surrender made by other heirs after they have entered on the inheritance; for it makes no difference whether one becomes heir by *cretio* or behaving as heir, or is bound to the inheritance by legal necessity.

9. BOOK III [obligations *ex contractu*]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book III, §§ 88–181; pp. [odd nos.] 179–213 [footnotes omitted]

88. Let us now proceed to obligations. These are divided into two main species: for every obligation arises either from contract or from delict.

89. First let us consider those that arise from contract. Of such there are four *genera*: for an obligation by contract arises either *re* (by delivery of a *res*: real contract), by words (verbal contract), by writing (literal contract), or by consent (consensual contract).

90. A real obligation is contracted, for instance, by conveyance on loan for consumption. Such a contract takes place properly in the case of things that are reckoned by weight, number, or measure—such things as money, wine, oil, corn, bronze, silver, gold. We convey these things by counting, measuring, or weighing them out, to the end that they should become the property of the recipients, and that at some future time there should be restored to us not the identical things, but others of the same kind. Hence the term *mutuum*, because what is conveyed in this manner by me to you becomes *ex meo tuum* (from being mine yours). **91.** He too who receives what is not due to him from one who pays in error comes under a real obligation. For the *condictio* with the pleading 'if it appear that the defendant is bound to convey' lies against him precisely as if he had received the payment by way of loan. Hence some hold that a ward or a woman, to whom without their tutor's *auctoritas* payment of what is not due has been made in error, is not liable under the *condictio* any more than under a loan for consumption. This sort of obligation, however, appears not to be founded on contract, because one who gives with intent to pay means to untie rather than to tie a bond.[1]

92. A verbal obligation is created by question and answer in such forms as: 'Do you solemnly promise conveyance? I solemnly promise conveyance'; 'Will you convey? I will convey'; 'Do you promise? I promise'; 'Do you promise on your honour? I promise on my honor'; 'Do you guarantee on your honour? I guarantee on my honor'; 'Will you do? I will do.' **93.** Now the verbal obligation in the form *dari spondes*? *spondeo* is peculiar to Roman citizens; but the other forms belong to the *ius gentium* and are consequently valid between all men, whether Roman citizens or peregrines. And even though expressed in Greek, in such words as Δώσεις; Δώσω· Ὁμολογεῖς; Ὁμολογῶ· Πίστει κελύεις; Πίστει κελύω· Ποιήσεις; Ποιήσω, they are still valid between Roman citizens, provided they understand Greek. Conversely, though expressed in Latin, they are still valid even between peregrines, provided they understand Latin. But the verbal obligation *dari spondes*? *spondeo* is so far peculiar to Roman citizens that it cannot properly be put into Greek, although the word *spondeo* is said to be derived from a Greek word. **94.** Hence we are told that there is one case only in which a peregrine can incur obligation by using this word, namely where our emperor puts to the ruler of a peregrine people the question of peace in this wise: 'do you solemnly promise that there shall be peace?' or our emperor in turn is interrogated in the same form. But this statement is over-ingenious; for if the treaty is broken, there is no action on the stipulation, but recourse is had to the law of war. **95.** A point on which doubt may arise is . . . .[2] **95a.** There are also other cases in which obligations [can be contracted by words spoken without any previous interrogation, as where a woman constitutes a dowry by declaration to her betrothed or to her wedded husband, as can be done whether the property is movable or immovable. And by this form not only can the women herself incur obligation, but also her father; and so can] her debtor, by declaring as dowry, with her authority, what he owes to her. But no other person than these can incur obligation in this form. If therefore another person desires to promise dowry on behalf of a woman, he must engage himself in the ordinary form, that is he must make the promise in answer to a stipulatory question by the husband. **96.** Another case in which a binding contract is formed by the spoken promise of one party without a previous question from the other is where a freedman has taken an oath to make his patron some gift or render him some observance or services. This is the one case of obligation being contracted by oath; in Roman law at

[1] Similar language in D.44.7.5.3 (Gaius, *Aurea*, book 2).

[2] One and half lines are illegible. The discussion may have concerned what happens if the language of the question and answer differed or whether languages other than Latin and Greek were admissible. Cf. D.45.1.1.6, Theoph. 3.15.1.

least we find no other. As to peregrine law, an examination of the systems of the various States will teach us that the rule varies from place to place.

97. If the thing for conveyance of which we stipulate is one that cannot be conveyed, our stipulation is void, for instance if one were to stipulate for conveyance of a free man whom one believed to be a slave, or of a dead slave whom one believed to be alive, or of sacred or religious land which one thought to be subject to human law. **97a.** Again, if one stipulates for a thing which cannot exist at all, such as a hippocentaur, the stipulation is likewise void. **98.** Again, if one stipulates subject to a condition which cannot happen, for instance on condition that one touches the sky with one's finger, the stipulation is void. Yet a legacy left subject to an impossible condition is held by our teachers to be due precisely as though it had been left unconditionally, whereas the authorities of the other school consider a legacy to be as void as a stipulation in such a case. One must admit that it is not easy to give a satisfactory ground for distinguishing. **99.** Further a stipulation is void in which a man, not knowing that a thing belongs to him, stipulates for its conveyance to himself, obviously because what belongs to a man cannot be conveyed to him. **100.** Then again, a stipulation is void in which a man stipulates for conveyance thus: 'Do you solemnly promise conveyance after my death?' or 'after your death?'. Yet it is valid in the form 'when I am dying' or 'when you are dying', so that the obligation is made to begin at the last moment of the stipulator's or the promisor's life; for it was felt to be against principle that an obligation should start from the heir. But again, we cannot stipulate thus: 'Do you solemnly promise conveyance on the day before I die?' or 'on the day before you die?', because the day before a death cannot be known till the death has taken place, but when that has happened, the obligation is carried back into the past and is something like a stipulation: 'Do you solemnly promise conveyance to my heir?', which is of course void. **101.** Everything we have said about death must be taken to apply also to *capitis deminutio*. **102.** The stipulation is also void if the promisor does not answer the question put to him, for example, if I stipulate for 10,000 sesterces and you promise 5,000 or if I stipulate unconditionally and you promise conditionally. **103.** Further, if we stipulate for conveyance to a person to whose power we are not subject, the stipulation is void. Hence a question has arisen how far a stipulation for conveyance to oneself and to one to whose power one is not subject is valid. Our teachers hold it to be completely valid, and that the whole of what is promised is due to him alone who put the stipulation, just as if he had not added the stranger's name. But the authorities of the other school consider that half is due to the stipulator, but that the stipulation is void as to the other half. 1**03a.** The case is different if I stipulate thus: 'Do you solemnly promise conveyance to me or Titius?' Here it is agreed that the whole is due to me and that I alone can sue on the stipulation, though you are discharged if you pay Titius. **104.** Further, the stipulation is void if I stipulate from one who is subject to my power or he from me. Indeed a slave, a person *in mancipio*, a daughter in *patria potestas*, and a woman in *manus* are incapable of incurring obligation not only to him to whose power they are subject, but also to anyone at all. **105.** That a dumb man can neither stipulate or promise is obvious. The same is accepted also in the case of a deaf man, because it is necessary both that the stipulator should hear the words of the promisor and that the promisor should hear those of the stipulator. **106.** A lunatic is incapable of any transaction, because he does not understand what he is doing. **107.** A ward is capable of any transaction, provided that his tutor's *auctoritas* is obtained when it is necessary, as when it is he who is incurring obligation; for he can lay someone else under an obligation to himself even without his tutor's *auctoritas*. **108.** The law is the same for women who are in *tutela*. **109.** But what we have said about a ward is only true of a ward who has attained to some understanding. For an infant or one little more than an infant does not differ much from a lunatic, because at such an age the ward has no understanding. But in their case, for practical reasons, a lenient view of the law has been taken.

110. It is, however, possible for us, when we stipulate, to bring in another person to stipulate for the self-same thing; this person is commonly called an *adstipulator*. **111.** Action can be brought by him and payment can lawfully be made to him exactly as by and to ourselves; but by the *actio mandati* he will be compelled to make over to us whatever he may so obtain. **112.** An *adstipulator* may employ other words than those employed by the principal stipulator. He can, for instance, where the stipulator has used the form 'Do you solemnly promise conveyance?' use the form 'Do you promise the same thing on your honour?' or 'Do you guarantee the same thing on your honour?'; or the variance may be reversed. **113.** Further, he may stipulate for less, though not for more (than the principal stipulator). Thus where I have stipulated for 10,000 sesterces he may stipulate for 5,000; but he may not stipulate for more than 10,0**00.** Again, if I have stipulated unconditionally, he may stipulate conditionally; but not the other way about.

'More' or 'less' are not solely a question of amount, but also one of time: for to convey at once is more, to convey after time is less. **114.** This institution has some peculiar legal features. Thus, the *adstipulator*'s heir has no action. Again, a slave's adstipulation is a nullity, though in all other cases he acquires by stipulation for his owner. The same has been held, according to the better view, of a person *in mancipio*, he being in the position of a slave. But adstipulation by one in *patria potestas* is not entirely ineffectual: he does not acquire for his father, though he does so in all other cases by stipulating, and even he himself has an action only if he has left his father's *potestas* without undergoing *capitis deminutio*, for example by his father's dying or his being himself inaugurated priest of Jupiter. The same rules must be understood to apply to a daughter in *patria potestas* or a woman in *manus*.

115. On behalf of the promisor also it is common for other persons to become bound; some of these are termed *sponsores*, others *fidepromissores*, others *fideiussores*. **116.** To a *sponsor* the question put is 'Do you solemnly promise the conveyance of the same thing?', to a *fideipromissor* 'Do you promise the same thing on your honour?', to a *fideiussor* 'Do you guarantee the same thing on your honour?' What special name can be applied to those to whom we put the question 'Will you convey the same thing?' or 'Do you promise the same thing?' or 'Will you do the same thing?' we shall see. **117.** We commonly take *sponsores*, *fidepromissores*, *and fideiussores* when seeking to obtain better security, but we bring in an *adstipulator* in general only when we are stipulating for something to be conveyed after our death. For because our stipulation for conveyance to ourselves after our death is a nullity, we bring in an *adstipulator*, in order that he may sue after our death. Whatever he recovers he is liable by the *actio mandati* to make over to our heir.

118. The positions of *sponsor* and a *fidepromissor* resemble one another and are very different from that of a *fideiussor*. **119.** For *sponsores* and *fidepromissores* can become accessory to none but verbal obligations, though occasionally they are bound when the principal promisor is not, as where conveyance is promised by a woman or a ward without tutor's *auctoritas*, or where anyone promises conveyance after his own death. But it is a doubtful point whether a *sponsor* or *fidepromissor* is bound on behalf of a slave or peregrine who has promised using th word *spondeo*. **119a.** A *fideiussor*, on the other hand, can become accessory to any kind of obligation, that is whether it arises from real, verbal, literal, or consensual contract. It does not even matter whether the principal obligation be civil or natural; indeed a *fideiussor* becomes bound even on behalf of a slave, whether he who is taking a *fideiussor* from the slave be a stranger, or the slave's own master in respect of what may be due to him. **120.** Further, the heir of a *sponsor* or *fidepromissor* is not bound, except where a peregrine *fidepromissor* is in question and his city follows a different rule. But the heir of a *fideiussor* is bound like the *fideiussor* himself. **121.** Again, *sponsores* and *fidepromissores* are discharged after two years under the *L. Furia*, and, whatever be their number at the time when the debt falls due, the obligation is divided between them into as many parts, and each of them will he called on only for his aliquot part. *Fideiussores*, on the other hand, are bound for all time; and, whatever be their number, each is liable for the whole debt. Therefore the creditor is free to sue whichever he pleases for the whole. However, at the present day he is compelled under an epistle of the late emperor Hadrian to sue each of them, provided they are solvent, for a proportionate part only. This epistle differs therefore from the *L. Furia* in that, if one of several *sponsores* or *fidepromissores* is insolvent, the burden of the others is not thereby increased, whereas if only one of a number of *fideiussores* is solvent, the burden of the others also falls on him. **121a.** As, however, *L. Furia* applies only in Italy, the result is that in the provinces *sponsores* and *fidepromissores* are bound for all time, just like *fideiussores*, and that each is liable for the whole debt, unless it be that they are relieved as to part by the epistle of the late emperor Hadrian. **122.** Furthermore, the *L. Appuleia* introduced a sort of partnership between *sponsores* and *fidepromissores*. For to any one of them who has paid more than his share the statute gives an action against the others for the excess. This statute was passed before the *L. Furia*, at a time when each was liable for the whole. It is therefore asked whether since the *L. Furia* the benefit of the *L. Appuleia* still survives. The answer is that outside Italy it does survive, because the *L. Furia* is in force only in Italy, but the *L. Appuleia* in the provinces in general. It is, however, very questionable whether the benefit of the *L. Appuleia* survives in Italy too. To *fideiussores*, on the other hand, the *L. Appuleia* has no application, and therefore, if a creditor has recovered the whole debt from one *fideiussor*, the loss is solely his, assuming of course that the principal debtor is insolvent. But, is clear from what has already been said, a *fideiussor* sued by the creditor for the whole will be entitled, under the epistle of the late emperor Hadrian, to demand that the action should be granted against him only for a rateable share. **123.** Further, it is provided by the *L. Cicereia* that one who is taking *sponsores* or *fidepromissores* shall publicly notify in

advance and declare both the matter in respect of which he is securing himself and how many *sponsores* or *fidepromissores* he is taking in respect of it; if he fails to give this notice, the *sponsores* and *fidepromissores* are allowed within 30 days to ask for a prejudicial action to determine whether notice has been given in accordance with the statute, and if the decision is in the negative, they are discharged. No mention is made of *fideiussores* in this statute, but the practice is to give the notice also when we are taking *fideiussores*.

124. The benefit of the *L. Cornelia*, on the other hand, is common to them all. This statute forbids the same person to become surety for the same debtor to the same creditor in the same year for a larger sum of *pecunia credita* than 20,000 sesterces. And though *sponsores* or *fidepromissores* or *fideiussores* should have undertaken obligation for so large a sum, as say, 100,000 sesterces, they are nevertheless liable only up to 20,000. By *pecunia credita* we mean not only money advanced on loan, but any money which, at the time when the obligation is contracted, is certain to become due, that is, any money that is brought unconditionally into obligation. Consequently money stipulated to be paid at a fixed date is in this category, because it is certain to become due, though action for it is deferred. The term *pecunia* in this statute covers every kind of thing, so that whether what we stipulate for be wine or corn or land or a slave, the statute must be complied with. **125.** In certain cases, however, the statute allows security to be taken without limit, as where it is taken on account of *dos*, or of a debt under a will, or by order of a *iudex*. Further, the statute concerning the 5 per cent. duty on inheritances enacts that to the securities for which it provides the *L. Cornelia* shall not apply. **126.** In yet another point the position of all *sponsores*, *fidepromissores*, and *fideiussores* is identical, namely that they cannot incur a greater obligation than that of their principal. On the other hand, they can incur a lesser obligation: we made the same remark with regard to an *adstipulator*. For in their case, as in that of an *adstipulator*, the obligation is accessory to a principal obligation, and the accessory cannot contain more than the principal. **127.** The position of all is identical also in this, that they have an *actio mandati* against their principal for the recovery of anything they have paid on his behalf. More than this, *sponsores* have udner the *L. Publilia* and action of their own, called *actio depensi*, for double the amount.

