6. 19; h. t. 10, 10. There could be no condicio indebita, if the legacy were per damnationem, but there might in other cases: the legacies were not due, 42. 8. 25.
⁶ 29. 5. 91; so if freed vivo testatore, h. t. 7, pr.
⁷ h. t. 3, pr.
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 infamia. Unless on the occurrence he is a voluntary heres who has not yet accepted, his position is bad as he loses the beneficium separationis.

CH. XXI] Necessarius Heres: Exceptional Cases

But apart from them he would acquire the hereditas to the alienæ¹. 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 libertus². 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 gift³.

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 aditia. Ulpian tells us that Severus and Caracalla construed this as a direct gift to S⁴. 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 death⁵. 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 remarks⁶ 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 says⁷ that a senatusconsultum of Hadrian’s time provides that S can compel X to enter, whether the gift of liberty is direct or only fideicommissary⁸. 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 good⁹.

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 29. 1. 13. 4.
³ h. t. 14. The language is that of a legislator.
⁴ 36. 1. 65. 15.
⁵ Post, p. 524.
⁶ 29. 5. 22.
⁷ 29. 5. 84. 1. Or Tribonian as to fideicommissum.
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*.

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*. 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*. 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.

In a very long, very obscure, and in some parts, corrupt text, a will is considered which ran: *T* *heres esto*; *S* *Maevio de 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. 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 the *T*. The legacy to *Maevius* is void.

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.

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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 *servus*. draftsman and he was also substituted, the condition of liberty was inserted into the substitution, 21. 33.
2 36. 5. 55; 36. 6. 40. 2.
3 Cp. 40. 7. 2. 3.
4 Aeste, p. 449.
5 28. 6. 48. 1.
6 28. 5. 55; 28. 6. 40. 2.
7 Cp. 40. 4. 10. 1; 40. 5. 50.
8 Cp. 40. 4. 14; 28. 5. 21. 22.
9 28. 7. 16. pr.
10 35. 1. 77. pr.

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CH. XXI] Manumission with Institution: Modalities

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. 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*.

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*. 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. 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 extincta institutio inutilis fuerit. 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, *favor libertatis* 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. 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. This is puzzling, but Marcian's source is Papinian, whose text shows that Pius meant the condition of liberty, not the other.

1 28. 5. 9. 17—19. This is very like *dies* in an institution.
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 *fideicommissus* of liberty was given to a *servus alienus* and he was also substituted, the condition of liberty was read into the substitution, 21. 33.
3 38. 1. 4.
4 28. 5. 1. 77. pr.
5 *h. t.* 38. 2. So if he were a common slave, *h. t.* 7 (Monsen).
6 *h. t.* 38. 3.
7 40. 4. 14; 28. 5. 21. 22. It might be effective as a *fideicommissus* on the *heres ab intestato*, but the texts treat it as a direct gift.
8 28. 7. 16. 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. 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. This is a simple case of favor libertatis.

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. 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. 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.

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.

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. 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.

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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 is 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.

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1 C. 7. 4. 7; G. 2. 366–37; 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 Palaestinian purposes (35. 2. 36. 2, 37, etc.). A legacy of alimenta to freedmen covered those freed by pec. (84. 1. 3). It is the age of the testator which is material in such manumissions, post, p. 541. See also the rules as to addictio hereditis, post, Ch. xxvii.  5 Post, p. 568.  6 40. 4. 43. Or in a will operating as a codicil, 40. 5. 24. 11. Vangerow, Pand. § 927.  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. 18. 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. But though one who has liberty by fideicommissum under a will can take gifts under the same will, yet a fideicommissum of money, sub conditione, with no gift of liberty, is not held to imply such a gift. 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, 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 codicellaris. 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 solo sit mea liberta. The word solo 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. 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. It is true that the Instaures deny this, but the evidence is strong. The text cited 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, and it seems likely that while the insertion of the condition is classical, the further extension dates only from Justinian. Paul discusses the case of a slave of the testator given freedom by fideicommissum, and appointed tutor, and observes that

there is a difficulty, since he cannot be tutor till he is free, or free till there is a tutor, since an impubes cannot free sine auctoritate. 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. Dasamianum and connected legislation.

In one text 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 says: at ideo licet directae libertates deficiant attemen ad fideicommissarissas 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.

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 perducit. But if this means an immediate gift, the text must be interpolated, as indeed its language suggests. A direction ne postea serviat is certainly an immediate fideicomissum of liberty. 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, as once. 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 fiduciarius. If on the other hand it is neither due to the testator, nor voluntary, e.g. where the fiduciary is publicus, the condition is declared to be satisfied, and the slave is to be freed, if necessary by the public

1 C. 6. 28. 5.
2 40. 5. 11.
3 Post, Ch. xxvii. One given freedom by fideicommissum cannot properly be made tutor, but, says Papianus, after he is free the appointment will be confirmed, 26. 2. 28. 5.
4 C. 6. 42. 28.
5 40. 5. 38.
6 C. 6. 41. pr. The case in 40. 4. 40 is construed as a legacy of the slave with a fideicommissum of liberty.
7 26. 3. 10. 4.
8 C. 7. 4. 10. But it attributes the opinion to prudentes.
9 P. 4. 13. 3.
10 212.
11 26. 2. 28. 5. 26. 3. 8.
12 40. 5. 4. 40. 5. 38.
13 26. 3. 8.
14 48. 10. 15. 2. 8.
15 40. 5. 24. 8.
16 40. 5. 24. 8. 48. 10. 15. 2. 8.
17 212.
18 40. 5. 24. 7.
19 Ibid.
authority. If the fiduciary having sold him buys him back this does not mend matters: the condition is already satisfied. All this suggests, as Gradenwitz points out, 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 that the favourable effect of such a direction as ne alices, 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. Very little more, however, will turn it into a duty. The words si volueris fidei tuae committto, si tibi videbitur peto manumitttas, si tibi videbitur manumitttas, si voluntatem probaveras, 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. This may be a case of favor libertatis, since we are told that the words, si volueris fidei tuae committto, have no effect in other testamentary matters. So also "if you find them worthy," or si te promeruerint dignos eos libertate existimes are good fideicommissary gifts. 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 his.

But it may be left to the fiduciarius to choose when he will free, 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.

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 uxor 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. Elsewhere, Modestinus holds that her ceasing to be heres must not prejudice the man, and moreover that her dissent is immaterial. As fideicommissary gifts are binding on substitutes and coheredes, and a gift

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CH. XXII. Gifts at Discretion of other Persons

Of liberty may be at the discretion of a third party, 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 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, 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.

As the gift may be at the discretion of a third person, so it may be at that of the slave himself. Even if it is not so expressed, the gift will not take effect, in uento servio, 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.

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. 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. 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. 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. In direct gifts, as we have seen, that operates which is most favourable to liberty. 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.

The principles to be applied as to condition and the like are much

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1. Ante, p. 485. 2. 40. 5. 5. 20. 3. 51. 8. 4. 40. 5. 5. 20. 5. 40. 5. 14. 6. 40. 5. 46. 3. 7. 40. 5. 46. 3. 8. 40. 5. 14. 9. Ante, p. 485. 10. 40. 5. 46. 3. 11. Ante, p. 485. 12. 51. 8. 13. 40. 5. 46. 5. 14. 30. 1. 50. 1. 15. 60. 1. 50. 1.
Fideicommissary Gifts: Conditions

[PT. II]

the same as in direct gifts: 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. A slave to be freed on rendering accounts is not responsible for losses not imputable to his negligence, nor, when the dominus had approved and signed his accounts, for the insolvency of any debtors therein set out. 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. 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. Where a son is to be 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. 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 show, if he could, that the testator meant to burden the heres with the cost of repurchase. The text remarks that the rule is the same in direct gifts.

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. 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. 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. 402.
2 For a case of modus see Testamentum Dambini, 1. 44.
3 C. 7. 5. 7; D. 40. 5. 33. 10; ante, p. 490.
4 40. 5. 33. 7; ante, p. 494.
5 40. 5. 33. 7.
6 A. f. 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, a. f. 9; a. f. 8 (obscure).
7 40. 5. 23. 4. Where a slave was to pay, glane et mori moes, so much, and that he be free, and the wife abstained, all was payable to the daughter, a. f. 14.1. Where he was to be freed when debts were paid, they must be paid unless the heres wilfully delayed so as to keep him, a. f. 1. 1.
8 40. 4. 1.; ante, p. 470. The concluding words suggesting a presumption that they run from the date of the will are apparently an inept interpolation. Gradwitz, Interp. 182.
9 40. 5. 23. 4. Where a slave was to pay, glane et mori moes, so much, and that he be free, and the wife abstained, all was payable to the daughter, a. f. 14. 1. Where he was to be freed when debts were paid, they must be paid unless the heres wilfully delayed so as to keep him, a. f. 1. 1.
10 For a strained construction, favore libertatis, to exclude a certain condition, 40. 5. 56.
11 36. 1. 23. 1.
12 40. 5. 11. The text adds that Hadrian laid down the same rule when the gift was direct.

CH. XXII] Ademption. Lapse

519

take the hereditas. If a servus alienus is appointed heres, there may be a fideicommissum of liberty to him, post mortem dominii, which will leave his dominus heres.

Like other gifts they are liable to revocation and destruction. We are told that they may be adeemned 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 adeemned 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. There are many forms of implied ademption. 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. Punishing by chaining by the testator is an implied ademption, 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. In general the last 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.

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. So if the codicil in which they are given becomes irripputus 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. 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 latity. 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, 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. 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, but caducus and the like take their burdens with them. 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. 25. 5. 34. 1. So also in case of direct gift. Ante, p. 607.
3 Ulp. 2. 12; D. 40. 4. 14. 4 40. 5. 1.
4 40. 5. 33.
5 40. 4. 43.
6 Ante, p. 466.
7 40. 5. 34. 11, 47. 4; C. 7. 2. 12.
8 40. 5. 34. 11, 47. 5. 8.
9 30. 6. 1; 28. 1. 60. 1; 34. 9. 5, 4; 40. 5. 12. pr. 2, 51. 53. As to the case of the fisc, see also post, CH. XXVII.
10 31. 29. 2. Caesius.
11 Ulp. 17. 2.
ferring that if a legitimus heres refused, a fideicommissum charged on him would bind his coheir. 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-heater. 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.1 And Ulpian lays down a similar rule, precisely because such gifts are to be favoured. Paul deals in the same spirit with the case in which the legatee refuses the gift of the slave.

The rules under the sc. Pegasianum, as to compilation 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.2 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, even though they be slaves of third persons.3 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.4 It should be remarked that the gift is binding on all successors of the fiduciary, of any kind.5

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.6 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.7 Moreover in an appropriate case the actio expilatae hereditatis will lie8 since manumission does not destroy liability for delict9. 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: 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 85. 81. 1. 12 36. 1. 55. 13 40. 5. 26. 6. 14 40. 5. 33. 2. See post, p. 528. 15 C. 7. 2. 12. 16 29. 4. 12. 22. pr., 29. 17 h. t. 28. 1. See also 35. 6. 1. 9—11. 18 C. 7. 4. 1. Plus 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. 5. 4—6; 36. 1. 55; C. 3. 51. 12. 19 40. 5. 12. 1. 51. pr.; 4. 13. 2. But not one taking adversely, 40. 5. 31. 3. 20 40. 5. 23. pr.; 47. 4. 1. 7. 21 40. 5. 23. pr.; 40. 12. 41; 47. 4. 1. 7. 22 47. 4. 1. 7. 23 Ante, p. 106; post, Ch. xxiii. 24 40. 5. 33.
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. We have seen 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, 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*. This is simple, but not very logical, since this would certainly not represent one fourth of the benefit to the *legatarius*, nor what would be the effect of 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 liberty, which, according to the interpretation 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 the acquisition *ex operis* will belong to the *heres*. This is simple, but not very logical, since this would certainly not represent one fourth of the benefit to the *legatarius*, nor what would be the effect of 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 liberty, which, according to the interpretation of the matter.

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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. 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, and Z’s right is subordinate to that of S. It does not appear that it is in 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.

We have seen that these gifts need for completion an act of manus-
mission. Till that has been done, or there has been mora, they are still slaves for all purposes. Their children born in the meantime are slaves and belong to their owner. But the beneficiaries themselves are quasi statuliberti, 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. The fiduciarius cannot in any way make their position worse. Marcus Aurelius lays it down that no act or defect of his is in any way to affect the slave. Thus the acts and defects we shall have illustrations, when we come to deal with statutory restrictions.

Others can be taken here. If the slave is instituted by the fiduciarius with a gift of liberty, he is not a heres necessarius. If the fiduciarius chains the slave, this is no bar to his liberty. The fiduciarius may not hand him to another to free; if, however, he does in any way alienate him, we have seen that the holder is bound to free him. But he may choose, if he prefers, to be freed by the original rogatus — so it was provided by Hadrian and by Antoninus Pius — and the fiduciarius

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1 a. t. 11. 2.
2 a. t. 28. 17.
3 aucto.
4 a. t. 57. 2. fum.
5 a. t. 55.
6 act. p. 521.
7 act. 54. 21. 26. pr.
8 of course in this case there was no handing back.
9 h. t. 15. 26. pr.
10 h. t. 15. 30. 16. 15.
11 h. t. 30. 15. 16.
12 h. t. 30. 15. 16.
13 h. t. 4. 12. 4.
14 h. t. 34. 21; 19. 1. 49.
15 h. t. 34. 21; 19. 1. 49.
16 h. t. 34. 21; 19. 1. 49.
To whom Fideicommissary Gifts may be made [PT. II

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, provided, according to one text, that there was testamenti factio with his owner. 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 estraneus 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. 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.

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. 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. 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 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. 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, and Justinian speaks of a division of opinion among the jurists on the matter. Against the validity of such gifts there is the rule that fideicommissa in favour of incertae personas and postumi alieni are void. On the other hand, it is a very reasonable application of favor libertatis, and there are texts which make it certain that such a personus could be an incerta persona, at any rate if born before the testator died. There are other texts which 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.

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. As the text notes, this would not be true of a fideicommissum of property: it is a case of favor libertatis.

We pass to the question: on whom may such gifts be charged? The general rule is that the may be imposed on anyone who can be charged with any fideicommissum, i.e. substantially, on any person who takes a pecuniary benefit under the will, or the paterfamilias of any such person. It is noticeable that Gaius does not speak of fideicommissarui as being liable to such charges, but we have already seen such cases. If he takes anything under the will, it is enough, even though he renounces, or is excused from, some of its provisions. 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. 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. 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, though a pupillus may not do it without the auctoritas of his tutor.

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 heredes. A difficulty arises where one of the heredes not

1. e.g. C. 7. 4. 16. pr., ante, p. 476.
2. 40. 5. 24. 2.
3. 40. 5. 24. 3.
4. 40. 5. 31. pr.
5. 40. 5. 16.
6. 40. 7. 13. 4.
7. G. 2. 264; Ulp. 2. 11.
10. G. 2. 264; Ulp. 2. 9.
11. G. 2. 316. ex.
12. 1. 34. 2.
13. 1. 34. 13.
14. 1. 34. 14.
15. 1. 34. 15.
16. 1. 34. 2.
17. 40. 5. 16.
18. 40. 5. 24. 3.
19. 40. 5. 24. 2.
20. 40. 5. 24. 2.
21. 40. 5. 31. 2.
charged is an infans, and is thus incapable of selling. It is settled by a st. Vitruvianum, 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. 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.

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
t, but not if it is a simple gift inter vivos. And of course there is no fideicommissum on one who gets neither the slave nor anything else. 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. 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, 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. 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.

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.

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 advertising 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.

1 40. 5. 30. 6. 2 28. 5. 3. 86. pr. 3 32. 37. 3. 4 40. 5. 40. pr. 5 40. 5. 20. 6. 6 40. 4. 54. 7 Post, Ch. xxvii. 8 92. 19. etc. See Pernico, Libres, 3. 1. 7. 9 40. 5. 33. 2. 10 It is not a case of failure of the gift. 11 32. 3. 1. 12 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 freedman until he was acquired by usucapio. See Pap. Resp. 9. 2; Eusebius, Melanges, 462.

CH. XXII] Gift of liberty to a Slave of Fiduciarius

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. 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. But he must get a real benefit. Thus, accepting a legatum dotis does not bind the wife to free a slave of hers. 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, sine minime, there were some jurists who thought that he was entitled to rescind his acceptance.

Ulpian 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 arbitre. 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. 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.

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. There can be little doubt that this text is interpolated, but

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1 40. 5. 8. 24. 12. 24. 13. 45. 1; C. 6. 50. 18. Restitutio if donee is a minor: he can restore the gift before the liberty is given, 4. 4. 33.
2 40. 5. 22. pr. k. t. 19. 1.
3 k. t. 6. Another text credits this view to Ulpian (k. t. 24. 16), but it may be that Tribonian is speaking, as he certainly is in the concluding words of both these texts.
4 k. t. 24. 17.
5 Where a patron wishes 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. 29. 2. 7 34. 9. 5. 4. In such a case the gift went to the fisc.
8 38. 2. 41.
9 Gratianus, Z. 6. 8. 29. 342; Kalb, cvstematikeis, 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 dis-tasteful 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 the conflict with the principle that one entitled to the whole cannot enter for half.\(^3\) It is however probably not from Tribonian, but an abridgment 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 fiduciary at a reasonable price and 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 of his own slaves.\(^9\) 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.\(^10\) 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.\(^11\) 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.\(^12\) 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.\(^13\) In any case, the owner cannot be compelled to free or hand the man over, till he has received security for the price.\(^14\)

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.\(^15\) But Justian says the gift *difertur* till the opportunity arises,\(^16\) and he inserts in his Code an enactment of about a.d. 220 which lays down the same rule.\(^17\) 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.\(^18\) 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.\(^19\) 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.\(^20\) If he refuses to give this security, his action for the security, his action for the price will be met by an *exceptio doti*.\(^21\)

\(^1\) *loc. cit.* He refers to C. 6. 4. 6. 16.\(^2\) 30. 114. 1; cp. 40. 8. 81. 3.\(^3\) *cp. cit.* 343.\(^4\) It may be that Papinian allowed the patron to keep the legacy without freeing. This is consistent with Papinian's known characteristics. See Rohy, *Introduction to Dig. exsurv.*\(^5\) 40. 5. 24. 19. But there was disagreement on the point.\(^6\) 30. 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.\(^7\) 30. 5. 4. 6. 15.\(^8\) 40. 5. 24. 18; *op. cit.* 17.\(^9\) *ibid.* 40. 5. 31. 4; *cp. cit.* 40. 5. 23. \(^{10}\) 40. 5. 31. 4; *cp. cit.* 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.\(^{11}\) 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.  

\footnote{C. 7. 4. 8.}

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. 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. The cases with which it dealt were, apparently, the slave freed by his bonitary owner, the slave informally freed, and the slave freed under 30, 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. 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 it is clear that a bonitary owner could give freedom by will. It is hardly so clear whether he could do it vindictas. And it seems that manumission censu must have given civitas or nothing. 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. And it does not seem that it amounted in itself to a manumission inter amicos or per epistolam.

\footnote{Ante, p. 444.}
\footnote{G. 1. 22; 3. 56.}
\footnote{G. 1. 157; Ulp. 1. 16; 11. 19; 92, 8; Fr. D. 9.}
\footnote{G. 1. 17, 22; 3. 56; Ulp. 1. 10; Fr. Doc. 4, 6—9, 14; C. 7. 6. 1. Ante, p. 444. Consent of consilium if dominus under 20, G. 1. 41; post, p. 536.}
\footnote{G. 1. 17, 22; Ulp. 1. 12.}
\footnote{Post, p. 542.}
\footnote{Ulp. 1. 25; 22, 8.}
\footnote{Post, p. 543.}
\footnote{See however Vangerow, Latini Iuniani, 20.}
\footnote{Mommsen, Rom. Staatsrecht (8) 2. 1. 574; Dr. P. R. 4. 52.}
\footnote{Ante, p. 446.}
Only such a slave was protected and thus became a Latin as was *talis ut praedor libertatem tuetur*. The language seems to contemplate defects in the slave, and though, as we have seen, 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 *dedictii* were made to apply to cases quite different from that for which they were invented, and-Junian latines 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. 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 colonial Latin that by will. But we are without information.

The only other topic to consider in connexion with this *lex* is its date. It is always called *lex Iunia* by the classical writers, and usually even in Justinian's time, but in one passage of the Institutes it is called *lex Iunia Norbanus*. 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, 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, enumerates the modes of manumission, and could hardly have failed to mention so important a law as the later of the two. But the absence of early authority for the name Norbanus makes the evidence for the actual year 19 very slight.

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1 Fr. Doss. 8. 2 Vaugerow, op. cit. 13. 3 As to certain questions concerning the position of Junian latins, post, App. iv. 4 G. 1. 22, 80, 167; 2. 110; 275; 3. 56, 57, 70; Ulp. 1. 10; 3. 3; 11. 16; 20. 14; Fr. Doss. 6, 7, 8, etc. 5 In. 3. 7. 4; C. 7. 6. 1. 6 In. 1. 5. 3; Theoph. ad a. 1. 7 See especially Vaugerow, Latini Iuniani, 4 *epig*.; Voigt, R. K. G. 2. 160; Karlowa, R. R. G. 1. 621; Conq. Inst. Juris. 2. 149. 8 Topica. 2. 9 G. 1. 80.

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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, and thus assumes the existence of the status. No other enactment of Tiberius extends or improves the rights of *libertini*: from the *lex Visellia* 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 *dedictii*. 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 shows it: we are frequently so told, and nearly every rule relating to them is repeatedly referred to that law. Gaius tells us 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. It must not be forgotten that one text refers the rules of *anniculi probatio* to the *lex Iunia*. 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 *cives*. But the earlier and repeated testimony of Gaius 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. It must also be noted that some texts suggest that the *lex Iunia* dealt only with informal manumission, though the weight of evidence is in favour of a wider scope. Again Ulpian tells us that slaves who had been guilty of misconduct became, on manumission, *dedictui*, *quoque modo manumissi sunt*, and adds that this was enacted by the *lex Aelia* Sentia. The
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. Moreover Gaius in dealing with the law as to the distribution of the goods of dediicati 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 iudicium latinum sit is certainly an inference for the present: the lex is cited as putting the man in libertate. 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, 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 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. But the contrary view has many supporters. Karlowa, following Brinz, argues strongly for it. He points out that though Gaius says the lex Aelia deals with latini 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.  

It is true that the lex Aelia Sentia seems to speak of marriage 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 uxor et dux. On the whole, as Mommsen says, 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. It applies to all cases inter vivos or on death, and even soldiers’ wills are not exempt. 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. 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 of which is needed, was made before he reached that age. Usually the codicil is read into the will, the effect of which is in some cases to destroy the gift. The text in the Code gives as the reason for laying down the more favourable rule, nec enim potestas iuris sed uxor et dux 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.
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. In the same way he could not, in his will, validly direct liberty to be given. 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. 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 amano manumittendi, the receiver could not free— the transaction being null nihil agit. 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. It is evident that the Senatusconsult was somewhat general in its terms. Probably it prohibited what Plocinus calls fraus legis, and left a good deal of room for juristic interpretation. 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. 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. 

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. All this is subject to the very important exception that if causa was shown 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 latum. 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. This consilium was a council chosen by the magistrate who presided in it. It consisted, at Rome, of five Senators and five Equites, and it sat to enquire into causas 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. 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. It was immaterial that the Praetor who presided was his tutor. 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.

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. A causa 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 causa shewn was a mere nullity, one after causa shewn did not admit even of restituto in integrum; liberty is irrevocable. 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 causa probata revocars non operate, non causa probata contradiendum, non est causa, nam probata retractanda est. This means presumably that there was no appeal, it would not prevent a magistrate from vetoing any further steps, where a fraud was proved.

Apparently the only fixed requirement for a causa (and this was a creation of practice) was that it must be honesta causa, non ex lucrum sed ex aetate, non delictus sed susus affectionum. 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. The causa might be notable services in the past, e.g. the protection of life or honour.

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 14. See below, n 9. 
3 18 7 4. 
4 40 9 16 1. 
5 40 9 7 1. 
6 40 9 8 1. As to the date of Campanus see Roby Introd. to Dig. elv. 
7 12. See n 1. A minor freed a slave tefer evos, 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 as it was in effect a gift to his own slave ut liberatur. 20 1/2 next p 114. A minor freed a slave tefer evos, having by will made a beneficium of the estate to which the slave was attached with its slaves. The man was not included the manumission, though void showing he did not mean him to be included. 33 7 4 1. 
8 40 1 16. Anti. pr. 457 sqq. 
9 13 1. G 1 57 1. 
10 G 1 39. D 40 2 24, 25. Fr. Dos 13. As to the unity of the whole transaction see Wlasak, Z S S 32 37 sqq. 
11 40 2 5 1. See below, n 9. 
12 40 2 5 1. 
13 40 2 15 5. 
14 40 5 51 7. 
15 40 2 14 1. D 4 3 7 pr. 
16 40 2 15 1. G 1 19. 
17 40 2 9 1. 
18 C 2 50 3 1. 
19 D 4 3 7 pr. 
20 G 1 19, 39. In 1 5 1, 6, C 7 11 1. See Haezelius. Domna 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. 
21 40 2 16 pr. 
22 G 1 19, 39. In 1 5 1, D 4 22 11 14 pr. The causa of foster child applied especially to women freeing, but it was allowed in case of men who had provided for nurture of the child. 
23 40 2 9 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; provided that the manumitter had more than one slave. 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. The reason seems hardly satisfactory. The enquiry into the sufficiency of the causa would include an inquiry 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 Senatusconsultum (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, 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. 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. 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.

