Gaius meets Cicero

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INTRODUCTION

The school controversies between the Sabinians and the Proculians is one of the more contentious issues in the field of Roman law. The Principate saw the emergence of two law schools in Rome, the Sabinian or Cassian school and the Proculian school. Their representatives defended opposite positions over several points of private law, which are known in the literature as the school controversies. Both Gaius and Justinian mention a number of these controversies.

Until now, modern literature has proved unable to explain the origins of these controversies in a satisfactory way. Most modern scholars who have addressed this problem did so from a dogmatic perspective on Roman law. They wanted to incorporate the controversies into an overall interpretation of classical Roman jurisprudence in terms of an attempt to evolve towards a systematic legal science. For this reason, they all tried to explain the opposition between the two schools from their adherence to a fundamentally different conception of law. Several suggestions have been made as to the nature of the foundations of this difference. Some authors have argued that the representatives of the schools belonged to opposing philosophical schools, others that the controversies stemmed from a fundamental difference of opinion relating to society, legal methodology, or politics, but so far without any success. They have never been able to single out one particular theory or tradition that could have been at the root of each controversy and thus to indicate the internal consistency among the legal opinions of the representatives of each single school.

In this book, the question about the origins of the controversies will be studied from a historical perspective. Roman law and jurisprudence need to be understood within its proper historical context. The Sabinians and the Proculians, as were most Roman jurists, were first and foremost legal practitioners whose main activity was to give advice (*responsa*) in court cases and other legal disputes. Most probably, the controversies arose when representatives of the two schools had been consulted by parties locked in a case and had come to contradictory opinions. The controversies differed from ordinary differences of opinion between jurists because the heads of the schools were invested with the *ius publice respondendi ex auctoritate principis*, making their opinions binding upon the court.
INTRODUCTION

The main thesis underlying this book is that jurists, like orators and lawyers, made use of the art of rhetoric, and of its argumentative theory, the *topica* as developed by Cicero and Quintilian, to make their opinions persuasive. Through a close analysis of the controversies, it will be attempted to demonstrate that each and every controversy may very well have originated from the use of different topical arguments by the opposing heads of the two schools. If this was the case, it may be concluded that there is no coherent theory behind the positions of the two schools and that their representatives constructed a specific argumentation for each separate. This in itself would serve a refutation of the dogmatic approach to the problem of the controversies and the myth of the systematic nature of Roman jurisprudence.

First, a general overview of the different heads of the two schools will be presented, ending with some brief remarks about the nature and sources of the controversies. Second, the most important modern theories about the controversies will be critically assessed. Third, it will be argued that jurisprudence and legal practice were closely intertwined in ancient Rome and that this could constitute an important means to solve the problem of the controversies. Fourth, the main thesis of the book on the instrumental role of rhetoric and topical reasoning in Roman jurisprudence at large and in the controversies in particular will be elaborated upon and it will be explained how this thesis will be tested throughout the book. Fifth, the methodology applied to thoroughly analyse the primary sources is amplified on.
INTRODUCTION

1. The Sabinians and the Proculians

During the 1\textsuperscript{st} and 2\textsuperscript{nd} centuries AD, two legal schools emerged in Rome, the Sabinian or Cassian school and the Proculian school. Nearly all the prominent jurists of that time belonged to either the one or the other. The principal source of information in this connection is the \textit{Enchiridium}, which was compiled by Sextus Pomponius in the middle of the 2\textsuperscript{nd} century AD. This work is an overview of the history of Roman law and is partly preserved in the Digest of Justinian. The relevant text is Pomp., D. 1.2.2.47-53. Because it is rather lengthy, the text will not be quoted here, but is included in Appendix 1.

According to Pomponius, the opposition of the two schools can be traced back to C. Ateius Capito and M. Antistius Labeo,\textsuperscript{1} the two luminaries of Augustus' reign.\textsuperscript{2} Pomponius mentions the heads of each school and provides some information about their family background, their political career, and legal achievements. On the basis of his text, the following list can be made of the successive heads on each side:

<table>
<thead>
<tr>
<th>SABINIANS</th>
<th>PROCULIANS</th>
</tr>
</thead>
<tbody>
<tr>
<td>C. Ateius Capito</td>
<td>M. Antistius Labeo</td>
</tr>
<tr>
<td>Massurius Sabinus</td>
<td>Nerva pater</td>
</tr>
<tr>
<td>C. Cassius Longinus</td>
<td>Proculus</td>
</tr>
<tr>
<td></td>
<td>Nerva filius</td>
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<tr>
<td></td>
<td>Longinus</td>
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<tr>
<td>Caelius Sabinus</td>
<td>Pegasus</td>
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<tr>
<td>L. Iavolenus Priscus</td>
<td>Celsus pater</td>
</tr>
<tr>
<td>Salvius Iulianus</td>
<td>Celsus filius</td>
</tr>
<tr>
<td>Aburnius Valens</td>
<td>L. Neratius Priscus</td>
</tr>
<tr>
<td>Tuscius</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{1} Pomp., D. 1.2.2.47: ‘Hi duo primum veluti diversas sectas fecerunt.’ (‘These men set up for the first time \textit{sectae}, so to say’); Pomp., D. 1.2.2.52: ‘Appellatique sunt partim Cassiani, partim Proculiani, quae origo a Capitone et Labeone coeperat.’ (‘They were partly called Cassiani and partly Proculiani. This distinction originally began with Capito and Labeo’).

\textsuperscript{2} Tac., \textit{Ann.}, 3.75: ‘Duo pacis decora’. 
INTRODUCTION

A biographical sketch of the leaders of the Sabinian and the Proculian schools is included in Appendix 2. In the modern literature, it is much debated whether Sextus Pomponius was an adherent of one of the schools and, if so, to which school he belonged.\(^3\)

Whereas the existence of two different legal schools appears clearly from the sources, the \textit{raison d’être} of the schools and the nature of their opposition is much harder to determine. What exactly were the jurists of these schools engaged in? How did they come to oppose one another?

The little we know for certain on the basis of Roman sources is that a number of controversies about particular problems of private law arose between the schools. The main sources are the \textit{Institutiones} of Gaius and the \textit{Corpus} of Justinian. Since the text of Gaius’ \textit{Institutiones} has almost completely come down to us, this work is extremely valuable as a source of information about the schools and the controversies that existed between them. In his \textit{Institutiones}, which date from approximately 160 AD, Gaius mentions twenty-two controversies and often adds the arguments in support of the Sabinian and Proculian opinions. Moreover, he presents himself as an adherent of the Sabinian school. Apart from Gaius, Justinian also mentions the schools and a number of controversies in the Digest and, to a lesser extent, in his \textit{Institutiones}. The \textit{Codex} is an important source as well, for it occasionally renders information on which view eventually prevailed.

Much ink has been spent by modern scholars on the question of why and how the controversies arose. To many students of Roman law, the question was and remains puzzling as it strikes at the very heart of Roman law. The controversies pertain to some important

\(^3\) The majority of modern scholars, including J. KODREBSKI, Der Rechtsunterricht am Ausgang der Republik und zu Beginn des Prinzipats, \textit{ANRW} 2.15 (1976), p. 193; D. LIEBS, Rechtsschulen und Rechtsunterricht im Prinzipat, \textit{ANRW} 2.15 (1976), p. 283; O. BEHRENDS, \textit{Le due giurisprudenze romane e le forme delle loro argomentazioni}, \textit{Index} 12 (1983), p. 204; M. BRETONE, \textit{Storia del diritto romano}, 11th edn., Laterza 2006, p. 258, maintain that Pomponius was an adherent of the Sabinian school. G. BAVIERA, \textit{Le due scuole dei giureconsulti romani}, Firenze 1898 (repr. Roma 1970), pp. 27-30, on the other hand, took the opposite view and claimed that Pomponius belonged to the Proculian school. In support of this view, Baviera argued that Pomponius always sided with the Proculians whenever he recorded a controversy (see, e.g., Pomp., D. 45.1.110,pr). However, Baviera intentionally ignores some cases (e.g., Pomp., D. 45.3.6), in which Pomponius seems to have preferred the Sabinian view. A.M. HONORÉ, \textit{Gaius}, Oxford 1962, pp. 21-26, argued that Pomponius was first educated at the Proculian school and subsequently moved to the Sabinian school to teach. Finally, E. STOLFI, Il modello delle scuole in Pomponio e Gaio, \textit{SDHI} 63 (1997), pp. 7-16, maintained that Pomponius does not offer any conclusive indication regarding his own preference for one school or the other. This seems to be correct.
problems of private law. Unearthing the origins of the controversies and the subsequent evolution of the legal problem in question would, according to many, shed more light on the historical origins of some classical institutions and doctrines of private law.

2. The Controversies between the Sabinians and the Proculians: Status Quaestionis

So far, most authors have held to the opinion that each school represented one side of a theoretical coin. They believed that the study of the controversies would disclose the nature of this theoretical opposition and would allow them to identify the foundational theory on which each school vested its proper conception of law. All sorts of suggestions, such as philosophical, methodological, or political theories, have been made.

In the following sections, the different attempts to place the school controversies under a common denominator are catalogued, discussed, and critically assessed. It must be borne in mind that a subdivision of the modern theories into categories is not absolute; some of the modern theories are eclectic and combine elements of several categories.

2.1 The Philosophical Explanation

The opposition between the two law schools has been traced back to philosophical differences. An important adherent of this theory is Sokolowski. According to him, the Sabinians were influenced by the Stoa and the Proculians by the Peripatetics. The stock example to demonstrate that the law schools adopted opposing philosophical doctrines is the controversy about *specificatio* in Gai., 2.79. The Sabinians granted the ownership of a new thing to the owner of the material. This decision was founded on the Stoic principle that the essence of a thing was its substance or material (οὐσία). The Proculians, granting the ownership to the

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4 The controversy about *specificatio* (Gai., 2.79); about the validity of a legacy that is bequeathed under an impossible condition (Gai., 3.98); about a *stipulatio* for a third person (Gai., 3.103); the controversies about the nature of the price in a contract of sale (Gai., 3.140 and Gai., 3.141); the controversy regarding *datio in solutum* (Gai., 3.168); and the controversy about *novatio* (Gai., 3.177-178).

5 P. SOKOLOWSKI, Die Lehre von der Specification, SZ 17 (1896), pp. 252-311.
INTRODUCTION

maker, are seen as applying the Peripatetic doctrine that the form (ἐἶδος) was the essence of a thing.

This theory has often met with scepticism. Its greatest fallacy is that it only explains a few controversies and, thus, does not allow for a general explanation of the opposition of the two schools in terms of their adherence to two fundamentally different traditions. Furthermore, it does not seem plausible that jurists only used philosophical arguments to solve legal problems. Finally, it is also questionable to what extent the Stoa had an influence on Roman jurisprudence. Vander Waerdt, for example, acknowledged that an impressive number of Roman jurists possessed an intimate knowledge of Stoic philosophy, but argued in a very convincing way that this knowledge had not led jurists to revise their legal doctrine in the light of philosophical considerations. Certainly, Roman jurists have been influenced to a certain extent by philosophy in general and by the Stoa in particular, but the impact of this influence has often been overestimated.

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7 P. VANDER WAERDT, Philosophical Influence on Roman Jurisprudence? The Case of Stoicism and Natural Law, ANRW 4.36 (1990), pp. 4851-4900, discussed four promising cases that may support the widely held hypothesis that Stoic philosophy decisively influenced the development of Roman jurisprudence, but came to the conclusion that, although Stoic influences were noticeable, in none of these cases had Stoic philosophy ever substantively influenced juristic doctrine. 1) According to Vander Waerdt, there was evidence that, during the late republican period, jurists had made use of Greek philosophy in their attempts to codify the civil law. Nonetheless, this evidence was no reason to suppose that Stoic philosophy exercised any substantive influence on jurisprudential doctrine, however much it may have helped to shape its form. 2) Vander Waerdt also drew attention to Cicero’s plan set out in De Legibus I to place Roman civil law on the foundation of the Stoic theory of natural law. However, there was no evidence that any jurist ever undertook to revise the civil law along the lines proposed by Cicero. Moreover, Vander Waerdt argued that Cicero did not reproduce an early Stoic position in De Legibus I, but adapted a series of orthodox Stoic arguments to support the unorthodox thesis that not only the sages, but all human beings were capable of living according to natural law. 3) Gaius’ account of the ius gentium provided yet another example of possible Stoic influences on legal doctrine. However, there was no fundamental difference between Gaius’ account and the Stoic doctrine of natural law. Whereas the latter doctrine demanded the invalidity of a positive law contrary to nature, Gaius rejected this view. In his view, a provision of civil law which conflicted with nature was nonetheless binding. 4) A final promising place to look for examples of Stoic influence were those passages in which jurists of the Principate might be thought to echo known Stoic texts. Although jurists often adorned their arguments with philosophical dicta, these dicta either represented philosophical commonplaces which were widely known among educated people, or were merely ornamental additions to positions already developed on other, legal grounds. A few years earlier, M.L. COLISH, The Stoic Tradition from Antiquity to the Early Middle Ages, I: Stoicism in Classical Latin Literature, Leiden 1985, pp. 341-389, had already argued that ‘Stoicism had only a tangential and superficial relationship to Roman jurisprudence’. 
Behrends too tried to give an overall explanation for the law schools and the controversies that existed between them. In his view, the controversies are to be explained by means of philosophy, the socio-political changes in society, and the conservative/progressive antithesis.\footnote{O. BEHRENDS, \textit{Die Fraus Legis. Zum Gegensatz von Wortlaut- und Sinngeltung in der römischen Gesetzesinterpretation}, Göttingen 1982; BEHRENDS (1983), pp. 189-225.}

According to Behrends, the contrast between the Sabinians and the Proculians dates back from the Roman Republic. In the 2\textsuperscript{nd} century BC, Roman legal science was based upon the Stoic law of nature and used to be called ‘giurisprudenza dei veteres’. According to Behrends, Q. Mucius Scaevola was the last and most significant jurist of the \textit{veteres}. In the eighties of the 1\textsuperscript{st} century BC, the \textit{veteres} were superseded by a new group of jurists, who were inspired by the positivism of the Sceptic Academy.\footnote{Regarding the Sceptic Academy, see H. DÖRRIE, Akademeia, \textit{Der kleine Pauly} 1 (1964), cc. 211-213.} The central figure of this new system was Servius Sulpicius Rufus. In the beginning of the Principate, this new \textit{genus consultorum} turned into the law school of the Proculians. Behrends maintained that their formalistic and positive nature was first to be countered by Sabinus, who partially fell back on the old system of the \textit{veteres}. The emergence of Sabinus and the creation of the Sabinian school were encouraged by Augustus, because he wanted to rehabilitate republican traditions.\footnote{Whereas Behrends maintained that the Sabinians fell back on a tradition, represented by Q. Mucius Scaevola, and the Proculians continued the tradition of Servius Sulpicius Rufus, C. ARNÔ, \textit{Scuola Muciana e scuola Serviana, Archivio Giuridico} 87.1 (= 3.1 of the fourth series) (1922), pp. 34-67; C. ARNÔ, \textit{Le due grandi correnti della giurisprudenza romana}, Modena 1926, turned things around. In his view, the Sabinians followed the method of interpretation, introduced by Servius Sulpicius Rufus and his \textit{auditores}. The Proculians, on the other hand, abided by the systematic study of the \textit{ius civile}, originating from Q. Mucius Scaevola.}

However, Behrend’s theory does not find any support in the sources. Nowhere is it stated that Q. Mucius Scaevola was the predecessor of the Sabinian school or that S. Sulpicius Rufus was that of the Proculian school. Pomponius (D. 1.2.2.51) did state that the Roman jurist S. Sulpicius Rufus was the great-grandfather of Gaius Cassius Longinus. However, this statement rather contradicts the theory of Behrend, for Gaius Cassius Longinus was the head of the Sabinian school and not of the Proculian school.

2.2 The Social Explanation: Conservative versus Progressive
INTRODUCTION

The school controversies have also been explained in terms of conservative versus progressive, which will be referred to as the socially-inspired explanation. While some Romanists, such as Voigt and Kodrebski, qualified the Sabinian school as conservative and the Proculian school as progressive, others, including Karlowa and Falchi, qualified the Sabinian school as progressive and the Proculian as conservative.

2.2.1 The Conservative Sabinians and the Innovative Proculians

First, Voigt’s theory will be discussed. This Romanist took the text of Pomponius (D. 1.2.2.47), in which Capito was characterised as a traditional and Labeo as an innovative jurist, as a starting point to regard the Sabinians as conservative and the Proculians as progressive. In Voigt’s view, moreover, the opposition between the two schools could be explained by way of the contrast between *rigor iuris* and *verbi ratio*, on the one hand, and *aequitas* and *voluntatis ratio*, on the other. Whereas the Sabinians looked as far as possible to interpret texts to the letter, the Proculians underlined the *voluntas* or the intention of the parties and, thus, were sensitive to claims of equity.

Three critical remarks can be made on Voigt’s theory. First, the opposition between Capito and Labeo cannot merely be transmitted to their successors. The fact that Capito was a traditional jurist does not necessarily imply that his successors at the head of the Sabinian school approached the law in a similar way. Although Pomponius maintained that Labeo set out to make a great many innovations, this does not mean that his successors at the head of the Proculian school did the same. Second, Voigt implies that the antithesis between *verba* and *voluntas* is consequential to a conservative or progressive viewpoint. He suggests that the Sabinian view to attach importance to *verbi ratio* was traditional and conservative. The Proculians, who held the *voluntas* and *aequitas* to be decisive, were regarded as progressive. However, the antithesis *verba-voluntas* has always been used as a way of argumentation and

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holds no automatic relation with a conservative or progressive attitude. Third, the \textit{verba/voluntas status} can only be applied when the meaning of a text admits of more than one interpretation and, thus, causes a legal problem. However, the majority of the controversies did not concern the interpretation of a text, but of unwritten law.

Kodrebski also regarded the Sabinians as conservative and the Proculians as progressive, but, in his view, the two law schools were educational institutions. They introduced a new educational system for jurists that was democratic and productive, and that replaced the old, republican, and aristocratic way of teaching. The heads of the laws schools were assisted by helpers and substitutes. According to Kodrebski, the Sabinians and, in particular, G. Cassius Longinus, partially held on to the traditional form of education and were, therefore, rather conservative. The Proculians, on the other hand, were, perhaps under the influence of Labeo, rather innovative.

An important methodological point of criticism can be raised against Kodrebski’s theory. He makes statements about the nature of the law schools without analysing one controversy that existed between them. Moreover, his theory does not explain how the controversies between the Sabinians and Proculians arose.

\textbf{2.2.2 The Conservative Proculians and the Innovative Sabinians}

Let us now turn to Karlowa. He studied the same texts as Voigt and, yet, he came to exactly the opposite conclusion. In his view, the Proculians were conservative and the Sabinians progressive.\textsuperscript{12} At the root of the opposition between the two schools lays, what Karlowa calls, a ‘Verschiedenheit der Grundrichtung’. The Proculians were faithful to ‘altrepublikanische’ and ‘römische Anschauungen’, whereas the Sabinians adhered to ‘peregrinische Anschauungen’. Karlowa argued that it is quite unlikely that Labeo’s republican tendency would not have moulded his views on private law.

INTRODUCTION

Falchi was another to claim that the controversies arose because the Proculians were conservative and the Sabinians progressive and, additionally, because they adhered to fundamentally different views on legal method. As a starting point, Falchi took the text of Pomponius (D. 1.2.2.47) in which the latter stated that Labeo had introduced many innovations (plurima innovare instituit). According to Falchi, ‘innovare’ does not necessarily mean ‘to reject the traditional, Roman values’. Instead, it could also mean ‘to adapt the ius civile system that had been handed down to new situations’. Falchi maintains that, in this case, the alternative meaning is pertinent and that Labeo adapted the traditional ius civile system, inherited from the veteres, to the new situations of his own time. In this way, Labeo innovated the traditional system by analogy with the traditional structure of the institutions and was thus conservative. According to Falchi, the Sabinian school was not founded by Ateius Capito, who persevered to the way that had been handed down to him (Pomp., D. 1.2.2.47: ‘In his, quae ei tradita fuerant, perseverebat’), but by Massurius Sabinus. This jurist also noticed that times had changed and that the ius civile system was no longer adequate. Instead of adjusting the existing system, however, Sabinus preferred constructing a new and autonomous system, independent of the traditional institutions of the Republic. This system was based upon voluntas; the Sabinians wanted to take into account the will and the intention of the parties. A number of controversies concern the acquisition of ownership. According to Falchi, the Proculians had a traditional conception of the acquisition of ownership: ownership was acquired by means of a unilateral act accompanied by a legitimate causa. The Sabinians, on the other hand, held that the acquisition of ownership was based on the bilateral relation between both the previous and the new owner and on the manifestation of will or voluntas of the former.

The main point of criticism that can be raised against Falchi’s theory is the lack of support for his view in the sources. For example, nowhere in the sources is a unilateral acquisition of ownership qualified as conservative and traditional or a bilateral acquisition as progressive and innovative. Moreover, Falchi does not take into account the arguments in support of the Sabinian and Proculians opinions that are mentioned by Gaius. Instead, he adduces new arguments that find no basis in the text.

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Finally, one more critical remark can be raised against each and every one of the socially-inspired explanations. The labels conservative and progressive are contemporary labels. Whenever they are used to denote and explain phenomena and movements in Antiquity, these terms are used anachronistically. Thus, all of the above-mentioned scholars have explained the controversies in an anachronistic way.

### 2.3 The Methodological Explanation

According to some Romanists, such as Dirksen, Kuntze, Stein, Liebs, Herberger, Scacchetti, and Falchi, the school controversies were due to a different view on methodology. The work of Dirksen was the first monograph on the subject. Already in 1825, he explained the opposition between the Sabinians and the Proculians in terms of methodology. The most important representative of this theory is Stein and his explanation will be discussed here. His interpretation of the controversies has largely been adopted by Liebs and Scacchetti and was further elaborated by Herberger. Falchi’s theory has already been discussed in the previous section.

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15 DIRKSEN (1825).
16 According to J.E. KUNTZE, *Excurso über römisichen Recht. Hülfsbuch für academische Privatstudien im Gebiet der Institutionen sowie der äusseren und inneren Rechtsgeschichte*, Leipzig 1869 (repr. 1880), pp. 267-281, the Sabinians were Naturalists and the Proculians Idealists. B. KÜBLER, *Rechtsschulen*, RE 2.1 (1914), c. 383, commented on Kuntze’s theory as follows: ‘Ebenso unhaltbar wie alle bisher kritisierten Versuche ist die Idee Kuntzes daß die Sabinianer Naturalisten, die Proculianer Idealisten gewesen seien, jene mehr auf den Zweck, diese auf den Grund der Rechtssätze sahen, jene der *utilitas*, diese der *subtilitas* huldigten. Seine Ausführungen, die nicht ohne Geist sind, haben doch etwas stark Phantastischen an sich, und wenn darin die Sabinianer zu Zweck- und Nützlichkeitsjuristen herabgedrückt werden, so geschieht ihnen Unrecht.’
22 V. SCARANO USSANI, L’ars dei giuristi: considerazioni sullo statuto epistemologico della giurisprudenza romana, Torino 1997, pp. 61-108, refuted the view that there had been a methodological difference between the two schools. In his opinion, the Sabinians and the Proculians had each elaborated their own legal doctrines consisting of different *opiniones*. These *opiniones* related to specific theoretical questions. Scarano Ussani developed this interpretation of the *scholae* or *sectae* of the Early Empire by comparing them with their philosophical, medical, and rhetorical counterparts and their organisation and activities.
According to Stein, the two schools differ from one another on questions of legal method and technique. This difference between the two schools goes back to Labeo and Capito. Whereas Labeo introduced new ideas regarding legal method and technique, Capito (and Sabinus) probably opposed these new methods and wanted to preserve the traditional, late-republican methods. By examining Labeo’s opinions that were mentioned in the Digest, Stein tried to reconstruct his legal method. First, Labeo had a great interest in problems of *interpretatio verborum*. They arose when the meaning of a text (either public or private) admitted of more than one interpretation. In such cases, Labeo stuck as much as possible to a literal and objective interpretation of the words and did not take into account the subjective intention of the author of the text in question. The majority of the school controversies, however, arose from unwritten law. Some of these controversies concerned the nature of legal obligations. The Proculians consistently held that an obligation had certain characteristics and that the parties had to observe them. In disputes concerning the law of inheritance, however, the Proculians took a positively liberal line. Even if the testator did not observe the requirements for a valid testament, the Proculians consistently followed his intention. Only in case of a *legatum per damnationem*, the Proculians took a stricter approach. If a conflict of interest occurred in such a case, Labeo applied a technique of defining and distinguishing legal institutions of which the limits and scope had become blurred in practice. Furthermore, Labeo also made use of the method of analogy to justify his decisions and, according to Stein, Labeo had taken over that technique from the grammarians. In line with Schanz and Betti, Stein regarded the differences between the Proculian and the Sabinian methodologies as a reflection of the subdivision of the Greek grammarians into two schools, the analogists and the
anomalists, respectively. Whereas the former believed that language was inherently orderly and governed by general principals, the latter stressed that language was the product of usage and practice and could not be captured in a set of rules.\textsuperscript{30}

Several objections can be raised against Stein’s theory. First, the large number of Labeo’s decisions in the Digest allowed Stein to draw some conclusions about the legal method of this jurist. However, Stein admits that he has little evidence of Capito’s opinions and methods. Only the text of Pomponius, stating that Capito was traditional, supports Stein’s view that Capito opposed Labeo’s new methods and wanted to preserve the traditional ones. Nevertheless, this statement is too vague to allow any firm conclusions about the legal method of Capito, in particular, and that of the Sabinians, in general. Second, Stein contradicts himself when stating that the Proculians took a positively liberal line in cases concerning the law of inheritance, but that they adopted a stricter approach when a \textit{legatum per damnationem} was involved. Apparently, there was no internal consistency among the opinions of the Proculians. Third, Stein was evidently right when he maintained that techniques of analogy played a significant role in Roman law, but neither Labeo nor the Proculians had exclusive rights on it: on the contrary, also the Sabinians made use of analogy to justify some of their decisions.\textsuperscript{31}

\subsection*{2.4 The Political Explanation}

The theory that the Proculians were opponents of the imperial regime and the Sabinians its supporters is outdated.\textsuperscript{32} It is conclusive that Labeo was a political adversary of Augustus and Capito a supporter, but this opposition does not apply to the other authorities of the Sabinian and Proculian schools. As stated by Pomponius (D. 1.2.2.48-51), Nerva and Pegasus, both Proculians, were on good terms with the Emperors Tiberius and Domitian, respectively. The

\textsuperscript{30} According to HERBERGER (1984), pp. 116-120, the methodological differences between the Sabinians and the Proculians are not only a reflection of the division of the Greek grammarians into anomalists and analogists, respectively, but also reflect the opposition in medical schools between rational dogmatists and sceptical empiricists.

\textsuperscript{31} See, for example, the controversy in Gai., 2.231.

\textsuperscript{32} About the political theory, see G. MASCOVIUS, \textit{De sectis Sabinianorum et Proculianorum in iure civili Diatriba}, Leipzig 1728 (non vidi); J.G. HEINECCIUS, \textit{Historia iuris civilis Romani ac Germani}, Halle 1733 (non vidi); C. DEMANGEAT, \textit{Cours élémentaire de droit romain}, I, 3\textsuperscript{rd} edn., Paris 1876, pp. 97-98. JOLOWICZ (1972), p. 379, and SCARANO USSANI (1997), pp. 94-95, regard this theory as outdated.
Sabinian C. Cassius Longinus, on the other hand, was exiled by Nero. What is more, this theory does not explain the controversies, for they relate to matters of private law and are scarcely relevant for public affairs.

More recently, Honoré has argued that the schools were teaching institutions and that Gaius had been both a student and a teacher at the Sabinian school. Honoré explains the distinction between the Sabinians and the Proculians both in terms of politics and in terms of the conservative/progressive antithesis. Whereas Labeo was progressive and innovative in law, he was conservative in his politics. According to Honoré, the legal tradition, stemming from Labeo, was maintained in the Proculian school, but the political outlook of that school became pro-imperial: ‘The Proculians, following Labeo, took equity as their guiding principle in legal problems and this naturally led them to favour strong central government and wide administrative discretion’ (see Ner., D. 6.2.17; Ulp., D. 47.4.1.1). The Sabinian tradition, on the other hand, was conservative, rational, and republican: ‘In legal doctrine reason is the leading concept used by the Sabinians. This goes back at least to Sabinus and Cassius’ (see Gai., D. 41.1.7.7; Iav., D. 45.1.108, pr).

Honoré’s theory is not quite convincing. He draws conclusions about the differences between the Sabinians and the Proculians without first analysing the controversies that existed between them. The controversies and opinions of the Sabinians and the Proculians do not reveal any political preference of either school and, therefore, cannot be explained in this way.

2.5 The Sceptical View

Another important theory about the schools and their controversies is that there is not a fundamental difference between them and that there is not one unequivocal criterion with which to identify the positions of the jurists of the two schools. This sceptical view was introduced by Schrader and Bremer, elaborated by Pernice and Baviera, and adopted by

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INTRODUCTION

Jolowicz and Guarino.\textsuperscript{36} Since Baviera has elaborated this view far more thoroughly than the others, only his theory will be discussed.

Baviera regards the text of Pomponius as unreliable, because of its contradictions and inaccuracies. He denies that the foundation of the two law schools can be traced back to the antagonism between Capito and Labeo. Although the jurists were different with regard to their personality and political ideas, there is no proof in the sources whatsoever that their legal method was fundamentally different as well.\textsuperscript{37} He dates the origin of the schools to a later period, i.e., to the days of Tiberius, when legal education was officially regulated. In his view, the schools were not scientific circles, but teaching institutions. The jurists gathered in a suitable and public place, called a \textit{statio}, where they were occupied with \textit{respondere} and \textit{docere} in public.\textsuperscript{38} Moreover, Tiberius had granted the \textit{ius publice respondendi ex auctoritate principis} to Massurius Sabinus and, probably, also to Nerva, so that they could give \textit{responsa} in public with the authority of the emperor. Hence, it was logical that before long a number of students gathered around them. Up to that time, education had always been a private affair but, from then on, it had assumed a public and official character. The reason why the Proculian school was not named after its founder, Nerva, is because his political activities had kept him from teaching. His successor Proculus, on the other hand, dedicated more time to his students. The controversies arose because the jurists belonged to two different \textit{stationes} in competition with each other. The recorded controversies were \textit{Lehrmeinungen}. Since the leaders of the schools had the \textit{ius respondendi}, they had a special value and were authoritative.

Baviera, being a representative of the sceptical view, correctly concluded, on the basis of his analysis of the texts that there was no fundamental difference between the Sabinians and the


\textsuperscript{37} In the same vein, PERNICE (1873), pp. 81-92.

INTRODUCTION

Proculians and that there was not one unequivocal criterion with which to identify the positions of the jurists. Baviera was also right in making a connection between the schools and the *ius respondendi*. However, the *ius publice respondendi ex auctoritate principis* does not relate to the field of education, but to the administration of justice. In the following section, this point will be addressed in depth.

### 2.6 Status Quaestionis: Conclusion

By and large, modern scholars have sought to explain the opposition between the schools as a confrontation between two internally consistent and unequivocal conceptions of law. These conceptions were prompted either by a philosophic, socially inspired, methodological, or political perspective. It has been suggested that the Sabinians represented the Stoic side and the Proculians the Peripatetic side in what was one of the main traditional philosophical debates of the Early Empire. Furthermore, the view that the controversies are to be explained in terms of conservative and progressive is widespread. Whereas some have asserted that the Sabinians were traditionalists and the Proculians innovators, others have taken exactly the opposite view. Another common way to explain the controversies is that the two schools held different views on methodology. The suggestion that the differences of opinion were prompted by the conflicting political background of the representatives of the schools, on the other hand, has never found general acceptance. The sceptical view, finally, deviates from the general assumption that there was a fundamental difference between the schools. This view has also been endorsed by several authors.

None of these attempts have succeeded at definitely or even convincingly solving the problem of the controversies, or at finding general acceptance.\(^{39}\) Indeed, three general arguments can be put forward to counter these theories.

First, the different attempts in modern literature to single out one particular theory that could have been at the root of every controversy have failed. Some of the theories, such as the

\(^{39}\) About a decade ago, SCARANO USSANI (1997), p. 88, stated the following: ‘Nessuna delle moltissime … ricerche, che hanno finora tentato di restituire un’identità, teoretica o almeno metodologica alle scuole giurisprudenziali, sembra essere pervenuta a risultati definitivi.’
Stoa/Peripatics opposition, may indeed explain a handful of the controversies, but none of them is helpful at explaining all or even a significant number of them. In other words, as already pointed out in the sceptical view, the controversies cannot be placed under one common denominator: there is no internal consistency among the positions of the Sabinians or among the positions of the Proculians. Thus, a substantial number of modern scholars have contented themselves with forwarding a general theory which applied to only one or a few controversies. Second, few of the modern authors have taken much trouble, if any, to systematically and thoroughly analyse the primary sources. They have overlooked the significance of understanding the actual legal problem and the circumstances underlying the controversy even to the point of ignoring the explanations about the origins of the controversy forwarded in the sources themselves. An important consequence of this methodological shortcoming is that, third, many of the theories suggested are hardly supported by the primary sources.

Several reasons can be advanced for these failures. By and large, modern scholars perceive of classical Roman jurisprudence as a systematic and autonomous legal science. The Roman jurists are considered to be legal scientists who tried to build Roman law into a scientific system and were greatly influenced in this by Greek philosophy. Roman jurisprudence is also perceived as an autonomous ‘science’, abstracted from its historical context. This has induced scholars to underplay its connection and interaction with legal practice.

This dogmatic approach is deeply embedded in the study of Roman law. Since the rediscovery of the Digest in the 11th century, the teleological and non-contextual approach to Roman law has been prevalent. The Justinian collection was regarded as an authoritative text embodying a consistent and coherent legal system. Particularly in the 19th century, there was a strong revival of the dogmatic approach in German Pandect Science. The dogmatic study of Roman law served the purposes of the German Pandectists. As they themselves had a strong impact on 19th century jurisprudence as well as on the German Civil Code of 1898, their approach to

INTRODUCTION

Roman law left deep traces in the collective memory of modern lawyers all over continental Europe.41

The dogmatic approach to Roman law, predominant in the history of European legal science, has been projected back into Antiquity. As a consequence, Roman jurisprudence is interpreted in an anachronistic way. It is regarded as an autonomous discipline that, just as the 19th-century German concept of Rechtswissenschaft, was concerned with developing a coherent system of private law. However, the jurisprudence of the Romans, which ended with the codification of Justinian in the 6th century, had developed in a way that was fundamentally different from the way it was studied from the 11th century onwards. There are, so to say, two histories of Roman jurisprudence and the distinction between them has often been blurred. Therefore, it is necessary to study ancient Roman jurisprudence within its own historical context and not as an autonomous legal system. Although such an historical approach emerged in the 20th century, the traditional and dogmatic approach to Roman law still determines many underlying assumptions. A disproportionate emphasis is placed on the dogmatics of Roman private law, whereas its historical background has generally been undervalued. In other words, current Roman lawyers have not yet shed the shadow of their dogmatic predecessors.42

The traditional, dogmatic approach to Roman law has also premised the modern debate on the schools and the controversies. Thus far, the controversies have nearly always been seen as problems of a theoretical nature. Students of Roman law have tried to understand the controversies as a debate among academic scholars who were driven by their theoretical conception of law. They have refrained from considering the Roman jurists’ engagement with legal practice.

This dogmatic approach to Roman jurisprudence has spilled over into modern views on the Roman jurists themselves. They are not seen within their historical context, but are regarded as a separate class of unworldly armchair scholars. They are set as theoreticians against the orators who acted as advocates but had little knowledge of Roman law. It is generally held

INTRODUCTION

that, by the 1st century BC, there was a virtually complete separation between the jurists and advocates and that they treated one another with mutual contempt.\(^{43}\) The most representative adherent of this view is Schulz.\(^{44}\) Because of the assumption that there was a fundamental distinction between jurisprudence and advocacy, the influence of rhetoric on jurisprudence has always remained in the shadows.

The misconception that Roman jurists were merely theoreticians who occupied themselves with Roman legal science is based on the 19th-century notion of the *Fachjurist*.\(^{45}\) This notion was introduced within the framework of the Historical School and it refers to a separate class of legal experts who practised legal science in a professional manner. This notion is indeed applicable to the modern jurists of the 19th and 20th centuries, for they form a separate professional class of educated and salaried persons. Modern scholars have erroneously projected the concept of the *Fachjurist* back into Antiquity. Again, this is an illustration of anachronistic thinking: the Roman concepts of *iurisprudens*, *iurisperitus*, and *iurisconsultus* are regarded as synonymous with the concept of *Fachjurist*. However, these terms were historically used as adjectives that qualify certain persons as having an excellent knowledge of the Roman law, not as nouns denoting a profession. Although jurisprudence and advocacy were different occupations, there was no sharp and absolute separation. The Roman jurists belonged to the same elite and performed on one and the same public setting as advocates and orators. They were also concerned with Roman legal practice and did not only find their intellectual inspiration in Greek philosophy, but in the rhetorical tradition as well. These two ideas, the connection between jurisprudence and legal practice and the role of rhetoric in jurisprudence, may very well offer the keys to solving the riddle of the controversies.

\(^{43}\) The opposition between jurists and orators is often illustrated by a saying from the jurist Gaius Aquilius Gallus, quoted by Cicero in his *Topica* (12.51). When anyone brought to him a case which turned on a question of fact, Gallus used to say: ‘Nihil hoc ad ius, ad Ciceronem’ or ‘This is not a matter for the law, but for Cicero’. For an alternative interpretation of these words, see O. TELLEGEN-COUPERUS - J.W. TELLEGEN, *Nihil hoc ad ius, ad Ciceronem*, RIDA 53 (2006), pp. 381-408.

\(^{44}\) SCHULZ (1946), pp. 43-45, 108-109. Recently, T. REINHARDT, *Marcus Tullius Cicero* *Topica*, Oxford 2003, pp. 53-72, assumed that there was a clear distinction between jurists and advocates and, a few years earlier, J.A. CROOK, *Legal Advocacy in the Roman World*, London 1995, pp. 37-46, esp. pp. 40-41, had maintained that ‘by the time of Cicero’s middle age, there was a virtually complete separation: advocates versus jurisprudents.’ Unlike Reinhardt, however, CROOK (1995), p. 41, slightly mitigated his extreme point of view: ‘We must not, for sure, treat the distinction as absolute’.

3. The First Key: Jurisprudence and Legal Practice. The Connection between the Controversies and the Ius Respondendi

This study departs from a historical approach to Roman law, an approach which has long, too long, remained in the shadow of the predominant, dogmatic one. In reality, Roman jurists were not primarily concerned with the development of a coherent system of private law. Obviously, there had been some attempts to systematise the law, but these were not taken very far, nor were they the primary concern of the Roman jurists.\textsuperscript{46} Roman jurisprudence was casuistic and Roman jurists were first and foremost legal practitioners and their major legal activity was \textit{respondere}, i.e., giving legal advices or \textit{responsa} in court cases and legal disputes.\textsuperscript{47} In the late Republic and the Principate, it was common practice that citizens, whenever they were confronted with a legal problem, approached jurists and asked them for advice. In his \textit{De oratore}, Cicero indicates that it was not uncommon for a jurist to give an advice that served the cause of the citizen who consulted him.\textsuperscript{48} A citizen from the countryside consulted Publius Crassus, who was campaigning for the office of \textit{aedile}. However, the jurist gave an advice that was not to the citizen’s advantage. Servius Galba, who accompanied Crassus, noticed that the citizen was disappointed and asked him what he had consulted Crassus about. The man presented his legal problem to Galba, who gave him a different advice that did serve his purpose. In support of his view, Galba cited several parallel cases and argued against a strict interpretation of the law and for an equitable one. Crassus, in his turn, referred to some authorities in order to support his view, but eventually had to admit that Galba’s argumentation seemed plausible and even correct.

\textsuperscript{46} Already in the late Republic, there had been some initiatives to systematise the law. Cicero (\textit{De or.}, 1.186-190) lets Crassus look forward to the systematisation of the law by means of a philosophical method of division. According to Pomp., D. 1.2.2.41, moreover, Quintus Mucius Scaevola was the first to arrange the \textit{ius civile generatum} into eighteen books. Cicero (\textit{Brutus}, 39.145-41.152), furthermore, maintained that the legal knowledge of Servius Sulpicius Rufus was superior to that of Quintus Mucius Scaevola, because the former understood law as a science and mastered the arts of division, definition, interpretation, and logic. The first genuine attempt at systemising the law is to be found in Gaius’ \textit{Institutiones} (161 AD): the first book deals with \textit{personae}, the second and the third with \textit{res}, and the fourth with \textit{actiones}. As far as we know, Gaius was the inventor of this institutional scheme. There is no known fully-fledged precedent to his division of the civil law. The fact that there had been some initiatives to systematise the law, but that they were merely first attempts that had not been fully developed, demonstrates that the Roman jurists were not first and foremost system builders.


\textsuperscript{48} Cic., \textit{De or.}, 1.239-240.
Whenever a jurist was consulted, he would interpret and apply the law to the case and render an advice on his personal authority. If jurists ended up giving conflicting *responsa* on the same case, a difference of opinion or a controversy arose. These controversies were common; the Justinian Digest abounds with them.\(^{49}\) The school controversies were just particular instances of these differences of opinion among jurists. With respect to the contents, there is no difference whatsoever between common controversies, on the one hand, and the school controversies, on the other.

Some 20 years ago, Tellegen suggested that the only fundamental difference between these two categories of controversies is that the school controversies were of greater importance, because the leaders of the schools held the *ius publice respondendi ex auctoritate principis*.\(^{50}\) This meant that they could give advice under the public authority of the emperor and that, as a consequence, their *responsa* were binding. If, therefore, the heads of the Sabinian and of the Proculian schools gave conflicting *responsa* about a specific dispute, the judges were bound by either advice and a so-called school controversy arose. Tellegen’s hypothesis introduced the first key to solving the riddle of the controversies by connecting them with legal practice and, thus, triggered the approach in this book to study the school controversies. In the following, I will first introduce the topic of the *ius respondendi* and then summarise Tellegen’s interpretation.

The true meaning of the *ius respondendi* is a much-debated problem among students of Roman law.\(^{51}\) It raises many questions. The first question concerns the implications of the *ius

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\(^{49}\) Regarding the freedom of jurists to discuss legal issues and the divergent and contradictory opinions as the inevitable result of these discussions and disputations, see A.A. SCHILLER, Jurists’ Law, *Columbia Law Review* 58 (1958), pp. 1226-1238, esp. pp. 1232-1235.

\(^{50}\) TELLEGEN (1988), pp. 263-311; J.W. TELLEGEN, ‘Responsitare’ and the Early History of the *Ius Respondendi*, *Studies in Roman Law and Legal History in Honour of Ramon D’Abadal I de Vinyals on the Occasion of the Centenary* 6 (1989), pp. 59-77. In the same vein, TELLEGEN-COUPERUS (1993:2), pp. 95-98. BAVIERA (1989), pp. 16-19, also made a connection between the schools and the *ius respondendi*. In his view, the schools arose in the days of Tiberius, when the emperor officially regulated legal education by granting the *ius publice respondendi ex auctoritate principis* to Massurius Sabinus and probably to Nerva as well.

respondendi. It has been suggested that the *ius respondendi* was an exclusive right to render legal advice. Whereas the privileged jurists could give *responsa*, the others had to confine themselves to other activities, such as education and the study of law. 52 Others maintained that the *ius respondendi* only bestowed greater authority on the privileged jurists, but did not prevent others from responding on their own authority. 53 The second question is whether or not the advices of the privileged jurists were binding on the judge. 54 The third question concerns the identification and the number of jurists on whom the *ius respondendi* was bestowed. The only jurist of whom we have absolute certainty that he held the privilege is Massurius Sabinus (Pomp., D. 1.2.2.48). On the number of jurists, the opinions go from one extreme to the other. 55 The fourth question regards the moment when the practice of granting the *ius respondendi* came to an end. Whereas some scholars, including Schulz and Wieacker, 56 maintained that the *ius respondendi* did not exist for a long time, others, including Kunkel and Magdelain, 57 stated that the *ius respondendi* survived the reign of Hadrian and that, from then onwards, it was granted even more generously.

The main representatives of this theory are KUNKEL (1948), pp. 423-457, and MAGDELAIN (1950), pp. 1-22.


54 According to SCHULZ (1946), p. 113, a *responsum* of an authorised jurist carried higher authority, but was not binding on the judge. SIBER (1941), p. 402, maintained that the *responsa* only became binding in the time of Hadrian. MAGDELAIN (1950), pp. 7-12; BRETONE (1982), pp. 247-248; and BAUMAN (1989), p. 12, on the other hand, stated that the *responsa* of the authorised jurists were binding.

55 According to the representatives of the theory that the *ius respondendi* was an exclusive right to give legal advice, every jurist who gave *responsa* had received the *ius respondendi*. CANCELLI (1987), pp. 543-568, and FÖGEN (2002), pp. 203-206, on the other hand, represented the other extreme. The latter maintained that Augustus’ attempt to encroach on jurisprudence by way of the *ius respondendi* failed and that the privilege had never been granted in practice. Cancelli even went one step further and claimed that the *ius respondendi* never existed.


Two reasons can be adduced to explain these problems of interpretation: the limited number of sources on the subject and the ambiguities and contradictions within these sources. A more thorough discussion of the different interpretations of these sources and of the *ius respondendi* would lead us too far. I will focus on the study of Tellegen, because he argued convincingly that there was a connection between the schools and the controversies, on the one hand, and the *ius respondendi*, on the other.

Tellegen advances several arguments. The fact that Pomponius’ treatment of the *ius respondendi* (in D. 1.2.2.49) is situated in the middle of his discussion about the schools strongly suggests that they may have something to do with each other. Another indication in support of this connection is that the only jurist of whom we have absolute certainty that he held the *ius respondendi*, namely, Massurius Sabinus, was the head of the Sabinian school. The final indication is found in the *Noctes Atticae* of Aulus Gellius, namely, in the words ‘stationibus ius publice docentium aut respondentium’.

Probably, the term *stationes* is a reference to the famous schools.

Although these indications do not demonstrate incontestably that there was a connection between the schools and the controversies, on the one hand, and the *ius respondendi* on the other, they point in that direction. The challenge is to reconstruct the history of the schools in relation to the *ius respondendi*. Tellegen’s attempt to make such a reconstruction is meritorious for several reasons and will, therefore, be taken into consideration. Tellegen departed from the text of Pomponius in its original form and refused to gratuitously make alterations to it. Instead, he tried to decipher what Pomponius actually meant. Moreover, his reconstruction explains persuasively what the difference is between the common controversies and the school controversies, why the controversies between the Sabinians and the Proculians have arisen, and why the sources present them as being important.

58 The principal source of information about the *ius respondendi* is Pomponius (D. 1.2.2.48-50). Because of the contradictions and irregularities within this text, Pomponius has often been labelled as an ignoramus; see, for example, SIBER (1941), pp. 397-402, and CANCELLI (1987), pp. 564-566. According to SCHULZ (1946), pp. 115-117, the passage of Pomponius was corrupt and four different hands had been at work. Others, however, upgraded the work of Pomponius and recognised its importance as a source of information on the *ius respondendi*. Modern scholars, such as KUNKEL (1948), pp. 435-436; HORVAT (1964), pp. 711-712; BAUMAN (1989), pp. 3, 287-288; and CANNATA (2003), pp. 34-39, wanted to limit any extensive changes in the text and I agree with them.

Tellegen maintained that the jurists at the end of the Republic had formed a secta or schola in the Senate, in which they discussed legal problems under the leadership of a prominent senator who was well-versed in the law. At the time, the practice of jurists to render legal advice to citizens was unorganised; conflicting responsa were no exception. The Emperor Augustus therefore introduced the ius respondendi in order to restrain the uncontrolled practice of giving responsa and to promote legal unity and certainty. Henceforth, a jurist having the ius publice respondendi ex auctoritate principis would be able to respond under the public authority of the emperor. These responsa would be binding on the judge.

Initially, there was only one school and, according to Tellegen, Augustus intended to grant the ius respondendi to its leader, i.e., C. Ateius Capito. However, the emperor was faced with the emergence of a second schola in the Senate under the direction of M. Antistius Labeo, so that he was reluctant to grant the ius respondendi to anyone. If both rivals received this privilege, there was an actual risk that they would give contradictory advices and thereby undermine legal certainty. Augustus did not want to bestow his favour on only one leader either. If he granted the privilege to Capito alone, he would favour the less gifted jurist. If he granted it only to Labeo, he would advance a political adversary. Pomponius’ words in D. 1.2.2.49 seem to confirm that Augustus had established the ius respondendi, but did not bestow it on anyone: ‘Primus divus Augustus … constituit, ut ex auctoritate eius responderent’.

Although Capito and Labeo were the first leaders of the two schools, they were not regarded as the true founders of their schools, because they did not have the ius respondendi.

According to Pomponius (D. 1.2.2.48), Massurius Sabinus was the first jurist who held the ius respondendi. Tiberius had ‘authorised’ him to exercise the ius respondendi and, afterwards, the privilege became to be ‘granted’: ‘Massurius Sabinus in equestri ordine fuit et publice primus respondit; posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi

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60 According to TELLEGEN (1988), p. 283, the term ‘publice’ is to be translated as ‘on behalf of the State’ or ‘on behalf of the Senate’. Pomponius (D. 1.2.2.49) maintained that, from the time of Augustus onwards, the responsa were sealed. According to Tellegen, this observation suggests that ‘publice respondere’ does not mean ‘to respond in public’, but ‘to respond on behalf of the State’. I agree with Tellegen that ‘publice respondere’ cannot be translated as ‘to respond in public’. However, the notion of State is anachronistic when used in Roman Antiquity. Therefore, it is better to translate ‘publice respondere ex auctoritate principis’ as ‘to respond under the public authority of the emperor’.

61 ‘Divus Augustus was the first to establish that they would give advice under his authority.’
concessum erat’. Sabinus was not a member of the Senate and was not elevated to the equestrian order until he was fifty. In addition, he lacked substantial means. It is acceptable that Sabinus, due to his situation, only functioned as the unofficial head of his school. Because Sabinus was an exceptionally talented jurist, Tiberius wanted to ensure that he could continue to act as the unofficial head of the school with sufficient power. For this purpose, he ‘authorised’ Sabinus to exercise the *ius respondendi*. According to Tellegen, there are indications that Tiberius did not grant the privilege to Nerva *pater*, the leader of the Proculian school. Therefore, it may be said that, though for different reasons, neither Sabinus nor Nerva *pater* could be regarded as the real founders of their schools.

Later emperors, such as Caligula and Nero, did confer the *ius respondendi* upon the leaders of the two schools for political reasons (*divide et impera*). While Sabinus was the first jurist who held the *ius respondendi*, C. Cassius Longinus, being a senator, was the first to whom it was granted in a regular way. This explains why their school is sometimes called ‘Sabiniani’ and, at other times, ‘Cassiani’. It also explains why Cassius (and not Capito or Sabinus) is called the leader and true founder of the Cassian school. Indeed, in a letter to Geminus, Pliny the Younger (7.24.8) qualifies him as such: ‘Cassianae scholae princeps et parens fuit’.

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62 ‘Massurius Sabinus was of equestrian rank and the first to respond *publice*. Afterwards, this became to be granted as a privilege. To him, however, it had been conceded by the emperor Tiberius.’

63 Tellegen (1988), p. 282: Tacitus (*Ann.*, 6.26) and Dio (58.21.4) report that he committed suicide. The latter suggests that Nerva *pater* killed himself because he was dissatisfied with the way in which Tiberius interfered with the law. This suggestion might imply that the jurist did not have the *ius respondendi*. The fact, moreover, that Pomponius only mentions Nerva in D. 1.2.2.48 and not in D. 1.2.2.49 as well, i.e., after dealing with the *ius respondendi*, creates the impression that the jurist did not have this *beneficium*.

64 Tellegen (1988), pp. 293-298. There are two indications that C. Cassius Longinus had the *ius respondendi*: 1) In a letter to Geminus, Pliny the Younger (7.24.9) calls him *iurisconsultus* and, according to *Inst.*, 1.2.8, a jurist who held the *ius respondendi* was referred to as *iurisconsultus*. However, the use of this term does not demonstrate irrefutably that Cassius held the *ius respondendi*, since its meaning was broader than the *Institutiones* of Justinian suggest. In fact, *iurisconsultus* was a general term for any jurist who gave *responsa* to persons who consulted him.

2) A more convincing indication is found in the *Annales* of Tacitus (14.42-45). In this text, the interpretation of the clauses of the *SC Silanianum* is discussed. In 61 AD, the *praefectus urbi* Pedanius Secundus had been murdered by one of his slaves. According to the *SC Silanianum*, which dated from the year 10, all of his 400 slaves had to be put to death. On this occasion, the people vigorously protested against the execution of so many innocent slaves and the Senate assembled to decide on the matter. The Senate split in two on the issue: while one group of senators protested against the execution of the slaves, the majority defended a strict interpretation of the *SC* and demanded their execution. Gaius Cassius Longinus was a supporter of the latter group and held a speech in which he argued that all slaves should be executed. In this speech, he tried to enforce his claims by appealing to an unspecified *auctoritas*. Apparently, it had effect, for no senator dared to raise objections against Cassius’ proposal and all the slaves were executed. According to Tellegen, the reticence of the senators is explicable when it is assumed that Cassius referred to the *auctoritas principis* or, i.e., to the *ius respondendi ex auctoritate principis*, that had been granted to him.

65 The term ‘Sabiniani’ is used in Ulp., D. 24.1.11.3; Marci., D. 41.1.11; *Inst.*, 2.1.25; and C. 6.29.3.1. The term ‘Cassiani’ is used in Pomp., D. 1.2.2.52; Paul, D. 39.6.35.3; Paul, D. 47.2.18; Ulp., *Ep.*, 11.28; and Plin., 7.24.8.
INTRODUCTION

From the claim that the Cassian school is named after Gaius Cassius Longinus because he was the first to whom the *ius respondendi* was granted in a normal way, Tellegen infers that the Proculian school was named after Proculus for the same reason. There is no information in the sources to confirm that Proculus held the *ius respondendi*, but Pomponius does say that Proculus had the greatest authority because he was the most gifted jurist.

It is possible that the later heads of the schools also had this privilege. Yet, this can only be confirmed for L. Iavolenus Priscus. In a letter to Voconius Romanus, Pliny the Younger describes an amusing scene in a poetry recitation involving L. Iavolenus Priscus. Pliny (6.15.3) calls the jurist a rather eccentric person, but also describes him as someone who participated in official functions, who was invited to sit in *consilia*, and who even responded *publice* in the field of civil law: ‘Est omnino Priscus dubiae sanitatis, interest tamen officiis, adhibetur consiliis atque etiam ius civile publice respondet’. When Pliny states that L. Iavolenus Priscus responded *publice* in the field of civil law, this probably indicates that the jurist held the *ius respondendi*.

According to Tellegen, it was in all probability the Emperor Hadrian who abolished the *ius respondendi*. When men of praetorian rank asked him to allow them to give advices, he answered in a *rescriptum* that this was not usually asked for, but earned. If someone had faith in himself, the emperor would be delighted for him to give advice to citizens.66 It is likely that Hadrian, by means of this answer, actually abolished the *ius respondendi*. He refused to grant the privilege to the *viri praetorii* and recommended them to give advice on their own authority.

This presumption finds support in the *Institutiones* of Gaius. In Gai., 1.2, Gaius made an enumeration of the different sources of law: besides *leges* (Gai., 1.3), plebiscites (Gai., 1.3), *senatusconsulta* (Gai., 1.4), imperial constitutions (Gai., 1.5), and edicts of those who held the *ius edicendi* (Gai., 1.6), Gaius also mentioned the *responsa prudentium*. On the latter source of law, he expanded in Gai., 1.7:

66 Pomp., D. 1.2.2.49.
INTRODUCTION

Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. Quorum omnium si in unum sententiae concurrunt, id quod ita sentient, legis vicem optinet; si vero dissentint, iudici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur.

The responsa prudentium are decisions and opinions of those who are allowed to establish the law. If the decisions of all of them converge on a point, what they thus hold obtains the force of law. If, however, they dissent, it is permitted for the judge to follow whichever decision he wishes. And this is made known by a rescript of divus Hadrian.