128. A literal obligation is created by transcriptive entries. A transcriptive entry is made in two ways: *a re in personam* or *a persona in personam*. **129.** It is made *a re in personam* where, for instance, I enter to your debit what you owe me on account of a purchase, a hiring, or a partnership. **130.** It is made *a persona in personam* where, for instance, I enter to your debit what Titius owes me, provided, that is, that Titius has assigned you to me as debtor in his place. **131.** The entries known as cash-entries are of a different nature. For in their case the obligation is real, not literal, since their validity depends on the money having been paid, and payment of money creates a real obligation. This is why it is right to say that cash-entries create no obligation, but merely afford proof of an existing obligation. **132.** It is therefore incorrect to say that even peregrines are bound by cash-entries, because what they are bound by is not the entry itself, but the payment of money; the latter form of obligation is *iuris gentium*. **133.** But whether peregrines can be bound by transcriptive entries is questioned with good reason, because this kind of obligation is in a way *iuris civilis*. Nerva held accordingly, but Sabinus and Cassius considered that peregrines as well as citizens are bound if the transcriptive entry is *a re in personam*, but not if it is *a persona in personam*. **134.** Furthermore, literal obligation appears to be created by chirographs and syngraphs, that is to say documents acknowledging a debt or promising a payment, of course on the assumption that a stipulation is not made in the matter. This form of obligation is special to peregrines.

135. Obligations are created by consent in sale, hire, partnership, and mandate. **136.** The reason why we say that in these cases the obligations are contracted by consent is that no formality whether of words or writing is required, but it is enough that the persons dealing have consented. Hence such contracts can be formed between parties at a distance, say by letter or messenger, whereas a verbal obligation cannot be formed between parties at a distance. **137.** Further, in these contracts the parties are reciprocally liable for what each is bound in fairness and equity to perform for the other, whereas in verbal obligations the one party puts and the other gives the stipulatory promise, and in literal contracts the one party by entering the debit imposes and the other incurs the obligation. **138.** It is, however, possible to make a transcriptive entry against an absent person, though a verbal obligation cannot be contracted with such a one.

139. A contract of sale is concluded when the price has been agreed, although it have not yet been paid and even no earnest have been given. For what is given by way of earnest is evidence of a contract of sale having been concluded. **140.** The price must be definite. Thus, if we agree that the thing be bought at the value to be put on it by Titius, Labeo said that this transaction was of no effect, and Cassius approves his

view. But Ofilius thought it was a sale, and Proculus followed his view. **141.** Also, the price must be in money. There is, however, much question whether the price can consist of other things, for example whether a slave or a robe or land can be the price of something else. Our teachers hold that the price can consist of another thing. Hence their opinion commonly is that by exchange of things a sale is contracted and that this is the most ancient form of sale. They argue from the Greek poet Homer, who somewhere says: 'Thence the long-haired Achaeans bought wine, some for copper, some for gleaming steel, some for hides, some for the cattle themselves, and some for slaves.' The other school dissent, holding that exchange or barter is one thing and sale another; for if not, so they argue, one cannot, when things are exchanged, determine which is the thing sold and which that given as price, while on the other hand it seems absurd that both things should be considered as both sold and given as price. Caelius Sabinus, however, says that if I give you a slave as the price of something, for instance land which you are offering for sale, then the land is to be considered as having been sold and the slave as having been given as price for the land.

142. Hire is governed by rules similar to those of sale; for unless a definite reward be fixed, there is held to be no contract of hire. **143.** Hence, if the reward is remitted to the arbitrament of a third party, say 'for as much as Titius thinks reasonable', it is a question whether a contract of hire is formed. Accordingly, if I give clothes to a cleaner to be cleaned or furbished or to a tailor to be mended, but no reward is fixed at the time, the understanding being that I am to pay later what we may agree, it is a question whether a contract of hire is formed. **144.** Again, if I lend you something for your use and receive in return another thing for my use, it is a question whether a contract of hire is formed. **145.** The affinity between sale and hire goes so far that in certain cases there is a standing question whether the contract is one of sale or of hire, for example where a thing is let in perpetuity. This is the practice with the lands of municipalities: they are let upon the terms that, so long as the rent is paid, the land shall not be taken away from either the tenant or his heir. But the prevailing opinion is that this is a letting. **146.** Again, if I supply you with gladiators upon the terms that for each man who comes out scatheless I shall be paid 20 *denarii* in return for his exertions, but for each one who is killed or disabled 1,000, the question arises whether the contract is one of sale or of hire. The prevailing opinion is that it is one of hire of those who come out scatheless, but of sale of those who are killed or disabled: which it is, the events declare, there being understood to he a conditional sale or hire of each gladiator. For there is no longer any doubt that things can be sold or hired conditionally. **147.** The question whether the contract is one of sale or hire is also raised where I agree with a goldsmith for him to make me rings of a certain weight and pattern out of gold of his, he receiving, say, 200 *denarii*. Cassius says that the contract is one of sale of the material, but hire of the work. But most jurists hold that it is a contract of sale. It is agreed, however, that if I supply the gold, a reward for the work being settled, the contract is one of hire.

148. We enter into a partnership either in respect of our entire fortunes or for some particular business, such as the buying and selling of slaves. **149.** There has been a great dispute as to whether a partnership is possible on the terms that one of the partners should have a larger share in profits than in losses. Q. Mucius considered this to be against the nature of partnership, but Servius Sulpicius, whose opinion has prevailed, held that not only is partnership possible on these terms, but even on the terms that one partner shall bear no share of losses and yet have a share in profits, on the supposition that his services are considered so valuable that it is fair that he should be admitted to partnership on such terms. For it is settled law that a partnership agreement may provide that one partner should, and the other should not, bring in money, and yet that the profits should be shared; for a man's services are often as valuable as money. **150.** What is certain is that, if no express agreement has been made between the parties as to their shares in profit and loss, their shares in either will be equal. But if their shares in, say, profits have been expressly agreed, but their shares in losses have not been mentioned, their shares in what has not been mentioned will be in the same proportion. **151.** A partnership lasts as long as the parties remain of the same mind, but when one of them renounces the partnership, it is dissolved. But of course if one of the partners renounces for the purpose of profiting alone by some coming gain, for example, if my partner in a universal partnership, having been left heir by someone, renounces the partnership in order to gain the inheritance for himself alone, he will be compelled to share this gain. If, however, he makes other gain which he has not sought for, this belongs to him alone. I, on the other hand, have the sole right to anything whatever that I acquire after his renunciation of the partnership. **152.** Partnership is also dissolved by the death of a partner, because one who enters into a partnership selects a particular person. **153.** A partnership is also held to he dissolved by *capitis deminutio*, because in the conception of civil law

capitis deminutio is equivalent to death; nevertheless if the parties still consent to be partners, a new partnership is held to begin. **154.** Again, a partnership is dissolved if the property of one of the partners is sold up for public or private indebtedness. The partnership of which we are speaking, namely that which is formed by simple consent, is *iuris gentium* and thus obtains by natural reason among all men. 1**54a.** But there is another kind of partnership peculiar to Roman citizens. For at one time, when a *paterfamilias* died, there was between his *sui heredes* a certain partnership at once of positive and of natural law, which was called *ercto non cito*, meaning undivided ownership: for *erctum* means ownership, whence the term *erus* for owner, while *ciere* means to divide, whence the words *caedere* and *secare*. **154b**. Other persons too, who desired to set up a partnership of the same kind, could effect this by means of a definite *legis actio* before the praetor. Now in this form of partnership, whether between brothers succeeding as *sui heredes* or between other persons who contracted a partnership on the model of such brothers, there was this peculiarity, that even one of its members by manumitting a slave held in common made him free and acquired a freedman for all the members, and also that one member by mancipating a thing held in common made it the property of the person receiving in mancipation.

155. There is a contract of mandate when we give a commission either in our own interest or in that of another. Thus, whether I commission you to conduct affairs of my own or those of a third party, a binding contract of mandate is formed, and we shall be liable to one another for whatever each ought as a matter of good faith to perform for the other. **156.** For if I give you a commission only on your own behalf, the mandate is superfluous, because anything that you have to do on your own behalf you should do on your own judgment, and not under a mandate from me. Thus, if I urge you to put out at interest money that you have lying idle at home, then, even though you lend it to someone from whom you are unable to recover it, you will not have the *actio mandati* against me. Again, if I urge you to buy something, then, even though you had better not have bought it, I shall not he liable to you in mandate. This principle is carried so far that it is questioned whether one who tells you to lend at interest to a particular person (Titius) is liable in mandate. Servius said not, there being no more an obligation in this case than where general advice is given to a man to put out his money at interest. But we follow Sabinus' contrary opinion, because you would not have lent to the particular person if you had not received a mandate. **157.** An unquestionable rule is that if a commission is given which offends against morality, no obligation is contracted—if, for instance, I give you a commission to steal from Titius or to insult him. **158.** Again, if a man gives me a commission to be executed after my death, the mandate is void, it being a general principle that an obligation cannot begin in the person of an heir. **159.** A contract of mandate, though validly formed, is dissolved if revoked before it has been acted on. **160.** A contract of mandate is also dissolved if, before it has been acted on, death of either party, the giver or the receiver of the mandate, occurs. But on practical grounds it has become established that if I carry out a mandate after its giver's death, but in ignorance of that fact, I can sue by *actio mandati*; otherwise my justifiable and natural ignorance will cause me loss. Similarly, according to most authorities, a debtor of mine, who pays my cashier in ignorance of the fact that he has been manumitted, is discharged from the debt, though on strict legal principle he could not be discharged by a payment made to a wrong person. **161.** If he to whom I have given a valid mandate exceeds his instructions I have, on my side, an *actio mandati* against him up to the amount I have lost by his not having carried out the mandate, provided that was possible; but he has no action against me. Thus if, for example, I give you a mandate to buy an estate for me for 100,000 sesterces, and you buy for 150,000, you will have no *actio* mandati against me, even supposing you to be willing to convey to me for the sum at which I commissioned you to buy; this was the view preferred by Sabinus and Cassius. But if you buy for less than 100,000 you will of course have an action against me, because a man who gives a mandate to buy for 100,000 is naturally taken to authorize purchase at a lower price if possible. **162.** In conclusion it should be noted that if I commission the doing of something without reward, where, had I fixed a reward, there would have been a hiring, the *actio mandati* lies: if, for example, I give clothes to a cleaner to be cleaned or furbished or to a tailor to be mended.

163. Having explained the various *genera* of obligations arising from contract we must now observe that there is acquisition for us not only through our own contracts, but also through those of persons who are in our *potestas*, *manus*, or *mancipium.* **164.** There is acquisition for us also through the contracts of free men and slaves of other persons whom we possess in good faith, but this only in two cases, namely where they make an acquisition through their own work or in connexion with our affairs. **165.** The acquisition is likewise for us in these two cases through slaves in whom we have a usufruct. **166.** But one who has only a bare Quiritary title to a slave, though he is owner, is considered to have less right in this

respect than a usufructuary or a *bona fide* possessor. For it is settled law that in no case can there be acquisition for him, not even, in the opinion of some, if the slave stipulates for conveyance to him by name or takes by mancipation in his name. **167.** That a slave of several owners acquires for them each in proportion to their respective shares in him is beyond doubt, except that, if he stipulates or receives by mancipation for one of them by name, he acquires for that one alone, for example if he stipulates thus: 'Do you solemnly promise conveyance to my master Titius?' or receives by mancipation thus: 'I affirm that this thing is the property of my master Lucius Titius by Quiritary title and be it bought for him by this bronze ingot and bronze scale.' **167a.** It is a disputed point whether authorization of the contract by one of the owners has the same effect as his being expressly named. Our teachers hold that there is acquisition for the giver of authorization exactly as though the slave had stipulated or taken by mancipation naming him alone. The authorities of the other school consider that the acquisition is for both the owners, just as though there had been no authorization.

168. Obligations are discharged principally by payment or performance of what is due. On this the question arises whether one who, with his creditor's consent, pays or performs something else instead of what is due, is discharged at law, as our teachers have held, or whether he remains under the obligation at law, but may resist an action brought on it by means of the *exceptio doli mali*, as the authorities of the other school have thought.

169. Obligations are also discharged by *acceptilatio*. This is a sort of imaginary payment: if you wish to release me from what I owe you under a verbal obligation, it can be done by your allowing me to say, 'What I promised you, have you received?' and replying yourself 'I have'. **170.** By this method, as we have said, obligations resting on verbal contract are extinguished, but others are not. For it has been held appropriate that an obligation created by words should be discharged by other words. However, what is due on some other ground can be thrown into a stipulation and then be discharged by *acceptilatio*. **171.** But although *acceptilatio* takes the form of an imaginary payment, still a woman cannot release her debtor by *acceptilatio* without her tutor's *auctoritas*, though a real payment can be made to her without it. **172.** And again, a debt can be validly paid in part, but whether a partial *acceptilatio is* possible has been questioned.

173. There is also another kind of imaginary payment, namely *per aes et libram*, which likewise is admitted only in certain cases, as where something is owing on a transaction *per aes libram* or under a judgment. **174.** Not less than 5 witnesses and a *libripens* are obtained. Then the party who is being released must say as follows: 'Whereas I have been condemned to pay you so many thousand sesterces, in respect thereof I loose and free myself from you by this bronze ingot and bronze scale. I weigh out to you this pound as the first and last in compliance with the public statute.' He then strikes the scale with the coin and gives it to him by whom he is being released in token of payment. **175.** Similarly a legatee by the same process sets the heir free from a legacy left by damnation, with this difference that where the judgment debtor declares himself to have been *condemnatus*, the heir states that he has been *testamento damnatus*. An heir can, however, be released by this method only from a debt of things reckoned by weight or number, and then only if the debt be certain. Some hold the same of things reckoned by measure.

176. Furthermore, obligations are discharged by novation, for instance if I stipulate from Titius for payment of what you owe me; for by a new party coming in a new obligation arises and the previous obligation is discharged, being transformed into the later one. Indeed, sometimes the prior obligation is discharged by novation in spite of the later stipulation being void, for instance if I stipulate for what you owe me from Titius as from after his death, or from a woman or a ward without tutor's *auctoritas*; in such a case I lose my right, for both the former debtor is freed and the later obligation is void. The law is different if I take the stipulation from a slave: in this case the former debtor remains under obligation just as if I had not stipulated from anyone. **177.** But where the person from whom I take the later stipulation is the same, there is novation only if there is something new in the later stipulation, for example if a condition or a date or a *sponsor is* added or omitted. **178.** Our statement regarding a *sponsor is* not universally accepted; for the authorities of the other school hold that the addition or omission of a *sponsor* does not produce novation. **179.** Our statement that there is novation if a condition is added must be understood as meaning that there is novation only if the condition is realized; for if it fails, the previous obligation continues. But let us consider whether one who sues on it cannot be defeated by the *exceptio doli mali* or the *exceptio pacti conventi*, because the *intentio*n of the parties appears to have been that an action should lie on it only if the condition in the later stipulation were realized. Servius Sulpicius thought

that novation takes place at once, even during the pendency of the condition, and that if it fails, no action lies on either ground, so that all claim is lost. Consistently he further advised that, if a man stipulates from a slave for what he is owed by Lucius Titius, novation takes place and the claim is lost, because action cannot be brought against a slave. But in both cases we follow a different rule: in such cases novation does not take place any more than where, in stipulating for what you owe me from a peregrine who is outside the communion of *sponsio*, I use the word *spondes*.

180. Yet again, obligations are discharged by joinder of issue, if the action be by *iudicium legitimum*. For thereupon the original obligation is dissolved and the defendant becomes bound by the joinder of issue. Then, if he is condemned, the joinder of issue is discharged and he becomes bound by the judgment. Hence the saying in ancient writers, that before joinder of issue a debtor ought to pay, after joinder he ought to be condemned, and after *condemnatio*n he ought to satisfy judgment. **181.** The result is that if I claim a debt by a *iudicium legitimum*, I am debarred by mere operation of law from suing for it afresh, because my pleading that payment is due to me is vain, seeing that it ceased to be due on issue being joined (in the first action). But it is otherwise if I sue by a *iudicium imperio continens*; for in this case the existing obligation continues, and therefore I am not debarred by mere operation of law from suing afresh, but I must be defeated by means of the *exceptio rei iudicatae uel in iudicium deductae*. What proceedings are *iudicia legitima* and what *iudicia imperio continentia* we shall state in our next book.