A woman freed matrimonii causa could not refuse or marry any other without the manumitter’s renunciation of his right. 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.

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1. 40. 6. 18. The Institutes make it 17, the minimum age for postulatio in iure: our text may mean, having entered on his 16th 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. 13.
4. 40. 2. 19.
5. 40. 2. 20. 2. Spado could free matrimonii causa as he could marry: castratus could not, 23. 3. 99. 1; 40. 2. 14. 1.
6. 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.
7. 40. 5. 29.
8. 40. 2. 51.
9. 24. 5. 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 fo. to free, see 23. 2. 45, and post, Ch. xxvii.

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A woman could free on most of these causae, but no, it seems, matrimonii causa, unless she was a liberta, and a slave, e.g. a fellow-slay, had been left to her for this purpose.

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. 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. 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 causa. But another text of Ulpian says 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 causa probatio is here used untechnicaly, 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 consiliun, if need be, as in the case of sale for a price. 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. We are told that this constitution applied even though the owner were a minor. 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 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, if the man was one as to whom the minor could have shewn cause, if he had freed inter vivos. 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...
him could not be regarded as null as it could inter vivos. 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, 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 it. 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.

II. The slave must be over 30 or he does not become a civis. 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. 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. There is however some difficulty as to what happened if there were no causa. If he was manumitted by will directly, he became a civis: there could be no question of causa. So too there is no sign of causa in relation to manumission. If the man was over 30 he became a civis: if he was not it was presumably void. 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 could not give liberty even by way of postponed fideicommissum. The same reason does not apply here, and we are told that a direct or fidei-commissary gift of liberty to take effect when the man reached 30 was valid. The distinction shows 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. 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 derelictus would not have this effect, but would leave him res nullius, and manumission, which leaves the manumitter patronus, is much less than that. 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. Of the many suggestions for emendation, the old one that the word was originally the name of some juris 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 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. Moreover manumission vindicta is an actus legis eius of extreme antiquity, and for this reason may have been regarded as a nullity if not completely operative. However this may be, it is probable that practice early

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1 Ante, p. 388.
2 op. cit. 256; 10. 2. 39; 40. 4. 38. 1; 40. 7. 13. 5; 34. 2. 29; cited by Vangerow, op. cit. 38.
3 Ulp. 1. 12.
4 It may make him servus sine domano (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 leg. These Vangerow cites and rejects on what seem adequate grounds (op. cit. 25 sqq.). He also rejects the suggestion of the name of a jurist (Cassius; Caesaris Balinurn) on less convincing grounds. He treats the whole clause as a gloss. He considers that the act, as is shows 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 conception later servus or per epistolas. 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 Kruger, ad h. i. Schneider thinks the text rational as it stands (Z. S. 6. 189; 7. 31 sqq.), but see Hülsner, Z. 5. 6. 305 sqq. 7. 44 sqq. 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 per epistolas, e.g. and Fraschmann, post, pp. 574, 575.
9 Op. cit. 50. 17. 77; see App. IV.
developed disregarding these considerations, and from the generality of Gaius' language in connexion with annumuli 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 shown 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.

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\(^5\). The rule as to the patron does not recur under Justinian's law and even traces of it are hardly discoverable\(^6\). 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 wrong-doing, and convicted or made to fight with 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\(^7\). 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 for his offence, the badness of the slave, he became a

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1. G. 1. 29–31, see also G. 1. 18. 2. G. 1. 47. 3. Prohibet lex, Ulp. 1. 15; censat libertati, censat, Fr. Do. 16; nil agit, liberi non sunt, G. 1. 37. 4. See further, post, p. 583. 5. In. 1. 6. 3; C. 7. 11. 1. No merit of the slave would save the gift if creditors suffered, 40. 2. 33. 6. 40. 9. 10. 7. P. 3; D. 38. 5. 8. P. 3; D. 38. 5. 9. See Bodemeyer, op. cit., 22. 10. G. 1. 13; Ulp. 1. 5, 11.
ensured the attendance of a number of grateful

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*.

The disabilities resulting from this degradation are very grave, and Paul shews that very definite rules were laid down as to the *legitimus numerus*. If any other restrictions applied, not even the last, in a case where the master knew that the man was innocent, at any time before the punishment was actually inflicted, the fact would not be a bar to future complete liberty.

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 creditor, 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*, 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, and it was only against the restrictions of the *lex Aelia Sentia* that the exception held good.

*Lex Fufia Caninia* (B.C. 2)*.

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. It was a natural consequence that manumission became frequent. It appears indeed that the number of *liberti* 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 *liberti* and

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1. G. 3. 64-70. 2. G. 1. 27; 1. 160. 3. P. 4. 12; 3-9. 4. G. 1. 33; Ulp. 1. 14; Ins. 1. 6; C. 6. 27; 1. D. 40. 4. 27. 5. *Ante*, pp. 905 seq. 6. Ulp. 1. 14. 7. 28. 5. 84. pr. 8. See Mitteis, Z. S. S. 27, 257. 9. See the cases mentioned in Apuleius, Apol. 17. 10. See also Wallon, *op. cit.* 2. Ch. III.

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CH. XXIII. *Lex Fufia Caninia*  

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. The maximum in each case is called the *legitimus numerus*. The *lex* further provided that the power of manumission never to be diminished by an increase in the number of slaves. If more than the right number were freed, only the earlier, up to the *legitimus numerus* were free. To prevent evasion the *lex* required that they should be freed *nominativa*: the *se*, 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." If the gift broke this rule, *e.g.* a gift of freedom to "all my slaves," the whole gift was void. 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 *qua* in *fraudem eius facta sint*. Other similar attempts to evade the *lex* were met by *senatusconsulta*, which have, however, left little trace. There may be, indeed, one case. The *lex* applied only to manumission by will or *codicill*, and Gaius tells us that it left manumission *vidicta*, *censu*, and *inter amicos* quite free.

His epitomator makes a similar remark, substituting in ecclesiar 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*. Perhaps this is the effect of a Senatusconsult.

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. We are nowhere told how common slaves were reckoned. As the common owners' rights in the slave were in nearly every case *pro parte*, 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* is rather ambiguous. It is plain, however, that unless it did apply to them it must have been nearly nugatory, and, Paul, dealing
with this lex, gives, as an illustrative case, *qui ex ea ancilla nascetur*, which could have been effective only as a *fideicommissum*. It has been suggested 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, abolishing the rule, is clear for its application to *fideicommissa* in later law, and he cites a text of Paul in the Digest which seems to shew that it applied in the time of Nero and Tatian. There seems little reason to suppose a Senatusconsult: such a case would be contained in the

Before passing to the law of Justinian, it may be well to discuss shortly the circumstances under which the status of latinity could arise. The following list has no claim to completeness.

1. The slave informally freed by a competent dominus. It has been shown by Wlassak that the classical law knew of but two of these modes, *per epistolam* and *inter amicos*, and that manumission in *convivo* is of much later introduction. 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. The form of manumission *inter amicos* is not very precise. In one, the record of which has come down to us, the witnesses do not sign and are not named. The transaction was in Egypt and some of its provisions are coloured by Greek law, 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 *convivo* and the enactment of Justinian abolishing latinity gives other instances of the same thing, such as declaring *apud acta* that he is a son, giving him or destroying the papers evidencing his slavery, and perhaps also the direction in the will that he is to stand, pileatus, at the grave of the deceased. 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 show of humanity, the men are to be cites, 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, but all this means is that the slaves must be *evidenter denotati*.

2. A slave informally freed by a master under 20, with the approval of the Consilium.

3. A slave manumitted under 30.

4. A slave manumitted by his merely bonitary owner. 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 fictiae* 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 (*officio iudiciis* or by the Praetor himself in those cases in which he carried out the *restitutio*) as would restore the quirital ownership.

5. By an edict of Claudius a slave cast out because of sickness became free and a Latin, provided the master *pubie* ejected him and, having the means, took no steps to have him looked after or sent to a hospital.

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, the slave, on manumission, became only a Latin, as a sort of punishment. 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
manumission. Justinian made it give citizenship, 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.

9. A libertus ingratus under the conditions already discussed.  

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. 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. The date of our rule is not known: Pomponius 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.

12. Slaves who detected rape were under certain circumstances made latins by Constantine. Justinian gave them civitas.  

13. A freewoman, sciens vel ignora, cohabiting with a slave of the Fisc, remained free under a provision of Constantine, but the children of the union were latins.

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.

15. The sc. Silanianum may have contained a case, to be discussed later.

16. A pledged slave could not be freed. 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. But Justinian does not mention this case in his general enactment.

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. 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. 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.

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.

20. If a slave was freed conditionally by will, he did not become a statutiber till the heir entered. We are told, however, that if he was usucapted, in the meantime, the Praetor would protect his liberty. In another text it is said that his spes libertatis is restored favore sui. The language of the first text has led to the suggestion that the slave, on the satisfaction, became a Latin. 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, 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 Gerold, Manuel, 225, and post, p. 594.  
5 40. 5. 55. 1.  
6 40. 7. 3. 3.  
7 A. Faber, Coniect. 16. 10.  
8 Bodemeyer, op. cit.  
9 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.

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1 C. 7. 6. 9.  
2 C. 7. 6. 4; ante, p. 70; post, p. 603.  
3 C. 7. 6. 7; ante, p. 423.  
4 C. 7. 6. 7. Other texts imply a power in the heres to free, e.g. 38. 3. 3; 40. 4. 61; 40. 7.  
5 C. Th. 2. 22. 1; ante, p. 423.  
6 C. Th. 6. 7. See post, p. 596.  
7 C. 4. 3. 32.  
8 40. 4. 61. 2; post, p. 596.  
9 A. Faber, Coniect. 16. 10.  
10 Ante, p. 416; post, p. 592.  
11 C. Th. 2. 22. 1. There were probably other cases of the same type, post, p. 598; C. 7. 15. 3.  
12 C. Th. 4. 12. 3; ante, p. 417.  
13 C. 7. 6. 6.  
14 Post, p. 603.  
15 Post, p. 573.  
16 Pr. Dos. 15. See Krüger and Huschke, ad loc.  
17 C. 7. 6.
CHAPTER XXIV.

MANUMISSION UNDER JUSTINIAN.

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. He repealed the sc. Claudianum, with its connected legislation. He abolished the classes of latini and dediticii (thereby doing away with the rule that the slave must be 30, and with the restrictions as to criminal slaves who were freed), and he repealed the lex Fufia Caninia.

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. Manumission by will of course still remains. The general effect of legislation of the later Empire having been to abolish the prætorian will, the question whether freedom can be given by it is obsolete. The place in the will is now immaterial. 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. 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. 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, 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.

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.

CH. XXIV] Manumission by Will under Justinian 553

In the same way a gift of the hereditas to servus proprius implies, in Justinian's time, a gift of liberty. Thus where a slave is instituted with a gift of liberty, and, in the same will, the gift of liberty is addeed, this cannot be construed as taking away the institution, for it is a rule of law that a hereditas cannot be addeed. The institution stands good, and this implies a gift of liberty, so that the slave takes the inheritance, with liberty. 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. 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. 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.

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. 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. 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

Institutio.

1 In. 1. 6. 2; C. 6. 27. 5. 1.

2 C. 7. 15. 2. In. 1. 7.

3 The chief text (26. 2. 32. 2) gives liberty at once but delays the tutela till the liberius is 35. This is due to Justinian, but how far the alteration goes is uncertain.

4 26. 2. 22.

5 In. 1. 14. 1.

6 26. 2. 10. 4; ante, p. 463.

7 In. 3. 12.

8 C. 7. 5. 6; In. 1. 5. 3. He remarks that dediticii have disappeared already in practice.

9 C. 6. 27. 5. 1. In. 1. 7.

10 C. 6. 27. 5.

11 In. 2. 30. 24.

12 In. 2. 30. 34.

13 Vgl. p. 463. The chief text (26. 2. 32. 2) gives liberty at once but delays the tutela till the liberius is 35. This is due to Justinian, but how far the alteration goes is uncertain.

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directs that the institution is to take effect notwithstanding the legacy. If a slave was left as a legacy, and, later in the will, there was a papular substitution in his favour without a gift of liberty, the effect was doubtful. Justinian decides that the legacy is in suspense, substitution in his favour without a gift of liberty, the institution is to take effect notwithstanding the legacy. 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. The reading of the condition into both gifts presents no difficulty: it was the settled rule. 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 unbourn persons, so that they shall be born free, and, if there are twins or more, all will be free. The latter part of the rule does not look very rational: we should have expected the first born to be free.

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. 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.

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.

3. Formally recording the slave as a son, apud acta, involving of course an official witness. We have seen that in this and the other case now to be stated, latinity had resulted, though probably not in classical law.

4. Giving to the slave, or destroying, in the presence of five witnesses, the papers evidencing his slavery.

Other informal modes allowed were:

5. If by order of the deceased or of the heres they stand around the funeral couch, or walk in the funeral procession, plecti, i.e., wearing the cap of liberty.

6. If a slave woman is given in marriage to a freeman with a dos.

In the other cases, apart from informal manumission, in which latinity had been conferred, ciuitas was now to result.

B. EFFECT AND REQUIREMENTS.

I. All valid manumission makes the slave a ciuis, and a declaration that a slave freed is to be a latin is to have no effect.

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.

(b) A minor may free vindicta before the consilium for a cause approved by that body. An impubes needs auctoritas tutoris.

(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.

(d) The rule does not apply if the slave has been received inter vivos, from a competent person, on a condition to manumit.

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.

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. This seems to conflict with the principle that invitum beneficium non datur. 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. But manumission is not dereliction, and to be a Roman citizen is hardly
"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.

IV. The manumission must be nominatim. 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*. It is somewhat confused with the rule that liberty cannot be given to an *incerta persona*, which is itself based on the *lex Fufia*. But this wider rule has clearly disappeared in Justinian's law, at least in analogous applications. Error in name is immaterial if there is no uncertainty if it is not clear who is meant. 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 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. Others held that if the gift is void if there are several of the same name and there is nothing to shew which it is, and, in general, the gift is void for uncertainty if it is not clear who is meant. 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 it 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 gift may be made in favour of an unborn person. 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*, and Justinian elsewhere 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 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 *ipsa facto* in such a case, but to be *liberti* of the *heres*. Whether "born free" is to be taken as meaning *ingenius* is not clear: it seems hardly probable. What he says is that *cum libertate solem respeciat*. The logical difficulties are obvious: they are discussed elaborately but not to much purpose by the early commentators. It is in no way inevitable that Justinian should have considered these words as meaning *ingenuitas*, though they cannot in strictness mean anything else.
V. Manumission must be by the owner. We have already 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. 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. 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.

There must, however, be real ownership. To free another man's slave is a nullity: in some cases it is penalized. 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. 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 the manumission was good or would be validated as far as this represents classical law it presumably means no more than that it is a nullity: in some cases it is penalised. We are told, however, that A man tricked the Emperor into thinking he was free before doing so, being liable for the value of the slave holder to free. He is owner and the gift is good, but nothing is said about favor libertatis. The reason is noticeable that, notwithstanding its date, there is no trace of this narrow conception of the family. It does 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 fideicommissa on behalf of his father in the case of the son he provides that if a slave is given 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 additionem manumissio...convalescit. 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. 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. Acta, pp. 464 sqq. 2. 36. 1. 26. 2. 3. C. 7. 10. 3. 4. As to this and the case of servus legata post, p. 580.

668 Manumission must be by the Owner

In one text we are told that a coheres rogatus manumittit, can, by a rescript of Pius, free the slave even before partition, (when he cannot be the sole owner,) where the other heres is an impubes non rogatus. But this is part of the law as to the enforcement of fideicommissum not carried out.

Other exceptional cases may be noticed. 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. 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.

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.

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 fideicommissa on behalf of his father in the case of the son he provides that descendants 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 that if a slave is given ab extraneo to a fideicommissi 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.

VI. Manumission in fraud of creditors is void. Nothing is said by Justinian in this connexion about fraud on the patron. The reason

1. 40. 5. 30. 6 post, pp. 611 sqq. 2. 40. 5. 24. 3. 3. 40. 6. 30. 6 4. 24. 2. 5. 24. 32. 6. Post, pp. 457 sqq: App. v. 7. C. 7. 15. 1. 8. C. 7. 15. 1. 9. 40. 5. 24. 3. 10. C. 6. 61. 8. 7. 11. See also 40. 12. 9. 2. 12. Accarias, Précis, §69. See also 40. 5. 11. Bodemeyer, op. cit., 52.
for the disappearance of this from the rule is not clear. No doubt
Julian 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 rearrange-
ment 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 patro~i gestum revocabtur.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,6 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.7 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.8

The general principle is that the manumission, to be void, must
have been intentionally fraudulent.9 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.10
In another text in which the same rule is laid down, Julian
seems to have no doubt, but probably his conformity is due to Tribonian.11 It
has been suggested12 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.13

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 manu-
mission, though the text hints at an abandoned view that the fact was

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1 The lex Aelia, which introduced the rule, is not much concerned with latins.
2 Demangeot, Droit Rom. 1. 392. 36; 9. 1. 37.
3 G. 1. 37; Ulp. 1. 15; Girard. Maconl, 190; Sohn, Inst. § 32; Murhead, Rom. Law. 337.
4 G. 1. 37; 47; Ulp. 1. 15; Fr. Dom. 18; In. 1. 6. pr.; D. 40. 9. 16. 2; 42. 8. 6. 6; C. 7. 11. 1.
5 40. 4. 57. 60. 9. 6. 1.
7 There is reason for the doubt. If the gift is valid these slaves could have only the value of
statusi~i, however insolvent the estate was. If an insolvent heres entered the loss to
creditors might be serious. See post. p. 565.
8 CH. XXIV] Manumission in Fraud of Creditors
9 enough without knowledge of it. The source of the text is a passage
from Gaius, which is cited in the Digest, where, however, nothing is said
about knowledge. 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 as it certainly
was the Sabinian. 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 patron, the gift is void if either knows of the insolvency. The
rule applies only to an ordinary voluntary manumission. Thus it has
no application where the manumission is of a slave received ut manu-
mittatur: such a person would be free without manumission if the
direction were not carried out. So also where the manumission is under
a fideicommissum, or is in return for money.10

If it is given fraudulenti animo in a codicil, it is bad though at
the date of a previous confirmatory will the testator was solvent,11 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.12 Thus insolvency at aditio might destroy
a gift designed in fraud, but solvency at aditio would always save it.13
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.14 Scævola in two texts15 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 damnum, 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-

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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. 32.
2 40. 9. 10.
3 Post. p. 629. 28. 5. 56; Fr. de i. Fisci, 19.
4 40. 9. 16. 5.
5 40. 10; 49. 14. 45. 3; Fr. de i. Fisci, 19.
6 Post. p. 629. 28. 5. 56; Fr. de i. Fisci, 19.
7 C. 7. 11. 5. As to fideicommissary gifts, post. p. 565. The texts say nothing of collision.
9 40. 9. 16. 5.
10 40. 9. 16. 5.
11 C. 7. 11. 1.
12 2. 14. 7. 17--10. The texts give further details.
vailed was that it was immaterial. In a text which seems to say the contrary it is clear from the context that a now has dropped out. 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. It has been suggested that the reason for this rule is to induce the heres to enter. 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 and, unlike other provisions of the legate, it applies to manumissions by peregrines. Most of the texts apply to direct gifts by will, obviously the commonest case, but the rule applied equally to gifts inter vivos, and to those by way of fideicommissum.

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. There is, however, one distinction to be noted: a claim on account of legacy or fideicommissum is a sufficient debt. But if the debt is merely a conditional legacy or fideicommissum due from the manumitter, this is not enough, 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. 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. 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 use his right. 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.

The creditor may be an individual civis, a corporation, or the Fisc, animus fraudandi being as necessary here as elsewhere. The Fisc does not seem to have had any privilege in the matter in classical law, 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.

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. 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. In another text however, from Papinian, and apparently from the same book, 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 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 show no trace of any such distinction. And when we remember that Julian, in speaking of fraudulent intent, 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.

We have seen that the lex makes the manumission absolutely null. If it is set aside the man never was free and thus he is fairly called a statuliber in the intervening period. There are, however, some texts

1 As this will occur if at all after adito, the gift is in effect conditional. See A. Faber, op. cit. 218.
2 40. 9. 11; 49. 14. 45. 3; C. 7. 11. 5.
3 As to 40. 9. 16. 9; see post, p. 664.
4 40. 9. 11. The nullity was dependent on certain steps being taken: the Fisc itself could not take these steps.
5 42. 8. 15.
6 J. a. f. 10. 2.
7 40. 9. 25.
8 A. Faber, op. cit. 292.
9 Bodenmeyer, op. cit. 25, 24.
10 42. 6. 15.
11 A having two slaves, S and P, and no other property, promises "S et 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 revoicare in servitutem. 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 retroh placiuit. Others having nothing to do with the Fisc use similar language. 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 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. 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 and senatus consultula 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 the lapse of five years from a traceable eventus.6 What is the reason of this? It must be remembered that it was only by adoption of the Sabine view that the rule was reached which made animus

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.4

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 show that they alone can. 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, it is clearly laid down in three texts that the heres of the manumitter is barred from bringing proceedings. 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 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.

There is some difficulty as to the application of the rule about fraudulent manumission in the case of fidieommisary 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. What is the reason of this? It must be remembered that it was only by adoption of the Sabine view that the rule was reached which made animus
Manumission must be in Perpetuity

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. If a man frees a slave under a fideicommissum contained in a codicil which is afterwards shown to be a falsum, or by way of fulfilling a condition which is afterwards shown to be, from any cause, not binding, the manumission is still valid.2 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. Even where the gift is such as to work a fraud, the gift is good.4 Even where the gift is such as to work a fraud, the gift is good.4

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.4 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.4 Thus liberties which have taken effect, by the aditus of the minor, are not undone by his obtaining restitutio in integrum.5 If the minor is 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.6 So when a heres under a fideicommissum to hand over the hereditas frees a slave, the gift is valid.7

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The principle is 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 shown, the manumission is good.1 If a minor sells a slave and the buyer frees him, and the minor is restititus, the liberty holds, even though the slave managed the affair in fraud.2 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 restititus after he has freed.3 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.4 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.2 If a will is void direct liberties are null.4 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 honorum possesso contra tabulas, but not otherwise.4 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.8 But we are told that fideicommissary gifts must be carried out.4 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

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1 40. 4. 33. 34; the rule is the same in Jewish law. Winter, Stellung der Sklaven, 35. 36.
2 C. 7. 1. 2. 40. 4. 47. pr., 1; 6. 3. 30.
3 37. 14. 29. 1.
4 4. 3. 32.
5 4. 4. 9. 6; 6. 3. 11. 5.
6 4. 4. 10. C. 7. 2. 3.
7 5. 2. 9. 9. As for the Querita Falcidia.
8 40. 4. 25. But see post, p. 609.
9 5. 2. 8. 2. 4. 4. 46.
10 4. 4. 11. 1. This has been retouched though it may represent classical law. Gradenwitz, Z. 8. 33. 346.
11 4. 4. 47. pr., 1; 6. 3. 30. 4.
12 4. 4. 7. 10. 5. 2. 8. 9.
13 4. 4. 11. 1. This has been retouched though it may represent classical law. Gradenwitz, Z. 8. 33. 346.
14 4. 4. 47. pr., 1; 6. 3. 30. 4.
15 5. 2. 8. 2. 4. 4. 46.
16 6. 3. 16. 9. 28; unless the institution also takes on intestacy, C. 6. 4. 26 b.
Cp. 30.81.4; to be treated as making further inroad on the principle that if the will is void or avoided by erection into a dominus. 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. 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.

If, as may happen, the will stands partly good, after the querela, all the liberties both direct and fideicommissary stand good.

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. In one text it is said, apparently in error, that the slave's value is to be paid. 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 void.

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, sequum est. The same rule is applied where the querela is successfully brought after five years, ex magna causa, 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 Modestinus quotes Paul as holding that fideicommissary gifts must still be carried out, 2 aurei being paid for each. 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, 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. 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 manusmitter. 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. Whether this was to be calculated on the basis of 20 solidi per head we do not learn.

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. 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 fideicommissio. 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. As the text puts it, the manumissi have
not to pay the 10 aurei, which shows 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 wrong-doer. 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 duty to hand over, who frees a slave is liable ex fideicommissio, and this, at least in later law, whether he knew of the fideicommissum or not. 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. 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). 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. In fact the text (of which this clause is certainly compilers’ work) seems to rest the claim not on dolo, 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, but there is the de facto difference, that while he is in libertate, the statuliber is in servitute, pendente conditione. Similarly unreal is the case of a manumission void because the manumitter was vi coactus. So, too, new enslavement for ingratitude is not an exception: freedom does not involve incapacity ever to become a slave.