In the first sentence of this text, Gaius claims that the responsa prudentium, such as they had been given by jurists with the ius respondendi, were binding on the judge. This explains why Gaius dealt with these responsa in his enumeration of the sources of law. In the second part of the text, ‘Quorum omnium … idque rescripto divi Hadriani significatur’, Gaius may have discussed the same rescriptum of Hadrian as the one mentioned by Pomponius (D. 1.2.2.49). In this rescriptum, Hadrian decided that the ius respondendi was no longer in operation and that the opinion of an individual jurist was no longer binding on a judge. Henceforth, consent among the jurists was required to make their responsa binding.

The reason why Hadrian wanted to abolish the ius respondendi may be found within the schools themselves. During Hadrian’s reign, the Sabinian school was led by three jurists and the Proculian school by two. There was an actual danger that new schools would be formed. If the ius respondendi was granted to all five leaders, legal certainty would become jeopardised. This may have influenced Hadrian’s decision to put an end to the ius respondendi. Instead, Hadrian began to give legal advice himself and reorganised the rescript chancery. According to Tellegen, it is not clear whether the schools continued to exist after the abolishment of the ius respondendi.

4. The Second Key: Jurisprudence and Rhetoric. The Connection between the Controversies and the Topica
INTRODUCTION

As said above, Roman jurists were legal practitioners, whose main occupation was to render legal advice on specific cases. Occasionally, a case could be settled by mere deductive reasoning: the application of the general legal rules pointed at one particular solution. However, the law did not always unequivocally point to a solution. Therefore, the Roman jurists were often compelled to interpret the law. Whenever a legal problem admitted of more than one plausible interpretation, the jurists had to substantiate their specific decision persuasively. It stands to reason that, to this end, rhetoric, specifically the *topoi* were apposite methodological tools in the hands of the jurists.  

Indeed, the Roman jurists were acquainted with rhetoric and *topica*. Every young Roman who belonged to the Roman elite and who aspired a career in public life was educated in grammar, literature, rhetoric, law, and philosophy. None of these disciplines, however, was the preserve of a single professional group. Whereas some aristocrats excelled in their knowledge of the law, some of them were rather eloquent and well versed in rhetoric, while others were focused on a political career. Obviously, the most successful Roman citizens excelled in more than one of these disciplines. In any case, there was no sharp distinction between jurists, advocates, and politicians. Whereas jurisprudence, advocacy, and politics were of course different activities, they were often performed by the same persons or at least people from the same circles and with the same intellectual background. Although jurisprudence and advocacy were distinct activities, they were both inspired by rhetoric. The Roman jurists are to be seen within their historical context: they often played a prominent role in society, held public offices, and were intellectually inspired by rhetoric.

By and large, modern scholarship has overlooked the role of rhetoric in Roman jurisprudence, because of its rejection of the interaction between jurisprudence and legal practice. Legal historians have failed to recognise the impact of the *topica* on the formation of Roman jurisprudence.  


jurisprudence and the value for jurists of Cicero’s legal approach in his *Topica*. Some of the following quotations from modern literature illustrate this quite clearly. Horak wrote:

Trebatius, für den die Topik des römischen Eklektikers geschrieben worden ist, scheint mit ihr so wenig anzufangen gewußt zu haben wie mit dem Original des Aristoteles. ... Schließlich gibt es in den Büchlein so manches an Argumentationslehre, was spätere Jurisprudenz ausgiebig verwendet hat und heute noch verwendet. Aber der römische Jurist scheint zu sehr in den Schranken seines Fachs befangen gewesen zu sein, als daß er so Ungewohntes hätte in seine Wissenschaft integrieren können.69

Nörr stated: ‘Die den Juristen gewidmenten Topica waren diesen … fremd.’70 Some years ago, Fuhrmann held: ‘Doch im ganzen scheint Ciceros *Topik* als Versuch einer juristischen Heuristik ohne Folgen geblieben zu sein.’71 As appears from these quotations, the importance of Cicero’s *Topica* for the intellectual formation of Roman law has generally been underestimated. This lack of interest is caused by the generally accepted conception of Roman law as an autonomous systematic legal science. Still, in 2003, in his introduction to Cicero’s *Topica*, Reinhardt adhered to this view on Roman law. According to him, the *Topica* was intended to contribute to the systematisation of the Roman *ius civile*, a development that was still in its early stages in the middle of the 1st century BC and that Cicero had advocated in *De oratore*.72 Reinhardt, however, is unable to substantiate the claims in the body of his commentary.

Only a few authors have addressed the significance of rhetoric in the formation of Roman jurisprudence.73 Others have stressed the significance of rhetoric and topical reasoning in modern legal argumentation.74

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73 J. STROUX, *Summum ius summa iniuria. Ein Kapitel aus der Geschichte der interpretatio iuris*, intended for the *Festschrift P. Speiser-Sarasin*, Leipzig 1926, which never appeared in its entirety. The article was reprinted in
Nevertheless, the use of rhetoric and *topica* by the Roman jurists may very well throw a new light on the study of the schools. Some students of Roman law, in their analysis of one specific controversy, have noticed that the arguments used by the Sabinians and the Proculians at times were similar to the arguments as described in Cicero’s *Topica* and Quintilian’s *Institutio Oratoria*. However, they never pursued this point or examined whether there is a structural relation between topical argumentation and the school controversies. Nevertheless, the view that the rhetorical tradition was very instrumental in the intellectual formation of Roman jurists may have great consequences for the interpretation of the controversies that existed between the Sabinians and the Proculians. It will be argued that the controversies arose when the leaders of each school gave a contradictory, but defendable advice about particular legal problems encountered in legal practice. It will also be examined whether the arguments, adduced by the leaders of the schools in support of their view, can be linked with rhetoric and, more specifically, with the *topoi*, as described in rhetorical literature. If it can be demonstrated that they used topical argumentations and that they did so, each time, in a different way, it may be concluded that there is no coherent theory underlying the controversies and that the representatives of the schools have constructed for each particular problem an adequate argumentation. This would explain why modern literature has failed to identify a single foundational theory underlying the school controversies.

First, the term *topica* is to be defined. Then the relevant sources on the subject will be introduced and discussed. Third, the relationship between Roman jurisprudence and *topica* in general will be taken into consideration and, finally, some general remarks will be made about the connection between the schools and *topica*.

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4.1 *Topica*

*Topica* is a part of rhetoric and, more specifically, of *inventio*. Invention implies the discovery and formulation of arguments pro and contra. The term *topica* is derived from the Greek word *topos*, which is translated in Latin as *locus* and literally means ‘place’. *Topoi* or *loci* are places where arguments lurk. They are characterised by their names (e.g., a *locus a definitione*, a *similitudine*, or a *differentia*) and are meant to guide an associative process that might lead to an argument for or against a certain point of view.\(^\text{76}\)

In his *Topica*, Cicero (*Top.*, 2.7-8) gives the following definition of a *locus*:

> Ut igitur earum rerum quae absconditae sunt demonstrato et notato loco facilis inventio est, sic, cum pervestigare argumentum aliquod volumus, locos nosse debemus; sic enim appellatae ab Aristotele sunt eae quasi sedes, e quibus argumenta promuntur. Itaque licet definire locum esse argumenti sedem, argumentum autem rationem quae rei dubiae faciat fidem.

Then, just as it is easy to find those things that are hidden, once the place is pointed out and marked down, so if we wish to track down some argument, we need to know the places (*loci*). This is what those seats, from which arguments are drawn, are called by Aristotle. So it is allowed to define a *locus* as a seat of an argument, and an argument as a reasoning that lends belief to a doubtful issue.

In this text, Cicero compares an argument with a thing that is hidden (*res abscondita*) in a certain hiding place, i.e., a *locus*. In order to find the hidden thing or the argument, knowledge of the *locus* is essential. According to Cicero, *loci* are ‘sedes e quibus argumenta promuntur’ or ‘seats, from which arguments are drawn’.

\(^{76}\) D.E. MORTENSEN, *The loci of Cicero*, *Rhetorica* 26 (2008), pp. 31-56, has tried to define the concept of the *locus* within the rhetorical works of Cicero and to clarify ambiguities within this concept.
INTRODUCTION

Another definition of the term *locus* is given by Quintilian in his *Institutio Oratoria*. The relevant text is Quint., *Inst. Or.*, 5.10.20-22:

20. ... Locos appello non, ut vulgo nunc intelleguntur, in luxuriem et adulterium et similia, sed sedes argumentorum, in quibus latent, ex quibus sunt petenda. 21. Nam ut in terra non omni generantur omnia, nec avem aut feram reperias, ubi quaeque nasci aut morari soleat ignarus, et piscium quoque genera alia planis gaudent, alia saxosis, regionibus etiam litoribusque discreta sunt, nec helopem nostro mari aut scarum educas: ita non omne argumentum undique venit ideoque non passim quaerendum est. 22. Multus alioqui error et, exhausto labore, quod non ratione scrutabimur non poterimus invenire nisi casu. At si scierimus ubi quodque nascatur, cum ad locum ventum erit facile quod in eo est pervidebimus.

20. ... By *loci*, I do not mean commonplaces against luxury, adultery, and the like, as they are nowadays commonly understood, but seats of arguments, in which they are hidden, and from which they have to be drawn out. 21. For, just as all things are not generated in all countries, you would not find a bird or a wild animal if you do not know where they are usually born or live. Even of fish some kinds prefer a smooth and others a rocky bottom, and they are separated in areas and coasts; in our sea, you would not land a sturgeon or a parrot-wrasse. Likewise, every argument does not come from everywhere and, therefore, one must not search at random. 22. Otherwise, we shall go greatly astray and waste our work. What we will try to search without a system, cannot be found unless accidentally. But if we know where everything is born, when we come to the place, it will be easy to find what is in it.

According to Quintilian, *loci* are ‘sedes argumentorum, in quibus latent, ex quibus sunt petenda’ or *loci* are ‘seats of arguments, in which they are hidden and from which they have to be drawn’. Quintilian then compares arguments with birds, wild animals, and fish. In order to find a bird, a wild animal, or a fish and to avoid a search at random, its place of birth or dwelling place must be known. Likewise, arguments are not found everywhere and, therefore, they should not be searched for at random, but systematically.
Rhetoricians, when writing a speech, certainly had an interest in discovering pertinent arguments in an efficient and systematic way. For this, they used the theory of *topoi* or *loci*. This theory provides an ordered checklist of *loci* and ways to draw arguments from each *locus* on the list. One can quickly run through this list and find whatever argument one needs.

### 4.2 *Topica*: The Sources

In the 4th century BC, Aristotle wrote a work, entitled *Topica*. This work was primarily addressed to dialecticians and explained how the theory of *topoi* could be helpful for conducting philosophical discussions. For jurists, however, Aristotle’s *Topica* did not have any practical value. Aristotle wrote yet another work, entitled *Rhetorica*, in which he discussed the theory of *topoi* from a different perspective. The *topica* as described in this work was particularly helpful for advocates pleading criminal cases.

In the 1st century BC, Cicero dedicated an entire treatise to the subject. The significance of Cicero’s *Topica* is that it was not primarily composed for dialecticians or advocates, but for jurists and that its examples pertained to private law,\(^{77}\) so that the theory of *topoi* was adapted to the jurists’ needs. Cicero wrote the *Topica* in 44 BC for his friend C. Trebatius Testa, who was a jurist. From the introduction (Cic., *Top.*, 1.1-5), we learn that Trebatius hit upon Aristotle’s treatise on *topoi* in Cicero’s library at Tusculum and became fascinated by the subject. At Trebatius’ request to inform him on the subject, Cicero urged his friend to read the treatise himself or to let a particular rhetorician teach him the system of *topoi*. However, Trebatius was put off by the obscurity of Aristotle’s work, and the rhetorician Cicero had

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\(^{77}\) Thus far, Cicero’s examples, pertaining to private law, have never been thoroughly analysed in modern literature. The book by REINHARDT (2003) on Cicero’s *Topica*, for example, contains a valuable commentary with regard to the textual, rhetorical, and philosophical questions raised by the text. Nevertheless, the private law cases in Cicero’s *Topica* do not get the attention they deserve. Reinhardt does not accurately define the legal problem at the root of a case and, even though he occasionally refers to republican legal texts and to texts in Justinian’s Digest relating to the same legal problem, he does not give any further information about them. The scanty discussion of the legal elements in Cicero’s *Topica* may be explained by Reinhardt’s background. He is a classicist with special interest in Latin literature, philosophy, and rhetoric, so he wrote his book from a non-juridical perspective. However, a more fundamental reason comes forward and explains why modern scholars have tended to disregard the legal aspects in Cicero’s *Topica*. The connection between Cicero’s *Topica*, being part of rhetoric, and Roman private law has never been made, because modern scholars have generally adopted the view that there was a distinction between law and rhetoric. The only modern scholar who paid attention to the legal elements in Cicero’s *Topica* was G. CRIFO, *Per una lettura giuridica dei Topica di Cicerone, Annali dell’istituto Italiano per gli studi storici* 1 (1967/8), pp. 113-145. He tried to identify the republican legal sources that Cicero used to write his *Topica*, but did not pay any attention to the examples, pertaining to private law, either.
referred him to was not acquainted with the work. Therefore, Cicero composed a brief treatise on the theory of *topoi* as an aid to Trebatius as well as to other jurists who were not well acquainted with the subject.

The corpus of the *Topica* consists of three parts: 1) a preliminary discussion of more than fifteen *loci* (Cic., *Top.*, 2.6-4.24); 2) a more elaborated discussion of these *loci* (Cic., *Top.*, 4.25-20.78); 3) a detailed division of different kinds of *quaestiones* and a discussion of various ways of finding *loci* (Cic., *Top.*, 21.79-26.99). Cicero (*Top.*, 26.100) concludes his book with a short epilogue.

In the first part of his *Topica*, Cicero illustrates each *locus* with an example from private law. In *Top.*, 2.8, Cicero makes a distinction between *topoi* that are inherent to the nature of the subject under discussion and those that are extrinsic. The former category consists of those arguments that are derived from definition (i.e., from the *locus a definitione*), from the enumeration of parts (i.e., from the *locus a partium enumeratione*), from etymology (i.e., from the *locus a notatione*), and from those things which are related to the subject under discussion. According to Cicero (*Top.*, 3.11), the latter class has many subdivisions, for some arguments are called ‘conjugate’, others are derived from the genus, the species, similarity, difference, contraries, adjuncts, antecedents, consequents, contradictions, cause, effect, and from comparisons with greater, equal, and lesser things. Finally, Cicero adds that extrinsic arguments are principally based on authority.

In the second and more elaborate part, Cicero discusses all the *loci* which are mentioned in the first part (except for the *locus a forma generis*), using the same order. He provides additional information about them and their subdivisions. Although, in this part, Cicero does not

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79 Cic., *Top.*, 2.9.
80 Cic., *Top.*, 2.10.
81 Cic., *Top.*, 2.10.
82 Cic., *Top.*, 3.12: *locus a coniugatione*.
systematically add examples from private law cases, he often uses concepts from private law to illustrate the subdivisions of the *loci*.

In the third part of the *Topica*, however, the examples are no longer drawn from private law, but from philosophy. Cicero unfolds a wide range of approaches to deal with legal problems from a philosophical perspective. At the outset of the third part, Cicero makes a distinction between general and particular questions, i.e., between *theseis* and *hypotheseis*, respectively. First, Cicero (*Top.*, 21.81-23.90) discusses the general questions or *theseis*. They are subdivided into theoretical and practical questions. In this context, only the former are relevant. The theoretical questions are further divided into three groups: the question is either ‘Is it?’ (‘*Sitne?’*); ‘What is it?’ (‘*Quid sit?’*); or ‘Of what kind is it?’ (‘*Quale sit?’*). These questions refer to *coniectura*, *definitio*, and *qualitas*, respectively. Cicero then addresses which *loci* are suitable for each question. *Coniectura* is most assisted by the *locus ex causis*, *ex effectis*, and *ex coniunctis*.\(^{85}\) *Definitio* is best helped by the *locus ex definitione*, *a similitudine*, *a differentia*, *ex consequentibus*, *ab antecedentibus*, *a repugnantibus*, *ex causis*, and *ex effectis*.\(^{86}\) Whenever right and wrong are being discussed, the *locus ex comparatione* and the *loci aequitatis* are particularly suitable.\(^{87}\)

After having closed the discussion on general questions (*theseis*), Cicero (*Top.*, 24.91-25.96) turns to the particular questions (*hypotheseis*). There are three kinds of speeches on particular subjects: the forensic, the deliberative, and the epideictic. Cicero also refers to disputes arising from written documents. He observes that all written documents, including laws, wills, and contracts, may be the subject of a dispute because of an ambiguity (*ambiguitas*) in the text, a discrepancy between what is written and what is intended (*verba/voluntas*), and because of conflicting documents (*scripta contraria*).

Here, it seems that Cicero refers to the system of *inventio*, which is ascribed to Hermagoras of Temnos and dates from the middle of the 2\(^{nd}\) century BC.\(^{88}\) Unfortunately, Hermagoras’ text

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\(^{85}\) Cic., *Top.*, 23.87.
\(^{86}\) Cic., *Top.*, 23.87-88.
\(^{87}\) Cic., *Top.*, 23.89-90.
INTRODUCTION

has not come down to us. The cornerstone of Hermagoras’ system seems to be the *status* theory. This is a method to determine what is at issue in a case that requires rhetorical arguments. The term *status* refers to the nature of the *quaestio* that results from the confrontation between claim and defence. The claim always has the same factual character, so that the *status* is determined by the changing contents of the defence.

Hermagoras determined that a conflict could either relate to facts or to the interpretation of a law or a written text. If the conflict related to facts, it had to be classified under one of the four *status rationales*: 1) the *status coniecturalis*, 2) the *status definitivus*, 3) the *status qualitatis*, or 4) *translatio*. If, on the other hand, the discussion turned on the interpretation or the application of a written text, one of the following four *status legales* was pertinent: 1) *scriptum et voluntas*; 2) *leges contrariae*; 3) *ambiguitas*; or 4) *ratiocinatio*. The first was pertinent when one party gave a literal interpretation of the text, whereas the other party was more interested in the spirit of the text or the intention of its author. In case of *leges contrariae*, the two parties invoked two contradictory laws. In the case of *ambiguitas*, the parties explained a text that was ambiguous in two different ways. Finally, it was a matter of *ratiocinatio* (i.e., a reasoning in terms of analogy) when one party maintained that the case in question was not provided for by the law, whereas the other party argued that the case was governed by an existing law for analogous cases. When the *status* of a question had been determined, the orator could look for arguments with the aid of *topoi* that were particularly suitable for that specific *status*.

Cicero’s system of *inventio* deviates from that of Hermagoras in a number of aspects, but one of these is essential. Whereas Hermagoras’ theory started from the *status* and then proceeded to the *topoi*, Cicero used the opposite order. According to Reinhardt, Cicero inverted the natural order of *status* and *topoi*, because it was the latter in which Trebatius had shown an interest. However, Cicero’s approach may have been prompted by other, more substantial considerations. Hermagoras’ system of *inventio*, containing the *status* theory, had been designed for pleading criminal cases so it was less relevant and less useful in private law cases. In his *Topica*, therefore, Cicero developed a proper system of *inventio* focusing on *topoi*

89 If the plaintiff made his accusation, there were four different possibilities of defence. First, the defendant could deny the accusation so that the central question was as follows: ‘Did the defendant do what he is being accused of?’ (‘Sitne?’). Second, the defendant could maintain that, for example, the theft he committed was not a *sacrilegium*, but a mere *furtum*. In this case, the main question was as follows: ‘What did the defendant do?’ (‘Quid sit?’). Third, the defendant could state that he acted legitimately (‘Quale sit?’). Fourth, he could opt for a procedural defence: ‘Is the court competent?’ These four kinds of *quaestiones* refer to the *status coniecturalis*, the *status definitivus*, the *status qualitatis*, and *translatio*, respectively.

rather than on status. The tripartite structure of the Topica corresponded to three distinct ways of finding pertinent topoi and pertinent arguments. First, Cicero presented a shortlist that may have been useful for jurists in instant need of a topical argument. Second, Cicero offered to the jurists a more elaborate list of the same topoi as presented in the shortlist. The third way to approach the topica involved using the status doctrine of Hermagoras.

Cicero primarily focused on the four status rationales and on the loci that were particularly suitable for them. The status legales were brought up only in passing. As he himself pointed out in Top., 26.96, the methods of treating the latter had been set forth in another work, namely, in De inventione, 2.116-154.

De inventione is an early work by Cicero about rhetorical invention. Originally, the treatise contained four books in all, but only two of them have come down to us. Although Cicero (De or., 1.5) seems to have been ashamed of the schoolish, overtly systematic, and immature nature of this work, it provides useful information on the four status legales and on the ways of argumentation whenever a controversy turned upon written texts. Cicero discussed ambiguitas in De inv., 2.116-121; the status scriptum et voluntas in De inv., 2.122-143; the status of leges contrariae in De inv., 2.144-147; and, finally, ratiocinatio in De inv., 2.148-153.

Finally, Quintilian’s Institutio Oratoria contains valuable information on rhetoric and topica. This is a textbook for students that was published in 94 or 95 AD and covers the entire study of rhetoric in twelve books. In this context, the fifth book is particularly relevant, for it concerns the discovery of arguments. In the relevant sections, Quintilian (Inst. Or., 5.10.20-94) defined the term topos and took into consideration more than twenty topoi or places where arguments were to be found. Quintilian discussed arguments that were derived from persons, motives, places, time, means, manner, definition, genus, species, properties, differences, division, elimination, beginning, development and culmination, similarities and dissimilarities,

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91 R.N. GAINES, Cicero’s Partitiones Oratoriae and Topica: Rhetorical Philosophy and Philosophical Rhetoric, J.M. MAY (ed.), Brill’s Companion to Cicero: Oratory and Rhetoric, Leiden 2002, pp. 445-480, argues that Cicero developed a proper system of inventio in the Partitiones Oratoriae and in the Topica and that, in doing so, he was influenced by the Sceptic Academy. Gaines points out the similarity between the Partitiones Oratoriae and the Topica with regard to the tripartite structure of both works. His observations initiated the interpretation of Cicero’s system of inventio as a threefold approach to find topical arguments.

92 Cicero (De inv., 2.153-154) also paid some attention to status of definitio, which was pertinent whenever a document contained words of which the meaning was questioned.
INTRODUCTION

conflicts, consequences, causes and effects, conjugates, outcomes, and comparison. In the final text, Quintilian (Inst. Or., 5.10.94) gave an enumeration of the different kinds of arguments. Quintilian described the *topica* in a way that was particularly helpful for advocates pleading in criminal cases. Nonetheless, the *topica* as described by Quintilian may be helpful as an additional source to better understand the system of *inventio* and the way in which it was used by jurists.

4.3 The School Controversies and the *Topica*

Cicero’s *Topica* offers explicit indications that there was some interaction between rhetoric and *topica*, on the one hand, and jurisprudence, on the other. The fact that Cicero addressed his work to Trebatius in particular and to jurists in general implies that the system of *topoi* had some kind of practical value for jurists. Cicero was the obvious person to write such a methodological textbook for jurists, for he was knowledgeable about both rhetoric and jurisprudence. Cicero, furthermore, explicitly confirmed in his *Topica* that jurists were acquainted with rhetoric and *topoi*. Two fragments in particular are relevant in this respect. First, Cicero (*Top.*, 17.66) asserted that a careful study of the *topoi* of arguments would enable orators, philosophers, and also jurisconsults to argue with ease about questions on which they had been consulted.

Licebit igitur diligenter argumentorum cognitis locis non modo oratoribus et philosophis, sed iuris etiam peritis copiose de consulationibus suis disputare.

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93 These arguments are discussed successively by Quintilian in Quint., Inst. Or., 5.10.23-31 (*argumenta a personis*); Quint., Inst. Or., 5.10.32-36 (*argumenta a causis*); Quint., Inst. Or., 5.10.37-41 (*argumenta a locis*); Quint., Inst. Or., 5.10.42-48 (*argumenta a tempore*); Quint., Inst. Or., 5.10.49-51 (*argumenta a facultatibus*); Quint., Inst. Or., 5.10.52 (*argumenta a modo*); Quint., Inst. Or., 5.10.54-55 (*argumenta a finitione*); Quint., Inst. Or., 5.10.56 (*argumenta a genere*); Quint., Inst. Or., 5.10.57 (*argumenta a specie*); Quint., Inst. Or., 5.10.58-59 (*argumenta a propriis*); Quint., Inst. Or., 5.10.60-63 (*argumenta a differentibus*); Quint., Inst. Or., 5.10.64 (*argumenta a divisione*); Quint., Inst. Or., 5.10.65-70 (*argumenta a remotione*); Quint., Inst. Or., 5.10.71-72 (*argumenta ab initio incremento summa*); Quint., Inst. Or., 5.10.73 (*argumenta a similibus dissimilibus*); Quint., Inst. Or., 5.10.74 (*argumenta a pugnantibus*); Quint., Inst. Or., 5.10.74-79 (*argumenta a consequentibus*); Quint., Inst. Or., 5.10.80-84 (*argumenta ab efficientibus, ab effectis*); Quint., Inst. Or., 5.10.85 (*argumenta a coniugatis*); Quint., Inst. Or., 5.10.87-93 (*argumenta a comparatione*). An overview of these arguments is given by B. SAIZ NOEDA, Proofs, Arguments, Places: Argumentation and Rhetorical Theory in the *Institutio Oratoria*, Book V, in: O. TELLEGEN-COUPERUS (ed.), Quintilian and the Law. The Art of Persuasion in Law and Politics, Leuven 2003, pp. 95-110.
Therefore, it will be possible, once the places of arguments have been diligently 
studied, not only for orators and philosophers, but also for jurists to discuss fluently 
about questions put before them.

Second, Cicero (Top., 17.65) maintained that jurists provided tools to diligent advocates who 
sought help from knowledgeable jurists:

Privata enim iudicia maximarum quidem rerum in iuris consultorum mihi videntur 
esse prudentia. Nam et adsunt multum et adhibentur in consilia et patronis 
diligentibus ad eorum prudentiam confugientibus hastas ministrant.

Private law suits about the most important matters seem to me to depend on the 
wisdom of jurists. For they are often present (with their aid), they are consulted, 
and they provide the weapons for diligent advocates who take refuge in their 
wisdom.

In other words, jurists provided advocates with appropriate arguments and informed them of 
which action was pertinent. These statements show that Cicero’s Topica was written as a 
guide or a methodological textbook for jurists and that, as such, it helped bring the rhetorical 
tradition to bear on Roman jurisprudence.

Now that it is established that the topica has influenced Roman jurisprudence to some extent, 
we may turn to the school controversies. There are indications that the leaders of the schools 
were acquainted with the topica. By and large, the leaders belonged to the Roman elite and, 
therefore, had been exposed to rhetoric during their schooling. Labeo, the first head of the 
Proculian school, had been instructed by C. Trebatius Testa. Cicero had dedicated his Topica 
to the latter, so it is almost certain that Trebatius passed his knowledge on the subject on to his 
student Labeo. Aulus Gellius, furthermore, stated in his Noctes Atticae that Labeo was well-
versed in the origins and meanings of Latin words and that he used this knowledge primarily 
to untangle many legal knots. The fact that etymology is one of the places or topoi in 
Cicero’s Topica in which arguments can be found seems to suggest that Labeo was acquainted 
with at least this way of topical argumentation.

94 Pomp., D. 1.2.2.47.
95 Gellius, Noctes Atticae, 13.10.1.
5. Methodology

The two main theses of this book are that, generally speaking, rhetoric and topical argumentation had a substantial impact on Roman jurisprudence and that, more specifically, the school controversies arose when the representatives of the two schools used topical argumentation in such a way that they reached different conclusions.

To substantiate the latter statement, each of the controversies between the Sabinians and the Proculians that are mentioned in Gaius’ *Institutiones* will be analysed. I will examine whether topical argumentation has been used and could plausibly have led to the articulation of the two opposing opinions of the representatives of the schools. The controversies mentioned in the Digest will not be taken into consideration. Several reasons justify this choice. First, time constraints have imposed this limitation. Second, the relevant texts in Gaius’ *Institutiones* are all written by one author and are all part of one work. The Digest, on the other hand, is an anthology. This means that the relevant texts stem from a variety of works, ascribed to several Roman jurists who lived in different periods. This renders the study of texts in the Digest of Justinian more difficult than that of texts in the *Institutiones* of Gaius. Moreover, there is an actual risk that interpolations were made between the original publication of the text by its author and its insertion in the Digest by the compilers, who were free to modify the texts from which they were excerpting. Third, Gaius was contemporary to the later generations of the Sabinians and the Proculians, and was a Sabinian himself. Fourth, the twenty-two controversies from Gaius are more than sufficiently representative to draw conclusions.

20) Gai., 4.78; and 21) Gai., 4.79. All these will be analysed below in this book. The twenty-second text in which Gaius discusses a school controversy, namely, Gai., 4.114, is so lacunary that the difference of opinion between the Sabinians and the Proculians cannot be reconstructed satisfactorily. Therefore, Gai., 4.114 will not be examined.

The texts will all be analysed as to the following issues. First, the legal problem at the root of the controversy will be defined. The legal problem is the juridical articulation of the actual conflict that gave rise to the court case or other legal dispute. Second, the advice rendered by the representatives of each school and the arguments in support of it will be discussed. In many cases, Gaius mentions the opinions and arguments of the two schools. Third, any text in the Corpus of Justinian or in other sources that relates to the same legal problem will be brought to bear on the discussion. Fourth, the different interpretations of each controversy given in modern literature will be recapitulated and suggestions will be made on why they fail to explain it. Fifth, I will examine how the arguments of the jurists relate to the topical theory of argumentation, as described by Cicero in his Topica and, to a lesser extent, by Quintilian in his Institutio Oratoria. If, sixth and finally, the controversy was solved at a later stage, it will be discussed by whom, when, and how this occurred.

Under the heading where the relation between the jurists’ arguments and the topical theory of argumentation is examined, the particular circumstances of the case will be reconstructed as well as the claims and counterclaims of the litigants that may plausibly have given rise to the legal problem and to the opposing advices. Whereas Gaius in all but one controversy discussed first the opinion of the Sabinians, in whose ranks he posited himself, and then turned to the Proculians, here another order will be used. With a few exceptions, first the argumentation of the defence, as it appeared from the reconstruction, will be assessed for each controversy, followed by that of the plaintiff. This allows for a more parallel reconstruction of

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96 The controversy about the ownership of the tabula picta, as described in Gai., 2.78, arose outside the context of the law schools. In modern literature, it is often assumed that this was a controversy between the Sabinians and the Proculians, but the sources make no reference at all to the schools. About the controversy in Gai., 2.78, see T. LEESEN, Romeinse schilderkunst op andermans paneel: Wie wordt eigenaar van de tabula picta?., Groninger Opmerkingen en Mededelingen 23 (2006), pp. 113-130.

97 In Gai., 4.79, Gaius first discussed the opinion of the Proculians and then turned to the opinion of his own school.
the cases than following the order of Gaius would. In most cases, moreover, it is easier to rediscover the plaintiff’s case from the argumentation of the defence than vice versa.98

Reconstructing the case is often very helpful in understanding the argumentation used by the different jurists. The reconstructions elucidate what had happened; why the conflict had arisen; and who the opposed parties were. The arguments linked the jurist’s opinion to the legal problem, which in turn arose from the particular case. The case and the legal problem are as useful as the opinions themselves to understand the argumentation. And it is precisely in these respects that modern literature has methodologically failed by neglecting the legal problems and the particular circumstances of the case, and by having taken too many liberties with the sources.

The analysis of the controversies as described above will be based on a close reading of the sources, which are primarily the twenty-one relevant fragments from Gaius and other later Roman texts. The exegesis of the source material will be taken much further and will be conducted in much more detail than has been attempted so far. As will appear, the Institutiones of Gaius are far more informative, not only on the opinions of the jurists, but also on their argumentations, and even underlying legal problems and cases than might be expected on the basis of the modern literature.

The analysis of the controversies will not only prove that topical reasoning is the key to explain the controversies, but it may also contribute arguments to the claim that the leaders of the schools held the ius publice respondendi. The use of the verb respondere (publice) to refer to the opinion of the jurists may serve as a strong indication that the heads of the schools held the ius respondendi. I will also systematically examine by whom the controversies were instigated and how they were brought to an end. If the controversies were settled by a constitution or a decision of an emperor, this implies that the two conflicting opinions were responsa ex auctoritate principis and that only the emperor was in a position to end the controversy.

For the purpose of this book, the text edition of David and Nelson of Gaius’ Institutiones is used.99 This edition, which is supplemented with a commentary,100 only covers the first and

the second book of Gaius’ *Institutiones*. The work has been carried on by Nelson and Manthe and, at present, they have edited and commented the text of the entire third book of Gaius’ *Institutiones*.\textsuperscript{101} Although their text edition has not been completed yet, it has been selected, because of the authors’ allegiance to the *apographum* of Studemund and their excellent commentaries on the texts.\textsuperscript{102} For the two final texts, Gai., 4.78 and Gai., 4.79, the text edition of FIRA has been used.\textsuperscript{103} Unless stated otherwise, all translations are my own.\textsuperscript{104}

The quotations from Cicero’s *Topica* are taken from the text edition of Reinhardt, since it is the most recent one.\textsuperscript{105} The texts in Cicero’s *De inventione*, furthermore, are taken from the text edition of Hubbell.\textsuperscript{106} For Quintilian, finally, the text edition of Russell is used.\textsuperscript{107}

\begin{itemize}
\item \textsuperscript{102} G. STUDEMUND, *Gaii Institutionum. Commentarii Quattuor*, Osnabrück 1874 (repr. 1965).
\item \textsuperscript{103} FIRA, II, pp. 169-170.
\item \textsuperscript{106} HUBBELL (1949).
\end{itemize}
I. MALE PUBERTY

1. Gai., 1.196: Text and Controversy

Masculi autem cum puberes esse coeperint, tutela liberantur. Puberem autem Sabinus quidem et Cassius ceterique nostri praeceptores eum esse putant, qui habitu corporis pubertatem ostendit, id est eum qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam aetatem esse spectandam, cuius aetatis puberes fiunt. Sed diversae scholae auctores annis putant pubertatem aetiamandam, id est eum puberem esse existimant, qui \| XIII annos explevit ...

Males, on the other hand, are released from tutelage when they reach puberty. Sabinus, Cassius, and our other teachers think that someone who shows his puberty by his physical development, that is someone who is capable of procreation, is pubes; but for those who cannot become sexually mature, such as eunuchs,\(^{108}\) the age at which males usually become pubes has to be taken into consideration. But the authorities of the other school think that puberty must be judged by age, that is, they hold someone to be pubes, who has completed his fourteenth year ...\(^{109}\)

This text mentions the first controversy in the Gaius’ Institutiones. It forms part of the first book, which deals with the law of persons. The final part of book I (i.e., Gai., 1.142-200) concerns persons who are sui iuris and, at the same time, in tutela or curatio. The discussion of tutela is much more extensive than that of curatio.

There are two kinds of tutelage: tutela impuberum and tutela mulierum. The text under discussion concerns the former. Tutela impuberum is the guardianship with the aim of protecting the personal and financial interests of persons sui iuris below the age of puberty. For girls, tutela impuberum ends at the age of twelve, but then they fall under tutela

\(^{108}\) The translation by F. DE ZULUETA, The Institutes of Gaius. Part I: Text with Critical Notes and Translation, 3rd edn., Oxford 1958, p. 63, of the word ‘spadones’ as ‘naturally impotent’ is incorrect. In this context, the word ‘spado’ is used in the narrow sense of ‘eunuch’.

\(^{109}\) According to the apographum of G. STUDEMUND, Gaii Institutionum. Commentarii Quattuor, Osnabrück 1874 (repr. 1965), pp. 52-53, Gai., 1.196 is followed by a large lacuna of 24 lines.
mulierum. In Gai., 1.196, Gaius discusses the end of male tutelage. A male was released from tutelage as soon as he became pubes.\textsuperscript{110}

The legal question in Gai., 1.196 runs as follows: ‘What criterion applies to determine when a male adolescent reaches puberty and, as a result, is released from tutelage?’ This question gave rise to a controversy between the Sabinians and the Proculians.\textsuperscript{111} According to Sabinus, Cassius, and the other authorities of the school (‘Sabinus quidem et Cassius ceterique nostri praeceptores’), the criterion for male puberty was physical development: as soon as a male adolescent was capable of reproduction, he was pubes.\textsuperscript{112} Since castration before the onset of puberty prevented the physical changes associated with manhood, physical development could not be applied as a criterion to eunuchs. Therefore, the Sabinians decided that for eunuchs the age at which males usually become pubes had to be taken into consideration. The authorities of the other school (‘diversae scholae auctores’) judged according to age in all cases: every male who had reached the age of fourteen was pubes. The last part of the text is missing, but its content can be reconstructed partially by means of Ulpian’s Epitome.

\textsuperscript{110} See also Gai., 1.145 and Paul, D. 27.3.4.pr.


\textsuperscript{112} According to A.A. LELIS - W.A. PERCY - B.C. VERSTRAETE, The Age of Marriage in Ancient Rome, New York 2003, pp. iii-iv, the physical signs of male puberty are the wrinkling of the scrotum, increase in the size of penis and scrotum, growth of pubic hair, and inconvenient erections.
2. Ulp., Ep., 11.28: The Third Opinion of Priscus

In his *Epitome*, Ulpian mentions the same controversy and, additionally, a third opinion is introduced. The relevant text is Ulp., *Ep.*, 11.28:

*Liberantur tutela masculi quidem pubertate. Puberem autem Cassiani quidem eum esse dicunt, qui habitu corporis pubes apparet, id est qui generare possit; Proculeiani autem eum, qui quattuordecim annos explevit: verum Priscus eum puberem esse, in quem utrumque concurrit, et habitus corporis, et numerus annorum.*

Males are released from tutelage by puberty. The Cassiani say that someone who appears to be *pubes* by his physical development, that is, someone who is capable of procreation, is *pubes*, but the Proculians hold that someone is *pubes* who has completed his fourteenth year. Priscus, however, says that the term *pubes* applies to someone in whom both criteria concur: physical development and the number of years.

It seems that this text is a shortened version of the text in the *Institutiones* of Gaius. Although Ulpian mentions the difference of opinion between the Cassiani and the Proculeiani regarding the criterion of male puberty, he says nothing about the Sabinian view on the beginning of puberty in eunuchs. At the end of the text, Ulpian refers to the opinion of a certain Priscus. It is very likely that Gaius also cited this third opinion in the section that is missing from Gai., 1.196.

Ulpian does not specify whether Priscus is L. Iavolenus Priscus or L. Neratius Priscus. Both jurists lived at the turn of the 1st century AD. While the former was head of the Sabinian School, the latter was head of the Proculian School. At present, it is generally accepted that Ulpian was referring to the opinion of the Proculian L. Neratius Priscus. An argument that points in this direction is to be found in Gai., 1.196. In this text, Gaius first mentions the opinion of Sabinus, Cassius, and his other teachers (*Sabinus quidem et Cassius ceterique*

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nostri praeceptores’). These “other teachers” may include L. Iavolenus Priscus. Since the authorities of the Proculian school were not mentioned by name (‘diversae scholae auctores’), the opinion of Priscus, which was mentioned immediately after the Proculian view, may have come from someone of that school. Although this argument is an indication that Priscus was in fact L. Neratius Priscus, it is by not conclusive.

According to the literal interpretation of the text, Priscus held the view that a male adolescent had to fulfil both the criteria of sexual maturity and age in order to reach puberty, but this interpretation raises two problems. If both criteria had to be fulfilled to reach puberty, eunuchs would be categorically excluded from puberty, for they could never satisfy the criterion of sexual maturity. Roman citizens belonging to the lower classes could run into difficulties as well, because their date of birth might not have been recorded and was, therefore, unknown. Consequently, it was uncertain when such persons would reach the age of fourteen and, hence, puberty. Since it is unlikely that Priscus failed to foresee these difficulties, a different interpretation of his opinion is called for.

In my view, Priscus is to be identified as the Sabinian L. Iavolenus Priscus. As the head of the Sabinian school, he elaborated the Sabinian view. Indeed, the third opinion is much closer to that of the Cassiani than to the Proculian view. The Sabinians maintained that for male puberty the criterion generally was physical development, whereas for the puberty of eunuchs it was age. L. Iavolenus Priscus went one step further: for males, either the criterion of sexual maturity or age could be used to determine the beginning of puberty and the fulfilment of only one criterion was sufficient. At first sight, Ulpian’s text may seem to contradict this interpretation, particularly, the word concurrit, but the word does not rule out the interpretation either. Moreover, Ulpian’s text is merely a summary of Gai., 1.196, so it is possible that the opinion of L. Iavolenus was described more elaborately and accurately in the large lacuna of Gai., 1.196. Whenever a text is summarised, ambiguities are likely to creep in and misunderstandings often occur.
3. The Controversy in Gai., 1.196: Modern Theories

Most of modern theories that attempt to explain this controversy make use of the antithesis conservative versus progressive. Many scholars, including Schulz, Schwarz, Kaser, Albanese, Scacchetti, Pugliese, Franciosi, and Fayer, were of the opinion that the criterion for male puberty in ancient Rome was sexual maturity,\textsuperscript{114} so they regarded the Sabinian opinion as traditional. In their view, the Proculian decision to let male puberty begin at the age of fourteen was practical, rational, and innovative.

These scholars refer to a solemn and religious ceremony that took place on 17 March during the \textit{Liberalia}, which were celebrated in honour of Bacchus. During this ceremony, male adolescents were granted the right to wear the \textit{toga virilis}. On that day, they were also inscribed in the census lists and, henceforth, they were regarded as \textit{pubes}. According to the above-mentioned scholars, the Sabinians were anxious to preserve this ancient tradition. The Proculians, on the other hand, regarded the practice to determine puberty in a solemn ceremony as outdated and introduced the more modern and rational point of view that male puberty began at the age of fourteen. This age is mentioned for the first time in the \textit{Lex Coloniae Genetivae Iuliae}. This law, dating from 44 BC, determined that men between the ages of 14 and 60 could be forced by \textit{decuriones} to carry out official duties or \textit{munera}. Some of the above-mentioned scholars, including Schwarz and Pugliese, assert that the lower age limit, as applied in the law, was adopted by the Proculians as the criterion for the beginning of puberty and the termination of tutelage.

Tellegen-Couperus has formulated some convincing counterarguments which challenge this theory.\textsuperscript{115} First of all, the sources to which the Romanists refer do not support their theory. Although these sources confirm that in ancient Rome puberty was determined in a solemn ceremony,\textsuperscript{116} they do not specify how this was done. Nowhere is it stated that puberty was determined through examining the body. The criterion of sexual maturity is usually regarded as ancient because it seems primitive and irrational. However, the fact that female puberty was


\textsuperscript{116} Ovid, \textit{Fast.}, 3.771-790; App., \textit{Roman History}, 5.30; Cat., 68.15.
determined by age at quite an early stage in Roman history shows that the Romans did use the age as criterion. The *Lex Coloniae Genetivae Iuliacae* cannot be used as an argument either.\(^{117}\) This law declares that men between the ages of 14 and 60 can be forced to participate in the construction of city defences. However, the age limit of fourteen in this law does not determine the beginning of puberty. It simply indicates that men, aged 14 and over, had to carry out physical labour. If the lower age limit did establish the beginning of puberty, then there would be no explanation for the higher age limit of sixty. Therefore, there is no direct link between the *Lex Coloniae Genetivae Iuliacae* and the Proculian criterion for puberty. Moreover, the criterion of age to determine puberty is not in the least practical, rational, and innovative. Since the age of Roman citizens belonging to the lower classes was often unknown, the criterion of age may have caused practical difficulties as well.

Others Romanists, including Karlowa and more recently Falchi, have also used the conservative/progressive antithesis to explain the controversy in Gai., 1.196,\(^{118}\) but these scholars regarded the Proculians as traditional and the Sabinians as progressive. Falchi maintained that the opinion of Priscus, identified as L. Neratius Priscus, preceded the school controversy: In the Late Republic, both criteria had to be met to reach puberty.\(^{119}\) Thereafter, the conservative Proculians no longer took sexual maturity into account as a criterion for puberty. According to them, every male who had reached the age of fourteen was *pubes*. The Proculians assumed that a male of that age was sexually mature (and automatically met the second criterion). The progressive Sabinians, on the other hand, lowered the age limit of fourteen. They held that any male adolescent who had become sexually mature before the age of fourteen was qualified as *pubes* as from that younger age. If a male still did not possess the physical requirements for sexual maturity, he reached puberty at the age of fourteen anyhow.

This theory is not very persuasive either. Falchi maintains that he can deduce all this information from two sources, namely, Gai., 1.196 and Ulp., *Ep.*, 11.28, but, at the same time, these texts also provide the counterargument for Falchi’s theory. By putting the opinion of Priscus at the end of the paragraph, Gaius and Ulpian were stating implicitly that this view was the more recent one.\(^{120}\)

\(^{117}\) *Lex Coloniae Iuliacae Genetivae seu Ursonensis*, par. XCVIII: FIRA I, pp. 177-198.


\(^{120}\) For this counterargument, see TELLEG-COUPERUS (1993:1), p. 476.
Finally, a more general point of criticism can be levelled against the Romanists who explain the controversy about male puberty in terms of the conservative/progressive antithesis. In Gai., 1.196, Gaius mentions two criteria for determining male puberty, age and sexual maturity. However, he does not specify one criterion as being conservative and the other as being progressive. Neither does he state that, for this reason, the Sabinians opted for one criterion and the Proculians for another, so, the legal sources do not support this theory.

More recently, Tafaro has maintained that, in the republican era, male puberty did not begin at the age of fourteen; in fact, the sources mention other ages. At the end of the Republic, under Greek influence, the idea arose that there was a relation between the development of the state, the city of Rome, and of its citizens and that the number seven played a significant and magical role in this. The Proculian view that the criterion for male puberty had to be established at the age of fourteen was adopted because fourteen was a multiple of seven. At this age, a boy was both physically and mentally an adult. Gaius’ text shows that this opinion provoked reactions from other jurists, such as the Sabinians.

In my view, Tafaro’s theory is incorrect. According to Tafaro, the Proculians believed that a male adolescent became *pubes* at the age of fourteen, i.e., a multiple of the magical number seven, but what about girls, who reached puberty at the age of twelve? Furthermore, Tafaro paid a great deal of attention to the magical role attributed to the number seven with which he explains the Proculian view. However, he fails to give an adequate explanation for the Sabinian opinion that male puberty sets in with sexual maturity.

A more convincing theory that might explain the controversy between the Sabinians and the Proculians has been developed by Tellegen-Couperus. In her view, the controversy regarding male puberty concerned ‘une question de droit pratique’ and did not originate from legal theory. At the beginning of the Principate, there was not an unambiguous regulation determining the criterion for the beginning of male puberty. The first person to give advice on this matter, according to Tellegen-Couperus, was Sabinus: a male reached puberty the moment

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121 E.g., Gell., *Noct. Att.*, 10.28.1-2; Liv., 22.57.9; and Ulp., D. 3.1.1.3.
123 According to TAFARO (1988), p. 106, the age for female puberty was a few years lower than that for male puberty in order to meet with the desire of boys to marry girls whose character could still be moulded.
he was sexually mature. Cassius, who was invested by the emperor with the *ius respondendi*, held the same view, whereas Proculus recommended that age should be the criterion for puberty. Since both Cassius and Proculus were invested with the *ius respondendi*, their legal advice was binding on the judge and, thus, a controversy arose.

4. **The Locus a Similitudine and the Locus a Differentia in Gai., 1.196**

As stated above, the following legal question gave rise to the controversy: ‘What criterion applies to determine when a male adolescent reaches puberty and, as a result, is released from tutelage?’ or, to put it differently, ‘What is the definition of male *pubertas*?’ In other words, the central question (*quaestio*) of the conflict involves a matter of *definitio*.

In this part, it will be argued that the Sabinians and Proculians made use of *topoi* to form their opinion on the matter and to construct a pertinent definition. In *Top.*, 5.26-6.29, Cicero described several methods to define a term. The Proculians as well as the Sabinians may have built up the definition of male puberty by the method to define a term mentioned in *Cic.*, *Top.*, 6.29. First, the Proculian opinion will be discussed and then the Sabinian one.

4.1 **The Proculian View**

The Proculians may have defined male puberty as follows: ‘Male *pubertas* is a phase in a human’s life that sets in when a certain age, i.e., the age of fourteen, is reached’. In the third part of his *Topica*, Cicero (*Top.*, 23.87-88) enumerates eight *topoi* that are particularly suitable for a matter of *definitio*: the *locus a definitione, a similitudine, a differentia, a consequentibus, ab antecedentibus, a repugnantibus, a causis*, and *ab effectis*.

The Proculians arrived at their definition of male puberty by using an argument *a similitudine* and, more specifically, by using an argument by analogy. According to Quintilian, analogy is part of the *genus* ‘similarity’. The relevant text is *Quint.*, *Inst. Or.*, 5.11.34:
Some have made a distinction between analogy and similarity, but we think that it comes under the genus (of the latter). For ‘just as one is to ten, so ten is to a hundred’ certainly is similarity, so too ‘a bad citizen is like an enemy’.

The Proculians emphasised the similarity between the beginning of the puberty of a female and that of a male adolescent. Since the puberty of girls was determined by age, the Proculians maintained that the criterion for male puberty also had to be age.

The Proculian argument can now be reconstructed as follows:
- Since girls and boys are both humans, and the criterion for determining the beginning of a girl’s puberty is age,
- the same criterion is to be applied to determine the beginning of male puberty.
- X has reached a certain age (i.e., the age of fourteen).
- Therefore, X has reached puberty.

4.2 The Sabinian View

The Sabinians, on the other hand, gave another definition of male puberty: ‘Male puberty is the stage in a human’s life that sets in when the man becomes sexually mature.’ The Sabinians made use of the _locus a differentia_ to support their view that the criterion for the onset of male puberty was not age, but sexual maturity. They may have underlined the difference between a female and a male adolescent, in general, and between the beginning of female and male puberty, in particular. Indeed, female adolescents became physically mature at an earlier stage than male adolescents. Furthermore, the analogy as applied by the Proculians did not fully apply. Whereas female puberty began at the age of twelve, male puberty did not begin until the age of fourteen. In this way, the Sabinians invalidated the criterion suggested by the Proculians. However, it is not known what argument the Sabinians used to support their view that sexual maturity was the criterion for the beginning of male puberty.

125 Regarding the _locus a differentia_, see Cic., _Top._, 3.16; 11.46.
CHAPTER I

A weakness in the Sabinian view is that eunuchs could never reach puberty because they were unable to meet the criterion of sexual maturity. It is possible that the Proculians, in their turn, pinpointed this deficiency. The controversy in question is therefore a typical example of a difference of opinion that could be contested by either side.

The Sabinian argumentation can now partly be reconstructed.

- Although girls and boys are both humans, there is a difference between the beginning of female and male puberty.
- Therefore, the criterion for determining the beginning of female puberty – age – should not be applied to male puberty.
- X is a male adolescent.
- Therefore, the criterion of age should not be used to determine the beginning of the pubertas of X.

5. The Decision on the Controversy

There are some indications that the decision of (L. Iavolenus) Priscus was not merely a new dissenting opinion, but may have put an end to the school controversy about male puberty in the 2nd century AD (see infra). The opinion of (L. Iavolenus) Priscus may have persisted until Justinian decided that male puberty began at the age of fourteen. Justinian’s decision was recorded in a constitution of 529. The relevant text is C. 5.60.3:


Emperor Justinian to Mena, Praetorian Prefect. Abolishing the indecent observation to examine the puberty of males, we order: just as females are considered in all circumstances to have becomes pubes after completing their twelfth year, so, likewise, males are held to be pubes after exceeding the age of
Justinian’s decision to support the Proculian opinion was motivated by two factors, the first being (Christian) chastity. The examination of the body of a male to find out – case by case – whether he was sexually mature was held to be dishonourable. In the second place, Justinian made his decision by analogy with the view about female puberty. The examination of the body of a female had been prohibited at a much earlier date. Since females were considered to have reached puberty at the age of twelve, male puberty should also be determined by the criterion of age.

The *Institutiones* of Justinian confirm that the Proculian opinion prevailed. The relevant text, i.e., *Inst.*, 1.22.*pr*, is found under the title ‘Quibus modis tutela finitur’:\(^{126}\)

Pupilli pupillaeque cum puberes esse coeperint, tutela liberantur. Pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitu corporis in masculis aestimari volebant. Nostra autem maiestas dignum esse castitate temporum nostrorum bene *putavit*, quod in feminis et antiquis impudicum esse visum est, id est inspectionem habitudinis corporis, hoc etiam in masculos extendere: et ideo sancta constitutione promulgata pubertatem in masculis post quartum decimum annum completum ilico initium accipere disposuimus, antiquitatis normam in femininis personis bene positam suo ordine relinquentes, ut post duodecimum annum completum viripotentes esse credantur.

Male and female pupils are released from tutelage when they reach puberty. In the case of males, the *veteres* wanted puberty to be determined not only by age, but also by physical development. However, our sovereign has rightly deemed that it is proper for the chastity of our times that what was held by the ancients to be impudent for females, i.e., the inspection of their physical development, should also be extended to males. And, therefore, we have determined by promulgating a solemn constitution that puberty for males begins immediately after the completion

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of the fourteenth year, leaving intact the well considered rule for females, i.e., that they are considered marriageable after the completion of their twelfth year.

Again, in the *Institutiones* of Justinian, the decision of Justinian is motivated by two factors: first, by chastity and, second, by means of the analogy between male and female puberty. The text under consideration refers to the constitution of Justinian (C. 5.60.3) in which the Emperor had decreed that male puberty should begin at the age of fourteen: ‘And, therefore, we have determined by promulgating a solemn constitution …’ (‘Et ideo sancta constitutione promulgata … disposuimus’).

More than fifty years ago, Schwarz suggested that the so-called third opinion had put an end to the school controversy in the 2nd century AD. He mentioned the following arguments in support of his view. First, it would have been peculiar if such an important legal problem about the beginning of male puberty, which initiated legal capacity and ended tutelage, was left unsolved for centuries. Second, an examination of the Justinian sources demonstrates that these texts do not mention an ongoing controversy and neither indicate that Justinian intended to solve it. The constitution of Justinian (C.5.60.3) merely mentions the abolition of the corporeal examination of a male’s body because such an action was inappropriate. The criterion for male puberty was age by analogy with women, who became *pubes* at the age of twelve. Henceforth, a male would become *pubes* at the age of fourteen without the need for any physical examination (C. 5.60.3: ‘Indagatione corporis inhonesta cessante’). The text allows only one interpretation: Until 529, the investigation of the body had been one of two methods for determining sexual maturity and puberty. Moreover, the *Institutiones* of Justinian (*Inst.*, 1.22.*pr*) refer to an established point of view: in the case of males, the *veteres* wanted puberty to be determined not only by age, but also by physical development.

The opinion of the *veteres* probably refers to the opinion of L. Iavolenus Priscus, who required that either one of the two criteria had to be fulfilled. The arguments of Schwarz are convincing: the so-called third opinion has been authoritative until Justinian decided otherwise in his constitution. Whereas, according to Schwarz, the identification of Priscus is

127 SCHWARZ (1952), pp. 345-387.
128 BAVIERA (1898), pp. 46-47, in particular, emphasised the importance of determining puberty.
129 ‘Pubertatem autem veteres quidem non solum ex annis, sed etiam ex habitu corporis in masculis aestimari volebant.’ THOMAS (1975), p. 55, however, did not translate the word *etiam*: ‘Puberty, however, the ancients sought to determine not only by age but, in the case of males, by physical development.’
to be left undecided, I have argued that the third opinion was held by L. Iavolenus Priscus. An additional argument in support of the view that the school controversy was already brought to an end in the 2nd century AD, is that L. Iavolenus Priscus probably held the *ius respondendi* and, thus, had the authority to end the controversy.
II. **RES MANCIPI**

1. Gai., 2.15: Text and Controversy

But when we say that these animals that are usually domesticated are *mancipi*, ... they think that they are *mancipi* immediately when they are born. But Nerva, Proculus, and the other authorities of the opposing school think that they are not *mancipi*, unless they have been domesticated. And if they cannot be domesticated because of excessive wildness, then they are considered to become *mancipi* when they have reached the age at which they are usually domesticated.

In the beginning of the text, there are two important lacunae. They are separated by two more or less legible words, namely *mancipi esse*. Several suggestions have been made to complete these lacunae. In the context of this study, it is not relevant to discuss every suggestion made. Only the integration proposed by Krüger will be cited, because it has been accepted by the majority of the editors:

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130 According to the calculation of M. DAVID - H.L.W. NELSON, *Gai Institutionum. Kommentar, II*, Leiden 1960, pp. 243-244, the two lacunae consist of 23 and 66 letters, respectively.