10. BOOK III [obligations *ex delicto*]

The Institutes of Gaius (F. de Zulueta ed. & trans., 1946, vol. 1)
Book III, §§ 182–223; pp. [odd nos.] 213–229 [footnotes omitted]

182. Now let us pass on to obligations arising from delict, as where theft or robbery is committed, or damage to property is done, or injury to the person. Obligations from these sources all belong to one *genus*, whereas, as we have already explained, obligations from contract are distributed among four *genera*.

183. According to Servius Sulpicius and Masurius Sabinus there are four *genera* of theft—manifest, non-manifest, *conceptum*, and *oblatum*; according to Labeo there are two—manifest and non-manifest, *conceptum* and *oblatum* being rather *species* of actions connected with theft than *genera* of thefts. The latter seems clearly the better view, as will appear below. **184.** Manifest theft, according to some, is theft detected whilst being committed. Others extend it to theft detected in the place where it is committed, holding, for example, that a theft of olives committed in an olive-grove, or of grapes committed in a vineyard, is manifest if detected whilst the thief is still in the olive-grove or vineyard, or, where there is theft in a house, whilst the thief is still in the house. Others, going further, have maintained that a theft remains manifest up to when the thief has carried the thing to the place he intended. And others go so far as to say that it is manifest if the thief is seen at any time with the thing in his hands. This last opinion has not been accepted, nor does the opinion that the theft is manifest if detected before the thief has carried the thing to where he intended, seem to be approved, because it raises a considerable doubt as to whether this is to be limited to one day or extends to several, the point being that thieves often intend to carry off what they have stolen to another town or province. Either of the first two opinions is tenable, but the second is generally preferred. **185.** What non-manifest theft is can be gathered from what we have said. For what is not manifest is non-manifest. **186.** There is what is called *furtum conceptum*, when a stolen thing has been sought and found on a man's premises in the presence of witnesses. Against him, even if he be not the thief, a special action called *concepti* has been established. **187.** There is what is called *furtum oblatum*, when a stolen thing has been passed off to you by someone and has been found on your premises, at any rate if he gave it to you with the *intentio*n that it should be found on your premises rather than on his own. A special action called *oblati* has been established in favour of you, on whose premises the thing has been found, against him who passed it off to you, even if he be not the thief. **188.** There is also an action *prohibiti furti* against one who prevents another who wishes to search for a stolen thing from doing so.

189. Under the law of the Twelve Tables the penalty for manifest theft used to be capital. A free man was scourged and then solemnly assigned by the magistrate (*addictio*) to him from whom he had stolen; whether by the *addictio* the thief was made a slave, or was placed in the position of a judgment debtor, used to be disputed by the early lawyers. A slave, after being similarly scourged, was put to death. But in later times the ferocity of the penalty was reprobated, and in the case of both a slave and a free man an action for fourfold was established by the praetor's Edict. **190.** For non-manifest theft a penalty of double

is imposed by the law of the Twelve Tables, and this is preserved by the praetor. **191.** For *conceptum* and *oblatum* the penalty under the law of the Twelve Tables is threefold, and this is likewise preserved by the praetor. **192.** An action for preventing search (*prohibiti furti*) for fourfold has been introduced by the praetor's Edict. The law of the Twelve Tables provides no penalty for this, but merely ordains that one wishing to search must do so naked, girt with a *licium* and holding a platter; if he finds anything, the law says it is to be manifest theft. **193.** What, it has been asked, is the *licium*? Probably it is some sort of cloth for covering the privy parts. The whole thing is ridiculous; for one who will not let you search with your clothes on is not going to let you do so with them off, especially when, if you search and find in this manner, he is brought under a heavier penalty. Again, of the two explanations of the requirement of a platter in the hands—namely, that the object is to engage the searcher's hands and so prevent him from palming anything off, or else that it is for him to place on it what he finds—neither will serve, if we suppose the thing sought for to be of such a size or nature that it can neither be palmed off nor be placed on the platter. At any rate there is no doubt that the statute is complied with whatever the platter is made of. **194.** The fact that the statute enacts that in such case there is manifest theft causes some writers to say that theft may be manifest by statute or in fact: by statute in the case we are now discussing, in fact in the circumstances described previously. But the truth is that manifest theft means manifest in fact; for statute can no more turn a thief who is not manifest into a manifest thief than it can turn into a thief one who is not a thief at all, or into an adulterer or homicide one who is neither the one nor the other. What statute can do is simply this: it can make a man liable to a penalty as if he had committed theft, adultery, or manslaughter, though he has committed none of these crimes.

195. Theft is committed not only by removing another's property with intent to appropriate it, but also by any handling whatsoever of another's property against his will. 196, Accordingly, one who makes use of a thing left in his custody commits theft. Again, one who turns to some other use a thing lent to him for a particular use is liable for theft, for example one who obtains a loan of silver on the plea that he is giving a party and then takes it abroad, or one who borrows a horse for a ride and takes it further than was meant; the old writers laid this down of the man who took a borrowed horse into battle. **197.** It is, however, agreed that those who use borrowed things for purposes outside the agreement commit theft only if they are aware that their act is against the owner's will, and that, had he known of it, he would not have allowed it; but if they believe that he would have allowed it, they are not guilty of theft. This is a thoroughly sound distinction, because theft is not committed without dishonest *intentio*n. **198.** But even though one believes that one is handling the thing against its owner's will, still, if in fact he is willing, no theft is held to be committed. Hence the following problem: Titius having solicited my slave to steal certain things from me and bring them to himself, the slave reports the matter to me; I, wishing to catch Titius in the very act of stealing, allow the slave to take certain things to him: is Titius liable to me in the action for theft, or in that for corrupting a slave, or in neither? It has been held that he is liable in neither; not in the action for theft, because his handling of the things was not against my will, not in that for corrupting a slave, because the slave was not corrupted. **199.** Sometimes there is theft even of free persons, for instance where a child in my *potestas* or my wife in *manus* or my judgment debtor or my sworn gladiator is stolen. **200.** Sometimes a man actually commits theft of his own property, for example, if a debtor purloins a thing he has pledged to a creditor, or if I steal my own thing from its *bona fide* possessor. Accordingly it has been held to constitute theft if an owner hides his slave who has escaped from a *bona fide* possessor and returned to himself. **201.** On the other hand, it is sometimes possible, without its being considered theft, to take and acquire by usucapion things belonging to another, for example hereditary things of which the heir has not yet taken possession, except where there is a *heres necessarius*; for if there is, it is settled law that usucapion *pro herede* is impossible. Or again, a debtor may without theft take possession of and acquire by usucapion a thing that he has mancipated, or surrendered *in iure*, by way of trust to a creditor, as we have related in the preceding book. **202.** Sometimes a man is liable for a theft of which he is not the actual perpetrator; we refer to one by whose aid and counsel the theft has been carried out, for instance a man who knocks coins out of your hands, or obstructs you, for another to make off with them, or who stampedes your sheep or cattle for another to catch them. So the old lawyers wrote of one who stampeded a herd with a red rag. But if it is a mere prank, without *intentio*n of furthering a theft, the question will be whether an *actio utilis* ought not to be given, since even negligence is punished by the *L. Aquilia*, which governs damage to property.

203. The action of theft lies at the suit of one who has an interest in the safety of the thing, though he be not its owner. Therefore it is not open even to an owner except if he is interested in its not being lost.

204. Consequently it is clear that a creditor can sue in theft if his pledge has been stolen from him; indeed he can do so even if it has been taken by its owner, that is, the debtor. **205.** Again, if for a definite reward a fuller has received clothes to be cleaned or furbished, or a tailor clothes to be mended, and loses them by theft, it is he, and not their owner, who has the action of theft, because the owner has no interest in their not being lost, seeing that he can recover his damages from the fuller or tailor by *actio locati*, provided that the fuller or tailor is able to meet the damages; for if he is insolvent, then the owner, not being able to recover his damages from him, has the action of theft himself, because in this case he has an interest in the safety of the thing. **206.** What we have stated of a fuller or tailor will apply equally to one to whom we have lent a thing for use. For just as the former by accepting a reward make themselves responsible for safe-keeping, so likewise a borrower, in consideration of the benefit he gets by using the thing, must take the same responsibility. **207.** On the other hand, one with whom a thing is deposited is not answerable for its safe-keeping, but is liable only for his own wilful fault. Therefore, if the thing deposited is stolen from him, not being liable in the action of deposit for its restitution and having therefore no interest in its not being lost, he cannot sue in theft, but the action goes to the thing's owner.

208. Finally be it noted that it has been a question whether a person below puberty commits theft by removing another's thing. Most lawyers hold that, since theft depends on *intentio*n, the child is only liable on such a charge if he is approaching puberty and so understands that he is doing wrong.

209. He who takes another's property by violence is also liable in theft. For who more truly handles another's property against the will of its owner than one who robs him with violence? Thus he has rightly been described as an outrageous thief. However, the praetor has introduced a special action on this delict, called *ui bonorum raptorum*, which lies for fourfold within a year, and after that for simple value. This action is available even if the robbery is of but a single thing of insignificant value.

210. An action for wrongful damage exists under the *L. Aquilia*, the first chapter of which provides that one who has wrongfully killed another's slave, or his four-footed beast of the class of cattle, shall be condemned to pay the owner the highest value thereof in that year. **211.** He is deemed to kill wrongfully, by whose malice or negligence the death is caused. There being no other statute which visits damage caused without fault, it follows that a man who, without negligence or malice, but by some accident, causes damage, goes unpunished. **212.** In an action under this statute it is not only the value of the thing damaged in itself that is assessed, but also if by the killing of his slave an owner suffers loss exceeding the value of the slave, this too is assessed. Suppose, for example, that my slave has been killed after he has been instituted heir by someone, but before he has by my authority formally accepted the inheritance; in that case not only the personal value of the slave, but also the amount of the lost inheritance is assessed. Again, if one of twins, or a member of a troupe of actors or musicians, has been killed, account is taken not only of the value of the person killed, but also of the depreciation of the survivors. It is the same if one of a pair of mules or of a team of chariot-horses is killed. **213.** The owner of a slave who has been killed has the option between prosecuting the killer on a capital charge and suing under the present statute for his damages. **214.** The effect of the words in the statute 'the highest value thereof in that year' is that if, for instance, a slave is killed who is lame or one-eyed, but had been free from defect within the year, the measure of the *condemnatio*n is his highest value in the year, not his value at the time of his being killed. This means that sometimes an owner recovers more than the loss that has been inflicted on him.

215. The second chapter provides, against an *adstipulator* who has released the debtor in fraud of his principal, an action for the amount in question. **216.** This part of the statute, like the rest, obviously introduces a remedy for damage; but the provision was unnecessary, as the action of mandate would meet the case, except that the statutory action is for double against a defendant who denies liability.

217. The third chapter deals with all other damage to property. Accordingly, it provides an action if a slave or a four-footed beast of the class of cattle is wounded, or if a four-footed animal other than cattle, such as a dog, or a wild beast like a bear or a lion, is either wounded or killed. It also gives a remedy for wrongful damage to all other animals and to any inanimate things. For it provides an action if anything is 'burnt, destroyed (*ruptum*), or broken', though the single term *ruptum* would have covered all the cases. For by *ruptum* we understand physically damaged (*corruptum*) in any way at all. Thus not only burning and breaking, but also cutting, bruising, spilling, and all kinds of damage, destruction, or spoiling are covered by the word *ruptum*. **218.** Under this chapter, however, the person doing the damage is condemned to pay the value not in that year, but in the last 30 days. Indeed the word *plurimi* (highest) is not inserted, and consequently some jurists have thought that the *iudex* is free to assess the value in the

last 30 days at its highest or when it was less. But Sabinus held that we must interpret as if here too the word *plurimi* had been inserted, the legislator having thought it sufficient to have used the word in the first chapter. **219.** It has been decided that there is an action under the statute only where a man has done damage with his own body; consequently actions on the case are granted if the damage has been caused in some other way, for example, if one shuts up and starves to death another man's slave or cattle, or drives his beast so hard that it founders, or if one persuades another's slave to climb a tree or to go down a well and he falls and is killed or physically injured in climbing up or down, or if one throws another's slave into a river from a bridge or bank and he is drowned, though in this case there would be no difficulty in seeing an infliction of damage with the defendant's body in the act of throwing.

220. Outrage is committed not only by striking a man with the fist or a stick or by flogging him, but also by raising a clamour against him, or if, knowing that he owes one nothing, one advertises his property for sale as a debtor's, or by writing defamatory matter in prose or verse against him, or by following about a matron or a youth, and in short in many other ways. **221.** A man is deemed to suffer outrage not only in his own person, but also in the persons of his children in potestas and his wife. Accordingly, if you commit an outrage on my daughter (in *potestas*) who is married to Titius, an *actio iniuriarum* lies against you not only in her name, but also in mine and Titius'. **222.** A slave is not considered personally to suffer outrage, but an outrage is held to be committed through him on his owner, though not in all the ways in which it is held to be committed on us through our children or wives, but only if the act is specially shocking and obviously intended as an insult to his owner, as where one flogs another's slave—a case for which a *formula* is published in the Edict. But for raising a clamour against a slave or striking him with the fist there is no *formula* published in the Edict, nor is one lightly granted to a plaintiff.

223. Under the Twelve Tables the penalties for outrage used to be: for destroying a limb retaliation, for breaking or bruising a bone 300 *asses* if the sufferer was a free man, 150 if a slave; for all other outrages 25 *asses*. These penal sums were considered sufficient in those days of extreme poverty. **224.** But the system now in force is different. For the praetor allows us to make our own assessment of the outrage, and the *iudex* may, at his discretion, condemn in the amount of our assessment or in a lesser sum. But as it is customary for the praetor impliedly to assess an aggravated outrage himself, when he determines in what sum the defendant must give security for reappearance, the plaintiff limits the claim in his *formula* to the same amount, and the *iudex*, though he has power to condemn in a lesser sum, generally out of deference to the praetor does not venture to reduce it. **225.** An outrage is regarded as aggravated either by the actual deed, for example wounding or flogging or cudgelling a man, or by the place, for example if an outrage is inflicted in the theatre or the marketplace, or by the person, for example if an outrage is inflicted on a magistrate, or on a senator by a person of low degree.

[Book 4 is found in Section 2.]

is in danger of being sold, the magistrate who has cognizance of such matters shall on application entertain your desire to have the property adjudged to you, in order to give effect to the bequests of liberty, direct and fiduciary, provided you give proper security to the creditors for payment of their claims in full. Slaves to whom liberty has been directly bequeathed shall become free exactly as if the inheritance had been actually accepted, and those whom the heir was requested to manumit shall obtain their liberty from you; provided that if you will have the property adjudged to you only upon the condition, that even the slaves who have received a direct bequest of liberty shall become your freedmen, and if they, whose status is now in question, agree to this, we are ready to authorize compliance with your wishes. And lest the benefit afforded by this our rescript be rendered ineffectual in another way, by the Treasury laying claim to the property, be it hereby known to those engaged in our service that the cause of liberty is to be preferred to pecuniary advantage, and that they must so effect such seizures as to preserve the freedom of those who could have obtained it had the inheritance been accepted under the will.' **2**. This rescript was a benefit not only to slaves thus liberated, but also to the deceased testators themselves, by saving their property from being seized and sold by their creditors; for it is certain that such seizure and:sale cannot take place if the property has been adjudged on this account, because some one has come forward to defend the deceased, and a satisfactory defender too, who gives the creditors full security for payment. **3**. Primarily, the rescript is applicable only where freedom is conferred by a will. How then will the case stand, if a man who dies intestate makes gifts of freedom by codicils, and on the intestacy no one accepts the inheritance? We answer, that the boon conferred by the constitution ought not here to be refused. No one can doubt that liberty given, in codicils, by a man who dies having made a will, is effectual. **4**. The terms of the constitution show that it comes into application when there is no successor on an intestacy; accordingly, it is of no use so long as it is uncertain whether there will be one or not; but, when this has been determined in the negative, it at once becomes applicable. **5**. Again, it may be asked whether, if a person who abstains from accepting an inheritance can claim a judicial restoration of rights, the constitution can still be applied, and the goods adjudged under it? And what, if such person obtains a restoration after they have been actually adjudged in order to give effect to the bequest of freedom? We reply that gifts of liberty to which effect has once been given cannot possibly be recalled. **6**. The object with which this constitution was enacted was to give effect to bequests of liberty and accordingly it is quite inapplicable where no such bequests are made. Supposing, however, that a man manumits certain slaves in his lifetime, or in contemplation of death, and, in order to prevent any questions arising whether the creditors have thereby been defrauded, the slaves are desirous of having the property adjudged to them, should this be permitted? and we are inclined to say that it should, though the point is not covered by the terms of the constitution. **7**. Perceiving, however, that the enactment was wanting in many minute points of this kind, we have ourselves issued a very full constitution, in which have been collected many conceivable cases by which the law relating to this kind of succession has been completed, and with which any one can become acquainted by reading the constitution itself.