But though manumission could not be in diem, it might, as we have seen, be conditional or ex die. 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, 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. We must remember that even if there is no condition, a slave in whose favour such a gift has been made is in loco statuliber, and this is not altered by the presence of a condition: in such a case, cum sua causa alienatur. 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. 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. 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 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 usucipated. 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. 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 statulibers. 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. 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. 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.
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 usucapied. 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.

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**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

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\(^1\) 40. 7. 1. pr.  
\(^2\) Festus, *s. v. Statuliberi.*  
\(^3\) Even though the pledge covers other things of greater value than the debt, 40. 9. 3. 2.  
\(^4\) *C. 7. 8. 4.* A *puppillus* 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.  
\(^5\) 40. 9. 27. 1; *C. 7. 8. 5.*  
\(^6\) 40. 9. 5. *Mommven omits obligatum:* others insert *omnis,* *Cp.* 40. 1. 10.  
\(^7\) *Cp.* 40. 1. 10; 49. 14. 45. 3; *C. 7. 8. 2, 3.*  
\(^8\) 48. 19. 33.  
\(^9\) 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.  
\(^{28}\) 28. 9. 30. The case is not within the rule of the *lex Aelia Sentia.* The text adds *ita tenus si paratus est primo creditoris 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 ulla voluntate liber fit. It seems clear that he is speaking of payment after the act of manumission. So an enactment of 223 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.

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 and the rule does not rest on the lex, 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 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, so that we have not to do with tacit conditions on a manumission vindicta. 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. It is noticeable that both in the enactment of 223 and in Paul’s text, 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, others show that the two rules are independent. A general hypothec is no bar unless it conflicts with the lex. Solvency is immaterial. It was not the lex but a provision of Severus which made it possible to institute a pledged slave as a necessarius heres. One at least of the texts referring to the rule was written of fiducia, 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

![Image](image-url)

CH. XXV] Manumission of Common Slave

could not not have been saved by release before aditus: he must have been the testator’s when the will was made. Assent of the creditor, the owner, 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. 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, and Papinian’s Quaestiones. Hence the enquiry addressed to Scaevola as to whether the rule bound the heres of the debtor, and Ulpian’s treatment of it as a legal subtlety.

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, 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. 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. 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 show 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. The rule barring manu-

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1 40. 9. 26.
2 C. 7. 8. 5.
3 40. 9. 27. 1; C. 7. 8. 4.
4 C. 7. 8. 2.
5 See ante, p. 550.
6 C. 7. 8. 5.
7 C. 7. 8. 6.
8 C. 7. 8. 7.
9 Fr. Dos. 16.
10 C. 7. 8. 8.
11 In the text, however, mean merely that he cannot cense unless he has a causa. But this seems difficult to reconcile with 40. 2. 6.
12 C. 7. 8. 9.
13 See on these matters, Vangerow, Latini Iuniani, 58.
14 See, e.g., Krüger, ad h. l.
15 Ante, p. 453.
16 C. 7. 6. 12a.
17 40. 9. 26. 10.
18 Ulp. 1. 18; P. 4. 12. 1; Fr. Dos. 10.
19 P. 4. 12. 1; Ulp. 1. 18.
20 40. 2. 4. 2.
21 The text may, however, mean merely that he cannot cense unless he has a causa. But this seems difficult to reconcile with 40. 2. 6.
22 48. 19. 33; ante, p. 464.
23 40. 9. 27. 7; C. 7. 8. 4.
24 As censure without economic content is hardly, it would seem, a rea. See the significant C. 8. 13. 15.
25 40. 9. 6.
26 40. 5. 24. 10.
27 Fr. Dos. 10.
mission by one owner did not of course prevent the man from becoming free by other causes. If all joined the slave was free, and they were joint patrons. If they were under 20 it was enough if one shewed cause. We are told that a minor common owner freeing must always shew cause: it is to be presumed that in this case, the fact that the other has a causa is sufficient. 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. 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. 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. Where a slave was left unconditionally to two, and one freed him and the other afterwards repudiated the gift, the manumission was good, on principles already considered. The repudiation made the other legatee sole owner, retrospectively.

Some points of interest and difficulty arise where the manumission is accompanied by an institution of the slave. 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. 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. 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.

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

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necessarius, the testator having been part owner at the time the will was made. 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. 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. Ulpin appears to add 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 Saltowski observes 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 communitatis failed, where there was also an institution, the manumission was simply ignored, exactly as it was in the case of a servus proprius.

The effect of manumission by one of common owners is completely changed by Justinian. 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. 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.
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 patroenatus* 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 *soctius*. Whatever the testator's intent may have been, it is now, *favo libertatis*, to be treated as a gift of liberty.

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. 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. 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 *mulites*, but was not confined to a specific case as the earlier one had been.

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. Justinian regulated this matter in a way to be stated shortly.

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 only on the expiration of the usufruct. 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. 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. The act of the owner shews that he did not contemplate the natural expiry of the usufruct as a condition. 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 by can be conditional, while one *vindicta* cannot. Such a manumission was good if the fructuary assented (even though he was under 20, for he was not freeing), with the *auctoritas* of his tutor if he was a pupillus. 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*. This is a perfectly logical effect to be produced by the *cessio in iure*. The same thing is said elsewhere, with the addition: *sed latitum...*. 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. 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*, 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*. There is no reason why informal manumission should not have made...
the man a latin at the end of the usufruct, and probably the Dosithean fragment was about to lay down some such rule. A manumission vindicta, regarded as such, could hardly have had such a suspended operation. 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. 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. 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, 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.

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. 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. 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 retrospectively, to vest the thing in him to whom it would have belonged apart from the legacy: in this case the other legatee. The two were at no time joint owners of the slave. The liberty dates from the manumission.

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. Ulpian quotes Marcellus as saying that if, where there was such a gift, the heres freed the slave, the manumission was good, 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. The Digest quotes the same doctrine from Marcian. 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. 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, 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, 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. 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
might not benefit the other legatee. In an enactment of A.D. 531, 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: 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. 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. As Gaius seems to express a view which he rejects in his Institutes, 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, in which he prohibits dealings with things legated, assumes a prima facie right to alienate such alienation irrevocable. It is hardly possible to apply the rule that the effect of such alienation should 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, but they may seem difficult to reconcile with what has just been said. 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 Juris, with the exception of one which has not been deciphered. 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, with the effect of becoming patron and heres legitimus. 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. 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 which he has over the libertus, either ipso iure or expressly imposed, or even for the slave himself. The gift is valid, notwithstanding that it is a gift from wife to husband, just as a gift to him, ut manumittat, would be. 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 bontis, or ex obligatio, including anything specially imposed, even though after the manumission. Thus if he accepts the man as debtor or surety iure patroni, the
Manumission of Servus Dotalis [PT. II

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 patro
den, 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 by manumissions, and in that case there is no difficulty for the question of disposal of the slave. After that time the heres may free, unless his culpa has delayed the husband in bringing the charge 12.

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 13. 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 adultery. The rule is laid down in the provisions Iulia de adulteriis, quod uidem perquam durum est, sed ita lex scripta est 14. Whenever under these rules they cannot be freed, they can be tortured 15. 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 16. If such persons, dying within the 60 days, manumit by will, the slave is a statutus liber; the condition being that there is no accusation within the 60 days 17. Though the husband dies within the 60 days the bar still continues, as the father can still accuse 18. 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 19. Similar rules are applied if the manumission is in fraudem legis, i.e. in contemplation of a divorce 20. 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 21.

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 22, and a direction not to sell includes a direction not to free 23. 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 40. 9. 3. 3 40. 9. 3. 4 40. 9. 13. 5 40. 9. 14. 6 40. 5. 49. 2. 7 40. 5. 49. 3. 8 40. 9. 3. 9 40. 9. 3. 10 40. 9. 14. 11 40. 1. 9. 12 12 40. 9. 3. 2. 13 C. 4. 51. 7. 14 C. 4. 57. 5. pr. 15 C. 4. 51. 7. The conversus is not true: a direction not to free is not a direction not to sell.

1 h. t. 64. 4. 2 h. t. 6. 7. 3 h. t. 2. 4 h. t. 5. 5 C. 5. 12. 3. 6 Girardi, Manuel, 990. 7 23. 4. 29. 2. 8 Ante, pp. 304, 305. 9 There is no reason to suppose a direct gift construed as fideicommissary, facere libertatis. 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 40. 17. 136. 1. 10 Girardi, Manuel, 990. 11 40. 9. 12. 14. 9. 12 C. 9. 3. 13 40. 1. 9. 12. 14 40. 9. 2. 15 C. 4. 57. 5. pr. 16 40. 9. 14. 17 40. 5. 49. 2. 18 40. 5. 49. 3. 19 C. 4. 51. 7. Conditio personae eius cohonest. C. 4. 57. 5. pr. 20 40. 1. 9. 12 21 C. 7. 12. 2. pr. 22 C. 4. 51. 7. The conversus 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. 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. 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. 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 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. It may be applied to a slave of the testator or of the heres, but not it seems to one of a third person.

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, 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 as laying down or mentioning the rule in most general terms, not confining it to heredes extraneus, but it is quite clear that there were possibilities of making the slave a civis in some cases. Pomponius observes 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 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 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

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, 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, as it ordinarily does in manumission inter vivos. The reason is that a tutor has, in general, no power to authorise gifts. It should also be noted that in any manumission, by a pupillus, or a pupilla under 20, causa must be shown. If the tutor refuses to authorise a manumission due under a fideicommissum the same rule applies as in the case of infans.

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1. Ante, p. 580. 2. 40. 4. 61. 3. 25. 3. 3; 4. 3. 32. See also 40. 7. 3. 15. Ante, p. 550. 4. 36. 1. 67. 5. 5. 4. 1. 6. 36. 1. 92. 7. 40. 4. 61. pr.
Manumission by Corporations

A minor under 20 must of course shew cause whether he has a curato or not, and we are told repeatedly that a minor over 20 who frees cannot get restitutio in integrum. 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.

A furiosus is incapable of freeing, and his curato cannot free for him, as manumission is not administration. The imposition of a fideicommissum on a furiosus creates an obvious difficulty. He cannot authorize his filius, if he has one: his personal iussum is impossible. Octavenus suggests as a way out of the difficulty that the curato 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 infantiya was to apply.

IX. Slaves of corporate bodies. Marcus Aurelius gave a general power of manumission omnibus collegis quibus coeundi ius est, and they, and municipalities whose slaves are freed, have rights of succession and the other patronal rights. It has been said that before these enactments such a slave if freed could not become a cives. But in fact Varro, the contemporary of Cicero, speaks of libertini of towns, and of their names, in terms which show 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 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. The form of manumission by a collegia is not known. Slaves of

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CH. XXV] Manumission of Public Slaves

towns were freed by a decretum of the local senate (ordo, curia) with the consent of the Praeses or Rector. They took the name either of the town or of the magistrate who freed them. Brunö 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. It seems to have been a common thing for them to give a mancipium in the place of themselves, but there is no reason to think this was a legal requirement: it occurred commonly in other manumissions. Such a substitute was called in some cases vicarius, which, in this connexion, no doubt implies that he was qualified for the same function.

Any person could give a fideicommissum of freedom to the slave of a municipality. And conversely where any townsman suffered forfeiture of his goods, any slave he was bound to free was declared free by the municipal authority.

It is a vexed question whether societates vectigales were, or might be, corporate bodies. The evidence is mainly one obscure text. Into the various solutions which have been offered of the problem it presents we will not enter. If (or when) it was a corporation it would be governed by the rules just stated. Varro seems to refer to freedmen of societates, 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. 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. 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, or for service in

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1 C. 7, 9, 1, 2, 3; 11. 37. 1. 2 Varro, loc. cit. 3 Pontes, I. 291. 4 Acting apparently under the authority of the Senate. It is not, however, quite clear who those slaves were. 5 C. 7, 9, 1. 6 See, however, Wallon, Histoire de l'Esclavage, 2, 600; Erman, Servus Vicarius, 422. 7 P. G. C. 6. 46. 6, pr.; C. Th. 6, 8, 7; D. 88. 1, 44; 41. 3, 15, 17; 41. 4. 9. 8 Erman, loc. cit. 9 40. 5, 24. 10 P. G. C. 8. 1, 369; 3, pro Balbo, 22. 33, 26. 27, 4. 29, 26; Cicero, pro Rab. 11, 8, pro Balbo, 9. 24; Vul. Max. 6, 6, 8, 5, 7; Dion. Hal. 5, 13; Sallust, Catil. 20; Plutarch, Popul. 7; Macrobr. Sat. 1. 11. 40. 11 But see, as to their ownership, post, p. 998.
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. Sempio 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 libertas receives money as well this and indeed the abandonment of property rights in the many cases 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 cives. In one case Cicero says libertas, id est cives, donares^10. But in some cases liberty only is mentioned^11, and it is quite possible that in earlier days when 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 libertas Caesars and it is hardly possible to distinguish between the different grades^14. No doubt the Emperor could free by will those slaves who were his own private property^15, but there is no sign of an attempt to do so in the case of those in any sense State property. Inter eves the manumission was done by the Emperor himself, and there exists a constitution warning magistrates that it is unlawful for them to do it. 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^16, and the Emperor has full patronal rights^17. Whether they were always cives, or the Princeps could make them latini, or did so if they were under 30, is not clear. It may be noted that slaves in the peculium of servus Caesaris could not be freed by them, even per interpellationem personam, i.e. slaves could not be validly transferred ut manumittatur^18. For this rule to be effective the conveyance for this purpose must have been ab initio void. Naturally, fidemissummary gifts of liberty could be made in favour of such persons.

XI Guarly Owners and Slaves. It was provided by Antoninus Pius that a deportatus could not free^19. The rule refers to slaves acquired since the deportation, for of the others he has ceased to be owner. As he is not a cives he cannot of course give cives. But as he has all sure 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^20. A person condemned, even after his death, for maestas, could not free, and thus gifts of liberty in his will were nullified by subsequent condemnation^21. 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^22.

Servi poenae could not be freed^23. 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^24. In some cases there was a permanent rule that the slave could not be freed^25. A slave who had been guilty of some offence under the lex

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^1 Livy, 29 57 26 47, Val Max 7 6 15, Florus 1 22 30
^2 Cicero, Philipp 8 3 11, Polyb 10 7 9, Servius in Aen 9 547, Macrobius 1 11; Plutarch, Sulla 10, Dio Cass 39 23
^3 Livy, 2 6 24 14 32 26 (cp 39 19), Sallust, Catil 30, Macrobius 1 11 40, Plutarch, Catil 39 19
^4 Livy 4 4 5 6 11 22 33 26 27 26 47 27 4 7 4, Cicero, pro Rab 11 3, pro Balb 9 24, Florus 1 22 30, Plutarch, Sulla 32, Don Hals 5 13
^5 Appian B 1 100, Val Max 6 5 7
^6 Livy 26, 47, Polyb 10 17 9
^7 Livy 3 4 4 5 4 6 21 33, 26 27 24 32 26, cp Livy 39 19, Kautop 2 27
^8 Polyb 2 5, Plutarch 7
^9 Cicero, pro Balb 9 24
^10 E.g. Livy 4 45 22 33 26 47 etc
^11 Caeser, de Bell G 3 30, Willems, Serat 2 254, Halkin, Esclaves Publics, 25
^12 C I 6 5 2340, Mommsen, loc cit. The libertas Romana natus a praepos manumission of the lex Rom. Burg (3 2) are no doubt libertas Caesaris. See also C. Th 8 5 8
^13 C 3 22 5 See the information collected by Wallon, op cit 2, pp 106 sqq
^14 See Marquardt, Org Staats 394
^15 C Th 8 5 58 Ther was now no practical difference between publics and Caesaris. As to freeing by the free post, p 625
^16 40 1 14 1 There may have been a Sc authorising the Emperor generally
^17 38 6 8 4 7 11 2, post, p 625
^18 40 22 2
^19 40 23 15 There is a difference between
^20 40 8 3 pr, C 4 6 11 F
^21 Aeb, p 110
^22 30 1 9
^23 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, auct, p 94
Manumission: Cases of Crime [PT. II]

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. Severus appears to have provided that persons condemned to perpetual vincula could not be freed. But as this punishment was always illegal, and the enactment which rectifies 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 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, who, for many offences, were more severely punished than were civis or any freemen.

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 will in question, it was valid, and even a general subscriptio prevented the penalty from applying. 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 shown that the writing was at the dictation of the master, whom the slave was bound to obey. If, moreover, the testator subscribed the will, the gift though not valid was declared by the Senate to impose on the free-the words of the testator to obey. If, moreover, the testator subscribed the will, the gift though not valid was declared by the Senate to impose on the free-the words of the testator to obey. If, moreover, the testator subscribed the will, the gift though not valid was declared by the Senate to impose on the free-the words of the testator to obey. If, moreover, the testator subscribed the will, the gift though not valid was declared by the Senate to impose on the free.

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.

XIII. Cases of Vis and Metus. A manumission is null if the slave compelled his master to do it by threats or force. The same is true if the fear is inspired by a third person or by popular clamour. On the same principle Marcus Aurelius nullifies any manumission ex acclamatione populi. 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, and Dio Cassius credits similar legislation to Hadrian. The reference to others is probably an allusion to a direction by some prominent person to free. Conversely where a man compelled conveyance of a slave to him, and freed him by will, the manumission was null, the reason being that it had been allowed to take effect there would have been no remedy against the heres, as he had not benefited.

XIV. Slave in bonitary ownership. It has already been noted that a bonitary owner could make the slave no more than a servus. The only thing that need be said here is that mere traditio instead of mancipatio is not the only source of this inferior ownership.

XV. Servus Incensus. The only real authority is a very defective fragment of the Responsa Papini anii, too imperfect to admit of certain
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, census. 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 dedictici applied to latins manumitting. The lex municipalis Salpensana provides for manumission apud IIivros in a Latin colony: the libertini are to be latini: causa, in the case of an owner under 20, is to be shown before a committee of decuriones. Elsewhere language is used which confirms the view that the freedman of a latin was a latin. 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 cines.

XVII. Servus Peregrini. Such slaves could not be freed census 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 vindicta were only though the other provisions of the lex were 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.

XVIII. Servus Fugitivus. A senatusconsult, based on the lex Fabia, forbade the sale of slaves in fuga. It was allowed, however, to

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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 municipalis Salpensana, xxii.; Bruns, Fontes, i. 145.
5 Fr. Dos. 12; Phil., Litt. Trai. 5.
6 C. 10. 39. 2.
7 A. &. 256.
8 A. &. 9. 20. 6.
9 The text is not of the highest authority: it is one of those restored by Cujas from the Vesontine ws. now lost.
10 P. 1. 13a. 2; 4. 32. 2; D. 40. 2. 10. Could he mancipate? Cp. Ulp. 20. 7. 13.
11 A. &. 9. 2. 1.
12 A. &. 15. 13; 48. 1. 9.
13 A. &. 31. 1; 55. 1. 37.
that limitation it seems probable that the rule was absolutely universal, and not confined to gift by will.\footnote{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.\footnote{2} This applied even to a manumitter who was not found to be a slave till after the manumission\footnote{3}, and to servi poenae\footnote{4}, who had been cives. And we are expressly told that a slave could not do it indirectly by interposita persona\footnote{5}.

XXII. A dediticius enslaved for living within the prohibited area was sold into perpetual slavery beyond it.\footnote{6} 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. 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.\footnote{7} These were always men and a privileged class.\footnote{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.\footnote{9}

XXIII. Manumission in a will post mortem heredis was void—a rule based on the similar rule in legacies.\footnote{10} Justinian abolishes the rule in general terms.\footnote{11}

XXIV. A liberta cohabiting with a servus alienus without the patron's knowledge was reenslaved without possibility of citizenship.\footnote{12} This rule disappears with the rest of the provisions dependent on the sc. Claudianum, under Justinian's legislation.\footnote{13}

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.\footnote{14} Justinian abolishes the rule which forbade such gifts.\footnote{15}

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.\footnote{16} 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 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.\footnote{17}

XXVIII. The case of slaves sold for export has already been considered.\footnote{18}

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.\footnote{19} 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: it was not one of those transactions which non debent fieri sed facta valent.
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 cases1, 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 poenae2. The cases shortly to be considered in which freedom is given as a punishment to the master can be explained only in the same way3. These are of course cases1, 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. The cases shortly to be considered in which freedom is given as a punishment to the master can be explained only in the same way.

(ii) 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 cases1, 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.

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(iii) 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 cases1, 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. The cases shortly to be considered in which freedom is given as a punishment to the master can be explained only in the same way.
(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. 

(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 *servitus iugum, donec in eodem monachorum habitu duraverit*. But Justinian went further. By a Novel 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 showing 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 *arripatur* in *liberatem*, and the case is compared with others in which liberty is given *ex lege*. It is perhaps not necessary to scrutinize 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 *ingenius*, and even if the master did not know, he has only one year from the ordination in which to reclaim the man. 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 *ingenitiae* 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, *f.n.* Fr. de i. Fisci, 13.
2 C. 1. 3. 37.
3 Nov. 5. 2. pr.—9.
5 C. 7. 13. 1; D. 36. 2. 4. pr.
6 38. 2. 4. pr. He is not in the *hereditias*, pro Фalculia, 55. 2. 39.
8 C. 7. 13. 3. 9 29. 5. 12.
9 C. 3. 4. pr. 29. 5. 16.
10 A. 1. 13.
11 Unless the right is taken away for *indignitas*, 40. 16. 3. 4. Tryphoninus shows 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.
12 40. 8. 5. 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 patrois 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, but this may well have been Latinus in the original. It may be that the Praetor could declare which the man was to be.

(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 Latinus. 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.

(b) An ancula whom her master had given in marriage to a freeman with a written contract of dowry became under earlier law a Latinus. Justinian, as we have seen, turned this into citizenship. 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.

(c) By Justinian's final legislation it appears that a slave treated pro derelicto by his master became free. If this is to be understood literally it destroys the law of manumission inter civos as to form, and also the significance of the words 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. 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. The practice, however, continued, and Justinian found it necessary to confirm the rule in a Novel, 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. 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, 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. 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. 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 prostituetur. 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.

(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. 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.

The origin of the rule is uncertain. For Vespasian, it was clearly an existing institution. It was probably due to an Emperor. As we...
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 prostitutatur_, 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. 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. 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, and Paul says that _Imperator et poter_ (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 herself. All these remarks seem to be glosses on Hadrian's enactment, which we do not possess.

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.

(f) Religious grounds. 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. And Jews who

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 _Pp. 606._
5 C. Th. 16. 9. 2; cp. C. Th. 16. 10. 1. Non-juridic texts, Gothofredus, ad C. Th. 16. 9. 1, and Haeceni, Corpus Legum, 556.
6 C. Th. 3. 5. 5
7 C. Th. 16. 5. 40. 6 = C. Th. 16. 5. 4. 8
8 C. Th. 16. 6. 4. 2

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. 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: its exact meaning will be considered shortly. 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. In A.D. 384 it was provided that no Jew should acquire any Christian slave or attempt to Judaize any that he had, on pain of forfeiture of the slave, and, further, that if any Jew had any Christian or Judaized Christian slave, the slave was to be redeemed from that servitude at a fair price, to be paid by _Christiani_. Which Gothofredus takes to mean the local church. 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_. 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. 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. 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

circumcised non-Jewish slaves, however acquired, were deported or otherwise capitum puniunt.
slave: that was already settled by the statement that the late master
was publicus. 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. In
A.D. 415 an enactment aimed at a certain Jewish dignitary called
Gamaliel laid down a general rule punishing attempts to convert
Christian, or other non-Jewish slaves or freedmen, and circumcising
them. The enactment added that, in accordance with a certain enact-
ment 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 enact-
ment of Constantine to which the law refers has not been traced: it
has been suggested 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, since that concerns freedom, and there is no real
reason to suppose that the expression ecclesiae mancipentus implies a
gift of freedom, any more than the expression fisco vindicetet does.
But it is quite likely that in the same or another enactment Constan-
tine 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
Christian slaves (though they could not acquire them), provided they
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nor would he be able to
3:3s4, 5.
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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.

(c) Slaves noxally surrendered. Under the law as stated in the Institutes, if a slave was noxally surrendered by his master, and he had by acquisitions recouped the injured person for the damage done, auxilio praetorius 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. 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. 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 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 show 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. If he took the latter course this was a case of a slave becoming free without manumission. The prohibition of exposure 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. 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; but it may be doubted whether the new rule made for charity. The reason given is, lest charity degenerate into commercial exploitation.

(e) Sanguinolenti. The rules as to sale of young children, slave or free, have already been considered. It is enough to point out that so far as the institution created true slavery, the power of redemption involves a release from slavery without manumission. How far it did amount to actual slavery was considered in the earlier discussion.

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. This applied only if the will contained no provisions, e.g. a legacy of them, shewing a contrary intent. After varying legislation on legitimatio 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. 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 the gift took effect, and we shall soon consider the effect of refusal to carry out the gift after acceptance. 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. The gift is good, retaining its modalities.

(ii) Suis heres institutus abest. The gift is good if not in fraudem creditorum, which on such facts it is likely to be.

(iii) If the heres abest in a price, he is compelled to buy the slave and free him.