131 An enumeration of the suggestions by Krüger, Huschke, Kniep, Bizoukides, and David and Nelson has been made by G. NICOSIA, *Il testo di Gai. 2.15 e la sua integrazione*, *Labeo* 14 (1968), pp. 171-178. NICOSIA (1968), pp. 178-186, ends up by making a suggestion of his own.

Sed quod diximus <ea animalia quae domari solent> mancipi esse, <quomodo intellegendum sit, quaeritur, quia non statim ut nata sunt domantur. Et nostrae quidem scholae auctores> statim ut nata sunt mancipi esse putant[ur].

But where we have said that those animals, that are usually domesticated, are mancipi, it is disputed how we have to understand this because they are not domesticated immediately when they are born. And the authorities of our school consider them to be mancipi immediately when they are born.

Even though the text contains considerable lacunae, the part that has come down to us suffices to reconstruct the difference of opinion between the Sabinians and the Proculians. However, too many letters are missing to provide a correct emendation with any degree of certainty. To avoid misinterpretations, only the apographum, as cited by Studemund, will be used.

The text in question is situated in the second book of Gaius’ Institutiones. In this book (as well as in the third book), Gaius covers things or res. These are either privately owned (res in nostro patrimonio) or regarded as outside private ownership (res extra nostrum patrimonium). Next, Gaius makes a distinction between two main kinds of things: the res divini iuris and the res humani iuris. While the former (res sacrae, res religiosae, and res sanctae) are subject to divine law, the latter (res publicae and res privatae) are subject to human law. The res divini iuris together with the res publicae are outside private ownership (and, therefore, res extra nostrum patrimonium). The res privatae, on the other hand, belong to an individual and are qualified as res in nostro patrimonio. Another way to divide res is into res corporales and res incorporales, i.e., into tangible and intangible things. The res

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133 P. KRÜGER, Gai Institutiones ad codicis Veronensis apographum Studemundianum, in: P. KRÜGER (ed.), Collectio librorum iuris antejustiniani, I, 7th edn., Berlin 1923, p. 48. Against Krüger’s first lacuna, NICOSIA (1968), pp. 171-172, raises two arguments: 1) The integration consists of 26 letters, while the calculation by David and Nelson points out there were only 23; 2) Krüger did not take into account the letters os that Studemund reads in the middle of the lacuna. The second lacuna has been criticized by Nicosia as well: 1) The suggestion is much longer than the space available (92 letters against 66 of the lacuna); 2) Krüger ignores the fact that, according to Studemund, the first letter of the lacuna is an n.

135 Gai., 2.1.
136 Gai., 2.2.
137 Gai., 2.3-9.
138 Gai., 2.10.
139 Gai., 2.11.
incorporales include inheritance, obligations, usufruct, and servitudes.\textsuperscript{140} Although Gai., 2.14\textsuperscript{a} is lacunary, Gaius probably states in this text that res can also be divided into res mancipi and res nec mancipi. Elsewhere, Gaius includes land and houses on Italic soil, slaves, beasts of draught and burden, and rustic praedial servitudes in the category of res mancipi.\textsuperscript{141}

In the sources, the beasts of draught and burden are indicated as ‘animalia’ (or ‘quadrupedes’, or ‘pecora’ quae collo dorsove domantur’ (animals, quadrupeds, or cattle that are domesticated for draught or burden purposes).\textsuperscript{142} Gaius and Ulpian count boves, equi, muli, and asini (oxen, horses, mules, and asses) among these animals.\textsuperscript{143} The following legal question is asked in Gai., 2.15: ‘From which particular moment do beasts of draught and burden belong to the category of res mancipi, at birth or after domestication?’ This question gave rise to a controversy between the Sabinians and the Proculians.\textsuperscript{144} While the former took the view that

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\textsuperscript{140} Gai., 2.12-14.
\textsuperscript{141} See Gai., 1.120 (slaves; animals that are mancipi; Italic lands with or without buildings) and Gai., 2.17 (rustic praedial servitudes).
\textsuperscript{142} - Gai., 2.16: ‘At ferae bestiae nec mancipi sunt, velut ursi leones, item ea animalia quae fere bestiarum numero sunt, velut elephanti et cameli. Et ideo ad rem non pertinet, quod haec animalia etiam collo dorsose domari solent: nam ne nomen quidem eorum animalium illo tempore fuit, quo constituebatur quasdam res mancipi esse, quasdam nec mancipi.’ ('But wild beasts such as bears and lions are nec mancipi, as are those animals that are considered to be wild beasts, such as elephants and camels. Thus, it does not matter that the latter are usually domesticated for draught or burden purposes, for their very names were unknown at the time when it was determined that some things were mancipi and others nec mancipi').

- Ulp., Ep., 19.1: ‘Ommes res aut mancipi sunt aut nec mancipi. Mancipi res sunt praedia in Italico solo, ...; item servi et quadrupedes, quae dorso collovo domantur, velut boves, mali, equi, asini.’ ('All things are either mancipi or nec mancipi. Mancipi are things like lands on Italic soil, ...; likewise, slaves and quadrupeds that are domesticated for draught or burden purposes, for example, oxen, mules, horses, asses').

- Fr. Vat. 259: ‘Apparuit, servos autem et pecora, quae colle vel dorso domarentur, usu non capta.’ ('But it appeared that the slaves and the cattle that were domesticated for draught or burden purposes could not be obtained through usucapia').

\textsuperscript{143} Gai., 1.120; Ulp., Ep., 19.1.
beasts of draught and burden were *mancipi* from the day they were born, the latter considered them to be *mancipi* from the moment they were domesticated. However, the criterion of domestication could not be applied to those animals which proved to be too wild to be domesticated. Therefore, the Proculians held that these animals were *mancipi* when they reached the usual age for domestication.

In the early Roman Republic, it was important to know whether an animal belonged to the category of *res mancipi* or *res nec mancipi*, since there was a difference in the requirements for the transfer of ownership. According to the *ius civile*, *res mancipi* had to be transferred in a formal and solemn way by means of *mancipatio* or *in iure cessio*, whereas *res nec mancipi* could be transferred by mere conveyance (i.e., by *traditio*) or by *in iure cessio*. The distinction between *res mancipi* and *res nec mancipi*, however, became less relevant in the late Republic, because the praetor granted praetorian ownership to the transferee when *res mancipi* had been delivered by *traditio*. As a consequence, the importance of the category to which a thing belonged (*res mancipi* or *res nec mancipi*) diminished considerably. This puts the discussion between the Sabinians and the Proculians, as described in Gai., 2.15, into historical perspective.

### 2. The Controversy in Gai., 2.15: Modern Theories

Most authors explain this controversy by means of the antithesis conservative versus progressive. In the 19th century, scholars presumed that, in ancient Rome, beasts of draught and burden were considered *res mancipi* from birth and, therefore, they qualified the Sabinian school as traditional. The Proculians, on the contrary, were qualified as progressive, for they introduced an innovation, namely the exclusion of undomesticated beasts of draught and burden from the category of *res mancipi*.  

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145 An overview of the different theories with bibliography can be found in NICOSIA (1967), pp. 45-91. Much briefer is the outline given in FALCHI (1981), pp. 101-109.

Almost fifty years ago, Nicosia joined in with this theory. He held that the inventory of the things falling into the category of *res mancipi* had been fixed in ancient times and that this category had remained unchanged ever since, any extension or enlargement of the category having been avoided. Since *res mancipi* had to be transferred by means of a *mancipatio*, the circulation of property was hindered. Sensitive to the needs of a changing society, the Proculians wanted to reduce the number of animals belonging to the *res mancipi*. Therefore, they excluded the beasts of draught and burden which were not yet domesticated from the category of *res mancipi*. Nicosia also explains why the Proculians particularly decided to exclude young animals. Whereas the number of bred animals was limited on traditional family farms, the situation changed when the Roman agricultural economy was industrialized. Henceforth, the breeding of animals occurred on a large scale and large herds of young animals were destined for sale or slaughter. The necessity to transfer every single animal – one by one – by means of a *mancipatio* seemed absurd and counterproductive to the Proculians. Therefore, they decided that young and untamed beasts of draught and burden did not yet belong to the category of *res mancipi*. To make their innovation acceptable, they made a concession by considering those animals which could not be domesticated because of their ferocity, to become *res mancipi* when they reached the age of domestication. The Sabinians, however, opposed this innovation and defended the ancient composition and closed character of the category of *res mancipi*.

Indeed, in the late Republic and the early Principate, *mancipatio* had become an obstacle for trade. Rome had conquered all of Italy and was building an empire. Apart from agriculture, trade and industry were also becoming important. In that society, *mancipatio* hindered the circulation of goods and trade. Yet, a tendency to avoid any enlargement of the category of *res mancipi* does not necessarily imply that the Roman jurists wanted to reduce the category of *res mancipi*. If the Proculians did want to reduce the category, the question may be asked why they only reduced the class of beasts of draught and burden and not, for instance, also the class of slaves. What is more, the praetor had already made it possible to transfer *res mancipi* by a


148 For example, Nicosia refers to Gai., 2.16, in which it is said that camels and elephants, although usually domesticated, were not reckoned among the *res mancipi*, because the Romans did not know of these animals when the distinction between *res mancipi* and *res nec mancipi* was made. Since the Romans attempted to avoid any extension of the list of *res mancipi*, these animals were qualified as *res nec mancipi*.
simple *traditio* by granting praetorian ownership to the transferee, so, at the time when Nerva and Proculus adopted their view, the problem had already been dealt with.\(^{149}\)

Scholars like Karlowa, Bonfante, Wlassak, Gallo,\(^{150}\) and Falchi, also consider the conservative/progressive antithesis to be the key to the controversy in Gai., 2.15.\(^{151}\) They, however, explain the relation between the two schools the other way around: the Proculians are considered conservative, the Sabinians progressive. These authors assert that, in early history, only domesticated beasts of draught and burden – or at least those animals which had reached the age at which they were normally domesticated – were *res mancipi*. Later on, the Sabinians extended this rule by reckoning among the *res mancipi* also the young and untamed beasts of draught and burden.

In support of this view, these scholars have brought forward several arguments. A first argument is provided by Karlowa as well as by Wlassak.\(^{152}\) To prove that the Sabinian view was progressive, both scholars underline its simplicity and clarity. The traditional practice, defended by the Proculians, required for each animal a separate examination to determine whether it was (or was not yet) domesticated or could (not) be domesticated. To avoid such ambiguities, the Sabinians proposed an innovation: every animal, from the day it was born, had to be either assigned to the category of *res mancipi* or to the category of *res nec mancipi*. This opinion was a manifestation of their legal-technical competence.

This argument can be invalidated, because simplicity is not necessarily an indication of innovation. On the contrary, it can also be an indication of primitive thinking. Often, things tend to get more complicated and less transparent in the course of time.

\(^{149}\) GUARINO (1968), p. 228, as well refuted the arguments adduced by Nicosia in support of his view that the Proculian opinion was progressive and innovative. According to Guarino, the controversy was purely theoretical and ‘una pure e semplice divergenza interpretativa ... nei confronti di un principio tradizionale ambigamente espresso.’ According to the ancient civil rule, ‘animalia, quae collo dorsove domantur’ were included in the category of *res mancipi*. The Sabinians, on the one hand, gave an abstract interpretation of the verb *domari* and held that animals which could be domesticated were part of the category of ‘animalia quae collo dorsove domantur’. The Proculians, on the other hand, held that only those animals which were already domesticated were part of this category.

\(^{150}\) GALLO (1958), pp. 40-59, blindly followed his predecessors, so I will not discuss his theory.


\(^{152}\) KARLOWA (1885), pp. 665-666; WLASAK (1933), p. 65.
A second argument was put forward by Wlassak. He pointed out that the general and currently used designation for animals falling into the category of *res mancipi* was: ‘quadrupedes’ or ‘animalia’ or ‘pecora, quae collo dorsove domantur’ (see Ulp., *Ep.*, 19.1; *Fr. Vat.* 259; Gai., 2.16). According to Wlassak, this expression could not have been introduced by the Sabinians, because they did not hold domestication but birth as the criterion for these animals to become *res mancipi*. Wlassak supposes that the general expression and the corresponding opinion was introduced by some unknown jurists of the Republic and were copied by Nerva and Proculus at a later stage.

Wlassak’s argument would have been valid if the indication in the sources had been ‘animalia collo dorsove domiti’, i.e., animals that are domesticated for draught and burden purposes. However, the sources do not mention animals that are already tamed (‘Animalia collo dorsove domiti’), but that may be tamed: ‘Animalia collo dorsove domantur’ or ‘domari solent’.

A third argument is given by Bonfante, when he refers to some texts by Varro. According to Bonfante, the Proculian view was a residue of the ancient system and the ancient idea that only domesticated beasts of draught and burden were held to be *res mancipi*. In his treatise *De re rustica*, Varro speaks of *traditio* (instead of *mancipatio*) for the transfer of ownership of oxen, horses, mules, and asses. Bofante argues that these animals were not yet domesticated and, therefore, they did not yet belong to the category of *res mancipi*. As a consequence, they could be transferred by a mere *traditio*. According to Bonfante, these texts probably demonstrate that, in the time of Varro (2nd and 1st centuries BC), the traditional view, which would later be adopted by the Proculians, still prevailed.

But if Bonfante is right, then why did not Varro make it clear that he was only dealing with young and untamed animals? This limitation, proposed by Bonfante, is nowhere noted by Varro and, therefore, not probable. In my view, the Varronian texts prove that the formal

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153 Wlassak (1933), pp. 62-64.
154 Wlassak (1933), p. 64, equates the indication ‘collo dorsove domantur’ that is found in the sources (Fr. Vat. 259; Ulp., Ep., 19.1; Gai., 2.16) with ‘collo dorsove domiti’. However, the latter is nowhere stated in the sources.
155 Fr. Vat., 259; Ulp., Ep., 19.1; Gai., 2.16.
157 Varro, *De re rust.*, 2.6.3 (asini), 2.7.6 (equi, bovi, asini), 2.8.3 (multi).
CHAPTER II

mancipatio had already lost some of its importance in the 2nd and 1st centuries BC. By the 3rd century AD, mancipatio would have disappeared completely.

Finally, Falchi’s theory about this controversy has to be mentioned. In his view, ab antiquo, oxen, horses, mules, and asses did not fall into the category of res mancipi unless they had been domesticated. It was possible that animals that had the potential of being domesticated were not tamed because of excessive wildness. In the archaic period, these animals were probably not held to be res mancipi. According to Falchi, the authorities of the two schools aspired to create a general and an abstract category of animalia mancipi. By analogy with the archaic view, the Proculians required that such animals had to reach the age of domestication in order to become res mancipi. The Sabinians, on the other hand, formulated a new and autonomous view, holding that such animals were res mancipi from birth. Finally, Falchi has given the motivation for both opinions. In his view, the authorities of the two schools thought in terms of the following fundamental orientations when creating an abstract category of animalia mancipi. The Proculians held that domestication was a turning point in the life of the animals. Since the new and domesticated animal was radically different from the old animal, only the new one met with the legal requirement to fall into the category of res mancipi. According to the Sabinians, on the other hand, the nature and fundamental characteristics of animals remained the same throughout their lives and domestication only brought to the fore certain predispositions that had already been there from birth. Since domestication did not change the nature of an animal, the Sabinians held that the mere potential of domestication sufficed for the animals to qualify as res mancipi and that the animals in question were res mancipi from birth.

Falchi’s theory does not find support in the sources. Nowhere in the sources is it stated that, in ancient Rome, the criterion for oxen, horses, mules, and asses to fall into the category of res mancipi was domestication, nor that, in the archaic period, animals which could not be domesticated because of their excessive wildness were not res mancipi. According to Falchi, moreover, the Proculians held the view that animals became res mancipi when they had reached the age of domestication. However, according to Gai., 2.15, the Proculians only used this criterion when animals could not be domesticated because of their excessive wildness; they did not use it as a general criterion for all beasts of draught and burden. Another point of

criticism may be raised against Falchi’s theory. In his view, the Proculians held that
domestication changed the nature of animals completely. Yet, according to Falchi, the
Proculians held that all beasts of draught and burden became *res mancipi* when they had
reached the age of domestication, even if they had not been domesticated. This contradiction
weakens the Falchi’s theory.

3. **The Locus ex Notatione and the Locus a Genere in Gai., 2.15**

As stated above, the following legal problem gave rise to a controversy between the Sabinians
and the Proculians. If an animal of draught and burden, such as an ox, a horse, a mule, or an
ass, had not yet been domesticated, the question arose whether it fell into the category of *res
mancipi* and, hence, whether ownership of such an animal had to be transferred by means of a
formal *mancipatio* (*or in iure cessio*). The fact that the Sabinians and Proculians gave different
answers to the question at which particular moment beasts of draught and burden became
*mancipi* is remarkable. In practice, the distinction between *res mancipi* and *res nec mancipi*
had lost much of its importance, because, from the late Republic onwards, the praetor granted
ownership to the transferee when *res mancipi* were delivered by *traditio*. Therefore, it may be
assumed that the controversy involved a mere theoretical problem.

Nonetheless, the Sabinian and Proculian argumentation reveals the influence of rhetoric and
topoi. The central question of the conflict is whether an untamed beast of draught and burden
falls under the definition of the term *animalia mancipi* and, therefore, the controversy turns on
definition.

3.1 **The Proculian View**

The Proculians argued that an untamed beast of draught and burden, e.g., an untamed foal, did
not fall into the category of *res mancipi*. In their view, beasts of draught and burden were not
*mancipi* unless they had been domesticated (Gai., 2.15: ‘Nerva vero et Proculus et ceteri
diversae scholae auctores non aliter ea mancipi esse putant, quam si domita sunt’). What kind of argumentation did the Proculians use in support of this opinion?

I suggest that the Proculians built up their argumentation by the locus a definitione and, more precisely, by the locus ex notatione or, in Greek terminology, the topos of etymology.\textsuperscript{159} There are different ways to define a term and, according to Quintilian, etymology is one of them.\textsuperscript{160} The Proculians needed to define the term \textit{animalia mancipi} and determine whether an untamed foal met this definition. They may have formulated the following definition: ‘\textit{Animilia mancipi} are animals of draught and burden (namely, oxen, horses, mules, and asses) that become \textit{mancipi} after domestication’. The Proculians may have argued that the requirement of domestication had to be added to this definition, because the term \textit{mancipi} is derived from \textit{manu capere}, which means ‘to take by the hand’. If an animal had not yet been domesticated, it could not be taken by the hand and, hence, it could not be delivered by means of a \textit{mancipatio}. A young and untamed foal did not fall under the definition of \textit{animalia mancipi} and, therefore, did not belong to the category of \textit{res mancipi}. Since the Proculians developed this argument out of the meaning of the word \textit{mancipi}, they obviously made use of the \textit{locus ex notatione}.

The argumentation as developed by the Proculians can now be reconstructed.

- Since the word \textit{mancipi} is derived from \textit{manu capere}, which means ‘to take by the hand’,
- the definition of the term \textit{animalia mancipi} has to contain the criterion of domestication as a prerequisite.
- The foal is not domesticated.
- Therefore, it does not fall under the definition of \textit{animalia mancipi}.

\textbf{3.2 The Sabinian View}

The Sabinians, on the other hand, regarded beasts of draught and burden as \textit{mancipi} immediately when they were born (Gai., 2.15: ‘Statim ut nata sunt mancipi esse putant’).

\textsuperscript{159} Regarding the \textit{locus ex notatione}, see Cic., \textit{Top.}, 2.10; 8.35-37.
\textsuperscript{160} Quint., \textit{Inst. Or.}, 5.10.55.
Hence, a young and untamed animal belonged to the category of *res mancipi* and needed to be transferred by means of a formal delivery, i.e., by means of a *mancipatio* or *in iure cessio*. What kind of argumentation did the Sabinians use to support their opinion?

In my view, the Sabinians derived their argumentation from the *locus a genere*. In order to demonstrate this, I will discuss what Cicero stated about this *topos*. In the first part of his *Topica*, Cicero gave an example of an argument that can be found under this *topos*. The relevant text is Cic., *Top.*, 3.13:

> A genere sic ducitur: Quoniam argentum omne mulieri legatum est, non potest ea pecunia quae numerata domi relicta est non esse legata; forma enim a genere, quoad suum nomen retinet, nunquam seiiungitur, numerata autem pecunia nomen argenti retinet; legata igitur videtur.

From *genus* an argument is drawn like this: Since all the silver is bequeathed to the wife, it cannot be the case that the money that was left in the house in form of coins is not bequeathed. For the *species* is never seperated from the *genus*, as long as it retains its name. The coined money retains the name ‘silver’; thus, it is held to have been bequeathed.

In this text, Cicero described the case of a man, who had bequeathed all his silver to his wife. The question arose whether the coins that were left in the house were part of this legacy. An argument in support of the view that these coins were part of the legacy can be found under the *locus a genere*. Since coined money was a *species* of the *genus* of silver and retained the name of silver, it was part of the legacy.

The Sabinians may have used a similar reasoning in support of their view that beasts of draught and burden were *mancipi* from birth. This means that not only domesticated animals were part of the category of *res mancipi*, but also young and untamed animals, e.g., untamed foals. The Sabinians may have argued that the *species* (e.g., an untamed foal) is never seperated from the *genus* (i.e., horse), as long as it keeps its proper name. Since the untamed foal keeps the name ‘horse’, the Sabinians held that it was also part of the category of *res mancipi*. 
CHAPTER II

The argumentation in support of the Sabinian view may be reconstructed as follows:

- Since an untamed beast of draught and burden is a *species* of the *genus* of beasts of draught and burden,
- and since beasts of draught and burden are *res mancipi*,
- also untamed beast of draught and burden belong to the category of *res mancipi*.
- An untamed foal is a *species* of the *genus* of horse.
- Therefore, an untamed foal falls into the category of *res mancipi*. 
III. SPECIFICATIO

1. Gai., 2.79: Text and Controversy

In aliis quoque speciebus naturalis ratio requiritur. Proinde si ex uvis <aut olivis aut spicis> meis vinum aut oleum aut frumentum feceris, quae sit utrum meum sit id vinum aut oleum aut frumentum an tuum. Item si ex auro aut argento meo vas aliquod feceris vel ex tabulis meis naevum aut armarium aut subsellium fabricaveris, item si ex lana mea vestimentum feceris vel si ex vino et melle meo mulsum feceris sive ex medicamentis meis emplastrum vel collyrium feceris, <quae sit utrum meum ex meo effeceris,> an meum. Quidam materiam et substantiam spectandam esse putant, id est ut cuius materia sit, illius et res, quae facta sit, videatur esse; idque maxime placuit Sabino et Cassio. Alii vero eius rem esse putant, qui fecerit; idque maxime diversae scholae auctoriis visum est; sed eum quoque cuius materia et substantia fuerit, furti adversus eum, qui subripuerit habere actionem; nec minus adversus eundem conditionem ei competere, quia extinctae res, licet vindicari non possint, condici tamen furibus et quibusdam aliis possunt.

On a change of species also,\(^\text{161}\) we have recourse to naturalis ratio. If, therefore, you have made wine, or oil, or grain from my grapes, olives, or ears of corn, the question is asked whether this wine, oil, or grain is mine or yours. In like manner, if you have made some vase from my gold or silver or if you have constructed a boat, or a cupboard, or a bench from my planks. In like manner, if you have made a garment from my wool or if you have made mead from my wine and honey or if you have made a plaster or an ointment from my drugs, the question is asked whether what you have thus made from my material is yours or is mine. Some think that the material and the substance have to be taken into consideration, that is, the manufactured article is considered to belong to the owner of the material. And this

opinion is above all preferred by Sabinus and Cassius. Others, however, think that the object belongs to him who created it; this is the view held above all by the authorities of the other school. However, they also think that he who owned the material and the substance has the *actio furti* against him who stole it and also a *condictio* against the same person because, although it is no longer possible to bring a *vindicatio* when things have perished, they may be the object of a *condictio* against thieves and certain other possessors.

The controversy about *specificatio* (Gai., 2.79) is found in section 2.1-96 of Gaius’ *Institutiones* and concerns property law. In 2.66-79, Gaius discusses the different means of acquisition of ownership based upon *naturalis ratio*: after mentioning *occupatio* (2.66-69) and *accessio* (2.70-78), he mentions a third case.

In this text, Gaius provides us with a series of concrete examples which are nowadays covered by the term *specificatio*. Although this term is mediaeval Latin, it will be used for the sake

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162 According to M.J. SCHERMAIER, *Materia. Beiträge zur Frage der Naturphilosophie im klassischen römischen Recht*, Wien-Köln-Weimar 1992, p. 195, Gaius’ assertion that the *dominus materiae* could no longer vindicate his perished materials, but could be indemnified for his materials by means of a *condictio* did not only reflect the opinion of the Proculians. Schermaier held that Gaius articulated this view on his own behalf and, at the same time, on behalf of both the Sabinian and the Proculian school. However, Schermaier’s opinion is incorrect. Gaius’ assertion that, in case of theft, the *dominus materiae* has an *actio furti* or a *condictio ex causa furtiva* against the thief only represents the opinion of the Proculians, for the words ‘eum … habere actionem’ and ‘condictionem ei competere’ are instances of an *accusativus cum infinitivo* and depend on the word ‘putant’ in the principal sentence.

of convenience. The first example has become classic. When somebody (A) makes wine for himself by processing the grapes of somebody else (B) without mutual agreement, a problem of ownership arises: ‘Does the owner of the grapes (B) or the maker of the wine (A) become the owner of the wine?’ The owner of the grapes will claim ownership of the wine from the maker who is in possession; he will do so by means of a *rei vindicatio*.

Apparently, the Sabinians and the Proculians took opposing positions. Whereas the former argued that B (the owner of the grapes) acquired the ownership of the wine, the latter attributed the ownership of the wine to A (the maker). The Proculians acknowledged that, if the grapes had been stolen, B could bring an *actio furti* against the thief. Because the grapes had perished (‘quia extinctae res’), it was not possible for B to claim them from any possessor through a *rei vindicatio*. Yet, he could be indemnified by means of a *condictio* (*ex causa furtiva*).

In his *Institutiones*, Gaius does not explicitly mention the arguments used by the Sabinians and the Proculians, but they have come down to us via the Digest in the second book of the *Res cottidianae sive aurea* (Gai., D. 41.1.7.7):

> **GAIUS libro secundo rerum cottidianarum sive aureorum. Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit: veluti si ex auro vel argento vel aere vas aliquod fecero, vel ex tabulis tuis navem aut armarium aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis aut olivis aut spicis tuis vinum vel oleum vel frumentum. Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et Sabinus et Cassius sensorunt, si non**


The term *specificatio* appears for the first time in a student manual of the 12th century, the so-called *Corpus legum sive Brachylogus iuris civilis*. E. BÖCKING, *Corpus legum: sive Brachylogus iuris civilis*, Berlin 1829, p. 36. Gaius uses the words ‘speciem facere’.

In Gai., 2.79, Gaius does refer implicitly to the Sabinian argument: ‘Quidam materiam et substantiam spectandum esse putant’.
possit reverti, verius esse, quod Nervae et Proculo placuit. Ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest: ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt. Videntur tamen mihi recte quidam dixisse non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt: cum enim grana, quae spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam quae est detegit.

GAIUS, book 2, *Res cottaianae sive aurea*. When someone has made for himself something from another’s material, Nerva and Proculus think that the maker owns that thing, because what has been made previously belonged to no one. Sabinus and Cassius rather think that the *naturalis ratio* requires that the person who has been the owner of the material also becomes the owner of what is made from this material, since nothing can be made without the material: if, for example, I make some vase from gold, silver or bronze, or a garment from your wool, or mead from your wine and honey, or a plaster or an ointment from your drugs or wine, oil or grain from your grapes, olives or ears of corn. Nevertheless, there is also a *media sententia* of those who correctly think that, if the thing can be returned to its material, the better view is that propounded by Sabinus and Cassius. If it cannot be returned, Nerva and Proculus are sounder. Thus, for example, a finished vase can be returned to its raw mass of gold or silver or bronze. It is not possible, however, to return wine, oil or grain to grapes and olives and ears of corn. Neither can mead be returned to honey and wine or plasters or ointment to drugs. It seems to me, however, that some have said correctly that there should not be doubted that the grain, shaken from someone’s ears of corn, belongs to him whom the ears of corn have come from. For since the grain, that is contained in the ears of corn, has its own perfect form, the one who has shaken out the ears of corn does not make a new form. But he only uncovers what already exists.

While Gaius only mentions individual and concrete cases to illustrate *specificatio* in his *Institutiones*, the *Res Cottidianae* commence with a description of *specificatio* in general terms: ‘Cum quis ex aliena materia speciem aliquam suo nomine fecerit’. Next, Gaius mentions the view of the Proculians. They favour the maker, ‘quia quod factum est, antea
nullius fuerat’ (because what has been made, previously belonged to no one). This sentence requires some explanation. By the creation of a new thing (e.g., wine), the materials (i.e., the grapes) have perished and can no longer be taken into account. Therefore, the Proculians consider the wine to be a new and autonomous thing without a previous owner (a res nullius) that is acquired by the maker through occupatio.166 According to the Sabinians, on the other hand, it stands to reason (naturalis ratio) that the ownership of the wine is granted to the owner of the grapes, ‘quia sine materia nulla species effici possit’ (since nothing can be made without the material). This means that the Sabinians emphasize the importance of the grapes as a prerequisite for the wine and that they do not consider the grapes to have perished. Because the grapes are still present within the wine, the owner of the grapes is considered to be the owner of the wine. The text of the Res Cottidianae ends with the same casuistic examples as those mentioned in the Institutiones.

Next, the concept of naturalis ratio is discussed.167 According to this text, the Sabinians use an extra argument by referring to the naturalis ratio.168 However, it is probable that the Proculians used the same argument in this connection. The reason for the Proculian view, granting the property of the wine to its maker, was: ‘Quia quod factum est, antea nullius fuerat’. Because the grapes have perished, the wine has become a new thing without previous owner or, in other words, a res nullius. On the basis of the occupatio principle, expressed in Gai., D. 41.1.3.pr, the res nullius becomes the property of the maker, who is the first taker:

‘Quod enim nullius est, id ratione naturali occupanti conceditur.’


167 The naturalis ratio is mentioned three times in the context of this controversy:
1. Gai., 2.79: ‘In aliis quoque speciebus naturalis ratio requiritur.’
2. Gai., D. 41.1.7.7: ‘Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species efficci possit.’
3. Inst., 2.1.25: ‘Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utram is qui fecerit, an ille potius qui materiae dominus fuerit.’

‘Certainly, what belongs to no one, is conceded by *naturalis ratio* to the first taker.’

Thus, the *naturalis ratio* as a ground for *occupatio* also holds the ground for the Proculian view on *specificatio*.\(^{169}\) In the case of *occupatio*, *naturalis ratio* can be defined as ‘in correspondence to the common sense of all men’.\(^{170}\) It is ‘in correspondence to the common sense of all men’ that a person who takes possession of a *res nullius* becomes its owner. Since the opinion of Sabinus and Cassius in favour of the owner of the material is also based on the *naturalis ratio* (see Gai., D. 41.1.7.7), two conflicting opinions are derived from the application of one and the same concept, i.e., *naturalis ratio*. This indicates that, in this respect, there is no fundamental difference between the two schools.

2. The Media Sententia

Let us now turn to the *media sententia*, which is mentioned in Gai., D. 41.1.7.7.\(^{171}\) The central question of the *media sententia* is whether or not the *nova species* can be reduced to its materials. If this is possible, it can be stated that the materials subsist. In this case, the Sabinian view, granting the ownership to the *dominus materiae*, prevails. If, for example, A has made a vase from the gold, silver, or bronze of B, the *media sententia* accords the property of the vase to the *dominus materiae* (B), because the vase can be reduced to its materials. However, when the *nova species* cannot be reduced to its materials, these are considered to have perished. Wine, for example, cannot be reduced to the grapes of which it is made and, therefore, the grapes are considered to have perished.\(^{172}\) In this case, the Proculian view to make the maker owner is followed. The word *recte* in the sentence ‘*Est tamen etiam etiam media*’


\(^{170}\) SOBOTTA (1969), p. 77, defines the *naturalis ratio* as ‘Ausdrucksmittel der natürlichen, menschlichen Einsicht offenstehenden Gegebenheiten.’


\(^{172}\) Apparently, some doubt remained about the ownership of grain, which A has shaken from B’s ears of corn. Because the grain cannot be reduced to its materials, the *media sententia* would grant ownership to A. At the end of Gai., D. 41.1.7.7, however, the remark is made that A did not create a *nova species* presenting an entirely new condition (*non novam speciem facit*), but only revealed the actual material. Therefore, some (quidam) have held that the ownership of the grain belongs to the owner of the ears of corn (B). The author of the *Res Cottidianae* agrees with this point of view.
sententia recte existimantium’ in Gai., D. 41.1.7.7 suggests that the media sententia already prevailed at the time the Res Cottidianae were written.

However, there is no absolute certainty about the author or about the time at which the Res Cottidianae were composed. It is possible that Gaius wrote this work in the 2nd century AD, but the authorship may also be assigned to a pseudo-Gaius, who lived in the post-classical period. Therefore, Gai., D. 41.1.7.7 does not give full evidence that the media sententia was already known in the age of Gaius.

The question when the media sententia arose has been a matter of dispute in modern literature. Whereas some authors take the view that the media sententia was classical, others hold it to be post-classical. According to Nelson, the authorship of the Res Cottidianae has to be assigned to Gaius and the media sententia was already known in the 2nd century AD. He argues that in Ulp., D. 6.1.5.1, a text that goes back to Pomponius, a contemporary of Gaius, an argumentation is articulated that is similar to that of the media sententia. Even though this text concerns a case that is similar to the one in Gai., D. 41.1.7.7, but not exactly the same, the text suggests that the media sententia may have already been known in the time of Pomponius, i.e., in the 2nd century AD. The conclusion of Schermaier, on the other hand,

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175 Ulp., D. 6.1.5.1: Ulpius libro sexto decimo ad edictum. Idem scribit, si ex melle meo, vino tuo factum sit mulsum, quosdam existimasse id quoque communicari: sed puto verius, ut et ipse significat, eius potius esse qui fecit, quoniam suam speciem pristinam non continet. Sed si plumbum cum argento mixtum sit, quia deduci possit, nec communicabitur nec communi dividundo agetur, quia separari potest: agetur autem in rem actio. Ulpius book 16 ad edictum. Again, he (i.e., Pomponius) writes: if mead is made from my honey and your wine, some have thought that this also becomes common property. But I truly think, as Pomponius himself points out, that it rather belongs to the person who made it, because it does not retain its previous form. If, however, lead is mixed with silver, it will not become common property, because it can be detached, nor will there be an actio communi dividundo, because it can be separated. However, an actio in rem will be brought.

176 Both Schermaier (1992), p. 201, and Bretone (1999), p. 90, however, do not find Nelson’s argument convincing. Schermaier underlines the difference between the legal case, as described in Ulp., D. 6.1.5.1, and the case of specificatio in Gai., D. 41.1.7.7. According to Schermaier, Pomponius and Ulpian discuss, in the cited
that the remark about the *media sententia* in Gai., D. 41.1.7.7 is merely a postclassical addition, is groundless.

In the *Institutiones* of Justinian (Inst., 2.1.25), finally, the school controversy is mentioned and the prevalence of the *media sententia* confirmed: ¹⁷⁷

> Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utram is qui fecerit, an ille potius qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel aere vas aliquod fecerit, vel ex alieno vino et melle mulsum miscuerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis navem vel armarium vel subsellium fabricaverit. Et post multas Sabinianorum et Proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse, qui materiae dominus fuerat, si non possit reduci, eum potius intellegi dominum qui fecerit: ut ecce vas conflatum potest ad rudem massam aeris vel argenti vel auri reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest, ac ne mulsum quidem ad vinum et mel resolvi potest. …

When something is made by someone out of another’s material, it is usually asked which of them is the owner according to the *naturalis ratio*: either the person who made it, or rather the person who was owner of the material. Suppose, for example, that someone has made wine or oil or grain from another’s grapes or olives or ears of corn; or has made some vase from another’s gold or silver or bronze; or has prepared mead from another’s wine and honey or has composed a plaster or an ointment from another’s drugs; or has made a garment from another’s wool; or has constructed a boat, a cupboard or a bench from another’s planks. And after the many vacillations of the Sabinians and the Proculians, there prevailed the *media sententia* of those who think that, if this thing can be returned to its material, he

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who was owner of the material is considered owner; but if it cannot be returned, then he is considered owner who made it. A completed vase, for example, can be returned to a raw lump of bronze, silver or gold. However, wine or oil or grain cannot be returned to grapes, and olives, and ears of corn, neither can the mead be separated into wine and honey. …

3. The Controversy in Gai., 2.79: Modern Theories

The most typical interpretation of the controversy about specificatio is the philosophical one. Some Romanists have asserted that the Sabinians were influenced by the Stoa and the Proculians by Aristotle and the Peripatos. Sokolowski was one of the first to support the philosophical interpretation. According to this Romanist, the Proculian view in favour of the maker is influenced by the Peripatetics. These followers of Aristotle take the view that every object consists of material (ὕλη) and form (εἶδος) and that the form is the more essential and superior. If a new thing is created, the form (eidos or – in Latin – the species) is predominant. The material or the hylè is no longer present in the nova species: it is consumed by the latter. Because of the inferiority of the material or hylè and its absorption into the nova species, the Proculians decided to attribute the property of the nova species to the maker. The Sabinians, on the other hand, attributed the ownership of the nova species to the dominus materiae. According to Sokolowski, this opinion may have been influenced by the Stoics. This philosophical movement takes the substance or material to be something concrete and corporeal and calls it ‘das Seiende’ (οὐσία). For the Stoics, it is not the form, but the material that is brought to the fore. While the Peripatetics hold that the hylè disappears together with the creation of the eidos (or the nova species), the Stoics are convinced that the οὐσία subsists. Because the transformation of the external form


179 SOKOLOWSKI (1896), pp. 252-311.
does not influence the true existence of a thing, the Sabinians granted the ownership of the *nova species* to the owner of the material (or substance).

However, the philosophical interpretation of this controversy is not convincing. Although this interpretation may explain the controversy about *specificatio*, it does not apply to the other controversies in Gaius’ *Institutiones*. Moreover, it does not seem plausible that the jurists only used philosophical arguments to solve a legal problem.

The *specificatio* controversy is also explained by means of the conservative/progressive antithesis. Scholars like Betti, Cohen, Balzarini, Lucrezi, and Scacchetti, explain the controversy by means of a political and social criterion and qualify the Sabinian view as traditional and the Proculian view as innovative.\(^\text{180}\) The Sabinian view in support of the *dominus materiae* reflects their intention to secure the right of ownership against any external interferences. The Proculians, on the other hand, took their decision because they took higher stock of the production and the actions of the creator.

This explanation is incorrect, because it does not take into account the arguments as mentioned in Gai., D. 41.1.7.7. In fact, Betti carries the matter even further and explicitly rejects the arguments that are mentioned in the sources: ‘The Sabinians hold it praiseworthy that the interest of the *dominus materiae* prevails, not so much because of the formal reason that ‘sine materia nulla species effici potest’, but because of a conservative political-legislative criterion ... The Proculians, on the other hand, give preference to the interest of the maker, probably, not so much because of the formal reason of the novelty of the *species* (*Quia quod factum est, antea nullius fuerat*), but for a political reason of social progress.’\(^\text{181}\) However, the sources cannot be simply dismissed. On the contrary, they are the starting point of any conclusions about Roman law, in general, and about the controversies, in particular.

Other Romanists, including Karlowa, Mozzillo, Thielmann, and Falchi, explain the controversy the other way around. According to them, the Proculian view is traditional and the


\(^{181}\) Betti (1942), p. 406: ‘I Sabiniani ritengono degno di prevalere l’interesse del proprietario della materia, non tanto per la ragione formale che “sine materia nulla species effici potest”, quanto per un criterio politico-legislativo conservatore ... I Proculiani, per contro, danno la preferenza all’interesse dello specificatore, probabilmente, non tanto per la ragione formale della novità della species (*quia quod factum est, antea nullius fuerat*), quanto per un criterio politico di progresso sociale.’
Sabinian view progressive. Nonetheless, they have all come to this conclusion in a different way.

According to Karlowa, the Romans were a decisive and energetic people and, therefore, it fitted their nature to attach more importance to *facere* than to *materia*. In a city where buildings, roads, *formule*, rules, etc., often bore the name of their maker, it was logical that, in the Roman Republic, the maker was favoured in case of *specificatio*. The Proculian view rested on this tradition.

This argument does not make any sense. It is true that the Romans were an energetic and productive people. Nevertheless, property was important as well in the Roman Republic. To consider the Proculians as communists *avant-la-lettre* would be historically doubtful incorrect. The energetic nature is therefore unlikely to illustrate the traditional character of the Proculian opinion. Moreover, the explanation of a complex legal problem by means of some vague idea about the nature and character of a people seems unconvincing.

According to Mozzillo, in general practice, a maker first acquired the material and then transformed it into a *nova species*. This means that, generally, the maker of a *nova species* and the owner of the processed material were one and the same person and that the ownership of the *nova species* was assigned to the maker. The Proculians held that *specificatio* by a maker who had not acquired the material was ‘un caso rarissimo, o meglio una manifestazione anormale nell’ambito dei rapporti economici’. When it did occur, the Proculians defended the maker by analogy with general practice: ‘La considerazione dei casi di specificazione come manifestazioni patologiche dei rapporti economici, chiarisce e giustifica l’esame concreto e caso per caso, operato dalla più antica giurisprudenza’.

The Sabinians, on the other hand, went beyond this pathological conception of cases (‘questa concezione patologica dei casi’) in which someone made a new thing out of somebody else’s material. They disapproved of *ad hoc* solutions: they put all cases in which a maker did not first acquire the property of the material under a common denominator and made it impossible for the maker to

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acquire the *nova species*. Hence, their theory was regarded by Mozzillo as ‘un maggiore progressivismo giuridico’.\(^{186}\)

Mozzillo’s theory can easily be refuted if general practice is reversed. In common situations (i.e., when the maker and the owner of the processed material are one and the same person), it may be said just as well that the property was assigned to the owner of the material. Moreover, Mozzillo is inaccurate in that he overlooked a second situation of *specificatio* that was common practice: the creation of a *nova species* by someone who had not been the owner of the material, but who did have an agreement with the *dominus materiae*.

Thielmann explains the controversy by means of the antithesis between the ‘Produktions-’ and the ‘Substantialprinzip’. Although Thielmann admits that, in general, the status of manual labourers was low in Antiquity, he underlines the esteem for agricultural activity. Thielmann, therefore, suggests that, originally, the human factor of production was given priority and that the roots of the Proculian view go back further in time than those of the Sabinian view. The Sabinians, on the other hand, opted for the ‘Substantialprinzip’ and gave preference to the material factor of production.

It can be brought against Thielmann’s theory is that the sources do not mention such scientific concepts as a ‘Produktions-’ or ‘Substantialprinzip’. Another objection is that the Proculian argument, as mentioned in Gai., D. 41.1.7.7, does not refer to the activities of the maker.

Falchi is the last to explain the controversy by means of the conservative/progressive antithesis. The Proculians held the opinion that the materials perished after the creation of the *nova species*. Together with the materials, also the ownership of B perished. This meant that the newly created and autonomous thing belonged to no one and had to be qualified as a *res nullius* (see Gai., D. 41.1.7.7: ‘Quia quod factum est, antea nullius fuerat’). The maker acquired this *res nullius* ‘per atto unilaterale’, thanks to his relation with the thing he had created. The Sabinians, on the other hand, did not consider the materials to have perished. This explains why the *voluntas* of the *dominus materiae* (B) remained important. In the Sabinian view, only a bilateral relation between the *dominus materiae* and the maker could legitimate a transition of ownership. Because the *dominus materiae* persisted in his will (*voluntas*) to

\(^{186}\) MOZZILLO (1954), p. 723.
remain the owner of the material, such a transition did not take place. The maker, therefore, could not acquire the *nova species*. According to Falchi, the ‘unilateral’ conception of acquisition of property was applied by the Proculians by analogy with the *veteres*, while the Sabinian principle of ‘bilaterality’ was new and innovative.

Falchi’s theory does not find any support in the sources. Nowhere is it stated that the *veteres* were acquainted with a unilateral conception of acquisition of property and a bilateral conception was neither new nor innovative.

According to Stein, finally, the controversy about *specificatio* is due to a different view on methodology between the Proculians and the Sabinians. While the Proculians preferred a literal and objective interpretation of words and texts, the Sabinians favoured a less strict interpretation. Stein holds that the Proculian view in favour of the maker (A) can be explained by means of their rigid interpretation of the *formula* of a *rei vindicatio*. The Proculians granted the ownership of the *nova species* to A, since it was impossible for B to vindicate it, i.e., to claim them through a *rei vindicatio*. When he wanted to vindicate the new thing, he ‘had to describe exactly what he claimed and prove that it was his. In practice, it would be difficult for B to claim the new thing. If he described the thing as he had owned it, he would be describing what no longer existed and if he described it as it actually was, he would be describing something he had not previously owned.’

The Sabinian view in favour of the *dominus materiae*, on the other hand, is in accordance with the common sense of all men or with *naturalis ratio*: without material, nothing can be made. According to Stein, the Sabinians used this argument to counterbalance the sophisticated and legalistic argument of the Proculians.

Stein has introduced a more plausible interpretation of the Proculian argumentation. However, he failed to connect his interpretation with the Proculian argument, as mentioned in Gai., D. 41.1.7.7. Furthermore, the Proculian opinion is not an illustration of their strictness in adhering to the letter of a text (i.e., in this case, of the *formula* of the *rei vindicatio*), but shows

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189 STEIN (1974), p. 306: ‘The reason given for the Proculian view, that what has been made belonged to no one before, suggests that the basis of A’s acquisition of ownership is *occupatio* of a *res nullius*, … It is rather far-fetched, and has been suspected as an interpolation on that ground.’
their pragmatic disposition. They wanted to find an argument in support of the party who had consulted them. Finally, Stein failed to find an adequate explanation for the Sabinian view.

4. The Locus ex Causis and the Locus ex Adiunctis in Gai., 2.79

At the beginning of the 1st century AD, a conflict may have arisen between an owner of grapes (B) and the person who had made wine from them (A) about the ownership of the wine. The owner of the grapes put this legal problem to the Sabinians and expected a responsum that would be to his advantage. The maker of the wine, on the other hand, seems to have consulted the Proculians. The Sabinians had no doubt that the action to be used was a rei vindicatio, whereas the Proculians denied that the owner of the grapes could use this action. How did they find arguments in support of their view?

4.1 The Proculian View

When the owner of the grapes claimed the wine from the maker, the latter turned to the Proculians for advice: ‘I have created wine for myself with the grapes of somebody else without his consent and now he claims to be the owner of the wine. How can I defend myself?’ The Proculians answered that the ownership of the wine had to be granted to the maker, ‘quia quod factum est, antea nullius fuerat’. How did the Proculians find this argument? As explained in the introduction, Cicero describes three ways of finding a pertinent topos. One of them involves using the status doctrine of Hermagoras. In this case, it may be useful and interesting to try and apply this approach.

In the case of specificatio, the owner of the grapes claims ownership of the wine by means of a rei vindicatio against the maker who is in possession. In his defence, the maker (A) denies that B is the owner. The quaestio which results from this confrontation between claim and defence, ‘Is B the owner of the wine or not?’, corresponds best to the question ‘Sitne?’ of the status coniecturalis.
Once the *status* had been determined, the Proculians may have consulted the lists of *topoi* that were particularly suitable for the *status coniecturalis*. In the third part of the *Topica*, Cicero mentions various ways of finding *topoi* and arguments. For *coniectura*, he mentions in Cic., *Top.*, 23.87:

\[…\] Ad coniecturam igitur maxime apta quae ex causis, quae ex effectis, quae ex coniunctis sumi possunt.\[…\]

… Then, for conjecture, the *topoi* that can be drawn from causes, effects, and conjuncts are best suited.

Especially the *locus ex causis*, the *locus ex effectis*, and the *locus ex coniunctis* could be used by the Proculians as a lead to find an argument. By the latter, Cicero probably means the *locus ex adiunctis*.\(^{190}\) These *topoi* could guide the Proculians to find an argument to support the claim of the maker. In my view, the Proculians found their argument under the *locus ex adiunctis*. Cicero himself does not give an example that fits the position of the Proculians, but Quintilian does.\(^{191}\)

Quintilian discusses the *locus ex consequentibus* together with the *locus ex adiunctis* in book 5.10 on arguments after he had discussed a number of other *topoi* or ‘places’ of arguments. The relevant text is Quint., *Inst. Or.*, 5.10.74:

\[Ex consequentibus siue adiunctis: ‘si est bonum iustitiae, recte iudicandum’: ‘si malum perfidia, non est fallendum’: idem retro. Nec sunt his dissimilia ideoque huic loco subicienda, cum et ipsa naturaliter congruant: ‘quod quis non habuit, non perdidit’: ‘quem quis amat, sciens non laedit’: ‘quem quis heredem suum esse voluit, carum habuit, habet, habebit’. Sed cum sint indubitata, vim habent paene signorum inmutabilium.\]

\(^{190}\) A few indications point in that direction:
- Cicero has not included the *locus ex coniunctis* in his enumeration of *topoi*. Therefore, it is likely that the term *locus ex coniunctis* refers to some other *topos* which Cicero does mention in the first two parts of his *Topica*.
- In Cic., *Top.*, 3.11, some manuscripts give ‘(loci) ex adiunctis’, others ‘(loci) ex coniunctis’. Apparently, the terms are interchangeable.
- In Cic., *Top.*, 11.50, the *locus ex adiunctis* is explicitly said to be valuable in conjectural issues, so it is highly likely that the term *locus ex coniunctis* can be read as *locus ex adiunctis*.

\(^{191}\) Quint., *Inst. Or.*, 5.10.74-75.
CHAPTER III

From Consequences or Adjuncts: ‘If justice is good, then we must judge rightly’; ‘if dishonesty is bad, we must not deceive.’ Likewise in reverse. Not dissimilar to these and therefore brought under this *topos*, because they themselves naturally belong to this group: ‘What someone never had, he has not lost’; ‘Someone will not knowingly hurt a person whom he loves’; ‘Someone who has wanted a person to be his heir, held him dear, holds him dear and will continue to hold him dear.’ But since these are indubitable, they almost have the force of irrefutable Signs.

In this connection, only the expression ‘quod quis non habuit, non perdidit’ is relevant. Let us now compare the information which Quintilian gives about the *locus ex consequentibus sive adiunctis* with the Proculian argument mentioned Gaius’ *Res Cottidianae*.

Gai., D. 41.1.7.7: Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. …

It is clear that Quintilian’s formulation differs from the argument of the Proculians. Although differently worded, both formulations seem to form part of the same reasoning. In order to demonstrate this, it may be useful to have another look at the *formula* of the *rei vindicatio*:

> Si paret rem qua de agitur ex iure Quiritium Ai. Ai. esse neque ea res arbitrio iudicis Ao. Ao. restituetur, quanti ea res erit, tantam pecuniam iudex Nm. Nm. Ao. Ao. condemnato, si non paret, absolvito.\(^\text{192}\)

The thing at stake or ‘res qua de agitur’ was the wine and the owner of the grapes vindicated it, ‘quia sine materia nulla species fuerat’. By way of reply, the Proculians borrowed an expression from Quintilian (*Inst. Or.*, 5.10.74): ‘Quod quis non habuit, non perdidit’ or ‘What someone never had, he has not lost’. The plaintiff never owned the wine and so he could not have lost it. According to the Proculians, the owner of the grapes could not vindicate the ownership of the wine if he had never had it. The Proculians even refined and elaborated this argument: not only was the owner of the grapes never the owner of the wine, no one else was either. In other words, the wine (i.e., ‘quod factum est’) was a *res nullius* before it was

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appropriated by the maker. This thought is formulated in the argument in Gai., D. 41.1.7.7: ‘Quia quod factum est, antea nullius fuerat’.193

The argumentation of the maker in which he refutes the claim of the owner of the grapes can now be reconstructed as follows:194

- What has been made did previously not belong to anyone.
- Therefore what someone never had, he has not lost.
- B is the owner of the material, i.e., of the grapes.
- Therefore, B cannot vindicate the nova species, i.e., the wine

4.2 The Sabinian View

The owner of the grapes put the following legal question to the Sabinians: ‘When somebody else (A) has made wine from my grapes without my consent, who becomes the owner of this wine?’ They answered that the owner of the grapes should be considered the owner, ‘quia sine materia nulla species effici possit’ (Gai., D. 41.1.7.7). While reconstructing how the Sabinians found this argument, it may be assumed that they also made use of the status doctrine.

Since it was already shown that the status of the conflict about specificatio may have been that of coniectura, it may be reconstructed how the arguments were found. The Sabinians may also have consulted Cicero’s list of topoi, which were particularly suitable for coniectura. As already stated, the list consisted of the locus ex causis, ex effectis, and ex coniunctis.195 The Sabinians found their argument under the locus ex causis. In order to demonstrate this, I will

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193 In the same vein, DE ZULUETA (1963), pp. 78-79; THOMAS (1966), pp. 155-159; and STEIN (1974), pp. 306-307. THOMAS (1966), p. 155: ‘The crucial question with ownership is whether one party can claim the thing from the other with the vindicatio, that is, assert that it is his by Quiritary right, and to do so he must detail it with considerable particularity – if it be made up, describing it, etc.; … Now, if A had made a cup out of B’s gold, then, as De Zulueta puts it, “if B, as plaintiff, described the thing as he had owned it, it would be describing what no longer existed and, if he described it as it actually was, he would be describing something that he had not previously owned.”

194 After the maker refuted the claim of the owner of the grapes, he probably claimed the ownership of the wine himself as follows:
- The ownership of the wine falls to the first taker,
- Quia quod factum est, antea nullius fuerat.
- The maker (A) is the first taker.
- Thus: A is the owner of the wine.

195 Cic., Top., 23.87.
first discuss what Cicero stated about this topos earlier in the Topica and then make the connection with the Sabinian argument.\textsuperscript{196}

In the first discussion on the locus ex causis (§ 22), Cicero gives an example of an argument that can be found under this topos.\textsuperscript{197} In the second discussion (§58-66), the notion of cause itself is examined. Cicero (§ 58) makes a distinction between the two main kinds of causes: 1) those which inevitably produce an effect and 2) those without which the effect cannot be produced:

\begin{center}
Causarum enim genera duo sunt; unum, quod vi sua id quod sub eam vim subiectum est certe efficit, ut: ignis accendit; alterum, quod naturam efficiendi non habet sed sine quo effici non possit, ut si quis aes statuae causam velit dicere, quod sine eo non possit effici.
\end{center}

In fact, there are two kinds of causes: one which certainly effects by its own force what is subjected to this force, for example: fire burns. The other which does not have the nature of producing an effect but without which an effect cannot be produced, for example if someone wanted to call bronze the cause of a statue, because it cannot be produced without it.

In this connection, the second group of causes ‘sine quo effici non possit’ is relevant; some of them are passive, while others provide a certain preliminary cause to the effect and carry with them certain factors which are helpful, but not necessary (§ 59):

\begin{center}
Huius generis causarum, sine quo non efficitur, alia sunt quieta, nihil agentia, stolida quodam modo, ut locus, tempus, materia, ferramenta, et cetera generis eiusdem; …\textsuperscript{198}
\end{center}

\textsuperscript{196} The relevant paragraphs are Cic., Top., 4.22 and 14.58-17.66.

\textsuperscript{197} Between the estates of A and B, there was a party wall and A had built a new wall, which touched the party wall at right angles and rested on arches. When B wanted to demolish the party wall, he gave guarantees that he would cover any damage he might cause. However, while demolishing the party wall, B did damage, but the damage was caused by an arch. In this case, B would not be bound to cover the loss, for the damage was not caused by his building activities, but by the fact that the wall A’s side could not stand without the support of the party wall. This argument is found under the locus ex causis.

\textsuperscript{198} The second kind of causes ‘sine quo effici non possit’ are those which provide a certain preliminary cause to the effect and carry with them certain factors which are helpful, but not necessary. Cicero gives the following example: a meeting was the cause of love and love of crime. Cicero also states that the Stoics wove their doctrine of Fate from this type of cause. This reference to the Stoa is only mentioned in passing and it applies only to the second kind of causes ‘sine quo effici non possit’ and not to the first kind, that is relevant to us.
In this class of causes without which something is not produced, some are quiet, passive, and in some way inert, such as place, time, material, iron tools and other things of that kind. …

In § 60-61 Cicero cautions that an argument that is based on causes ‘sine quo effici non possit’ is not irrefutable and in the subsequent paragraphs (§ 62-64) other distinctions between causes are made. Since these are of no relevance here, they need not be discussed.