TITLE XII

OF UNIVERSAL SUCCESSIONS, NOW OBSOLETE, IN SALE OF GOODS UPON BANKRUPTCY, AND UNDER THE SC. CLAUDIANUM

There were other kinds of universal succession in existence prior to that last before mentioned; for instance, the 'purchase of goods' which was introduced with many prolixities of form for the sale of insolvent debtors' estates, and which remained in use under the so-called 'ordinary' system of procedure. Later generations adopted the 'extraordinary' procedure, and accordingly sales of goods became obsolete along with the ordinary procedure of which they were a part. Creditors are now allowed to take possession of their debtor's property only by the order of a judge, and to dispose of it as to them seems most advantageous; all of which will appear more perfectly from the larger books of the Digest. **1**. There was too a miserable form of universal acquisition under the SC. Claudianum, when a free woman, through indulgence of her passion for a slave, lost her freedom by the senatusconsult, and with her freedom her property. But this enactment we deemed unworthy of our times, and have ordered its abolition in our Empire, nor allowed it to be inserted in our Digest.

TITLE XIII

OF OBLIGATIONS

Let us now pass on to obligations. An obligation is a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State. **1**. The leading division of obligations is into two kinds, civil and praetorian. Those obligations are civil which are established by statute, or at

least are sanctioned by the civil law; those are praetorian which the praetor has established by his own jurisdiction, and which are also called honorary. **2**. By another division they are arranged in four classes, contractual, quasicontractual, delictal, and quasi-delictal. And, first, we must examine those which are contractual, and which again fall into four species, for contract is concluded either by delivery, by a form of words, by writing, or by consent: each of which we will treat in detail.

TITLE XIV

OF REAL CONTRACTS, OR THE MODES IN WHICH OBLIGATIONS ARE CONTRACTED BY DELIVERY

Real contracts, or contracts concluded by delivery, are exemplified by loan for consumption, that is to say, loan of such things as are estimated by weight, number, or measure, for instance, wine, oil, corn, coined money, copper, silver, or gold: things in which we transfer our property on condition that the receiver shall transfer to us, at a future time, not the same things, but other things of the same kind and quality: and this contract is called *mutuum*, because thereby *meum* or mine becomes *tuum* or thine. The action to which it gives rise is called a condiction. **1**. Again, a man is bound by a real obligation if he takes what is not owed him from another who pays him by mistake; and the latter can, as plaintiff, bring a ccodiction against him for its recovery, after the analogy of the action whose formula ran 'if it be proved that he ought to convey', exactly as if the defendant had received a loan from him. Consequently a pupil who, by mistake, is paid something which is not really owed him without his guardian's authority, will be no more bound by a condiction for the recovery of money not owed than by one for money received as a loan: though this kind of liability does not seem to be founded on contract; for a payment made in order to discharge a debt is intended to extinguish, not to create, an obligation. **2**. So too a person to whom a thing is lent for use is laid under a real obligation, and is liable to the action on a loan for use. The difference between this case and a loan for consumption is considerable, for here the intention is not to make the object lent the property of the borrower, who accordingly is bound to restore the same identical thing. Again, if the receiver of a loan for consumption loses what he has received by some accident, such as fire, the fall of a building, shipwreck, or the attack of thieves or enemies, he still remains bound: but the borrower for use, though responsible for the greatest care in keeping what is lent him—and it is not enough that he has shown as much care as he usually bestows on his own affairs, if only some one else could have been more diligent in the charge of it—has not to answer for loss occasioned by fire or accident beyond his control, provided it did not occur through any fault of his own. Otherwise, of course, it is different: for instance, if you choose to take with you on a journey a thing which has been lent to you for use, and lose it by being attacked by enemies or thieves, or by a shipwreck, it is beyond question that you will be liable for its restoration. A thing is not properly said to be lent for use if any recompense is received or agreed upon for the service; for where this is the case, the use of the thing is held to be hired, and the contract is of a different kind, for a loan for use ought always to be gratuitous. **3**. Again, the obligation incurred by a person with whom a thing is deposited for custody is real, and he can be sued by the action of deposit; he too being responsible for the restoration of the identical thing deposited, though only where it is lost through some positive act of commission on his part: for for carelessness, that is to say, inattention and negligence, he is not liable. Thus a person from whom a thing is stolen, in the charge of which he has been most careless, cannot be called to account, because, if a man entrusts property to the custody of a careless friend, he has no one to blame but himself for his want of caution. **4**. Finally, the creditor who takes a thing in pledge is under a real obligation, and is bound to restore the thing itself by the action of pledge. A pledge, however, is for the benefit of both parties; of the debtor, because it enables him to borrow more easily, and of the creditor, because he has the better security for repayment; and accordingly, it is a settled rule that the pledgee cannot be held responsible for more than the greatest care in the custody of the pledge; if he shows this, and still loses it by some accident, he himself is freed from all liability, without losing his right to sue for the debt.

TITLE XV

OF VERBAL OBLIGATION

An obligation is contracted by question and answer, that is to say, by a form of words, when we stipulate that property shall be conveyed to us, or some other act be performed in our favour. Such verbal contracts ground two different actions, namely condiction, when the stipulation is certain, and the action on stipulation, when it is uncertain; and the name is derived from *stipulum*, a word in use among the ancients to mean 'firm', coming possibly from *stipes*, the trunk of a tree.

1. In this contract the following forms of words were formerly sanctioned by usage: 'Do you engage yourself to do so and so?' 'I do engage myself.' 'Do you promise?' 'I do promise.' 'Do you pledge your credit?' 'I pledge my credit.' 'Do you guarantee?' 'I guarantee.' 'Will you convey?' 'I will convey.' 'Will you do?' 'I will do.' Whether the stipulation is in Latin, or Greek, or any other language, is immaterial, provided the two parties understand one another, so that it is not necessary even that they should both speak in the same tongue, so long as the answer corresponds to the question, and thus two Greeks, for instance, may contract an obligation in Latin. But it was only in former times that the solemn forms referred to were in use: for subsequently, by the enactment of Leo's constitution, their employment was rendered unnecessary, and nothing was afterwards required except that the parties should understand each other, and agree to the same thing, the words in which such agreement was expressed being immaterial.

2. The terms of a stipulation may be absolute, or performance a may either be postponed to some future time, or be made subject to a condition. An absolute stipulation may be exemplified by the following: 'Do you promise to give five *aurei*?' and here (if the promise be made) that sum may be instantly sued for. As an instance of a stipulation '*in diem*', as it is called where a future day is fixed for payment, we may take the following: 'Do you promise to give ten *aurei* on the first of March?' In such a stipulation as this, an immediate debt is created, but it cannot be sued upon until the arrival of the day fixed for payment: and even on that very day an action cannot be brought, because the debtor ought to have the whole of it allowed to him for payment; for otherwise, unless the whole day on which payment was promised is past, it cannot be certain that default has been made. **3**. If the terms of your stipulation run 'Do you promise to pay me ten *aurei* a year so long as I live?' the obligation is deemed absolute, and the liability perpetual, for a debt cannot be owed till a certain time only; though if the promisee's heir sues for payment, he will be successfully met by the plea of contrary agreement. **4**. A stipulation is conditional, when performance is made to depend on some uncertain event in the future, so that it become actionable only on something being done or omitted: for instance, 'Do you promise to give five *aurei* if Titius is made consul?' If, however, a man stipulates in the form 'Do you promise to give so and so, if I do not go up to the Capitol?' the effect is the same as if he had stipulated for payment to himself at the time of his death. The immediate effect of a conditional stipulation is not a debt, but merely the expectation that at some time there will be a debt: and this expectation devolves on the stipulator's heir, supposing he dies himself before fulfilment of the condition. **5**. It is usual in stipulations to name a place for payment; for instance, 'Do you promise to give at Carthage?' Such a stipulation as this, though in its terms absolute, implies a condition that enough time shall be allowed to the promisor to enable him to pay the money at Carthage. Accordingly, if a man at Rome stipulates thus, 'Do you promise to pay to-day at Carthage?' the stipulation is void, because the performance of the act to be promised is a physical impossibility. **6**. Conditions relating to past or present time either make the obligation void at once, or have no suspensive operation whatever. Thus, in the stipulation 'Do you promise to give so and so, if Titius has been consul, or if Maevius is alive?' the promise is void, if the condition is not satisfied; while if it is, it is binding at once: for events which in themselves are certain do not suspend the binding force of an obligation, however uncertain we ourselves may be about them.

7. The performance or non-performance of an act may be the object of a stipulation no less than the delivery of property, though where this is the case, it will be best to connect the non-performance of the act to be performed, or the performance of the act to be omitted, with a pecuniary penalty to be paid in default, lest there be a doubt as to the value of the act or omission, which will make it necessary for the plaintiff to prove to what damages he is entitled. Thus, if it be a performance which is stipulated for, some such penalty should be added as in the following: 'If so and so is not done, do you promise to pay ten *aurei* as a penalty?' And if the performance of some acts, and the non-performance of others, are bargained for in the same stipulation, a clause of the following kind should be added, 'If any default is made, either as contrary to what is agreed upon, or by way of nonperformance, do you promise to pay a penalty of ten *aurei*?

TITLE XVI

OF STIPULATIONS IN WHICH THERE ARE TWO CREDITORS OR TWO DEBTORS

There may be two or more parties on either side in a stipulation, that is to say, as promisors or promisees. Joint promisees are so constituted by the promisor answering, 'I promise,' after they have all first asked the question; for instance, if after two promisees have separately stipulated from him, he answers, 'I promise to give so and so to each of you.' But if he first promises to Titius, and then, on

another's putting the question to him, promises to him too, there will be two distinct obligations, namely, one between him and each of the promisees, and they are not considered joint promisees at all. The usual form to constitute two or more joint promisors is as follows,—'Maevius, do you promise to give five *aurei*? Seius, do you promise to give the same five *aurei*? and in answer they reply separately, 'I promise.' **1**. In obligations of this kind each joint promisee is owed the whole sum, and the whole sum can be claimed from each joint promisor; and yet in both cases but one payment is due, so that if one joint promisee receives the debt, or one joint promisor pays it, the obligation is thereby extinguished for all, and all are thereby released from it. Of two joint promisors one may be bound absolutely, while performance by the other is postponed to a future day, or made to depend on a condition; but such postponement or such condition in no way prevents the stipulator from at once suing the one who was bound absolutely.

TITLE XVII

OF STIPULATIONS MADE BY SLAVES

From his master's legal capacity a slave derives ability to be promisee in a stipulation. Thus, as an inheritance in most matters represents the legal 'person' of the deceased, whatever a slave belonging to it stipulates for, before the inheritance is accepted, he acquires for the inheritance, and so for the person who subsequently becomes heir. **1**. All that a slave acquires by a stipulation he acquires for his master only, whether it was to that master,or himself, or his fellow slave, or no one in particular that performance was to be made under the contract; and the same principle applies to children in power, so far as they now are instruments of acquisition for their father. **2**. When, however, what is stipulated for is permission to do some specific act, that permission cannot extend beyond the person of the promisee: for instance, if a slave stipulates for permission to cross the promisor's land, he cannot himself be denied passage, though his master can. **3**. A stipulation by a slave belonging to joint owners enures to the benefit of all of them in proportion to the shares in which they own him, unless he stipulated at the bidding, or expressly in favour, of one of them only, in which case that one alone is benefited. Where a jointly owned slave stipulates for the transfer of property which cannot be acquired for one of his two masters, the contract enures to the benefit of the other only: for instance, where the stipulation is for the transfer of a thing which already belongs to one of them.

TITLE XVIII

OF THE DIFFERENT KINDS OF STIPULATIONS

Stipulations are either judicial, praetorian, conventional, or common: by the latter being meant those which are both praetorian and judicial. **1**. Judicial stipulations are those which it is simply part of the judge's duty to require; for instance, security against fraud, or for the pursuit of a runaway slave, or (in default) for payment of his value. **2**. Those are praetorian, which the praetor is bound to exact simply in virtue of his magisterial functions; for instance, security against apprehended damage, or for payment of legacies by an heir. Under praetorian stipulations we must include also those directed by the aedile, for these too are based upon jurisdiction. **3**. Conventional stipulations are those which arise merely from the agreement of the parties, apart from any direction of a judge or of the praetor, and which one may almost say are of as many different kinds as there are conceivable objects to a contract. **4**. Common stipulations may be exemplified by that by which a guardian gives security that his ward's property will not be squandered or misappropriated, which he is sometimes required to enter into by the praetor, and sometimes also by a judge when the matter cannot be managed in any other way; or, again, we might take the stipulation by which an agent promises that his acts shall be ratified by his principal.