2. Girard, Manuel, 690.
3. C. 6. 4. 4.
4. Nov. 78, 3.
7. C. 7. 15. 3.
8. C. 6. 4. 10; 6. 3. 22. 1 is an apparent exception. Quaest. debe ex supra scriptis heres erit s liber heredes esto. The heres omits and takes on intensity. The liberty fails: its condition is not satisfied.
9. 40. 4. 32.
10. C. 7. 4. 1. 1, a.d. 197.
Effect given to abortive Gifts

(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 refers to fideicommissa, but the rule is applicable to direct gifts. An enactment of 293 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.

(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.

(vi) A Jew who disinherits his Christian son is intestate by a provision of Theodosius, which Justinian does not adopt, but his manusmissions are to stand.

(vii) The case of the Querela brought after five years.

(viii) Ulpian says that if a hereditas is cadoqua, legacies and liberties are good. 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 unseized by a third person. The liberty is protected by the Praetor, somewhat as in the case of delayed fideicommissary gifts.

(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 accounts. But if the will is a falsum all are of course void.

(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: 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. 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.

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 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.

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, 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.

1 49. 1. 14, 15. 8 C. 7. 2. 12. 2. 9 Post, p. 611.
2 29. 1. 13. 4; 40. 5. 42. 8 C. Th. 16. 8. 28.
3 Ante, p. 568; post, p. 650. 7 Ulp. 17. 3.
4 40. 5. 55. 4. As to the possibility that he may have been only a Latin, ante, p. 561.
5 40. 4. 29.
7 C. 7. 4. 17.
8 C. 7. 4. 16. 9 C. 6. 43. 3; In. 2. 30. 23.
9 C. 3. 31. 12. 4 Post, p. 626.
10 34. 9. 5. 4.
11 Ante, p. 525.
12 34. 9. 6. In the same case the name of one slave was struck out, but here too the Emperor decided, favor libertatis, that the liberty should take effect.
13 Ante, p. 525.
14 40. 5. 33. 1. 47. 2; ante, p. 496.
Fideicommissary Liberty overdue

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. To bring the senatusconsult into operation the persons liable have must been summoned with notice—edicta litterisque. The matter being an important one, favore libertatis, it must go before maiorves sudes. Severus and Caracalla provide that if the liberty is not really due the Praetor's decree is a nullity, 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 fideicommisaries, heres or third party. On appearance before the Praetor the cover all cases of fideicommissary liberty. Further, the question whether the gift is valid, but only whether, assuming inability from any cause to appear, and imperfect piece of legislation since it does not provide for the case of praetorian decree and its privative results. 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, provides for the case in which the failure to appear is not attributable, 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 fideicommissuo. Hence follow a number of distinctions as to what is and what is not absence usuta causa, the result of the difference being usually expressed by saying that if the fiduciary is absent usuta causa he does not lose his libertus, while in the other case he does. Person who hides, or simply refuses to come to the tribunal, or who being present, refuses to come, comes under the Rubrianum, as does one who imposes hindrances and delays. Absence usuta causa includes any reasonable ground of absence, not necessarily on public affairs.

If the gift was conditional and the fiduciary has prevented fulfilment of the condition, he loses his libertus as for lattation. 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 has accepted restitutus in integrum, and in all these cases the man is, for obvious reasons, a libertus orcznus 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 honorum possessor. 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 negabatur, the Praetor declares the slave free as if he had been freed ex fideicommissuo. The case primarily contemplated by this senatusconsult is no doubt that of a slave of the fiduciary, 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. Thus the heres who has bought a slave whom he was under a fideicomissum to free is within its terms. 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 orcznus.

If the slave entitled to freedom is alienated, we know that he does not lose his right to be freed. Accordingly these provisions apply also. 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. It is the buyer who is under a duty to free. So when the rogatus is compelled by death or procuratio to pass the slave on to another, Ulpian holds that the "constitutions" may, let the conditions of liberty be made worse. 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 s 26 7. 2. 40 s 39 9. 3. 40 s 36 2. 4. The sc. Articlealium (a.D. 128) provided that the Praetor might try the case though the heres was of another province. 5. 40 s 21 7. Marcus Aurelius provided that like many other cognitio8 it might be tried on holidays. 2 12 2. 6. 40 s 26 s. 7. 1. 4. 5. 40 s 21 9. C. 4. 8. The Rubrianum seems to deal only with wrongful delay, the Rubrianum deals with both cases, the Dasumianum creates the distinction and seems to have come between the others. 9. 40 s 36 pr. 31 4. 10. 40 s 30 3 33 1 36 pr. 1. 11. C. 7 4. 15. 12. C. 4 10. Justianum. 13. Residence at a distance and consenting, 40 s 26 5. Infancy, lunacy, captivity, important affairs, great danger to person or property, being a pupillus, with no tutor or warden. 14. The sc. Articlealium (a.D. 128) provided that the Praetor might try the case though the heres was of another province. 15. 40 s 21 7. Marcus Aurelius provided that like many other cognitio8 it might be tried on holidays. 2 12 2. 16. 40 s 26 s. 17. 1. 4. 5. 40 s 21 9. C. 4. 18. The Rubrianum seems to deal only with wrongful delay, the Rubrianum deals with both cases, the Dasumianum creates the distinction and seems to have come between the others. 19. 40 s 36 pr. 31 4. 20. 40 s 30 3 33 1 36 pr. 1. 21. C. 7 4. 15. 22. C. 4 10. Justianum. 23. Residence at a distance and consenting, 40 s 26 5. Infancy, lunacy, captivity, important affairs, great danger to person or property, being a pupillus, with no tutor or warden. 24. The sc. Articlealium (a.D. 128) provided that the Praetor might try the case though the heres was of another province. 25. 40 s 21 7. Marcus Aurelius provided that like many other cognitio8 it might be tried on holidays. 2 12 2. 26. 40 s 26 s. 27. 1. 4. 5. 40 s 21 9. C. 4. 28. The Rubrianum seems to deal only with wrongful delay, the Rubrianum deals with both cases, the Dasumianum creates the distinction and seems to have come between the others. 29. 40 s 36 pr. 31 4. 30. 40 s 30 3 33 1 36 pr. 1. 31. C. 7 4. 15. 32. C. 4 10. Justianum. 33. Residence at a distance and consenting, 40 s 26 5. Infancy, lunacy, captivity, important affairs, great danger to person or property, being a pupillus, with no tutor or warden. 34. The sc. Articlealium (a.D. 128) provided that the Praetor might try the case though the heres was of another province. 35. 40 s 21 7. Marcus Aurelius provided that like many other cognitio8 it might be tried on holidays. 2 12 2. 36. 40 s 26 s. 37. 1. 4. 5. 40 s 21 9. C. 4. 38. The Rubrianum seems to deal only with wrongful delay, the Rubrianum deals with both cases, the Dasumianum creates the distinction and seems to have come between the others. 39. 40 s 36 pr. 31 4. 40. 40 s 30 3 33 1 36 pr. 1. 41. C. 7 4. 15. 42. C. 4 10. Justianum. 43. Residence at a distance and consenting, 40 s 26 5. Infancy, lunacy, captivity, important affairs, great danger to person or property, being a pupillus, with no tutor or warden. 44. The sc. Articlealium (a.D. 128) provided that the Praetor might try the case though the heres was of another province. 45. 40 s 21 7. Marcus Aurelius provided that like many other cognitio8 it might be tried on holidays. 2 12 2. 46. 40 s 26 s. 47. 1. 4. 5. 40 s 21 9. C. 4. 48. The Rubrianum seems to deal only with wrongful delay, the Rubrianum deals with both cases, the Dasumianum creates the distinction and seems to have come between the others. 49. 40 s 36 pr. 31 4. 50. 40 s 30 3 33 1 36 pr. 1. 51. C. 7 4. 15. 52. C. 4 10. Justianum.
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.

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; if the fiduciary was not in fault he does not lose the libertus. 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.

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. If the rogatus is dead, then so far as alienation, he is the libertus of the fiduciary, in fault or not. 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. If the rogatus dies without a successor the liberty is still good. 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.

It was clear law, apart from these constitutions, that the rogatus must not do anything to make the slave's position worse, and there are texts discussing this in relation to sale. Julian lays it down that one conditionally so freed ought not to be sold without a condition for reconveyance on arrival of the condition. Pomponius says 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 that such a slave can be sold before mora, cum sua causa, Marcin tells

1 40. 5. 20. Where there has been no entry, foci are not in general binding on successors of intestato. Exceptions, ante, p. 609.
2 40. 5. 28. 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 Cassarca provided that if the Prætor declared absent insta causæ causa in fact deed, the decree stood for the benefit of his heres, whose libertus the man would be.
4 40. 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. 5. 4. 4.
6 40. 5. 30. 25. 1.
7 h. t. 36. pr. If the man vests in the fideicus effect is given to the trust, ante, p. 611, post, p. 626.
8 40. 5. 5. A sc. under Hadrian.
9 40. 3. 30. 9–15. The text speaks of the rule as ex constitutio, but it is the sec. which are in question.
10 Ante, p. 525. 11 40. 5. 47. 3. 12 h. t. 34. pr. 13 h. t. 45. 2.

us that one to whom liberty is due cannot be alienated to another so as to bar his liberty or make his position worse.

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. Pius added that if already freed he could claim to be the libertus of the rogatus. 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. In considering the ultimate position it must be remembered that the request to be freed by one or the other brings the senatusconsults 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. 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. 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. 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. One text observes that the choice did not exist if the testator did not wish it, but this is probably Tribonian.

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. Thus the fiduciary manumitter has no personal patronal rights, except that he cannot be in ius vocatus. Hadrian provides that he cannot exact any operae. A person so freed can plead excuses from tutela as against the patron.
On the other hand the fiduciary has iura in bonis1 and, what is a consequence of this, tutela2. If he loses the libertus, he loses all these rights,3 except in so far as he may inherit them as heres patrum4.

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 applies5. If of the rogati some present; and some absent, the senatusconsult (presumably the Dasumianum) requires the Praetor to pronounce which are in default6. The slave will then be the libertus of those not so pronounced, as if they alone had been rogati,7 the shares of the defaulter vesting in the others8. 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 both9. 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 erciusundae or by a utilis actio11. If one of the heredes non rogati is an infans, then, even though there be no latitatio, there is the difficulty that the infans cannot sell his share. For such a case it is provided by the sc. Vitratinum, 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 them12. 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 other will be declared free, whatever the cause of non-assent of the other heres13.

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 latitatur, 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 Emperor14.

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 index, 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 direction15.

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 freedman16. 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 domini17. 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 construction18.

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 fidicommisary liberty is an ingenius19. If he was born before the liberty was due, e.g. while a condition was unsatisfied, or a day not yet reached20, 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 relief21.

The first difficulty in dealing with the rules, is in connexion with the word mora. It appears to contemplate what is sometimes called

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1 Vat. Fr. 225. 26. 4. 3. pr. 1.
2 B. r. 1. 3. 3. 3.
3 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.
4 40. 5. 33. 2. 5 B. r. 22. 2.
6 B. r. 1. 30. 3. 8 40. 5. 30. 6; cp. B. r. 31. 11.
9 A. pr. 64.
10 40. 5. 30. 1. 11 40. 5. 49.
12 40. 5. 26. 9.
13 26. 5. 28. 2.
14 40. 5. 28. 2.
15 26. 5. 28. 2.
16 26. 5. 28. 2.
17 26. 5. 28. 2.
18 26. 5. 28. 2.
19 26. 5. 28. 2.
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21 26. 5. 28. 2.
22 26. 5. 28. 2.
23 26. 5. 28. 2.
24 26. 5. 28. 2.
25 26. 5. 28. 2.
26 26. 5. 28. 2.
27 26. 5. 28. 2.
28 26. 5. 28. 2.
29 26. 5. 28. 2.
30 26. 5. 28. 2.
31 26. 5. 28. 2.
mora ex persona, 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. 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. 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. 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 ingenui5. This is not perhaps to be regarded as laying down any different rule. But Marcial6, after laying down the rule that if born after demand they are ingeni, 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 constitutio, and it is not unlikely that these remarks emanate from Tribonian. We are told in the same extract7 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

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1 Nothing else is properly called mora; Girard, Manuel, 646.
2 *Fideicommisary Liberty overdue* [PT. II]
3 40. 5. 26. 1, Ulpian's deduction from a rescript of Severus to the effect that mere delay in paying a *fideicommisary* has the effect that the creditor was freed; cp. *Arg.*, h. t. 53. pr.
4 40. 5. 26. 2, *h. t. 53, 55 pr.
6 *h. t. 55. 1, 29; 53, 55, pr.
7 *Arg.*, h. t. 55, pr.
8 *h. t. 26. 3, 4.
9 *h. t. 55. 3.
10 *h. t. 55. 3.
11 *h. t. 26. 3, 4.
12 *h. t. 55. 5.
13 *h. t. 55. 5.
14 *h. t. 26. 3, 4.
15 *h. t. 55. 5.
16 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

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they were to be ingeni as if the mother had been freed. It is not said that the mother applied for the freedom. Where the heres was directed to buy and free an ancilla cum filius, 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. 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. Marcial 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. 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. 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 fideicommisuum 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, show that the emperors did not mean even accidental delay to prejudice the freedom of the child. One would have expected the heres to be allowed to free in this case, as the delay is accidental, but it must be noted that the case under discussion is one in which entry was postponed under the *sec. silianum* and *taurianum*, 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.

If the mother (or her successor) having received the child, fails to free, she can be compelled to do so. 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
of one bound to free under a \textit{fideicommissum}. The child is not one to whom the \textit{fideicommissum} referred.

In the same text\footnote{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.} 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 \textit{heres} should free. The case of a child in the possession of the mother is 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 \textit{ingenii}, brought with it the question whether they had rights of succession to their mother and father. As to the mother, the ancients doubted\footnote{In. 3. 11. 1. D. 40. 4. 50; C. 7. 2. 6.}. Ulpian, in a text probably genuine\footnote{C. 6. 57. 6.}, takes a favourable view. He holds that, just as the issue of a \textit{fideicommissum} returning with her, could succeed to her by a rescript of Severus and Caracalla, \textit{quasi volgo quaesitis}\footnote{49. 15. 9; 25; C. 8. 50. 1; ante, p. 308.}, so persons declared \textit{ingenii}, under the \textit{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\footnote{38. 16. 1.} that, saving the right of those otherwseg otherwise entitled under the \textit{sc. Orfitianum}, there are mutual rights of succession under that \textit{senatusconsult} and the \textit{sc. Tertullianum}. But what of succession to the father? In another text Ulpian appears as still arguing from the case of \textit{captivitas}, and holding that if both father and mother are entitled to freedom and there is \textit{mora} affecting each, and thereafter a child is born, he is \textit{suus heres} to his father\footnote{40. 5. 3. 4. 5.}. His language suggests that he would hold this \textit{a fortiori} if the father had been an ordinary \textit{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 showing that even slaves were capable of \textit{affectio maritalis}.

IV. \textbf{Addictio Bonorum Libertatum 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 the position of a \textit{bonorum possessor}, and any liberties given by will or codicil take effect\footnote{In. 3. 11. 6.}

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 Gordan, to \textit{extranei}\footnote{9. 2. 6. C. 7. 2. 6.}. Justinian allowed even slaves not entitled to freedom to make the application\footnote{6. 5. 15. 5.}. 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 \textit{heres ab intestato}, by way of \textit{fideicommissum} in a codicil\footnote{h. f. 15.}. In later law it was enough if there were liberties given \textit{mortis causa} or even \textit{inter vivos}, if there was any possibility that they might be set aside as being in fraud of creditors: the goods might be \textit{addicta} so as to avoid raising this question\footnote{5. 2. 11. 3; D. 40. 5. 4. 5.}

If some of the liberties were simple and others conditional or \textit{ex die}, the \textit{addictio} could proceed at once, the deferred liberties taking effect only if and when the day or condition occurred\footnote{H. 2. The language of C. 7. 2. 15. 5 makes it unlikely that this extension is due to Justinian.}. It could not be made if there were no liberties\footnote{40. 5. 4. 5.}, and the older view seems to have been that if all the liberties were conditional or \textit{ex die}, nothing could be done till there was one capable of taking effect. But the text which states this rule, at least for \textit{die}, 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 \textit{addictio} till after Gordan, (if it was due to him,) had authorised \textit{addictio} to \textit{extranei}. As Ulpian, the writer of the text, was dead before Gordan came to the throne, and the text contradicts itself, it is probable that the compilers had a hand in it as it stands\footnote{In. 3. 11. 5.}, but it must not be inferred from this that they were making a new rule. If \textit{addictio} to \textit{extranei} really dates from Gordan, they may merely have incorporated a long established practice. On the other hand the origin of the rule that there could be \textit{addictio} to \textit{extranei} is obscure. The remark is added at the end of Gordan's constitution, the main part of which is concerned with addiction to a slave. But in one of Justinian's constitutions, it is said\footnote{9. 2. 6. C. 7. 2. 6.} that under the constitution of Marcus Aurelius there could be \textit{addictio} to an \textit{extraneus}. And the rescript itself is addressed to...
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 a fideicommissary liberty was due can get relief against the
*heres* only ex *vista 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 *ipsa facta*, 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 competenter, si modo potuit*

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\(^1\) *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.*

\(^6\) *In. 3. 11.* 4; *C. 7. 2. 15.* pr.

\(^7\) *40. 5. 4.* 2; *In. 3. 11.* 5.

\(^8\) *In. 3. 11.* 5.

\(^9\) *40. 5. 4.* 1.

\(^10\) The case in *40. 5. 30.* 10 is one in which there was a *fe* binding the testator.

\(^11\) *In. 3. 11.* 6.

\(^12\) *40. 5. 4.* 7; *In. 3. 11.* 1.

\(^13\) *40. 5. 4.* 11. Any form of security may suffice, and the *index* must summon the creditors
to nominate one to receive it on their behalf. *Fam. 1.* 3. 9.

\(^14\) *Fam. erciunculus, inter se.*

\(^15\) *40. 5. 4.* 10.

\(^16\) *40. 5. 4.* 9.

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\(^\text{CH. XXVII}\) Addictio Bonorum

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\(^1\) *40. 5. 18.*

\(^2\) *Ante, p. 541.* Justinian's changes as to age must be borne in mind. *ante*, p. 555.

\(^3\) *40. 5. 1.* 3.

\(^4\) *40. 6. 4.* 6. *h. l. 15.* 16; probably both late developments.

\(^5\) *40. 6. 4.* 4. He would be a *latin* before Justinian. As to *tectus* of *latin*; *G. 1.* 197.

\(^6\) *40. 5. 4.* 15; *In. 3. 11.* 1.

\(^7\) *40. 5. 4.* 13. Justinian's recital of the rescript of Marcus makes it appear that the slaves
cannot be given in this case (*In. 3. 11.* 11) and the Digest text suggests the same. This may be
genuine but is rather in Justinian's way of thought.

\(^8\) *38. 1.* 13.

\(^9\) *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. 15.* 1. 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. 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. Elsewhere we are told, also by Ulpian, that, plurumque, the creditors have utiles actiones against him. 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. 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 datu. It is the compilers who apply it to the present case, and in all probability they are responsible for the word plurumque. 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 the actio bonitatis. 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 usuappio had elapsed.

Justinian observes in his Institutes that he has made a complete enactment reorganising and completing the institution. Some of the changes made by this enactment 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.

(ii) Securities must be given for the debts and the liberties. 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. The security for debts was given as we

have seen 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.

(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. 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, forsitam 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. 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.

(vi) If several apply together they get addictio in common, giving security in common both for debts and liberties. 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 annum utiles.

(viii) If a 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.

1 Justinian remarks that the actio Pauliana has made buyers familiar with a rule of rescission within one year, 42. 8. 14, etc.
2 C. 7. 2. 15. 1a.
3 C. 7. 2. 15. 1a.
4 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 addictees and became his liberti, though by the older rule those directly freed were ipso jacto free and liberti orinum, In. 3. 11. 1.
5 Justinian calls the enactment piecerrum (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. 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 addicatio 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. 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. 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. Gains tells us that when the fiscus acquires under the sc. Silanianum, all liberties are good. 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.

Notwithstanding these strong texts, a different view is now commonly held. In one text it is said by Papinian that the enactment of Marcus Aurelius, for the preservation of liberties, applies if, the will being irrestitum, 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 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. 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, a fact expressed in the Edictal rule that the goods are sold, si ex his...
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 (*opere ovetore*) 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 *vacanta*, 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.

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.

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 intervention by the Fisc can upset it. But if the *fiscus* took the estate, the *addictio* would fail if the Fisc took the estate.

VI. A slave transferred ut *manumittatur*. Where a slave was sold or given, to be freed either at once, or within a certain time, or after a certain time, 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 debvstit, sed libertatem quam obtinueras defendere*. It seems probable that the constitution did not in terms apply to gift, but that this was an early extension, ex

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1 See, for a different view and some references, Otto and Schilling's translation, note to 40. 3. 4. 17.
2 40. 3. 4. 19.
3 40. 3. 4. 19.
4 40. 9. 30. pr.; C. 4. 57. 1. 2; 5. 18. 93, etc.
5 40. 1. 20. pr.; 24. 1. 7. 9; 40. 8. 9; C. 6. 61. 8. 7, etc.
6 37. 14. 8. 1; 40. 1. 29. 2. 71. 1.
7 C. 4. 57. 6; D. 18. 7. 10; 24. 1. 7. 9; 40. 1. 20. 2; 40. 12. 38. 1. 9, etc.
8 C. 4. 57. 1.

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1 40. 8. 8; see also Pernice, Labec, 3. 1. 132, and Naber, Mnesogenes, 22. 443. Haymann (ap. cat. 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 would be no talk of bringing it before the time. If in a case of *fidei* the donor revoked the trust the constitution would not apply (post, p. 685) and the action could still be brought after the time fixed. The language of 40. 8. 8 and C. 4. 57. 1 is, as 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. 6. 3; C. 4. 37. 2. Thus its date must be about 148: it has been suggested that there were two of nearly equal date, one extending the other.
3 *Thus ut liberum esset* (C. 4. 57. 3) or even in *libertate mortis* (18. 7. 10) will suffice.
4 40. 12. 35; 40. 8. 1.
5 40. 2. 25; 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. If it is at (18. 7. 10; pr, 40. 1. 20. 3; 40. 8. 9); if it is at *praebere* (post, p. 685), it becomes free at once after the acquiescence of the seller. If it is *causa* at the acquirer's death, 40. 8. 4. If *est* at 9. 3 Paul is made to say that he was free after the slave's capacity of action, *passio*, but the law does not so define the time. *Fiscus* 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 49. 1. 10.
9 C. 6. 61. 6. 7.
10 40. 2. 20. pr.
11 40. 2. 20. pr. ante, p. 541.
they seem, mutatis mutandis, to be equally applicable to other licit gifts between vir et uxor.

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 ingenii: their position is not affected by any subsequent manumission of their mother, which is in itself a nullity. The receiver becomes patron whether he frees or allows the constitution to operate. His position is not, however, quite that of an ordinary patron. 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 ingratios. 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.

But the other rule was apparently expressed in an enactment of Severus and Caracalla, which prevents the manumitter from reenslaving the man, and this must be taken to be the law, at least thereafter. Whether the man be freed or allowed to become free, no operate may be imposed. On the other hand in both cases the patron is protected against in ius vocatio, will be tutor of the slave, if the latter is a minor, and has the ordinary iura in bonis, this being expressly provided for in the constitution. 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 here. If it is afterwards, says Ulpian, he can abstain. Paul appears to say that he can abstain in any case, but his remarks in another part of the text suggest a limitation to the case where the slave nihil commodi sensit, which would agree with Ulpian.

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

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1 e.g. 24. 1. 5. 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 i.e.t: 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, to pass. The jurists utilise the præsens facit invalidity of the gift to produce these results; they could not result from convention inter incapaces.

2 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) Neronius think it good, 31. 31; 35. 1. 37. Pounce, Labeo, 3.1. 269, suggests that in one case there is intent to benefit the receiver while in the other it is a mere mandate.

3 24. 1. 1. 8.

4 24. 1. 9. 1.


6 24. 1. 9. 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". 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.

It has been suggested that the constitution may have provided that the slave freed by its rules should be a Latin. There seems to be little evidence for this and it is negative, as Gradenwitz shows, 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. The same result follows from the texts which say that the stipulation penalty cannot be recovered, since he becomes free by the constitution. Still stronger is the text which says that the constitution itself declares that the man meus libertus est, at legitima eius hereditatis mihi deferetur. Such language could not be used of a Latin.

The mechanism of the transaction is not easily made out from the texts. In the time of Justinian it is clear, formal conveyances having been free at the end of the three years: apparently he treats actio fiduciae 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. Many of these texts tell us that the constitution applies only if the transferor has not altered his mind. Others ignore this point. Most of the texts which speak of a right of revocation have obvious marks of interpolation. 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, 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, and it is clear that there is no right of recovery on mere change of mind. The constitutio dealt only with this case and provided that the man should be free ipso jure 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. 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 that 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 fortified by a fiducia attached to the conveyance. In any case it is clear that the transaction sometimes contained a fiducia and sometimes did not.