Let us now compare the Sabinian argument, mentioned in the Res Cottidianae, with the locus ex causis mentioned by Cicero.

Gai., D. 41.1.7.7: Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset. quia sine materia nulla species effici possit: …

Cic., Top., 15.58: Causarum enim genera duo sunt; unum, …; alterum, quod naturam efficiendi non habet sed sine quo effici non possit, ut si quis aes statuae causam velit dicere,199 quod sine eo non possit effici.

The similarity in the wording of Gai., D. 41.1.7.7 and Cic., Top., 15.58 demonstrates that the Sabinians made use of the locus ex causis to find an argument that would favour the owner of the grapes.200 Cicero considered it useful to enumerate the various kinds of causes. Someone searching for an argument could be guided by browsing through this list of types of causes. When the Sabinians considered the first distinction between the two main kinds of causes, they probably acknowledged that the grapes were not a cause which inevitably effected the

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199 In a text about the media sententia, Paul (D. 41.1.24) also refers to bronze as the material out of which a statue can be made. In other words, the example used in the legal text of Paul is the same as the one in the rhetorical text of Cicero. This may be an indication that there is a connection between the school controversies and the theory of topoi.

200 Although SCHERMAIER (1992), pp. 232-233, noticed the similarity between the Sabinian argument and Cic., Top., 14.58, he disregards the fact that the Sabinians used topoi in order to find arguments. According to this Romanist, ‘die Vorstellung, dass ohne Stoff nichts entstehen könne, ist in dieser Form beispielhaft für ein Vulgärophilosophem. Schon in klassischen griechischen und auch in der zeitgenössischen römischen Philosophie ist sie als Teil der Prinzipienlehre Gemeingut verschiedenster Schulen und Richtungen und wurde wohl früh als allgemeiner naturwissenschaftlicher Grundsatz angesehen.’ In order to demonstrate that the idea ‘nothing can come into existence without material’ was a widely accepted ‘Vulgärophilosophem’, Schermaier refers to different sources, such as Cic., Top., 14.58; Sen., Nat., 2.3.1; Sen., Epist., 65.4. He also maintains that this argument is derived from the naturalis ratio.
wine. However, the second kind of cause, ‘sine quo effici non possit’, was pertinent: without the grapes, the wine could not be produced. In this category of causes, a further distinction is made between causes that are passive and others that furnish a preparation for producing something (see Cic., Top., 15.59). The Sabinians regarded the material (i.e., the grapes) as a passive cause for the creation of the wine. This way of thinking is confirmed in Cic., Top., 15.59, where materia – together with place, time, and iron tools – is mentioned as a passive cause without which no effect can be produced.

The argumentation which the owner of the grapes used in the rei vindicatio can now be reconstructed.

- Since nothing can be made without the material,
- the ownership of a nova species (e.g., wine, oil, or grain) must be granted to the owner of the materia (i.e., to the owner of the grapes, olives, or ears of corn).
- B is the owner of the material.
- Therefore, B is the owner of the nova species.

4.3 The Media Sententia and the Ius Respondendi

The controversy about specificatio arose when a legal problem was put to the Sabinians and the Proculians and when they each gave different responsa. However, both responsa were binding on the judge on account of the ius respondendi. Therefore, the judge may have sought a compromise that combined the best of the Sabinian opinion with the best of the Proculian opinion, i.e., the media sententia, so that he could henceforth pronounce judgments which were in accordance with both responsa.

The central question underlying the media sententia was whether or not the nova species could be reduced to its materials. If it could not, the materials were held to have perished.\(^{201}\) In this case, the Proculian opinion was followed and the property of the new thing was granted to the maker, quia quod factum est, antea nullius fuerat. The maker had converted the material into a nova species and, as a result, the material was consumed as well as the ownership of the

\(^{201}\) Paul, D. 41.1.26, pr.
dominus materiae. However, the followers of the media sententia may have discovered a weak point in the Proculian argumentation. When it was possible to reduce the nova species to its materials, they had to admit that the materials (and the ownership of the dominus materiae) did subsist. In this case, the Proculian view was untenable and the media sententia chose to follow the opinion of the Sabinians, which granted the ownership to the dominus materiae. If the material subsisted and was still present within the nova species, the ownership remained.
IV. FILIUS PRAETERITUS

1. Gai., 2.123: Text and Controversy

Item qui filium in potestate habet, curare deber, ut eum vel heredem instituat vel nominatim exheredet; alioquin si eum silentio praeterierit, inutiliter testabitur, adeo quidem, ut nostri praeceptores existiment, etiamsi vivo patre filius defunctus sit, neminem heredem ex eo testamento existere posse, quia scilicet statim ab initio non constiterit institutio. Sed diversas scholae auctores, siquidem filius mortis patris tempore vivat, sane impedimento eum esse scriptis heredibus et illum ab intestato heredem fieri confitentur; si vero ante mortem patris interceptus sit, posse ex testamento hereditatem adiri putant, nullo iam filio impedimento; quia scilicet existimant <non> statim ab initio inutiliter fieri testamentum filio praeterito.

Likewise, someone who has a son in potestate has to make sure that he either institutes him as heir or disinherits him by name. Otherwise, if he has passed him over in silence, his testament will be of no effect. Even so that our teachers think that, even if the son has died during his father’s lifetime, no one can become heir under that testament, because of course the institution was void immediately from the beginning. But the authorities of the other school acknowledge that, if indeed the son is alive at the time of his father’s death, he surely is a bar for the instituted heirs and becomes himself an heir by intestacy. If, on the other hand, he dies before his father, they think that the inheritance can be accepted under the testament, as the son is no longer a bar. This is of course because they think that a testament in which a son is passed over is not void immediately from the beginning.

This text is found in the second book of Gaius’ Institutiones and concerns the first controversy regarding the law of succession out of eight. Gaius (Gai., 2.99) makes a distinction between two kinds of inheritances: the inheritance ex testamento and ab intestate and, in Gai., 2.100, he announces to take on testate succession first (in Gai., 2.101-289). The text under consideration initiates the part about exheredatio or disinheritance (Gai., 2.123-143).
In Roman law, the essential part of the testament is the *heredis institutio*, in which the testator institutes his heirs. He is free to institute as heir whomever he wants. However, when there are *sui heredes*, civil law requires that the testator either institutes them as heirs, or disinherits them by an appropriate clause in the testament (*exheredare*), for he is not allowed to pass them over in silence (*praeterire*). At civil law, *sons in potestate* have to be disinherited one by one and by name (*nominatim exheredare*). If the testator passes over in silence one son, the entire testament is null and void and there will be succession on intestacy.

However, the particular moment at which the testament has to be valid is not explicitly determined in Roman law. There are two possibilities: either the testament has to be valid immediately when it is made or at the time of the testator’s death. This deficiency is the cause of the legal question in Gai., 2.123: ‘Is a testament in which the testator has passed over his *son in potestate* also void when the son has predeceased his father?’ This question gave rise to a controversy between the Sabinians and the Proculians.

The former (‘nostri praeceptores’) hold that such a testament is ineffective, because the *heredis institutio* has been void immediately from the beginning (‘quia scilicet statim ab initio non constiterit institutio’). The Proculians (‘diversae scholae auctores’), on the other hand, argue that such a testament is valid, because the defective *heredis institutio* does not render the testament void from the moment it is made, but only at the time of the testator’s death (‘quia scilicet existimant <non> statim ab initio inutiliter fieri testamentum filio praeteritio’).

Although the testator can institute as heir whomever he wants, there is a restriction: in order to avoid the cancellation of the will by *querela inofficiosi testamenti*, he has to leave the *debita portio* to his closest relatives.

Different rules apply for the other *sui heredes* (namely, daughters, grandchildren of either sex, the *uxor in manu*, and adoptive children). See KASER, *RPR*, I, p. 706.

Since the son who is passed over was already dead at the time of his father’s death, he did no longer bar the entire testament.

2. The Controversy in Gai., 2.123: Modern Theories

Most authors, including Voigt, Karlowa, and Falchi, explain the controversy between the Sabinians and the Proculians in terms of conservative and progressive, but they reach this conclusion on different grounds.

First, Voigt’s theory will be discussed. His qualification of the Sabinians as conservative and of the Proculians as innovative is based on the famous text in Pomponius’ *Enchiridium* about the two law schools, i.e., Pomp., D. 1.2.2.47. In this text, Pomponius qualified the founder of the Sabinian school, C. Ateius Capito, as traditional and the founder of the Proculian school, M. Antistius Labeo, as an innovator. According to Voigt, moreover, the school controversies can be explained by means of the antithesis *rigor iuris/verbi ratio - aequitas/voluntatis ratio*. The conservative Sabinians, in favour of *rigor iuris* and *verbi ratio*, were opposed to the Proculians, who adhered to *aequitas* and *voluntatis ratio*. Voigt uses this theory to explain the controversy under consideration.

If a father has made a testament in which he passed over his son and the son died during his father’s lifetime, the Sabinians hold that the testament is void in accordance with the following legal rule: ‘Quod initio vitiosum est, non potest tractu temporis convalescere’. The open-minded and flexible Proculians, on the other hand, argued that the testament was valid at the time of the testator’s death. This opinion shows their adherence to *aequitas* and *voluntatis ratio*.

Three points of criticism can be raised against Voigt’s theory. 1) The Sabinians qualified the testament as void at the time of the testator’s death. The reason for this decision was not their

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206 In the same vein, G. SCHERILLO, *Corso di diritto romano: il testamento*, 2nd edn., Bologna 1999, pp. 175-176. He maintains that the Sabinians followed the ancient rule, whereas the Proculians were more progressive, but he does not elaborate this view.

207 VOIGT (1899), pp. 222-228, 231-232.

208 Paul, D. 50.17.29.
attachment to *rigor iuris* and *verbi ratio*, but their belief that a testament had to be valid immediately from the moment it was made. This also goes for the Proculian opinion: they qualified the testament as valid, because they held that a testament only had to be valid at the time of the testator’s death and not because they adhered to *aequitas* and *voluntatis ratio*. In other words, Voigt did not take into account the arguments as mentioned in the sources. 2) Moreover, the *verba-voluntas status* can only be applied if the words in the testament of the *pater familias* are ambiguous. The *praeteritio* of the son, however, obviously is not expressed in words. If the words are lacking, they cannot be ambiguous and, therefore, the *verba-voluntas status* cannot be applied in this case. 3) Finally, Voigt has not demonstrated in a convincing way the Proculian adherence to *aequitas* and *voluntatis ratio*, since the *voluntas* of the testator is not entirely clear. It is indeed true that the testator probably wanted his testament to be valid and it is also possible that he did not want his son *in potestate* to be his heir, but if he did not want his son to be his heir, why did he fail to disinherit him by name? Since there are doubts about the true nature of the testator’s *voluntas* there are not enough reasons to assume that the Proculians adhered to the *voluntatis ratio*.

Unlike Voigt, Karlowa has qualified the Proculian opinion as conservative and the Sabinian as progressive. In archaic Rome, the prohibition to pass over in silence a *suus heres* had not yet been introduced. This means that a *pater familias* could exclude his son *in potestate* from the inheritance simply by not mentioning him (*praeterire*) in his testament, without making the testament void. According to Karlowa, there is a connection between this archaic tradition and the Proculian view. The conservative Proculians decided that a testament in which a son *in potestate* had been passed over was valid if he died during his father’s lifetime, because they did not want to deviate from the archaic tradition.\footnote{KARLOWA (1901), p. 890.}

Karlowa’s theory is not convincing for the following reasons. 1) Against Karlowa, the same point of criticism can be raised as against Voigt. Karlowa failed to take into account the arguments that are mentioned in Gai., 2.123, i.e., the relevance of the point in time at which a testament had to be valid. 2) If the Proculians really were very conservative, as Karlowa asserts, and did not want to deviate from the archaic tradition that allowed the *praeteritio* of a *suus heres*, then it would have been more attractive for them to copy this archaic tradition, instead of adapting it. 3) Karlowa’s assertion, finally, that the prohibition to pass over a *suus*
heres had not yet been introduced in archaic Rome is a mere assumption without any basis in the sources.

According to Falchi, furthermore, the conservative Proculians looked at the problem from the point of view of the instituted heir. They focused on the moment he would accept and acquire the inheritance and they only took into consideration this ‘unilateral’ acquisition of the inheritance. All previous events were of no interest to the Proculians. Because the filius praeteritus was already dead at the moment of the ‘unilateral’ acquisition of the inheritance by the heir, the bar for the testament had been removed. For this reason, the Proculians considered the testament valid. According to the Sabinians, on the other hand, the voluntas of the testator was very important. Therefore, they adopted his point of view and required that a testament had to be valid from the moment it was made.210

According to Falchi, the Sabinians attached much importance to the voluntas of the testator. In my opinion, however, it is not likely that the testator wanted to make an invalid testament.

3. The Locus a Tempore in Gai., 2.123

The school controversy as described in Gai., 2.123 may have arisen in the following way. A pater familias made a testament in which he passed over one of his sons in potestate. The filius praeteritus died during his father’s lifetime. When the pater familias passed away, the instituted heirs were to obtain the inheritance. The intestate heirs, however, maintained that the testament was void and that they were entitled to the inheritance. Thereupon, they turned to the Sabinians for advice and put to them the following legal question: ‘A testament in which a pater familias has passed over a son in potestate is null and void, isn’t it, even if the son has predeceased his father?’ According to the Sabinians, such a testament was indeed void. They advised the intestate heirs to claim the inheritance by means of an hereditatis petitio. The instituted heirs, on the other hand, seem to have consulted the Proculians, who supported their view that the testament was valid. Since the heads of the law schools had to base their responsa on convincing arguments, they may have used rhetoric and, in particular, topoi.

CHAPTER IV

The hereditatis petitio could only be brought against the possessor of the inheritance. The question of who would be the defendant was resolved by the praetor. After an investigation, the praetor accorded bonorum possessio to one of the parties in a decree. In this case, it is impossible to know whom the praetor had designated as the possessor of the inheritance and, therefore, as the defendant. The choice to first discuss the Proculian argument in support of the instituted heirs is therefore arbitrary.

3.1 The Proculian View

When the intestate heirs brought the hereditatis petitio, the Proculians rendered the instituted heirs assistance. According to the Proculians, a testament in which a pater familias had passed over his son was valid if the son predeceased his father, ‘quia scilicet existimant <non> statim ab initio inutiliter fieri testamentum filio praeterito’. In other words, the testament did not have to be valid immediately from the beginning, but only at the time of the testator’s death. Since the son who had been passed over was already dead at that time, he did no longer bar the entire testament. How did the Proculians find this argument?

The Proculians found this argument under the locus a tempore. In Chapter 5.10 of his Institutio Oratoria, Quintilian discussed a number of topoi, including the locus a tempore. In § 42-44, Quintilian stated that time has two meanings: a general and a special meaning. Next, Quintilian (5.10.45-46) distinguished three phases of time: Antecedent (antecedens), Contemporary (coniunctim), and Subsequent (insequens). The relation between actions and words is covered by these phases, but in two ways (§ 47). Some things occur because something else is going to occur later; other things occur because something else happened before. In § 48, finally, Quintilian discusses chance.

After the Proculians had run through the different distinctions of time, they found their argument by way of the subsequent phase of time. According to the Proculians, a testament had to be valid at the time of the testator’s death, i.e., subsequent to the moment it was made.

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211 Gai., 2.123: ‘This is of course because they think that a testament in which a son is passed over is not void immediately from the beginning.’
212 About the locus a tempore, see Quint., Inst., 5.10.42-48.
213 Cicero has limited himself to the locus ex antecedentibus: Cic., Top., 4.19; 12.53.
In other words, the *praeteritio* of a son *in potestate* did not make the testament void immediately. It would only have made it void if the son had still been alive at the time of the testator’s death. However, the son had predeceased his father and, therefore, he did no longer bar the entire testament. According to the Proculians, the testament was therefore valid at the time of the testator’s death and the instituted heirs were the legitimate beneficiaries of the inheritance.

The argumentation in support of the instituted heirs in the *hereditatis petitio* can be reconstructed.
- A testament in which a son is passed over is not void immediately from the beginning,
- but only at the moment when the testator dies.
- The *filius praeteritus* has predeceased his father.
- Therefore, the testament is valid.

### 3.2 The Sabinian View

The intestate heirs, on the other hand, wanted the testament of the *pater familias* to be null and void. The Sabinians confirmed their assumption and adduced the following argument: *quia scilicet statim ab initio non constiterit institutio*. How did the Sabinians find this argument?

The Sabinians used the same *topos* as the Proculians, namely, the *locus a tempore*. However, they did not find their argument by way of the subsequent phase of time, but by way of the contemporary phase. According to the Sabinians, a testament in which a father had passed over his son was void immediately from the beginning. In other words, the moment at which the testament had to be valid was contemporary with the moment it was made. Since the testament had been void from the moment it was made, the death of the *filius praeteritus* could not revalidate the testament. According to the Sabinians, therefore, the intestate heirs were entitled to the inheritance.

The argumentation in support of the intestate heirs can now be reconstructed.
CHAPTER IV

- Because a testament in which a son is passed over is void immediately from the beginning,
- the testament is still null and void at the moment of the testator’s death.
- Although the filius praeteritus has predeceased his father,
- the testament is still null and void and the intestate heirs are the legitimate beneficiaries of the inheritance.

4. The Controversy Decided

In Gaius’ Epitome, the rules of the civil law for exheredatio are discussed. The relevant text is Gai., Ep., 2.3.pr-1:

Is, qui filium in potestate habet, curam gerere debet, ut testamentum faciens masculum filium aut nominatim heredem instituat aut nominatim exheredet. Nam si masculum filium testamento praeterierit, non valebit testamentum. 1. Si vero filiam praeterierit, non rumpit testamentum filia praetermissa: sed inter fratres suos, legitimo stante testamento, suam, sicut alii fratres, consequitur portionem; si vero testamento extranei heredes scripti fuerint, stante testamento, filia medietatem hereditatis adquirit. Nam si facto testamento, in quo filius masculus praetermissus est, evenerit, ut vivente adhuc patre, filius, qui praetermissus est, moriatur, sic quoque, quamlibet filius ille mortuus fuerit, testamentum, quod factum est, non valebit.

Someone who has a son in potestate has to make sure that he, while making a testament, either institutes his son as heir by name or disinherits him by name. For if he has passed over his son in the testament, the testament will not be valid. 1. However, if he has passed over a daughter, the testament does not become invalid by passing over the daughter. But if she has other brothers, she acquires a portion just like her other brothers, while the testament stands. If, however, extranei heredes have been instituted in the testament, the daughter acquires half of the inheritance, while the testament stands. But if, after a testament is made in which a son is passed over, it happens that the son who is passed over dies during his
father’s lifetime, even then the testament that is made will not be valid, although
this son has died.

In Gaius’ *Epitome*, only the Sabinian opinion is mentioned. If a testator has passed over a son
in silence, the testament is null and void, even if the *filius praeteritus* predeceased his
father.\(^\text{214}\)

Under the *ius civile*, the other *sui heredes* (e.g., daughters, grandchildren of either sex, the
*uxor in manu*, and adoptive children) can be disinherited by a general clause without the
explicit mentioning of their names.\(^\text{215}\) If they are passed over, the testament remains valid, but
they are given a *ius accrescendi* to compensate them: if the instituted heirs are *extranei
heredes*, the *sui heredes* who are passed over receive half of the inheritance. If the instituted
heirs are *sui heredes* themselves, then the persons who are passed over receive their part *ab
intestato*.\(^\text{216}\)

In the first book *ad Sabinum*, Paul has also mentioned only the Sabinian opinion. The relevant
text is Paul, D. 28.2.7:

> PAULUS, libro primo ad Sabinum. Si filius qui in potestate est praeteritus sit et
vivo patre decedat, testamentum non valet nec superius rumpetur, et eo iure utimur.

> PAUL, book 1 *ad Sabinum*. If a son who is *in potestate* is passed over and dies
during his father’s lifetime, the testament is not valid, nor is a previous testament
annulled. And this is the rule we apply.

Like Gaius and Paul, Justinian also mentioned only the Sabinian view in his *Institutiones*
(*Inst.*, 2.13, pr).\(^\text{217}\) Therefore, it may be assumed that this view prevailed.

> Non tamen, ut <omnimodo> valeat testamentum, sufficit haec observatio, quam
supra exposuimus. <Sed> qui filium in potestate habet, curare debet, ut eum

\(^{214}\) In the same period of time, also Pomponius in D. 28.2.8 only mentioned the Sabinian opinion (and argument).
\(^{215}\) See also Gai., 2.128; Ulp., *Ep.*, 22.20.
\(^{216}\) See also Gai., 2.124.
CHAPTER IV

heredem instituat vel <exheredem> nominatim <faciat>: alioquin si eum silentio praeterierit, inutiliter testabitur, adeo quidem ut, etsi vivo patre filius <mortuus> sit, nemo ex eo testamento heres existere possit, quia scilicet ab initio non constiterit testamentum. Sed non ita de filiabus vel aliis per virilem sexum descendentibus liberis utriusque sexus fuerat antiquitati observatum: sed si non fuerant heredes scripti scriptaeve vel exheredati exheredateve, testamentum quidem non infirmabatur, ius autem adcrecendi eis ad certam portionem praestabatur. Sed nec nominatim eas personas exheredare parentibus necesse erat, sed licebat et inter ceteros hoc facere.

This procedure, which we have described above, does not suffice for a testament to be valid in all respects. But someone who has a son in potestate, has to make sure that he either institutes him as heir or disinherits him by name. Otherwise, if he has passed him over in silence, his testament will be of no effect. Even so that, although the son has died during his father’s lifetime, no one can become heir under that testament, because of course the testament was void from the beginning. In antiquity, this rule had not been observed for daughters or for other descendants of either sex through the male line. But if they are not instituted as heir or disinherited, the testament was not invalidated, but the ius adcrerendi up to a certain portion was granted to them. It was not necessary for parents to disinherit these persons by name, but they could do it by a general clause.

It is significant that none of these texts refer to the school controversy. The legal problem that had given rise to the controversy never came up for discussion afterwards. It was so obvious that the heredis institutio, which was the most important part of the testament, had to be valid at all times, that there was no need of a more or less formal decision to confirm this.

218 Gai., 2.229.
V.  **LEGATUM PER VINDICATIONEM (1)**

1.  **Gai., 2.195: Text and Controversy**

   In eo solo dissentient prudentes, quod Sabinus quidem et Cassius ceterique nostri praeceptores, quod ita legatum sit, statim post aditam hereditatem putant fieri legatarii, etiamsi ignoret sibi legatum esse dimissum; et posteaquam scribit et cesserit *legato*, proinde esse atque si legatum non esset; Nerva vero et Proculus ceterique illius scholae auctores non aliter putant rem legatarii fieri, quam si voluerit eam ad se pertinere. Sed hodie ex divi Pii Antonini || constitutione hoc magis iure uti videmur quod Proculo placuit nam: *cum legatus fuisset* Latinus per vindicationem coloniae, ‘*Deliberent*, inquit, ‘decuriones, an ad se velint pertinere, proinde ac si uni legatus esset.’

   Only in this matter the learned disagree. Sabinus namely and Cassius and our other teachers think that what is bequeathed in this manner becomes the property of the legatee immediately after the acceptance of the inheritance, even if he does not know that a legacy has been bequeathed to him. And they think that after he has found out about it and has rejected the legacy, it is just as if it had not been bequeathed. On the other hand, Nerva and Proculus and the other authorities of that school think that the thing does not become the property of the legatee unless he has wanted that it would belong to him. Nowadays, however, as the result of a constitution of divus Antoninus Pius, we rather seem to apply the rule approved by Proculus. Because when a *Latinus* had been bequeathed *per vindicationem* to a colony, he said: ‘The *decuriones* are to deliberate whether they want him to belong to them, just as if he had been bequeathed to an individual.’

   This text comes from the part about legacies (Gai., 2.192-245) in the second book of Gaius’ *Institutiones*. The first section deals with the four different forms of legacies and covers Gai, 2.192-223. In 2.192, Gaius merely enumerates the four forms and, in the subsequent paragraphs, he elaborates on them: 1) the *legatum per vindicationem* (Gai., 2.193-200); 2) the *legatum per damnationem* (Gai., 2.201-208); 3) the *legatum sinendi modi* (Gai., 2.209-215);
and 4) the *legatum per praeceptionem* (Gai., 2.216-223). The text under consideration is mentioned in Gaius' discussion about the *legatum per vindicationem* so the words ‘quod ita legatum est’ refer to this kind of legacy.

A testator who wanted to bequeath a *legatum per vindicationem* usually applied the words: ‘<Titio hominem Stichum> do lego’.\(^{219}\) Gaius (2.194) maintains that the legacy is called *per vindicationem*, because, immediately after the heir has accepted the inheritance, the legatee is vested with Quiritary ownership of what has been bequeathed to him. If the legatee wants to claim the bequeathed item either from the heir or from any other possessor, he must use a *rei vindicatio*. Then Gaius (2.195) raises the following legal question: ‘When and how does a legatee who does not know about the legacy acquire ownership of something that has been bequeathed to him in a *legatum per vindicationem*?’ This question gave rise to a controversy between the Sabinians and the Proculians.\(^{220}\) According to Sabinus, Cassius, and the other teachers, the legatee acquired the bequeathed item immediately and *ipso iure* after the heir had accepted the inheritance (‘statim post aditam hereditatem’), even if he did not know about it. When he was informed, he did have a possibility to reject the legacy. Such a rejection had a retroactive effect: it was as if no legacy had been bequeathed and the heir acquired ownership of the bequeathed thing. The Sabinians used a fiction as a means to rectify an unwanted result. Nerva, Proculus, and the other authorities of the Proculian school, on the other hand, were of the opinion that the legatee should not become the owner of the legacy until he indicated his intention to have it (‘quam si voluerit eam ad se pertinere’).

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}\(^{219}\) Gai., 2.193.

At the end of the text in question, Gaius states that, in his day, the Proculian opinion prevailed as a result of a constitution of *divus* Antoninus Pius. When a *Latinus* had been bequeathed to a colony by way of a *legatum per vindicationem*, the Emperor decided that the *decuriones* should deliberate whether they would acknowledge him, as if he had been bequeathed not to a colony, but to an individual. A *Latinus* is a former slave whose manumission had not been in accordance with the requirements of civil law.\(^{221}\) Probably in the reign of Augustus, a *Lex Iunia* regularised the position of *Latini* by allowing them freedom, without Roman citizenship, hence they were called *Latini Iuniani*.\(^{222}\) The question of whether a *Latinus* could be the object of a *legatum per vindicationem* is not relevant for the controversy.\(^{223}\) Apparently, someone had bequeathed such a legacy to a colony and Antoninus Pius enacted a constitution with instructions pertaining to the matter. Thereupon, Gaius cited the decision of Antoninus Pius, because he interpreted the constitution as a reinforcement of the Proculian view, even though it dealt with a somewhat different legal problem.

2. **The Controversy in Gai., 2.195: Modern Theories**

Scholars like Voigt and Falchi have explained the controversy by means of the conservative/progressive antithesis.\(^{224}\) According to Voigt, the conservative Sabinians

\(^{221}\) Gai., 1.17.

\(^{222}\) Gai., 3.56.

\(^{223}\) Strictly speaking, a *Latinus* could not be the object of a *legatum per vindicationem*, for only Quiritary property could be the object of such a legacy and free men could never be Quiritary property. Modern literature has offered different solutions for this incongruity: W.M. Gordon - O.F. Robinson, *The Institutes of Gaius*, London 1988, p. 219, have given an alternative translation: ‘For in case where a Latin had left a proprietary legacy to a colony he says …’ According to Gordon and Robinson, the *Latinus* is not the bequeathed thing, but the testator. Grammatically, their translation is incorrect, for the sentence ‘nam cum legatus fuisset Latinus per vindicationem coloniae’ is passive and not active. Their translation was prompted by an alternative interpretation of the text, but they have failed to indicate and explain this.

Scholars like G. Beseler, *Beiträge zur Kritik der römischen Rechtsquellen, II*, Tübingen 1911, pp. 105-106, and C. Appleton, *Les Interpolations dans Gaius*. La vraie date de ses Institutes, *RHDFE* 8 (1929), pp. 218-221, have suggested that the words ‘Sed hodie … legatus esset’ were interpolated. Romano (1933), pp. 4-11, 89-91, furthermore, maintained that the words ‘Sed hodie hoc magis iure utimur quod Proculo placuit’ were written by Gaius, but that the reference to the constitution of Antoninus Pius was a postclassical interpolation. Voigt (1936), pp. 62-64; David - Nelson (1968), pp. 393-395; and Sirk (1983), p. 272, on the other hand, maintained that the passage was genuine and I agree with them. From a scientific perspective, it is unwarranted to regard a passage that is not fully understood to be an interpolation. Other solutions for the incongruity are offered by Grosso (1962), p. 77, n. 1; Sirk (1983), pp. 278-282; and others.

\(^{224}\) Voigt (1899), pp. 222-229; Falchi (1981), pp. 46-56.
persisted in *rigor iuris* and *verbi ratio*, whereas the progressive Proculians adhered to *aequitas* and *voluntatis ratio*. Indeed, the Proculian opinion that a legatee did not become owner unless he wanted the legacy to belong to him is an illustration of *voluntatis ratio*. However, the *verba-voluntas* status is applied when the meaning of the words in a testament is not clear, so that the *voluntas* should relate to the intention of the testator and not to that of the legatee. Moreover, Voigt failed to demonstrate in what way the Sabinian point of view was an illustration of their persistence in *rigor iuris* and *verbi ratio*.

Unlike Voigt, Falchi argued that the Proculian school defended the archaic tradition, whereas the Sabinians were progressive. The authorities of the Proculian school held that the testator’s ownership of the bequeathed item is extinguished upon his death and that, as a consequence, the bequeathed thing became a *res nullius*. Only by means of a positive action, i.e., by means of an explicit expression of his wish, could the legatee acquire ownership of what had been bequeathed to him in a *legatum per vindicationem*. Falchi characterises this positive action as unilateral: since the bequeathed item was a *res nullius*, only the receiver’s action was of any relevance. According to Falchi, the Sabinians introduced an innovation, fitted to their preoccupation to limit the number of *res nullius*. The Sabinians decided that, henceforth, the legatee became the owner of the bequeathed thing immediately after the *aditio hereditatis*. In other words, the legatee became owner without the performance of a positive action or the expression of his *voluntas*. The *voluntas* of the previous owner, namely, of the testator, sufficiently justified the acquisition by the legatee. Nonetheless, the legatee did have the possibility to reject the legacy. In this case, the Sabinians made use of a fiction: it would be as though no legacy had been bequeathed. According to Falchi, the theory of Salvius Iulianus (see § 4; Iul., D. 30.86.2) brought the Sabinian opinion to perfection and, eventually, prevailed.

A flaw in Falchi’s theory is that there is no source to confirm the alleged preoccupation of the Sabinians to limit the number of *res nullius*. Moreover, Gaius (2.195) does not mention the *voluntas testatoris*. The Sabinian opinion that the legatee acquired the *legatum per vindicationem* immediately after the *aditio hereditatis* does not imply that they took into consideration the testator’s *voluntas*.

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225 In support of this statement, Falchi refers to Gai., 2.200.
3. **The Locus ex Causis in Gai., 2.195**

The controversy under consideration arose in the 1st century AD. Gaius does not give any details about the particular case that caused the controversy. However, there is a text by Pomponius that mentions a problem which may have been similar and comparable to the problem at the root of the controversy. In the following, this text will be used to reconstruct the possible legal problem underlying the controversy. In the relevant text, Pomp., D. 8.6.19.1, Pomponius described two cases. Only the second will be discussed here.

A testator (A) has instituted B as his heir and has bequeathed an easement (namely, a right of way) by way of a *legatum per vindicationem* to a legatee (C). After the *aditio hereditatis*, C was still ignorant about the fact that an easement had been bequeathed to him. However, if rustic praedial servitudes are not used for a period of two years, they perish. Before the two years had expired, C sold his own estate to D. Next, the purchaser (D) found out about the easement and wanted to make use of the right of way across the servient tenement, which now belonged to the heir (B), but B denied access. Hence, a conflict arose between B and D about the validity of the easement. In fact, the heart of the matter was whether the legatee (C) had acquired the easement that had been bequeathed to him. The purchaser (D) seems to have consulted the Sabinians, who advised him to bring a *vindicatio servitutis* against B, who put the legal problem to the Proculians. They held the view that the legatee (C) had never acknowledged the legacy and that, therefore, he had not acquired the easement. As a consequence, the purchaser of the estate (D) was not authorised to exercise the easement. The Sabinians, on the other hand, replied that the legatee (C) had acquired the legacy *ipso iure* and immediately after the *aditio hereditatis* and that, therefore, the owner of the dominant estate (D) did have a right of way. How did the Proculians and the Sabinians find arguments to support their views?

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226 Regarding the question to what extent this text expresses one of the two opinions, see *infra*.

227 Pomponius does not inform us about the reason for the ignorance of C; he may have been abroad or there may have been another reason.
3.1 The Proculian View

When D had brought a *vindicatio servitutis* against B, the latter turned to the Proculians and asked the following question: ‘When and how does an ignorant legatee acquire something that has been bequeathed to him by way of a *legatum per vindicationem*?’ According to the Proculians, it could be argued that the bequeathed item did not become the property of the legatee unless he wanted it to belong to him (‘quam si voluerit eam ad se pertinere’). This meant that the legatee, who was unaware that a legacy had been bequeathed to him, did not acquire it. Therefore, he could not transfer it to D and D did not have a right of way across B’s estate. How did the Proculians build up their argumentation?

They may have used the *locus ex causis* to argue that the *legatum per vindicationem* was a cause which produced effect through the *voluntas* of the legatee. In order to demonstrate this, the relevant information about this *topos* given by Cicero in his *Topica*, will be discussed. In *Top.*, 16.62, Cicero distinguishes two kinds of causes:

Atque etiam est causarum dissimilitude, quod aliae sunt, ut sine ulla appetitione animi, sine voluntate, sine opinione suum quasi opus efficient, vel ut omne intereat quod ortum sit; aliae autem aut voluntate efficient aut perturbatione animi aut habitu aut natura aut arte aut casu: …

There is a further difference in causes in that some effect their own work as it were without any inclination of the mind, without *voluntas* or without an opinion; for instance, the rule that everything is born must die. Others work through *voluntas*, or mental agitation, or disposition, or nature, or skill, or chance: …

Cicero makes a distinction between causes that effect their own result and others that produce an effect through the will (‘voluntate’), agitation of the mind (‘perturbatione animi’), disposition (‘habitu’), nature (‘natura’), skill (‘arte’), or chance (‘casu’). The second kind of causes were relevant: the *legatum per vindicationem* was the cause, effecting an acquisition by the legatee, through an act of will or *voluntas* of the legatee. Only if C had been informed about the legacy and had acknowledged it (‘quam si voluerit eam ad se pertinere’), would he have become the owner of the easement. Since C was unaware that an easement had been
bequeathed to him, he had not acknowledged it by a manifestation of his *voluntas*. Therefore, when he sold his estate, the purchaser (D) did not become the owner of the easement and he did not have any right of way.

The Proculian argumentation in defence of B may be reconstructed as follows:

- Since one cannot acquire something unknowingly
- and a *legatum per vindicationem* is a cause which produces effect through the act of will of the legatee,
- and C was unaware that a right of way had been bequeathed to him,
- C did not acquire the right nor did D, who bought the land from C.

### 3.2 The Sabinian View

The purchaser of the estate (D), on the other hand, asked the Sabinians whether an ignorant legatee could acquire a legacy that had been bequeathed to him by way of a *legatum per vindicationem*. According to Sabinians, it could be argued that a legatee acquired such a legacy *ipso iure* and immediately after the *aditio hereditatis*. This meant that the legatee had acquired the easement, even though he was unaware that it had been bequeathed to him. Since D purchased the dominant estate from C, he also acquired the easement attached to it.

In my view, the Sabinians made use of the same *topos* as the Proculians to build up an argumentation, namely, the *locus ex causis*, but applied it in a different way. As stated above, Cicero (*Top.*, 16.62) made a distinction between two kinds of causes: some bring about what may be called their own work without any inclination of the mind, without *voluntas* or without an opinion, and others have an effect through *voluntas*, or mental agitation, etc. Whereas the Proculians referred to the latter kind of causes, the Sabinians probably held the former to be relevant. According to the Sabinians, the *legatum per vindicationem* was a cause that brings about its own work without any act of will, i.e., *statim* and *ipso iure*. This means that C, even though he was ignorant of the fact that an easement had been bequeathed to him, acquired the legacy. When D purchased the dominant estate from C, he also acquired the easement that was attached to it.
The Sabinian argumentation in support of D can be reconstructed as follows:

- Since a *legatum per vindicationem* is a cause that effects its own work without any indication by the legatee of his *voluntas,*
- the legatee acquires such a legacy *ipso iure* and *statim."
- C was unaware that an easement had been bequeathed to him. Nonetheless, he acquired the easement *ipso iure* and immediately after the acceptance of the inheritance
- So, C acquired the easement and so did D, who bought the land from C.

4. The Afterlife of the Controversy

In modern literature, the question of which opinion eventually prevailed is much debated, for the sources do not provide an unequivocal answer. Gaius (2.195) maintained that the Proculian opinion prevailed as a result of a constitution by Antoninus Pius.

In one case, however, the decision of Pomponius, who is a contemporary of Gaius, is clearly influenced by the Sabinian theory. The relevant text is Pomp., D. 8.6.19.1, the same as the one used to (re)construct the controversy of Gai., 2.195:

**POMPONIUS libro trigensimo secundo ad Sabinum.** Si per fundum meum viam tibi legavero et adita mea hereditate per <constitutum tempus ad amittendam servitutem> ignoraveris eam tibi legatam esse, amites viam non utendo. Quod si intra idem tempus, antequam rescires tibi legatam servitutem, tuum fundum vendideris, ad emptorem via pertinebit, si reliquo tempore ea usus fuerit, quia scilicet tua esse coeperat: ut iam nec ius repudiandi legatum tibi possit contingere, cum ad te fundus non pertineat.

**POMPONIUS, book 32 ad Sabinum.** If I will have bequeathed to you a right of way across my estate and if, after the acceptance of my inheritance, you will have remained unaware that a legacy is bequeathed to you for the period of time which is prescribed to lose a servitude, you will lose the right of way by not using it. But if you will have sold your estate within the same period of time, before you knew that
the servitude was bequeathed to you, the right of way will belong to the purchaser if he makes use of it within the remaining period of time. This is of course because the easement had begun to be yours. Since the estate no longer belongs to you, the right to reject the legacy no longer affects you.

In this text, Pomponius described two cases. In the first case, a testator (A) bequeathed an easement (namely, a right of way across his estate) to a legatee (C). After the *aditio hereditatis*, C remained unaware that an easement had been bequeathed to him and he did not use it for two years. As a consequence, C lost the easement. The influence of the Sabinian theory is obvious: the legatee could only lose his easement if he had acquired it *ipso iure* and immediately after the acceptance of the inheritance. In the second case, the legatee (C) sold the dominant estate to D before the two years had expired. In this case, the purchaser (D) became the owner of the estate and of the easement attached to it, provided that he made use of the right before the two years had expired. The fact that the purchaser (D) could become the owner of the easement implies that the legatee (C) had already been the owner, even though he had been ignorant about the legacy. Although Pomponius does not explicitly refer to the controversy in this text, he clearly expresses the Sabinian opinion. Apart from Pomponius, other jurists, such as Iulianus, Papinian, and Paul, also seem to have been influenced by the Sabinian view.\(^{228}\)

However, the majority of the sources do not show a pronounced influence of either opinion. At times, jurists deviate slightly from the opinion of either of the schools (such as Ulp., D. 30.44.1 and D. 38.5.1.6)\(^{229}\) and at other times they combine elements of the two views (such as Marci., D. 34.5.15(16)).\(^{230}\)

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\(^{228}\) In Ulp., D. 7.2.1.1, Ulpian refers to an opinion of Iulianus, who brings up in passing that a legacy of usufruct is acquired and then rejected. This passing remark may have been influenced by the Sabinian view. Pap., D. 31.80: If a legacy is bequeathed unconditionally and the legatee has not repudiated (*non repudiavit*) it, the legacy passes directly (*recta via*) to the legatee and never becomes the heir’s. This opinion seems to be inspired by the Sabinian view. Paul (D. 36.2.21.\(*pr\*)) has stated that a legacy (i.e., a *legatum per damnationem* and a *legatum per vindicationem*), if not bequeathed under a designated day, is due at once or at once belongs to him to whom it was given. Regarding the *legatum per vindicationem*, Paul uses the word *confestim*, parallel to Gaius’ term *statim*.

\(^{229}\) Ulp., D. 30.44.1, and Ulp., D. 38.5.1.6: From the moment it becomes clear that a legatee will not reject a legacy, he is considered to be the owner with retroactive effect. Here, Ulpian slightly deviates from the Sabinian view: the aspect of retroactivity is new. Yet, the result is the same: if the legatee did not reject his legacy, he was considered to be the owner from the moment the heir had accepted the inheritance. If the legatee did reject it, the legacy clearly never was his. The legacy was then considered to be the heir’s with retroactive effect.

\(^{230}\) In Marci., D. 34.5.15(16), the terms *velle* and *non repudiare* are interchangeable.
These texts led some modern scholars to argue that the Proculian opinion prevailed, while others maintained that the Sabinian opinion prevailed. Wlassak, however, holds that neither the Proculian view nor the Sabinian view prevailed. He is convinced that both views were rejected in favour of a new theory, which he ascribes to Salvius Iulianus. According to this theory, the ownership of the bequeathed item was pending until the legatee had decided whether or not he wanted to acquire the legacy. If he did, the legacy was considered his property with retroactive effect from the day of the *aditio hereditatis*. If, on the other hand, the legatee rejected it, the legacy became the property of the heir, also with retroactive effect. Wlassak’s theory has been discussed and convincingly refuted by Voci.

By way of conclusion, it must be said that nowhere in these sources, reference is made to the school controversy, nor does any of the jurists explicitly refer to the Sabinian or Proculian opinions. The ambiguity and eclecticism in the sources indicates that neither opinion prevailed. The controversy was never decided and jurists could take various points of view.

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233 WLASSAK (1910), pp. 236-253, is followed by AMIRANTE (1952), pp. 249-253, and by BIONDI (1955), pp. 344-352. GROSSO (1962), pp. 364-370, agrees with Wlassak that, apart from the Sabinian and Proculian views, a third opinion came up, but he does not agree that this third opinion prevailed.

234 The main argument in support of his view is found in Iul., D. 30.86.2. In this text, Iulianus maintained that, when a slave was bequeathed, the status of that slave and of everything that related to him was pending (*in suspenso est*) until the legatee decided whether or not he would reject the legacy. If he rejected it (*nam si legatarius repplerit*), the slave was taken never to have been his. If, on the other hand, he did not reject (*si non repplerit*), the slave was considered to have been his from the day the heir had accepted the inheritance.

235 VOCI (1963), pp. 384-386.
VI. **LEGATUM PER VINDICATIONEM (2)**

1. **Gai., 2.200: Text and Controversy**

*Illud quaeritur, quod sub condicione per vindicationem legatum est, pendente condicione cuius esset. Nostri praeceptores heredis esse putant exemplo statuliberi, id est eius servi, qui testamento sub aliqua condicione liber esse iussus est, quem constat interea heredis servum esse. Sed diversae scholae auctores putant nullius interim eam rem esse; quod multo magis dicunt de eo, quod sine condicione pure legatum est, antequam legataris admittat legatum.*

When something is bequeathed conditionally by way of a *legatum per vindicationem*, it is asked whose it is while the condition is pending. Our teachers think that it belongs to the heir, by analogy with the *statuliber*, that is that slave who is granted freedom by will under some condition. It stands that this slave belongs to the heir during the interim. But the authorities of the other school think that, during the interim, this thing belongs to no one. This they say more convincingly of a thing bequeathed unconditionally, before the legatee acknowledges the legacy.²³⁶

The controversy under consideration is related to the controversy in Gai., 2.195. Both texts pertain to the discussion about the *legatum per vindicationem* (Gai., 2.193-200).

When a testator makes a *legatum per vindicationem*, he may add a condition precedent; the legatee becomes the owner of the legacy after the condition is fulfilled. This kind of situation gives rise to the following legal question: ‘If something is bequeathed conditionally by way of a *legatum per vindicationem*, to whom does it belong while the condition is pending?’ About

²³⁶ The following editors have translated the verb ‘admittere’ as ‘to accept’: J. REINACH, *Gaius Institutes*, Paris 1950, p. 74 (‘Pour la période antérieure à l’acceptation du legs par le légataire’); F. DE ZULUETA, *The Institutes of Gaius. Part I: Text with Critical Notes and Translation*, 3rd edn., Oxford 1958, p. 125 (‘… Up to when the legatee accepts the legacy’); A.C. OLTMANS, *De Instituten van Gaius*, 3rd edn., Groningen 1967, p. 85 (‘Vóórdat de legataris het legaat aanvaardt’). However, this translation is incorrect, for a *legatum per vindicationem* cannot be accepted by the legatee. The verb ‘admittat’ has been translated correctly by W.M. GORDON - O.F. ROBINSON, *The Institutes of Gaius*, London 1988, p. 223: ‘Before the legatee acknowledges the legacy’.
this legal problem, the Sabinians and Proculians held different views. While the former assigned the bequeathed object to the heir during the interim, the latter took the view that it belonged to no one.

Gaius, moreover, mentioned the argument in support of the Sabinian view. The Sabinians argued that, while the condition was pending, the legacy belonged to the heir, ‘exemplo statuliberi’, i.e., by analogy with a *statuliber*. A *statuliber* is a slave who is granted freedom by will under a condition. Pending the condition, such a slave was called *statuliber* and belonged to the heir.238

The Proculian view that the legacy belonged to no one while the condition was pending may have been taken by analogy with their view about a legacy, bequeathed unconditionally by way of a *legatum per vindicationem*, before the legatee acknowledged it, as Gaius indirectly suggested. The closing sentence of Gai., 2.200 (i.e., ‘this they say more convincingly of an item bequeathed unconditionally, before the legatee acknowledges the legacy’) refers to the controversy in Gai., 2.195. According to the Proculians, an ignorant legatee did not immediately become the owner of an item bequeathed to him unconditionally in a *legatum per vindicationem*; he had to indicate his intention to have it. In the meantime, during the period between the *aditio hereditatis* and the acknowledgement, the legacy belonged to no one and was qualified a *res nullius*. Gaius, moreover, seemed to suggest by the words ‘quod multo magis dicunt’ that this reasoning was more convincing than the Proculian reasoning in case of a conditional legacy. Since it was by definition impossible that a *legatum per vindicationem* bequeathed unconditionally (‘sine condicione pure’) belonged to the heir before the legatee acknowledged it, it could be regarded as a *res nullius*.


2. The Controversy in Gai., 2.200: Modern Theories

Some authors, including Voigt and Falchi, explained the controversy between the Sabinians and the Proculians in terms of conservative versus progressive.\(^\text{239}\) However, only Falchi adduced arguments in support of his view. Voigt did not explain in what way the Sabinian opinion was an illustration of their *rigor iuris* and *verbi ratio*. Neither did he adduce arguments in support of his statement that the Proculian opinion was an example of their adherence to *aequitas* and *voluntatis ratio*.

Falchi maintained that the Proculians were conservative, whereas the Sabinians were progressive. He did not explicitly apply his theory to the controversy in Gai., 2.200, because he had already done so in the earlier controversy of Gai., 2.195. According to Falchi, the Proculians abided by an archaic principle. According to this principle, the conditionally bequeathed item was a *res nullius* until the condition was fulfilled. The Proculians maintained that the testator’s ownership ended immediately after his death. Only by means of a unilateral action, i.e., by the fulfilment of the condition, could the legatee acquire the legacy. According to Falchi, the Sabinians tried to limit the number of *res nullius*. Therefore, they introduced an innovation: they accorded the legacy to the heir until the condition was fulfilled.

Against Falchi’s theory, the same objection can be made as for the previous controversy: there is no source to confirm the Sabinian preoccupation to limit the amount of *res nullius*. Moreover, the sources do not confirm that the qualification of a legacy as a *res nullius* before the condition was fulfilled was an archaic principle.

Finally, there was one author who offered an explanation that differed from the opposition conservative/progressive. According to Stein, the controversy in Gai., 2.200 was due to a different view on methodology between the two schools: whereas the Sabinians were influenced by the anomalists, the Proculians were inspired by the analogists. Stein maintained that, in the two disputes regarding a *legatum per vindicationem*, as described in Gai., 2.195 and Gai., 2.200, the Proculians ‘carried their abhorrence to illogical reasoning to extremes’. The Proculians rejected the Sabinian view, because it involved some rather circular reasoning. The Sabinians held that a legacy belonged to the heir pending the condition. This would mean


that the heir had a right to freely dispose of it. Once the condition was fulfilled, ownership would pass to the legatee, who was entitled to the legacy as it was at the moment of the *aditio hereditatis*. Since the Proculians wanted to avoid such complications, they held that, in the meantime, the legacy belonged to no one. However, Stein admitted that the Proculian view may have proven unsatisfactory in practice.\(^{240}\)

Stein’s theory is inadequate, because it is incomplete: Stein only explained why the Proculians may have rejected the Sabinian view. However, he failed to explain why the Proculians decided that the conditionally bequeathed legacy was a *res nullius*, pending the condition, and why the Sabinians attributed the ownership of the legacy to the heir in the meantime. A second critical remark can be made. Stein qualified the Proculians as analogists and the Sabinians as anomalists. In this case, however, the Sabinians held that the conditional legacy belonged to the heir, by analogy with the *statuliber*. This means that the argument in support of the Sabinian view, mentioned by Gaius, contradicts Stein’s theory.

3. **The Locus a Similitudine in Gai., 2.200**

At the beginning of the 1\(^{st}\) century AD, the following situation or a comparable one may have occurred. A testator (A) instituted B as heir and bequeathed something conditionally in a *legatum per vindicationem* to a legatee (C). Thereupon, the testator died and B entered into the inheritance. While the condition was pending, the legatee took possession of the bequeathed thing. As a consequence, a conflict arose between the heir (B), on the one hand, and the legatee (C), on the other, about the ownership of the bequeathed thing. The heir consulted the Sabinians about the legal problem and expected a *responsum* that would be to his advantage. According to the Sabinians, the heir could be regarded as the legitimate owner of the bequeathed item and they advised him to bring a *rei vindicatio* against the legatee, who was in possession. The latter, however, turned to the Proculians for advice. They held that, pending the condition, the bequeathed item belonged to no one. This meant that the legatee had taken possession of a *res nullius*. Let us see what arguments the Proculians and the Sabinians used to support their *responsa*.

3.1 The Proculian View

When the heir brought a *rei vindicatio* against the legatee, the latter put the following legal question to the Proculians: ‘When something has been bequeathed to me conditionally in a *legatum per vindicationem*, to whom does the legacy belong while the condition is pending, to me or to the heir?’ The Proculians answered that such a legacy could be regarded as belonging to no one. They probably took this view by analogy with their opinion about a *legatum per vindicationem* that was bequeathed unconditionally before the legatee had acknowledged it.

The Proculians may have found their argument by means of the *locus a similitudine*.\(^{241}\) They emphasised the similarity between a *legatum per vindicationem* bequeathed unconditionally and one bequeathed conditionally. More specifically, they compared the period in which the legatee had not (yet) acknowledged the legacy with the period in which the condition had not (yet) been fulfilled. In the latter period, the legatee could not acknowledge the legacy either. Since the Proculians had taken the view that an unconditional legacy belonged to no one before the legatee knew about it and acknowledged it, they took the same view regarding a conditional legacy, pending the condition.

The Proculian argumentation in defence of the legatee can be reconstructed.

- Since an item bequeathed unconditionally by way of a *legatum per vindicationem* did not belong to the legatee, nor to the heir before the legatee acknowledged it and, thus, was a *res nullius*,
- since the period before the acknowledgement was comparable to the period before the fulfilment of a condition, all things that were bequeathed under some condition are *res nullius*, while the condition is pending, and
- since the item was bequeathed by way of a *legatum per vindicationem* under some condition,
- the bequeathed item belonged to no one while the condition was pending.

\(^{241}\) Cic., *Top.*, 3.15: 10.41-45.
3.2 The Sabinian View

The heir, on the other hand, put the following legal question to the Sabinians: ‘A testator has bequeathed something by way of a *legatum per vindicationem* to a legatee under some condition. To whom does the legacy belong while the condition is pending?’ The Sabinians answered that, in the meantime, the legacy belonged to the heir, ‘exemplo statuliberi’.

The Sabinians used the same *topos* as the Proculians did, i.e., the *locus a similitudine*, but they used it in a different way. The Proculians had underlined the similarity between an unconditional and a conditional legacy and, more specifically, between the period in which the legatee had not yet acknowledged the legacy and that in which the condition had not yet been fulfilled. The Sabinians, on the other hand, made use of another similarity, that between a conditional legacy and a conditional manumission.

In order to demonstrate that the Sabinians made use of the *locus a similitudine*, some of the information provided by Cicero regarding this *topos* is interesting. In the second part of his *Topica*, Cicero discussed four general kinds of the *locus a similitudine*.242 The first kind of argument of similarity reaches its goal by means of several parallels and is called induction. Another kind of argument of similarity rests on comparison (*collatio*). Under the *locus a similitudine* also comes the citing of examples. The final argument from similarity makes use of imaginary examples. In this connection, particularly the third kind is relevant. Cicero comments on it in *Top.*, 10.44:

Ex eodem similitudinis loco etiam exempla sumuntur, ut Crassus in causa Curiana exemplis plurimis usus est, qui testamento sic heredes instituti,243 ut si filius natus esset in decem mensibus isque mortuus prius quam in suam tutelam venisset, hereditatem obtinuissent. Quae commemoratio exemplorum valuit, eaque vos in respondendo uti multum soletis.

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243 In this part of the text, the text edition gives rise to some problems. Apart from *instituti*, other possibilities are: 1) *instituisset*, 2) *instituissent*, and 3) *instituti essent*. Accordingly, different translations occur: 1) ‘as Crassus has used many examples in the *Causa Curiana* of someone who had instituted heirs in his will so that they would have obtained the inheritance if...’; 2) ‘as Crassus has used many examples in the *Causa Curiana* of those men who had instituted heirs in their wills so that they would have obtained the inheritance if...’, and 3) ‘as Crassus has used many examples in the *Causa Curiana* of those men who had obtained an inheritance, having been instituted as heirs in a testament...’
From the same *topos* of similarity, examples are drawn, as Crassus has used many examples in the *Causa Curiana* of those who had obtained an inheritance, instituted as heirs in a testament in such a way that they would acquire the inheritance only if a son had been born within ten months and had died before attaining maturity. Such a mentioning of examples was effective and you jurists tend to use them a lot in giving *responsa*.

The Sabinians, obviously, used the example of a *statuliber* by way of an argument. Since a *statuliber* belonged to the heir before the condition for his release was fulfilled, a conditionally bequeathed legacy, too, belonged to the heir, while the condition was pending.

The final remark of Cicero is particularly interesting: ‘Such a mentioning of examples was effective and you jurists tend to use them a lot in giving *responsa*’. This statement is a convincing argument in support of the thesis that jurists had indeed made use of topical argumentations in their legal advices.

The Sabinian argumentation in favour of the heir (B) can be reconstructed as follows:

- Because a *statuliber* belonged to the heir while the condition for his release was pending.
- an item bequeathed by way of a *legatum per vindicationem* under some condition belonged to the heir while the condition was pending.
- The item was bequeathed in a *legatum per vindicationem* under some condition.
- Therefore, the bequeathed item belonged to the heir while the condition was pending.

4. A Controversy Fading Away

Apart from the *Institutiones* of Gaius, no other source that has come down to us refers to the school controversy. In the Digest, jurists like Paul, Ulpian, and Modestin applied the same view as the Sabinians: while the condition was pending, the legacy belonged to the heir.244

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244 In the following sources, the jurists have applied the same view as the Sabinians: Paul, D. 6.1.66; Ulp., D. 7.1.12.5; Ulp., D. 10.2.12.2; and Mod., D. 31.32.1.
CHAPTER VI

Once the condition was fulfilled, the legatee became the new owner. An application of the Proculian view, on the other hand, is nowhere to be found in the sources.

This leads to the conclusion that the legal question that had given rise to the school controversy had not come up for discussion anymore. The Proculian opinion that an item bequeathed by a *legatum per vindicationem* belonged to no one before the condition was fulfilled was very impractical because of the legal instability it created. Therefore, there was no need for a decision to confirm that the Sabinian opinion prevailed.