TITLE XIX

OF INVALID STIPULATIONS

Anything, whether movable or immovable, which admits of private ownership, may be made the object of a stipulation. **1**. But if a man stipulates for the delivery of a thing which either does not or cannot exist, such as Stichus, who is dead but whom he thought alive, or an impossible creature, like a hippocentaur, the contract will be void. **2**. Precisely the same a principle applies where a man stipulates for the delivery of a thing which is sacred or religious, but which he thought was a subject of human ownership, or of a thing which is public, that is to say, devoted in perpetuity to the use and enjoyment of the people at large, like a forum or theatre, or of a free man whom he thought a slave, or of a thing which he is incapable of owning, or which is his own already. And the fact that a thing which is public may

become private property, that a free man may become a slave, that the stipulator may become capable of owning such and such a thing, or that such and such a thing may cease to belong to him, will not avail to merely suspend the force of the stipulation in these cases, but it is void from the outset. Conversely, a stipulation which originally was perfectly good may be avoided by the thing, which is its object, acquiring any of the characters just specified through no fault of the promisor. And a stipulation, such as 'do you promise to convey Lucius Titius when he shall be a slave?' and others like it, are also void from the beginning; for objects which by their very nature cannot be owned by man cannot either in any way be made the object of an obligation. **3**. If one man promises that another shall convey, or do so and so, as, for instance, that Titius shall give five *aurei*, he will not be bound, though he will if he promises to get Titius to give them. **4**. If a man stipulates for conveyance to, or performance in favour of, another person who is not his paterfamilias, the contract is void; though of course performance to a third person may be bargained for (as in the stipulation 'do you promise to give to me or to Seius?'); where, though the obligation is created in favour of the stipulator only, payment may still be lawfully made to Seius, even against the stipulator's will, the result of which, if it is done, being that the promisor is entirely released from his obligation, while the stipulator can sue Seius by the action of agency. If a man stipulates for payment of ten *aurei* to himself and another who is not his paterfamilias, the contract will be good, though there has been much doubt whether in such a case the stipulator can sue for the whole sum agreed upon, or only half; the law is now settled in favour of the smaller sum. If you stipulate for performance in favour of one in your power, all benefit under the contract is taken by yourself, for your words are as the words of your son, as his words are as yours, in all cases in which he is merely an instrument of acquisition for you. **5**. Another circumstance by which a stipulation may be avoided is want of correspondence between question and answer, as where a man stipulates from you for payment of ten *aurei*, and you promise five, or vice versa; or where his question is unconditional, your answer conditional, or vice versa, provided only that in this latter case the difference is express and clear; that is to say, if he stipulates for payment on fulfilment of a condition, or on some determinate future day, and you answer: 'I promise to pay to-day,' the contract is void; but if you merely answer: 'I promise,' you are held by this laconic reply to have undertaken payment on the day, or subject to the condition specified; for it is not essential that every word used by the stipulator should be repeated in the answer of the promise. **6**. Again, no valid stipulation can be made between two persons of whom one is in the power of the other. A slave indeed cannot be under an obligation to either his master or anybody else: but children in power can be bound in favour of any one except their own paterfamilias. **7**. The dumb, of course, cannot either stipulate or promise, nor can the deaf, for the promisee in stipulation must hear the answer, and the promisor must hear the question; and this makes it clear that we are speaking of persons only who are stone deaf, not of those who (as it is said) are hard of hearing. **8**. A lunatic cannot enter into any contract at all, because he does not understand what he is doing. **9**. On the other hand a pupil can enter into any contract, provided that he has his guardian's authority, when necessary, as it is for incurring an obligation, though not for imposing an obligation on another person. **10**. This concession of legal capacity of disposition is manifestly reasonable in respect of children who have acquired some understanding, for children below the age of seven years, or who have just passed that age, resemble lunatics in want of intelligence. Those, however, who have just completed their seventh year are permitted, by a beneficent interpretation of the law, in order to promote their interests, to have the same capacity as those approaching the age of puberty; but a child below the latter age, who is in paternal power, cannot bind himself even with his father's sanction. **11**. An impossible condition annexed to an obligation invalidates the stipulation. An impossible condition is one which, according to the course of nature, cannot be fulfilled, as, for instance, if one says: 'Do you promise to give if I touch the sky with my finger?' But if the stipulation runs: 'Do you promise to give if I do not touch the sky with my finger?' it is considered unconditional, and accordingly can be sued upon at once. **12**. Again, a verbal obligation made between persons who are not present with one another is void. This rule, however, afforded contentious persons opportunities of litigation, by alleging, after some interval, that they, or their adversaries, had not been present on the occasion in question; and we have therefore issued a constitution, addressed to the advocates of Caesarea, in order with the more dispatch to settle such disputes, whereby it is enacted that written documents in evidence of a contract which recite thepresence of the parties shall be taken to be indisputable proof of the fact, unless the person, who resorts to allegations usually so disgraceful, proves by the clearest evidence, either documentary or borne by credible witnesses, that he or his adversary was elsewhere than alleged during the whole day on which the document is stated to have been executed. **13**. Formerly, a man could not stipulate that a thing should be conveyed to him after his own death, or after

that of the promisor; nor could one person who was in another's power even stipulate for conveyance after that other's death, because he was deemed to speak with the voice of his parent or master; and stipulations for conveyance the day before the promisee's or promisor's decease were also void. Stipulations, however, as has already been remarked, derive their validity from the consent of the contracting parties, and we therefore introduced a necessary emendation in respect also of this rule of law, by providing that a stipulation shall be good which bargains for performance either after the death, or the day before the death, of either promisee or promisor. **14**. Again, a stipulation in the form: 'Do you promise to give to-day, if such or such a ship arrives from Asia to-morrow?' was formerly void, as being preposterous in its expression because what should come last is put first. Leo, however, of famous memory held that a preposterous stipulation in the settlement of a dowry ought not to be rejected as void, and we have determined to allow it perfect validity in every case, and not merely in that in which it was formerly sanctioned. **15.** A stipulation, say by Titius, in the form: 'Do you promise to give when I shall die' or 'when you shall die' ? is good now, as indeed it always was even under the older law. **16**. So too a stipulation for performance after the death of a third person is good. **17**. If a document in evidence of a contract states that so and so promised, the promise is deemed to have been given in answer to a preceding question. **18**. When several acts of conveyance or performance are comprised in a single stipulation, if the promisor simply answer: 'I promise to convey,' he becomes liable on each and all of them, but if he answers that he will convey only one or some of them, he incurs an obligation in respect of those only which are comprised in his answer, there being in reality several distinct stipulations of which only one or some are considered to have acquired binding force: for for each act of conveyance or performance there ought to be a separate question and a separate answer. **19**. As has been already observed, no one can validly stipulate for performance to a person other than himself, for the purpose of this kind of obligation is to enable persons to acquire for themselves that whereby they are profited, and a stipulator is not profited if the conveyance is to be made to a third person. Hence, if it be wished to make a stipulation in favour of any such third person, a penalty should be stipulated for, to be paid, in default of performance of that which is in reality the object of the contract, to the party who otherwise would have no interest in such performance; for when one stipulates for a penalty, it is not his interest in what is the real contract which is considered, but only the amount to be forfeited to him upon non-fulfilment of the condition. So that a stipulation for conveyance to Titius, but made by some one else, is void: but the addition of a penalty, in the form 'If you do not convey, do you promise to pay me so many *aurei*?' makes it good and actionable. **20**. But where the promisee stipulates in favour of a third person, having himself an interest in the performance of the promise, the stipulation is good. For instance, if a guardian, after beginning to exercise his tutorial functions, retires from their exercise in favour of his fellow guardian, taking from him by stipulation security for the due charge of the ward's property, he has a sufficient interest in the performance of this promise, because the ward could have sued him in case of maladministration, and therefore the obligation is binding. So too a stipulation will be good by which one bargains for delivery to one's agent, or for payment to one's creditor, for in the latter case one may be so far interested in the payment that, if it be not made, one will become liable to a penalty or to having a forceclosure of estates which one has mortgaged. **21**. Conversely, he who promises that another shall do so and so is not bound unless he promises a penalty in default. **22**. And, again, a man cannot validly stipulate that property which will hereafter be his shall be conveyed to him as soon as it becomes his own. **23**. If the stipulator and the promisor mean different things, there is no contractual obligation, but it is just as if no answer had been made to the question; for instance, if one stipulates from you for Stichus, and you think he means Pamphilus, whose name you believed to be Stichus. **24**. A promise made for an illegal or immoral purpose, as, for instance, to commit a sacrilege or homicide, is void. **25**. If a man stipulates for performance on the fulfilment of a condition, and dies before such fulfilment, his heir can sue on the contract when it occurs: and the heir of the promisor can be sued under the same circumstances. **26**. A stipulation for a conveyance this year, or this month, cannot be sued upon until the whole year, or the whole month, has elapsed. **27**. And similarly the promisee cannot sue immediately upon a stipulation for the conveyance of an estate or a slave, but only after allowing a sufficient interval for the conveyance to be made.

TITLE XX

OF FIDEJUSSORS OR SURETIES

Very often other persons, called fidejussors or sureties, are bound for the promisor, being taken by promisees as additional security. **1**. Such sureties may accompany any obligation, whether real, verbal,

literal or consensual: and it is immaterial even whether the principal obligation be civil or natural, so that a man may go surety for the obligation of a slave either to a stranger or to his master. **2**. A fidejussor is not only bound himself, but his obligation devolves also on his heir. **3**. And the contract of suretyship may be entered into before no less than after the creation of the principal obligation. **4**. If there are several fidejussors to the same obligation, each of them, however many they are, is liable for the whole amount, and the creditor may sue whichever he chooses for the whole; but by the letter of Hadrian he may be compelled to sue for only an aliquot part, determined by the number of sureties who are solvent at the commencement of the action: so that if one of them is insolvent at that time the liability of the rest is proportionately increased. Thus, if one fidejussor pay the whole amount, he alone suffers by the insolvency of the principal debtor; but this is his own fault, as he might have availed himself of the letter of Hadrian, and required that the claim should be reduced to his rateable portion. **5**. Fidejussors cannot be bound for more than their principal, for their obligation is but accessory to the latter's, and the accessory cannot contain more than the principal; but they can be bound for less. Thus, if the principal debtor promised ten *aurei*, the fidejussor can well be bound for five, but not vice versa; and if the principal's promise is absolute, that of the fidejussor may be conditional, though a conditional promise cannot be absolutely guaranteed, for more and less is to be understood of time as well as of quantity, immediate payment being regarded as more, and future payment as less. **6**. For the recovery of anything paid by him for the principal the fidejussor can sue the latter by the action on agency. **7**. A fidejussor may be taken in Greek, by using the expressions τῇ ἐμῇ πίστει κελεύω, λέγω, θέλω, or βούλομαι; and φημί will be taken as equivalent to λέγω. It is to be observed that in the stipulations of fidejussors the general rule is that whatever is stated in writing to have been done is taken to have really been done; and, accordingly, it is settled law that if a man signs his name to a paper stating that he became a fidejussor, all formalities are presumed to have been duly observed.

TITLE XXI

OF LITERAL OBLIGATION

Formerly there was a kind of obligation made by writing, and said to be contracted by the entry of a debt in a ledger; but such entries have nowadays gone out of use. Of course, if a man states in writing that he owes money which has never been paid over to him, he cannot be allowed, after a considerable interval, to defend himself by the plea that the money was not, in fact, advanced; for this is a point which has frequently been settled by imperial constitutions. The consequence is, that even at the present day a person who is estopped from this plea is bound by his written signature, which (even of course where there is no stipulation) is ground for a condiction. The length of time after which this defence could not be pleaded was formerly fixed by imperial constitutions at five years; but it has been reduced by our constitution, in order to save creditors from a more extended risk of being defrauded of their money, so that now it cannot be advanced after the lapse of two years from the date of the alleged payment.

TITLE XXII

OF OBLIGATION BY CONSENT

Obligations contracted by mere consent are exemplified by sale, hire, partnership and agency, [**1.**] which are called consensual contracts because no writing, nor the presence of the parties, nor any delivery is required to make the obligation actionable, but the consent of the parties is sufficient. [**2.**] Parties who are not present together, therefore, can form these contracts by letter, for instance, or by messenger: [**3.**] and they are in their nature bilateral, that is, both parties incur a reciprocal obligation to perform whatever is just and fair, whereas verbal contracts are unilateral, one party being promisee, and the other alone promisor.

TITLE XXIII

OF PURCHASE AND SALE

The contract of purchase and sale is complete immediately the price is agreed upon, and even before the price or as much as any earnest is paid: for earnest is merely evidence of the completion of the contract. In respect of sales unattested by any written evidence this is a reasonable rule, and so far as they are concerned we have made no innovations. By one of our constitutions, however, we have enacted,[1] that no sale effected by an agreement in writing shall be good or binding, unless that agreement is written by

[1] [C.4.21.17. CD from FdeZ.]

the contracting parties themselves, or, if written by some one else, is at least signed by them, or finally, if written by a notary, is duly drawn by him and executed by the parties. So long as any of these requirements is unsatisfied, there is room to retract, and either purchaser or vendor may withdraw from the agreement with impunity—provided, that is to say, that no earnest has been given. Where earnest has been given, and either party refuses to perform the contract, that party, whether the agreement be in writing or not, if purchaser forfeits what he has given, and if vendor is compelled to restore double what he has received, even though there has been no express agreement in the matter of earnest. **1**. It is necessary that the price should be settled, for without a price there can be no purchase and sale, and it ought to be a fixed and certain price. For instance, where the parties agreed that the thing should be sold at a price to be subsequently fixed by Titius, the older jurists doubted much whether this was a valid contract of sale or not. The doubt has been settled in the following way by our decision;[2] if the third person named actually fixes the price, it must certainly be paid, as settled by him, and the thing must be delivered, in order to give effect to the sale; the purchaser (if not fairly treated) suing by the action on purchase, and the vendor by the action on sale. But if the third person named will not or cannot fix the price, the sale will be void, because no price has been settled. This rule, which we have adopted with regard to sales, may reasonably be extended also to contracts of hire. **2**. The price, too, should be in money; for it used to be much disputed whether anything else, such as a slave, a piece of land, or a robe, could be treated as price. Sabinus and Cassius held the affirmative, explaining thus the common theory that exchange is a species, and the oldest species, of purchase and sale; and in their support they quoted the lines of Homer, who says in a certain passage that the army of the Greeks procured themselves wine by giving other things in exchange, the actual words being as follow: 'then the longhaired Greeks bought themselves wine, some with bronze, some with shining iron, some with hides, some with live oxen some with slaves.'[3] The other school maintained the negative, and distinguished between exchange on the one hand, and purchase and sale on the other: for if an exchange were the same thing as a sale, it would be impossible to determine which is the thing sold, and which is the price, and both things cannot be regarded in each of these characters. The opinion, however, of Proculus, who affirmed that exchange was a species of contract apart by itself, and distinct from sale, has deservedly prevailed, as it is confirmed by other lines from Homer, and by still more cogent reasons, and this has been admitted by preceding Emperors, and is fully stated in our Digest. **3**. As soon as the contract of sale is concluded—that is, as we have said, as soon as the price is agreed upon, if the contract is not in writing—the thing sold is immediately at the risk of the purchaser, even though it has not yet been delivered to him. Accordingly, if a slave dies, or is injured in any part of his body, or if a house is either totally or partially burnt down, or if a piece of land is wholly or partially swept away by a river flood, or is reduced in acreage by an inundation, or made of less value by a storm blowing down some of its trees, the loss falls on the purchaser, who must pay the price even though he has not got what he purchased. The vendor is not responsible and does not suffer for anything not due to any design or fault of his own. If, however, after the purchase of a piece of land, it receives an increase by alluvion, it is the purchaser who profits thereby: for the profit ought to belong to him who also bears the risk. [**3a.**] And if a slave who has been sold runs away, or is stolen, without any design or fault of the vendor, one should look to see whether the latter expressly undertook to keep him safely until delivery was made; for, if he did this, the loss falls upon him, though otherwise he incurs no liability: and this is a rule which applies to all animals and other objects whatsoever. The vendor, however, will be bound to transfer to the purchaser all his rights of action for the recovery of the object or damages, for, not having yet delivered it to the purchaser, he still remains its owner, and the same holds good of the penal actions on theft and on unlawful damage. **4**. A sale may be made conditionally as well as absolutely. The following is an example of a conditional sale: 'If Stichus meets with your approval within a certain time, he shall be purchased by you for so many *aurei*.' **5**. If a man buys a piece of land which is sacred, religious, or public, such as a forum or basilica, knowing it to be such, the purchase is void. But if the vendor has fraudulently induced him to believe that what he was buying was not sacred, or was private property, as he cannot legally have what he contracted for, he can bring the action on purchase to recover damages for what he has lost by the fraud; and the same rule applies to the purchase of a free man represented by the vendor to be a slave.

[2] [C.4.38.15. CD from FdeZ.]

[3] *Il*. vii.472 sqq.