The idea of a right of revocation is closely connected with the idea of a right of recovery, and the view that the two ideas go together is beautifully illustrated by the constitutio which speaks of a right of reclamation. This idea of a right of recovery is not in fact new to the constitution, but is an old one. The idea of a right of recovery is not in fact new to the constitution, but is an old one. The idea of a right of recovery is not in fact new to the constitution, but is an old one.
anything which implies it, associates the undertaking with the conveyance, not with a contract of sale. Conversely it has been pointed out that every text that sets out the constitution in detail refers to sale, and it may be added that most of the texts which ignore any right of revocation are cases of sale. 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, but if there was no sign of this they inserted, not consistently, but commonly, a provision for excluding the operation of the constitution. That the power of recovery where it existed was independent of the constitution appears from what seems the only text on this matter which mentions both the constitution and the right of recovery on change of mind. It deals with the constitution in a separate clause and there mentions the exclusion of its operation.

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 constitution. In its earlier form it says nothing about sales, but if there was no sign of this they inserted, not consistently, but commonly, a provision for excluding the operation of the constitution. That the power of recovery where it existed was independent of the constitution appears from what seems the only text on this matter which mentions both the constitution and the right of recovery on change of mind. It deals with the constitution in a separate clause and there mentions only the exclusion of its operation.

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. On the view here accepted that the allusions to ius poenitentiae, though attributed here and there to the constitution, are really due to the compilers, it is not 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.

In one text Papinian is consulted on the question whether there is any action in a case in which there was a sale for 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

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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. 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 condicio ob caausam datis might have sufficed.

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. On the other hand a sale ut manumittatur, after, e.g., one day, would seem a ready means of substituting manumission for cessio in iure as a mode of conferring civilitas, but it would involve loss of the libertas.

The form of the rule, which makes the liberty date from the breach of duty without any need of claim, 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. 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, and if this is not done he can claim his liberty before the Praesides of the province. If he proves his case, the Court will order the owner to free, and if he lattat, or refuses, will proceed exactly in the case of an undue fiduciary manumission. 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. This view is supported by the fact that no

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1 40. 1. 20. 2; 45. 1. 122. 2; C. 4. 57. 6; ante, p. 71. 9 Cp. C. 4. 6. 6.
2 Haymann, op. cit. 56; ante, p. 598.
3 C. 4. 57. 1. An enquirer is told that he has not to claim, sed libertatem quam obtinuvas defendere. This does not seem to mean that he will be defendant in any causa liberatis (post, pp. 564 sqq.): this will depend on his apparent position. It is only emphasising the absence of need to claim.
4 Ante, p. 618. 10 k. t. S. pr.; 1. 12. 1. 1.
5 k. t. 5. 6. 11 Mommsen, ad k. l.
6 40. 1. 4. pr. 12 aere, aere.
7 5. 1. 67.
8 48. 19. 38. 4; ante, p. 404.
9 40. 1. 4. 1. 13 k. t. 9.
10 48. 19. 38. 4; ante, p. 585.
11 40. 1. 4. 1. 14 k. t. 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 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 decease, 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, 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, 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. 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. 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, 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. 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.

It does not seem clear that this is compilers’ work, though some details are interpolated. 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. 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 conductio 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. 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. It follows that the buyer is not released: 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. 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, and even, affectus ratione, on the mandate. The text has been much discussed. As the slave has not paid the price, the constituto 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. But there may be an actio doli against the freedman for reimbursement.

1 Ante, p. 538. 2 18. 7. 4. 3 40. 1. 4. 11. 4 h. l. 18. 5 A. 40. 1. 4. 14. 6 40. 1. 4. 14: Sic et ut partem quis reddat pars altera ex causa lucrativa accuserit discendum et un constitutionem locun habere.

1 Ante, p. 538. 2 18. 7. 4. 3 40. 1. 4. 11. 4 h. l. 18. 5 A. 40. 1. 4. 14. 6 40. 1. 4. 14: Sic et ut partem quis reddat pars altera ex causa lucrativa accuserit discendum et un constitutionem locun habere.

1Gradenwitz, 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 17. 1. 24. pr 7 e.g., if the man is a natural son. 8 e.g., Pernce, Labeo, 3. 1. 185; Van Wetter, Obligations, I. 92; 2. 58. 9 It is not contemplated as a sale ut manumittatur: the consent of the owner was of course necessary for this.
Dioecletian decides a similar problem in terms which seem to shew that he had this text before him. He gives further reasons for holding the mandate to be essentially void. 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, without authority, but ownership is regarded as having passed, which at any rate nothing is said of

The same conflict occurs in the Code. Here three texts refer to enforced completion. An enactment of A.D. 240, of Gordian, 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 Dioecletian 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. The difficulty does not stop here. Paul, who tells us that the liberty takes effect automatically* tells us elsewhere that if the freedom is not given, the money paid can be conducted, i.e. the causa has failed, and one of the constitutions of Dioecletian, 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. Papinian who tells us the liberty* 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, but there is no hint that, after all, he can have it carried out if he likes.

VIII. The slave whose master has taken money to free him*. 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, says that the Constitution of Marcus Aurelius as to one sold ut manumittatur applies here too, i.e. the liberty takes effect auto-

1 C. 4. 36. 1. 2 Aste, p. 216. 3 The case gave the early commentators a good deal of trouble, Haznel, Diss. Domn. 425. 4 2. 4. 10. pr. 7 37. 13. 3; C. 6. 3. 8. 8 32. 3. 42. 9 28. 8. 82. 10 C. 6. 4. 3. 11 C. 6. 5. 8, notwithstanding the language of C. 6. 4. 1. 12 3. 4. 10. pr. 13 See for an illustrative surviving case, Girard, Textes, Appendice. 14 See for an illustrative surviving case, Girard, Textes, Appendice.
The manumitter could not exact services, or money in lieu of them, 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. An enactment of Diocletian tells us that even though the manumission were done pecunia accepta, it could not be revoked. It is hardly credible that if such a gift operated automatically or could be enforced, such a question could have been asked. We are told that a promise by the owner to free when certain services were rendered was in no way binding on him, 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 huc omnia modo esse succurrendum. If this is genuine, 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 latinitas 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. 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 servus 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. The same is probably true of that of Papinian. Haymann, indeed, 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.

It is clear that Papinian knew of no general rule. 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, but there may be a question as to those of Diocletian. 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 favo solici libertatis. 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. 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. 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.

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...
against the person who paid it, if he was acting fraudulently. 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.

Most of the texts dealing with the transaction have no reference to enforcement: they lay down rules for it regarded as an ordinary immo-
nate 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 condicio to recover it, or if he has any interest in the manumission he can sue prae-scriptis verbis for quanti interest. The right to condicio arises only where there has been some wrongful delay. The death of the slave after mora does not destroy the condicio. If it was before mora, Proculus says generally that there is no condicio. Ulpius distinguishes. The loss falls on the slave owner (i.e. the money can be
condicet) 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. In a case in which the slave who was to be freed ran away, there is a similar discussion of hypotheses. If the owner was going to sell the slave but did not because of this bargain, there is no condicio, 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 payor 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.

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. 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 condicio ob rem datis. But where money was promised to secure the freeing of a slave, and he was in fact freed, but by some other person, the money was still due: nothing was said as to the personality of the manumitter.

The agreement was not always that he should be a civis. In a
recorded case the man was made a latin. The manumitter here was a
civis who had been a peregrine. Probably in such cases and in manu-
mission 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 ingenius.

If the freedom is carried out there can be of course no condition of the money. But if the slave is not yet freed, and there has been no breach, two texts tell us that there is a condicio ex poenitentia. It has been urged by Gradenwitz, not without predecessors, but with new and strong argument, that this particular condicio is an invention of the compilers. His view has been widely accepted, 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. 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.

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1 15. 3. 1. 53. 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. 3; 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 condicio do not concern us. See Haymann, Schenkung unter Anflage, 125 sqq.
6 12. 4. 3. 5. 4. 7 12. 4. 3. 3. 8 12. 4. 5. 3.
9 Gradenwitz, Interp. 167.
10 19. 4. 5. 5. He remarks that the clause sed si eligat, etc., belongs to the discussion in the next preceding passage.
11 19. 5. 5. 2. 12 C. 4. 6. 6.
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 St. Iuncianum, ante, p. 615, 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\(^3\), or endow a slave or libertinus with ingenuitas\(^4\), or make an ingenuus a libertinus\(^5\). Acting as a slave will not make a free person a slave\(^6\). An acknowledgment by a man that he is a slave, whether it be voluntary or compelled, does not make him one\(^6\), 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\(^6\). 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\(^7\). 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\(^8\). 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\(^9\). An enactment of Constantine\(^12\) provides

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\(^1\) 40. 12. 37; C. 7. 16. 10.
\(^2\) 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.
\(^3\) C. 7. 14. 2. 6; 7. 16. 20; 7. 16. 23.
\(^4\) C. 7. 16. 25. 23.
\(^5\) C. 7. 16. 25. 23.
\(^6\) C. 7. 16. 25. 23.
\(^7\) C. 7. 16. 25. 23.
\(^8\) C. 7. 16. 25. 23.
\(^9\) C. 7. 14. 11.
\(^10\) C. 7. 14. 11.
\(^11\) C. 7. 14. 11.
\(^12\) C. 7. 14. 11.
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.

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. Letters and acknowledgments of freedom, even from the person now claiming him as a slave, are no bar to the claim. Proof that the father is ingenius is no proof that the child is, since the mother may have been a slave, and while the fact that the child was born after his mother's manumission is evidence of his freedom, nothing 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. 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, and from Theodore in the Scholia in the Basilica, that the lawyers who advised Alaric, and the post-Justinian lawyers, regarded the rule of longissimi temporis praescriptio of 30 or 40 years, laid down by Theodosius for all personal actions, as being applicable to adscriptiones libertatis. But no sign of this appears in the Corpus Iuris.

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. 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 cius. 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.

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, 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 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. But there is no probability that the lex dealt in any way with this sort of question.

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. On the whole it seems likely that liberty could not be acquired by lapse of time in classical law.
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 *ingenius*. 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. There were no exceptions from this rule, 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. The language of the text shows 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.

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. The scope of this rule is doubtful. The text makes it clear that their basis is the respect due from the *heres* to the *voluntas dominii*, 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. The manumission itself was no protection against a third party owner: he could still claim his slave. It is clear, however, from the conclusion of the lex that there was some prescriptive period which would protect such a slave, 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. If a will were upset by the *querela* more than five years from the death, all liberties which had taken effect remained valid. 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. So, apart from questions of death, where a judgment of *ingenuitas* was retracted for collusion within five years, the man was handed back to his old owner. These last texts show 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. 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.

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. Callistratus tells us that this rule was first laid down by Nerva in an Edict. Nerva’s enactment was probably a statement of a general principle which was supplemented by a senatusconsult referred to in several texts. 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. 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. 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. Apparently the prescription is not barred by bringing proceedings within the time before a magistrate who has no jurisdiction. However, if the man died *in fugae* or *latitans*, he could...
not be said to be living in undisputed possession of his status, and the rule
did not apply.

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 show 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. 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. 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. 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. 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.

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. Marcellus, 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. It is noticeable that these three jurists
are very late: it is possible that the rule above stated had been couched
in a form which superseded that of legis actio. It is generally held that the trial was by
praediiicium, a view which rests mainly on the fact that we are expressly told that this was so in later law.

There is, however, no direct evidence for this in earlier law. The opinion has in its favour
the fact that praediiicium had no condemnatio, and under the formulaic system,
when every action sounded in damages, a condemnation in such a case seems out of place.

Nevertheless Lenel remarks that it is very doubtful whether it was in fact a praediiicium.
He points out that Gaius does not mention it in speaking of praediiici. His main
illustration is an libertus sit, a very much less important affair. Further,
he points out that a praediiicium 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 vindiciatio in libertatem. He admits the existence
of texts which declare to it to be a praediiicium, and in relation to the text in the Code he rejects as inadmissible the rendering of the word
praediiicium as meaning "disadvantage", which would destroy the
force of this text. Even if these texts be accepted they would shew only that the process was a praediiicium in later law, after it had
become a cognito, 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. 7. 21. 8. 2 40. 15. 1. 2. 3 40. 15. 2. pr. 4 40. 15. 1. 4. 3.
5 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. 6 40. 15. 1. 3.
7 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. Op. 50. 17. 30.

CH. XXVIII] Causae Liberales are civil suits; 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 sacra-
mentum in such cases was fixed at 50 asses. The dominant opinion is
that in causae liberales the vindiciatio 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.

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
praediiicium, a view which rests mainly on the fact that we are expressly told that this was so in later law. There is, however, no
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1 C. Th. 7. 7. 3. 2 G. 4. 14. 3 As to the general question, see Jobbé-Duval, Procédure Civile, 335 sqq. The dominant
view on the immediate question rests on the accounts of the case of Virginia (D. 1. 5. 24; 41. 25 sqq. ; Dion. Hal. 11; Diodor. Sic. 12. 34). 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. 296 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 vindiciatio were secundum libertatem if
the man was as libertus 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 In. 4. 6. 13; Theoph, ad h. l.; C. 7. 16. 21. 8 C. 7. 16. 21. 9 Sintenis, Otto and Schilling, ad h. l.; Wissau, Z. S. S. 25. 395.
that there exist several texts showing that there was or might be an actual condemnatio. It may be doubted whether the process was tried by formula for any long time. It became a cognitio very early, at latest under Antoninus Pius. In the time of Cicero it was still tried by sacramentum, and went before the decennviral court. Mommsen thinks on negative evidence (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 that it was transferred to the centumviri, which gives the same results, since all centumviral causes were tried by leges in ture, 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 leges agere, alieno nomine, was that pra libertatis. 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 turpitud, or the like from acting as a procurator, unless indeed the Praetor thought fit to reject him on his own authority, as suspect. If an adsertor abandoned the cause, 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. There is an obscure enactment in the Codex Theodosianus, which may mean that if a second presentor presented himself when there was one already, he was admitted to the suit, but was liable to a severe penalty in case of failure. It is plain, however, that in the later Empire there were difficulties in procuring adsertores: Constantine legislated elaborately on the matter. 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 (circumducens) bearing a label, showing 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 multatitius, 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. If the alleged slave died during the proof. The fact might be doubtful and there was an edictal machinery for a preliminary enquiry on this point. So far as can be gathered from the Digest this was also a cognitio. Whether this was the case in classical law cannot be said. As Wlassak says, 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 solennibus ordinatios in this connection. The first point to note is that a person whose status is doubtful cannot postulare in ture, 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 leges agere, alieno nomine, was that pra libertatis. 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 turpitud, or the like from acting as a procurator, unless indeed the Praetor thought fit to reject him on his own authority, as suspect. 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. There is an obscure enactment in the Codex Theodosianus, which may mean that if a second presentor presented himself when there was one already, he was admitted to the suit, but was liable to a severe penalty in case of failure. It is plain, however, that in the later Empire there were difficulties in procuring adsertores: Constantine legislated elaborately on the matter. 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 (circumducens) bearing a label, showing 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 multatitius, 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. If the alleged slave died during the

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1 7, 7, 4, 6; 40, 12, 36. There seems no sufficient reason for distinguishing the two cases. A formula per sponsonem for a civis in libertate 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, Staatsrecht (3) 2, 1, 608; D. P. R. 4, 318. 
5 Cuq, Instit. Jurid. 2, 141. 
6 There was a Praetor de liberiscaus from about A.D. 393. 
7 8, B. G. 2. 1108 sqq. 
8 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, 60, 1, 34; Karlowa, loc. cit. 
9 See 40, 12, 3, 6, 3; 43, 29, 3, 7; 40, 12, 4. 
10 Cuq, 37, 10, 3, 2, 6, 3; 43, 29, 3, 7; 40, 12, 4.
hearing the case went on and the *servus mulcatiarius* 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. The text says that this *circumducatio* 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. 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.

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*), 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*. 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 servitute*, 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 *fideiusser* must do so, but if the *iudex* is satisfied that this is impossible they must give a *cautio iuratoria*. Before Justinian it is not clear what the law as to security was. His enactment shows 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 to be given, and so Wlassak holds. 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 dominii*, 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 dominii*. 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.

_Causae liberales_ were required—*favore libertatis*—to go before _maiores iudices_. In the provinces this would be the _Praesae_. The _Procurator_ Caesarius had no jurisdiction in such matters.

A _causa liberalis_ was not a fitting subject for arbitration, and if one was submitted, _ex compromesso_, to an arbitrator, he would not be compelled to issue a _sententia_, 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. 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 _transactio_ between a _dominus_ and his slave could be in any way binding on the _dominus_. On the other hand we are told that _Anastasius_ provided that _transactio_ as to status should be good and should not _titubare_, merely because they decided for slavery. Elsewhere Diocletian had decided that pact could not make a slave free, _neo his qui transactio non consensuerunt quicquam praedicti poieserint_. 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. Nothing in Diocletian's enactments 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.

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1 C. Th. 4. 8. 5. 2 See Monnier, _N. R. H._ 24, pp. 62 sqq. as to the history of this expression and the extent to which the form _Proc. in libertatem_ is interpolated, see Goedewitz, _Interp._ 101; E. S. S. 14. 6. 2; Wlassak, _Gründz._ _Zeitsch._ 19. 721; Schlesemann, _Z. S. S._ 13. 253. Schl. thinks _proclamatio_ was originally an appeal to the bystanders for an _adsertor_ (see the story of Virginia, and the rules as to _cauda_ in _mens sumptus_ but that in the sources it is merely setting up his claim.

4 _Anas._ p. 649. 5 C. Th. 4. 9. 9. So explained by _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. 7 Wlassak, _Z. S. S._ 36. 400. 8 Post, p. 661.
so far at least as the result was in favour of liberty. The practical outcome of the enactment of Anastasius suggests 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. There is no sign that the rule was worked out: it does not appear in the Institutes or Digest, and in the Basilica where the matter is discussed, the rule is made out that transactio is effective, after litis contestationis in the causa, but not before.

_Causae liberales_ might be tried and decided on privileged days, not open for ordinary litigation. If the claim was one _e liberalis_ in servitutem it must be tried at the domicil of the alleged slave. If it was _e servitutem_ it would be at the domicil of the alleged _dominus_.

Under the system of _legis actio_ the person in question was of necessity present, and the _adsercio_ appears to involve his presence in any case. The machinery by which it was compelled is not very clear. The interdict _quoniam librum_ was not available because this assumes freedom, and to decide it would prejudge the _causa liberalis_. We are told that the _actio ad exibendum_ was available to one who wished _vindicare in libertatem_, but it is not easy to see the pecuniary interest needed. There is no need for compulsion where the man himself is raising the question. The Institutes mention an _interdictum exhibendi_, for the production of one, _cuia de libertate agitur_. It is not mentioned by Gaius from whom the next interdict mentioned, _libertum cui patronus operas indicere velit_, 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 exibendum_, perhaps designed to meet the objection that an _adsercio_ had not the pecuniary interest, which, according to the Digest, the _actio ad exibendum_ required.

At least after Constantine, the case could be continued and decided in the absence of one party. Justian's enactment abolishing _adserciones_ provided that if the alleged slave failed to appear for a year after summons by the claimant, judgment should go against him. But there is nothing to shew, apart from this, that action could ever have been begun in his absence.

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CH. XXVIII] _Causae Liberales: Who may proceed_

Subject to the possibility of being already barred by _res indicata_, 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. It is presumably barred to one who may not _postulare in ture_, 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_, but not _tutores_ and _curatores_ against their former wards. A husband can dispute the status of his _liberta_ whom he has married, as, indeed, a manumitter could in general prove his manumission invalid.

On the other side the natural person to move is the alleged slave himself, and he can choose his _adsercio_ 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. In general the right applies to all _necessariae_, _i.e._ related or connected people. If the person concerned is mad or _infans_, not only relatives, but other people, may proceed. A patron has an interest in the freedom of his _libertos_ either on the ground of succession or on that of _operae_, and can thus bring a _causa liberalis_ on his account. The man's consent is immaterial, and thus the patron may do it even where the man himself has sold himself into slavery, 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.

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, 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.
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. 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. 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, whether it was or was not dolo malo. If it was, he is treated as in servitute. There was evidently a good deal of discussion as to what was being in libertate sine dolo malo. Julian cited by Ulpian lays down the simple rule that one who thinks he is free and acts as if he was 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 fugitius 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 what seems to mean that if he fled so as to hide from his master, it follows, as Ulpian says, that a freeman may be dolo malo in libertate, and a slave may be so sine dolo malo. 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, i.e. is not under the burden of proof. But just as a man might be in libertate sine fide, so he might be in servitute sine 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.  

1 C. 14. 19; C. 12. 5. 2. 22. 3. 14; 40. 12. 7. 5. 2 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 ex libertate means 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. 3 h. t. 11. 4 40. 12. 10. 5 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. 6 h. t. 4. The critical date is at which application is first made to the court. 22. 3. 20; C. 4. 19. 15.

CH. XXVIII] Burden of Proof

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. Two texts which have never been conclusively explained, 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, 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 sine dolo malo after ordinatio litis, the only effect would be, if the classical law as to security was, as we have supposed, to shift the burden of proof, a matter involving no change in the mechanism.

Caracalla provided that there could be no proclamation in libertatem until proper accounts had been rendered as to past administration, 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. 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—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.

The rule applies from the moment when the lis is ordinata or nichoauta or coepta. 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 Wlassak, Z. S. 5. 19914. Ante, p. 657. 3 See Buckland, N. R. H. 40. 12. 34. 4 Wlassak, Z. S. 5. 19914. Ante, p. 657. 5 See Backland, N. R. H. 40. 12. 34. 6 It does not appear that the question of dolo malo or not could be disposed of by oath, though this is allowed where a libertus is claiming inugentia, C. 4. 1. 6. In C. 4. 19. 30 the effect is considered of the presence or absence of instrumenta emptiones. 7 40. 12. 34. 8 40. 12. 34. 9 4. 6. 12; 40. 12. 24. pr. 25. 2; 48. 16. 1. 21.
nowhere indicated. Karlowa thinks the cause is *ordinata* at the moment at which the distribution of parts is determined. Cujas thinks it is at the absolute beginning, but the expression *ordinata* seems to imply that some matters have already been arranged.

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. He may not be put to the torture on the question of his liberty. He may have actions even against his alleged *dominus*, lest they be barred by death or lapse of time, 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*. 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*. 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 *lis contestatio*, but the hearing will be suspended till after judgment in the *causa liberalis*, according to the event of which the *ius dictum* will proceed or be useless. So if a third party wishes to charge him with theft or *damnum*, he must give security *se iudicio siste* 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*. So, if his alleged *ordinus* is charged with *furtum* committed by him, and he *proclamat in libertatem*, the trial is postponed so that it may be transferred to him if he is really free, and the *actio judicati* may go against him. So an interdict *unde est brought against him, while he is proclaiming, can result in a judgment of restitution after he is declared free. 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 *itis contestatio*.

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. 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 he is presumably liable to capital punishment if he proves to be a slave. Our text adds that a *miles calumnia petitus in servitutem* is not expelled, but *restitutur in causam*. 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 *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. 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*, it is certainly held by Cassius and Julian, leaders of the school to which Gaius belongs. Paul discusses the matter in two texts, 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 *ordinus* 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
Causae Liberales

libero, and we have seen that even in that case many jurists thought the master lost possession. 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.

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 no such penalty or pressure be imposed. 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 freelancer 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. 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.

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 adserter is bound to go on with the case, and in Justinian's law, adserteres being abolished, the buyer can take up his claim, and require the vendor to prove the slavery.

The lex Julia 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. There were also many constitutions directing them to decide in favour of liberty if the evidence seemed equal.

If the judgment is against the slave it will be simply eum servum esse. 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 (Agelii) 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 (ingenium) esse, which besides that it bars the defendant, puts the plaintiff into the position of one bona fide in libertate. 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. 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 ingeniosus. 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 (Agelii) non esse but ingenium 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 according to the results. In the first case the decision of it will not determine the status of her children born before the hearing. And a very clear case.

If the dominus wins he need not accept damages, but may take away the slave, 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. 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 called libri) might punish calumnia with exile. It was immaterial which way the action was brought. It was iniuriae to call a freeman a slave: a fortiori, if, when called on to support the allegation, the person so speaking failed to do so.
The alleged slave on getting judgment will be able to recover any property which the soi-disant dominus has detained. 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 bona fide 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 by him. 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, 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.

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. Lenel holds, on account of the remark of Gaius that the existence of the limit certum est, that the limitation to the 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 dolu datum. 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 noxially liable for him, for theft, cannot have an action for theft by him. 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 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.

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. If, however, the judgment is in his favour, he can in an appropriate case proceed for calumnia against the adverter or any other person who set up the claim on behalf of the slave.

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. On the same principle, a patron of full age who claims his libertus as a slave has no bonorum possessio contra tabulas, and one who so claims the libertus of his father cannot claim, unde liberi patrovi contra tabulas. 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. 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 Fraterns. 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 not 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, and there is no restitutio in integrum, or rescission even on the ground of minority. There may of course be an appeal, and as the court which tries the case is the highest, the appeal is to the Auditorium. We have already considered the case in which the judgment is rescinded after five years. One text, of Macer, tells us that if my libertus is adjudicated the slave of another, me inter-

1 C. 7. 15. 31.
2 40. 12. 32. The words in domo cuiusque intulisset 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. 574.
5 40. 12. 12, 6,
7 40. 12. 15.
8 40. 12. 41.
9 See Girard, Manuel, 705.
10 C. 6. 44. 15. 21. 25.
11 G. 4. 175.
12 38. 1. 14. pr.
13 38. 3. 14. pr.
14 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 a libertate, h. t. pr. It does not apply where the claim is merely to secure the eviction penalty, A. t. 80.
15 A. t. 14. 1, 2.
16 4. 4. 34; C. 2. 30. 4.
17 C. 7. 16. 4. 27.
18 A. t. 16. 2–4.
19 C. 3. 20. h. 7. 16. 4.
20 40. 12. 26, 1; ante, p. 350. 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.
21 42. 1. 69.
Causae Liberales

ventientes, 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 adserter.