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245 The legatee, moreover, had a right to the thing as it was when the heir entered into the inheritance. Therefore, it was decided that some of the legal acts of the heir were valid immediately, but their effects were revoked as soon as the condition was fulfilled. See, for example, Ulp., D. 7.4.16 and Marcell., D. 8.6.11.1. Other legal acts were ineffective unless the condition remained unfulfilled, since their effects could not be revoked at a later stage. See: Paul, D. 11.7.34; Paul, D. 40.1.11 and Gai., D. 40.9.29.1.
VII. LEGATUM PER PRAECEPTIONEM

1. Gai., 2.216-222: Text and Controversy

216. Per praeceptionem hoc modo legamus L. TITIUS HOMINEM STICHIUM PRAECIPITO. 217. Sed nostri quidem praeceptores nulli aliī eo modo legari posse putant nisi ei, qui aliqua ex parte heres scriptus esset. Praecipere enim esse praecipuum sumere; quod tantum in eius persona procedit, qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecipuum legatum habiturus sit.

218. Ideoque si extraneo legatum fuerit, inutile est legatum, adeo ut Sabinus ἵδι existimaverit ne quidem ex <senatus> consulto Neroniano posse convalescere: ‘nam eo’, inquit, ‘senatus consulto ea tantum confirmantur, quae verborum vitio iure civili non valent, non quae propter ipsam personam legatarii non deberentur’. Sed Iuliano et Sexto placuit etiam hoc casu ex senatus consulto confirmari legatum: nam ex verbis etiam hoc casu accidere, ut iure civili inutile sit legatum, inde manifestum esse, quod eidem aliīs verbis recte legatur, veluti per vindicationem, [et] per damnationem, sinendi modo; tunc autem vitio personae legatum non valere, cum ei legatum sit, cui nullo modo legari possit, velut peregrino cum quo testamenti factio non sit. Quo plane casu senatus consulto locus non est.

219. Item nostri praeceptores, quod ita legatum est, nulla ratione putant posse consequi eum, cui ita fuerit legatum, quam iudicio familiae erciscundae, quod inter heredes de hereditate erciscunda, id est dividunda, accipi solet: officio enim iudicis id contineri, ut ei quod per praeceptionem legatum est, adiudicetur. 220. Unde intellegimus nihil aliud secundum nostrorum praeceptorum opinionem per praeceptionem legari posse, nisi quod testatoris sit. Nulla enim alia res quam hereditaria deducitur in hoc iudicium. Itaque si non suam rem eo modo testator legaverit, il iure quidem civili inutile erit legatum, sed ex senatus consulto confirmabitur. Aliquo tamen casu etiam alienam rem <per> praeceptionem legari posse fatentur; veluti si quis eam rem legaverit, quam creditori fiduciae causa mancipio dederit: nam officio iudicis coheredes cogi posse existimant soluta pecunia luere eam rem, ut possit praecipere is, cui ita legatum sit. 221. Sed diversae scholae auctores putant etiam extraneo per praeceptionem legari posse,
proinde ac si ita scribatur: TITIUS HOMINEM STICHUM CAPITO, supervacuo adiecta PRAE syllaba; ideoque per vindicationem eam rem legatam videri. Quae sententia dicitur divi Hadriani constitutione confirmata esse. 222. Secundum hanc igitur opinionem si ea res ex iure Quiritium defuncti fuerit, postest a legatario vindicari, sive is unus ex hereditibus sit sive extraneus. Quod si in bonis tantum testatoris fuerit, extraneo quidem ex senatus consulto utile erit legatum, heredi vero familiae erciscundae iudicis officio praestabitur; quod si nullo iure fuerit testatoris, tam heredi quam extraneo ex senatus consulto utile erit.

216. We bequeath per praecipere in this way: ‘L. Titius has to take in advance the slave Stichus’. 217. Now our teachers think that a legacy in this form can be made to no one unless to him who had been appointed heir for some part. For praecipere means to take in advance, and this only applies to this person who is instituted heir for some part, because he is to have the legacy in advance beyond his share of the inheritance. 218. If, therefore, a legacy is bequeathed to an extraneus, the legacy is void, so much so that Sabinus held that it could not even be validated by the Senatus Consultum Neronianum: ‘because’, he says, ‘by that Senatus Consultum only those legacies are validated which are invalid by ius civile because of a defectiveness of the wording, not those which are not due because of the person of the legatee himself’. But Iulianus and Sextus took the view that even in this case the legacy was validated by the Senatus Consultum. The fact that, in this case, the legacy is void by ius civile owing to the words used, is therefore clear, because it would be valid if made to the same person in different words such as per vindicationem, per damnationem, or sinendi modi. A legacy is void owing to the disability of the legatee only when it is bequeathed to a person to whom it cannot be bequeathed in any form, for example, to a peregrinus, because he has no testamenti factio. In such a case there is obviously no room for the Senatus Consultum. 219. Moreover, our teachers think that he to whom such a legacy has been bequeathed can acquire the legacy only by a iudicium familiae erciscundae. This action is usually brought between the heirs in order to divide the inheritance, that is, to split it up. For this is part of the function of the judge that what is bequeathed per praecipere is adjudicated to the legatee. 220. From this we understand that, according to the opinion of our teachers, nothing else can be bequeathed per praecipere, but what belongs to the testator; for in this action no other things
than things belonging to an inheritance are brought into account. And so, if the testator has bequeathed in this manner a thing that is not his, the legacy will indeed be void by *ius civile*, but it will be validated by the *Senatus Consultum*. All the same they do admit that in a particular case even another’s thing can be bequeathed *per praeceptionem*: for example, if somebody has bequeathed that thing which he mancipated to his creditor by way of *fiducia*. For they think that the coheirs can be compelled by the competence of the judge to redeem that thing by paying the debt, so that the legatee in question can obtain in advance. 221. But the authorities of the other school think that a *legatum per praeceptionem* can also be bequeathed to an *extraneus*, as if it was written: ‘Titius has to take the slave Stichus’ with the addition of a superfluous syllable ‘prae’ and that therefore the thing appears to have been bequeathed by way of a *legatum per vindicationem*. This opinion is said to have been confirmed by a constitution of *divus* Hadrian. 222. According to this opinion, therefore, if this thing belonged to the deceased by Quiritary title, it can be vindicated by the legatee, whether he is one of the heirs or an *extraneus*. But if it belonged to the testator only by bonitary title, the legacy will be valid under the *Senatus Consultum*, if to an *extraneus*. But if to an heir, it will be secured to him in a *iudicium familiae erciscunda* under the office of the judge. And if the testator had no title to the thing at all, the legacy will be valid under the *Senatus Consultum*, whether made to an heir or to an *extraneus*.

The paragraphs under consideration are situated at the end of the discussion on the four different forms of legacies (Gai., 2.192-223) and deal with the *legatum per praeceptionem*. 246

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CHAPTER VII

Such a legacy is bequeathed in the following way: ‘Lucius Titius hominem Stichum praecipito’ or ‘Let Lucius Titius take in advance the slave Stichus’. 247

The text can be divided into two parts. In the first part (Gai., 2.217-220), Gaius goes into the Sabinian interpretation of the legatum per praeceptionem and, in the second part (Gai., 2.221-222), he deals with the Proculian interpretation. Throughout the entire text, Gaius discusses three legal problems. The first one is the main problem and concerns the beneficiary of a legatum per praeceptionem. The two other problems, regarding the object of such a legacy and the legal remedy, are derived from the main legal problem.

1.1 The Beneficiary

The main question in the text is: ‘To whom can a testator bequeath a legatum per praeceptionem?’ 248 The general rule determined that a legatum per praeceptionem had to be bequeathed to one of the testamentary heirs. This general rule was not under discussion, but the Sabinians and Proculians dissented about the question of whether a legatum per praeceptionem could also be bequeathed to an extraneus. First, I shall discuss the term extraneus and, next, the Sabinian and Proculian answers to this question.

The term extraneus in the text of Gaius does not have the connotation of extraneus heres; it does not signify the opposite of suus heres. Instead, the term is used as opposed to testamentary heirs and, thus, refers to those persons who are not instituted as heirs. Although modern translators have made several suggestions as to the translation of the term extraneus, 249 it is preferable not to translate it.

247 See also Ulp. 24.6.
248 This question is discussed in Gai., 2.217-218 and 2.221.
The Sabinians held the opinion that the beneficiary of a *legatum per praeceptionem* had to be one of the testamentary heirs. Only a person who was instituted heir for some part could acquire a legacy in advance (*praecipere*) beyond his share of the inheritance. If a *legatum per praeceptionem* was bequeathed to an *extraneus*, i.e., to a person who had not been instituted as heir, all the Sabinians agreed that it was void (by *ius civile*). Within the Sabinian school, however, a difference of opinion emerged between Sabinus, on the one hand, and Iulianus and Sextus, on the other, about the question of whether such a legacy to an *extraneus* could be validated by means of the *SC Neronianum*. According to Massurius Sabinus, the *SC Neronianum* could not be applied in this case. A century later, however, Salvius Iulianus and his disciple Sextus Africanus defended the opposite. According to them, the *SC Neronianum* could validate a *legatum per praeceptionem* that was bequeathed to an *extraneus*. Sabinus, Iulianus, and Sextus agreed that the *SC* only validated those legacies that were void by *ius civile* on account of their wording (‘vitium verborum’), not those on account of the person of the legatee himself. Sabinus held that a *legatum per praeceptionem* to an *extraneus* was void on account of the person of the legatee. According to Iulianus and Sextus, however, it was clear that such a legacy was void on account of the words, because it would have been valid if made to the same person in different words. If the legatee was a person to whom a legacy could be bequeathed in any other form, the legacy could be validated by the *SC Neronianum*. This was not the case if the legatee was a *peregrinus*, for a *peregrinus* could not acquire any legacy, neither *per vindicationem*, nor *per damnationem*, nor *sinendi modi*.

Unlike the Sabinians, the Proculians held that a *legatum per praeceptionem* could be bequeathed validly to an *extraneus* as well. In this case, they held it sufficient to read *capito* instead of *praecapito*. Henceforth, the legacy was considered a *legatum per vindicationem* (without help of the *SC Neronianum*).

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250 Gai., 2.217: ‘Sed nostri quidem praeceptores nulli alii eo modo legari posse putant, nisi ei qui aliquia ex parte heres scriptus esset’.
251 Gai., 2.218: ‘Ideoque si extraneo legatum fuerit, inutile est legatum’.
252 The *SC Neronianum* determined that a legacy which was void on account of the form chosen by the testator could be regarded as a valid legacy of another kind. Such a legacy remained void by *ius civile*, but the praetor provided actions so that the legatee could claim the legacy.
253 The fact that Sabinus took the view that, in this case, the *SC Neronianum* could not be applied implies that he was still alive when the *SC* was enacted (somewhere between 54 and 68 AD).
255 The question of whether the *legatum per praeceptionem* is merely interpreted as a *legatum per vindicationem* or is converted into one, is much-debated. FALCHI (1981), p. 135, adheres to the first assertion: ‘Infatti,
CHAPTER VII

superfluous addition, which did not invalidate the entire legacy. Gaius adds that it was said ('dicitur') that the Proculian opinion was confirmed by a constitution of Hadrian.

1.2 The Object

The second legal question in the text concerns the object of the legacy: 'What can be bequeathed in a legatum per praeceptionem?' The general rule was that everything belonging to the testator by Quiritary title at the time of his death could be the object of a legatum per praeceptionem. The two schools adhered to this general rule. Thus, the testator could bequeath in a legatum per praeceptionem all the res hereditariae. According to the Proculians, the category of res hereditariae did not only include things belonging to the testator by Quiritary title, but also by bonitary title (§ 222). Yet, Gaius does not state whether the Sabinians held the same view regarding bonitary things. If the testator bequeathed an item to which he had no title, the Sabinians and Proculians agreed that such a legacy was void by ius civile, but that it could be converted into a legatum per damnationem by means of the SC Neronianum.

However, the Sabinians admitted that in some cases the legatum per praeceptionem was valid by ius civile even when someone else’s property was bequeathed. In § 220, Gaius gives the example of fiducia. A testator could transfer an item into the ownership of his creditor by way of mancipatio as a guarantee that he would pay off his debt. If he bequeathed this same item by way of a legatum per praeceptionem, while it was still in the fiduciary ownership of the creditor, the legacy was valid by ius civile. The judge could compel the testamentary heirs to pay off the debt to the creditor in order to recover the item that was in fiducia, so that it could be given to the legatee.

considerato superfluo il prae, il legato doveva essere considerato alla stregua di quello per vindicationem.’
According to LEUBA (1962), pp. 63-64, and GIUFFRE (1965), p. 138, n. 95, the legatum per praeceptionem is converted into a legatum per vindicationem.
256 This question is discussed in Gai., 2.220 and 2.222.
257 According to BERNSTEIN (1894), pp. 62-63, the Sabinians did not reckon among the res hereditariae things belonging to the testator by bonitary title and, therefore, they qualified a legacy of such a thing as void by ius civile. According to BAVIERA (1898), p. 110, on the other hand, the Sabinians did reckon things which belonged to the testator by bonitary title among the res hereditariae. This means that such things could also be the object of a legatum per praeceptionem.
258 See also Gai., D. 10.2.28.
1.3 The Legal Remedy

The third question in the text is: ‘What kind of legal remedy is at the legatee’s disposal in order to enforce his rights?’\textsuperscript{259} This question too gave rise to a difference of opinion between the Sabinians and the Proculians. According to the Sabinians, the legatee could acquire his legacy only by means of a \textit{iudicium familiae erciscundae}: it was part of the judge’s function to grant the bequeathed item to one of the testamentary heirs before the division of the inheritance. Since only \textit{res hereditariae} could be brought into account in this kind of action, the object of the \textit{legatum per praeceptionem} had to belong to the testator. In all other cases, i.e., when the legatee was not one of the testamentary heirs and/or the bequeathed item did not belong to the testator, the legacy was either void or could be validated by means of the \textit{SC Neronianum}.

The Sabinian view to grant a \textit{iudicium familiae erciscundae} to the legatee in order to enforce his rights, may be explained by the origin of the \textit{legatum per praeceptionem}. Initially, the functioning of this kind of legacy was as follows. The Roman law of succession used to be acquainted with the concept of a \textit{Bruchteilsgemeinschaft} or a ‘common participation in the inheritance’ between the different \textit{sui heredes}, coming forward as coheirs.\textsuperscript{260} At all times, any one of them could claim the division of the inheritance between the different coheirs.\textsuperscript{261} The action for dividing the inheritance was a \textit{iudicium familiae erciscundae}. A testator who bequeathed a \textit{legatum per praeceptionem} to one of the coheirs wanted him to acquire the legacy ‘in advance’ at the time the inheritance was divided by means of the \textit{iudicium familiae erciscundae}. In this way, the legacy was separated from the estate in advance and was not taken into account in the calculation of the parts. This meant that the legatee first received his legacy and then his part of the inheritance.

The Proculians, on the other hand, held that the legal remedy for the legatee (either one of the testamentary heirs or an \textit{extraneus}) was a \textit{rei vindicatio}, provided that the bequeathed item belonged to the testator by Quiritary title. Since the Proculians interpreted a \textit{legatum per praeceptionem} to an \textit{extraneus} as a \textit{legatum per vindicationem}, it seems reasonable that they

\textsuperscript{259} This question is discussed in Gai., 2.219 and 2.222.
\textsuperscript{260} KASER, \textit{RPR}, I, pp. 727-729.
\textsuperscript{261} Even against the will of the other coheirs: Ulp., D. 10.2.43.
CHAPTER VII

granted the legatee a \textit{rei vindicatio}. Yet, the Proculians decided to accord a \textit{rei vindicatio} to the testamentary heir as well.\textsuperscript{262}

If the bequeathed item did not belong to the testator by Quiritary title, obviously the \textit{rei vindicatio} could not be applied. If the item belonged to the testator by bonitary title and the legatee was one of the testamentary heirs, the Proculians granted him a \textit{iudicium familiae erciscundae}. If, on the other hand, he was an \textit{extraneus}, the legacy could be validated by means of the \textit{SC Neronianum}. If the testator had no title at all, the legacy was void by \textit{ius civile}, but the Proculians took the view that it could be validated by the \textit{SC Neronianum}, regardless of whether the legatee was one of the testamentary heirs or an \textit{extraneus}.

1.4 Summary

The following outline represents the three legal questions concerning the \textit{legatum per praeceptionem}, together with the Sabinian and Proculian answers:

\textsuperscript{262} According to LEUBA (1962), pp. 60-63, there is a contradiction between Gai., 2.221 and Gai., 2.222. In his view, § 221 implies that the Proculians held that a \textit{legatum per praeceptionem} to one of the testamentary heirs was valid and that the beneficiary could obtain his legacy by way of a \textit{iudicium familiae erciscundae}. In conflict with § 221, however, § 222 also grants a \textit{rei vindicatio} to the testamentary heir. This means, according to Leuba, that the \textit{legatum per praeceptionem} would be absorbed by the \textit{legatum per vindicationem}. Therefore, Leuba concludes that the sentence ‘sive is unus ex heredibus sit, sive extraneus est’ is a postclassical gloss. KASER (1965), pp. 426-427, on the other hand, does not agree with Leuba. In § 221, Gaius states that, according to the Proculians, a \textit{legatum per praeceptionem} can also be bequeathed to an \textit{extraneus} and that, in this case, the legatee could obtain the bequeathed thing by means of a \textit{rei vindicatio}. That the application of the \textit{rei vindicatio} is restricted to the case of an \textit{extraneus}, however, is stated nowhere. On the contrary, the suggestion of Leuba to refer a testamentary heir, to whom a thing in Quiritary ownership of the testator was bequeathed \textit{per praeceptionem}, to a \textit{iudicium familiae erciscundae} seems illogical and contradictory. If the Proculians equate the \textit{legatum per praeceptionem} with the \textit{legatum per vindicationem}, the beneficiary (whether he is one of the testamentary heirs or an \textit{extraneus}) may vindicate what is bequeathed to him. According to Kaser, therefore § 222 links up perfectly with § 221 and the words ‘sive is unus ex heredibus sit sive extraneus’ should not be regarded as a gloss.
**LEGATUM PER PRAECEPTIONEM**

<table>
<thead>
<tr>
<th><strong>LEGATUM PER PRAECEPTIONEM</strong></th>
<th><strong>SABINIANS</strong></th>
<th><strong>PROCULIANS</strong></th>
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<tr>
<td><strong>1. TO WHOM?</strong></td>
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<tr>
<td>- to one of the testamentary heirs</td>
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<tr>
<td>- to an extraneus</td>
<td><strong>Sabinus</strong>: void</td>
<td>valid: the <em>lpp</em> is interpreted as a <em>lpv</em></td>
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<td><strong>2. WHAT?</strong></td>
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<tr>
<td>Something that belongs to the testator:</td>
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<td>- by Quiritary title</td>
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<td>- by bonitary title</td>
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<td><em>SC Neronianum</em></td>
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<td><strong>3. LEGAL REMEDY?</strong></td>
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<td>The testator bequeathed something in a <em>lpp</em> to <strong>one of the testamentary heirs</strong> which belonged to him:</td>
<td><em>Judicium familiae erciscundae</em></td>
<td><em>Rei vindicatio</em></td>
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<tr>
<td>- by Quiritary title</td>
<td>?</td>
<td><em>Judicium familiae erciscundae</em></td>
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<td>- by bonitary title</td>
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<td>The testator bequeathed something in a <em>lpp</em> to an <strong>extraneus</strong> which belonged to him:</td>
<td><strong>Sabinus</strong>: void</td>
<td><em>Rei vindicatio</em></td>
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<td>- by Quiritary title</td>
<td><strong>Iulianus and Sextus</strong>: <em>SC Neronianum</em></td>
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By way of recapitulation, the differences of opinion between the Sabinians and the Proculians concerning the person to whom a *legatum per praeceptionem* could be bequeathed and the
legal remedy at the legatee’s disposal are set out. First, the schools had a difference of opinion about the question to whom the legacy could be bequeathed. This question arose because the words of the *legatum per praeceptionem*, i.e., ‘<Lucius Titius hominem Stichum> praecipito’, admitted of more than one interpretation. The Sabinians held that a *legatum per praeceptionem* could only be bequeathed to one of the testamentary heirs. A legacy to another beneficiary was void by *ius civile*. According to the Proculians, on the other hand, a *legatum per praeceptionem* could be bequeathed to one of the testamentary heirs as well as to an *extraneus*. If the legacy was bequeathed to an *extraneus*, the Proculians interpreted the *legatum per praeceptionem* as a *legatum per vindicationem*. Second, the Sabinians and Proculians disagreed about the legal remedy. Whereas the Sabinians maintained that the legatee could claim his legacy by means of a *iudicium familiae erciscundae*, the Proculians granted him a *rei vindicatio*.

### 2. The Controversy Decided

The sources provide no unequivocal information as to the question of which opinion eventually prevailed. First, the arguments will be enumerated that indicate that the Proculian opinion prevailed. Next, the arguments in support of the prevalence of the Sabinian view will be taken into consideration.

According to Gaius (2.221), the Proculian view that a *legatum per praeceptionem* could also be bequeathed to an *extraneus* is said (‘dicitur’) to have been confirmed by a constitution of *divus* Hadrian. The use of the word ‘dicitur’, however, may indicate that Gaius was not entirely certain about his statement.

A constitution of 240 contains another argument in support of the view that the Proculian opinion prevailed. The relevant text is C. 6.37.12:

> **Imp. Alexander A. Muciano.** Cum respondero viri prudentissimi Papiniani, quod precibus insertum est, praeceptionis legatum et omissa parte hereditatis vindicari posse declaratur, intellegis desiderio tuo iuxta iuris formam esse consultum. Verba
vero responsi haec sunt: Filiae mater praedium ita legavit: ‘praecipito sumito extra partem hereditatis’: cum hereditati matris filia renuntiasset, nihil minus eam recte legatum vindicare visum est. PP. constitutio v id. Iul. Sabino II et Venusto conss. [a 240]

The Emperor Alexander to Mucianus. Since it is stated in a responsum by the very erudite Papinian, which is inserted in your request, that a legatum per praeceptionem can be claimed even though the share of the inheritance is not accepted, you understand that your petition has been met according to the standards of law. The words of the responsum are the following: A mother has bequeathed land to her daughter in the following manner: ‘Take it in advance beyond your part of the inheritance.’ When the daughter had rejected the inheritance of her mother, nonetheless it is held that she can legally claim the legacy. Published on the fifth of the Ides of July, during the Consulate of Sabinus, Consul for the second time, and Venustus, [240].

According to this text, the rescript is issued by the Emperor Alexander, i.e., by Alexander Severus. However, at the time when Sabinus and Venustus were both consul, i.e., in the year 240, this emperor had already died. In 240, the Emperor Gordian was in power and, therefore, the rescript was probably drawn under his reign.

The rescript refers to a responsum of Papinian, who had dealt with the following case. A mother had instituted her daughter as heir for some part and had bequeathed land to her in a legatum per praeceptionem. The daughter, however, did not accept her part of the inheritance and, therefore, the question arose whether she could still legally claim the legacy. Papinian gave an affirmative answer to this question: ‘Nonetheless she can legally claim the legacy’ (‘nihilo minus eam recte legatum vindicare visum est’).\(^2\) Even though the daughter was no longer a testamentary heir, but had become an extraneus, because she had rejected her part of the inheritance, she could still claim the legacy by way of a rei vindicatio. In this constitution,

\(^2\) In the same sense, Ulp., D. 30.17.2:

Si uni ex heredibus fuerit legatum, hoc deberi ei officio iudicis familiae herciscundae manifestum est: sed et si abstinuerit se hereditate, consequi eum hoc legatum posse constat.

If a legacy has been bequeathed to one of the heirs, it is clear that it is due to him by the competence of the judge in a iudicium familiae erciscundae. But even if he has refused the inheritance, it is established that he can recover this legacy.
CHAPTER VII

Bernstein sees a confirmation that the Proculian opinion prevailed. Leuba, however, remarks that the meaning of the expression ‘legatum vindicare’ is not certain: ‘Vindicare peut signifier “réclamer, prétendre à” … On est donc bien loin du sens technique de ‘agir en justice par rei vindicatio.’

Let us now turn to the arguments which may be adduced in support of the view that the Sabinian opinion prevailed. No other source mentions a legatum per praeceptionem that is bequeathed intentionally to an extraneus. Sometimes the legatee was one of the testamentary heirs, but became an extraneus by rejecting his part of the inheritance. What is more, the sources frequently qualify the legal remedy at the legatee’s disposal as a iudicium familiae erciscundae. Since there are no indications that, in all these cases, the bequeathed things were objects belonging to the testator by bonitary title, this argument suggests that the Sabinian opinion prevailed.

From these conflicting indications, it is difficult to draw any definite conclusions about which opinion eventually prevailed. The Institutiones of Justinian make it clear that the distinction between the different kinds of legacies merged: henceforth, all legacies were the same in nature. By the time of Justinian, the discussion between the Sabinians and the Proculians had therefore lost its relevance.

3. The Controversy in Gai., 2.216-222: Modern Theories

Most scholars explain the controversy regarding the legatum per praeceptionem in terms of conservative versus progressive. The majority, including Bernstein, Voigt, Biondi, Leuba, and

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264 BERNSTEIN (1894), pp. 124-126.
265 LEUBA (1962), p. 78.
266 For example: Ulp., D. 10.2.4.pr; Ulp., D. 10.2.22.1; Gai., D. 10.2.26; Pomp., D. 10.2.42; Iul., D. 10.2.51.pr; Ulp., D. 30.17.2; and PS, 3.6.1.
267 KASER (1965), p. 427, has suggested that some kind of media sententia prevailed. If a legatum per praeceptionem was bequeathed to one of the coheirs (Miterben), who acquired his part of the inheritance, then the Sabinian opinion prevailed and the legatee had a iudicium familiae erciscundae at his disposal. If, however, the legatee did not acquire his part of the inheritance and thus became an extraneus, the Proculian opinion prevailed and he could vindicate his legacy.
268 Inst., 2.20.2.
Galeno, maintain that the Sabinian view was traditional and the Proculian view progressive.\footnote{BERNSTEIN (1894), pp. 26-144; VOIGT (1899), p. 230; BIONDI (1955), pp. 222-225, 272-278; LEUBA (1962), pp. 57-87; GALENO (1964), pp. 212-213. 269} They regard the Sabinian view as an attempt to preserve the ancient conception of the \textit{legatum per praeceptionem}. Originally, such a legacy was bequeathed to coheirs only and could be acquired only by means of a \textit{iudicium familiae erciscundae}. In other words, the Sabinians held on to the original meaning of the formula ‘Lucius Titius hominem Stichum praecipito’. The Proculian view, on the other hand, is considered to be part of the historical evolution of the legacy. The Proculians wanted to take into account the testator’s will and assimilated the \textit{legatum per praeceptionem} with the \textit{legatum per vindicationem} in order to make it accessible to \textit{extranei}.

Falchi, on the other hand, also regards this antithesis as the key to explain the controversy under consideration. However, he describes the relation between the two schools the other way around. Falchi regards the Proculians as traditional and the Sabinians innovative.\footnote{FALCHI (1981), pp. 133-141. 270} In his view, the traditional Proculians adapted the \textit{ius civile} system, which was inherited from the \textit{veteres}, to new situations of their own time. In other words, they innovated the traditional system by analogy with the institutions of the \textit{veteres}. The innovative Sabinians, on the other hand, did not adapt the existing system. They preferred constructing a new and autonomous system that was independent of the traditional institutions of the Republic. According to Falchi, the text regarding the \textit{legatum per praeceptionem} confirms this theory. The Proculians constructed the \textit{legatum per praeceptionem} as a new kind of legacy by analogy with the traditional structure of a \textit{legatum per vindicationem}. The Sabinians, on the other hand, attributed to the \textit{legatum per praeceptionem} a specific and autonomous legal structure that was completely different from the structure of a \textit{legatum per vindicationem}. In order to accentuate this difference, the Sabinians decided that a \textit{legatum per praeceptionem} could only be attributed to coheirs. Falchi, furthermore, maintains that the Sabinians attached great importance to the \textit{voluntas} of the testator. From the moment the coheirs had accepted the inheritance, the legatee immediately acquired what had been bequeathed to him.\footnote{See Gai., 2.195. 271} Even if the legatee refused, the legacy would still devolve upon him through the shares of the inheritance. If an \textit{extraneus}, however, refused a legacy, it would not devolve upon him and the \textit{voluntas} of the testator would be violated and, therefore, the Sabinians decided that a \textit{legatum per praeceptionem} would still devolve upon him.
CHAPTER VII

praecceptionem could not be bequeathed to an extraneus. The Proculians, on the other hand, maintained that a legacy (whether a legatum per vindicationem or a legatum per praeceptionem) became a res nullius immediately after the testator’s death and that the legatee could only acquire the legacy by way of an explicit and unilateral acceptance.\(^{272}\) This means that the voluntas of the testator was not important and, therefore, a legatum per praeceptionem could also be bequeathed to an extraneus.

Falchi’s theory is not convincing, because he has incorrectly defined the legal problem at the root of the controversy. The core of the legal problem was the interpretation of the words of the legatum per praeceptionem and whether or not these words could be interpreted by analogy with those of a legatum per vindicationem. Falchi, however, has turned things around. According to him, the authorities of the Sabinian and Proculian schools wanted to determine to what extent the legal structure of a legatum per vindicationem had to underlie the legal structure of a legatum per praeceptionem. Another point of criticism can be raised against Falchi. He states that the opinion of Salvius Iulianus, i.e., that a legatum per praeceptionem to an extraneus could be validated by the SC Neronianum, was more liberal and surpassed the school controversy. Falchi also maintains that Hadrian had accepted Iulianus’ opinion.\(^{273}\) However, Gaius has stated nowhere that the opinion of Salvius Iulianus surpassed the school controversy. When Gaius (2.221) mentioned an opinion to have been confirmed by a constitution of divus Hadrian, he referred to the Proculian opinion and not to the opinion of Salvius Iulianus.

4. The Locus ex Notatione and the Locus a Similitudine in Gai., 2.216-222

At the beginning of the 1st century AD, the following situation may have given rise to the school controversy. A testator had drawn up a testament in which he instituted his heirs. To one of the heirs (B), he also bequeathed something by means of a legatum per praeceptionem. This thing still belonged to him by Quiritary title at the moment of his death. For one reason or another, B did not accept his part of the inheritance and, thus, became an extraneus. At the

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\(^{272}\) See Gai., 2.195.  
testator’s death, the inheritance had to be divided and a conflict arose between the remaining testamentary heirs (A), on the one hand, and the legatee (B), on the other, about the validity of the *legatum per praeceptionem*. The legatee (B), who wanted to acquire the bequeathed thing, may have consulted the Proculians. They answered that such a legacy could be regarded as valid and advised B to bring a *rei vindicatio* against the testamentary heirs in order to claim ownership of the bequeathed thing. The testamentary heirs (A), in their turn, may have consulted Sabinus. He stated that a *legatum per praeceptionem* to an *extraneus* was void and that B, therefore, could not use this action. 274 The arguments in support of the Sabinian and the Proculian views may have been found in the following way.

### 4.1 The Sabinian View

When B brought a *rei vindicatio* against the testamentary heirs to claim ownership of the bequeathed thing, they turned to Sabinus: ‘To whom can a *legatum per praeceptionem* be bequeathed: to one of the testamentary heirs only or to an *extraneus* as well?’ Sabinus answered that such a legacy could be made to no one except to a person who had been appointed heir for some part of the inheritance, because *praecipere* means to take in advance (Gai., 2.217: ‘Praecipere enim esse praecipuum sumere’). Given the connotation of the verb *praecipere*, only one of the testamentary heirs could be the beneficiary of such a legacy, since he was the only person who could acquire a legacy in advance (*praecipere*) beyond his share of the inheritance. If, therefore, something was bequeathed to an *extraneus* by a *legatum per praeceptionem extraneus*, the legacy was void. Sabinus argued that it could not even be validated by the *SC Neronianum*. How did Sabinus find the argument ‘praecipere enim esse praecipuum sumere’?

The *status* of the conflict was that of *ambiguitas*. 275 The conflict had arisen because the words to bequeath a *legatum per praeceptionem*, i.e., ‘<L. Titius hominem Stichum> praecipito’, were ambiguous and admitted of more than one interpretation. Both the Sabinians and the Proculians explained the formulation in different ways.

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274 My account will be restricted to the essential issue, since the two other legal questions are derived from the main question.

275 Regarding *ambiguitas*, see Cic., *De inv.*, 2.116-121; Quint., *Inst. Or.*, 7.9.1-15.
Sabinus seems to have found his argument by means of the *locus ex notatione*, i.e., the *topos* of etymology.\(^{276}\) According to Cicero, an argument is found under the *locus ex notatione*, when it is derived from the meaning of a word.\(^{277}\) Clearly, the Sabinian argument ‘praecipere enim esse praecipuum sumere’ is derived from the meaning of the verb *praecipere*, signifying ‘praecipuum sumere’ or ‘to take in advance’. Sabinus thus concluded that a *legatum per praeceptionem* was a legacy which could only be bequeathed to a person who was instituted as heir for some part, so that he could take the legacy in advance beyond his share of the inheritance.

The argumentation which the coheirs used in the *rei vindicatio* can now be reconstructed.

- Since *praecipere* means ‘to take in advance’,
- a *legatum per praeceptionem* is a legacy that is bequeathed to one of the testamentary heirs who could take the legacy in advance beyond his share of the inheritance.
- B is not one of the testamentary heirs, but an *extraneus*.
- Therefore, the *legatum per praeceptionem* that has been bequeathed to him is void.

### 4.2 The Proculian View

The *extraneus* (B), in his turn, put the following question to the Proculians: ‘A testator has bequeathed something to me by way of a *legatum per praeceptionem*. This legacy is valid, isn’t it?’ The authorities of the Proculian school confirmed that such a legacy was valid. They took the view that a *legatum per praeceptionem* could also be bequeathed to an *extraneus*, as if it was written: ‘Titius has to take the slave Stichus.’ Since they held the addition of the syllable ‘prae’ to be superfluous, the item appears to have been bequeathed by way of a *legatum per vindicationem*. How did the Proculians construct this argumentation?

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\(^{276}\) In the same sense, LEUBA (1962), p. 58, who notices that the Sabinians used the etymological explanation of the verb *praecipere* by way of argument: ‘Mais, en outre, l’école sabinienne, …, ne concevait le legs ordonné per *praeceptionem* que comme une disposition en faveur de l’un des héritiers institués. Elle s’en tenait à l’explication étymologique du verbe *praecipere*, qui signifie prendre avant, prendre le premier.’ Leuba, however, fails to make a connection with the *locus ex notatione*, as used in rhetoric and *topica*.

\(^{277}\) Cic., *Top.*, 2.10: ‘Tum notatio, cum ex verbi vi argumentum aliquod elicuit.’ (‘Then etymology, when some argument is derived from the meaning of a word’) and Cic., *Top.*, 8.35: ‘Multa eitam ex notatione sumuntur. Ea est autem cum ex vi nominis argumentum elicuit.’ (‘Many arguments are deduced from etymology. This is what is used when an argument is derived from the meaning of words’).
As stated above, the *ambiguitas* of the words that were used to bequeath something by way of a *legatum per praeceptionem*, i.e., ‘L. Titius hominem Stichum praecepiito’, had given rise to the conflict between the two parties. If a testator had bequeathed something by way of a *legatum per praeceptionem* to an *extraneus*, the Proculians held that the syllable ‘prae’ was superfluous and argued that the formula should be read as: ‘L. Titius hominem Stichum capito’. In other words, the Proculians interpreted a *legatum per praeceptionem* that had been bequeathed to an *extraneus* as a *legatum per vindicationem*.

The Proculians constructed their argumentation with assistance of the *locus ex similitudine*. The Proculians emphasised the similarity between the formula of a *legatum per praeceptionem* and that of a *legatum per vindicationem*. Since a *legatum per vindicationem* could validly be bequeathed to an *extraneus*, the Proculians held the same for a *legatum per praeceptionem*. Since the Proculians put the *legatum per praeceptionem* and the *legatum per vindicationem* (or at least their formulae) on the same footing, they decided that the legal remedy at the legatee’s disposal was a *rei vindicatio*.

The argumentation which was used by the *extraneus* in the *rei vindicatio* can now be reconstructed.

- There is no substantial difference between *capere* and *praecipere* and,
- therefore, a *legatum per praeceptionem* can also validly be bequeathed to an *extraneus*.
- B is an *extraneus*.
- Therefore, the *legatum per praeceptionem* is valid.

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278 BAVIERA (1898), p. 110, admits that the Proculian argumentation was based on the assimilation between a *legatum per praeceptionem* and a *legatum per vindicationem*: ‘Pei Proculiani invece l’estraneo poteva goderne, perchè nella formula speciale in cui quel legato erigevasi la parola ‘praecipito’ equivaleva all’altra di “capito”: il “pre” era una sillaba aggiunta, “supervacua”... Sembra a me che la immediata ragione dell’opposta opinione dovesse essere l’impossibilità pei primi di ottenere il legato, tolta di mezzo dai secondi con una assimilazione analogica ad un’altra figura giuridica di legato.’ However, Baviera failed to make a connection with the *locus ex similitudine*.
5. A Controversy within the Sabinian School regarding the SC Neronianum

The Sabinians agreed that a legatum per praeceptionem to an extraneus was void by ius civile. Massurius Sabinus even went one step further and maintained that such a legacy could not even be validated by means of the SC Neronianum, ‘because by that SC only those legacies were validated, which were void by ius civile because of a defectiveness of the wording, not those, which were void because of the person of the legatee himself’. More than a century later, Salvius Iulianus and his disciple Sextus Africanus took a different view and held that a legatum per praeceptionem to an extraneus could be validated by the SC Neronianum. In their view, such a legacy was void on account of the words, ‘for it would have been valid if made to the same person in different words, such as, per vindicationem, per damnationem, or sinendi modi’. The difference of opinion arose because the formulation of the SC Neronianum admitted of more than one interpretation. Although the text of the SC has not been preserved, the argument of Sabinus in Gai., 2.218 demonstrates that the SC intended to validate legacies that were void on account of their words (‘vitium verborum’). Whereas Sabinus took the view that a legatum per praeceptionem to an extraneus could not be regarded as a legacy that was void on account of its words, Iulianus and Sextus did regard it as such. According to the latter, a legatum per praeceptionem to an extraneus would have been valid if made to the same person in different words. Since Sabinus, on the one hand, and Iulianus and Sextus, on the other, had a different concept of the term ‘vitium verborum’, the status of the conflict was that of ambiguitas.

It may be concluded that the SC Neronianum gave rise to legal insecurity, because its formulation had been too broad. The provision that those legacies that were void on account of their words (‘vitium verborum’) could be validated was too broad, because – one way or the other – the invalidity of a legacy can always be ascribed to the words. More or less every defectiveness of a legacy could be put under the denominator of ‘vitium verborum’. Therefore,

279 Gai., 2.218: ‘Nam eo, inquit, senatasconsulto ea tantum confirmantur, quae verborum vitio iure civili non valent, non quae propriam ipsum personam legatario non deberentur’.
280 Gai., 2.218: ‘Nam ex verbis etiam hoc casu accidere, ut iure civile inutile sit legatum, inde manifestum esse, quod eidem aliis verbis recte legatur, veluti per vindicationem, per damnationem, sinendi modo’.
281 MAGLIOCCA (1972), pp. 298-304, explains the controversy within the Sabinian school in terms of conservative versus progressive. In his view, the strict and restrictive interpretation of the notion vitium verborum, given by Sabinus, is the most ancient conception. Iulianus and Sextus, on the other hand, defended a more extensive (and progressive) connotation of this notion.
Iulianus and Sextus did not simply challenge the opinion of Sabinus, 282 but also the efficacy of the *SC Neronianum*. 283

The controversy between Sabinus, on the one hand, and Iulianus and Sextus, on the other, demonstrates that the Sabinian school was not a rigid and closed movement and that, even within one school, disagreements could arise.

282 The fact that Salvius Iulianus has written a work called *De Ambiguitatibus* shows his interest in the subject.
283 Nonetheless, Iulianus and Sextus acknowledged that a legacy to a *peregrinus* could not be put under the denominator of *vitium verborum*. Such a legacy was void on account of the person of the legatee, and not on account of its words. Since legacies and *fideicommissa* tend to be assimilated in the classical and post-classical period and Justinian (C. 6.43.2), eventually, explicitly stated that they were similar, even legacies to a *peregrinus* were to be admitted.
CHAPTER VII
VIII. DATIO TUTORIS

1. Gai., 2.231: Text and Controversy

For a proper understanding of the school controversy in Gai., 2.231, it is necessary to read it in combination with the two preceding paragraphs, namely, Gai., 2.229-230:

229. Ante heredis institutionem <in>utiliter legatur, scilicet quia testamenta vim ex institutione heredis accipiunt; et ob id velut caput et fundamentum intellegitur totius testamenti heredis institutio. 230. Pari ratione nec libertas ante heredis institutionem dari potest. 231. Nostri praeceptores nec tutores eo loco dari posse existimant; sed Labeo et Proculus tutorem posse dari, quod nihil ex hereditate erogatur tutoris datione.

229. A legacy preceding the heredis institutio is void, because of course testaments derive their force from the heredis institutio. And for this reason, the heredis institutio is reckoned to be the head and foundation of the entire testament. 230. For the same reason, liberty cannot be granted before the heredis institutio. 231. Our teachers think that a tutor cannot be appointed in that place either; but Labeo and Proculus think a tutor can be appointed there, because by the appointment of a tutor, nothing is taken out of the inheritance.

This text is included in the part about legacies. At the end of this part, Gaius (2.229-245) discusses the various causes of invalidity of a legacy. A first cause of invalidity is dealt with in Gai., 2.229. A legacy that precedes the heredis institutio is void, because a testament derives its efficacy from the heredis institutio,284 which is, therefore, the head and most fundamental part of a testament (§ 229: ‘Caput et fundamentum totius testamenti’). As a result, every testament needed to contain a heredis institutio, which had to be placed at the very beginning of the will. Dispositions preceding the heredis institutio were not taken into account. This

284 Ulp., Ep., 24.15: ‘Ante heredis institutionem legari non potest, quoniam <vis> et potestas testamenti ab heredis institutione incipit.’ (‘A legacy cannot be made before the heredis institutio, because the efficacy and power of a testament begin with the heredis institutio’).
cause of invalidity of a legacy offered Gaius an opportunity to make a digression about other dispositions preceding the *heredis institutio*. A grant of freedom in this place was void for the same reason as a legacy. To this rule, however, one exception is made. A slave had to be manumitted before the *heredis institutio* if he was instituted as an heir *cum libertate*. The question of whether the appointment of a tutor could precede the *heredis institutio* gave rise to a controversy between the Sabinians and the Proculians.

Before discussing this difference of opinion any further, a few words must be said about tutelage. There are two kinds of tutelage: *tutela impuberum* and *tutela mulierum*. Probably, the latter kind of tutelage was not under discussion here, because it had become fairly irrelevant by the time of the Principate. Every *impubes* who was *sui iuris* was placed under tutelage, i.e., *tutela impuberum*. As soon as a male reached adulthood (at the age of fourteen or when he became sexually mature) tutelage ended. A *pater familias* was allowed to appoint a *tutor testamentarius* by testament for those persons who would become *sui iuris* at his death. In this case, he had to use either one of the following expressions: ‘L. Titium liberis meis tutorem do’ or ‘L. Titium liberis meis tutor esto’. If a father left behind an *impubes*, who became *sui iuris* at his death, and if he had not appointed a *tutor testamentarius*, a *tutor legitimus* came forward immediately and *ipso iure*.

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288 Already in the late Republic, the question of whether a woman who was *sui iuris* could draw up her own testament without a guardian’s assistance had become controversial and a number of jurists held the view that such a testament should not be regarded as invalid. See O. TELLEGEN-COUPERUS - J.W. TELLEGEN, Nihil hoc ad ius, ad Ciceronem, *RIDA* 53 (2006), pp. 381-408.

289 See Gai., 1.196 (Controversy 1).

290 Gai., D. 26.2.1; Ulp., D. 26.2.5.

291 See Gai., 1.149; Gai., 2.289.
In Gai., 2.231, Gaius discusses the following legal question: ‘Is the appointment of a tutor in a testament before the *heredis institutio* valid or not?’ This question gave rise to a controversy between the Sabinians and the Proculians. According to the former, such an appointment was void. The Sabinian view was consistent with the general rule that nothing could precede the *heredis institutio*. Since both a legacy and a grant of freedom before the *heredis institutio* were void, the Sabinians took the view that a tutor could not be appointed in this place either. The Proculians, on the other hand, deviated from the general rule. According to them, the appointment of a tutor before the *heredis institutio* was valid because by the appointment of a tutor, nothing was taken out of the inheritance (Gai., 2.231: ‘Quod nihil ex hereditate erogatur tutoris datione’). Unlike a legacy and a grant of freedom, the *datio tutoris* did not reduce the inheritance. Therefore, the general rule did not apply to the appointment of a tutor.

2. The Controversy in Gai., 2.231: Modern Theories

The majority of the Romanists have explained this controversy by means of the conservative/progressive antithesis. Some scholars, including Voigt and Biondi, have qualified the Sabinian view as traditional and the Proculian view as progressive.

Voigt has asserted that the Sabinians adhered to *rigor iuris* and *verbi ratio* and the Proculians to *aequitas* and *voluntatis ratio*. The fact that the Sabinians strictly observed the word order, as required in a testament, would demonstrate their *rigor iuris* and *verbi ratio*. The Proculians, on the other hand, attached great importance to the *voluntas* of the testator. Therefore, they decided that a *datio tutoris* which preceded the *heredis institutio* was valid.

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292 Parallel to this question, the following legal question arose: ‘Is the appointment of a tutor after the death of the heir valid or not?’ See Gai., 2.234.

293 According to VOCI, *DER, I*, pp. 382-383, there was no structural connection between the appointment of a tutor and the testament. Whereas the function of a testament was the assignment of patrimonial things, the function of the *datio tutoris* was the appointment of a tutor. Because the two functions had nothing to do with each other, the tutor could be appointed before the *heredis institutio*: ‘La *datio tutoris* … era testamentaria perché materialmente si trovava nel testamento; ma tanto poco era parte di esso, che poteva essere scrittà prima della *heredis institutio*’.

Although Voigt’s theory may seem plausible at first sight, it is not. According to Voigt, the Proculians were progressive, because they attached more importance to the voluntas of the testator than to formalistic requirements. In Gai., 2.231, however, Gaius does not mention this argument. On the contrary, according to Gaius, the Proculians held that a datio tutoris before the heredis institutio was valid, because, by the appointment of a tutor, nothing was taken out of the inheritance. Voigt, however, failed to take this argument into account.

According to Biondi, the rule that the heredis institutio had to be at the head of every testament was very old and gradually became less strict through a series of exceptions. The rule did not apply when a slave was manumitted before he was instituted as an heir cum libertate.\(^{295}\) Neither did the rule apply to a fideicommissum, which could also precede the heredis institutio.\(^{296}\) Then, in the 1st century AD, a conflict arose about the validity of a datio tutoris before the heredis institutio. According to Biondi, the Sabinians adhered to the strict and ancient principle that nothing could precede the institution of an heir. Therefore, they held that such an appointment was void. The Proculians, on the other hand, took the more progressive view that a datio tutoris in this place was valid. Biondi supposes that the Proculian view prevailed, in conformity with the more general evolution of the law of succession to abandon traditional formalism. At the end of this historical evolution, Justinian (C. 6.23.24 and Inst., 2.20.34) agreed that the voluntas of the testator was more important than the place of the heredis institutio in the will.

The account of Biondi is valuable, because he puts into perspective the strictness of the rule that no disposition could precede the heredis institutio. He pointed out that there were exceptions to this rule. Biondi, however, gave a double explanation of the Proculian view. They maintained that the appointment of a tutor before the heredis institutio was valid in conformity with the historical evolution and because nothing was taken out of the inheritance. Only the second explanation is valid, since it is mentioned by Gaius. Furthermore, Biondi generalised this Proculian argument: only those dispositions before the heredis institutio were void that diminished the inheritance. If, however, this had indeed become a general rule, as Biondi suggests, a fideicommissum before the heredis institutio could not be valid because it diminished the inheritance.

\(^{295}\) Ulp., D. 28.5.9.14.  
\(^{296}\) Ulp., Ep., 25.8.
Falchi as well explained the controversy by means of the antithesis conservative versus progressive. Unlike Voigt and Biondi, however, he maintained that the Proculian view was traditional and the Sabinian view innovative. Falchi gave the following explanation for the Proculian view. According to the Proculians, an heir acquired his inheritance by means of a unilateral act and so they looked at the acquisition of the inheritance from the heir’s perspective. Tutelage, on the other hand, was imposed upon the tutor by the testator and the Proculians considered it to be an autonomous manifestation of the testator’s voluntas. Because of this difference, the Proculians held that the datio tutoris was independent from the heredis institutio and, therefore, decided that it could precede the heredis institutio. The Sabinians, on the other hand, maintained that both the inheritance and tutelage were imposed by the testator’s voluntas. According to the Sabinians, moreover, dispositions of a personal character, such as a datio tutoris, were an essential part of a testament and, therefore, had to be incorporated in the testament and follow the heredis institutio.297

The term voluntas is crucial in Falchi’s theory. Gaius, however, did not even mention this term once in the text under consideration. Actually, he implicitly held that the Sabinians took their view by analogy with the rule that neither a legacy, nor a manumission could precede the heredis institutio. Falchi did not take this argument into account.

According to Stein, finally, the controversy under consideration was due to a different view about methodology between Proculians and Sabinians.298 Regarding disputes about wills and succession, the Proculians were anxious to give effect to the intention of the testator. The Sabinians, on the other hand, followed a strict line of thought. The question of whether a tutor could be appointed before the heredis institutio was answered differently by the two schools. The Sabinians extended the general rule that a legacy and a manumission preceding the heredis institutio were void to the datio tutoris. The Proculians, on the other hand, examined the ratio of the rule. Both a grant of a legacy and a manumission diminished the value of the inheritance and were disadvantageous for the heir. Therefore, Stein maintained, these dispositions logically followed the heredis institutio. This ratio, however, did not hold in the case of the appointment of a tutor. Therefore, the Proculians decided that the general rule did

not apply to the *datio tutoris* and that the appointment of a tutor before the *heredis institutio* was valid.

Although Stein did take into account the arguments mentioned by Gaius, he did not really explain the controversy between the Sabinians and the Proculians, because the conflict did not concern methodology, but the interpretation of the words of the testament. Furthermore, Stein stated that the Proculians were analogists. They frequently made use of analogy to construct legal reasonings. In this case, however, the Sabinians made use of analogy to justify their decision. Since a legacy and a manumission preceding the *heredis institutio* were void, also the appointment of a tutor in that place was void.

3. *Ratiocinatio in Gai.*, 2.231

In the Early Principate, the controversy about the validity of a *datio tutoris* preceding the *heredis institutio* may have originated in the following way. A testator drew up a testament in which he instituted as heir an *impubes* who belonged to the *sui heredes* and in which he appointed a tutor for his heir. He placed the *datio tutoris* before the *heredis institutio*. He may have done so to make sure that the instituted heir had a tutor first, so that he could acquire the inheritance. A slave who was instituted as heir had to be granted freedom before the *heredis institutio*. For the same reason, the testator may have been under the impression that it was necessary to include a *datio tutoris* in that place as well.

When the testator died, the testament became effective and the *tutor testamentarius* came forward to hold tutelage. The validity of his appointment may have been challenged by the person who would become *tutor legitimus* immediately and *ipso iure* if the appointment was void. Since both potential tutors may have been willing to practise tutelage (e.g., in order to look after family interests), a conflict arose. Whereas the *tutor testamentarius*, who seems to have consulted the Proculians, stated that his appointment before the *heredis institutio* was valid, the person who would become *tutor legitimus* consulted the Sabinians and raised objections. Both parties then gathered before the praetor, who had to decide who would become tutor. Next, the arguments in support of the Sabinian and the Proculian views will be
discussed. Since there is neither a plaintiff nor a defendant, the order in which the views are discussed is irrelevant. Therefore, the order in which Gaius discussed them will be followed.

### 3.1 The Sabinian View

The person who was to become tutor legitimus if the datio tutoris was void may have put the following question to the Sabinians: ‘A datio tutoris preceding the heredis institutio is void, isn’t it?’ The Sabinians confirmed that such an appointment could be regarded as void. In support of this view, they brought forward an analogous argument. Since a legacy and a manumission could not precede the heredis institutio, a tutor could not be appointed in this place either. How did the Sabinians find this argument?

First, they may have determined the status of the conflict. Since the conflict involved the interpretation of the words of the testament, one of the four status legales was pertinent. It appears that the Sabinians built up their argument by means of ratiocinatio, i.e., by means of a reasoning in terms of analogy.\(^{299}\) It is a matter of ratiocinatio when one party maintains that the case is not provided for by a rule, whereas the other party wants to subsume the case under an already existing rule for analogous cases. Since the Sabinians maintained that the rule that neither a legacy nor a regular manumission (with the exception of a slave instituted as an heir cum libertate) could precede the heredis institutio also applied to the appointment of a tutor, this obviously was a case of ratiocinatio.\(^{300}\)

The argumentation in support of the person who was on the verge of becoming a tutor legitimus may be reconstructed as follows:

- Since both a legacy and a regular manumission ahead of the heredis institutio were void,
- by analogy, also a datio tutoris in that place was void,
- The tutor testamentarius was appointed before the heredis institutio.

\(^{299}\) Regarding ratiocinatio, see Cic., De inv., 2.148-153.

\(^{300}\) STOLFI (1997), p. 56, as well maintained that, evidently, the Sabinians argued by means of analogy: ‘Menti gli imprecisati nostri praecptores negavano la validità di tale disposizione – parificandola, evidentemente, alle ipotesi e manomissione ante heredis institutionem – Labeone e Proculo erano di parere opposto, …’ However, Stolfi did not qualify this reasoning as rationicatio.
Therefore, his appointment as a tutor was void and the *tutor legitimus* became the tutor.

### 3.2 The Proculian View

The person appointed as *tutor testamentarius* was eager to practise tutelage and turned to the Proculians for advice. He may have presented the following question to them: ‘Is the *datio tutoris* before an *heredis institutio* valid or not?’ According to the Proculians, such an appointment could be regarded as valid, *quod nihil ex hereditate erogatur tutoris datione*. Unlike a legacy and a manumission, the appointment of a tutor did not diminish the value of the inheritance and, therefore, a *datio tutoris* could precede the *institutio heredis*. How did the Proculians construct this argumentation?

It has already been demonstrated that one of the *status legales*, i.e., *ratiocinatio*, was pertinent for the conflict under consideration. Whereas the Sabinians had argued that a *datio tutoris* before the *heredis institutio* was void by analogy with a legacy and a manumission in that place, Labeo denied that the rule that nothing could precede the *heredis institutio* could be applied in this case.

In *De inventione*, Cicero discussed some of the *loci communes* which could be used by litigants who challenged the extension of a rule. The relevant text is Cic., *De inv.*, 2.151:

> Contra autem qui dicet, similitudinem infirmare debet; quod faciet, si demonstrabit illud, quod conferatur diversum esse genere, natura, vi, magnitudine, tempore, loco, persona, opinione; ...

The litigant who opposes the extension of a rule will have to invalidate the similarity, which he will do if he demonstrates that what is brought together for comparison differs in kind, nature, meaning, importance, time, place, person or opinion; …
The things brought together for comparison were a legacy, a manumission, and a *datio tutoris*. According to the Proculians, the general rule that nothing could precede the *heredis institutio* did apply to a legacy and to a (regular) manumission, but not to a *datio tutoris*, because the former differed from the latter as to their effect. Whereas a legacy and a manumission diminished the inheritance, a *datio tutoris* did not.

In addition to this argumentation and in reply to the Sabinian argument, moreover, the Proculians may have underlined the analogy between the case at issue and that of a slave who had been manumitted before his institution as heir. In the latter case, the manumission had to precede the *heredis institutio*, because the slave first had to be manumitted before he could become heir. The Proculians may have reasoned that, in the same way, an *impubes* had to have a tutor before he could accept his inheritance. If the appointment of a tutor had followed his institution as heir, the opposite party could also object its validity, because an *impubes* (who had become *sui iuris*) needed a tutor before he could acquire his inheritance. This means that, if the heir was an *impubes* who was about to become *sui iuris* at his father’s death, either way an objection could be made against the position of the appointment of a tutor. Admittedly, this argumentation is nowhere to be found in the sources. Yet, the legal necessity in this case to appoint a tutor before the institution of the heir may serve a better understanding of the school controversy, in general, and of the Proculian view, in particular.