TITLE XXIV

OF LETTING AND HIRING

The contract of hire resembles very closely the contract of sale, and the same rules of law apply to both. Thus, as the contract of sale is concluded as soon as the price is agreed upon, so the contract of hire is held to be concluded as soon as the sum to be paid for the hiring is settled, and from that moment the letter has an action on the letting, and the hirer on the hiring. **1**. What we have said above as to a sale in which the price is left to be fixed by a third person must be understood to apply also to a contract of hire in which the amount to be paid for hire is left to be fixed in the same way. Consequently, if a man gives clothes to a fuller to clean or finish, or to a tailor to mend, and the amount of hire is not fixed at the time, but left to subsequent agreement between the parties, a contract of hire cannot properly be said to have been concluded, but an action is given on the circumstances, as amounting to an innominate contract. **2**. Again, a question often arose in connexion with the contract of hire similar to that which was so common, namely, whether an exchange was a sale. For instance, what is the nature of the transaction if a man gives you the use or enjoyment of a thing, and receives in return the use or enjoyment of another thing from you? It is now settled that this is not a contract of hire, but a kind of contract apart by itself. Thus, if a man had one ox, and his neighbour another, and they agreed that each should in turn lend the other his ox for ten days to make use of, and then one of the oxen died while working for the man to whom it did not belong, an action cannot be brought on hire, nor on a loan for use, for a loan for use ought to be gratuitous: but an action should be brought as on an innominate contract. **3**. So nearly akin, indeed, is purchase and sale to letting and hiring, that in some cases it is a question to which class of the two a contract belongs. As an instance may be taken those lands which are delivered over to be enjoyed for ever, upon the terms, that is to say, that so long as the rent is paid to the owner it shall not be lawful for the latter to take the lands away from either the original hirer, or his heir, or any one else to whom he or his heir has conveyed them by sale, gift, dowry, or in any other way whatsoever. The questionings of the earlier lawyers, some of whom thought this kind of contract a hiring, and others a sale, occasioned the enactment of the statute of Zeno,[1] which determined that this contract of *emphyteusis*, as it is called, was of a peculiar nature, and should not be included under either hire or sale, but should rest on the terms of the agreement in each particular case: so that if anything were agreed upon between the parties, this should bind them exactly as if it were inherent in the very nature of the contract; while if they did not agree expressly at whose risk the land should be, it should be at that of the owner in case of total destruction, and at that of the tenant, if the injury were merely partial. And these rules we have adopted in our legislation. **4**. Again, if a goldsmith agrees to make Titius rings of a certain weight and pattern out of his own gold for, say, ten *aurei*, it is a question whether the contract is purchase and sale or letting and hiring. Cassius says the material is bought and sold, the labour let and hired; but it is now settled that there is only a purchase and sale. But if Titius provided the gold, and agreed to pay him for his work, the contract is clearly a letting and hiring.[2]

5. The hirer ought to observe all the terms of the contract, and in the absence of express agreement his obligations should be ascertained by reference to what is fair and equitable. Where a man has either given or promised hire for the use of clothes, silver, or a beast of burden, he is required in his charge of it to show as much care as the most diligent father of a family shows in his own affairs; if he do this, and still accidentally lose it, he will be under no obligation to re- store either it or its value. **6**. If the hirer dies before the time fixed for the termination of the contract has elapsed, his heir succeeds to his rights and obligations in respect thereof.

[1] [C.4.66.1. CD from FdeZ.]

[2] [Cf. GI.3.147. FdeZ.]

TITLE XXV

OF PARTNERSHIP

A partnership either extends to all the goods of the partners, when the Greeks call it by the special name of κοινοπραξία, or is confined to a single sort of business, such as the purchase and sale of slaves, oil, wine, or grain. **1**. If no express agreement has been made as to the division of the profit and loss, an equal division of both is understood to be intended, but if it has, such agreement ought to be carried into effect; and there has never been any doubt as to the validity of a contract between two partners that the one shall take two-thirds of the profits, and bear two-thirds of the loss, and that the remaining third shall

be taken and borne respectively by the other. **2**. If Titius and Seius agreed that the former should take two-thirds of the profits, and bear only one-third of the loss, and that the latter should bear two-thirds of the loss, and take only one-third of the profits, it has been made a question whether such an agreement ought to be held valid. Quintus Mucius thought such an arrangement contrary to the very nature of partnership, and therefore not to be supported: but Servius Sulpicius, whose opinion has prevailed, was of a different view, because the services of a particular partner are often so valuable that it is only just to admit him to the business on more favourable terms than the rest. It is certain that a partnership may be formed on the terms that one partner shall contribute all the capital, and that the profits shall be divided equally, for a man's services are often equivalent to capital. Indeed, the opinion of Quintus Mucius is now so generally rejected, that it is admitted to be a valid contract that a partner shall take a share of the profits, and bear no share in the loss, which indeed Servius, consistently with his opinion, maintained himself. This of course must be taken to mean that if there is a profit on one transaction, and a loss on another, a balance should be struck, and only the net profit be considered as profits. **3**. It is quite clear that if the shares are expressed in one event only, as for instance in the event of profit, but not in the event of loss, or vice versa, the same proportions must be observed, in the event of which no mention has been made, as in the other. **4**. The continuance of partnership depends on the continuing consent of the members; it is dissolved by notice of withdrawal from any one of them. But of course if the object of a partner in withdrawing from the partnership is to fraudulently keep for himself some accruing gain—for instance, if a partner in all goods succeeds to an inheritance, and withdraws from the partnership in order to have exclusive possession thereof—he will be compelled to divide this gain with his partners; but what he gains undesignedly after withdrawing he keeps to himself, and his partner always has the exclusive benefit of whatever accrues to him after such withdrawal. **5**. Again, a partnership is dissolved by the death of a partner, for when a man enters into a contract of partnership, he selects as his partner a definite person. Accordingly, a partnership based on the agreement of even several persons is dissolved by the death of one of them, even though several others survive, unless when the contract was made it was otherwise agreed. **6**. So too a partnership formed for the attainment of some particular object is terminated when that object is attained. **7**. It is clear too that a partnership is dissolved by the forfeiture of the property of one of the partners, for such an one, as he is replaced by a successor, is reckoned civilly dead. **8**. So again, if one of the partners is in such embarrassed circumstances as to surrender all his property to his creditors, and all that he possessed is sold to satisfy the public or private claims upon him, the partnership is dissolved, though if the members still agree to be partners, a new partnership would seem to have begun. **9**. It has been doubted whether one partner is answerable to another on the action of partnership for any wrong less than fraud, like the bailee in a deposit, or whether he is not suable also for carelessness, that is to say, for inattention and negligence; but the latter opinion has now prevailed, with this limitation, that a partner cannot be required to satisfy the highest standard of carefulness, provided that in partnership business he shows as much diligence as he does in his own private affairs: the reason for this being that if a man chooses as his partner a careless person, he has no one to blame but himself.

TITLE XXVI

OF AGENCY

Of the contract of agency there are five modes. A man gives you a commission either for his own exclusive benefit, or for his own and yours together, or for that of some third person, or for his own and the third person's, or for the third person's and yours. A commission given simply for the sake of the agent gives rise in reality to no relation of agency, and accordingly no obligation comes into existence, and therefore no action. **1**. A commission is given solely for the benefit of the principal when, for instance, the latter instructs you to manage his business, to buy him a piece of land, or to enter into a stipulation as surety for him. **2**. It is given for your benefit and for that of your principal together when he, for instance, commissions you to lend money at interest to.a person who borrows it for your principal's benefit; or where, on your wishing to sue him as surety for some one else, he commissions you to sue his principal, himself undertaking all risk: or where, at his risk, you stipulate for payment from a person whom he substitutes for himself as your debtor. **3**. It is given for the benefit of a third person when, for instance, some one commissions you to look after Titius's affairs as general agent, or to buy Titius a piece of land, or to go surety for him. **4**. It is for the benefit of the principal and a third person when, for instance, some one instructs you to look after affairs common to himself and Titius, or to buy an estate for himself and Titius, or to go surety for them jointly. **5**. It is for the benefit of yourself and a third person when, for instance, some one instructs you to lend money at interest to Titius; if it were to lend money

free of interest, it would be for the benefit of the third person only. **6**. It is for your benefit alone if, for instance, some one commissions you to invest your money in the purchase of land rather than to lend it at interest, or vice versa. But such a commission is not really so much a commission in the eye of the law as a mere piece of advice, and consequently will not give rise to an obligation, for the law holds no one responsible as on agency for mere advice given, even if it turns out ill for the person advised, for every one can find out for himself whether what he is advised to do is likely to turn out well or ill. Consequently, if you have money lying idle in your cash-box, and on so and so's advice buy something with it, or put it out at interest, you cannot sue that person by the action on agency, although your purchase or loan turns out a bad speculation; and it has even been questioned, on this principle, whether a man is suable on agency who commissions you to lend money to Titius; but the prevalent opinion is that of Sabinus, that so specific a recommendation is sufficient to support an action, because (without it) you would never have lent your money to Titius at all. **7**. So too instructions to commit an unlawful or immoral act do not create a legal obligation—as if Titius were to instigate you to steal, or to do an injury to the property or person of some one else; and even if you act on his instructions, and have to pay a penalty in consequence, you cannot recover its amount from Titius.

8. An agent ought not to exceed the terms of his commission. Thus, if some one commission you to purchase an estate for him, but not to exceed the price of a hundred *aurei*, or to go surety for Titius up to that amount, you ought not in either transaction to exceed the sum specified: for otherwise you will not be able to sue him on the agency. Sabinus and Cassius even thought that in such a case you could not successfully sue him even for a hundred *aurei*, though the leaders of the opposite school differed from them, and the latter opinion is undoubtedly less harsh. If you buy the estate for less, you will have a right of action against him, for a direction to buy an estate for a hundred *aurei* is regarded as an implied direction to buy, if possible, for any smaller sum.

9. The authority given to an agent duly constituted can be annulled by revocation before he commences to act upon it. **10** Similarly, the death of either the principal or the agent before the latter commences to act extinguishes the agent's authority; but equity has so far modified this rule that if, after the death of a principal and without having notice of his decease, an agent executes his commission, he can sue on the agency: for otherwise the law would be penalizing a reasonable and unavoidable ignorance. Similar to this is the rule, that debtors who pay a manumitted steward, say, of Titius, without notice of his manumission, are discharged from liability, though by the strict letter of the law they are not discharged, because they have not paid the person whom they were bound to pay. **11**. It is open to every one to decline a commission of agency, but acceptance must be followed by execution, or by a prompt resignation, in order to enable the principal to carry out his purpose either personally or by the appointment of another agent. Unless the resignation is made in such time that the principal can attain his object without suffering any prejudice, an action will lie at his suit, in default of proof by the agent that he could not resign before, or that his resignation, though inconvenient, was justifiable.

12. A commission of agency may be made to take effect from a specified future day, or may be subject to a condition. **13**. Finally it should be observed that unless the agent's services are gratuitous, the relation between him and the principal will not be agency proper, but some other kind of contract; for if a remuneration is fixed, the contract is one of hiring. And generally we may say that in all cases where, supposing a man s services are gratuitous, there would be a contract of agency or deposit, there is held to be a contract of hiring if remuneration is agreed upon; consequently, if you give clothes to a fuller to clean or to finish, or to a tailor to mend, without agreeing upon or promising any remuneration, you can be sued by the action on agency.

TITLE XXVII

OF QUASI-CONTRACTUAL OBLIGATIONS

Having enumerated the different kinds of contracts, let us now examine those obligations also which do not originate, properly speaking, in contract, but which, as they do not arise from a delict, seem to be quasi-contractual. **1**. Thus, if one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under a legal obligation even though he knows nothing of what has taken

place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better. **2**. Guardians again, who can be sued by the action on guardianship, cannot properly be said to be bound by contract, for there is no contract between guardian and ward: but their obligation, as it certainly does not originate in delict, may be said to be quasicontractual. In this case too each party has a reMedy against the other: not only can the ward sue the guardian directly on the guardianship, but the guardian can also sue the ward by the contrary action of the same name, if he has either incurred any outlay in managing the ward's property, or bound himself on his behalf, or pledged his own property as security for the ward's creditors. **3**. Again, where persons own property jointly without being partners, by having, for instance, a joint bequest or gift made to them, and one of them is liable to be sued by the other in a partition suit because he alone has taken its fruits, or because the plaintiff has laid out money on it in necessary expenses: here the defendant cannot properly be said to be bound by contract, for there has been no contract made between the parties; but as his obligation is not based on delict, it may be said to be quasi-contractual. **4**. The case is exactly the same between joint heirs, one of whom is liable to be sued by the other on one of these grounds in an action for partition of the inheritance. **5**. So, too, the obligation of an heir to discharge legacies cannot properly be called contractual, for it cannot be said that the legatee has contracted at all with either the heir or the testator: yet, as the heir is not bound by a delict, his obligation would seem to be quasi-contractual. **6**. Again, a person to whom money not owed is paid by mistake is thereby laid under a quasi-contractual obligation; an obligation, indeed, which is so far from being contractual, that, logically, it may be said to arise from the extinction rather than from the formation of a contract; for when a man pays over money, intending thereby to discharge a debt, his purpose is clearly to loose a bond by which he is already bound, not to bind himself by a fresh one. Still, the person to whom money is thus paid is laid under an obligation exactly as if he had taken a loan for consumption, and therefore he is liable to a condiction. **7**. Under certain circumstances money which is not owed, and which is paid by mistake, is not recoverable; the rule of the older lawyers on this point being that wherever a defendant's denial of his obligation is punished by duplication of the damages to be recovered—as in actions under the lex Aquilia, and for the recovery of a legacy—he cannot get the money back on this plea. The older lawyers, however, applied this rule only to such legacies of specific sums of money as were given by condemnation; but by our constitution, by which we have assimilated legacies and trust bequests, we have made this duplication of damages on denial an incident of all actions for their recovery, provided the legatee or beneficiary is a church, or other holy place honoured for its devotion to religion and piety. Such legacies, although paid when not due, cannot be reclaimed.

TITLE XXVIII

OF PERSONS THROUGH WHOM WE CAN ACQUIRE OBLIGATIONS

Having thus gone through the classes of contractual and quasi-contractual obligations, we must remark that rights can be acquired by you not only on your own contracts, but also on those of persons in your power—that is to say, your slaves and children. What is acquired by the contracts of your slaves becomes wholly yours; but the acquisitions of children in your power by obligations must be divided on the principle of ownership and usufruct laid down in our constitution: that is to say, of the material results of an action brought on an obligation made in favour of a son the father shall have the usufruct, though the ownership is reserved to the son himself: provided, of course, that the action is brought by the father, in accordance with the distinction drawn in our recent constitution. **1**. Freemen also, and the slaves of another person, acquire I for you if you possess them in good faith, but only in two cases, namely, when they acquire by their own labour, or in dealing with your property. **2**. A usufructuary or usuary slave acquires under the same conditions for him who has the usufruct or use. **3**. It is settled law that a slave jointly owned acquires for all his owners in the proportion of their property in him, unless he names one exclusively in a stipulation, or in the delivery of property to himself, in which case he acquires for him alone; as in the stipulation 'do you promise to convey to Titius, my master?' If it was by the direction of

one of his joint owners only that he entered into a stipulation, the effect was formerly doubted; but now it has been settled by our decision that (as is said above) under such circumstances he acquires for him only who gave him the order.