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 procurator1.

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 bar2.

(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 way3. 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 hearing4. 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 says5 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 adserio secunda, the case having been heard before6, and in another of secunda adserio, tried before other judices7. Martial8 speaks loosely and allusively of a third or fourth hearing which is to have a decisive effect. Finally Justinian in his constitution9 by which he abolishes the need of adseriores, 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 now has provided, and which, in turn, ad secundam inquisitionem minime deducetur, by colour of the aforesaid laws. With this collection 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 law10. Schlossmann11 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 librite, 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 text12. 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 leges13, and the language of Martial14, Quintilian15 and Justinian seems rather to refer to a necessary precautionary repetition which every adserio 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 clementor terminus. This all points to a conjecture that there was a rule, of which the source is now lost, requiring all adsertorius litus to be gone through twice (or more) before different iudices16, before a decision was come to. The whole thing would be one trial, and would amount to res iudicata whichever lost17. 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 Schlossmann18. Constantine, in his enactment as to circumducetio19, provided that the slave handed over to the claimant by decree of the magistrate, for lack of an adserio, could renew his claim if he ever found an adserio. There is little point in

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1 S. 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. 9. 3.
2 46. 12. 42. It should be noted that a judgment, cum ingenium esse (ante, p. 665), has the advantage that thereafter he is in possesso inimicissimo.
4 40. 12. 25. 1.
5 Quint. Inst. Orat. 5. 2. 1.
6 Id. 11. 1. 78.
7 Cicero, de domo, 29. 78.
8 Martian, Epig. 1. 52.
9 C. 7. 17. 1. pr.
12 C. 7. 17. 1. pr. Probably not the XII Tabules; see his similar language in C. 3. 22. 6.
13 Epig. 1. 52.
14 Inst. Orat. 5. 2. 1; 11. 1. 78.
15 See Quint. Inst. Orat. 11. 1. 78. Parte victa in this text does not imply defeat of the adserio.
16 C. 7. 14. 5 appears to refer to a case not proceeded with.
17 Loc. cit., c. 8. 3. 1.
18 C. Th. 4. 8. 5; ante, p. 656. 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. 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. 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. 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.

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 repicatio. 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 to the loser. It is to be presumed that he does reject this view, by a iudex.

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if it is a libertate, he must give the thing back, security being given rem salvum 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 action was started, he will have to restore it without any security.

On the same principle, if a hereditas is claimed, the question of the testator's status, if raised, must be settled first, though an interdict for the production of his will may issue meanwhile, as this can have no prejudicing effect.

Where a man is claiming an inheritance, and his claim is disputed on the allegation that he is a slave, his freedom is 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. If by chance such a case has been tried first it must not be allowed to produce any prejudicial effect. 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. 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. 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 fortum, and if it is a servitate, no rule is necessary. But if it is a libertate, he must give the thing back, security being given rem salvum 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.

1 40. 12. 8. pr.
2 h. t. 2. The claims might be hostile.
3 C. 7. 9. pr.
4 h. t. 8. 1, 9. 1.
5 40. 12. 2. Ulpin 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.
6 40. 12. 30.
not claimed under that will, the *causa liberalis* must be tried, and the will may not be used as evidence that he is free. 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 and it may mean that the court will decide the issue of status incidentally.

Where the liberty is claimed under the will, new rules apply. The validity of the will must be decided first: this is provided by senatus-consul, to avoid prejudicing that question by the decision of the *causa liberalis*. Thus if the testator has been killed the *causa liberalis* will not be decided till the cause of death has been investigated. Of course, *res iudicata* on a point arising out of the will will not affect the liberty. Trajan provides that a *causa liberalis* must be postponed till a pending *querela* is decided, 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* 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.

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.

Claims of *ingenuitas e libertinate* 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 that no such claim could in any case be made, after a lapse of five years from a traceable manumission. Such cases would normally arise in connexion with property questions, and, apparently, they were always tried by *praecidicium*. Suetonius speaks of a recuperatory procedure, 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*. Gaius speaks, however, of a *formula*, and Justinian uses language with the same implication. 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. 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 *iusu variandum*. Though a pact could not give *ingenuitas*, it is clear that a *transactio* would bind the patron to regard the man as an *ingenius*, though it would not bind any other person.

We have seen that *ingenuitas* could not be disputed after a man's death, though the question might be raised to shew that an apparent *libertate* was really an *ingenius*. Conversely, one who had allowed himself to be sold and had afterwards been freed could not claim *ingenuitas*. In the case of unwillingness, of the party directly affected, to proceed, others might act for him as in a *causa liberalis*, 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. The burden of proof, says Ulpian, is on him if he is claiming *e libertinate*, 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. Elsewhere he tells us that if the man admits being a *libertus*, but alleges that he is a *ingenius* of another person, the ordinary *praebidicium* will give whichever party asks for it, and that in such a case the burden of proof is always on the patron. There seems little

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1 Ante, p. 660.
3 Suetonius, Vesuv. 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. 7. 14. 5.
9 C. 14. 15.
10 40. 15. 1. 8. At least after a *prævidicium* of *ingenuitas*.
11 A. 1. 4.
12 40. 13. 40. Mommsen. The case might be tried in absence of a party, duly summoned, but in case of absence beyond sea there might be nine months delay to allow of his appearance, C. 7. 16. 40; C. Th. 2. 7. 3 = C. 9. 11. 7
13 40. 12. 3. 8.
14 49. 4. 2. 2.
15 40. 13. 8.
16 14. 22. 3. 14. As to amount of proof, we are told that *instrumenta* and *argumenta* are to be used, as *solis testis* non sufiicit, C. 4. 20. 2. This rule, which may have applied to *causa liberalis*, has many possible meanings which are discussed at great length by the early commentators (Hedius, Diss. Dumann. 406). No doubt here as in *causa liberalis*, lost *instrumenta* would suffice, C. 4. 19. 20. The loss would be proved by *solis testae*. Probably the rule means no more than that the oath of his friends that he was *ingenius* would not suffice.
17 40. 14. 6.
reason for the exception if the claim is \textit{e libertinate}, 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 \textit{ingenuum esse} or \textit{non esse libertum} \textit{Auli} \textit{Ageri}, 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 \textit{res indicata}, and \textit{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 us that the successful claimant of \textit{ingenuitas} could keep what he had acquired unless it was \textit{ex re manumissoris}, but must return what was \textit{ex re}, together with gifts from him, and of course what had been taken without his consent. Both of them are commenting on the late owner to the words which there too are explained as covering even legacies by the concerned him, somewhat to his detriment, and such as they certainly words of a what he had ingenuitas ex compelled by the Emperor, he could recover what he had paid to secure his manumission\(^6\).

It is quite possible that the whole allusion to slavery in 40. 12. 22 is interpolated. It may be added that a \textit{libertinus} who loses his case does not lose his position as a \textit{libertinus}, C. 7. 14. 13, and it is an 

these claims of liberty and \textit{ingenuitas} were of course mere nullities if there was no \textit{iustus contradictor}, i.e. the other side made no genuine claim to be patron or \textit{dominus}\(^9\). 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 \textit{stuprum} with his \textit{domina}, and was by her collusion, with a pretence of captivity, declared free and \textit{ingenuus}, this was void\(^{10}\). And Gaius says that anyone who proved that a \textit{causa libertatis} had been gone through collusively, and the man declared free, had a right, by a senatusconsult of Domitian's time, to claim the slave\(^1\). In the case of claims of \textit{ingenuitas e libertinate} texts are more numerous. A \textit{senatusconsultum} Ninnianum provided penalties for such collusion, and a reward for the detector\(^7\). Marcus Aurelius seems to have legislated freely on the matter. He provides that collusion as to \textit{ingenuitas} can be shewn at any time within five years from the judgment\(^8\): the \textit{quinquennium} being \textit{continuum}, but not running till the person whose collusion is in question is \textit{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\(^9\), and time does not run to bar the real patron, if the original decree was given without his knowledge, \textit{alio agente}\(^7\). The collusion may be shewn even by an \textit{extraneus}, if he is a person who is qualified \textit{postulare pro alio}\(^8\), and if several come together to shew collusion there must be an enquiry to see which is the proper person on grounds of \textit{mores}, age, and interest\(^7\). We are told by Hermogenianus that a judgment in favour of \textit{ingenuitas} can be retracted for collusion only once\(^*\). This remark may mean that it can be attacked only once\(^*, 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 \textit{ingenuitas} is set up again, and the decision repeated, there can now be no further attack on the ground of collusion\(^*\).

When the judgment is retracted, the detector becomes patron\(^1\), and the original patron loses all patronal rights\(^1\). The man becomes a \textit{libertinus} again, but only from the decision\(^9\), for this is not an appeal, and the \textit{res indicata} is \textit{pro veritate} till rescinded. He loses the \textit{ius anuli aurei}, if he had it before the collusive decree\(^*\).

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 \textit{ingenuus} by the collusion of one of his patrons, the collusion being detected by another. He decides that the alleged \textit{ingenuus} loses the \textit{ius anuli aurei}, and certain \textit{alimenta} due to him from a third patron\(^1\), and it may be presumed that for the future two parts of the \textit{sura patronatus} vest in the detector.

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1. C. 4. 55. 4. 2 2. 3. 14. 121. 4. 15. 5 does not speak of rehearing. 12. 3. 5; Tac. Ann. 18. 27. 3. C. 7. 14. 1. 41. 3. 2. 5 49. 4. 2. 2. 6 12. 4. 3. 5; Tac. Ann. 18. 27. 7 40. 12. 32; 40. 14. 3. 8 C. 7. 14. 1. 9. Ibid. p. 566. It is quite possible that the whole allusion to slavery in 40. 12. 22 is interpolated. It may be added that a \textit{libertinus} who loses his case does not lose his position as a \textit{libertinus}, C. 7. 14. 13, and it is an attempt to attack \textit{ingenuitas} without reason, H. t. 8. 10 H. t. 1. 11 C. 7. 20. 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. Nox caput sequitur, a rule applied to delicta.
2. In matter of contract, the slave naturaliter obligat et obligatur.
3. The slave on manumission becomes a new man (and on re-enslavement, another man again). The change is analogous to the individuality of the slave. The three principles are:

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So 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. A theft of the man, or damnnum to him, is a delict against his dominus, with whom the right of action remains, notwithstanding manumission of the slave. 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. We are told by Ulpian, Marcián 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. Marcián 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

CH. XXIX] Manumission: Survival of Delictal Obligation 677

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, or theft of, 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 heres, the heres would have had the action.

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, nox caput sequitur, after he is freed. As Ulpian says, servi ex delicto obligantur et si manumittantur obligati remanent. The word remanent shows 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 delicta. But though he may thus be liable for furtum, he is not liable as a per 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. 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 and opus novum. Here, as elsewhere, the liability for dolus depends on the absence of another remedy. Where a libertus contracted in fraude 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. Percius, 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 Labore. 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
in criminal and religious law; that, long before Labeo, nothing new was involved in a recognition of his personal capacity for delict. Moreover liability for what was done nemo 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.

Civil injury, hints at no difference of principle, and says in which Labeo is cited as having laid it down that a man is liable after manumission for compensation to the injured person by freeing the slave, if the man's need involve no loss to him.

Deals in any way with the estate so as to lessen what will come to the injury to the injured person is not very clear. In most texts it is made to rest on the fact that there can be no noxa, 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: in such a case noxa non sequitur. If a slave stole from one of common owners the same rule was applied: there was no noxal action. 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. 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, and on the consideration that one who can punish has no need to take legal proceedings.

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.

A general rule or maxim

There is a general rule or maxim that non fuit ab initio noxa, actio quae non fuit ab initio nata orri potest. 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. 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, 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, and as it would have involved giving a noxal action against an alien, 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. There is a general rule or maxim

1 47. 4. 1. 3, 2 47. 3. 17. 1; ch. 4. 78; C. 4. 14. 6. There seem to have been disputes.
2 C. 3. 41. 4. 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 shows that the main rule was older. 47. 2. 18; O. 4. 78; In. 4. 8; ante, p. 107.
3 47. 2. 62. pr.; ante, pp. 107, 114.
4 4. 4. 11. pr.; 47. 2. 17. 1.
5 See Mandry, Familiationrecht, 1. 354 sqq.
6 47. 2. 17. pr.; 47. 4. 1. 1; see Mandry, loc. cit.
7 Mandry, op. cit. 1. 308.
8 Ante, p. 228.
9 As to the case of a duty to free, ante, p. 590.
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. 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 domus. 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.

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 says that a slave must not obey his master in facinoribus, and Ulpian says 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. Ulpian quotes Labeo as holding that iniurias, iussu domini, rendered the slave liable after liberty—nuxa caput sequitur. It is probable that Labeo was speaking of atroxa iniuriae. Conversely Ulpian agrees with Celsus that command of the master excuses the slave for wrongs under the lex Aquilia. 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.

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 sure, but by an exceptio rei indicatæ. We have already considered the case of freedom supervening while a noxal action against the master is pending: the action was transferred, but there, as we saw, much controversy as to the form of the transfer. 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 domus.

The very similar rules in criminal law have already been considered: 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.

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. 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 possessionis. He is another man, 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 usucaping 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 usucap: the initium possessionis was not in good faith. 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. The same rule applies to legacies and fideicommissi. 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. There were two heredes. A slave was left to one of them and money to the slave. The slave was freed vivis testatoris. He acquires the whole legacy, although it might appear that the gift ought to have been valid only as
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 Catonianna. But Julian overrides these points by remarking1 (by way of intervening manumission leaves would have been his in any case, and it could not convalesce by the 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 it.

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. 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 only the effect of enslavement followed by manumission. The rule is

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 tingenus, could not make a will; and, consistently, a will made by a slave could not be valid, even though he were freed before he died. 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. 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 that. at least

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; 16. 1. 5 pr.; h. t. 34. 2; discussed ante, p. 149.

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K. t. 1. 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.

3. Ante, p. 76. 4. 88. 8. 7.

6. K. t. 1. 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.

8. 29. 1. 16. 13. Post respont!

9. 22. 1. pr., 1. Yet he is another man, 46. 3. 98. 8.

10. In. 2. 25. pr.

11. Ulp. 55. 4.

12. Ulpian12 lays down a rule that those can make fideicommissa, because they cannot make restitutus, ante, p. 411.

13. 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; 16. 1. 5 pr.; h. t. 34. 2; discussed ante, p. 149.

14. Ante, pp. 158, 163, 202. 15. 46. 3. 16.

16. 4. 7. 2; op. 17. 1. 12. 2.

17. Ibid.; 12. 1. 41.

18. Ante, pp. 158, 163, 202. 19. 46. 3. 16.

20. 44. 7. 2; op. 17. 1. 12. 2.

21. 16. 3. 11.

22. 46. 3. 15; as to 44. 7. 14, post, p. 699.

23. 16. 3. 11.

24. Ante, p. 73. See Machielard, Obligations naturelles, 188.

25. 16. 3. 3; Mandry, op. cit. 1. 570.

26. Pernice, Labo, 1. 150 sqq.

wills. 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. But this case is less significant than ours, since such a complete restoration would restore the validity of a will. The style is rather that of a legislator, and the rule may be from the compilers.

Apart from naturalis obligatio, questions may arise as to payments to the man, after he is free, in respect of transactions during slavery. Where a slave was appointed to collect debts and continued collecting them after he was free, this might be furtum in him, 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. 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 adedium. 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. 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. The rule is old: Paul cites Alfenus as saying that the test question is whether the transaction was either pecularius 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. So again, Ulpian rests on the authority of Sabinus the rule that good faith means ignorance that he has been freed. 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 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, but it is unlikely that any general theory of natural obligation of the slave is so old. Pernice is
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. 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. The case of the slave is the most frequently treated case of naturalis obligatio, and is in all probability the original.

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. They constitute additions to, or deductions from, the peculium, for the purpose of the actio de peculio, and it is not easy to see any other importance they could have. We are repeatedly told that there may be natural debts between slave and master and that they are reckoned in the peculium. It must be remembered that a debt to the dominus took precedence of other debts. 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. 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. Such obligations may arise from any transaction, even from payments in lieu of noxal surrender, 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. Mardy shews that all the texts involve payments or the like by the slave, inconceivable without a peculium. 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 Pompeius to be estimated ex civili causa, 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. 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. This is not inconsistent. It would leave a liability to the creditor de in rem verso, or under the dole mali clause in the edict de peculio. It must be remembered that we are here considering only the rights of a creditor. 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, 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 condicio indebiti de peculo. Obviously the debtor might not recover in solido. 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
acting in good faith, so that there is no noxal action. A converse case is quoted by Paul from Neratius¹. 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 master³.

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 shown by a text of Ulpian⁸ which says that slaves cannot owe or be creditors, and that in using language implying that they can, we rather point out the reality of an obligation which was in practice familiar. The reason is not such a sale as *naturalis obligatio*, but this does not novate⁹. We have just considered the effect of such a transaction⁴. *Fideiussio* gives rise to similar but somewhat greater difficulties. We know that there may be *fideiussio* on any obligation, natural or civil⁶. Accordingly there may be *fideiussio* on a slave's *naturalis obligatio*, to his master or another⁸, and we are told that the very slave whose debt is in question may be the interroger on behalf of the master⁹. 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 person¹⁰, a rule frequently laid down⁷. It is remarked by Pernio¹¹ 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 slave¹². 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

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¹ G. 3. 119, 176, 179. Nor will the debtor have an exceptio dolii, 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 1. 14. 30. 1; post, n. 699.
² 15. 1. 56; ante, p. 724.
³ C. 2. 4. 13.
⁴ Mondry, Familiengiiterrecht, 1. 348 sqq. Could *etiam* create a *naturalis obligatio*?
⁵ 15. 1. 41. So Julian, 46. 1. 16. 4.
⁶ 12. 6. 13. pr.
⁷ 18. 3. 14. 3.
⁸ 14. 3. 11. 8.
⁹ Add n. 3. 19. 6; 3. 29. 3. Gains refers to an older exploded view, of Servius Sulpicius, that there was no *novatio*, with the result that in practice the right was destroyed.
¹⁰ Ad In. 3. 29. 3.
¹¹ 15. 1. 36; ante, p. 686. See Machelard, Obligations naturelles, 105 sqq.
¹² 46. 1. 16. 3.
¹³ 18. 3. 14. 7; 46. 1. 56. 1; G. 3. 119; In. 3. 20. 1.
¹⁴ 46. 1. 70. 3.
¹⁵ h. t. 56. 1.
¹⁶ Labbe, 1. 156.
¹⁷ See also Machelard, loc. cit. For texts expressing refusal to recognize such obligations, see Gradeneritz, 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 fideiusor 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 overlaid with debt to the dominus, or the
slave, with administratio, having paid away all the liquid assets. Thus
the fideiusor 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 fideiusor 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.
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.

The situation is fundamentally changed by a manumission of the
slave. So far as his rights are concerned, the general rule is
quod quis dum servus est egit, profeceret libero facto non potest. 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. If he does take the peculium, the natural obligation persists, and if the former dominus pays the debt he cannot recover. In one text a curious rule is laid down. Ulpian says that a servus heres necessarius who claims honorum separatior, 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 that the debt must be one which became claimable only after the death of the

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1 44. 7. 56; post, p. 698.
2 It should be noted that the fideiusor has in any case an actio mandati de peculio against the dominus, 12. 1. 3. 7.
3 50. 17. 146; cp. 2. 14. 7. 18.
4 The right of recovery by statutarius who has paid more than he was dare cassus is only an apparent exception, 12. 4. 3. 6; 40. 7. 3. 6.
5 12. 6. 64. # 42. 6. 1. 18. # Machelard, op. cit. 194.

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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 debetur: 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 honorum separatior against the creditors of the
deceased heir of their testator, 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. 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 quis 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 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. If he does not take the
peculium he cannot be sued for reliquias. If he does, it is subject to
debts to the master, not actionable, but such that if he pays he cannot
recover. It is to be presumed, though we have no information, that
his fideiusor 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. 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. 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

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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 hypothe.
3 Ante, p. 698.
4 Cp. 12. 6. 38.
5 G. 4. 14. 5
6 33. 8. 10.
7 66. 3. 8
8 3. 3. 6
9 5. 44. 1. 16; 44. 3. 29. 7; 40. 5. 19. pr., 37; 44. 5. 1. 4; C. 4. 14. 5.
Liability of Freedman ex ante gesto

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. We know that in all cases of manumission there is a general duty to render accounts, and if the investigation shows that moneys have been made away with in such a way as to create a liability, the amount can be deducted from any legacy. 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 condicio indebiti, and this is suggested by at least one text.\footnote{1} But most of them contemplate retentio as the obvious and only remedy. In fact to allow a condicio 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 peculialis, so that communis dividendo is available. The texts to be considered in relation to the next point show that, so far as this retention is concerned, the liability is estimated on the analogy of an ordinary negotiorum gestor, 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.\footnote{4}

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.\footnote{6} There are, however, some texts which seem to contemplate a wider liability in the case of a continued administratio. Paul cites\footnote{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 show 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

peculium, to have debited himself with whatever losses had been caused by his fault at any time (a capite rationem redendum, 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 negotis 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. Paul adds from Scaevola\footnote{8} 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.\footnote{1} 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 manumissor. He may specially promise opera, 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. 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 libertas to be exacted if he offend, and so to secure obedience. 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. 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. An enactment of A.D. 222 lays down, however, a different rule. Where a slave had promised money for liberty, and there was

\footnotesize{1} 3. 5. 17, 18. \footnotesize{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.

\footnotesize{2} 3. 5. 18.

\footnotesize{3} Cf. to the view that the freedom may not be burdened with old debt, see Machielard, Obl. Nat. 184.

\footnotesize{4} 44. 5. 1.

\footnotesize{5} 44. 1. 2. 2. Agreements breaking the rule are not necessarily void, but there is an exception, see 44. 5. passim. But a societas libertatis causa between patron and libertas is absolutely void, A. t. 1. 7; 39. 1. 26. It is perhaps a fraud on the 'lex Julia et Papia,' from a treatise on which one of the texts comes, 36. 1. 36.

\footnotesize{6} 44. 5. 2.

\footnotesize{7} 38. 1. 7. \footnotesize{pr.} 2; 40. 12. 44. \footnotesize{pr.} ante, p. 442. Venuleius is clear that the oath puts only religious pressure on the man.

\footnotesize{8} C. 4. 14. 5.
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, it was treated as an inominable contract facio ut des, the intervening manumission being ignored. But this does not show 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 manusmissus, and if the patron prevented the libertus from accepting the liability, the promisor has an exceptio doli against the patron. 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. What is to happen if the manumission was itself procured by fraud? There can be no restitution, even though the manusmissus were a minor, except by Imperial decree ex magna causa. 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: another gives vel actio doli vel utilis. Another says that an indemnity can be obtained ab eo cuius iuris dicit est, quatenus iuris ratio permittat. 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, 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, eked out by the fact that the injured person is a minor, 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 manusmissus—what he would have had had the manumission not occurred.

1 Savigny, System, Beilage iv in fin.  2 4. 3. 7. 8.  3 Ante, p. 107.  4 4. 3. 7. pr.  5 4. 3. 7. pr.  6 4. 11. pr.  7 C. 2. 36. 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. 270.  11 4. 4. 11. pr. No deduction for the problematical value of the man as a libertus, 19. 3. 5. 5; ep. 50. 17. 196. 1.

CH.XXIX] Transactions with Extranei: Naturalis Obligatio 693

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. 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 suata causa interveniendi, so that the expromissio gave X an actio de peculio against B, X is barred from suing T by the exceptio pacti conveni, but not if there was no such causa interveniendi or if he thought the slave free. The debt is not novated, even in the first case, for the slave's promise is not a verbal contract, 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. 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.

The independence of the obligation is shown by the fact that there may be pledge or fideiusso 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 pignoratia utilitas. 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.

1 The actio de peculio lay on such facts: the naturalis obligatio can hardly be narrower. Mandy, op. cit. 1. 574; Illustrations, ante, p. 212.
2 2. 14, 30. 1; ante, p. 216.
4 15. 1. 56; ante, p. 268.
5 15. 1. 3. 11. See also 46. 4. 8. 4, de tolluntur etiam obligatiores honoravice si quae sunt.
6 12. 6. 13. pr.
7 Ante, pp. 501 sqq.
The case of fideiusio for such an obligation is considered in several texts. It may be either only for the obligatio honoraria, in which case it is dura sacral de peculio, or for the natural obligation, in which case it is in solidum, whatever the state of the peculium. An actio de peculio does not release the fideiusso or the natural obligation, the obligations being distinct. Such a fideiusso may even be created after an actio de peculio has been brought, quia naturalis obligatio, quam etiam servus suscipere videtur, in litum translatas non est. Though payment discharges both, they are plures causae.