The argumentation used by the *tutor testamentarius* who hoped that the *datio tutoris* was valid and that he could become tutor can be reconstructed as follows:

- Since a *datio tutoris* (unlike a legacy and a regular manumission) does not diminish the inheritance,
- the rule that nothing can precede the *heredis institutio* does not apply to the appointment of a tutor.
- The *tutor testamentarius* was appointed before the *heredis institutio*.
- Therefore, his appointment as a tutor is valid.
CHAPTER VIII

4. The Decision on the Controversy

In Justinian’s time, the general rule that nothing could precede the heredis institutio was abolished. The relevant text is Inst., 2.20.34:

Ante heredis institutionem inutiliter antea legabatur, scilicet quia testamenta vim ex institutione heredum accipiunt et ob id veluti caput atque fundamentum intellegitur totius testamenti heredis institutio. Pari ratione nec libertas ante heredis institutionem dari poterat. Sed quia incivile esse putavimus ordinem quidem scripturae sequi (quod et ipsi antiquitati vituperandum fuerat visum), sperni autem testatoris voluntatem: per nostram constitutionem et hoc vitium emendavimus, ut liceat et ante heredis institutionem et inter medias heredum institutiones legatum relinquere et multo magis libertatem, cuius usus favorabilior est.

Formerly a legacy preceding the heredis institutio was void, because of course testaments derive their efficacy from the institution of the heir. For this reason, the heredis institutio is reckoned as the head and foundation of the entire testament. For the same reason, liberty could not be accorded before the heredis institutio either. But because we think it is unjust to follow the order of the document (which men of former times themselves appear to have criticized), and to scorn the testator’s will, we have corrected this defect by means of our constitution. So now it is permitted to grant a legacy before the heredis institutio and in between such institutions and, all the more, freedom, of which the use is more favourable.

In this text, Justinian allowed that both a legacy and liberty could be accorded before the heredis institutio. In support of this view, Justinian brought forward the argument that it would

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301 The compilers of the Institutiones referred to the constitution of 528, which is set out in C. 6.23.24: Imp. Justinianus A. Menae pp. Ambiguitates, quae vel imperitia vel desidia testamenta conscritentium oriuntur, resecandas esse censemus et, sive institutio heredum post legatorum dationes scripta sit vel alia praetermissa sit observatio non ex mente testatoris, sed vitio tabellionis vel alterius qui testamentum scribit, nulli licentiam concedimus per eam occasionem testatoris voluntatem subvertere vel minuere. D.k. Ian. dn. Justiniano A. pp. II, cons. The Emperor Justinian to Menna, Praetorian Prefect. We think that the ambiguities which arise either through the inexperience or idleness of those who draw up testaments should be removed. We do not grant permission to subvert or diminish the testator’s will on this account, either because the institution of the heirs is written down after the donation of legacies or because any other formality has been omitted, not intentionally by the testator, but by an error of the notary or somebody else who drew up the testament. Given on the Kalends of January, during the Consulate of Our Lord Justinian, Consul for the second time, 528.
be unjust to hold on to the order of words and ignore the intention of the testator. The text makes it probable that, in Justinian time, also a tutor could be appointed before the *heredis institutio* and that the controversy between the Sabinians and the Proculians had come to an end.
IX.  **REGULA CATONIANA**

1. **Gai., 2.244: Text and Controversy**

An ei qui in potestate sit eius, quem heredem instituimus, recte legemus, quaeritur. Servius recte legari putat, sed evanescere legatum, si quo tempore dies legatorum cedere solet, adhuc in potestate sit; ideoque sive pure legatum sit et vivo testatore in potestate heredis esse desierit, sive sub condicione et ante condicionem id acciderit, deberei legatum. Sabinus et Cassius sub condicione recte legari, pure non recte, putant; licet enim vivo testatore possit desinere in potestate heredis esse, ideo tamen inutile legatum intellegi oportere, quia quod nullas vires habeturum foret, si statim post testamentum factum decessisset testator, hoc ideo valere, quia vitam longius traxerit, absurdum esset. Sed \[\text{II diversae scholae auctores nec sub condicione recte legari, quia quos in potestate habemus, eis non magis sub condicione quam pure debere possimus.}\]

The question is raised whether a legacy bequeathed to someone who is in the *potestas* of the person whom we have instituted as heir, is valid. Servius thinks that the legacy is valid, but that it becomes void if the legatee is still in the *potestas* at the moment of the *dies cedens*. And that, therefore, the legacy is due, either when a legacy has been bequeathed unconditionally and he has ceased to be in the *potestas* of the heir during the testator’s lifetime or that this [i.e., the legatee ceases to be in the heir’s *potestas*] has happened in case of a legacy under condition, before the condition is fulfilled. Sabinus and Cassius hold such a legacy to be valid if conditional and void if unconditional. For though a legatee can cease to be in the *potestas* of the heir during the testator’s lifetime, nevertheless the legacy should be regarded as void, since it would be absurd that something which would have no force if the testator died immediately after making the testament should be valid because he had a longer span of years. But the authorities of the other school hold the legacy invalid even if conditional, because we do not owe anything to those we have in our *potestas* no more under a condition than directly.
This text concerns the final controversy in the *Institutiones* of Gaius on legacies.\(^{302}\) At the end of the discussion on legacies, which covers Gai., 2.195-245, Gaius (2.229-245) considered various causes of the invalidity of legacies. First, a legacy that precedes the *heredis institutio* is void.\(^{303}\) Equally void is a legacy which takes effect after the death of the heir.\(^{304}\) A third instance concerns legacies that are bequeathed by way of penalty with the aim of forcing the heir to do something or preventing him from doing something.\(^{305}\) Furthermore, legacies to an indeterminate legatee and to a *postumus alienus*, the child of a third person that is born after the death of the testator, are void.\(^{306}\) In the last paragraph but one (Gai., 2.244), the validity of a legacy bequeathed to a person in the *potestas* of the instituted heir is discussed. Yet, if the heir is in the *potestas* of the legatee, there is no doubt (‘constat’) that such a legacy is valid.\(^{307}\)

In the text under consideration, the following situation is described: A testator (A) has made a testament in which he instituted B as heir and in which he bequeathed a legacy to C, who was in the *potestas* of B at the moment the testament was made.\(^{308}\) The legacy has to be qualified as a *legatum per damnationem*.\(^{309}\) Such a legacy creates an obligation between the heir (B) as a debtor and the legatee (C) as a creditor: the heir owes the bequeathed item to the legatee. Since it was impossible for a *pater familias* to be indebted to a person in his *potestas*, the *legatum per damnationem* was deficient. If, therefore, C was still in the *potestas* of B on the *dies cedens*, all jurists agreed that such a legacy was void.

The *dies cedens* is the moment at which the legacy becomes due. In case of an unconditional legacy, this moment coincides with the acquisition or acceptance of the inheritance by the heir (i.e., often at the moment of the testator’s death).\(^{310}\) In case of a conditional legacy, on the other hand, the *dies cedens* coincides with the fulfillment of the condition. If the legatee was

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\(^{302}\) The controversies on legacies are to be found in (5) Gai., 2.195; (6) Gai., 2.200; (7) Gai., 2.216-222; (8) Gai., 2.231, and finally, (9) Gai., 2.244.

\(^{303}\) Gai., 2.229.

\(^{304}\) Gai., 2.232.

\(^{305}\) Gai., 2.235.

\(^{306}\) Gai., 2.238 and Gai., 2.241.

\(^{307}\) Gai., 2.245.

\(^{308}\) The legatee (C) may either be a *filius familias* or a slave.

\(^{309}\) The legal problem in Gai., 2.244 could only give rise to a controversy if the legacy was a *legatum per damnationem*, because such a legacy created a problematical obligation between the heir and the legatee, who was in his *potestas*.

\(^{310}\) If the heir is a *suus et necessarius heres*, the *dies cedens* always coincides with the moment of the testator’s death, because such an heir acquires the inheritance immediately and *ipso iure*. An *extraneus heres*, on the other hand, only acquires the inheritance after accepting it. If, therefore, the heir was an *extraneus heres*, the *dies cedens* did not necessarily coincide with the moment of the testator’s death.
still in the *potestas* of the heir at the moment the heir acquired the inheritance or at the moment the condition was fulfilled, the unconditional and the conditional legacies, respectively, were void.

However, a legal problem arose when the legatee left the heir’s *potestas* before the *dies cedens* because of the death of the *pater familias*, *emancipatio*, or otherwise. In such a case, the following legal question arose: ‘Is an unconditional or conditionial legacy valid if the legatee has left the heir’s *potestas* after the will was drawn up but before the *dies cedens*?’ In other words, ‘At which particular moment does a legacy have to be valid, immediately, that is, at the moment the testament is made or at the moment of the *dies cedens*?’ According to Servius Sulpicius Rufus, a jurist living in the 1st century BC, a legacy only needed to be valid on the *dies cedens*. If the legatee had ceased to be in the *potestas* of the heir at the moment of the *dies cedens*, he held that both an unconditional and a conditional legacy were valid. Sabinus and Cassius, on the other hand, made a distinction between an unconditional and a conditional legacy. They held that an unconditional legacy had to be valid at the moment the testament was made: even if the legatee had left the *potestas* of the heir before the testator’s death, the unconditional legacy could not be validated. The conditional legacy, on the other hand, only needed to be valid at the time the condition was fulfilled. Provided that the legatee had left the *potestas* of the heir before that time, the conditional legacy was valid. According to the Proculians, finally, a legacy – whether it was bequeathed unconditionally or conditionally – had to be valid from the beginning. Even if the legatee had left the *potestas* of the heir before the *dies cedens*, the legacy was void.

Thus, the Sabinians and Proculians agreed that an unconditional legacy had to be valid from the moment the testament was made. In other words, both law schools agreed that a legacy which was bequeathed unconditionally to a person in the *potestas* of the heir was void, even if the legatee had ceased to be in his *potestas* at the testator’s death. The controversy, however, concerned the validity of a conditional legacy that was bequeathed to a person in the *potestas* of the heir. Whereas the Sabinians held the view that such a legacy was valid if the legatee had left the *potestas* before the fulfilment of the condition, the Proculians thought is was void under all circumstances.\textsuperscript{311}

2. The *Regula Catoniana*

Before discussing the arguments of Servius Sulpicius Rufus, the Sabinians, and the Proculians in support of their opinion, the *regula Catoniana* must be taken into consideration. This rule is an authoritative opinion, which was either formulated by M. Porcius Cato the Censor (234-149 BC) or by his son M. Porcius Cato Licinianus (who died in 154 BC). Celsus (D. 34.7.1.pr) gives the following definition of the *regula Catoniana*:

> CELSUS libro trigesimo quinto digestorum. Catoniana regula sic definit, quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum quandocumque decesserit, non valere. Quae definitio in quibusdam falsa est.

> CELSUS, book 35 of the Digest. The *regula Catoniana* is as follows: ‘If the testator dies at the moment the testament is made and the legacy is void, this legacy is void whenever he dies’. In some cases, this definition is inapplicable.

This text is to be found in book 34 of the Digest under title 7 ‘De regula Catoniana’ or ‘About the Catonian Rule’. This rule was based on the fiction that the testator died at the moment the...
testament was made. In other words, it was based on the fiction that the making of the testament and the \textit{dies cedens} of an unconditional legacy were simultaneous.\footnote{This is only true if the inheritance was acquired \textit{ipso iure} by a \textit{suus et necessarius heres} or accepted by an \textit{extraneus heres} immediately after the testator’s death.} The rule did not apply to legacies for which the \textit{dies cedens} was not the time of death, but the acceptance of the inheritance.\footnote{Pap., D. 34.7.3.} According to the Catonian Rule, an unconditional legacy had to be valid from the beginning, so an unconditional legacy that was void at the time the testament was made, remained void. Even if the cause of invalidity was removed before the death of the testator, such a legacy could not be validated. The \textit{regula Catoniana} was formulated for unconditional legacies and did not say anything about the validity of conditional legacies, because the \textit{dies cedens} of a conditional legacy did not coincide with the testator’s death, but with the fulfilment of the condition. Although Gaius did not explicitly mention the \textit{regula Catoniana}, it is clear that the controversy concerned the interpretation of this rule.

3. The Argumentation

Let us now turn to the arguments in support of the different views. According to Servius Sulpicius Rufus, the unconditional legacy only needed to be valid at the moment of the \textit{dies cedens}. If the legatee had ceased to be in the \textit{potestas} of the heir by the time of the testator’s death, the unconditional legacy was valid. The conditional legacy as well only had to be valid on the \textit{dies cedens}, i.e., at the moment the condition was fulfilled. Unfortunately, Gaius did not mention an argument in support of Servius’ view. Apparently, he did not apply the \textit{regula Catoniana}.

Unlike Servius, the Sabinians and Proculians did apply the \textit{regula Catoniana} to unconditional legacies. In support of their view, the Sabinians used an argument which clearly reflected the argumentation of the \textit{regula Catoniana}. A legacy which was bequeathed unconditionally to a person in the \textit{potestas} of the heir was void (even if the legatee ceased to be in the heir’s \textit{potestas} before the \textit{dies cedens}), ‘since it would be absurd that something which would have no force whatsoever if the testator had died immediately after making the testament should be
valid, because he had a longer span of years’. According to the Sabinians, it would be absurd if the length of the testator’s life determined the validity of a legacy.

The school controversy concerned the validity of a conditional legacy: ‘Does a legacy which is bequeathed conditionally to a person in the *potestas* of the heir become valid if the legatee ceases to be in the *potestas* at the moment the condition is fulfilled?’ Whereas the Sabinians held that such a legacy was valid, the Proculians considered it void. The Proculians maintained that both an unconditional and a conditional legacy were void, ‘because we are not due anything to those we have in our *potestas* no more under a condition than directly’. According to the Proculians, an obligation could not be created between a man and a person in his *potestas* so both an unconditional and a conditional legacy to a person in the heir’s *potestas* were void.

The school controversy arose because the *regula Catoniana* did not include any specific provision regarding conditional legacies. Both the Sabinians and the Proculians gave a different interpretation to the *regula Catoniana*.

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316 Gai., 2.244: ‘... Quia quod nullas vires habiturum foret, si statim post testamentum factum decessisset testator, hoc ideo valere, quia vitam longius traxerit, absurdum esset.’
317 Gai., 2.244: ‘... Quia, quos in potestate habemus, eis non magis sub condicione quam pure debere possimus.’
318 FLUME (1975), p. 107, however, denies that the school controversy concerned the range of application of the *regula Catoniana*: ‘Gaius berichtet in Inst 2,244 nicht von einem Streit der Sabinianer und Proculianer über den Anwendungsbereich der *regula Catoniana*. Aus der Stelle ist nicht zu entnehmen, daß die Proculianer entgegen den Sabinianern allgemein für das bedingte Legat die Anwendung der *regula Catoniana* bejaht hätten, wie auch sonst in der Überlieferung kein Anhalt für eine solche These zu finden ist. Es geht vielmehr in der Tat nur darum, daß die Proculianer per se die Anordnung eines Legats für den Gewaltunterworfenen des zum Erben eingesetzten nicht haben gelassen.’ In my view, Flume misinterpreted the core of the legal problem. All jurists (including the Sabinians) agreed that any legacy in favour of a person in the *potestas* of the heir was void (for a father could not owe anything to a person in his *potestas*). However, the legal problem concerned the question at what point in time the legacy had to be valid, immediately from the moment the testament was made or at the time of the *dies cedens*. The *regula Catoniana* determined that an unconditional legacy had to be valid from the beginning and the Proculians extended its range of application to conditional legacies as well. HORAK (1969), p. 135, as well misinterpreted the legal problem that gave rise to the school controversy. In his view, a school controversy arose because the Sabinians and Proculians held different views about the question of when the obligation of the heir arose in case of an unconditional legacy and a conditional one. The Proculians decided that, in both cases, the obligation arose at the moment the testament was made. If, therefore, the legatee was in the heir’s *potestas* at that time, the legacy was void. The Sabinians, on the other hand, maintained that, in the case of a conditional legacy, the heir’s obligation arose as soon as the condition was fulfilled and that, in the case of an unconditional legacy, the obligation arose at the time of the testator’s death. Therefore, a conditional legacy was valid if the legatee had left the *potestas* of the heir before the condition was fulfilled. An unconditional legacy in favour of a person in the *potestas* of the heir was void, because of the *regula Catoniana*. However, the Sabinians and Proculians agreed that the heir’s obligation arose on the *dies cedens*, both for an unconditional legacy and for a conditional one. The Proculians maintained that a conditional legacy to a person in the *potestas* of the heir was void, not because the heir’s obligation could not arise at the moment the will was drawn up, but because the legacy was not valid from the beginning.
4. The Controversy in Gai., 2.244: Modern Theories

Voigt, who has tried to discover a common denominator for the school controversies, experienced difficulties when examining the controversy in Gai., 2.244. He has tried to explain the school controversies by means of the antithesis *rigor iuris/verbi ratio* and *aequitas/voluntatis ratio*. Whereas the Sabinians adhered to *rigor iuris* and *verbi ratio*, the Proculians favoured *aequitas* and *voluntatis ratio*.\(^{319}\) The controversy under consideration, however, does not correspond with Voigt’s theory.

In the previous controversies concerning the law of succession (especially Gai., 2.123, Gai., 2.216-222, and Gai., 2.231), the Sabinians had refused to validate a testament or legacy with deficiencies. According to Voigt, this approach was in accordance with their sympathy for *rigor iuris* and *verbi ratio*. The Proculians, on the other hand, had proven to be more accommodating in such cases: First, a testament in which a son *in potestate* had been passed over by his father was valid, provided that he had predeceased his father (Gai., 2.123). Second, the Proculians held that it was not only possible to bequeath a *legatum per praeceptionem* to a coheir, but also to an *extraneus* (Gai., 2.216-222). Third, the appointment of a tutor preceding the *heredis institutio* was valid (Gai., 2.231). According to Voigt, these opinions demonstrated the Proculian adherence to *aequitas* and *voluntatis ratio*. In the given controversy, however, the Proculians held that a legacy bequeathed conditionally to a person in the *potestas* of the heir was void, even if the legatee had left the *potestas* before the fulfilment of the condition. Voigt tried to solve this inconsistency by saying that such legacies were ‘von den Prokulianern wegen Widerspruchs der Willenbestimmung für nichtig erklärt’. However, he did not specify what or whose *voluntas* he referred to and Voigt provided no further explanation to that effect. The Proculians failed to take into consideration the *voluntas* of the testator who wanted to bequeath something so it is clear that, in this case, the Proculians did not adhere to *voluntatis ratio*. The Sabinians, moreover, held that a conditional legacy was valid if the legatee had left the *potestas* before the fulfilment of the condition. This opinion is not in accordance with their presupposed *rigor iuris* and *verbi ratio*.\(^{320}\)

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\(^{319}\) This theory is explained by VOIGT (1899), pp. 222-228. See also FALCHI (1981), pp. 14-15, for a clear summary of Voigt’s theory.

\(^{320}\) VOIGT (1899), p. 129.
Whereas Voigt qualified the Sabinians as conservative and the Proculians as progressive, Falchi explained the relation between the two law schools the other way around. He regarded the Proculians as traditional and the Sabinians as innovative. According to Falchi, the Sabinian view that an unconditional legacy had to be valid at the moment the testament was made runs parallel to their view about the *heredis institutio* (see Gai., 2.123) and seems to be based on analogous reasoning.\footnote{Falchi maintained that the Sabinians took this view, because they attached great importance to the *voluntas* of the testator. If one clause could not be upheld, the whole testament must be void. Therefore, they required that both an unconditional legacy (Gai., 2.244) and a *heredis institutio* (Gai., 2.123) had to be valid immediately from the moment the testament was made. Even if the cause of invalidity was removed at a later stage, there was no chance of validation. The Proculians, on the other hand, stated that not only an unconditional, but also a conditional legacy had to be valid from the moment the testament was made. According to Falchi, the Proculian argument in support of this view corresponded with their argument in support of the view that, for the *noxae deditio* of a *filius familias*, three *mancipationes* were necessary (see Gai., 4.79).} Falchi maintained that the Sabinians took this view, because they attached great importance to the *voluntas* of the testator. If one clause could not be upheld, the whole testament must be void. Therefore, they required that both an unconditional legacy (Gai., 2.244) and a *heredis institutio* (Gai., 2.123) had to be valid immediately from the moment the testament was made. Even if the cause of invalidity was removed at a later stage, there was no chance of validation. The Proculians, on the other hand, stated that not only an unconditional, but also a conditional legacy had to be valid from the moment the testament was made. According to Falchi, the Proculian argument in support of this view corresponded with their argument in support of the view that, for the *noxae deditio* of a *filius familias*, three *mancipationes* were necessary (see Gai., 4.79).\footnote{In Gai., 2.123, the Sabinians held that a testament in which a father had passed over his son in *potestate* was void, even if the son predeceased his father.}

Against Falchi’s theory, three points of criticism may be raised. First, Falchi failed to take into account that the school controversy only concerned the validity of a conditional legacy, bequeathed to a person in the *potestas* of the heir, and not that of an unconditional legacy as he assumed. Second, admittedly, the Sabinian view about an unconditional legacy corresponded to their view about the *heredis institutio*; both dispositions had to be valid from the beginning. Nonetheless, the Sabinian opinion that a conditional legacy only needed to be valid at the moment of the *dies cedens*, did not correspond to their view in Gai., 2.123. Falchi did not explain this incongruity. Third, there may indeed have been a correspondence between the Proculian view in Gai., 2.244 and their view in Gai., 4.79, as noted by Falchi. However, by underlining this correspondence, Falchi could easily ignore the contradiction between the Proculian view in Gai., 2.244 and their view in Gai., 2.123. Whereas, in the former text, the Proculians stated that a conditional legacy had to be valid from the beginning, they maintained

\footnote{FALCHI (1899), pp. 155-156: *In entrambi i casi vi è un’intensità del rapporto di soggezione alla *potestas* paterna, che non può essere attenuato né dalla stessa volontà del suo titolare (i Sabiniani ritenevano che una sola *mancipatio* fosse sufficiente per evidenziare e conseguire lo scopo perseguito dal *paterramilias*) né da quella del testatore (per i Sabiniani l’aggiunta della condizione avrebbe permesso il conseguimento di questo scopo)*.’}
in the latter text that a *heredis institutio* only needed to be valid at the moment of the testator’s death.

5. *Ratiocinatio* in Gai., 2.244

In the 1st century AD, the following situation may have occurred. A testator (A) had made a testament in which he instituted two heirs (B1 and B2) and in which he bequeathed a substantial *legatum per damnationem* under a condition to C. At the moment the testament was made, C was in the *potestas* of B1. Admittedly, in the text under consideration, Gaius does not mention a second heir. In order to reconstruct a conflict that may have given rise to the school controversy, however, the institution of a second heir (B2) is assumed.

The testator died some time after he had made his testament. At the moment of his death, the instituted heirs (B1 and B2) acquired the inheritance. Yet, a conflict arose between them about the validity of the conditional legacy. According to B2, the conditional legacy to C was void. He expected the substantial legacy to return to the estate and to receive his part through accession. B1, on the other hand, stood up for his son and maintained that the conditional legacy was valid. When the condition was fulfilled, C would acquire the legacy if he had left the *potestas* of B1 before that time. Since B1 wanted his son to acquire the substantial legacy, we may assume that he planned to emancipate C.

B2 may have consulted the Proculians on this matter, who gave a *responsum* to his advantage: A conditional legacy bequeathed to a person in the *potestas* of the heir was void, even if the legatee had left the *potestas* before the condition was fulfilled. Moreover, they advised B2 to bring an action against B1.

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323 It is less likely that the conflict arose between the heir and the legatee. If so, the conflict would not arise at the moment of the testator’s death, but at the moment the condition was fulfilled. The legatee, who had become *sui iuris* by *emancipatio*, would bring an action against his *pars manumissor* to claim what was bequeathed to him. It is rather unlikely that this case was at the root of the school controversy for the following two reasons. First, it is improbable that a *pater familias* who released his son from his *potestas* by *emancipation* did not want him to acquire what was bequeathed to him. Second, an emancipated son owed respect to his *pars manumissor* so that he is not likely to have brought an action against him.

324 If, at least, this had not yet occurred before the testator’s death.

325 It is not clear which action B1 brought against B2, for there is a lack of data. It may have been an *actio familae erciscundae*, but an *actio communi dividundo* also springs to mind.
maintained that it could be argued that the legacy was valid and that C would acquire it if the condition was fulfilled and if he had left the *potestas* of B1 at that particular time.

The leaders of the law schools had to base their *responsa* on convincing arguments and, therefore, they used rhetoric and, in particular, *topoi*. First, the argument that the Sabinians used in support of their *responsum* will be discussed and it will be shown on the basis of what *topos* they may have found it. The same will be done for the Proculian argument.

### 5.1 The Sabinian View

B1 may have asked the Sabinians the following legal question: ‘Is a conditional legacy bequeathed to a person in my *potestas* valid if the legatee will have left my *potestas* before the condition is fulfilled?’ In order to answer this question, the Sabinians may have appealed to the *regula Catoniana*. This rule adopts the fiction that the testator died immediately after making the testament. As a consequence, the unconditional legacy had to be valid from the beginning. Yet, the legal problem under consideration did not regard an unconditional legacy, but a conditional one. The Sabinians took the view that, in case of a conditional legacy, the *regula Catoniana* was not pertinent. The fiction that the testator died immediately after the testament was made did not have any effect on the validity of a conditional legacy, because the *dies cedens* of such a legacy was not the testator’s death, but the fulfilment of the condition.

First, the Sabinians may have determined the *status* of the conflict. Since it regarded the interpretation of a legacy, they classified it under one of the *status legales*. In his *status* doctrine, Hermagoras distinguished four instances of the *status legales*: 1) *scriptum et voluntas*, 2) *leges contrariae*, 3) *ambiguitas*, and 4) *ratiocinatio*.\textsuperscript{326} It is a matter of *ratiocinatio* (i.e., a reasoning in terms of analogy and reasoning *a contrario*) when one party maintains that the case is not provided for by the law, whereas the other party wants to subsume the case under an existing rule for analogous cases. Since the Sabinians maintained

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that the application of the *regula Catoniana* could not be extended to conditional legacies, this was a matter of *ratiocinatio*.

In the part about *ratiocinatio* in *De inventione*, Cicero discussed some of the *topoi* that could be used by litigants who opposed the extension of the law. The relevant text is Cic., *De inv.*, 2.151:

> Contra autem qui dicet, similitudinem infirmare debet; quod faciet, si demonstrabit illud, quod conferatur diversum esser genere, natura, vi, magnitudine, tempore, loco, persona, opinione; ... 

The litigant who opposes the extension of the law, will have to invalidate the similarity. This he does if he demonstrates that what is brought together differs in kind, nature, force, importance, time, place, person or opinion; …

The two sides of the analogy were the unconditional and the conditional legacy. The Sabinians, who opposed an extensive interpretation of the *regula Catoniana* and maintained that the rule could not be equally applied to conditional legacies, wanted to invalidate the similarity between an unconditional and a conditional legacy. They may have done so by demonstrating that the two kinds of legacies differed regarding the point in time (Cic., *De inv.*, 2.151: ‘tempore’) of the *dies cedens*. The *regula Catoniana* invoked the fiction that the testator died at the same moment the testament was made. Therefore, an unconditional legacy had to be valid immediately. However, this fiction did not influence the validity of a conditional legacy, since its *dies cedens* did not coincide with the testator’s death, but with the fulfilment of the condition.

The following reconstruction of the argumentation of B1 can be made:

- Since an unconditional and a conditional legacy are different regarding the point in time of their *dies cedens*,
- the application of the *regula Catoniana* cannot be extended to conditional legacies as well.
- The legacy to C is conditional.
- Therefore, the *regula Catoniana* cannot be applied and the legacy is valid.
5.2 The Proculian View

The heir (B2) may have put the following question to the Proculians: ‘Is a conditional legacy bequeathed to a person in the potestas of B1 valid if this person has left the potestas before the condition is fulfilled?’ In order to answer this question, the Proculians may have appealed to the regula Catoniana. This rule determined that an unconditional legacy had to be valid from the moment the testament was made. By analogy with the unconditional legacy, the Proculians maintained that the conditional legacy had to be valid from the beginning as well. However, a conditional legacy bequeathed to a legatee in the potestas of the instituted heir did not meet this criterion, ‘because we do not owe anything to those we have in our potestas no more under a condition than without a condition’ (Gai., 2.244: ‘Quia quos in potestate habemus, eis non magis sub condicione quam pure debere possumus’).

As stated above, the conflict under consideration arose from ratiocinatio, i.e., one of the four status legales. The Proculians defended an extensive application of the regula Catoniana: not only an unconditional, but also a conditional legacy had to be valid from the moment the testament was made.

In his De inventione, Cicero discussed ratiocinatio at length.327 According to Cicero, ‘a controversy arose from ratiocinatio when, from a statement written somewhere, one arrived at a principle which was written nowhere’.328 The Proculians had arrived at a principle which was written nowhere – i.e., a conditional legacy had to be valid from the moment the testament was made – by using a statement written down in the regula Catoniana.

Cicero has also mentioned some of the loci communes that can be used for ratiocinatio. The relevant text is Cic., De inv., 2.150:

Locos autem communes in hoc genere argumentandi hos et huiusmodi quosdam esse arbitramur: primum eius scripti quod proferas laudationem et confirmationem; deinde eius rei qua de quaeratur cum eo de quo constet collationem eiusmodi, ut id de quo quaeritur ei, de qua constet, simile esse videatur; …

327 Cic., De inv., 2.148-153.
328 Cic., De inv., 2.148: ‘Ex ratiocinatione nascitur controversia cum ex eo quod uspiam est ad id quod nusquam scriptum est venitur’.
We are of the opinion that, in this kind of argumentation, the following *loci communes* and others of a similar nature are: first, praise and confirmation of the text that you quote. Next, a comparison of the case in question with what is established in this way, that the case in question seems to be similar to what is established. …

In this case, only the second example is relevant. The Proculians may have compared the case in question with the provision in the *regula Catoniana*. According to this rule, an unconditional legacy bequeathed to a person in the *potestas* of the instituted heir was void, even if he had left the *potestas* of the heir before the *dies cedens*. The case in question, on the other hand, concerned the validity of a conditional legacy bequeathed under the same circumstances. The Proculians stressed the similarity between the two cases and concluded that the *regula Catoniana* applied in both cases. By analogy with an unconditional legacy, a conditional legacy to a person in the *potestas* of the heir was also void, even if the legatee had ceased to be in his *potestas* before the *dies cedens*, ‘because we do not owe anything to those we have in our *potestas* no more under a condition than without a condition’ (Gai., 2.244: ‘Quia quos in potestate habemus, eis non magis sub condicione quam pure debere possumus’).329

The following reconstruction of the argumentation in support of B2 can be made:

- Since the *regula Catoniana* determines that an unconditional legacy and, by analogy, also a conditional legacy, has to be valid from the moment the testament is made
- and since we do not owe anything to those we have in our *potestas* no more under a condition than directly,
- both an unconditional and a conditional legacy to a person in the *potestas* of the heir is void, even if he has left the *potestas* before the *dies cedens*.
- A has bequeathed a conditional legacy to C, who was in the *potestas* of B1 at the moment the testament is made.
- Therefore, this legacy is void, even if C has left the *potestas* before the *dies cedens*.

329 The words ‘non magis … quam’ are also used by Cicero (*Top.*, 3.15) when he gives an example of an argument *a similitudine*.
6. The End of the Controversy

The controversy under consideration has never been explicitly decided in favour of one of the two opinions, but the later sources all apply the Sabinian view. In the *Epitome*, Ulpian has adopted the Sabinian view. The relevant text is Ulp., *Ep.*, 24.23:

> Ei, qui in potestate manu mancipiove est scripti heredis, sub condicione legari potest, ut requiratur, quo tempore dies legati cedit, in potestate heredis non sit.

It is possible that something is bequeathed conditionally to someone who is in the *potestas*, *manus*, or *mancipium* of the instituted heir, in such a way that it is required that, at the time of the *dies cedens*, he is no longer in the *potestas* of the heir.

According to Ulpian, a conditional legacy bequeathed to a person in the *potestas* of the instituted heir was valid if the legatee had left his *potestas* before the condition was fulfilled.

In book 30 of the Digest ‘De legatis et fideicommissis’, Ulpian confirmed that the Sabinian interpretation of the *regula Catoniana* prevailed. The relevant text is Ulp., D. 30.41.1-2:

> *ULPIANUS libro vicesimo primo ad Sabinum*. 1. Sed ea quae aedibus iuncta sunt legari non possunt, quia haec legari non posse senatus censuit Aviola et Pansa consulibus. 2. Tractari tamen poterit, si quando marmora vel columnae fuerint separatae ab aedibus, an legatum convalescet. Et si quidem ab initio non constitit legatum, ex post facto non convalescet, quemadmodum nec res mea legata mihi, si post testamentum factum fuerit alienata, quia vires ab initio legatum non habuit. Sed si sub condicione legetur, poterit legatum valere, si existentis condicionis tempore mea non sit vel aedibus iuncta non sit, secundum eos, qui et emi rem meam sub condicione et promitt mihi stipulanti et legari aiunt. Purum igitur legatum Catoniana regula impediet, condicionale non, quia ad condicionalia Catoniana non pertinet.

> *ULPIAN*, book 21, *ad Sabinum*. 1. But those things that are joined to buildings cannot be bequeathed, because the Senate, during the Consulship of Aviola and
Pansa, has decreed that these cannot be bequeathed. 2. However, the question may arise whether the legacy becomes valid if ever the pieces of marble or the pillars have been separated from the buildings. And, indeed, if the legacy has not been valid from the beginning, it does not become so after a later fact, just as the legacy to me of my own thing does not become valid if the thing is alienated after the testament has been made, because the legacy had no force from the beginning. But if it is bequeathed under a condition, the legacy can become valid if the thing is not mine or is not joined to buildings at the moment the condition is fulfilled. This is in accordance with the opinion of those who say that it is possible for me to buy my own thing under a condition, to let it be promised by *stipulatio* and to bequeath it. So, the *regula Catoniana* will stand in the way of an unconditional legacy, but not of a conditional one, because the *regula Catoniana* does not apply to conditional legacies.

In this text, it is stated that an unconditional legacy has to be valid at the moment the testament is made. A legacy of materials which were joined to buildings was void, even if the materials were separated from the buildings before the *dies cedens*. Likewise, a legacy was void if an unconditionally bequeathed item belonged to the legatee at the moment the testament was made: even if the thing had been alienated before the *dies cedens*, the legacy could not be validated. So, the *regula Catoniana* determined that an unconditional legacy had to be valid from the moment the testament was made. However, the *regula Catoniana* did not apply to conditional legacies. Such a legacy only had to be valid at the moment the condition was fulfilled. This interpretation of the *regula Catoniana* is analogous to the Sabinian view.

In the *Institutiones* of Justinian (*Inst.*, 2.20.32), the Sabinian opinion prevailed in a comparable case:

An servo heredis recte legatum, quaeritur. Et constat, pure inutiliter legari, nec quidquid proficere si vivo testatore de potestate heredis exierit, quia quod inutile foret legatum, si statim post factum testamentum decessisset testator, hoc non debet ideo valere, quia diutius testator vixerit. Sub condicione vero recte legatur, ut requiramus, an, quo tempore dies legati cedit, in potestate heredis non sit.
The question is raised whether the legacy to a slave of the heir is valid. And it is settled that an unconditional legacy is void and can have no effect whatsoever, even if he [i.e., the slave] has left the heir’s potestas during the testator’s life, because a legacy that would have been void if the testator had died immediately after the testament was made must not become valid because the testator has lived a longer life. However, a legacy under condition can be bequeathed validly, in such a way that we require that he is no longer in the potestas of the heir at the moment of the dies cedens.

In this text, the legatee who was in the potestas of the heir was specified as being a slave. If an unconditional legacy was bequeathed to a slave in the potestas of the heir, the legacy did not have any effect whatsoever. A conditional legacy to a slave in the potestas of the heir was valid, provided that the slave had left the potestas before the condition was fulfilled.
1. **Gai., 3.85-87: Text and Controversy**

85. *Item si legitimam hereditatem heres, antequam cernat aut pro herede gerat, alii in iure cedat, pleno iure fit ille heres, cui cessa est hereditas, proinde ac si ipse per legem ad hereditatem vocaretur. Quodsi postea quam heres extiterit, cesserit, adhuc heres manet et ob id creditoribus ipse tenebitur; sed res corporales transferet, proinde ac si singulas in iure cessisset, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt. 86. Idem iuris est, si testamento scriptus heres, postea quam heres extiterit, in iure cesserit hereditatem; ante aditam vero hereditatem cedendo nihil agit. 87. Suus autem et necessarius heres an aliquid agat in iure cedendo, quae eritur. Nostri praeceptores nihil eos agere existimant; diversae scholae auctores idem eos agere putant, quod ceteri post aditam hereditatem; nihil enim interest, utrum aliquis cernendo aut pro herede gerendo heres fiat an iuris necessitate hereditati adstringatur.*

85. Likewise if an heir surrenders by *in iure cesso* a statutory inheritance to another person before he accepts it or behaves as heir, this person, to whom the inheritance is surrendered, becomes heir in full right, just as if he himself were called to the inheritance by law. But if he surrenders it after having become heir, he remains heir and so is himself liable towards the creditors. But he transfers the corporeal things, just as if he had surrendered them one by one by *in iure cesso*. The debts, however, perish and, in this way, the debtors to the inheritance make a profit. 86. The same is valid by law if an heir appointed in a testament surrenders the inheritance by *in iure cesso* after having become heir, but by surrendering the inheritance before accepting it, he achieves nothing at all. 87. But it is asked whether a *suus et necessarius heres* achieves anything by surrendering through *in iure cesso*. Our teachers think that they achieve nothing at all. The authorities of the opposite school think that they achieve the same as the others after accepting the inheritance. Indeed, it is of no interest whether somebody becomes heir by
CRETIO or by behaving as heir or if somebody is bound to the inheritance by necessity of law.

The texts in question are found in the third book of Gaius’ *Institutiones*. Like the second book, the third book of Gaius concerned *res*. These can be divided into *res corporales* and *res incorporeales*.330 Whereas corporeal things are tangible, incorporeal things are intangible.331 Among the latter, Gaius does not only include usufruct and servitudes, but also the inheritance and obligations.332 This explains why not only the law of property (2.1-96) is dealt with under the title *res*, but also the law of succession (2.97-3.87) and the law of obligations (3.88-225). The texts in question are found at the end of the part about the law of succession and deal with the *in iure cessio hereditatis*.

However, Gaius also mentioned the *in iure cessio hereditatis* earlier in the *Institutiones*, i.e., in the part about the law of property. Starting from Gai., 2.28, Gaius discussed the transfer of *res incorporeales*: first, he dealt with the transfer of urban and rustic praedial servitudes (Gai., 2.29); next, he discussed the transfer of usufruct (Gai., 2.30-33), of the inheritance (Gai., 2.34-37) and of obligations (Gai., 2.38-39). Obviously, the paragraphs about the transfer of an inheritance concern us most:

34. Hereditas quoque in iure cessionem tantum recipit. 35. Nam si is, ad quem ab intestato legitimo iure pertinet hereditas, in iure eam alii ante aditionem cedat, id est antequam heres extiterit, proinde fit heres is cui in iure cesserit, ac si ipse per legem ad hereditatem vocatus esset; post obligationem vero si cesserit, nihil minus ipse heres permanet et ob id creditoribus tenebitur, debita vero pereunt eoque modo debitores hereditarii lucrum faciunt; corpora vero eius hereditatis proinde transseunt ad eum cui cessa est hereditas, ac si ei singula in iure cessa fuissent. 36. Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agit; postea vero quam adierit si cedat, ea accident, quae proxime diximus de eo ad quem ab intestate legitimo iure pertinet hereditas, si post obligationem <in> iure cedat. 37. Idem et de necessariis heredibus diversae scholae auctores existimant, quod nihil videtur interesse, utrum <aliquid> adeundo hereditatem fiat heres, an

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330 Gai., 2.12.
331 Gai., 2.13-14.
332 Gai., 2.14.
invitus existat; quod quale sit, suo loco apparebit. Sed nostri praeeptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem.

34. Also an inheritance admits only of *in iure cessio*. 35. For if someone on whom an inheritance devolves *ab intestato* by statutory law surrenders by *in iure cessio* this inheritance to another person before acceptance, that is, before he has become heir, this person to whom he has surrendered it becomes heir, just as if he himself had been called to the inheritance by law. But when he has surrendered after having become bound (by acceptance), he himself remains heir none the less and so is liable towards the creditors. The debts, however, perish and in this way the debtors to the inheritance make a profit. But the corporeal things of his inheritance pass to the person to whom the inheritance was surrendered, just as if the individual things had been surrendered to him by *in iure cessio*. 36. An heir appointed in a testament achieves nothing at all if he surrenders his inheritance by *in iure cessio* to another person before acceptance. But if he surrenders after he has accepted, the same effects occur as we have just said about someone on whom an inheritance devolves *ab intestato* by statutory law if he surrenders by *in iure cessio* after having become bound. 37. The authorities of the opposite school hold the same for the *necessarii heredes* also, because they think it is of no interest whether someone becomes heir by accepting the inheritance or becomes such without a manifestation of will. What kind of distinction this is will be explained in the proper place. But our teachers regard *in iure cessio* of an inheritance by a *necessarius heres* as of no effect.

In Gai., 2.34, it is stated that an inheritance can only be transferred by means of *in iure cessio*. This remark fits in naturally at this point, since Gaius is dealing with the transfer of *res incorporales*. However, the detailed developments in Gai., 2.35-37 are out of place.\(^{333}\) They would have been better placed in the part about the law of succession (Gai., 2.97-3.87).

The words ‘quod quale sit, suo loco apparebit’ (what kind of distinction this is will be explained in the proper place) refer to Gai., 2.152.\(^{334}\) In this text, a distinction was made between three different kinds of heirs: *necessarii heredes*, *sui et necessarii heredes*, and

\(^{333}\) S. SOLAZZI, L’ “in iure cessio hereditatis” e la natura dell’antica “hereditas”, *IURA* 3 (1952), pp. 22-47, goes too far when he states that the texts Gai., 2.35-37 are the work of a post-gaian author.

\(^{334}\) Gai., 2.152: ‘Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.’ (‘But heirs are said to be either *necessarii*, or *sui et necessarii*, or *extranei*’).
extranei heredes. While the former two became heir without a manifestation of will (invitus), the latter became heir by accepting the inheritance. 1) A necessarius heres was one of the testator’s slaves who was instituted heir cum libertate by will. On the testators’ death, this slave was immediately freed and became his heir straightaway, whether he wanted this or not. Because slaves could not evade the inheritance, insolvent testators commonly freed one of the heirs and instituted him as heir so that the discredit associated with the bankruptcy fell on him rather than on the testator himself. 2) The sui et necessarii heredes were the uxor in manu and the children (or grandchildren by a son) in potestate, who became sui iuris after the testator’s death. It was of no importance whether they were instituted by will or not: immediately after the testator’s death, they acquired the position of heir by operation of law, even against their will. The praetor, however, allowed them the beneficium abstinendi, i.e., the right to abstain from succession. 3) All other heirs who were not subject to the testator’s potestas were called extranei heredes. They had the right to decide whether they accepted the inheritance or not. They could accept the inheritance in two different ways: either by means of a formal declaration known as cretio or by behaving as heir (‘pro herede gerere’).

The legal question in Gai., 2.34-37 and Gai., 3.85-87 runs as follows: ‘To what extent is an heir allowed to use the in iure cessio hereditatis to transfer his inheritance to another person?’ Gaius has distinguished three groups of heirs to which this question pertained: 1) the intestate extranei heredes; 2) the extranei heredes by will; and 3) the necessarii or sui et necessarii heredes.

1. If an extraneus heres ab intestato transferred the inheritance to another person before aditio by means of an in iure cessio hereditatis, the surrenderee became the new heir in full right. When he transferred the inheritance after aditio, the corporeal things were passed to the surrenderee, just as if they had been surrendered one by one. However, the surrendorer remained heir himself and, therefore, he remained liable toward the creditors of the inheritance. The debts owed to the estate, on the other hand, were extinguished.

336 Gai., 2.153.
337 Gai., 2.156-160.
338 Gai., 2.161-162.
339 Gai., 2.164-173.
340 See also Ulp., Ep., 19.12-15. Whereas the corporeal things are conferred on B, the obligations are not. The fact that obligations are not susceptible to in iure cessio (Gai., 2.38) explains why the debts and credits are not
2. The *in iure cessio hereditatis* made by an *extraneus heres* by will before *aditio* was entirely void. If such an heir surrendered the inheritance after *aditio*, he brought about the same effects as when the *extraneus heres ab intestato* surrendered his inheritance after *aditio*.

3. Third, the texts in which the controversy between the Sabinians (‘nostri praeceptores’) and the Proculians (‘diversae scholae auctores’) is mentioned, i.e., Gai., 2.37 and Gai., 3.87, are taken into consideration.\textsuperscript{341} The legal question that gave rise to the controversy is the following: ‘Is it possible for *sui et necessarii heredes* to transfer their inheritance to a third person by means of an *in iure cessio hereditatis*?’

The two texts adopted different wordings: ‘necessarii heredibus’ in Gai., 2.37 and ‘*suis et necessarius heres*’ in Gai., 3.87. In Gai., 2.152-153 (see *supra*), Gaius defined *necessarii heredes* as slaves who were instituted as heir *cum libertate* by will. The *sui et necessarii heredes*, on the other hand, were persons who became *sui iuris* upon the testator’s death (see Gai., 2.152; 2.156). However, elsewhere, Gaius used the term *necessarii heredes* also in a more general sense, referring both to slaves and to *sui et necessarii heredes*.\textsuperscript{342}

In recent literature, the opinions about the interpretation of the term ‘*sui et necessarius heres*’ in Gai., 3.87 are divided. The majority opinion is that Gaius was referring to both the *sui (et transferred to B. But why was the heir still responsible towards the creditors, whereas he could no longer address the debtors? According to \textsc{Voci}, \textsc{Der}, \textsc{I}, p. 103, the heir renounced his rights towards the debtors when he transferred his inheritance to a third person (B). The creditors of the inheritance, on the other hand, were persons who became *sui iuris* upon the testator’s death (see Gai., 2.152; 2.156). However, elsewhere, Gaius used the term *necessarii heredes* also in a more general sense, referring both to slaves and to *sui et necessarii heredes*.\textsuperscript{342}


\textsuperscript{342} See Gai., 2.58 and Gai., 3.201.
necessarii) heredes and the mere necessarii heredes. The editors who favour this opinion have emended agat into agant in Gai., 3.87. In my view, this interpretation of the term suus et necessarius heres is incorrect. First, it is unlikely that Gaius gave a meaning to the term suus et necessarius heres that did not correspond with his definition of it in Gai., 2.156. Second, the editors had to alter the text in order to make their interpretation plausible: They emend agat into agant. In the edition of Spruit and Bongenaar, in fact, no less than seven words are inserted. Finally, the translation of the word et in suus et necessarius heres into ‘or’ is incorrect.

The legal question in Gai., 3.87 of whether necessary heirs could surrender their inheritance by means of an in iure cessio only bore on the sui (et necessarii) heredes. This question could not concern the slaves who were instituted cum libertate, since it was unacceptable that they could evade the inheritance by any means. Yet, it is remarkable that Gaius (2.37) adopted the term ‘necessariis heredibus’ without any further specification. The term necessariis heredibus has to be interpreted in a more general way, referring to everybody who became heir without choice. Probably Gaius did not yet specify this term, because he had the intention to explain the different kinds of heirs further on in his Institutiones, in a more suitable place (‘suo loco’). After the reader had consulted these paragraphs, he would know that there were two groups of necessarii heredes. Gaius may have thought that the context of the paragraph would show the reader to which of the two groups he was referring in 2.37.


344 J.E. SPRUIT - K. BONGENAAR, De Instituten van Gaius, 2nd edn., Zutphen 1994, p. 104: ‘Suus autem et necessarius heres, <item alii qui sunt inter necessarios heredes> an aliquid agant in iure cedendo, quaeritur.’ (‘Of een eigen en tevens onvrijwillig erfgenaam, alsmede ieder ander die tot de onvrijwillige erfgenamen behoort, door overdracht ten overstaan van de magistraat een geldige rechtshandeling verricht, is een twistpunt’).


346 NELSON and MANTHE (1992), pp. 209-211, and I share their opinion. J. REINACH, Gaius Institutes, Paris 1950, pp. 106-107, was correct not to emend ‘agat’ into ‘agan’: ‘Suus autem et necessarius heres an aliquid agat in iure cedendo quaeritur.’ He gave the following translation: ‘Il y a une controverse sur la question de savoir si l’héritier interne et nécessaire peut valablement céder devant un magistrat.’
Let us now return to the legal question that gave rise to the controversy between the Sabinians and the Proculians: ‘Is it allowed for sui (et necessarii) heredes to transfer their inheritance to another person by means of an in iure cessio hereditatis?’ With regard to sui (et necessarii) heredes, no distinction is made between the heirs by will and the intestate heirs. It is important to know that, by operation of law, sui (et necessarii) heredes stood in the same position as extranei heredes who had accepted the inheritance or had started to behave as heirs. Therefore, the Proculians took the view that an in iure cessio hereditatis by a suus (et necessarius) heres was allowed and that it had the same effects as one by an extraneus after aditio. This means that the suus (et necessarius) heres remained heir himself and continued to be liable towards the creditors of the inheritance. The debtors were remitted from their debts and the corporeal objects of the inheritance were conferred on the surrenderee. In support of their opinion, the Proculians adduced the following argument: ‘It is of no interest whether someone becomes heir by accepting the inheritance or becomes such without a manifestation of will’.  

The Sabinians, on the other hand, maintained that an in iure cessio hereditatis by a suus (et necessarius) heres was null and void. For this opinion, Gaius provided no explicit motivation.

In the 3rd century AD, the in iure cessio hereditatis had become obsolete. The controversy, therefore, lost its importance and Justinian eliminated the in iure cessio hereditatis from the law.

2. The Controversy in Gai., 3.87: Modern Theories

Most authors, including Voigt, Solazzi, Guarino, De Martino, Scherillo, Nelson, and Manthe explain the controversy by qualifying the Sabinian opinion as conservative and the Proculian opinion as progressive. Here, the focus is on the theories of Guarino and De Martino, because their accounts are more elaborate than those of the others.

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347 Gai., 2.37: ‘Quod nihil videtur interesse utrum <aliquis> adeundo hereditatem fiat heres, an invitus existat’.  
Guarino has noted that the Proculians used an analogous argument in support of their view. The Sabinians, on the other hand, stated – ‘come cosa ovvia’ – that an in iure cessio hereditatis made by necessarii heredes was null and void. Gaius did not provide a motivation for this opinion, but Guarino explains it as a remnant of an ancient practice. Originally, an in iure cessio of an accepted inheritance was void, whether it was made by an extraneus or by a necessarius heres. The effects attributed later to an in iure cessio hereditatis by extranei heredes were admitted by preclassical jurisprudence. Whereas the Proculians wanted to apply these effects to an in iure cessio hereditatis of necessarii as well, the Sabinians adhered to the ancient principle of nullity for necessarii heredes. In this case, Guarino maintained, the Proculians have supported the ius aequum and the Sabinians the ius strictum.

Guarino’s theory is not convincing. His statement that, in ancient Rome, an in iure cessio of an accepted inheritance made by an extraneus or a necessarius was null and void is not confirmed by any source.

De Martino too gave an historical explanation for the controversy about the effectiveness of an in iure cessio hereditatis made by necessarii heredes. According to De Martino, only the cessio ante aditionem existed in ancient Rome. Because the legitimus heres was not yet a real heir before he had accepted the inheritance, he was permitted to transfer his right to accept it to someone else by means of an in iure cessio hereditatis. Because the cessio ante aditionem of the legitimus heres had always been valid, it was easy to extend this rule and attribute a partial validity to the cessio post aditionem of an inheritance. Since a necessarius heres could not perform a cessio ante aditionem, it did not seem easy for the more conservative jurists, i.e., the Sabinians, to assign a partial validity to their in iure cessio hereditatis. According to De Martino, an additional argument may explain why a necessarius heres could not validly transfer his inheritance. If a necessarius heres transferred his inheritance, he would not have any means to pay the hereditary debts, for which he continued to be responsible. De Martino kept silent on the Proculian position.

noi fuori dubbio, giacché ciò risulta evidente dalla stessa motivazione data dai Proculeiani alla loro opinione (qui sopra riferita), la quale è comprensibile appunto come reazione ad una precedente soluzione imperniata sulla nullità.’ NELSON - MANTHE (1992), pp. 211-212.

350 DE MARTINO (1948), p. 575: ‘La spiegazione non può essere che storica. La teoria Sabiniana rispecchia, come altrove, l’indirizzo conservativo e tradizionale della giurisprudenza.’
Some critical remarks can be raised against this theory. First, De Martino departed from an incorrect edition of Gai., 2.37, because he assumed that the question about the possibility of an *in iure cessio hereditatis* concerned both the *sui et necessarii* and the mere *necessarii heredes*. Second, as with Guarino, De Martino’s theory has no basis in the sources.

One author has explained the controversy by giving an opposite interpretation of the relation between the two schools. According to Falchi, the Proculian opinion was conservative, whereas the Sabinian opinion was progressive.\(^{351}\) Falchi asserted that the Proculians had a traditional and ‘unilateral’ conception of the acquisition of an inheritance. In this conception, only the position of the receiver (i.e., of the heir) was of any relevance. This meant that, in case of succession, the testator’s ownership of his own fortune was extinguished immediately at his death and was replaced by the new ownership of the heir. Therefore, only the fact that the heir acquired the inheritance was relevant. The way in which he acquired it, either by accepting it or by operation of law, on the other hand, was immaterial. Therefore, the Proculians attributed the same effects to an *in iure cessio hereditatis* by *extranei* and one by *necessarii heredes*. According to Falchi, the Sabinians maintained that a ‘bilateral’ relation between the testator and the heir was at the root of the acquisition of an inheritance. These jurists attached great importance to the testator’s *voluntas*. Because he gave no permission (lack of *voluntas*) to the *necessarius heres* to transfer the inheritance to a third person, the Sabinians maintained that the *in iure cessio hereditatis* had no effect. In other words, the *in iure cessio hereditatis* was a bilateral juridical act, in which both the position of the surrenderee and, in particular, the position of the surrenderor (i.e., the heir) were important and which could not take place because the surrenderor had neither the right nor the permission to transfer.

Falchi’s theory is not convincing either. According to him, the Sabinians attached great importance to the *voluntas* of the testator. However, it is stated nowhere in the sources that the testator’s *voluntas* was so important that a *necessarius heres* could not transfer his inheritance by means of an *in iure cessio hereditatis*.

Finally, there is one critical comment which can be made on all theories mentioned so far. Both in Gai., 2.37 and in Gai., 3.87, Gaius has motivated the Proculian opinion. The position

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CHAPTER X

of *sui et necessarii heredis* is analogous with the position of *extranei heredes* after they have accepted the inheritance. Therefore, an *in iure cessio hereditatis* made by a *suus et necessarius heredes* should have the same effects as one made by an *extraneus heres* who had accepted the inheritance. Modern scholars, however, have failed to acknowledge the value of this argument.

3. **The Locus a Similitudine and the Locus a Differentia in Gai., 3.87**

As stated above, the following legal question gave rise to the controversy: ‘Is it possible for *sui (et necessarii) heredes* to transfer their inheritance to a third party by means of an *in iure cessio hereditatis*?’ In this part, it will be argued that the Sabinians and the Proculians made use of *topoi* to form their opinion on the matter. First, the opinion of the Proculians will be discussed and then the opinion of the Sabinians.

3.1 **The Proculian View**

The Proculians argued that the *in iure cessio hereditatis* by a *suus et necessarius heres* had the same effect as the transfer by a voluntary heir after he had accepted the inheritance. Indeed, it is of no interest whether somebody becomes heir by *cretio* or by behaving as heir or if somebody is bound to the inheritance by necessity of law (Gai., 3.87: ‘Nihil enim interest, utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur’). In other words, the Proculians saw no difference between someone who became heir by acceptance or by acting as heir, on the one hand, and someone who became heir without a manifestation of will.