TITLE XXIX

OF THE MODES IN WHICH OBLIGATIONS ARE DISCHARGED

An obligation is always extinguished by performance of what is owed, or by performance of something else with the creditor's assent. It is immaterial from whom the performance proceeds—be it the debtor himself, or some one else on his behalf: for on performance by a third person the debtor is released, whether he knows of it or not, and even when it is against his will. Performance by the debtor releases, besides himself, his sureties, and conversely performance by a surety releases, besides himself, the principal debtor. **1**. Acceptilation is another mode of extinguishing an obligation, and is, in its nature, an acknowledgement of a fictitious performance. For instance, if something is due to Titius under a verbal contract, and he wishes to release it, it can be done by his allowing the debtor to ask 'that which I promised thee hast thou received?' and by his replying 'I have received it'. An acceptilation can be made in Greek, provided the form corresponds to that of the Latin words, as ἔχεις λαβών δηνάρια τοσα; ἔχω λαβών. This process, as we said, discharges only obligations which arise from verbal contract, and no others, for it seemed only natural that where words can bind words may also loose: but a debt due from any other cause may be transformed into a debt by stipulation, and then released by an imaginary verbal payment or acceptilation. So, too, as a debt can be lawfully discharged in part, so acceptilation may be made of part only. **2**. A stipulation has been invented, commonly called Aquilian, by which an obligation of any kind whatsoever can be clothed in stipulation form, and then extinguished by acceptilation; for by this process any kind of obligation may be novated. Its terms, as settled by Gallus Aquilius, are as follow: 'Whatever, and on whatsoever ground, you are or shall be compellable to convey to or do for me, either now or on a future specfied day, and for whatsoever I have or shall have against you an action personal or real, or any extraordinary remedy, and whatsoever of mine you hold or possess naturally or civilly, or would possess, or now fail to possess through some wilful fault of your own—as the value of each and all of these claims Aulus Agerius stipulated for the payment of such and such a sum, and payment was formally promised by Numerius Negidius.' Then conversely, Numerius Negidius asked Aulus Agerius, 'hast thou received the whole of what I have to-day engaged, by the Aquilian stipulation, to pay thee?' to which Aulus Agerius replied 'I have it, and account it received'. **3**. Novation is another mode of extinguishing an obligation, and takes place when you owe Seius a sum, and he stipulates for payment thereof from Titius; for the intervention of a new person gives birth to a new obligation, and the first obligation is transformed into the second, and ceases to exist. Sometimes indeed the first stipulation is avoided by novation even though the second is of no effect: for instance, if you owe Titius a sum, and he stipulates for payment thereof from a pupil without his guardian's authority, he loses his claim altogether, for you, the original debtor, are discharged, and the second obligation is unenforceable. The same does not hold if one stipulate from a slave; for then the former debtor continues bound as fully as if one had stipulated from no one. But when the original debtor is the promisor, a second stipulation produces a novation only if it contains something new—if a condition, for instance, or a term, or a surety be added, or taken away—though, supposing the addition of a condition, we must be understood to mean that a novation is produced only if the condition is accomplished: if it fails, the prior obligation continues in force. Among the older lawyers it was an established rule, that a novation was effected only when it was with that intention that the parties entered into the second obligation; but as this still left it doubtful when the intention was present and when absent, various presumptions were established as to the matter by different persons in different cases. We therefore issued our constitution, enacting most clearly that no novation shall take place unless the contracting parties expressly state their intention to be the extinction of the prior obligation, and that in default of such statement, the first obligation shall subsist, and have the second also added to it: the result being two obligations resting each on its own independent ground, as is prescribed by the constitution, and as can be more fully ascertained by perusing the same. **4**. Moreover, those obligations which are contracted by consent alone are dissolved by a contrary agreement. For instance, if Titius and Seius agree that the latter shall buy an estate at Tusculum for a hundred *aurei*, and then before execution on either side by payment of the price or delivery of the estate they arrange to abandon the sale, they are both released. The case is the same with hire and the other contracts which are formed by consent alone.

4. BOOK IV

TITLE I

OF OBLIGATIONS ARISING FROM DELICT

HAVING treated in the preceding Book of contractual and quasi-contractual obligations, it remains to inquire into obligations arising from delict. The former, as we remarked in the proper place, are divided into four kinds; but of these latter there is but one kind, for, like obligations arising from real contracts, they all originate in some act, that is to say, in the delict itself, such as a theft, a robbery, wrongful damage, or an injury.

1. Theft is a fraudulent dealing with property, either in itself, or in its use, or in its possession: an offence which is prohibited by natural law. **2**. The term *furtum*, or theft, is derived either from *furvum*, meaning 'black', because it is effected secretly and under cover, and usually by night: or from *fraus*, or from *ferre*, meaning 'carrying off'; or from the Greek word φώρ, thief, which indeed is itself derived from φέρειν, to carry off. **3**. There are two kinds of theft, theft detected in the commission, and simple theft: the possession of stolen goods discovered upon search, and the introduction of stolen goods, are not (as will appear below) so much specific kinds of theft as actionable circumstances connected with theft. A thief detected in the commission is termed by the Greeks ἐπ' αὐτοφώρῳ; in this kind is included not only he who is actually caught in the act of theft, but also he who is detected in the place where the theft is committed; for instance, one who steals from a house, and is caught before he has got outside the door; or who steals olives from an olive garden, or grapes from a vineyard, and is caught while still in the olive garden or vineyard. And the definition of theft detected in the commission must be even further extended, so as to include the thief who is caught or even seen with the stolen goods still in his hands, whether the place be public or private, and whether the person who sees or catches him be the owner of the property, or some third person, provided he has not yet escaped to the place where he intended to take and deposit his booty: for if he once escapes there, it is not theft detected in the commission, even if he be found with the stolen goods upon him. What is simple theft is clear from what has been said: that is to say, it is all theft which is not detected in the commission. **4**. The offence of discovery of stolen goods occurs when a person's premises are searched in the presence of witnesses, and the stolen property is found thereon; this makes him liable, even though innocent of theft, to a special action for receiving stolen goods. To introduce stolen goods is to pass them off to a man, on whose premises they are discovered, provided this be done with the intent that they shall be discovered on his premises rather than on those of the introducer. The man on whose premises they are found may sue the latter, though innocent of theft, in an action for the introduction of stolen goods. There is also an action for refusal of search, available against him who prevents another who wishes to look in the presence of witnesses for stolen property; and finally, by the action for non-production of stolen goods, a penalty is imposed by the praetor's edict on him who has failed to produce stolen property which is searched for and found on his premises. But the last-named actions, namely, those for receiving stolen goods, for introducing them, for refusal of search, and for non-production, have now become obsolete: for the search for such property is no longer made in the old fashion, and accordingly these actions went out of use also. It is obvious, however, that any one who knowingly receives and hides stolen property may be sued by the action for simple theft. **5**. The penalty for theft detected in the commission is four times the value, and for simple theft twice the value, of the property stolen, whether the thief be a slave or a free person.

6. Theft is not confined to carrying away the property of another with intent of appropriation, but comprises also all corporeal dealing with the property of another against the will of the owner. Thus, for a pawnee to use the thing which he has in pawn, or to use a thing committed to one's keeping as a deposit, or to put a thing which is lent for use to a different use than that: for which it was lent, is theft; to borrow plate, for instance, on the representation that the borrower is going to entertain his friends, and then to carry it away into the country: or to borrow a horse for a drive, and then to take it out of the neighbourhood, or like the man in the old story, to take it into battle. **7**. With regard, however, to those persons who put a thing lent for use to a different purpose than the lender contemplated, the rule is that they are guilty of theft only if they know it to be contrary to the will of the owner, and that if he had notice he would refuse permission; but if they believe that he would give permission, it is not theft: and the distinction is just, for there is no theft without unlawful intention. **8**. It is also said not to be theft if a man turns a thing lent for use to a use other than he believes its owner would sanction, though in point of fact its owner is consenting. Whence arose the following question: if Titius solicits the slave of Maevius

to steal property of the latter, and convey it to him, and the slave informs Maevius of it, who, wishing to detect Titius in the very act, allows the slave to convey the property to him; can an action of theft, or for corrupting the slave, or neither, be maintained against Titius? The case was submitted to us, and we examined the conflicting opinions of the earlier jurists on the matter: some of whom thought that neither action lay, and others, that Maevius might sue on theft only. But we, in order to put an end to such quibbles, have enacted by our decision that in such a case both the action on theft and that for corrupting a slave shall lie. It is true that the slave has not been corrupted by the advances made to him, so that the case does not come within the rules which introduced the action for such corruption: yet the would-be corrupter's intention was to make him dishonest, so that he is liable to a penal action, exactly as if the slave had actually been corrupted, lest his immunity from punishment should encourage others to perpetrate a similar wrong on a slave less strong to resist temptation. **9**. A free man too may be the subject of a theft—for instance, a child in my power, if secretly removed from my control. **10**. So too a man sometimes steals his own property—for instance, a debtor who purloins the goods which he has pledged to a creditor.

11. Theft may be chargeable on a person who is not the perpetrator; on him, namely, by whose aid and abetment a theft is committed. Among such persons we may mention the man who knocks money out of your hand for another to pick up, or who stands in your way that another may snatch something from you, or scatters your sheep or your oxen, that another may steal them, like the man in the old books, who waved a red cloth to frighten a herd. If the same thing were done as a frolic, without the intention of assisting a theft, the proper action is not theft, but on the case. Where, however, Titius commits theft with the aid of Maevius, both are liable to an action on theft. A man, too, is held to have aided and abetted a theft who places a ladder under a window, or breaks open a window or a door, in order that another may steal, or who lends tools for the breaking of them open, or a ladder to place under a window, if he knows the object for which they are borrowed. It is clear that a man is not liable on theft, who, though he advises and instigates the offence, does not actually aid in its commission. **12**. If a child in power, or a slave, steal property of his father or master, it is theft, and the property is deemed stolen, so that no one can acquire it by usucapion until it has returned into the hands of the owner; but no action will lie on the theft, because between a son in power and his father, or between a slave and his master, no action will lie on any ground whatsoever. But if the offender is aided and abetted by a third person, the latter is liable to an action on theft, because a theft has in fact been committed, and by his aid and abetment.

13. The action on theft will lie at the suit of any person interested in the security of the property, even though he be not its owner: indeed, even the owner cannot maintain the action unless he suffers damage from the loss. **14**. Hence, when a pawn is stolen the pawnee can sue, even though his debtor be perfectly able to pay the debt; for it is more advantageous to him to rely on the pledge, than to bring a personal action: and this rule is so unbending that even the pawnor who steals a pawn is suable for theft by the pawnee. **15**. So, if clothes are delivered to be cleaned or finished or mended for a certain remuneration, and then are stolen, it is the fuller or tailor who can sue on the theft, and not the owner; for the owner suffers nothing by the loss, having the action of letting against the fuller or tailor for the recovery of his property. Similarly a purchaser in good faith, even though a good title as owner is not given to him, can bring the action of theft if the property is stolen, exactly like the pawnee. The action is, however, not maintainable at the suit of a fuller or tailor, unless he is solvent, that is to say, unless he is able to fully indemnify the owner; if he is insolvent, the owner cannot recover from him, and so can maintain an action against the thief, being, on this hypothesis, interested in the recovery of the property. Where the fuller or tailor is only partly instead of wholly solvent the rule is the same. **16**. The older lawyers held that what has been said of the fuller and tailor applied also to the borrower for use, on the ground that as the remuneration which the fuller receives makes him responsible for custody, so the advantage which the borrower derives from the use requires him to keep it safely at his peril. Our wisdom, however, has amended the law in this particular in our decisions, by allowing the owner the option of suing either the borrower by action on the loan, or the thief by action of theft; though when his choice has been determined he cannot change his mind, and resort to the other action. If he prefers to sue the thief, the borrower is absolutely released from liability; but if he proceeds against the borrower, he cannot in any way himself sue the thief on the stealing, though this may be done by the borrower, who is defendant in the other action, provided that the owner knew, at the time when he began his action against the borrower, that the thing had been stolen. If he is ignorant of this, or even if he is merely doubtful whether the borrower still has the property in his possession or not, and sues him on the loan, he may, on subsequently

learning the facts, and if he wishes to drop the action which he has commenced, and sue the thief instead, adopt this course, in which case no obstacle is to be thrown in kits way, because it was in ignorance that he took action and sued the borrower on the loan. If, however, the owner has been indemnified by the borrower, in no case can he bring the action of theft against the thief, as his rights of action pass to the person who has compensated him for the loss of his property. Conversely it is clear, that if, at the outset, the owner began an action on the loan against the borrower, not knowing that the property had been stolen, and subsequently, on learning this, proceeded against the thief instead, the borrower is absolutely released from liability, whatever may be the result of the owner's action against the thief; the rule being the same, whether the borrower be wholly or only partially solvent. **17**. As a depositary is not answerable for the safe keeping of the thing deposited, but only for fraud, and, if it is stolen, is not compellable to make restitution by action of deposit, he has no interest if it is lost, and therefore the action of theft is maintainable only by the depositor. **18**. Finally, it has been a question whether a child below the age of puberty, who carries away the property of another, is guilty of theft. The answer is that, as theft depends on intention, obligation by theft is not incurred unless the child is near puberty, and so understands its delinquency. **19**. The object of the action on theft, whether it be for double or quadruple the value of the goods stolen, is merely the recovery of the penalty; to recover the goods themselves or their value the owner has an independent remedy by vindication or condiction. The former is the proper remedy when it is known who is in possession of the goods, whether this be the thief or any one else: the latter lies against the thief or his heir, whether in possession of the stolen property or not.

TITLE II

OF ROBBERY

Robbery is chargeable also as theft; for who deals with the property of another more against that other's will than the robber? And thus the description of the robber as an audacious thief is a good one. However, as a special remedy for this offence the praetor has introduced the action for robbery, or rapine with violence, which may be brought within a year for four times the value, after a year for simple damages, and which lies even when only a single thing of the slightest value has been taken with violence. This fourfold value, however, is not all penalty, nor is there an independent action for the recovery of the property or its value, as we observed was the case in the action of theft detected in the commission; but the thing or its value is included in the fourfold, so that, in point of fact, the penalty is three times the value of the property, and this whether the robber be taken in the act or not; for it would be absurd to treat a robber more lightly than one who carries off property merely secretly. **1**. This action is maintainable only where the robbery is attended with wrongful intention; consequently, if a man by mistake thought that property was his own, and, in his ignorance of law, forcibly carried it off in the belief that it was lawful for an owner to take away, even by force, a thing belonging to himself from a person in whose possession it was, he cannot be held liable to this action; and similarly on principle he would not in such a case be suable for theft. Lest, however, robbers, under the cloak of such a plea, should discover a method of gratifying a grasping habit with impunity, the law has been amended upon this point by imperial constitutions, by which it is enacted that it shall not be lawful for any one to forcibly carry off movable property, inanimate or animate, even though he believe it to belong to him; and that whosoever disobeys this shall forfeit the property, if, in fact, it be his, and if it be not, shall restore it, and along with it its value in money. And by the said constitutions it is also declared that this provision relates not only to movables (of which alone robbery can be committed), but also to forcible entries on land and houses, so as to deter men from all violent seizing upon property whatsoever under the cloak of such excuses. **2**. In order to support this action it is not necessary that the goods of which robbery has been committed should belong to the plaintiff, provided they were taken from among his property. Thus, if a thing be let, or lent, or pledged to Titius, or even deposited with him under such circumstances that he has an interest in its not being carried off—for instance, by his having undertaken the entire responsibility for its safe custody;—or if he possesses it in good faith, or has a usufruct or any other right in it whereby he suffers loss or incurs liability through its being forcibly taken from him, the action will be maintainable by him; not necessarily in order to restore to him the ownership, but only to compensate him for what it is alleged he has lost by its being taken from his goods or withdrawn from his means. In fact, it may be said generally that where, supposing property to be taken secretly, the action of theft will lie, the action on robbery will lie at suit of the same person, if it be taken with violence.