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 etiam an ment discharges both, they are released by an actio de peculio, 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.

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. It seems that acceptilatio could not be effectively made to the slave. Thus Paul says that if I have given an acceptilatio to the slave, the actiones honorariae become inutiles, and Ulpian says et servus accept liberari potest, et tolluntur etiam honorariae obligationes si quae sunt. Ulpian gives as the reason why both parties bound by an obligation are released by an acceptilatio to one: non quoniam ipsissi acceptus latum est, sed quoniam velut solvisse videtur qui acceptilatione solutus est. It seems that acceptilatio could not be effectively made to the slave.

Ulpian's text, in which he says that acceptilatio to the slave releases the dominus, 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 servio 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 (i.e. actionable), it

\[1\] 46. 1. 35.
\[2\] 46. 3. 38. 2. X lent money to Y, which freed him. Then because fideiusso to X. If this were for the obligatio honoraria it is good, but if for the natural obligation it is null, for a man cannot become fideiusso for himself. If he becomes fideiusso to a fideiusso of the natural obligation or estus versa, both obligations persist, one being natural and the other civil, though in the case of a fideiusso the father there would have been merger, both being civil, 46. 1. 21. 2. See ante, p. 217 and post, p. 696. See also App. ii.

\[3\] The slave's fideiussores are released, 12. 5. 13. pr.: 15. 1. 50. 2; 46. 3. 38. 2. 46. 4. 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.

\[4\] 46. 4. 16. etiam obligationes participes; cp. G. 3. 169; In. 3. 29. 1; post, p. 697.

\[5\] 46. 4. 8. 4.

\[6\] 46. 4. 16. etiam obligationes participes; cp. G. 3. 169; In. 3. 29. 1; post, p. 697.

\[7\] 46. 1. 35.

\[8\] 46. 3. 38. 2. X lent money to Y, which freed him. Then because fideiusso to X. If this were for the obligatio honoraria it is good, but if for the natural obligation it is null, for a man cannot become fideiusso for himself. If he becomes fideiusso to a fideiusso of the natural obligation or estus versa, both obligations persist, one being natural and the other civil, though in the case of a fideiusso the father there would have been merger, both being civil, 46. 1. 21. 2. See ante, p. 217 and post, p. 696. See also App. ii.

\[9\] The slave's fideiussores are released, 12. 5. 13. pr.: 15. 1. 50. 2; 46. 3. 38. 2. 46. 4. 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.

\[10\] 46. 4. 8. 4.

\[11\] Op. 5. 1. 57; 15. 1. 8. 11.
be justified on obvious practical grounds. And if, as Julian holds, a natural obligation in the actual defendant can survive an adverse judgment, a fortiori would it survive in the case of another person. This is not the only case in which a fideusum can be taken for a natural obligation surviving levis contestatio. All this makes it difficult to understand the text which makes the judgment release the slave's fideusum, and that not spuo sure, as might have been expected, but ope exceptions.

The last point is perhaps unimportant in the Digest where the distinction no longer exists. Apart from possible interpolation it may perhaps be explained on the ground that the exceptio was not excluded by the presence of spuo sure consumptus. 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 oversights. 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 supposes that there was no consumptus and not an ordinary exceptio res supervacatae, but a "positive" exceptio res contra A A supervacatae. This is an appeal to the "praecjudicial" effect of judgment. And Erman observes that there is no sign of such an exceptio in classical law. Affolter, 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 premise 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, 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 negate the natural obligation. And it is difficult to see how the nature of the transaction can affect the identity of the res, for this identity, however defined, is something already existing. Here too the texts give no evidence of any such function of the exceptio, in fact it seems that every

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1 Given natural obligation the slave's obligation is a premiss, not the consequence of the obligation de peculo, as Affolter and Erman make it. It may exist without the obligation de peculo, the converse is not true.
2 15 1 41. As to the meaning of the words servus ex contractibus naturaliter obligat (44 7 14), post, p. 699.
3 39 9 19 4. A 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 4 9 2. D 1 1 3 4, 15 1 17, 14 4 9 2.
6 16 5 17. Afric anus says (46 4 21, ante, p. 694) that if the liability of fidiusum and the natural liability of the former slave fall on the same person by inheritance both persist, so that if the civil obligation is transferred the money is still due under the other obligation. Naturaliter: Machi
del (op cit 176) thinks the word pert contemplate 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 Cypus as holding that it is a case of fi
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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 though the contract was so framed, by condition or the like, as to depositi

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 proficiere libero facto non potest. Actions acquired to the master remain with him, notwithstanding manumission of the slave. 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. 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. 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. 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. 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 proficiere 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 honorum separatio, which must be claimed before he touches the property.

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. The same is true of the conditions under which a payment may be validly made to a manumissus under a negotium conducted

while he was a slave. 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.

Another question which has given rise to some controversy is why the obligation of the slave remained natural after manumission, and did not become actionable. Schwanert 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 objects that it is not consistent with other opinions of Schwanert, but that is no objection to the opinion standing by itself. Savigny 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, according to Pernice, would equally naturalize 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 takes much the same view as Schwanert: he rests the rule on the fundamental principle of procedure: neque enim actio quae non sunt ab initio nata oriri potest. 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.

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1 Kalb, Juristenstein, 66.
2 For some remarks on the text see Savigny, System, 2. 141 and Beilage iv (2. 429).
3 60. 17. 166.
4 44. 7. 66.
5 16. 3. 1. 30; 45. 3. 40; 50. 17. 18.
6 42. 6. 1. 18.
7 35. 8. 19. 1.
8 Ante, p. 676.
9 Op. 4. 3. 7. 8; ante, p. 692.
10 45. 3. 40; 50. 17. 18.
11 44. 7. 14.
12 Macchelard, op. cit. 186, shews reason against inserting meo before servo. See Gradenwitz, Natur und Slave, 35.
13 Savigny, cited Pernice, Labeo, 1. 150.
14 System, 2. 426, cited Pernice, loc. cit.
15 47. 3. 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? The distinction 
is allied with the well-known and ancient rule: *nemo delictis exculatur 
quamvis capite minutas sit*. 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 
language used in all the rules 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.

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 *fideissia*, 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 
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 *compen-
sare*. But, as Machelard points out, there is here no question of 
*compensatio* in the judicial sense; and a rule introduced *favo liber-
tatis* 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. Mandry takes a 
similar view, citing the same and other texts which indicate the 
tendency against compulsory methods. He observes that, in texts 
which seem to have a different tendency, there is always some fact after 
the freedom accounting for the liability. 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 
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 
of the *peculium* could not vindicate the *peculaires res* except subject to 
a proportionate deduction for these. Nothing of the sort was true of 
depts to outsiders. One text observes: *etiam quod natura debetur venit in 
compensationem*. It has been shewn 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: 
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 actions 
*honorable* cannot be said, but on the analogy of what followed from a 
subsequent *pactum de non petendo*, 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*, 
the *servus poenae* formally *restitutus* or pardoned *ex indulgentia principis*. In 
the case of the slave freed by the public authority by way of reward or 
of punishment to his master, there is little authority: probably the 
rules were normal.

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1 Ante, pp. 193, 221 sqq.
2 Ante, pp. 440 sqq.
3 Ante, pp. 655.
4 Ante, pp. 599 sqq.
5 16. 2. 6.
6 Ante, p. 695.
7 Ante, pp. 307 sqq.
8 4. 5. 2. 3.
9 3. 5. 16, 18; C. 4. 14. 2.
10 3. 5. 16, 18; 4. 3. 7, 8; C. 2. 18. 21; 4. 14. 3.
11 4. 7. 14.
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. 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. In fact a well-known analogous case suggests that the difficulty was the other way. When the lex Praetoria allowed minors to set aside their agreements the result was that no one would deal with them. 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. 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 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 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, 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 inastitoria, Karlowa remarks 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 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 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. In relation to the actio inastitoria 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 Steilverfretzung, 3. 2 See ante, p. 157. 3 See Girard, Manuel, 927. 4 So, in English Law, the remedies against infants are designed in their interest, not in that of creditors.

APPENDIX I
third party trusts is the show of capital. Karlowa, besides making the same assimilation of the trade with the praepositio1, says that the principal, standing behind, of whom the third party knows nothing, could have no juristic importance. Mitteis2 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 gestio1? Must the third party have handed over the property in view of the intended verso1? These have been fully discussed1. 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 peculium2. But the action lies even though the contract (or all contracts) were prohibited by the dominus to the knowledge of the other party3. It lies against a master who acquired the slave only after the contract and who knew nothing of it4. It appears even that it lies though the contract was made even before there was a peculium5. No doubt these rules were gradually reached6, 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 negated 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 made4. The actions de in rem verso and de peculio

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1 Ante, p. 173.
2 Ed. Perp. § 102.
3 The distinction is clearly brought out in 14. 3. 7.
4 Ante, pp. 179 sqq.
5 R. R. G. 2. 1128. 9; ante, p. 173.
6 Stellvertretung, 26 sqq.
7 Ante, p. 179 sqq.
8 Mandry, Familiengüterrecht, 2. 133.
9 Ante, pp. 212 sqq.
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.

With regard to the actio inustitoria 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. 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 inustitoria 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. 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 authorization of a specific contract.

APPELLD IN.

FORMULATION AND LITIS CONSUMPTIO IN THE ACTIONS ADICITIAE 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. He holds that in the actio de peculio the intentio was in ius, with a fiction of liberty, 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 Lenell. 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, 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. But the chief argument is the ius ture consumptio which appears in some of the texts.

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 servio. 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, but the language of many texts leads Lenell to the opinion, now usually accepted, that there was a taxatio in the condemnatio—dumtaxat de peculio et in rem versa, or the like.

From this formulation it would follow, since a iudicium is none the less legitimum because the liability is praetorian, 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. There was disagreement as to whether the natural obligation of the slave was eadem res with the praetorian obligation of the master, 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, 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, declares that where one is only liable for a

1 Ed. Perp. (2) §§ 102, 104; Girard, Manuel, 663. Gradewitz (Z. S. 57. 229 sqq.) doubts the possibility of the crude fiction: "si liber esset," and supposes a fiction of succession at the date of the transaction. 19. 1. 24. 5; 46. 2. 15. 11. 1. 13. 14. 12. 13. 14. 2. 15.
2 Lenell, loc. cit., states and discusses the views of Mundy (Familienbürgerecht, 2. 259) and Bürzel (Pand. 2. 209), who argue for a formula in factum, and of Baron (Adjec. Klgr. 186 sqq.), who supposes an intentio expressing a duty (dare spertore) in the domus. See Kolk, Aktenw. 333, 341 sqq.
3 In 7. 1. 14; D. 3. 1. 57; 15. 1. 41; 15. 2. 1. 15; 18. 4. 2. 16; 16. 3. 23; 21. 3. 22; 23. 3. 12; 23. 4. 26. 12.
4 Lenell, loc. cit., cites, states and discusses the views of Mundy (Familienbürgerecht, 2. 259) and Bürzel (Pand. 2. 209), who argue for a formula in factum, and of Baron (Adjec. Klgr. 186 sqq.), who supposes an intentio expressing a duty (dare spertore) in the domus. See Kolk, Aktenw. 333, 341 sqq.
6 See Ulpian in 13. 3. 1 pr.
7 See Ulpian in 13. 3. 1 pr.
8 See Ulpian in 13. 3. 1 pr.
part, action against him releases the other, but on equitable grounds the Praetor restores the action. 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 res castrorum having been omitted.

Prima facie, the simplest case is that of renewal of the action against the same defendant, actio peculio. Ulpian tells us that the action lies. 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. The parallel is pointless unless further actio de peculio was barred at strict law. Erman indeed 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 socio 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 that where the actio annulis 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 the view was expressed that this was due to independence of the whole obligation, being expressed in the intentio, 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, 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 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, actio peculio. It may be noted that Papinian holds the whole obligatio to be brought into issue, and that the jurists who refuse conductio for payment in excess of peculium, are not authorities for the view expressed in Ulpian's text as it stands. 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.

On the whole the more probable view seems to be that in classical law the action was not renewable without relief, and that Ulpian either wrote non potest or, more probably, added a requirement of restitutio. 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. The same conclusion is deductible from the rule that in case now to be considered of claim against one owner, after action against another, the plaintiff might proceed as if the earlier judicium 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. 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 coheeres 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. As we learn that of two owners he could be sued in respect of whom there was no peculium, 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.
Appendix II

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. But Ulpian, quoting Julian, tells us in a suspected text, now proved, by discovery of a fragment of the original, to be substantially genuine, that neither could be condemned for more than he held, or deduct except for what was due to himself, 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. 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, 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. 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 annulata, but here the division is due to the express provision of the XII Tables.

In the case of vendor and buyer, within the annum 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.

The relief is sometimes called restauratio of the old action. 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 condemnation would be based on the present state of the peculium. It is in fact restitutio in integrum. It is elsewhere called rescissio iudicii, which expresses the same idea. It has been said that this makes what has been paid an indebitum. 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 to the heres. Is this mere succession or rescisio 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 that it is a mere case of succession. He has also shewn, however, 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 nulbal actions, and the view adopted that transfer of a pending action against the slave, freed, or against a new owner, is a mere case of succession, Koschaker takes a different view at least in the case of the man himself. He shews that Ulpian calls the old iudicium invitus, while Paul says the iudex must transse iudicium. 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, 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 proscription. This agrees with the language of the texts 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, and that de peculio barred qued insum9. 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. 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 veratio, to the amount of the peculium10, even before judgment. This excludes the possibility of the view that it is in the actio iudicii de peculio that the veratio is made effective. But any new action is presumably barred. Von Tuhr shows reason for supposing the action to be one by the surety iudicium siccum, which the defensor must have had. On this view the text has nothing to do with consumptio.

1 Translatio iudicii, 329 sqq., in opposition to Krüger, Z. S. S. 15. 140.
2 cp. cit. 15. The distinction is, however, sometimes brought out, e.g. in 5. 1. 17.
6 cp. cit. 295. 7 3. 62; 3. 53, 68, 107 etc.
8 4. 7.4; Inst. 4. 7. 5; D. 14. 4. 9. 10.
9 15. 1. 19.
10 Actio de in rem verso, 147.
In relation to the actio insitatoria (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 magni et. And it bars another actio insitatoria, where the first was lost through a mistake as to the business for which the loan was made. But the same writer, Ulpian, says in the same context, that if insitatoria has been brought on what is in fact a pecuniare negotium, and thus lost, the actio tributoria is still available. This seems to mean that insitatoria does not bar tributoria. Ernani is inclined to explain the texts as expressing a difference of view, some jurists holding the primitive (Proculian) view that inteto consummitur; 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 taking all the conditions of the negotium, is still available. 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 dolsus. It is not certain whether the bar of de peculio by tributoria depends on consumpto, or on fairness, or on express provision, as is suggested by one of the texts. If the formula alleged an obligation of the dominus other than that of the representative there is no reason why it should not survive as far as consumpto is concerned. This would explain why tributoria is mentioned and not de peculio. But this solution seems to require that it be dolsus not to admit, in the tributo, a debt now reduced to, at best, a naturalia 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, Professor Eisele makes some interesting remarks on the form of mancipatio. As Gaius shows, it contained in ordinary cases, two members; first an assertion of ownership in the acquirer, and secondly, what looks like the chief operative part, canto mili empta hoc acre aeneae aqua libra. With the odd fact that at the time when the

1 14. 1. 17. 24. 2 14. 9. 13. pr. 3 44. 2. 11. 18; 46. 8. 8. pr. 4 G. 3. 180. 5 The action was just that one not confined to the household relation. Lenel (Ed. Perp. § 107) shows 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. 8. 11. 7) while destroying the action against the representative (14. 1. 17. 24).
6 Maudry, Familiengeset. 2. 448. 9. 7 Karlowa, R. H. G. 2. 1163.
8 14. 4. 9. 1: run acti sobi regressum ad ulium non saturum.
9 Z. S. 38. 66 sqq. 10 G. 1. 119; 3. 167.
APPENDIX IV.

THE ESSENTIAL CHARACTER OF MANUMISSION. 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, 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 holds this text 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. We know that manumission by will is not a legacy. 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 manumipation 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 usuaption. 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, 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 sometimes cited may refer only to cessio in iure hereditatia.

What passes to the man is not what belonged to the master: his liberty and civitas are not abstractions 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 is not identical with the right which is destroyed. The cases seem parallel: what is released is something other than what is acquired. Rabel 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, and to cessio hereditatia by a necessarius, and perhaps still more from the rule that cessio after entry released debtors to the estate, and from that as to the effect of attempted cessio by a tutor cessicius, 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 civitas, 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, 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. 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, but a comparison of the accounts of the two transactions shows the closest similarity. It is true that there are differences: the prominence of the festa 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 showing 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 Wlasak: 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 addicito. He shows 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-dicito shows what is done is in supplement to the act of another.

From this point of view the question whether it is fictitious litigation or not is rather a matter of words. Wlasak suggests that it is of the essence.

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2 See Karlowa, loc. cit.
3 See Rabel, loc. cit.; G. 1, 134, 2.
4 See Wlasak, Z. S. 28, 1 sqq.
5 See Rabel, loc. cit.
6 See G. 1, 35 sqq.
7 See G. 1. 30.
8 Ibid.
9 Schlossmann, Cessio in Iure und Mancipatio.
10 Schlossmann, Cessio in Iure, 2, 55.
11 See See Rabel, loc. cit.
12 See G. 1. 24, and ante, p. 451.
13 See G. 1, 30.
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 liberratis, the vindicatio and the assertor, and is plainly based thereon.
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, 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 cives, 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.
Vangerow, 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, 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 and that the textual support of the others is only apparent.
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
vindicatio and will. He accounts for the language of Ulp. 3. 4, which requires

1 Libyr. 41. 9.
2 See the ref. Wlassak. Z. S. S. 25. 104 sqq.
3 Libyr. 41. 9.
4 See the ref. Wlassak. Z. S. S. 25. 104 sqq.
5 The chief are G. I. 86, 187; 2. 195; Gai. Ep. 1. 1. 1; Ulp. 1. 12; 3. 1; 3. 4; 11. 19; Fr.
7 Ulp. 3. 4, juris, 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 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, and some indications in Gaius 1. 35, so defective that recon-
stitution of the text is hopeless. On the other hand it must be admitted
that while there are texts speaking of iteratio as applicable to quiritian latins
generally, there is none which unequivocally applies it to a latin freed
civis 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 manu-
mitter, though it does not pass to the manumitter. 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 manu-
mission by will. 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, 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
vindicatio, 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. Indeed on
Vangerow's view it seems that the man should have become a servus sine
dominio, 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 vindicatio could
make a man a latin in classical law, 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. I. 167; Vat. Fr. 221.
2 Ulp. 3. 4, referring only to latins over 30.
3 Ulp. 3. 4, referring only to latins over 30.
4 The rule of accrual when a common slave is freed vindicatio or testamento by one owner
(ante, p. 575) may seem to throw doubt on this. But the principle on which this accrued
right is operated even in informal manumission. The view which
was very doubtful. Some thought it operated even in informal manumission, but to one
prevailing 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. 3). Justinian observes (C. 7. 7.
1. 54v.) that, as to the rules of accrual in this case, nulla ambignitas existit a quds veteres
usuriae.
5 G. I. 35; Ulp. 11. 7.
6 Reff. ante, p. 542.
7 Ante, p. 543.
APPENDIX IV

MANUMISSIO VINDICTA BY A FILIUSFAMILIAS.

It is clear that manumission vindicta was a legis actio. 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 legis agere. One of these is that of Mitteis, to refer all the texts which do not specify the form to the informal methods and 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, and holds, this the better view.

The relaxations stated on p. 452 are no doubt for the most part merely evidence that the process was not really regarded as judicial. Some can hardly be so disposed of, 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): ...δ ἐπεξεργάζομαι ὡς μὴ ᾧν legis ( ) δεκτικός ὁ δένταο τῷ εἰς τοῦτο εἴσεξε ἐκεῖ ἐν τῷ ἑπτάκτῳ.

This text leads Mitteis to reject all the others. He infers that in the judgment of Ulpian a filiusfamilias could not legis agere, and that thus all the texts which speak of him as freeing vindicta must be in part post-classical. Fifth century Greek scholias are not 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

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1 Ulp. 11. 6. 8.
2 See 37. 14. 8. pr.; 38. 2. 8 and ante, p. 459.
This text has been profoundly altered. It does not express Julian's view, 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 contingency 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 shown, 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, voluntas est dominus servum manumittere 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 subet quos dominus liberos esse voluit. On the other hand, as applied to manumission vindicata the decision is perfectly sound. As has been said by Wissak: "bei allen Formalgeschäften des alten Rechts, so auch bei der manumissio vindicata, die rechtliche Geltung unabhäng war vom Dasein des durch die Wortform... 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, 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. Some of them refer to informal manumission.

VIII. 40. 2. 10, Marcian. Surdi vel muti patris filius iussu eius manumittere potest: furiosis 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 vindicata. 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 not be altogether insignificant that in two of these the limit of the power is clearly stated, while in the third 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 scissi Romae agentem epistulam fecit quae permiserit ei quam vellet ex servis quos in ministerio secum hic habebat vindicta liberare: post quam filius Sthichum manumissit apud Praetorem: quaeo an fecerit liberum. respondi: quae non hoc concedam credamus patri ut permittere possit filio ex his quos in ministerio habeat manumittere I solan enim electionem filio concessit, ceterum ipse manumitterit.

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. 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 permiserit pater manumittere filius ignorans patrem deceisse manumissit vindicta non fieri cum liberum, sed et si vivit pater et voluntas mutaete et ob iudici volente patre filium manumississe.

Mitteis supposes the compilers to have interpolated the word vindicata. 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 Iulianam, 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

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1 39. 5. 33. 2.
2 Z. S. 27. 369.
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 aside1. 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 judiciae 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.

Appendix V

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 militia. 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 omitted2, 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 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 shown 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 multis contra iuris rigorem pro libertate sint constituta3.

1 40. 2. 34. 10.

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1 Ante, p. 719, no. v.
2 29. 2. 35. 1 (which, as Mitteis says, may have to do with sustrimesius iuris genetum 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 text.
INDEX

Abandonment of slaves (see also Sick slaves) 274; noxal liability 107
Abduction of slaves 32 sq.
Abseandng slaves, administrative rules 268
Absention of heres, effect on manumissions 609
Acceptilatio, to or for a slave 217, 261, 694
Acceual in manumission of common slave 575
Acknowledgments, by slave 164; of freedom, effect 648; of liberty, effect 647
Acquisitions by heres necessarius, ignorant of fact 332; servus communis 379 sqq.; dotalis 344 sqq.; libertaris 263 sqq.; fugitivus 271 sqq.; fructuarius 361 sqq.; hereditarius 256 sqq.; in bonis 250; malae fidei possessus, 555; publicus municipi 295 sqq.; slave whose ownership is in suspense 136; statuliber 287; vicarius 241 sqq.

Acquisition, in suspensu 292, 349, 363 sqq.; iudex possessoris 342; manumission 681; of ownership through slave 135 sqq.; through bona fide servitum 382; to peculium 198 sqq.

Actio aestimatoria 59; auctwitatis 52; de in rem verso 176 sqq., 585; adempio peculio 219; basis 184 eqq., 705; nomine vicarii 245; de pauperie 112

Actio de peculio 123, 207 sqq.; annalis 227 sqq., 366; error, restitutio 705, 710; renewal, actu peculio 706; spoee 207-214, 639, 705; transfer of slave inter vivos 229, 709

Actio doll, for acts done before manumission 692; ex empto, for edictal obligations 44, 45, 63; where contract is void 44; exsecutoria 127, 174 sqq.; ex scriptae hereditatis 590; ex poenitentia 634, 686, 690, 645; funeraria 74; fortii in case of pledged slave 269 sqq.; institoria suo, servi, nomin 79 sqq.; institoria 169 sqq.; knowledge of parties 173 sqq., 703 sqq.; nomine vicarii 245

Action against dominus, effect on natural obligation 696
Actiones adiectitiae qualitatis, consumptio inter se 711; formulation 706
Actio Pauliana 61; Publiciana 27; quanto minoris 53, 59, 60; qued iussu 166 sqq.; notice to third party 157, 703
Actio restitutoria 59 sqq.; burden of proof 60; duties of buyer 61 sqq.; effect 61, 63; eviction of slave 66; interitus rei 66; limits of time 59; more than one buyer or seller or slave 67, 68; penal character 64; refusal of vendor to receive slave 62

Actio Serviana 48, 60; tributoria 233 sqq., 712; alternative to de peculio 238, 712
Actor, sale of freeman to act as 433

Actus, liability after manumission 689
Addiction bonorum 630 sqq.