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352 In Gai., 2.37, the argument in favour of the Proculian view is formulated in a slightly different way: ‘Because they think it is of no interest, whether someone becomes heir by accepting the inheritance or becomes such without a manifestation of will.’ (‘Quod nihil videtur interesse, utrum <aliquis> adeundo hereditatem fiat heres, an invitus existat’).
The Proculians found their argument under the *locus a similitudine*. In his first discussion about this *topos*, Cicero gave an example of an argument *a similitudine*.\(^{353}\) A testator (A) has instituted B as heir and bequeathed the usufruct of a house to C. When the house collapsed or sustained damage, the legal question arose whether the heir was bound to rebuild or repair it. The heir who did not want to pay the damage could find an argument in support of his view under the *locus a similitudine*. Since an heir was not bound to replace a slave of whom the usufruct had been bequeathed if the slave died, he was not bound to rebuild or repair the house either. This argument was constructed by analogous reasoning. Since the Proculian argument in favour of the *necessarius heres* was also based on the similarity or analogy between voluntary and involuntary heirs, it is highly probable that they found their argument under the *locus a similitudine*.

The Proculian argument can now be reconstructed.

- Since it is of no interest whether somebody becomes heir by *cretio* or by behaving as heir or if somebody is bound to the inheritance by necessity of law,
- a *suus et necessaries heres* can transfer his inheritance by means of an *in iure cessio hereditatis* with the same effects as an *extraneus heres*.
- A is a *suus et necessaries heres*.
- Therefore, the transfer of his inheritance by an *in iure cessio* to B brings about the following effects: the corporeal things are passed to B; A remains an heir himself and, therefore, remains liable toward the creditors of the inheritance; the debts owed to the estate are extinguished.

### 3.2 The Sabinian View

The Sabinians, on the other hand, gave a negative answer to the question of whether an *in iure cessio hereditatis* by a *suus et necessaries heres* had the same effects as a similar transfer by a voluntary heir. According to the Sabinians, an *in iure cessio hereditatis* by a *suus et

\(^{353}\) Cic., *Top.*, 3.15. In his second discussion about the *locus a similitudine*, Cicero (*Top.*, 10.41-45) distinguishes four different kinds of arguments from similarity: 1) induction; 2) comparison; 3) the citing of examples of parallel cases; and 4) fictitious examples.
necessarius heres was null and void. Gaius did not explicitly mention the argument used by the Sabinians to support their view.

However, it is very likely that they used an argument a differentia. In the second part of his *Topica*, Cicero (*Top.*, 11.46) gave an example of an argument that can be found under this *topos*. In this text, the following legal question is under discussion: ‘Is it possible to lawfully discharge a debt to a male or a female minor without the authorisation of the tutor?’ In support of a negative answer to this question, the following argument a differentia may be given: ‘Though you may properly pay a debt owed to a woman directly to the woman without the authorization of her tutor, you may not in the same way discharge a debt owed to a minor, whether male or female.’

In his *Institutio Oratoria*, Quintilian discussed the *locus ex dissimilibus*, which has to be equated with the *locus a differentia* as described by Cicero. The relevant text is Quint., *Inst. Or.*, 5.10.73:

Ex dissimilibus: ‘non si laetitia bonum, et voluptas’: ‘non quod mulieri, idem pupillo’.

From dissimilarities: ‘If joy is a good thing, it does not follow that pleasure is’: ‘What applies to a woman need not apply to a minor’.

The second expression is particularly relevant. In these few words, Quintilian recapitulates the example as described by Cicero. The Sabinians clearly used a similar expression in support of their opinion. The transfer of an inheritance by a suus et necessarius heres did not have any effect: ‘Non quod extranei heredes, idem sui et necessarii heredes’. The Sabinians maintained that what applied to a voluntary heir need not apply to an involuntary heir.

Now the Sabinian argumentation can be reconstructed.
- What applies to extranei need not apply to suis et necessarii heredes.

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354 Cic., *Top.*, 11.46: ‘Non, quem ad modum quod mulieri debeas, recte ipsi mulieri sine tutore auctore solvas, item, quod pupillo aut pupillae debeas, recte possis eodem modo solvere.’
Therefore, a *suus et necessaries heres* does not transfer his inheritance through *in iure cessio* with the same effects as an *extraneus heres*. In fact, such a *in iure cessio hereditatis* has no effect at all.

- A is a *suus et necessarius heres*.

- Therefore, the transfer of his inheritance by an *in iure cessio* to B has no effect.
CHAPTER X

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XI. CONDICIO IMPOSSIBILIS

1. Gai., 3.98: Text and Controversy

Item si quis sub ea condicione stipuletur, quae existere non potest, velut ‘si digito cælum tetigerit’, inutilis est stipulaïio. Sed legatum sub inpossibili condicione relictum nostri praeceptores proinde deberi putant, ac si sine condicione relictum esset; diversae scholae auctores non minus legatum inutile existimant quam stipulationem. Et sane vix idonea diversitatis ratio reddi potest.

Likewise, if somebody stipulates under a condition that cannot happen, for example, ‘if he touches the sky with his finger’ the stipulatio is void. But where a legacy is bequeathed under an impossible condition, our teachers think it is due, as if it had been bequeathed unconditionally. The authorities of the opposite school think that the legacy is as void as the stipulatio. And certainly for this diversity, a proper reason can hardly be provided.

The text under consideration concerns the final controversy regarding the law of succession in Gaius’ Institutiones. Nonetheless, the text is situated in the part about the law of obligations and, more specifically, in the part about verbal contracts. In 3.97-109, Gaius discussed the various causes of invalidity of stipulationes. When someone stipulated that something be given that cannot be given (e.g., a free man instead of a slave) or that cannot exist at all (e.g., a hippocentaur), the stipulatio was void.\(^{355}\) Likewise, a stipulatio was void if made under an impossible condition, for instance, under the condition that the beneficiary touched the sky with his finger.\(^{356}\) In the same paragraph, Gaius made a digression about the validity of a legacy bequeathed under an impossible condition. By analogy with a stipulatio, which created an obligation, it is reasonable to assume that Gaius only referred to a legatum per damnationem, because such a legacy also created an obligation.

\(^{355}\) Gai., 3.97-97a.

\(^{356}\) Gai., 3.98. See also Inst., 3.19.11.
Even though it was commonly agreed upon that a *stipulatio* under an impossible condition was void, the following question regarding the validity of a legacy under such a condition gave rise to a school controversy: 357 ‘Is a legacy bequeathed under an impossible condition valid or not?’ 358 Before discussing the different views of the Sabinians and the Proculians, the concept of *condicio impossibilis* has to be defined. The impossibility may either be physical or legal. 359

Since Gaius gave an example of a condition that was physically impossible in the text under consideration, namely, ‘si digito caelum tetigerit’, it is unlikely that he was referring at one and the same time to the other main subdivision of impossible conditions: those that are already impossible at the moment the testament is made and those that become impossible afterwards. 360

Let us now turn to the opposite views, taken by the Sabinians and the Proculians. The former held the view that a legacy under an impossible condition, unlike a *stipulatio* under such a condition, was due unconditionally (‘ac si sine condicione relictum esset’). The Proculians, on

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358 Parallel to this controversy about the validity of a legacy, subject to an impossible condition, several jurists discussed the validity of other testamentary dispositions, subject to an impossible condition, such as, the *heredis institutio* and a manumission. A full discussion of the relevant texts is beyond the scope of this book.

359 WOLFF (1953), pp. 399-400; VOCI (1963), p. 610; and ARCHI (1981), pp. 253-254, have made the same distinction between factual or physical impossibility, on the one hand, and legal impossibility, on the other.

360 This subdivision has also been made by VOCI (1963), p. 610: ‘impossibilità originaria’ versus ‘impossibilità sopravvenuta’. 
the other hand, did not make a distinction between a *stipulatio* and a legacy and maintained that a legacy under an impossible condition was as void as a *stipulatio* under such a condition (‘Diversae scholae auctores non minus legatum inutile existimant quam stipulationem’).

The Sabinian decision to remove an impossible condition attached to a legacy, in order for the legacy to be valid, was not limited to this kind of testamentary dispositions. Impossible conditions added to testamentary dispositions other than the legacy, i.e., an *heredis institutio*, a manumission, or a *fideicommissum*, were often held to be unwritten as well.\(^{361}\) Modern writers, such as Cosentini, have captured these decisions under the name ‘regula Sabiniania’, which they interpret as a dogmatic legal principle.\(^{362}\) However, Wolff has correctly refuted this view in a valuable and lucid review on Cosentini’s book.\(^{363}\) In his opinion, the clause that an impossible condition in a testamentary disposition was considered ‘pro non scriptis’ was merely a convenient and popular formulation that could be used occasionally. The decision on whether or not the clause was applied in a specific case merely depended on the particular circumstances of each case.

The words ‘et sane vix idonea diversitatis ratio reddi potest’ at the end of Gai., 3.98 admit of two interpretations. First, it is possible that Gaius could hardly provide a satisfactory reason for the difference of opinion (diversitas) between the Sabinians and the Proculians.\(^{364}\) Second, the words can be interpreted as follows: Gaius could not adduce a good reason for the Sabinian distinction (diversitas) between a *stipulatio* and a legacy. The majority of modern

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361 Regarding the *heredis institutio* under an impossible condition, see, for example:
- Pomp., D. 28.3.16: ‘Si vero impossibiles sunt, veluti “Titius si digito caelum tetigerit, heres esto”, placet perinde esse, quasi condicio adscripta non sit, quae est impossibilis.’ (‘If, in fact, they are impossible, for example, “If Titius touches the sky with his finger, let him be heir”, it is settled that it is as if the impossible condition is not added’).
- Alf., D. 28.5.46(45): In this text the following case is described. A testator has instituted L. Titius as heir on condition that the testator’s mother Maevia en his daughter Fulvia survive him. The legal question in the text ran as follows: ‘Is the *heredis institutio* valid when the testator has never had a daughter, but when his mother did survive him?’ According to Servius Sulpicius Rufus, such an institution was valid, because anything impossible that had been written in a will, had no force (‘Quia id, quod impossibile in testamento scriptum esset, nullam vim haberet’).
- According to Pomp., D. 35.1.6.1, a large number of jurists (including Sabinus, Cassius, Labeo, and Pomponius) seem to have agreed with Servius. They regard an impossible condition attached to an *heredis institutio* to be unwritten: ‘Quasi impossibiles eas condiciones in testamento positas pro non scriptis esse’.

362 COSENTINI (1952).


364 This interpretation has been supported by FALCHI (1981), p. 164.
scholars has favoured the latter interpretation.\footnote{Among others: BUND (1970), p. 357; WIELING (1970), p. 213; SCAPINI (1981), p. 356. NELSON - MANTHE (1999), p. 97, go one step further: ‘Gaius (obwohl selbst Sabinianer) neigt zur Akzeptanz der prokulianischen Meinung: für eine unterschiedliche Behandlung von Stipulation und Legat lasse sich, so folgert er, kein triftiger Grund anführen.’ The allegation of Nelson - Manthe that Gaius was inclined to accept the Proculian opinion is incorrect, since Gaius did not say so. Indeed, he did not understand the reason for the school controversy and, accordingly, nor for the Sabinian opinion. Nevertheless, Gaius stood by the Sabinian view.} However, this interpretation is inadequate for the following two reasons. Gaius has inserted the words in question at the end of the text, immediately after the Proculian view. This position suggests that the word \textit{diversitas} does not refer to the Sabinian distinction between a \textit{stipulatio} and a legacy, but rather to the difference of opinion between the two schools. If, moreover, there had been no reasonable motivation for the Sabinian view, it is rather surprising that this opinion prevailed (see \textit{infra}). The former interpretation is the correct one. Gaius did not understand why the controversy arose and, accordingly, he could not provide a good reason for the Sabinian opinion either. Nevertheless, there may have been a satisfactory line of argument for the Sabinian view, even if Gaius did not know about it. The words ‘et sane vix idonea diversitatis ratio reddi potest’ are in direct conflict with the modern theory that there was a fundamental difference of a theoretical nature between the two schools. If indeed the controversies could be explained in terms of one theoretical criterion, Gaius would have had no difficulties to interpret the controversy in question.

2. \textbf{Later Texts in the Digest and \textit{Institutiones} of Justinian}

A text in the Digest of Justinian shows that the Sabinian Salvius Iulianus abided implicitly by the opinion of his school. The relevant text is Iul., D. 30.104.1:\footnote{Regarding this text, see BUND (1970), pp. 357-359; MacCORMACK (1974), p. 283.}

\begin{quote}
IULIANUS libro primo ad Urseium Ferocem. In testamento sic erat scriptum: ‘Lucio Titio, si is heredi meo tabellas, quibus ei pecuniam expromiseram, dederit, centum dato’: Titius deinde antequam tabellas heredi redderet, decesserat: quaesitum est, an heredi eius legatum deberetur. Cassius respondit, si tabulae fuissent, non deberi, quia non redditis his dies legati non cessit. Iulianus notat: si testamenti faciendi tempore tabulae nullae fuerunt, una ratione dici potest legatum Titio deberi, quod \varepsilon\delta\omicron\nu\nu\omicron\theta\omicron\varsigma condicio pro non scripta habetur.
\end{quote}
IULIANUS, book 1, Ureius Ferox. In a testament, it was written like this: ‘A hundred must be given to Lucius Titius if he gives to my heir the document in which I had promised him money.’ Titius subsequently died before returning the document to the heir. The question arose whether the legacy was due to his heir. Cassius answered that, if there had been a document, it was not due, because the legacy did not vest when the document was not returned. Iulianus notes: if there was no document at the moment the testament was made, for one reason it can be said that the legacy is due to Titius, for an impossible condition is held to be unwritten.

Urseius Ferox (±100 AD) has described the following case. A testator has bequeathed a sum of money to his creditor L. Titius by means of a *legatum per damnationem* on condition that he would be released from the debt through the return of the document in which the testator’s debt was described to the heir. Next, the testator died and, before returning the document, Titius died as well. The question arose whether the legacy was due to Titius’ heir. Earlier, Cassius had taken the view that, if there had been a document, the legacy failed and the sum of money was not due to Titius’ heir. In an additional note, Iulianus has described a similar case. If there had been no document at the time the testament was made, the condition was impossible. According to Iulianus, in that case, the legacy was due to Titius, because an impossible condition was regarded as unwritten (‘Quod ὁδὸν θος (impossibilis) condicio pro non scripta habetur’). Although Iulianus did not explicitly refer to the school controversy or to the Sabinian opinion, he implicitly agreed with the Sabinian view that an impossible condition did not invalidate the legacy. Moreover, he used a similar argumentation, although differently formulated: the legacy was valid, because the impossible condition was held to be unwritten.

Furthermore, a text by Ulpian reveals the influence of the Sabinian view without an explicit reference to the school controversy. In this text, Ulpian formulated a general rule about impossible conditions attached to testamentary dispositions. The relevant text has come down to us in the Digest of Justinian, i.e., in Ulp., D. 35.1.3:

ULPIANUS libro sexto ad Sabinum. Optinuit impossibiles condiciones testamento adscriptas pro nullis habendas.

367 The fact that the text was situated in book 6 ad Sabinum does suggest a Sabinian influence.
ULPIAN, book 6, *ad Sabinum*. The rule has prevailed that impossible conditions added to a testament are held to be non-existent.

The word ‘optinuit’ suggests that there had been a controversy. The statement of Ulpian implies that any testamentary disposition subject to an impossible condition remained valid, because the condition was considered to be non-existent.

Eventually, the Sabinian view was also adopted by Justinian in *Inst.*, 2.14.10:\(^{368}\)

> Impossibilis condicio in institutionibus et legatis nee non in fideicommissis et libertatibus pro non scripto habetur.

The impossible condition is held to be unwritten in institutions and legacies and also in *fideicommissa* and manumissions.

Justinian maintained that an impossible condition added to an *heredis institutio*, a legacy, a *fideicommissum*, or a manumission was to be considered unwritten (‘pro non scripto’) and that the testamentary disposition was valid. Justinian did not refer to the school controversy either.

3. **The Controversy in Gai., 3.98: Modern Theories**

Voigt’s theory that the conservative Sabinians abided by *rigor iuris* and *verbi ratio* and the progressive Proculians by *aequitas* and *voluntatis ratio* cannot be applied to the controversy in Gai., 3.98.\(^{369}\) This qualification of the two schools is in contradiction with their opinions about the validity of a legacy under an impossible condition. According to the Sabinians, an impossible condition added to a legacy was held to be unwritten and the legacy was therefore valid. However, the principle of *rigor iuris* would inevitably invalidate a legacy under an impossible condition. Moreover, the erasure of a condition can hardly be called *verbis ratio*. The Proculians, on the other hand, held that a legacy under an impossible condition was void.


\(^{369}\) VOIGT (1899), p. 231.
Since we do not know the testator’s reason for adding an impossible condition to a legacy, we cannot say that the Proculian opinion to regard such a legacy as void was in accordance with the will of the testator (voluntatis ratio).

Unlike Voigt, Falchi qualified the Proculians as conservative and the Sabinians as progressive.\textsuperscript{370} According to Falchi, the Proculians regarded an impossible condition as a failing condition, whether added to a disposition mortis causa or inter vivos. In support of this view, the Proculians referred to the authority of one of the veteres, namely, Quintus Mucius Scaevola. In other words, the legatee could not acquire an object bequeathed to him under an impossible condition because the condition was regarded as failing. The Proculians, moreover, qualified the acquisition of ownership by the legatee as unilateral. Therefore, the voluntas and intention of the testator to bequeath something to the legatee were irrelevant. According to Falchi, the Sabinians gave a different interpretation of the term condicio impossibilis. Under the influence of the Stoa, they held that an impossible condition was not a ‘real’ or ‘genuine’ condition, because it was certain from the beginning that it could not be fulfilled. Therefore, an impossible condition and a failing condition could not be dealt with in the same way. Indeed, the latter was a “real” or “genuine” condition because, initially, it could be fulfilled.\textsuperscript{371} Unlike the Proculians, moreover, the Sabinians attached great importance to the voluntas of the testator.\textsuperscript{372} In this case, the will of the testator to bequeath something to the legatee was obstructed by the impossible condition and so they erased this condition.

There are two reasons why Falchi’s interpretation fails to convince in this case. First, he is not quite accurate in respect of the Proculian view. According to Falchi, the Proculians regarded an impossible condition as failing by analogy with the opinion of the late Republican jurist Quintus Mucius Scaevola. However, Falchi fails to refer to a source that mentions this opinion. The only source in which the opinion of Quintus Mucius Scaevola about an impossible condition attached to an heredis institutio is mentioned is Pomp., D. 28.3.16. In this text, Quintus Mucius stated that a condition had to be capable of fulfilment in order for the heredis institutio to be valid. However, he did not state that the impossible condition was

\begin{footnotes}
\item[372] According to Falchi, the importance attached by the Sabinians to the voluntas of the testator explains why they maintained that a legacy under an impossible condition was valid, whereas a stipulatio under such a condition was void.
\end{footnotes}
regarded as failing. The text, moreover, concerns an heredis institutio under an impossible condition and not a legacy. Second, the intention of a testator who had added an impossible condition to a legacy was uncertain. Therefore, Falchi’s statement that the Sabinian opinion was in accordance with the will of the testator is questionable.

4. **The Locus ex Similitudine and the Locus ex Differentia in Gai., 3.98**

The controversy about the validity of a legacy under an impossible condition may have originated in the following way. A testator (A) made a testament in which he instituted B as heir and bequeathed something to C by way of a legatum per damnationem under an impossible condition. When the testator died, the heir acquired the inheritance, but refused to fulfil the obligation and give the bequeathed item to C. The latter, therefore, presented the case to the Sabinians. They stated that it could be argued that a legacy under an impossible condition was due as if it had been bequeathed unconditionally and they advised C to bring an actio ex testamento against the heir (B). Thereupon, B consulted the Proculians. They argued that a legacy under an impossible condition was void and that B, therefore, did not have to deliver the bequeathed item to C. How did the Proculians and the Sabinians find their respective arguments?

4.1 **The Proculian View**

The heir presented his situation to the Proculians: ‘A testator has instituted me as heir and has bequeathed something to C under an impossible condition by way of a legatum per damnationem. Such a legacy is void, isn’t it?’ The Proculians confirmed that a legacy subject to an impossible condition was as void as a stipulatio (Gai., 3.98: ‘Diversae scholae auctores non minus legatum inutile existimant quam stipulatiam’) and that B, therefore, did not have to fulfil the obligation.

The Proculians may have found their argument by means of the locus ex similitudine. In order to demonstrate this, the information given by Cicero in his Topica regarding this topos will be
looked at first. In the first discussion about the *locus ex similitudine*, Cicero gave an example of an argument that is based on similarity. For this purpose, he described the following case in Cic., *Top.*, 3.15:

A similitudine hoc modo: Si aedes eae corruerunt vitiumve faciunt quorum usus fructus legatus est, heres restituere non debet nec reficere, non magis quam servum restituere, si is cuius usus fructus legatus esset deperisset.

From similarity in this way: If a house of which the usufruct has been bequeathed tumbles down or becomes damaged, the heir is not bound to restore or rebuild it, any more than he is bound to replace a slave of whom the usufruct had been bequeathed if he had died.

A testator (A) has bequeathed the usufruct of a house to C. After some time, the house collapsed or sustained damage. A conflict arose between the legatee (C), who wanted the heir (B) to repair or rebuild the house, and B, who refused to do this. According to Cicero, B could use the following argument *ex similitudine* in support of his view: ‘I am not bound to restore or rebuild the house, any more than I would be to replace a slave of whom the usufruct had been bequeathed if the slave had died.’ The argument is based on the similarity between the legacy of a usufruct of a house and that of a slave. Since it was determined that, if a slave of whom the usufruct had been bequeathed had died, the heir did not have to replace him, the same can be said about a house of which the usufruct is bequeathed. If such a house collapsed or sustained damage, the heir did not have to restore or rebuild it.

Obviously, there is a clear resemblance between the argument *ex similitudine* mentioned by Cicero by way of example, on the one hand, and that of the Proculians, who considered a legacy under an impossible condition to be as void as a *stipulatio* under such a condition, on the other. By analogy with the rule that a *stipulatio* under an impossible condition was void, a legacy under such condition was void as well.

The way in which the Proculian argument mentioned in Gai., 3.98 and the argument *ex similitudine* mentioned by Cicero are formulated is similar.
Gai., 3.98: ... Diversae scholae auctores non minus legatum inutile existimant quam stipulationem. Et sane vix idonea diversitatis ratio reddi potest.

Cic., Top., 3.15: ... heres restituere non debet nec reficere, non magis quam servum restituere, si is cuius usus fructus legatus esset deperisset.

Since the conflict between the heir and the legatee concerned the words of a legacy, i.e., the addition of an impossible condition, its status may have been one of the four status legales. In this case, the most relevant one is that of ratiocinatio. Whereas the Proculians use a reasoning by analogy, the Sabinians used a reasoning a contrario.

Before discussing the Sabinian argument, the Proculian argument in support of the heir is reconstructed.

- Since a stipulatio under a condition that cannot happen is void,
- a legacy under an impossible condition is as void as such a stipulatio.
- The testator has bequeathed something to C under an impossible condition by way of a legatum per damnationem
- Therefore, the legacy is void and B does not have to fulfil his obligation and give the bequeathed item to C.

4.2 The Sabinian View

The legatee may have asked the Sabinians the following question: ‘A testator has bequeathed something to me in a legatum per damnationem under an impossible condition. Is such a legacy valid?’ According to the Sabinians, such a legacy could be regarded as valid. They maintained that it was due as if it had been bequeathed unconditionally (Gai., 3.98: ‘Ac si sine condicione relictum esset’). Unlike the Proculians, the Sabinians made a distinction between a stipulatio under an impossible condition and a legacy under such a condition. Although Gaius maintained that he could not give a satisfactory reason for the controversy and, accordingly, nor for the Sabinian opinion, the Sabinians surely adduced some argument in support of their view. What kind of argument may have been used by the Sabinians and how did they find it?
The key to the Sabinian argumentation is to be found in the distinction they drew between a *stipulatio* under an impossible condition, on the one hand, and a legacy under such a condition, on the other.\(^{373}\) A *stipulatio* was a bilateral contract and both parties had to be present when the contract was closed. The creditor (i.e., the *stipulator*), moreover, asked the other party a formal question, which in this case included the impossible condition. Thus, in case of a *stipulatio*, both parties were well aware of the content of the contract. A legacy, on the other hand, was a unilateral legal act. At the time of the conflict, moreover, the testator who had made the will was already dead and could no longer be consulted about his intentions. Therefore, the jurists may have wanted to maintain a term of a will by considering the impossible condition to be unwritten.

The following reconstruction of the Sabinian argumentation may be suggested.

- An impossible condition invalidates a *stipulatio*, but not a *legatum per damnationem*,
- because a *stipulatio* is a contract and a legacy a unilateral legal act.
- A testator has bequeathed something under an impossible condition by way of a *legatum per damnationem* to C.
- Therefore, this legacy is valid and B is obliged to give the bequeathed item to C.

\(^{373}\) According to WOLFF (1953), p. 405, as well the Sabinians may have taken their view by drawing a distinction between a *stipulatio* under an impossible condition and a legacy under such a condition.
CHAPTER XI
XII. STIPULATIO FOR A THIRD PERSON

1. Gai., 3.103: Text and Controversy

Praeterea inutilis est stipulatio, si ei dari stipulemur, cuius iurī subiecti non sumus. Unde illud quaesitum est, si quis sibi et ei, cuius iurī subiectus non est, dari stipuletur, in quantum valeat stipulatio. Nostri praeceptores putant in universum valere, et proinde ei soli, qui stipulatus sit, solidum debere, atque si extranei nomen non adiecisset. Sed diversae scholae auctores || dimidium ei deberei existimant, pro altera vero parte inutile esse stipulationem.

Moreover, a stipulatio is void if we stipulate that something is to be given to a person to whose power we are not subject. Hence, it is asked how far the stipulatio is valid if someone stipulates that something is to be given to himself and to a person to whose power he is not subject. Our teachers think that it is entirely valid and that, therefore, it is entirely due to the stipulator only, just as if he had not added the outsider’s name. But the authorities of the other school think that half is due to him, but that the stipulatio is void for the other part.

Just like the preceding text, i.e., Gai., 3.98, this text is situated in the part on verbal contracts and discusses one of the various causes of invalidity of a stipulatio.

In Gai., 3.97-109, Gaius has enumerated different causes of invalidity of a stipulatio. When the promisor has promised something that cannot be given (e.g., a free man instead of a slave) or something that cannot exist at all (e.g., a hippocentaur), the stipulatio is void. A stipulatio is also void if it is made under a condition that cannot happen (e.g., on condition that someone touches the sky with his finger). Moreover, a stipulatio is void where someone stipulates to be given a thing that is already his. Stipulationes that take effect only after the death of

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374 Gai., 3.97-97a.
375 Gai., 3.98 (controversy 11).
376 Gai., 3.99.
either party are void as well. 377 Besides, a stipulatio is void if the answer of the promisor fails to match the question. 378 In the text under consideration, still another cause of invalidity is mentioned.

A stipulatio in favour of a third party is void, except where a son stipulates on behalf of his pater familias or a slave on behalf of his master. 379 The rule that a stipulatio cannot be made in favour of a third party has several grounds. 380 Since a third party does not have an action, he cannot acquire an obligation. Moreover, a legal act and its effects are regarded as a unity. The effects cannot be separated from the persons performing the formalities and be passed on to an independent third party. Another ground for the general rule is found within the conceptio verborum: the formal character of the stipulatio required that the stipulator – and nobody else – was mentioned as the beneficiary (mihi dari spondesne?). Because the stipulatio in favour of a third party did not correspond to this formality, it was void. At a later stage, Roman jurists tried to rationalise the rule ‘alteri stipulari nemo potest’ by giving it a new explanation. A stipulatio in favour of a third party was void, because it was not in the interest of the stipulator. 381

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378 Gai., 3.102.
379 Ulp., D. 45.1.38.17: ‘Alteri stipulari nemo potest, praeterquam si servus domino, filius patri stipuletur.’ (‘No one can stipulate on behalf of a third party, except where a slave stipulates for his master or a son for his father’).
381 This explanation has been mentioned in the sources. See, for example, Inst., 3.19.19: ‘Alteri stipulari, ut supra dictum est, nemo potest: inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest: ceterum si aliud detur, nihil interest stipulatoris.’ (‘As stated above, no one can stipulate for another: Obligations of this kind are introduced to allow that everyone acquires for himself what is his interest. But if
The controversy under consideration, however, does not concern the question of whether a *stipulatio* can be made in favour of a third party. The Sabinians and the Proculians agreed with the general rule: such a *stipulatio* was void. The legal question, which gave rise to the controversy, was a variation: ‘To what extent is a *stipulatio mihi et Titio dari* valid?’ The words ‘… in quantum valeat stipulatio’ imply that neither the Sabinians nor the Proculians defended the complete invalidity of such a *stipulatio*. The Sabinians simply struck out the words ‘et Titio’ and held the *stipulatio* to be completely valid. Therefore, the whole of what was promised was due to the *stipulator* alone. According to the Proculians, on the other hand, the part that was promised to the third party became void and the other part of the *stipulatio* was valid, so that half was due to the *stipulator*.

2. The Controversy in Gai., 3.103: Modern Theories

The majority of the Romanists have used variations on the *verba-voluntas status* to explain the controversy in Gai., 3.103. Some of these theories will be discussed in chronological order.

Cornil explained the controversy between the Sabinians and the Proculians by means of the *verba-voluntas* antithesis. Cornil has described the evolution of the *stipulatio* as follows. A verbal obligation, such as a *stipulatio*, derived its efficacy from the words that were pronounced in the form of question and answer. According to Cornil, in classical law, the

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382 According to H. ANKUM, *De voorouders van een tweehoofdig twistziek monster*, Zwolle 1967, pp. 3-25 and H. ANKUM, Une nouvelle hypothèse sur l’origine de la règle alteri dari stipuli nemo potest, in: P. ANDRIEU - GUITRANCOURT (ed.), *Études offertes à Jean Macqueron*, d’Aix-en-Provence 1970, pp. 21-29, the classical principle only made a *stipulatio* in favour of a third person void when the object was a *dare*: ‘Alteri dari stipuli nemo potest’. In this connection, he refers to a text by Gaius (Gai., 3.103: ‘Si ei dari stipulemur’) and to a text by Paul (D. 45.1.126.2: ‘Sed quod libertus patrono dari stipulatus est, inutile est, ut …’). Since Ankum does not discuss the controversy, I will not go into his theory.

383 According to CLAUS (1973), pp. 221-224, however, the prohibitive rule ‘alteri stipulari nemo potest’ effected that a *stipulatio* for the *stipulator* himself and for a third party was void in its entirety. Claus maintained that both the Sabinians and the Proculians deviated from this view, because they wanted to weaken the rigidity of the rule. Claus has incorrectly come to the conclusion that the rule ‘alteri stipulari nemo potest’ would have made the entire *stipulatio mihi et Seio dari* void, for this is found nowhere in the sources. Moreover, the prohibitive rule does not have the force to also invalidate the *stipulatio* for the *stipulator* himself.

384 According to CLAUS (1973), pp. 221-224, both the Sabinians and the Proculians appealed to the *voluntas* of the two parties in order to justify their opinions.

importance of the *verba stipulationis* as the foundation for the obligation gradually faded, whereas the *voluntas contrahentium* gained significance. By the time of Justinian, this evolution had been completed: the *voluntas* had triumphed over the *verba*.\(^{386}\) In the same article, Cornil has dedicated some pages to the controversy between the Sabinians and the Proculians.\(^{387}\) In his view, the Sabinians maintained that a verbal obligation was created by the *verba stipulationis*, rather than by the *voluntas contrahentium*. When someone stipulated ten for himself and for a third party, the words spoken committed the promisor to pay ten. Since the *stipulator* had made a mistake to stipulate also for a third party, the Sabinians decided to remove the words ‘et Titio’ from the *verba stipulationis*. Therefore, what remained was a *stipulatio* of ten in favour of the *stipulator* alone. The Proculians, on the other hand, already wanted to discover the *voluntas contrahentium* underneath the words of the *stipulatio*. According to Cornil, the Proculians held that someone who stipulated ten for himself and for a third party expressed his intention to aspire to only half of what was promised so that the promisor was only obliged within these limits.

Cornil’s theory is not convincing for two reasons. If indeed the Sabinians held that a verbal obligation derived its efficacy from the *verba stipulationis*, their decision to alter the question of the *stipulatio* by striking out two words, namely, ‘et Titio’, is at the least remarkable. If, moreover, someone stipulated ten for himself and for a third party, his intention or *voluntas* is neither clear nor certain. Cornil’s suggestion that the *stipulator* aspired to only half of the promised sum cannot be proven, since his *voluntas* is unknown.

Stein stated that the controversy arose because of a problem of *interpretatio verborum*.\(^{388}\) With regard to such problems, Labeo tended to prefer a literal interpretation without taking into account the intention of the author of the text in question. Therefore, in the case of a *stipulatio mihi et Titio dari*, the Proculians may have looked for an objective meaning of the text. Since the part of the *stipulatio* referring to Titius was void, only the other part could be due to the *stipulator*. The Sabinians, on the other hand, took the opposite view and maintained that the whole was due to the *stipulator* alone.

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\(^{386}\) In support of this view, Cornil refers to *Inst.*, 3.19.13: ‘Ex consensu contrahentium stipulationes valent’ (*Stipulationes* derive their efficacy from the consensus between the contracting parties).

\(^{387}\) CORNIL (1936), pp. 245-247.

\(^{388}\) STEIN (1972), p. 18.
Stein was correct in stating that the conflict at the root of the controversy concerned a problem of *interpretatio verborum*, i.e., of the words of the *stipulatio*. The question that was asked by the *stipulator* (i.e., ‘… mihi et Titio dare spondes?’) and, more particularly, the word ‘et’ in this question admitted of more than one interpretation. Therefore, the *status* of the conflict was not that of *verba-voluntas*, but that of *ambiguitas*. Another deficiency in Stein’s theory is that, although he explained the Proculian view, by stating that they preferred a strict interpretation of the text, he failed to elaborate on the Sabinian view.

Other modern writers, including Falchi, explained the controversy between the schools in terms of conservative versus progressive. Falchi also made a connection between this antithesis, on the one hand, and a variation on the *verba-voluntas status*, on the other. In his view, the Proculian opinion that only half was due to the *stipulator* was conservative. He suggested that the Proculians had based their interpretation of the case on the traditional legal structure of a *stipulatio*. Falchi, furthermore, regarded the Sabinian opinion that the entire promise was due to the *stipulator* alone as progressive. In his view, the Sabinians wanted to secure the *voluntas* of the contracting parties. The authorities of this school held that the intention of the parties prevailed over the legal structure of a *stipulatio*.

Falchi’s theory fails to convince for the following reasons. In his theory, Falchi implied that the *verba-voluntas* antithesis is linked with time. He suggested that the Proculian view to attach importance to the traditional legal structure of a *stipulatio* was conservative. The Sabinians, on the other hand, who maintained that the *voluntas* or intention was a decisive criterion, were progressive. Yet, the *verba-voluntas* antithesis has always been used as a way of argumentation and cannot be connected with time. Furthermore, Falchi has failed to specify what aim the contracting parties had when they concluded the *stipulatio*. There is a very simple reason for Falchi’s silence: the *voluntas* of the contracting parties is unknown. Gaius did not specify their aim and, therefore, it was impossible to know what their intention was.

3. *Ambiguitas* in Gai., 3.103

CHAPTER XII

In the 1st century AD, the following conflict may have given rise to the controversy. One person (A) stipulated from another person (B) that a sum of money (e.g., ten) was to be given to himself and a third party (C), to whose power he was not subject. Since the general rule determined that a stipulatio for a third party was void, nothing was due to C and the promisor (B) only paid half of what was promised (i.e., five) to A. Thereupon, a conflict arose between the stipulator (A) and the promisor (B) about the extent to which the stipulatio was valid. The former held that it was wholly valid and that, therefore, the promisor (B) owed him the entire ten. B, however, refused to pay the full amount. He maintained that he owed no more than half to the stipulator and that, for the other part, the stipulatio was void. Thus, the two parties disagreed about the question of whether B had to pay the other half of what was promised.

Apparently, the stipulator (A) consulted the head of the Sabinian school, who advised him to claim the other half of what was promised by means of a condictio. The promisor (B), on the other hand, may have asked the head of the Proculian school for some advice. First, the topical argument in support of the Proculian view will be discussed and then the topical argument in support of the Sabinian view.

3.1 The Proculian View

The promisor (B) may have asked the following legal question to the head of the Proculian school: ‘To what extent is the following stipulatio valid: A asked me ‘Mihi et Titio decem dari spondes?’ and I have answered ‘Spondeo’? ’ The Proculians answered that B owed five to A and that the stipulatio was void for the other part. The Proculians may have found their argument as follows.

The status of the conflict was that of ambiguitas.\textsuperscript{390} The word ‘et’ in the question ‘mihi et Titio decem dari spondes?’ admitted of more than one interpretation: it could mean ten to me and Titius jointly, but also ten to me and ten to Titius cumulatively. According to the Proculians, ‘et’ meant that A stipulated one lot of ten jointly to himself and to Titius, in other

\textsuperscript{390} Regarding ambiguitas, see Cic., De inv., 2.116-121. Cicero does not mention any topoi that are particularly suitable for this status.

- 200 -
words, that five was due to A and five to Titius.\textsuperscript{391} Since a \textit{stipulatio} in favour of a third party was void, B did not owe anything to Titius. This meant that only half (i.e., five) was due to A and that the \textit{stipulatio} was void for the other part. If, therefore, B had already paid five to A, his debt was extinguished.

The Proculian argumentation in support of the promisor (B) can now be reconstructed.

- A had stipulated from B ten for himself and for C as follows: ‘Mihi et Titio decem dari spondesne?’
- In this question, the word ‘et’ means “half-half”, because A asked for ‘ten’ only.
- A \textit{stipulatio} for a third party is void.
- Therefore, B owed five to A and nothing to C.

3.2 The Sabinian View

The \textit{stipulator} (A), on the other hand, wanted to claim the remaining five from B. Therefore, he may have asked the following legal question to the head of the Sabinian school: ‘If I stipulated “mihi et Titio decem dari spondes?” from B, in how far is this \textit{stipulatio} valid?’ The head of the Sabinian school answered that this \textit{stipulatio} was entirely valid and that, therefore, it was entirely due to the \textit{stipulator} only, just as if he had not added the other’s name. How did the Sabinians build up this argumentation?

As stated above, the controversy arose from ambiguity, because the word ‘et’ could have different meanings. The Sabinians may have taken the view that the word ‘et’ should be interpreted in a cumulative sense: ten for A and ten for Titius. Since the latter part of the \textit{stipulatio} was invalid, the words ‘et Titio’ should be regarded as superfluous. The \textit{stipulatio} of

\textsuperscript{391} This interpretation of the word ‘et’ in the question ‘mihi et Titio decem dare spondes?’ is also found in Iul., D. 45.1.56.\textit{pr}. Iulianus, moreover, used an argument \textit{a similitudine} to support his interpretation of the word ‘et’:

\textit{IULIANUS libro quinquagessimo secundo digestorum}. Eum, qui ita stipulatur: ‘mihi et Titio decem dare spondes?’ vero similium est semper una decem communiiter sibi et Titio stipulari, sicuti qui legat Titio et Sempronio, non ahud intellegitur quam una decem communiiter duobus legare.

\textit{IULIANUS, book 52 of the Digest}. Someone who stipulates as follows, ‘do you promise to give ten to me and Titius?’ is, however, always taken to have stipulated one lot of ten jointly to himself and Titius, just as someone who bequeaths a legacy to Titius and Sempronius is understood to have bequeathed nothing else than one lot of ten to them jointly.
ten for A was entirely valid and, thus, B owed A the entire sum of ten. Since he had already paid five, A could rightfully claim the remaining five in a *condictio*.

A reconstruction can now be made of the Sabinian argumentation in favour of the *stipulator*.

- A had stipulated from B ten for himself and for C as follows: ‘Mihi et Titio decem dari spondesne?’
- Since, in this question, the word ‘et’ means “and-and” and since a *stipulatio* for a third party is void, the words ‘et Titio’ should be regarded as superfluous.
- A stipulated from B ten for himself.
- Therefore, B owed ten to A and nothing to C.

4. The Controversy Decided

Although Pomponius does not explicitly refer to the school controversy in Pomp., D. 45.1.110, pr, he obviously abides by the Proculian view in the following case:393

**POMPONIUS libro quarto ad Quintum Mucium.** Si mihi et Titio, in cuius potestate non sim, stipuler decem, non tota decem, sed sola quinque mihi debentur: pars enim aliena deducitur, ut quod extraneo inutiliter stipulatus sum, non augeat meam partem.

**POMPONIUS, book 4, On Quintus Mucius.** If I stipulate ten for myself and for Titius, in whose power I am not, not the entire ten but only five are due to me. The

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392 In Ulp., D. 45.1.1.5, Ulpian has given the same interpretation of the word ‘et’ in a case that was only slightly different from the case of a *stipulatio mihi et Titio dari*:

**ULPIANUS libro quadragesimo octavo ad Sabinum.** Sed si mihi Pamphilum stipulanti tu Pamphilum et Stichum spoponderis, Stichi adiectionem pro supervacuo habendam puto: nam si tot sunt stipulationes, quot corpora, duae sunt quodammodo stipulationes, una utilis, alia inutilis, neque vitiatur utilis per hanc inutilem.

**ULPIAN, book 48 ad Sabinum.** But if I have stipulated Pamphilus for myself and you have promised Pamphilus and Stichus, I think that the addition of Stichus should be regarded as superfluous. For if there are as many *stipulationes* as there are objects, there are in a way two *stipulationes*: one valid, the other invalid and the valid *stipulatio* is not vitiated by the invalid one.

393 The fact that Pomponius adds the words ‘non tota decem, sed …’ suggests that the legal problem had given rise to a controversy.
other’s part is deducted, so that what I have stipulated invalidly for an outsider does not increase my part.

This text may suggest that the school controversy had already been decided at the end of the 2nd century AD and that Pomponius applied the prevailing view. However, it is not clear on whose authority it was ended.

In Justinian’s time, the Proculian opinion definitely prevailed. The relevant text is *Inst.*, 3.19.4:394

Si quis alii, quam cuius iuri subiectus sit, stipuletur, nihil agit. Plane solutio etiam in extranei personam conferri potest (veluti si quis ita stipuletur ‘mihi aut Seio dare spondes?’), ut obligatio quidem stipulatori adquiratur, solvi tamen Seio etiam invito eo recte possit, ut liberatio ipso iure contingat, sed ille adversus Seium habeat mandati actionem. Quod si quis sibi et alii, cuius iuri subiectus non sit, decem dari <aureos> stipulatus est, valebit quidem stipulatio: sed utrum totum debetur quod in stipulatione deductum est, an vero pars dimidia, dubitatum est: sed <placet>, non plus quam partem dimidiam ei adquiri. Ei qui tuo iuri subiectus est si stipulatus sis, tibi adquiris, quia vox tua tamquam filii sit, sicuti filii vox tamquam tua intellegitur <in his rebus quae tibi adquiri possunt>.

If someone stipulates for someone other than a person to whose power he is subject, he effects nothing. Clearly, a payment can also be attributed to an outsider (for example if someone stipulates like this ‘Do you promise to give to me or Seius?’), so that the obligation is acquired by the stipulator and, yet, even against his will, payment can properly be made to Seius, so that the promisor is discharged ipso iure. The stipulator, however, will have an actio mandati against Seius. Again, if someone has stipulated ten golden coins for himself and for another person to whose power he is not subject, the stipulatio will be valid; However, there was doubt whether the entire sum that has been put down in the stipulatio was due or only half of it. But the view that has prevailed is that no more than a half is acquired by him. If you have stipulated for a person who is subject to your power, then you acquire for yourself, because your voice is like that of your son, just as the

voice of your son is understood to be like yours in those things that can be acquired for you.

In this text, Justinian indirectly refers to the controversy between the Sabinians and the Proculians by the words ‘sed … dubitatum est’. In Justinian time, the controversy had been ended and, henceforth, the Proculian opinion that a *stipulator* only acquired half of a *stipulatio* for himself and for a third party prevailed.
XIII. LITERAL CONTRACT

1. Gai., 3.133: Text and Controversy

Transscripticiis vero nominibus an obligentur peregrini, merito quae ritur, quia quodammodo iuris civilis est talis obligatio; quod Nervae placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transcripticum, etiam peregrinos obligari; si vero a persona in personam, non obligari.

The question of whether peregrini are bound by nomina transcripticia, on the other hand, is asked with reason, because this kind of obligation is in a sense part of ius civile. Nerva so held, but Sabinus and Cassius took the view that even peregrini are bound if the nomen transcripticium is a re in personam, but that they are not bound if it is a persona in personam.

The text in question is situated in the part on the law of obligations and, more precisely, in the part about literal contracts.\(^{395}\) The Institutiones of Gaius are the only legal source that mentions this kind of contract.\(^{396}\) Gaius distinguished two kinds of literal contracts: Roman and non-Roman literal contracts.\(^{397}\) The former were created by nomina transcripticia. The latter were of Hellenistic origin and were created by a chirographum or a syngrapha. This form of contract, moreover, was specific to peregrini.

In connection with this controversy, only the Roman literal contracts are relevant.\(^{398}\) In order to make such contracts, a codex accepti et expensi may have been a necessary device.\(^{399}\)


\(^{397}\) Regarding Roman literal contracts, see Gai., 3.128-130 and regarding non-Roman literal contracts, see Gai., 3.134.

a codex was an inventory in which a Roman pater familias recorded his receipts, expenses, claims, and debts by means of entries. Two kinds of entries could be made in such a codex: nomina transscripticia and nomina arcaria. Only the former gave rise to a literal contract.

A nomen transscripticium is the entry of a fictitious loan to a debtor, which the creditor has recorded in his codex accepti et expensi with the consent of the debtor. The entry of a fictitious payment (expensum ferre or expensilatio) created the obligation to repay it. The nomina transscripticia were applied to convert an already existing debt into a new one, either between the same parties (transscriptio a re in personam) or with the substitution of a debtor (transscriptio a persona in personam). In modern literature, there is some doubt whether or not a literal contract brought about a novatio of the original obligation. Here it is held that


Gaius does not mention the codex accepti et expensi in his Institutiones. This term only occurs in Cicero’s speech for Q. Roscius: Cic., Pro Rosc. Com., 1.4; 2.5; 3.8; and 3.9. Although Gaius does not say that the debtor’s cooperation was necessary to conclude a literal contract, it is obvious that he had to consent: see, e.g., Cic., Pro Rosc. Com., 1.2.

Together with F. BONIFACIO, La novazione nel diritto romano, 2nd edn., Napoli 1959, pp. 64-69, and THILO (1980), pp. 316-317, I think that a literal contract brought about a novatio of the original obligation. According to STEINWENTER (1926), c. 788, and THIELMANN (1961), p. 199, however, a literal contract did not bring about a novatio. They have adduced the following arguments in support of their view, but BONIFACIO (1959), pp. 64-69, has convincingly refuted Steinwenter’s arguments. 1) In Gai., 3.176, Gaius only mentions the stipulatio as an instrument to bring about a novatio. Bonifacio, however, explains Gaius’ silence regarding the nomina transscripticia by stating that, in Gaius’ days, the verbal form to effect a novatio already preponderated over the written one. Unlike a nomen transscripticium, moreover, which always produced the same effect, a stipulatio could have different functions and therefore it was necessary to specify when its function was to bring about a novatio. 2) Steinwenter and Thielmann assume that the creditor did not only record the fictitious loan (exceptilatio) in his codex, but also the fictitious receipt (acceptilatio) of what had been previously due by which the original obligation was extinguished. Whereas a novatio by way of a stipulatio only needed one act to effect the extinction of the former obligation and the creation of the new one, they maintain that nomina transscripticia consisted of two acts. Therefore, the effect brought about by nomina transscripticia could never fall under the definition of a novatio as described by Ulpian (D. 46.2.1.pr): ‘Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio’. Bonifacio, however, argues that Gaius does not mention anything about the recording of fictitious receipts; he only mentions expensum ferre. For a more extended bibliography on the subject, see NELSON - MANTHE (1999), pp. 506-509.
the *nomina transscripticia* had a novatory effect: the literal obligation replaced the original obligation.

Gaius first described the *transscriptio a re in personam*.\(^{402}\) If a debtor (B) owed money to a creditor (A) on account of sale, hire, or partnership, the creditor (A) could enter this sum into his *codex* as if he had lent it to B. Thereupon, B became indebted to A on account of a literal contract, and no longer on account of the previous contract. A *transscriptio a persona in personam*, on the other hand, occurred when a claim against an old debtor was recorded as if it had been paid to a new debtor.\(^{403}\) Gaius (3.138) added that the literal contract had an advantage over a *stipulatio* with regard to the novatory effect. Whereas a verbal contract could not be made with someone who was at a distance, the joint presence of the parties was unnecessary for the making of a literal contract. The literal obligation, finally, was enforceable by the same action as a verbal obligation, i.e., by an *actio certae creditae pecuniae* (*condictio*).\(^{404}\)

The *nomina arcaria*, i.e., the other kind of entry in a *codex accepti et expensi*, are discussed in Gai., 3.131-132. These are entries of actual receipts and actual payments, recorded by a *pater familias* into his *codex accepti et expensi*. Such entries did not create a literal obligation, but were purely evidentiary. When, for example, a creditor granted a loan (*mutuum*) to a debtor, the actual payment of the money created a real contract and the entry of the loan into the creditor’s *codex* did not alter the nature of this contract. Gaius maintained that the statement that not only Romans but even *peregrini* were bound by *nomina arcaria* did not make sense, because the obligation did not arise from the entry itself but from the payment of money, and this kind of obligation pertained to the *ius gentium*.

The controversy in Gai., 3.133 turned on the legal problem of whether *peregrini* could be bound by *nomina transscripticia*. According to Nerva, *peregrini* could not be bound by a literal obligation, ‘because this obligation was in a sense part of *ius civile*’.\(^{405}\) Sabinus and Cassius, on the other hand, made a distinction between *nomina transscripticia a re in personam* and *a persona in personam*. Whereas they allowed *peregrini* to be bound by the

\(^{402}\) Gai., 3.129.  
\(^{403}\) Gai., 3.130.  
\(^{405}\) Gai., 3.133: ‘Quia quodam modo iuris civilis est talis obligatio.’
former kind of entry, they excluded them from the latter so, apparently, the two schools only disagreed as far as *nomina transscripticia a re in personam* were concerned. Whereas the Sabinians maintained that both Roman citizens and *peregrini* could be bound by such entries, the Proculians preserved them for Roman citizens only. As far as the *nomina transscripticia a persona in personam* were concerned, the two schools agreed that, by such entries, only Roman citizens could be bound.

Since other sources are lacking, it is uncertain which opinion prevailed in the classical period. By the time of Justinian, however, the literal contract had long been obsolete and the controversy had lost its importance. Indeed, in the *Institutiones* of Justinian (*Inst.*, 3.21), the literal contract is merely referred to in the scope of a historical retrospective:

‘Olim scriptura fiebat obligatio, quae nominibus fieri dicebatur: quae nomina hodie non sunt in usu. …’

‘At one time, there used to be a literal obligation, which is said to be effected by entries: today such entries are no longer in use. …’

2. **The Controversy in Gai., 3.133: Modern Theories**

Few modern writers have discussed this controversy in a thorough way.\(^{406}\) Karlowa and Falchi took this controversy into consideration and explained it in terms of conservative versus progressive. In their view, the Proculian view was conservative, whereas the Sabinian view was progressive.\(^{407}\)

According to Karlowa, the opinion of Nerva that *peregrini* could not be bound by *nomina transscripticia* was in accordance with the republican view that literal obligations belonged to the *ius civile*. Karlowa stated that Sabinus and Cassius weakened the ancient principle by


allowing *peregrini* to be bound by *nomina transscripticia a re in personam*. They wanted to take into account the interests of trade.

Karlowa’s theory does not sufficiently explain the controversy. If the only motive for the Sabinians was to take into account the interests of trade, then they should have decided that *peregrini* could be bound by all *nomina transscripticia*. Nonetheless, the Sabinians made a distinction between *nomina transscripticia a persona in personam* and those *a re in personam*. Karlowa failed to motivate this distinction.

Falchi maintained that, generally, the purpose of a *nomen transscripticium a persona in personam* was that of a delegation to pay (*delegatio solvendi*) and compared it with a *mandatum pecuniae credendae*, i.e., when a mandator instructed a mandatory to give a loan to a certain third party. In his view, this kind of entry could be used abstractly as a source of obligations and this could only occur when the parties were Roman citizens. A *nomen transscripticium a re in personam*, on the other hand, was novatory and served to substitute a former obligation by a literal obligation. The Proculians took the view that by such an entry the former obligation, which theoretically could have been contracted by a *peregrinus*, was extinguished and the new obligation was independent from the former. Since a literal obligation was part of the *ius civile*, only Roman citizens could be bound by it. According to Falchi, this view showed the Proculian fidelity to the archaic structure of the legal institution. The Sabinians, on the other hand, wanted to protect the intention of the parties. They maintained that there was a tight relation between the previous obligation and the new one. Since a *peregrinus* could have been bound by the previous obligation, he could also be bound by an obligation on account of a *nomen transscripticium a re in personam*.

Falchi’s theory is not convincing either. A *nomen transscripticium a persona in personam* brought about effects that were totally different from those effected by a *mandatum pecuniae credendae*. Whereas the former was an entry of a fictitious loan in a *codex accepti et expensi* in order to replace the debtor of a previous obligation, the latter brought about that a mandatory gave an actual loan to a third party. According to Falchi, moreover, only a *nomen transscripticium a re in personam* had a novatory content. However, also a *nomen transscripticium a persona in personam* brought about a *novatio* of the former obligation.
CHAPTER XIII

3. The *Locus a Similitudine*, the *Locus ex Genere*, and the *Locus a Differentia* in Gai., 3.133

The controversy may have arisen in the following way. At the beginning of the 1st century AD, a *peregrinus* owed a sum of money to a Roman citizen on some account (e.g., on account of a sale, hire, or partnership).\(^{408}\) Next, both parties agreed that the creditor (A) would enter this sum as paid to the debtor (B) into his *codex accepti et expensi*. Consequently, B became indebted on account of a literal contract instead of on the previous contract. However, a conflict arose between the debtor (B), who was a *peregrinus*, on the one hand, and the creditor (A), on the other. B refused to pay the sum, which he owed to A on account of a literal contract, arguing that, as *peregrinus*, he was not bound by a *nomen transscripticum a re in personam*. Thereupon, the creditor (A) consulted the Sabinians, who advised him to bring an *actio certae creditae pecuniae* against the *peregrinus* (B) in order to claim the money due. B, in his turn, asked the Proculians for advice.

3.1 The Proculian View

The debtor (B) presented the following legal question to the Proculians: ‘I have entered into a literal contract, but am I bound by a *nomen transscripticum a re in personam*, being a *peregrinus*?’ According to the Proculians, *peregrini* could not be bound by such an entry, because both a *nomen transscripticum a re in personam* and *a persona in personam* were in a sense part of the *ius civile* (Gai., 3.133: ‘Quia quodammodo iuris civilis est talis obligatio’). How did the Proculians find this argument?

The central question of the conflict (*quaestio*) involved a matter of *definitio*: ‘What is a *nomen transscripticum a re in personam*?’

The Proculian reasoning consisted in two stages. First, the Proculians may have used the *locus a similitudine* to underline that obligations on account of a *nomen transscripticum a persona*

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\(^{408}\) Gai., 3.129: ‘Ex emptionis causa aut conductionis aut societatis’.
in personam and as well as those on account of a nomen transscripticium a re in personam were part of the ius civile.\(^{409}\)

In the second part of their reasoning, the Proculians may have used an argument \textit{ex genere}:\(^{410}\) ‘whatever holds for the genus, also holds for the species’.\(^{411}\) In other words, whatever holds for obligations, being part of the ius civile (genus), also holds for obligations on account of a nomen transscripticium a re in personam (species). An obligation that is part of the ius civile only binds Roman citizens. Therefore, only Roman citizens (and not peregrini) are bound by a nomen transscripticium a re in personam. This means that B, who was a peregrinus, was not bound by the literal contract.

The argumentation of the Proculians to support the position of B can now be reconstructed.

- Since peregrini are not bound by obligations that are part of the ius civile and since obligations on account of nomina transscripticia are part of the ius civile,
- peregrini are not bound by nomina transscripticia.
- A Roman citizen (A) has concluded a literal contract a re in personam with a peregrinus (B).
- Therefore, B is not bound by this contract.

\textbf{3.2 The Sabinian View}

The creditor (A), in his turn, consulted the Sabinians: ‘Are peregrini bound by nomina transscripticia re in personam?’ The Sabinians answered affirmatively. They maintained that also peregrini were bound if the nomen transscripticium was a re in personam, but that they were not bound if it was a persona in personam.