TITLE III

OF THE LEX AQUILIA

Unlawful damage is actionable under the lex Aquilia, whose first chapter provides that if a slave of another man, or a quadruped from his flocks or herds, be unlawfully killed, the offender shall pay to the owner whatever was the highest value thereof within the year next immediately preceding. **1**. From the fact that this enactment does not speak of quadrupeds simply, but only of such quadrupeds as are usually included under the idea of flocks and herds, it is to be inferred that it has no application to wild animals or to dogs, but only to such beasts as can properly be said to graze in herds, namely horses, mules, asses, oxen, sheep, and goats. It is settled, too, that swine come under its operation, for they are comprehended in 'herds' because they feed in this manner; thus Homer in his Odyssey, as quoted by Aelius Marcianus in his Institutes, says, 'You will find him sitting among his swine, and they are feeding by the Rock of Corax, over against the spring Arethusa.'[1] **2**. To kill unlawfully is to kill without any right; thus a man who kills a robber is not liable to this action, if he could in no other way escape the danger by which he was threatened. **3**. So, too, where one man kills another by misadventure, he is not liable under this statute, provided there is no fault or carelessness on his part; otherwise it is different, for under this statute carelessness is as punishable as wilful wrong-doing. **4**. Accordingly, if a man, while playing or practicing with javelins, runs your slave through as he passes by, a distinction is drawn. If it be done by a soldier in his exercising ground, that is to say, where such practice is usually conducted, he is in no way to blame; but if it be done by some one else, his carelessness will make him liable; and so it is with the soldier, if he do it in some place other than that appropriated to military exercises. **5**. So, too, if a man is trimming a tree, and kills your slave as he passes by with a bough which he lets fall, he is guilty of negligence, if it is near a public way, or a private path belonging to a neighbour, and he does not call out to give people warning; but if he calls out, and the slave takes no pains to get out of the way, he is not to blame. Nor would such a man be liable, if he was cutting a tree far away from a road, or in the middle of a field, even if he did not call out; for strangers had no business to be there. **6**. Again, if a surgeon operates on your slave, and then neglects altogether to attend to his cure, so that the slave dies in consequence, he is liable for his carelessness. **7**. Sometimes, too, unskilfulness is undistinguishable from carelessness—as where a surgeon kills your slave by operating upon him unskilfully, or by giving him wrong medicines. **8**. And similarly, if your slave is run over by a team of mules, which the driver has not enough skill to hold, the latter is suable for carelessness; and the case is the same if he was simply not strong enough to hold them, provided they could have been held by a stronger man. The rule also applies to runaway horses, if the running away is due to the rider's deficiency either in skill or in strength. **9**. The meaning of the words of the statute 'whatever was the highest value thereof within the year' is that if any one, for instance, kills a slave of yours, who at the moment of his death is lame, or maimed, or blind of one eye, but within the year was sound and worth a price, the person who kills him is answerable not merely for his value at the time of his death, but for his highest value within the year. It is owing to this that the action under this statute is deemed to be penal, because a defendant is sometimes bound to pay a sum not merely equivalent to the damage he has done, but far in excess of it; and consequently, the right of suing under the statute does not pass against the heir, though it would have done so if the damages awarded had never exceeded the actual loss sustained by the plaintiff. **10**. By juristic construction of the statute, lo though not so enacted in its terms, it has been settled that one must not only take account, in the way we have described, of the value of the body of the slave or animal killed, but must also consider all other loss which indirectly falls upon the plaintiff through the killing. For instance, if your slave has been instituted somebody's heir, and, before he has by your order accepted, he is slain, the value of the inheritance you have missed must be taken into consideration; and so, too, if one of a pair of mules, or one of four chariot horses, or one of a company of slave players is killed, account is to be taken not only of what is killed, but also of the extent to which the others have been depreciated. **11**. The owner whose slave is killed has the option of suing the wrongdoer for damages in a private action under the lex Aquilia, or of accusing him on a capital charge by indictment.

12. The second chapter of the lex Aquilia is now obsolete. **13**. The third makes provision for all damage which is not covered by the first. Accordingly, if a slave, or some quadruped which comes within its terms, is wounded, or if a quadruped which does not come within its terms, such as a dog or 'wild animal, is wounded or killed, an action is provided by this chapter, and if any other animal or inanimate

[1] Od. xiii.407, 8.

thing is unlawfully damaged, a remedy is herein afforded; for all burning, breaking, and crushing is hereby made actionable, though, indeed, the single word 'breaking' covers all these offences, denoting as it does every kind of injury, so that not only crushing and burning, but any cutting, bruising, spilling, destroying, or deteriorating is hereby denominated. Finally, it has been decided that if one man mixes something with another's wine or oil, so as to spoil its natural goodness, he is liable under this chapter of the statute. **14**. It is obvious that, as a man is liable under the first chapter only where a slave or quadruped is killed by express design or through negligence on his part, so, too, he is answerable for all other damage under this chapter only where it results from some wilful act or carelessness of his. Under this chapter, however, it is not the highest value which the thing had within a year, but that which it had within the last thirty days, which is chargeable on the author of the mischief. **15**. It is true that here the statute does not expressly say 'the *highest* value', but Sabinus rightly held that the damages must be assessed as if the words 'highest value' occurred also in this chapter; the Roman people, who enacted this statute on the proposal of Aquilius the tribune, having thought it sufficient to we them in the first chapter only. **16**. It is held that a direct action lies under this statute only when the body of the offender is substantially the instrument of mischief. If a man occasions loss to another in any other way, a modified action will usually lie against him; for instance, if he shuts up another man's slave or quadruped, so as to starve him or it to death, or drives his horse so hard as to knock him to pieces, or drives his cattle over a precipice, or persuades his slave to climb a tree or go down a well, who, in climbing the one or going down the other, is killed or injured in any part of his body, a modified action is in all these cases given against him. But if a slave is pushed off a bridge or bank into a river, and there drowned, it is clear from the facts that the damage is substantially done by the body of the offender, who is consequently liable directly under the lex Aquilia. If damage be done, not by the body or to a body, but in some other form, neither the direct nor the modified Aquilian action will lie, though it is held that the wrongdoer is liable to an action on the case; as, for instance, where a man is moved by pity to loose another's slave from his fetters, and so enables him to escape.

TITLE IV

OF INJURIES

By injury, in a general sense, is meant anything which is done without any right. Besides this, it has three special significations; for sometimes it is used to express outrage, the proper word for which—contumely—is derived from the verb 'to contemn', and so is equivalent to the Greek ὕβρις: sometimes it means culpable negligence, as where damage is said to be done (as in the lex Aquilia) 'with injury', where it is equivalent to the Greek ἀδίκημα; and sometimes iniquity and injustice, which the Greeks express by ἀδικία; thus a litigant is said to have received an 'injury' when the praetor or judge delivers an unjust judgement against him. **1**. An injury or out rage is inflicted not only by striking with the fist, a stick, or a whip, but also by vituperation for the purpose of collecting a crowd, or by taking possession of a man's effects on the ground that he was in one's debt; or by writing, composing, or publishing defamatory prose or verse, or contriving the doing of any of these things by some one else; or by constantly following a matron, or a young boy or girl below the age of puberty, or attempting anybody's chastity; and, in a word, by innumerable other acts. **2**. An outrage or injury may be suffered either in one's own person, or in the person of a child in one's power, or even, as now is generally allowed, in that of one's wife. Accordingly, if you commit an 'outrage' on a woman who is married to Titius, you can be sued not only in her own name, but also in those of her father, if she be in his power, and of her husband. But if, conversely, it be the husband who is outraged, the wife cannot sue; for wives should be protected by their husbands, not husbands by their wives. Finally, a father-in-law may sue on an outrage committed on his daughter-in-law, if the son to whom she is married is in his power. **3**. Slaves cannot be outraged themselves, but their master may be outraged in their person, though not by all the acts by which an outrage might be offered to him in the person of a child or wife, but only by aggravated assaults or such insulting acts as clearly tend to dishonour the master himself: for instance, by flogging the slave, for which an action lies; but for mere verbal abuse of a slave, or for striking him with the fist, the master cannot sue. **4**. If an outrage is committed on a slave owned by two or more persons jointly, the damages to be paid to these severally should be assessed with reference not to the shares in which they own him, but to their rank or position, as it is to the reputation and not to property that the injury is done; and if an outrage is committed on a slave belonging to Maevius, but in whom Titius has a usufruct, the injury is deemed to be done to the former rather than to the latter. **6**. But if the person outraged is a free man who believes himself to be your slave, you have no action unless the object of the outrage was to bring you

into contempt, though he can sue in his own name. The principle is the same when another man's slave believes himself to belong to you; you can sue on an outrage committed on him only when its object is to bring contempt on you.

7. The penalty prescribed for outrage in the Twelve Tables was, for a limb disabled, retaliation, for a bone merely broken a pecuniary mulct proportionate to the great poverty of the age. The praetors, however, subsequently allowed the person outraged to put his own estimate on the wrong, the judge having a discretion to condemn the defendant either in the sum so named by the plaintiff, or in a less amount; and of these two kinds of penalties that fixed by the Twelve Tables is now obsolete, while that introduced by the praetors, which is also called 'honorary', is most usual in the actual practice of the courts. Thus the pecuniary compensation awarded for an outrage rises and falls in amount according to the rank and character of the plaintiff, and this principle is not improperly followed even where it is a slave who is outraged; the penalty where the slave is a steward being different from what it is when he is an ordinary menial, and different again when he is condemned to wear fetters. **8**. The lex Cornelia also contains provisions as to outrages, and introduced an action on outrage, available to a plaintiff who alleges that he has been struck or beaten, or that a forcible entry has been made upon his house; the term 'his house' including not only one which belongs to him and in which he lives, but also one which is hired by him, or in which he is received gratuitously as a guest. **9**. An outrage becomes 'aggravated' either from the atrocious character of the act, as where a man is wounded or beaten with clubs by another; or from the place where it is committed, for instance, in the theatre or forum, or in full sight of the praetor; or from the rank of the person outraged,—if it be a magistrate, for instance, or if a senator be outraged by a person of low condition, or a parent by his child, or a patron by his freedman; for such an injury done to a senator, a parent, or a patron has a higher pecuniary compensation awarded for it than one done to a mere stranger, or to a person of low condition. Sometimes too the position of the wound makes an outrage aggravated, as where a man is struck in the eye. Whether the person on whom such an outrage is inflicted is independent or in the power of another is almost entirely immaterial, it being considered aggravated in either case. **10**. Finally, it should be observed that a person who has been outraged always has his option between the civil remedy and a criminal indictment. If he prefers the former, the penalty which is imposed depends, as we have said, on the plaintiff's own estimate of the wrong he has suffered; if the latter, it is the judge's duty to inflict an extraordinary penalty on the offender. It should be remembered, however, that by a constitution of Zeno persons of illustrious or still higher rank may bring or defend such criminal actions on outrage by an agent, provided they comply with the requirements of the constitution, as may be more clearly ascertained by a perusal of the same. **11**. Liability to an action on outrage attaches not only to him who commits the act,—the striking of a blow, for instance—but also to those who maliciously counsel or abet in the commission, as, for instance, to a man who gets another struck in the face. **12**. The right of action on outrage is lost by condonation; thus, if a man be outraged, and takes no steps to obtain redress, but at once lets the matter, as it is said, slip out of his mind, he cannot subsequently alter his intentions, and resuscitate an affront which he has once allowed to rest.

TITLE V

OF QUASI-DELICTAL OBLIGATIONS

The obligation incurred by a judge who delivers an unjust or partial decision cannot properly be called delictal, and yet it does not arise from contract; consequently, as he cannot but be held to have done a wrong, even though it may be due to ignorance, his liability would seem to be quasidelictal, and a pecuniary penalty will be imposed on him at the judge's discretion. **1**. Another case of quasi-delictal obligation is that of a person from whose residence, whether it be his own, or rented, or gratuitously lent him, anything is thrown or poured out whereby another is injured; the reason why his liability cannot properly be called delictal being that it is usually incurred through the fault of some other person, such as a slave or a freedman. Of a similar character is the obligation of one who keeps something placed or hung over a public way, which might fall and injure any one, In this last case the penalty has been fixed at ten *aurei*; in that of things thrown or poured out of a dwelling-house the action is for damages equivalent to double the loss sustained, though if a free man be thereby killed the penalty is fixed at fifty *aurei*, and even if he be merely injured he can sue for such damages as the judge shall in his discretion award; and here the latter should take into account the medical and other expenses of the plaintiff's illness, as well as the loss which he has sustained through being disabled from work. **2**. If a son in power lives apart from his father, and anything is thrown or poured out of his place of residence, or if he has anything so placed

or hung as to be dangerous to the public, it is the opinion of Julian that no action lies against the father, but that the son should be made sole defendant; and the same principle should be applied to a son in power who is made a judge, and delivers an unjust or partial decision. **3**. Similarly ship-owners, inn and stable keepers are liable as on a quasi-delict for wilful damage or theft committed in their ships, inns, or stables, provided the act be done by some or one of their servants there employed, and not by themselves; for the action which is given in such cases is not based on contract, and yet as they are in some sense in fault for employing careless or dishonest servants, their liability would seem to be quasi-delictal. In such circumstances the action which is given is on the case, and lies at suit of the injured person's heir, though not against the heir of the ship-owner, inn or stable keeper.

[The remainder of Book 4 is found in Section 2.]

cives–§54		Latini–§§55–72	cives tamquam Latini–§§72–3	dediticii–§§74–6
men–§§40–42	women–§§43–44			
descendants of patrons–§§45–48 descendants of patronesses–§§49–53				

other forms of acquisition *per universitatem*–3.77–87		
bonorum emptio–§§77–81	adoptio *and* conventio in manum–§§82–84	in iure cessio *of an* hereditas–§§185–7

Obligations–in general–§88	
ex contractu–3.88–181	ex delicto–3.182–225

acquisition of obligations *ex contractu*–§89							
re	verbis –§§92–127	litteris –§§128–34, 138	consensu–§§135–7				
mutuum–§§90–1			emptio venditio –§§102–4	locatio conductio –§§102–4	societas–§§102–4	mandatum–§§102–4	
acquisition of contractual obligations through others–§§163–67a							

extinction of obligations *ex contractu*				
solutio–§168	acceptilatio–§§169–72	per aes et libram–§§173–5	novatio–§§176–9	litis contestatio–§§180–1

acquisition of obligations *ex delicto*–§182			
furtum–§§183–208	vi bona rapta–§209	damnum iniuria datum–§§210–19	iniuria–§§220–5

JI.3.13 to JI.4.5

Obligations–in general–3.13, .28–9			
ex contractu–3.14–26	quasi ex contractu–3.27	ex delicto–4.1–4	quasi ex delicto–4.5

ex contractu									
re				verbis –3.15–20	litteris –3.21	consensu–§§135–7			
mutuum –3.14pr-1	commodatum –3.14.2	depositum –3.14.3	pignus –3.14.4			emptio venditio –3.23	locatio conductio –3.24	societas –3.25	mandatum –3.26
quasi-contract–*negotiorum gestio*–3.27									
acquistion of obligations through others–3.28									
discharge of obligations–3.29									

ex delicto			
furtum–4.1	vi bona rapta–4.2	damnum iniuria datum–4.3	iniuria–4.4
quasi-delict (mostly examples of absolute or vicarious liability)–4.5			

[Procedure]

[procedure]				
A. actions–§§1–114	**B.** exceptions–§§115–37	**C.** interdicts–§§139–70	**D.** abuse of process–§§171–82	**E.** summons and *vadimonium*–§§183–7

A. Actions–4.1–114

actions (in general)–§182		
in rem vs. in personam–§§1–5	rei persecutoriae vs. peonales–§§6–9	ad legis actiones vs. sua vi–§10

1. legis actiones–§§11–12				
sacramentum–§§13–17	iudicis postulatio–§17a	condictio–§§17b-20	manus iniectio–§§21–25	pignoris capio–§§26–9
in rem	in personam			

4.30–68	**2.** formulae	
	a.	substitution for *legis actiones*–§§30–1
	b.	formulae ficticiae–§§32–8
	c.	parts of the formula–§§39–44
	d.	conceptio in ius *and* in factum–§§45–7
	e.	condemnatio certae *or* incertae pecuniae–§§48–52
	f.	overclaim–§§53–60
	[**g.**?]	multiple claims–see JI.4.6.36–8]
	h.	cross-claims (including *bonae fidei iudicia*, *compensatio* against a banker, and *deductio* against a *bonorum emptor*)–§§61–8

4.69–87	**3.** actions by or on behalf of others	
	a.	actions against a *pater* or *dominus* on the contract of a son or slave–§§69–74
	b.	noxal actions (actions on the delict or a son, slave or animal)–§§75–9, 81
	c.	actions on the contract of one *in manu* or *in mancipio*–§80
	d.	representatives in litigation–§§82–7

4.88–102	**4.** security

4.103–114	**5.** extinction of actions	
	a.	iudicia legitima *and* imperio continentia–§§103–9
	b.	actiones perpetuae *and* temporales–§§110–11
	c.	active and passive transmissibility–§§112–13
	d.	satisfaction before judgment–§114