Addiction in cassio in iure 715
Ademption of, administratio peculii 205; of conditions 486; of servorum commissum 519; of legacy 149; of manumission 466, 470; of peculium 205, 219, 467
Additio of servus communis institutus 384
Adoption of slave 405
Adrogatio, actio de peculio 213
Adsumma libertatis 442, 655, 656, 726; sequenda 668
Adsumplation 155
Age of manumitting owner 537 sqq., 555
Age of manuumissus 450, 542 sqq., 552
Alienation by sale 159, 201, 241, 713; of statuliber 488
Alimenta 473, 475
Ancilia Caesaris 828; married to freeman 549, 602
Annicium donandi 635; fraudandi 561; postendi 131
Annexi puto 355
Apparent condition in manumission by will 483; fructuarius in good faith 395; liberty, praescriptio 648
Appeal in causa liberalis 667, 679
Appointment as tutor, without express gift of liberty 463, 514
Arbitrium in noxal actions 114
Benefactum separationis 506
Birth as cause of slavery 587 sqq.
Bonae fidei possessor 105, 104, 581 sqq.; acquisition by 541 sqq.; noxal liability 129
Bona fide serviores 282, 281 sqq.
Bona venalia, gifts of liberty 626
Bonitary owner, acquisitions to 136; manumission by 535, 549, 693
Burial of slaves 74
Burden of proof in causa liberalis 555, 560
Caroquiom in causa liberalis 663, 665
Capi'et fraudati 286, 229
Capiemento (see also Postiliumum) 291 sqq.; manumission 597; return without postilium 306, 307
Captivity, effect on family relations 295
Captivity of slave, effect on rights over him 298
Carobian edict 672
Castration of slaves 8, 37, 90, 602
Capua, theft by employees 122, 127
Causa manumissionis 595 sqq.
Causa probatio 588 sqq., 542, 629
Causa liberalis 85, 183, 563, 653 sqq., 718; acquisitions 684 eqq. ; actions against claimant of liberty 662; burden of proof 655, 660; claims of lesser rights 670; confluence with other issues 671 eqq.; interim position of the man 683; possession of the man 270, 663
Caxuto Muciana 485, 486, 586
Centum 439 eqq.
Cena in ture, essential character 715 eqq.
Child born apud hostes 301, 305, 308
Child of anicia, when free 398, 399, 400, 617 eqq.; of liber, when a slave 398
Cibera annua 321
Circumductio 655, 669
Civil position of slave 82 sqq.
Claims of liberty 623 eqq.; of impemittas, property relations 674
Codicile by capti'ni 301, 308
Conihi servitis 76 eqq., 662
Cohors as common owners 392 eqq.
Collegia tenenturum 74
Collusion between vendee and claimant of man 49; in causa liberalis, etc. 419, 650, 674; to defeat will 610
Coloni fugitivi 403
Commercial importance of slaves 131
Conmodatum of or by slave 11, 158, 205
Common slave, acquisition ex re unius domini 386; legacy to 256, 392; transactions affecting owners 300 eqq.
Compensation in naturalia obligatio 700
Compulsion to enter into same deieoedissima 223 eqq.; to free under 611 sqq.
Conscientia of fugitivi 269
Concessio peculi 196, 197, 206
Concubina, manumission 609
Condemnation in noxal action 105; of pregnant woman 400
Condicio generalis 529; in gift to slave 57; by statute 268
Conditional liberty, addicicio bonorum 621
Conditional manumission of common slave 576
Condition dando, faciendo 503; in deieoedissima 518; in legacy to freed slave 471; in manumission 465, 492 eqq., 671; territorum 685; pecuniae slave, dispute as to hereditis 470, 502; claim of payee 505 sqq.; prevention of performance 491 eqq., 496, 503; rationes vendere 495 eqq., 501
Comunatio 90
Consent of dominus to manumission by third party 457
Constitutio 583 sqq.
Constitutio Rutiliana 315
Consumptio ipso ture 707
Contract by deputy of master next 174
Contract by master, act of slave 161 eqq.
Contract by servus communis 577 eqq., 578 sqq.
Contract by servus dolus 157; dolus or culpa of dominus 212; obligation of master, limitations 155 eqq.
Contract by servus doliatria 206; ascilis 286; fructuarius 369, 363, 583; fugitivus 278; hereditarius 280 eqq.
Contract by vicarius publicus 122
Contract by vicarius 242, 243
Contract of bona fide servitius 339 eqq., 347;
of slave, for right for himself 156
Contractual capacity of slave 155
Contribution of slave 76
Conveyance of slaves 11
Corrupcio hereditatis 678
Creditor, what is 562 eqq.
Crime by slave 91 eqq., 700; by slave sold 57; by statute 268
Crime capitae hereditatis 256
Curtesy to slaves 36 eqq.
Curia in elegiando 123; in mandate 126
Curator bonorum capitii 11, 293
Custodia, nature of 282; noxal liability 123
Damnus by slave of colusus 123; by slave to himself, dedication in actio de peculo 223; in turba factum 99, 100; to slave 29; to pledged slave 281; to servus hereditarius 254
Death, effect on questions of status 651
Death in captivity, presumptions 303
Death of third person, effect on questions of status 623
Debita naturalia 685
Debt as part of premium 193, 194, 198, 220, 225; of dominus to slave 655; of pecunia in actio de peculo 251 sqq.
Decree as source of freedom 588 eqq.
Deventio cohabiting with ancella 77
Deventio 544; enslaved 402
Deventio per poter putratus, postiliumum 304
Deed for debt in actio de peculo 228–238, 370
Defaulting adverteres 655
Defaulting claimants of liberty 419
Default of slave, effect on possession 160
Deletio by slaves 85; by slaves of the Fisci 326; by slaves of pollution 278
Delict by familia 118 eqq., 376
Delict by servus communis 378 eqq., 377; by servus doliatis 124; by servus fructuarius 118 eqq.; by servus hereditarius 254 sqq.
Delict by slave 98 eqq., 677, 679; against rehbiting buyer 124; against third persons, deductio in actio de peculo 222; in connexion with contract 126 sqq.
Delict by slave, knowledge of dominus 115, 128
Delict by viciarius 248
Delict, enslavement of wrong-doer 433; privity of dominus, manumission 576 sqq.; to bona fide servitius 334 eqq.; to servus communis 373; to servus hereditarius 254; to slave 31, 576
Denial of potestas in noxal actions 104
Denuntiatio under Sc. Claudianum 412 eqq.
Deposit of or with slave 265, 697
Delictio compared with manumission 437
Derelict slaves 274, 289 sqq.
Dictum promiscuum in sale of slave 56 63
Dies cedens in gift to slave 145, 146, 152
Dies in manumission 455, 469, 479 eqq., 490
Discretion not to alienate 515
Discretionary fideicommissum 516
Division of claim, actio de peculo 229, 709
Divorce, restrictions on manumission 584 eqq.
Dolus, in nozce 106, 110; essential to actio tributaria 236; as basis for actio de peculo 209
Donatio by slave 304; by slave to master, when a 179 sqq.
Donatio mortis causa 151, 685
Donatio to common slave 399
Dos of servus poenae 407
Dos, promise to common slave 389
Domus, manumission 588
Duae lucrificae causa 147
Ductio in noxal actions 108 eqq., 110
Endem res, what is, for litis consumptio 709
Edictal liabilities enforced by actio ex empoto 45
Edict of Aediles 39, 46, 52 sqq.; fraud on the edict 55, 69; mutual and moral defects 57; nationality of slave 48, 58; sale of slave as accessory 59; sale of veteratus as noxialis 9, 57
Edictum Carobianum 86
Effect of enslavement 545 eqq.; of pardons 410, 607, 701; of prevention of performance of contract 493
Employments of slaves 7, 131, 320, 322, 324, 327
Empiro on credit by servus fructuarius 364
Empiro suum nummis 636 eqq.
Enslavement 397 eqq., 419 sqq.
Entry into monastery, freedom 600
Errro 52, 55
Error in institution and manumission 145, 506
Errors cause probato 545
Errors cause 145
Estoppel by fraudulent sale 430
Evasions of statutes affecting manumission 538, 547
Eviction 46 sqq., abandonment of slave by buyer 50, exclusion of penalty by agreement, effect 46, intestatus rei 49, 50, of accessories and partes 51, of an undivided part 51, of less than owner ship 50, of one slave where several sold 50, remedy ex empto et ex stipulatu, difference 46 sqq., usuempio by buyer 49
Evidence by slaves 86 sqq., in charge of admistratory 91, for or against masters 88 sqq.
Exceptio annua 228
Exceptio res indicatae, theories as to different types 696
Exercitor, what (see also Actio exercitoria) 174, theft by employees 122, 127
Ex opere, acquisitions 341 sqq.
Expropriatio by slave 215 686, 693
Ex re, acquisitions 341-5, 352
Extraneus, addictio bonorum to 631
Facemus, what are 94, 690
Facultas dedenda 115, 114
Failure in causa liberalis 549
Failure to receive instrumenta 648
Falsus causa in manumission 539
Falsa causa 490
Famula commercii, delict by 376
Famula, delict by 118 sqq.
Family relations of persons publicus 319, 320
Picta lega Cornelicae 300
Fideicommissus, implied 514 sqq.
Fideicommissum to slave, acceptance by master 140, of liberty 513 sqq., absence or default of one of several rogatis 616, alienation by rogatis 614, 615, application of ter Faenlia, etc 921 sqq. charged on infans 528, chosen by heres 517, consent of slave 517, 555, death of rogatus without successor 615, delay, status of partes 617, failure of will 520, failure to complete 559, insufficiency of gift to fiduciarius 599, 600, 557, interim position of slave 524, legacy of slave 518, not strictly due, relief 618, on whom may be charged 527 sqq., on whom binding 516, 519 sqq., 523, overdue 611 sqq., publication of rogatus 614
Fideicommissus of peculium 192
Fideicommissus tacito 148
Fideicommissus to buy and free a slave 530 sqq
Fideicommissus, by or for slave 158, 215, 687, 688, 695 sqq.
Fideicus 622 sqq., 645, 646, actio de peculio 220, noxal liability 125 sqq.
Fideicus, rights over slave 524 sqq
Fideicus, actions against, servit nonius 249
Fideicus, freeing by authority of pater 458, 559, 718 sqq.
Fideicus, bond by gifts of liberty 611, 627
Fideicus, manumission by debtor to 629
Flight of slaves, what is 267
Flight of slaves to status of Emperor 37
Forfeiture on condemnation 407 sqq., 456
Forfegy of will, torture of servus hereditarius 253
Formal manumission, sterilio 716 sqq.
Formulae of actions, acceptatione qualitatis 706
Fraud of creditors in manumission 544, 559, 565, who may slave 565, 655, successive creditors 563, in soldier’s will 562
Fraud of patron 544, 560
Fraudulent sale of freeman 427 sqq., 431, age of man sold 429, 432, person entitled to freedom 429, statutibus 429
Fraus legis 636
Freedom as reward 598 sqq.
Freeman, fideicommissum of liberty to 556
Freewoman, cohabiting with slave 412 sqq.
Fruit of bona fide servientes 334
Fruit of servis, various forms 10, 21
Fugax 267
Fugaxus 31, 52, 55, 69, 257 sqq., 656; accomplis 31, far ex 31, 271
Fugitivus, possession of 338, 666
Fugitivus, receptio 90
Fungible available in actio tributoria 235
Fusus servus manumissus 568
Gesto, in the actio de in re verso 170, 180
Gift by bound bona fide possessors to slave 342 sqq.
Gift by slave to wife of common owner 551
Gift by will to common slave 384, 391, to servus alius 144, to servus hereditarius 257, to slave, manumission 651, to slave, reputation by dominus 151, to slave of manumission 320
Gift of freeman as a slave 429
Gift to servus poenae 277
Gift ut manumittatur (see also Transfer ut manumittatur) 462, 563, 630
Gabelle, said of slave 151, 156
Hereditas uscursus 253, 254
Hereditas passing to Fisci, Manumission 626
Hereditata petitio, effect on gifts of liberty 611
Heres, fiduciarius, failing to choose slave to free 610
Heres necessarius 505 sqq., 524, 546, 555 sqq., 573, 575, 640, 642, acquires liberty from self 507, by fideicommissum 609
Hercy, freedom of slave 605 sqq.
Husband and wife, gift ut manumittatur 630
Hypothena 416
Imoritur, freedom of slave 605 sqq.
Imoritur ut servus 416
Imoritura, freedom of slave 578, 604, 642
Imoritura of servus 578
Imprisonment for dolus in actio de peculio 218 sqq.
Incensum 401, 547
Incertae personas, manumission 477, 556
Indemnity of peculium 199
Indulgentias generalis 410
Influence of Greek law 448, 643
Informal gift of liberty by will 444
Informed manumission 444 sqq., 456, 548, 554 sqq.
Informed manumission, sterilio 716
Informed manumission of pledged slave 674
Informal freed as reward 599 sqq.
Ingeniatus, clamat de 675
Ingeniatus, definition 458
Ingratitudine patrono, etc 422 sqq.
Infractus of filius libertae 427
Inheritance of captivus 999 sqq.
Inimica to slave 79 sqq., 358
Insector, appointment by pupilla 170, slave of other party to contract 171
Instituto and manumission under different conditions 512
Instituto, and legacy to servus caustrensis peculis 528
Instituto of delict slave 275
Instituto of slave 157 sqq., how far in stiatus of dominus 377, 138, 140 sqq., pro herede gesto by dominus 139, repul- diation 140, sine Libertate 482, 553
Instrumenta manumissionum 453
Intentio in nullos actions 105
Intentio of servus communis 378
Interdicta nuncula 128
Interdictum exstirpatorium 658
Interesse of bonae fide possessor, for actio juris 335
Intercus peculi 206
Interrogation in actio de peculio 208
Interrogation in nullo actions 102, 103
Irrevocability of manumission 444, 456, 564, 588, 600
Iteratio 716 sqq.
Joint bonae fide possessor 404, 594
Joint legacy, contrasted with joint instituted 154
Joint usufruit 394, 710
Judicium, proselytising, liberty 604, 605
Index endorsing damages instead of delivery 610
Judgment against a slave 3, 83
Judgment debtor 402
Judgment in actio de peculio, naturalis obligatio 656, in causa liberalis, effect 664, 651 sqq., 673, 675
Judicium legis 707
Judicia sine dedicatione 102, 103
Jurisdiction in causae liberalis 657
Fus ascendentes 158 sqq., 578
Jurisdiction by slaves 85, 202, 214
Fus poenentiae 634, 645
Jus in acquisition of possession 133, 183, in contract 176, 195, 549, 563, 567, 568, 580, 590, 593, in delict 115, 129, in delict by servus communis 375, 376
Jus usitum libertate 649
Killing of master by slave 90, 94
Killing of slave 29 sqq.; by master 37; by two injuries 29
Lapse of fideicommissum 520
Peculium, used for payment as condition of liberty 509
Peculium, usucapio 135
Peculium vicarii 240 sqq.
Peculium, what amounts to gift of 189; what included on manumission causa peculii 189
Pecuniam dare, as condition of liberty 496 sqq.; character of payment 497, 498; prevention 503
Penalties for ingratitude 423 sqq.
Penalties in sale with restrictive conditions 70 sqq.
Peregrine, manumission by 554
Perpetuity of manumission (see also Irreversibility) 669 sqq.
Personality of slave 3, 83, 147, 148, 150, 152, 155, 157, 409
Pileati 447, 549
Pledged ancilla, partus 22 sqq.
Pledged slave 261 sqq.
Pledged slave, abandoned by dominus 277
Pledged slave, delict by 115, 125
Pledged slave, manumission 279, 550, 575 sqq.
Posentia 654, 683, 695, 642, 645
Position of captives and children 292, 299
Possession, acquired through bona fide servitum 347; acquired through slave 181 sqq., 209; as common owner in good faith 295; death of possessing slave 161; by servus fructuaris 303
Possession, manumission 681
Possession of fugitivus 269 sqq.
Possession on behalf of captives 294
Possession, postimium 309
Possidere, said of slave 156
Postimimium 292, 298, 304 sqq., 607, 701
Postponement of causae liberales 659
Potestas, in noxal actions 101, 106
Praecaelius, servitudo, legacy to slave 150, 159
Praeceptio de libertate 659 sqq.
Praeposito 172 sqq., 763 sqq.; knowledge of creditor in actio tributoria 234
Praestantor will, manumission 447
Praetoria tulli tui liberti 446, 534, 720
Praecarium servii 266
Prejudice to causa liberalis 671 sqq.
Prevention of satisfaction of condition of manumission 483 sqq.
Price-sharing in fraudulent sale 435, 439
Priorities in actio de peculii 224, 226
Privative effect of nominatio 349, 363, 380, 383, 385
Privy of dominus to delict by slave 114, 128
Procedure, incapacity of slaves 83; in causa liberales 653 sqq.; in noxal actions 101 sqq.
Proclamation ad libertatem 656
Pro libero se genero, actio de peculio 212
Promise by slave 165, 215; of money for liberty 692; obnoxii libertatis causa 691; to give a slave 20 sqq.
Prostitution, liberty 503
Protection of slaves against dominus 86 sqq.
Protection to morality of slaves 75
Publicatio 407
Punishment of criminal actio quod iussu statului 167
Ratificatio in actio quod iussu 167
Rations reddere, as a condition on liberty 494 sqq.
Receipt of payment by slave 203
Receipt of servus communia 372
Recognition of servile relationships 78
Redemption of captives 811 sqq.
Redemption of slaves (see also Actio redditoria) 45
Recovery of premises for ingratitude 422
Regula Catoniana 142, 145, 146, 150, 471, 472
Relationship, enslavement followed by manumission 682
Rellagatio of slaves 93, 94
Religious position of slave 73, 600, 604
Reliqua reddere 498
Rem non liquere, in causa liberalis 665
Repayment to slave 183 sqq., 205, 683
Repetition of causa liberalis 669
Representation in contract in classical law 705 sqq.
Residuo judici (see also Restitutio actionis) 791, 711
Restitutio in integrum 295, 477, 566 sqq., 622, 630, 710
Restitutio of servi poenas 410 sqq., 701
Restrictions on power of master, nota Censoria 36
Retrospective effect of manumission of servus legitimus 581
Reversion to ingenui 422
Sale de causa 39, 657
Sale ne manumittatur 72, 588
Sale ne prostitutatur 70, 550, 608
Sale of ancile, voidability, rules as to partus 23
Sale of captivus 292; of freeman 6, 427 sqq., 647; of fugitivus 269; of partus ancillae 44
Sale of slave 39 sqq.; accessories and partus 41; edict of aediles 52 sqq.; entitled to freedom 47; warranty against defects 53; liability for defects 58; restrictive covenants 68 sqq.; theft by slave from vendor 43; to leones and lanistae 87; vendor’s liabilities at civil law 42 sqq.
Sale of statulator 267 sqq.
Sale of young children 420 sqq., 608
Sale ut exportetur 69; ut manumittatur 71, 628 sqq.; by minor ut manumittatur 538
Sanguinolentia 403, 429 sqq., 608
Scientia in actio tributoria 224, 706; in acquisition of possession 183; in delict 115, 375
Secundo aderentia 668
Semel hinc semper hinc 506, 567
Senatusconsultum Articulatum 454, 612
Senatusconsultum Claudianum 77, 95, 286, 333, 356, 399 sqq., 412 sqq., 431, 552, 595, 647; perseveratio 413; effect on children 414; latine 413, 550; property of women condemned 415; special cases 414 sqq.; to what women applicable 415
Senatusconsultum Cottianum 92; Daunianum 65, 613 sqq.; Iunianum 612 sqq., 646; Macedonianum 202; Neronianum 192, 466; Ninnianum 675; Orphitianum 410, 547, 620; Pegasianum 137, 507, 518, 530, 531, 558; Psionianum 47, 57, 85; Rubrianum 613 sqq.
Senatus consultum Silianum 18, 20, 37, 90, 95 sqq, 130, 281, 286, 332, 358, 400, 550, 563, 601, 619, 636
Senatus consultum Tarquinianum 97, 619, 597, 286, 286, Trebellianum 599, 553, 555, 616, Vatikanum 695, 616
Servile violatio 100
Sextus corruptio 33 sqq
Servile capit 3, 676
Servile relationship, obitus curae 78, 79
Sextus 426, 494, 563
Servitude, stipulation for, by common slave 389
Sextus morte ademulator 4, 434
Sick slave abandoned 37, 549, 602
Scutinarum venditione 53
Servus alienus, sale, manumission by owner 40
Servus bonorum adventitiorum 250
Servus Caesaris 533 sqq
Servus Caesaris, manumission 530
Servus captivus, redeemio (see also Captivus) 314 sqq
Servus commissus 379 sqq, captivus 315, manumission 575, nominatio in contract 381 sqq, Sc Claudianum 415
Servus deportatis, manumission 591, dotatis 264 sqq, 558, fitfamilias 249, fiscella 319, 324 sqq, 590, fugitious, nonas (see also Fugitious) 129, furioso, instituted 149
Servus fructuarum 356 sqq, delict by 103, 104, 116, 117, manumission 276, 278 sqq, 551, 578 sqq
Servus hereditarius 5, 252 sqq
Servus hestium, fidemcommision of liberty to 526
Servus in bono 250, 549; indendens 595, in libertate 135, 274, latum, penesviris 241, 254
Servus legatus cum peculo, actio de pecullo 232, delicta 107, 115, 255 sqq, legacy to, adoptio 150, manumission 580 sqq
Servus peculius 249, 459, 465
Servus poenae 2, 94, 277 sqq, 403 sqq, 427, captivus 298, manumission 591
Servus pro derecito 2, 53, 662, publicus, etc. 318 sqq, 555, 619 sqq, sine domino 2, 570, 590, sine numeris emptus 29, 638 sqq, 643, 645, universitatis 237, 588; uniusseri 309
Slave acting as miles 663
Slave acting as tutor 166
Slave as accussator 85, as index or arbiter 84, as member of a collegium 75, 238; as witness 66 sqq, 95
Slave bona fide possessed 331 sqq
Slave bought from minor, suus numerus 533
Slave freed cum peculo, actio de pecullo 231, pendente conditio 550
Slave held in fideus 285 sqq
Slave informally freed, position 279, 445, 533, 548, 552
Slave in publico 78
Slave of captive, acquisition by 293
Slave of municipality, ownership 327
Slave, essential character of 1, 2, 4, 434
Slave sold for export 69, 419, 649 sqq
Slave the subject of negotium, delict against a party 124 sqq
Slave under 20 freed sine causa 543
Social rank of servus public 321
Stabularius, theft by employees 122, 127
Statuiitius 298 sqq, alternata pendente conditio 551, how reckoned in the hereditas 274, manumitted by hores 986, noxal liability 103, 108, redemptio 516, sale of 47, what are 284, 469, 479, 482, 510, 562, 564, 570, 585
Statutory valuation of slave 8
Sterility as a redhibitory defect 55
Stipulatio by common slave 882, by slave 154 sqq, dominuto out extrae 155, 173
Stipulatio duplet 46 sqq, 64
Substitutions of slaves 510
Substitutions when father and son captured 302 sqq
Succession of children of woman entitled to liberty 620
Succession to captivus 299 sqq
Sardus vel mutus, manumission 720
Surety by or for slave (see also Fidemus) 215, 288
Surety to servus hereditarius 261
Suspense, acquisitions 293, 345, 363 sqq
Suspenso in manumission 455, 579
Synthetic identity 696
Tort conditions 484
Tortatio, in actio de pecullo 207, 707
Taxation of slaves 88
Terminal mutum 99
Testamentatico servis 88
Theft of property held by slave 31
Theft of slave 41, 282, 287
Torture of slaves 97, 98, 91 sqq, 95, 662, of slave where master killed 95, of servus hereditarius as witness 253
Transaction in actions affecting status 657, 673
Transactions affecting property of captivus 293, between slave and fructuary 367; between slave and master 684, 686, 688
Transfer of slave, actio de pecullo 229 sqq, 709
Transfer of slave ne manumissionatur 72, manumission 385
Transfer of slave ut manumissionatur 542, 567, 571, 628 sqq
Transfer via postulationem 305, 307, 310
Transfer lindus 108 sqq, 710
Tresore, trovone, by servus commissus 384
Trebutiendo, dolus in 235
Trial of slaves procedure 91 sqq
Trusts for redemption of captives 311
Tutela libertorum captivi 303
Twelve Tables 96, 99, 115, 129, 137, 492, 442, 443, 661
Unborn persons, gift of liberty to 476, 520, 557
Unde vi, nozal rules 124
Usucapio, manumission 681
Usucapio of ancilla or parvis 29 sqq.
Usucapio of servus captivus redeemptus 315 sqq
Usucapio through slave 134, 133
Unlustrum, acquisition by slave 152, 259, adverse bona fide possessed 335, held by common owner 395; in abandoned slave 278, in slave, confusio 357
Usucapio, actio de pecullo against dominus 368
Vacant inheritances, rights of Fas 626 sqq
Valuation of freed slaves under the lex Faeludia 474
Value of slaves 8
Verso 9
Verborato contra bonos mores 73, 81, 87
Verso, destruction of the versum 177, 178
Verso vs rem, conception (see also Actio de in rem verso) 176 sqq, 184 sqq
Verso, relation to original negotium 181
Veteranus 5, 77
Vicarius 238 sqq
Vindicatio pecull 190 sqq, 701
Vindicatio servis 12 sqq
Vindicta, accidunt libertatem 653
Vindicta liberare 721
Viva in manumission 593
Vocatio in tributum 333 sqq
Voluntas in actio exescrutoria 175
Voluntas in manumission 445, 720
Will, gift by, to slave See Gift by Will
Will, manumission by See Manumission by Will
Wrong by or to slave See Delicts
Year, how reckoned in actio annulis de pecullo 228