\(^{409}\) According to Cicero (Top., 23.87), the \textit{locus a similitudine} is particularly relevant to construct a \textit{definitio}.

\(^{410}\) Quintilian (Inst. Or., 5.10.56) states that the elements particularly belonging to \textit{definitio} are Genus, Species, Difference, and Property and that arguments may be derived from all these elements.

\(^{411}\) In his \textit{Topica}, Cicero does not give an example of an argument \textit{ex genere} that fits the position of the Proculians and neither does Quintilian in his \textit{Institutio Oratoria}. In his \textit{De oratore}, however, Cicero (2.167) gives an interesting illustration of the \textit{locus ex genere}: ‘Ex genere autem: “si magistratus in populi Romani esse potestate debent, quid Norbanum accusas, cuius tribunatus voluntati paruit civitatis?”’ (From the genus: ‘If magistrates have to be in the service of the Roman people, then why do you accuse Norbanus, who (being a tribune) obeyed the will of the community?’) Cicero maintains that tribunes were a \textit{species} of the \textit{genus} of magistrates. Whatever holds for magistrates, namely, being in the service of the Roman people, also holds for tribunes.
In my view, the Sabinians built up their reasoning by means of the *locus ex differentia*. Whereas a *nomen transscripticum* was part of the *ius civile* when it was *a persona in personam*, the Sabinians maintained that it was not when *a re in personam*. In order to justify this distinction, the Sabinians may have emphasised the difference between the two kinds of entries. A *nomen transscripticum a persona in personam*, on the one hand, brought about a true *novatio*, for the new obligation was different from the former. The new element (or *novum*) was the replacement of the debtor by another one. A *nomen transscripticum a re in personam*, on the other hand, did not introduce a *novum*. It merely replaced a former obligation on some account by an obligation on account of a literal contract. Since this kind of contract merely served to transform an already existing debt into a literal debt, the Sabinians may have taken the view that a *nomen transscripticum a re in personam* was not part of the *ius civile*. This means that not only Roman citizens, but also *peregrini* could be bound by it. Therefore, B was bound to pay his debt to A.

The argumentation of the Sabinians in support of the creditor can now be reconstructed.

- Since a *nomen transscripticum a re in personam* (unlike a *nomen transscripticum a persona in personam*) does not introduce a *novum* and, therefore, does not bring about a true *novatio*,
- it is not part of the *ius civile*.
- A Roman citizen (A) has concluded a literal contract *a re in personam* with a *peregrinus* (B).
- Therefore, B is bound by this contract.
XIV. EMPTIO VENDITIO (1)

1. Gai., 3.140: Text and Controversy

Pretium autem certum esse debet. Nam alioquin si ita inter nos convenerit, ut quanti Titius rem aemestimaverit, tanti sit empta, Labeo negavit ullam vim hoc negotium habere; cuius opinionem Cassius probat. Ofilius et eam emptionem et venditionem; cuius opinionem Proculus secutus est.

However, the price must be certain. For otherwise if we thus have agreed that the thing is bought for as much as Titius will estimate, Labeo denied that this transaction had any effect whatsoever. Cassius approves his view. Ofilius thought that even this was emptio venditio and Proculus has followed his opinion.

It is not clear whether this text really refers to a controversy between the Sabinian and the Proculian schools. Whereas Baviera, Kübler, and Falchi do not include Gai., 3.140 in their list of texts mentioning school controversies,⁴¹² other scholars, including Voigt and Liebs, do.⁴¹³ According to the latter, Labeo and Cassius represented the opinion of the Sabinian school. Ofilius and Proculus, on the other hand, spoke for the Proculian school. Their opinion seems incorrect because these scholars did not sufficiently take into account the peculiarities in the text. Although M. Antistius Labeo and Proculus had both been leaders of the same school, they disagreed on this matter. A second peculiarity is that C. Cassius Longinus, a Sabinian, supported the view of the Proculian M. Antistius Labeo. Thirdly, Proculus approved the view

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⁴¹² G. BAVIERA, Le due scuole dei giureconsulti romani, Firenze 1898 (repr. Roma 1970); B. KÜBLER, Rechtsschulen, RE 2.1 (1914), cc. 380-394; G.L. FALCHI, Le controversie tra Sabiniani e Proculiani, Milano 1981, pp. 263-267. In the same vein, J.A.C. THOMAS, The Institutes of Justinian. Text, Translation and Commentary, Oxford 1975, p. 231, and V. SCARANO USSANI, L’ars dei giuristi: considerazioni sullo statuto epistemologico della giurisprudenza romana, Torino 1997, p. 80, n. 84. According to Thomas, the dispute had been between individuals and not between the schools. I agree with these scholars that the dispute in question is not a school controversy.

of Ofilius, a jurist who lived in the 1st century BC and who had been a teacher of Capito, whose school was later called the Sabinians.\footnote{Pomp., D. 1.2.2.47.} Gaius, fourthly, did not use the unambiguous ‘nostri praeceptores’ to indicate the Sabinians, nor ‘diversae scholae auctores’ for the Proculians. Therefore, the controversy in Gai., 3.140 is not a genuine school controversy, but a mere controversy between individual jurists. As such, it sheds a new light on the widespread ideas about the schools. This controversy demonstrates incontestably that the contrast between the representatives of the Sabinian school and the Proculian school has not been as sharp as assumed thus far.\footnote{A.A. SCHILLER, Jurists’ Law, Columbia Law Review 58 (1958), p. 1233, acknowledged that in some cases ‘members of the same school took opposing views on a given question’ and illustrated this assertion with the controversy described in Gai., 3.140.}

The text in question is situated in the part on the law of obligations in Gaius’ \textit{Institutiones} and, more precisely, in the discussion on \textit{emptio venditio}, covered in Gai., 3.139-141. According to Gaius (3.139), a contract of sale was concluded when the parties agreed on the price. In the subsequent paragraphs (3.140-141), two further requirements regarding the price in a contract of sale are discussed: the price must be certain and must consist of money.

Under the first case, the parties fixed the price by way of a description that left its actual amount unknown to at least one if not to both of the contracting parties. Nevertheless, the price was *certum* and the contract of sale valid. If, for example, a thing was sold ‘for whatever sum the seller paid for it’ or ‘for whatever the buyer has in his cash box’, at least one of the parties did not know the actual amount. Nonetheless, the contract of sale was valid, because the case was one of ignorance of the amount of the price, rather than of the price being uncertain.

Under the second borderline case, the question was raised whether a contract of sale was valid if the parties decided that the price had to be determined by the buyer. According to Gaius, such a contract of sale was ‘imperfectum’. This term admits of more than one interpretation. The majority of the scholars have taken the view that, in this case, the term was equivalent to void. Others, however, have stated that Gaius regarded a sale at a price to be determined by the buyer as conditional. As soon as the buyer had determined the price and the condition was fulfilled, the contract of sale became effective and was no longer ‘imperfectum’.

In the text under consideration, Gaius (3.140) discussed the third borderline case. The following legal question gave rise to a controversy between Labeo and Cassius, on the one hand, and Ofilius and Proculus, on the other: ‘Is the rule “pretium certum esse debet” observed if the determination of the price is left to a (specified) third party?’ Since the certainty of the price was an essential feature of a consensual contract of sale, there was only a contract of *emptio venditio* when the price was certain. Therefore, the following legal question was closely linked to the former: ‘Is a transaction under a price agreement “ut quanti Titius rem aestimaverit, tanti sit empta” a contract of sale?’ According to Labeo and Cassius, the price

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418 According to DAUBE (1959), pp. 9-17, and ZIMMERMANN (1990), p. 253, the *arca* case is spurious. THOMAS (1964), pp. 77-89, however, maintains that Ulpian himself included the *arca* case in his discussion and took the view that a contract of sale under such an agreement was valid.
419 Ulp., D. 18.1.7.1.
420 Gai., D. 18.1.35.1.
423 According to Gaius (D. 19.2.25, *pr*), a contract of lease and hire did not arise if the amount of rent was to be determined by an unspecified third party. However, a contract of lease and hire was valid when the contract was concluded for as much as a specified third party (Titius) would have estimated it to be, on condition that Titius determined the rent. From this text, it may be deduced that, also in the case of sale, the third party had to be a specified person. If he was not a specified person, there may be an agreement that no contract of sale had been concluded. The words ‘ut quanti Titius rem aestimaverit, tanti sit empta’ seem to support the view that the third party had to be a specified person.
was not certain so the transaction was not a contract of sale and was of no effect (‘Labeo negavit ullam vim hoc negotium habet’). Ofilius and Proculus, on the other hand, took the view that a price to be determined by a third party was certum and that, therefore, the transaction was a contract of emptio venditio (‘Ofilius et eam emptionem et venditionem’).

Unfortunately, Gaius did not explicitly mention the arguments used by the jurists in support of their view. This led some scholars to make suggestions about their argumentation. According to Zimmermann, Labeo and Cassius had intended to avoid the acknowledgement of a contract of sale that could become void at a later stage if the third party was neither willing nor able to fix a price. Ofilius and Proculus, on the other hand, allowed a price to be determined by a third party, because they wanted to respect the will of the parties not to determine the price themselves, but to leave that to an impartial third party.\footnote{These arguments are suggested by ZIMMERMANN (1990), p. 254.} Schindler and, more recently, Nelson and Manthe have suggested another explanation.\footnote{SCHINDLER (1966), pp. 147-148; NELSON - MANTHE (1999), pp. 259-261.} According to them, Proculus interpreted the price agreement ‘ut quasi Titius rem aestimaverit, tanti sit empta’ as a suspensive condition.\footnote{Both Schindler and Nelson-Manthe came to this conclusion by analogy with Proculus’ view in Proc., D. 17.2.76 that an agreement that the shares of the partners in a societas had to be determined by a third party was conditional.} As soon as the third party fulfilled the condition by setting a price, the contract of sale became operative. Labeo and Cassius, on the other hand, did not regard the agreement as a condition, but as a pactum adiectum.\footnote{According to SCHINDLER (1966), pp. 147-148, and NELSON - MANTHE (1999), pp. 260-261, the choice of the term convenirit in Gai., 3.140 indicates that Labeo and Cassius interpreted the agreement as a pactum adiectum, for the term conventio has a general meaning, namely, agreement. Another indication may be found in C. 4.38.15.1: ‘... Scilicet in hulsumodi pactum ...’} In order for a pactum adiectum to be valid, the contract of sale to which it was attached had to be valid as well. Since the validity of the contract of sale had to be determined independently (and could not depend on the pactum adiectum), the contract was void, because a price was missing. Therefore, the pactum adiectum could not be valid either.

Modern scholarship has forged no theories explaining this controversy. The doubts about whether Gai., 3.140 concerned a school controversy obviously caused this lack.
2. **The Locus a Tempore in Gai., 3.140**

As stated above, the following legal question gave rise to the difference of opinion: ‘Is the rule “pretium certum esse debet” observed, when the determination of the price was left to Titius?’ or, to put it differently, ‘What is a *pretium certum*?’ and ‘Does a price to be determined by a third party fall under this definition?’ Thus, the central question (*quaestio*) of the conflict involved a matter of *definitio*.

It will be argued that Ofilius and Proculus, on the one hand, and Labeo and Cassius, on the other, made use of *topoi* to form their opinion on the matter and to construct a pertinent definition. In *Top.*, 6.26-29, Cicero described several methods to define a term. The jurists mentioned above may have built up the definition of a *pretium certum* by the method to define a term, mentioned in *Cic.*, *Top.*, 6.29. First the opinion of Ofilius and Proculus will be discussed and then the opinion of Labeo and Cassius.

2.1 **The View of Ofilius and Proculus**

Ofilius and Proculus may have defined a *pretium certum* as a sum of money with which something is bought under a contract of sale and which is definite or will be definite. According to Ofilius and Proculus, a price to be determined by a third party falls under this definition. In other words, they confirmed that such a price was certain and that, therefore, the transaction between the two contracting parties certainly was a contract of sale.

Ofilius and Proculus arrived at their definition of a *pretium certum* by using the *locus a tempore*. Quintilian discussed this *topos* in Chapter 5.10 of his *Institutio Oratoria*. In 5.10.42-44, Quintilian stated that time has two meanings: a general and a special meaning. Quintilian (*Inst., or.*, 5.10.45-46) distinguished three phases of time: antecedent (*antecedens*), contemporary (*coniunctim*), and subsequent (*insequens*). The relation between actions and words is covered by these phases, but in two ways (§ 47). Some things occur because

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429 Cicero limited himself to the *locus ex antecedentibus*: *Cic.*, *Top.*, 4.19; 12.53.
CHAPTER XIV

something else is going to occur later; other things occur because something else happened before. In § 48, finally, Quintilian discussed chance.

The determination of the price by a third party was a subsequent event, i.e., subsequent to the conclusion of the contract. Since the determination of the price was going to occur later and since, from that moment, the price would be certain, the transaction between the seller and the buyer was a valid contract of sale.

The argumentation of Ofilius and Proculus can be reconstructed as follows:
- Since a price to be determined by a third party will become certain through a future or a subsequent event,
- it falls under the definition of a *pretium certum* as a sum of money with which something is bought under a contract of sale and which is definite or will be definite.
- The buyer bought a thing for an amount to be fixed by Titius.
- Therefore, the price is certain and a contract of sale is concluded.

2.2 The View of Labeo and Cassius

Labeo and Cassius, on the other hand, gave another definition of a *pretium certum*: ‘A *pretium certum* is a definite sum of money with which something is bought for in a contract of sale.’ They acknowledged that a price to be determined by a third party could become definite or certain in the future, i.e., when Titius would have determined the price. However, they pointed out that there was a chance that Titius – for one reason or another – would not do so. They stated that the determination of the price by Titius was left to chance and that, therefore, such a price was not certain and did not fall under their definition of a *pretium certum*.

To support their view that the rule ‘*pretium certum esse debet*’ had not been observed, when the determination of the price was left to a third party, Labeo and Cassius made use of the same *topos* as Ofilius and Proculus, i.e., the *locus a tempore*. However, they used it in a different way. Since the determination of the price by a third party was a subsequent event, i.e., subsequent to the making of the contract, there was a chance that the third party would fail.
to do so. Therefore, such a price did not fall under the definition of a *pretium certum*. Indeed, Quintilian has mentioned chance (*causa*) as a place or *locus* where arguments can be found. The relevant text is Quint., *Inst. Or.*, 5.10.48:

> Casus autem, qui et ipse praestat argumentis locum, sine dubio est ex insequentibus, sed quadam proprietate distinguitur.

Chance, however, which itself provides a place for arguments, is without a doubt part of subsequent events, but is distinguished by some quality.

The argumentation of Labeo and Cassius can be reconstructed as follows:
- Since the determination of the price by a third party happens subsequently to the making of the contract, there is a chance that the third party will fail to determine it.
- Therefore, such a price does not fall under the definition of a *pretium certum*, which is a definite sum of money with which something is bought under a contract of sale and, thus, the transaction does not have any effect.
- The buyer bought a thing for an amount to be fixed by Titius.
- Therefore, the price is not certain and the transaction does not have any effect.

3. **The Difference of Opinion Decided**

Eventually, the difference of opinion was settled in a constitution of Justinian which dates from 530. The relevant text is C. 4.38.15.1-3:

> Imp. Justinianus A. Iuliano pp. Super rebus venumdandis, si quis ita rem comparavit, ut res vendita esset, quanti Titius aestimaverit, magna dubitatio exorta est multis antiquae prudentiae cultoribus. 1. Quam decidentes censemus, cum huiusmodi conventio super venditione procedat ‘quanti ille aestimaverit’, sub hac condicione stare venditionem, ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretia persolvi et venditionem ad effectum pervenire, sive in scriptis sive sine scriptis contractus celebretur, scilicet si huiusmodi pactum, cum in scriptis fuerit redactum, secundum
CHAPTER XIV

nostrae legis definitionem per omnia completum et absolutum sit. 2. Sin autem ille
vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem
quasi nullo pretio statuto: nulla coniectura, immo magis divinatione in posterum
servanda, utrum in personam certam an in viri boni arbitrium respicientes
contrahentes ad haec pacta venerunt, quia hoc penitus impossibile esse credentes
per huiusmodi sanctionem expellimus. 3. Quod et in huiusmodi locatione locum
habere censemus. D. k. Aug. Lampiado et Oreste cons. [a. 530]

The Emperor Justinian Augustus to Iulianus, Praetorian Prefect. A serious doubt
has arisen among the many authorities of ancient prudentia with reference to the
sale of things when someone bought something under the condition that it should
be sold for an amount to be fixed by Titius. 1. In order to remove this doubt, we
decree that if such an agreement regarding sale sets forth ‘for as much as he will
estimate’, the sale is valid under this condition that, if in fact the appointee himself
determined the price, then in all cases the prices are paid in accordance with his
valuation and the sale comes into effect, whether the contract is made known by
writing or without it. If, of course, such an agreement, when reduced to writing, is
in every aspect completed and concluded in accordance with the definition of our
law. 2. (We decree that) if he did not want to or could not set the price, the sale has
no effect as if no price had been determined. In the future, no conjecture or rather
divination can be taken into consideration about the question of whether the
contracting parties came to this agreement while referring to a certain person or to
the judgment of a respectable citizen, because we think this is completely
impossible and abolish this by this decree. 3. We decree that this rule shall also be
applied to contracts of hire of this kind. The 1st of August in the year that
Lampiadus and Orestes were consuls (i.e., 530).

At the beginning of the text, Justinian referred to the long-standing debate which had preceded
his decision: ‘Magna dubitation exorta est multis antiquae prudentiae cultoribus’. Justinian then
settled this debate by laying down that a contract of sale at a price to be determined by a third
party was conditional. If the third party had determined the price and the condition was
fulfilled, the contract of sale was valid and the parties had to respect the valuation. However, if
the appointee did not want to or could not determine the price, the contract of sale was void
for a lack of price (‘Quasi nullo pretio statuto’). So, in Justinian time, a *media sententia* prevailed.

At the end of the text, Justinian added that the decision also applied to contracts of hire. In his *Institutiones*, Gaius had already mentioned a dispute regarding the question of whether a contract of hire was made if the settlement of the *merces* was left to a third party, for example ‘for as much as Titius will determine’. Justinian decided that, by analogy with a contract of sale, also a contract of hire was made whenever the third party had fulfilled the condition by determining the *merces*.

In *Inst.*, 3.23.1.pr-1, Justinian’s decision regarding a contract of sale and a contract of hire reappears:

> Pretium autem constituí oportet: nam nulla emptio sine pretio esse potest. Sed et certum pretium esse debet. Alioquin si ita inter alios convenerit, ut, quanti Titius rem aestimaverit, tanti sit empta: inter veteres satis abundeque hoc dubitabatur, sive constat venditio sive non. Sed nostra decísio ita hoc constituit, ut, quotiens sic composita sit venditio ‘quanti ille aestimaverit’, sub hac condicione staret contractus, ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur, empore quidem ex empto actione, venditore autem ex vendito agente. Sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire, tunc pro nihiló esse venditionem quasi nullo pretio statuto. Quod ius cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere.

A price, however, must be established; for there can be no sale without a price. And the price must be certain as well. Otherwise, if the parties agreed that the thing was bought for as much as Titius will estimate, this was quite vigorously debated among the ancients as to whether this constituted sale or not. But our decision has thus determined that whenever a sale is thus concluded ‘for as much as he will estimate’, the contract is valid under this condition that, if the appointee himself

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430 Gai., 3.143.
indeed determined the price, then the price is to be paid and the thing to be
delivered entirely in accordance with his valuation, so that the sale is brought to
effect, the buyer now having the actio empti and the seller the actio venditi. But if
the appointee would not or could not define the price, the sale has no effect, as if no
price has been fixed. Since we have decided this rule for sale, it is not absurd to
extend it to locatio conductio as well.

In Inst., 3.23.1, once again, Justinian referred to the long-standing debate which preceded his
decision: ‘Inter veteres satis abundeque hoc dubitabatur…’. According to Justinian, the
agreement ‘quanti Titius rem aestimaverit, tanti sit empta’ was a condition. Once this
condition was fulfilled, the contract of sale became fully operative. Consequently, the buyer
would have an actio empti and the seller an actio venditi. If, however, the appointee did not
fulfil the condition, the contract of sale was void, as if no price had been fixed. Finally,
Justinian repeated that his decision regarding the contract of sale was extended to the contract
of hire.
XV.  **EMPTIO VENDITIO (2)**

1. **Gai., 3.141: Text and controversy**

Item pretium in numerata pecunia consistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut toga aut fundus alterius rei <pretium esse possit>, vale quaeeritur. Nostri praeceptores putant etiam in alia re posse consistere pretium; unde illud est, quod vulgo putant per permutationem rerum emptionem et venditionem contrahiri, eamque speciem emptionis venditionisque vetustissimam esse; argumentoque utuntur Graeco poeta Homero, qui aliqua parte sic ait:

<ἴθεν ἄρ όινίζοντο κάρη κομόντες Ἀχαιοί,>

άλλοι μὲν χαλκῷ, άλλοι δ’αἴθωνι σιδῆρῳ,

άλλοι δὲ πινοῖς άλλοι δ’ αὐτήσι βόεσιν;

άλλοι δ’ ἠνδραπόδεσσι.>

et reliqua. Diversae scholae auctores dissentient aliudque esse existimant permutationem rerum, aliud emptionem et venditionem; alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse, sed rursus utramque rem videri et venisse et utramque pretii nomine datam esse absurdum videri. Sed ait Caelius Sabinus, si rem tibi venalem habenti, veluti fundum, [acceperim et] pretii nomine hominem forte dederim, fundum quidem videri venisse, hominem autem pretii nomine datum esse, ut fundus acciperetur.

Likewise, 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 toga, or a piece of land can serve as price for another thing? Our teachers think that the price can also consist of another thing. Hence they commonly think that by barter of things a contract of sale is concluded and that this is the most ancient form of sale.\(^432\) And by way of argument they bring forward the Greek poet Homer, who

\(^432\) W.M. GORDON - O.F. ROBINSON, *The Institutes of Gaius*, London 1988, p. 345, have given an alternative translation: ‘That is their inference from the common belief that an exchange of things is sale, actually the oldest type.’ Their translation is prompted by an interpretation of the text. According to Gordon and Robinson, the Sabinians were in agreement with the common opinion (*vulgo*) that barter was a form of sale. In the same vein,
has said somewhere: ‘Thence the long-haired Achaeans procured wine, some in exchange for bronze, others in exchange for gleaming steel, some for hides, and others for the cattle themselves, and some for slaves.’ and so on. The authorities of the other school disagree and hold that barter of things is one thing and that sale is another. Otherwise, when things are exchanged one cannot determine which thing is considered as having been sold and which as having been given by way of price. But, on the other hand, it seems absurd that both things are considered as sold and as given by way of price at the same time. Caelius Sabinus, however, has said that, if I have given to you, who offers a thing for sale – e.g., a piece of land – a slave by way of price, then the piece of land is considered as having been sold and the slave as having been given by way of price in order to acquire the piece of land.

This text is situated in the third book of Gaius’ *Institutiones*, in the part on *emptio venditio* (Gai., 3.139-141). In this part, Gaius discussed some requirements of a contract of sale.

The legal question in Gai., 3.141 is the following: ‘Did the price in a contract of sale necessarily have to consist of money or could it also consist of other things, such as a slave, a toga, or a piece of land?’ This question was the subject of one of the most famous school controversies in classical Roman law. According to the Sabinians (‘nostri praeceptores’),

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J.E. SPRUIT - K. BONGENAAR, *De Instituten van Gaius*, 2nd edn., Zutphen 1994, p. 133. However, I think that the Sabinians are the subject of the verb *putant* and that, therefore, Gaius meant that the majority of the Sabinians commonly held that, by exchange of things, a contract of sale was concluded. J. REINACH, *Gaius Institutes*, Paris 1950, p. 118; furthermore, does not make it clear who is the subject of *putant*: ‘De là, l’opinion commune que l’achat-vente peut être fait sous forme de troc…’ Oltmans and De Zulueta, on the other hand, gave the correct translation. A.C. OLMANS, *De Instituten van Gaius*, 3rd edn., Groningen 1967, p. 138: ‘Vandaar komt het, dat zij over het algemeen denken, dat koop en verkoop door ruil van zaken worden gesloten’; F. DE ZULUETA, *The Institutes of Gaius. Part I: Text with Critical Notes and Translation*, 3rd edn., Oxford 1958, p. 197: ‘Hence their opinion commonly is that by exchange of things a sale is contracted.’

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the price did not necessarily have to consist of money; it could also consist of other things. The Proculians (‘diversae scholae auctores’), on the other hand, required that the price consisted in cash money.

Gaius indicated the arguments used by the Sabinians and the Proculians in support of their view. The Sabinians argued that barter was a *species* of sale and, more specifically, its oldest *species*. They invoked the authority of the Greek poet Homer and referred to certain lines in the *Iliad*, i.e., Hom., *II.*, 7.472-475. At this point in the *Iliad*, the Achaeans and the Trojans agreed to a truce in order to collect and burn the bodies of the men killed on the battlefield. Both the Achaeans and the Trojans grieved about the loss of their fellow combatants. At sunset, the hard task of the Greeks was accomplished. They slaughtered oxen and had dinner in their tents. From Lemnos, ships with wine on board had arrived. These ships had been sent by Euneas and contained a thousand jars of wine for Agamemnon and Menelaos. From this stock, the Achaeans, who could use some diversion after a hard day, procured wine in exchange for other things such as bronze, steel, hides, cattle, and slaves.

The Proculians, on the other hand, argued that barter and sale were two distinct contracts. If barter was a *species* of sale, it would be impossible to define which thing was the *merx* and which the *pretium*.\(^{434}\) The qualification of each of the bartered things as sold and as given by way of price at the same time, seemed absurd. The Sabinian Caelius Sabinus replied that, when something was offered for sale and the buyer has paid *in natura*, the first thing delivered had to be qualified as *merx* and the other thing as *pretium*. In other words, the order of exchange was important. Whereas the thing that was handed over first was the merchandise, the other thing was the price.

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\(^{434}\) According to WATSON (2007), p. 32, Gaius only mentioned the Sabinian argument. However, Watson failed to recognise that the difference between barter and sale, underlined by the Proculians, is an argument in support of their view that the price in a contract of sale had to consist of money.
2. Texts in the Digest: Paul

In the time of Paul, i.e., at the end of the 2nd and the beginning of the 3rd century AD, the controversy about the nature of the price in a contract of sale was still unsolved. Paul pointed this out in the following text, i.e., Paul, D. 18.1.1.1:

PAULUS libro trigensimo tertio ad edictum. Sed an sine nummis venditio dici hodieque possit, dubitatur, veluti si ego togam dedit, ut tunicam accipierem. Sabinus et Cassius esse emptionem et venditionem putant: Nerva et Proculus permutationem, non emptionem hoc esse. Sabinus Homero teste utitur, qui exercitum Graecorum aere hominibusque vinum emere refert, illis versibus:

ένθεν ἄρ’ οἰνίζοντο καρηκομώντες Ἀχαιοί,
 עולהι μὲν χαλκῷ, ὄλλοι δ᾿ αἴθωνι σιδήρῳ,
奥林οὶ δὲ πινοῖς, ὄλλοι δ᾿ αὐτής βόεσι,
ἄλλοι δ᾿ ἀνδραπόδεσσιν.

sed hi versus permutationem significare videntur, non emptionem, sicut illi:

Εύθετοι Πλαῦχω Κρονίδης φρένας ἐξέλετο Ζεύς ὃς πρὸς Τυδείδην Διομήδεα
teúxe ᾧζεμεῖβεν.

magis autem pro hac sententia illud dicetur, quod alias idem poeta dicit:

πρίατο κτεάτεσσιν ἐοίσιν.

sed verior est Nervae et Proculi sententia: nam ut aliud est vendere, aliud emere, alius emptor, alius vendor, sic aliud est pretium, aliud merx: quod in permutatione discerni non potest, uter emptor, uter vendor sit.

PAUL, book 33 ad edictum. But today it is a matter of doubt whether one can talk of sale when no money passes, as when I have given a toga in order to receive a tunic. Sabinus and Cassius think that it is sale. Nerva and Proculus maintain that this is barter and not sale. Sabinus invokes as a witness Homer, who relates that the army of the Greeks bought wine in exchange for bronze, steel, and slaves in these lines: ‘Thence the long-haired Achaeans procured wine, some in exchange for bronze, others in exchange for gleaming steel, some for hides, and others for the cattle themselves, and some for slaves.’ These lines, however, seem to suggest barter and not sale, as also do the following: ‘And then Zeus, son of Kronos, so deranged the mind of Glaukos that he exchanged his armour with Diomedes, son of
Tydeus.’ Sabinus would have found more support for his view in what the poet says elsewhere: ‘He bought with his possessions.’ But the opinion of Nerva and Proculus is the sounder one: for just like it is one thing to sell, another to buy, one thing to be a buyer, another to be a seller, the price is one thing, the merchandise another. In case of barter, however, one cannot discern who is buyer and who is seller.

Paul referred back to the controversy between the Sabinians and the Proculians about the nature of the price in a contract of sale. The Sabinians had argued that the price could also consist of other things, because barter was a species of sale. In this text, Paul intended to criticise this argument. To clarify the case, he gave an example of barter as a starting point. If someone had given a toga in order to receive a tunic, the Sabinians qualified this as sale, whereas it was merely barter. In order to support this view, they referred to a text of Homer. Paul compared this text with another quotation of Homer in order to demonstrate that both cases were examples of barter and not sale. In fact, Paul was saying that the Homeric quotation, as cited by the Sabinians, was a weak argument and that, therefore, the Sabinian view was unfounded. Then, he referred to a third quotation of Homer that would have been more likely to speak up for the Sabinian view. By citing these Homeric texts, Paul demonstrated his knowledge of the works of Homer, either intentionally or not. Not surprisingly, at the end, he opted for the Proculian view (‘sed verior est Nervae et Proculi sententia’). Like the Proculians, Paul considered barter and sale to be two distinct contracts. Whereas in a contract of sale it was essential to make a distinction between selling and buying, a buyer and a seller, the price and the merchandise, in barter such distinctions could not be made.

In D. 19.4.1.pr, Paul also referred to the difference between barter and sale:

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435 In the second quotation, namely, II., 6.234, the Trojan Glaukos and the Greek Diomedes exchanged armours. The mind of Glaukos was deranged, because he exchanged his valuable armour for Diomedes’ plain one, giving gold for bronze. Whereas the armour of Glaukos was worth a hundred cattle, the armour of Diomedes was worth less than ten. By quoting these lines, Paul wanted to demonstrate that this case (just like the former) concerned barter and not sale.

436 By referring to the Odyssey of Homer (Od., 1.430), Paul mentioned a quotation that would have been more likely to speak up for the Sabinian opinion. Laërtes had bought Eurykleia when she was just a young girl and had paid twenty oxen for her. Here, Homer used the word προπωθεν, which means ‘to buy’, even though the price was not in money. According to Paul these lines, therefore, may suggest that, in ancient Greece, barter could be regarded as sale.
PAULUS libro trigesimo secundo ad edictum. Sicut aliud est vendere, aliud emere, alius emptor, alius venditor, ita pretium aliud, aliud merx. At in permutacione discerni non potest, uter emptor vel uter venditor sit, multumque differunt praestationes. Emptor enim, nisi nummos accipientis fecerit, tenetur ex vendito, venditori sufficit ob evictionem se obligare possessionem tradere et purgari dolo malo, itaque, si evicta res non sit, nihil debet: in permutacione vero si utrumque pretium est, utrusque rem fieri oportet, si merx, neutrius. Sed cum debeat et res et pretium esse, non potest permutatio empiio venditio esse, quoniam non potest inveniri, quid eorum merx et quid pretium sit, nec ratio patitur, ut una eademque res et veneat et pretium sit emptionis.

PAUL, book 32 ad edictum. Just like selling is distinct from buying and a buyer is distinct from a seller, the price is distinct from the merchandise. For in barter it is impossible to discern who is buyer and who is seller, their duties being very different. The buyer is liable on the actio venditi if he has not made the recipient the owner of the money. For the seller it suffices to oblige himself in the event of eviction, to deliver possession, and to remain free of dolus malus, so that he owes nothing, when the thing is not evicted. But in barter, if both things are price, the thing should become property of both parties, if merchandise, then they need not become the property of either. But because there has to be a thing and a price, barter cannot be sale, for it cannot be ascertained which of the things would be merchandise and which price, nor does common sense allow that one and the same thing is the object that is sold and the price that is paid.

In this text that has come down to us under the title ‘De rerum permutationem’, Paul compared the legal implications of barter and sale. First, he discussed the contract of sale. He pointed out that, in a contract of sale, it was essential to distinguish between a seller and a buyer (between selling and buying and between the merchandise and the price), since both the seller and the buyer had different duties (‘multumque differunt praestationes’). The buyer was bound to transfer the money into the ownership of the seller. By means of the actio venditi, the seller could claim the payment of the money. The seller, however, was not obliged to make the buyer owner of the merchandise; he merely had to deliver it. The buyer could claim the delivery of the merchandise through an actio empti. Although the seller did not have to grant ownership to the buyer, he was liable for eviction of the buyer. When the buyer was evicted,
he could hold the seller responsible. The seller also had to remain free of dolus malus. If, for instance, he deliberately sold the object of somebody else or if he concealed either a servitude or defects in the merchandise, the buyer had recourse to an actio empti. So, obviously, it was indispensable in a contract of sale to determine which of the contracting parties was the seller and which the buyer.

Since it was impossible to make these distinctions in barter, the Proculians did not regard barter as a species of sale. If barter was regarded as a species of sale, clearly practical difficulties would arise. Paul mentioned two possible ways to overcome these difficulties. 1) In barter, both things could be regarded as price. In this case, both parties had to make each other owner of the things bartered. The bartered things could also be qualified as merchandise. In this case, they did not become property of either party. 437 2) The alternative was to qualify each of the bartered things as sold and as given by way of price at the same time. According to Paul, however, this alternative did not make sense (Paul, D. 19.4.1.pr: ‘nec ratio patitur’; see also Inst., 3.23.2: ‘rationem non pati’). Gaius even called it absurd (Gai., 3.141: ‘absurdum videri’). Paul did not refer to the opinion Caelius Sabinus, as mentioned by Gaius.

3. The Controversy in Gai., 3.141: Modern Theories

A number of theories that explain this controversy have been proposed; they lead to very different suggestions. Both Betti and Stein explained the controversy in Gai., 3.141 by qualifying the Sabinians as anomalists and the Proculians as analogists. 438 The anomalist Sabinians ‘tried to subsume new fact-situations under the old familiar categories. They identified divergent fact-situations with typical fact-situations and allowed the actions given in those typical situations, without any modification of the formula, so avoiding the

437 Paul, D. 19.4.1.pr: ‘In permutatione vero si utrumque pretium est, utriusque rem fieri oportet, si merx, neutrius.’ (‘But in barter, if both things are price, the thing should become property of both parties, if merchandise, then they need not become the property of either’).
recognition of new actions’. In this way, the Sabinians identified barter with sale and allowed the *actio empli* and the *actio venditi* to be used in case of barter as well. The Proculians, on the other hand, ‘recognised the differences and were ready to recognise new legal categories which would take account of those differences. They allowed not the identical action given in the typical situation, but an analogous, parallel action, with a modified *formula*. In other words, the Proculians stressed the difference between barter and sale and maintained that the actions of sale could not be applied to barter.

The theory of Betti and Stein is not persuasive, because they took the Sabinian and Proculian argumentation for a dogmatic reasoning. Therefore, they did not correctly define the legal problem. They assumed that the legal problem was whether the price in a contract of sale necessarily had to consist of money and whether barter was a *species* of sale. However, only the question of whether the price had to consist of money was at issue. The Sabinians argued that it could also consist of other things, because barter was a *species* of sale. In other words, the Sabinian assumption that barter was a *species* of sale was an argument and not a dogmatic issue. The Proculians, on the other hand, argued that the price had to consist of money, because barter and sale were two distinct contracts. Betti and Stein failed to acknowledge the argumentative value of these assumptions and took their reasoning even one step further. They maintained that, in the end, the legal problem was whether the actions of sale could also be applied to barter.

However, this question about the actions was not the core of the legal problem. The actual legal problem only arose after the contract of sale had been concluded and the buyer had offered to pay *in natura* instead of in money. Then, the question arose whether the price in a contract of sale necessarily had to consist of money. There are two arguments in the texts to support this. First, Gaius mentioned the controversy in the context of sale and, therefore, the controversy was about sale and not about barter. Moreover, Caelius Sabinus described the contract as concluded between a person who offered a thing for sale (‘rem venalem habenti’) and someone who offered a price *in natura*. Second, the buyer was willing to pay *in natura*.

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439 STEIN (1972), p. 20. In the same vein, BETTI (1915), p. 27: ‘Partendo da un criterio anomalistico (empirico) la teoria Sabiniana tende anzitutto a identificare fin dove ciò sia possibile la fattispecie divergente con la fattispecie tipica.’
and, therefore, the plaintiff did not need nor wanted to bring an action to claim payment *in natura*. Instead, he brought an action for payment in money. Consequently, the question was not whether the actions of sale could be applied to barter.

Most authors, including Karlowa, Falchi, and Behrends, explained the controversy between the Sabinians and the Proculians in terms of conservative versus progressive, but they reached this conclusion in different ways.

Karlowa’s is the oldest theory. According to Karlowa, the contrast between the Sabinians and the Proculians was based upon a ‘Verschiedenheit der Grundrichtung’. While the latter defended ‘altrepublikanische’ and ‘römishe Anschauungen’, the former adhered to ‘peregrinische Anschauungen’. Karlowa qualified the controversy in Gai., 3.141 as the most obvious example of this contrast. While the Proculians defended the ‘altrömische Anschauung’ that the price had to consist of money, the Sabinians preferred the ‘peregrinische Anschauung’ of the Greek poet Homer in support of their view that a price could also consist of other things.

Karlowa’s theory is not convincing either. According to this scholar, the Sabinian reference to Homer demonstrates that the Sabinians were progressive and that they adhered to ‘peregrinische Anschauungen’. However, the supposed progressiveness of the Sabinians is not in keeping with their using a Homeric passage of 800 BC as an argument. The fact that Karlowa does not explain the terms ‘altrepublikanisch’ and ‘peregrinisch’ makes his theory even less convincing.

Falchi too explained the controversy by means of the conservative/progressive antithesis. He appealed to the historical development of the contract of sale to explain the controversy between the two schools. According to Falchi, the consensual contract of sale found its origin in the *mancipatio* of the early Republic. In its archaic form, *mancipatio* was a kind of ‘Barkauf’: in exchange for an actual price (a weight of bronze), the object was delivered. Such a ‘Barkauf’ was a real contract: the actual payment of the price was the *causa* for the acquisition of the object. The real ‘Barkauf’ underwent an evolution and transformed into a...

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consensual contract of sale. Henceforth, the consensus between seller and buyer was fundamental and gave rise to mutual obligations. According to Falchi, the contrast between the archaic *mancipatio* and the consensual contract of sale underlay the controversy between the conservative Proculians and the progressive Sabinians. Since the Proculians construed the contract of sale by analogy with the archaic *mancipatio*, they regarded the price (corresponding to the bronze, weighed by the *libripens*) as the *causa* for the acquisition of the object sold. In other words, the (unilateral) acquisition only became possible after and because of the payment of the price. As a result of that fundamental importance, attached by the Proculians to the price, it could consist of no other thing than money. The progressive Sabinians, on the other hand, considered a consensus between the contracting parties as essential: the obligation to deliver the *merx* was based on the *voluntas* of both parties and was independent of the actual payment of the price. Therefore, in their view, it was possible that the price could also consist of other things than money. Falchi qualified this opinion as modern and progressive.

Falchi’s theory is incorrect, because it does not correspond to the relevant texts of Gaius and Paul. These jurists do not mention *mancipatio* nor ‘Barkauf’. Another point of criticism is that Falchi does not refer to the arguments of Sabinians and Proculians that are mentioned in the sources. Probably, Falchi ignores these arguments because they do not fit into his theory.

Behrends also considers the conservative/progressive antithesis to be the key to explain this controversy. Yet, he explained the relation between the schools the other way around. In his view, the Sabinians were conservative and the Proculians progressive. According to Behrends, the latter were representatives of the classical system. This system emphasised the significance of money in a market principally focussed on profit. Therefore, barter was valued lower than sale. According to Behrends, the citation of Homer (*Il.*, 6.234) about Glaukos exchanging his valuable armour for the less valuable one of Diomedes, clearly demonstrated the inferiority of barter. The Proculians maintained that only a rational contract of sale created obligations that were actionable; primitive barter did not.443 The Sabinians, on the other hand, were representatives of the traditional and pre-classical system. In this system as well, the importance of money as a means of exchange was recognised, but the superiority of sale in relation to barter was denied. In other words, the Sabinians put barter and sale on the same

level and argued that barter was based on natural law and, therefore, should be actionable as well.

Behrends’ theory is not persuasive either. He is guilty of *Hineininterpretierung*, because he adduces arguments that are not found in the sources. When Behrends asserts that the Proculians used the Homeric passage about the exchange of armour between Glaukos and Diomedes in order to demonstrate the inferiority of barter compared to sale, he commits an error. This passage is quoted by Paul (D. 18.1.1.1) and there is no evidence in the sources that it had been used by the Proculians. On the contrary, it is more likely that Paul added this quotation himself in order to demonstrate that it was a case of barter, not of sale. Moreover, just like Falchi, also Behrends fails to take into account the arguments that are mentioned in the sources.

Recently, Nelson and Manthe have explained the controversy in Gai., 3.141 by referring to philosophy. They took the view that the Sabinians were influenced by the Stoa and the Proculians by Aristotle. First, Nelson and Manthe tried to demonstrate the philosophical approach of the Proculians. For this purpose, they referred to a text of Paul, namely, D. 18.1.1. *pr*. In this text, Paul has described the history of a contract of sale. Paul made a clear distinction between the stage of sale, on the one hand, and the preceding stage of barter, on the other. It was the introduction of money that separated the one stage from the other. Nelson and Manthe argued that Paul’s description reached back to the *Politika* of Aristotle. This philosopher had given a comparable description of the history of sale. In the line of Aristotle, the Proculians regarded money as the criterion for the transition from a pre-legal community of barter to a legal community of sale. Since money did not come about in a natural way, but was introduced by the state, there was a fundamental difference between barter and sale. The Sabinians, on the other hand, were influenced by the Stoa. This philosophical movement regarded money as a sign of cultural decline. According to the Stoa, followed by the Sabinians, barter was a legal act based on natural law and, therefore, there was no reason to make a fundamental distinction between barter and sale.

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444 NELSON - MANTHE (1999), pp. 525-531.
CHAPTER XV

The philosophical approach does not really explain this controversy. The Proculians did not explain their view by referring to the historical development of a contract of sale. The text of Paul (D. 18.1.1.pr), to which Nelson and Manthe refer, is merely an historical overview and does not refer to an argument. The Proculians themselves did not mention the introduction of money as the moment when barter and sale were separated either. Whereas these explanations of the Proculian view are nowhere to be found in the sources, Nelson and Manthe fail to take into account the argument that is mentioned by Gaius. According to the Proculians, barter was not a *species* of sale, because they were essentially different. The sources, moreover, do not state that the Sabinians, in line of the Stoa, regarded money as a sign of cultural decline. They argued that barter was a *species* of sale and, for this purpose, they referred to Homer.

4. **The Locus a Specie, Auctoritas, and the Locus a Differentia in Gai., 3.141**

Two parties had entered into a contract of sale. Whereas the seller (A) was bound to deliver the merchandise (e.g., a toga), the buyer (B) had to pay a set price for it. A delivered the merchandise, but B refused to pay the price. Instead, he offered to pay *in natura* (e.g., by means of a tunic of the same value as the toga). The seller (A), for his part, was not interested in the tunic of B. He just wanted his money. Therefore, he consulted the Proculians about this legal problem and expected a *responsum* to his advantage. The Proculians advised A to bring an *actio venditi* against the buyer.

The *formula* of the *actio venditi* was as follows:

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Quod As. As. No. No. togam qua de agitur vendidit, qua de re agitur, quidquid ob
eam rem Nm. Nm. Ao. Ao. dare facere oportet ex fide bona, eius iudex Nm. Nm.
Ao. Ao. condemnato si non paret, absolvito. 448
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According to this *formula*, the contract of sale obliged the buyer to give or do whatever was necessary on account of the *bona fides*. This part of the *formula* admits of more than one

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interpretation. The words ‘quidquid … dare facere oportet ex fide bona’ do not explicitly define the obligation of the buyer: was he obliged to pay a price in money or could he also fulfil his obligation by handing over a tunic? According to the Sabinians he could, but the Proculians argued that he was obliged to pay a price in money, since the parties had consented on that point.

In Top., 17.66, Cicero makes a very interesting remark about formulary procedures in which the clause ‘ex fide bona’ is added to the formula. In those procedures, the jurists had to be prepared to interpret this clause. Cicero maintains that, when the jurists have carefully studied the topoi of arguments, they will be able, like orators and philosophers, to argue with abundant material about the questions brought before them.

4.1 The Sabinian View

As already stated, the legal problem turned on the interpretation of the words ‘quidquid … dare facere oportet ex fide bona’. In order to benefit the buyer, the Sabinians interpreted these words broader than the Proculians did. The bona fides allowed B to fulfil his obligation by handing over a valuable tunic. So, the price in a contract of sale could consist of money as well as in other things. In support of this view, the Sabinians argued that barter was the most ancient form of sale and they invoked the authority of Homer. In Il., 7.472-475, Homer related that the Achaeans procured wine in exchange for bronze, steel, hides, cattle, and slaves.449

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449 NICOLET (1984), pp. 116-119, enumerated several arguments, which he held the Sabinians used in support of their view that barter was a species of sale. First of all, Nicote maintained that the Sabinians appealed to the common opinion that barter was a form of sale (Gai., 3.141: ‘Unde illud est, quod vulgo putant per permutationem rerum emptionem et venditionem contrahi’; Inst., 3.23.2: ‘Quod vulgo dicebatur…’). However, the subject of the verb ‘putant’ and ‘dicebatur’ are the Sabinians. According to Nicote, moreover, the Sabinians also used an historical argument. In his view, they departed from the idea that barter was the most ancient form of sale (Gai., 3.141: ‘Eamque speciem emptionis venditionis vetustissimam esse’). Nicote stated that this sentence was the perfect summary of a text by Paul (namely, D. 18.1.1.pr). In this text, Paul maintains that sale had its origin in barter. Every primitive society, in which money had not yet been introduced, traded by way of barter. Barter, however, had a specific disadvantage: the other party was not always interested in the goods offered in exchange. To solve this problem, money was introduced as a medium of change. Hence, sale as a refined form of barter was born. However, it is not because barter is a predecessor of sale, that it is necessarily also a form of sale. In my view, therefore, the Sabinians did not use an historical argument to support their view. According to Nicote, finally, the Sabinians introduced the Homeric lines to illustrate the pre-monetary period.
The argument in question was found under the *locus a specie*, i.e., a *topos* that serves to make a pertinent definition of a term by means of the *genus* and the *species*. According to the Sabinians, barter was a *species* of the *genus* sale and, more specifically, its oldest *species* (Gai., 3.141: ‘… Eamque speciem emptionis venditionisque vetustissimam esse’). Therefore, barter was covered by the definition of sale. Since it was not so easy to demonstrate that barter was a *species* of sale, the Sabinians invoked the authority of Homer. The idea to use a Homeric passage as a testimony is found by means of a *locus* that is brought in from without.

Arguments that are brought in from without depend on testimony (*testimonium*). Cicero defines testimony as everything that is brought in from without in order to convince. The persons who are able to provide a testimony are all endowed with authority (*auctoritas*). In Cic., *Top.*, 19.73-20.78, Cicero gives an enumeration of the different kinds of testimony and explains why they carry authority and belief. The relevant text in connection with the Sabinians’ reference to Homer is Cic., *Top.*, 20.78:

> In homine virtutis opinio valet plurimum. Opinio est autem non modo eos virtutem habere qui habeant, sed eos etiam qui habere videantur. Itaque quos ingenio, quos studio, quos doctrina praeditos vident quorumque vitam constantem et probatam, ut Catonis, Laeli, Scipionis, aliorumque plurium, rentur eos esse qualis se ipsi velint; nec solum eos censent esse talis qui in honoribus populi reque publica versantur, sed et oratores et philosophos et poetas et historicos, ex quorum et dictis et scriptis saepe auctoritas petitur ad faciendem fidem.

In a man, the impression of his virtue is very important. However, the impression is not only that those have virtue who actually have it, but also those who seem to have it. And so people see persons who are gifted with talent, zeal, and learning and whose life is stable and good, like that of Cato, Laelius, Scipio and many others,

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450 According to Quintilian (*Inst. Or.*, 5.10.56), genus, species, difference, and *proprium* were elements, which particularly seemed to belong to Definition. Regarding the *locus a specie*, see Cic., *Top.*, 3.14 and Quint., *Inst. Or.*, 5.10.57.

451 At the beginning of the *Topica*, Cicero has made a classification of the different kinds of *topoi*. In Cic., *Top.*, 2.8, he distinguishes two main kinds of *topoi*: those that are inherent in the very nature of the subject and those that are brought in from without. The former are arguments which are derived from ‘loci ex toto’, ‘ex partibus eius’, ‘ex nota’, and ‘ex eis rebus quae quodam modo affectae sunt ad id de quo quaequirtur’. In this connection, they are not relevant.
and they regard them as such a kind of men they would like to be themselves. They are of the opinion that not only those men who are versed in honours of the people and public affairs are of such a kind, but also orators and philosophers and poets and historians. Their words and writings are often used as authority to create belief.

In this paragraph, Cicero does not only present statesmen as men with authority, but also orators, philosophers, poets, and historians. The words and writings of these persons can be used as authoritative. The Sabinians used the authority of Homer’s writing by way of argument (Gai., 3.141: ‘… Argumentoque utuntur Graeco poeta Homero qui aliqua parte sic ait’). According to the Sabinians, the buyer (B) was allowed to pay in natura by handing over a valuable tunic, because the most famous poet ever had written in a well-known and charming passage that the Greeks had already used barter to buy wine.452

Not only Cicero has given some useful information on topoi that are brought in from without, also Quintilian’s information about this kind of topoi is interesting.453 He also mentions authority as a kind of extrinsic argument. Among the people who carry authority, Quintilian (Inst. Or., 5.11.36) includes famous poets (inlustribus poetis):

Adhibebitur extrinsecus in causam et auctoritas. Hae secuti Graecos, a quibus κρίσεις dicuntur, iudicia aut iudicationes vocant, non de quibus ex causa dicta sententia est (nam ea quidem in exemplorum locum cedunt), sed si quid ita visum gentibus, populis, sapientibus viris, claris civibus, inlustribus poetis referri potest.

Also authority will be brought in from without to support a Cause. Following the Greeks, who call these arguments kriseis, they call them iudicia or iudicationes; this does not mean verdicts given in legal proceedings (for these come under the head of ‘Examples’), but opinions which can be attributed to nations, people, wise men, distinguished citizens, or famous poets.

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452 WATSON (2007), p. 32, asks himself the question what possible authority Homer could be and answers ‘None Whatsoever!’ Admittedly, the Homeric passage does not deliver a strong argument, but the texts of Cicero and Quintilian show that illustrious poets certainly carried authority.

453 DAUBE (1948-1950), p. 215, has noticed the following: ‘Still, writers like Cicero (Topica 20.78) and Quintilian (Institutio Oratoria 5.11.36-37) do state that a certain persuasive force attaches to the opinions of illustrious poets’. Yet, he disregards that the Sabinians may have used the topica in order to find such an argument.
The essential word in Homer’s testimony is the verb οἰνίζωμαι, with which he expressed the exchange of wine for other things. Liddell and Scott translate this verb in two different ways: 1) to procure wine by barter or 2) to buy wine.⁴⁵⁴ At first sight, the argumentation of the Sabinians only makes sense when the verb οἰνίζωμαι has a connotation of sale and is translated as ‘to buy wine’. The quotation of Homer would demonstrate that, even in ancient Greek society, the exchange of wine for other things was regarded as sale. However, the verb οἰνίζωμαι cannot have had a connotation of sale in the Homeric passage, because money had not yet been introduced in the days of the Trojan War or in the days of Homer.⁴⁵⁵

So, the verb οἰνίζωμαι has to be translated as ‘to procure wine by barter’. In this case, the Homeric lines merely describe the functioning of barter in ancient Greek society. How could this Homeric quotation support the Sabinian opinion that a price could also consist of other things than money?⁴⁵⁶ The Sabinians probably adduced this quotation because it was the famous poet Homer who had stated that the Greeks had already used barter to procure things. To modern readers, this argument does not seem very strong.

The Sabinian argumentation in support of the buyer can now be reconstructed.

- Since Homer had already stated that barter was used to procure things, barter is a species (and, particularly, the oldest species) of sale,
- Therefore, the price could also consist of other things than money.
- The buyer offers to hand over a valuable tunic.
- Therefore, he can fulfil his obligation of the contract of sale.

### 4.2 The Proculian View

After the buyer (B) had defended himself, the seller (A) argued that the price in a contract of sale could not consist of other things than money. Indeed, the Proculians maintained that

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⁴⁵⁵ In the Greek world, money was introduced at the end of the ⁷th century BC in Lydia: H. CHANTRAINE, *Münzwesen, Der kleine Pauly* 3 (1969), p. 1447.
⁴⁵⁶ DAUBE (1948-1950), pp. 213-215, has given a particular interpretation of how the Homeric quotation could support the Sabinian view. In his view, the words *aes* and χαλκός in Paul, D. 18.1.1.1 have to be translated as ‘money’. However, as already stated, money had not yet been introduced in the days of the Trojan war or in the days of Homer and, therefore, the interpretation of Daube is not persuasive.
barter and sale were two distinct contracts (Gai., 3.141: ‘Diversae scholae auctores … aliudque esse existimant permutationem rerum, aliud emptionem et venditionem’). They provided the following argument in support of this view. Whereas, in a contract of sale, it was indispensable to make a distinction between buying and selling, between a seller and a buyer (Paul, D. 19.4.1. pr: because they had different duties), and between the price and the merchandise, in barter such distinctions could not be made.

The Proculians built this argumentation by means of the *locus a differentia*. This *locus* is mentioned by Cicero as well as by Quintilian. The latter provides an interesting example in Quint., *Inst. Or.*, 5.10.60:

> Quod autem proprium non erit, differens erit, ut aliud est servum esse, aliud servire, qualis esse in addictis quaestio solet: ‘qui servus est si manu mittatur, fit libertinus, non item addictus’, et plura, de quibus alio loco.

What is not a *proprium*, will be a difference. It is, for example, one thing to be a slave, another to be in servitude. A common issue concerning persons in servitude for debt: ‘If a slave is manumitted, he becomes a freedman, not so a person in servitude.’ There are other differences like this, which I shall deal with later.

In this text, Quintilian makes a distinction between a slave, on the one hand, and a person in servitude for debt, on the other: ‘Ut aliud est servum esse, aliud servire’. Next, he explains why a person in servitude for debt was not a slave. He argues that a slave who is manumitted becomes a freedman, whereas a person in servitude for debt becomes a free citizen after his manumission and that, for this reason, a person in servitude for debt is not a slave. The other differences, which Quintilian refers to are discussed in Quint., *Inst. Or.*, 7.3.26.

The argumentation of the Proculians is similar to that of Quintilian. They made a distinction between barter, on the one hand, and sale, on the other, in the following words (Gai., 3.141): ‘Diversae scholae auctores … aliudque esse existimant permutationem rerum, aliud emptionem et venditionem’. The similarity in wording between Gai., 3.141 and Quint., *Inst. Or.*, 5.10.60 is striking. Gaius used the same words to describe the distinction between barter and sale as Quintilian had used to make a distinction between a person in servitude for debt
CHAPTER XV

and a slave. 457 This indicates that the Proculians may have used the *locus a differentia* to stress the difference between barter and sale.

In his *Topica*, Cicero also provides an example of the *locus a differentia*. 458 The relevant words ‘multum enim differt’ are similar to those used by Paul in D. 19.4.1.*pr*, i.e., ‘multumque differunt praestationes’.

The Proculian argumentation in support of the seller can now be reconstructed.

- Since it is essential in a contract of sale to make a distinction between a buyer and a seller and since such a distinction cannot be made in barter, barter is not a *species* of sale.
- Therefore, the price necessarily had to consist of money.
- The buyer offers to pay a price that consists in a tunic
- Therefore, the buyer does not fulfil his obligation of the contract of sale.

5. The Controversy Decided

The first Emperor to deal with the problem of the controversy was Gordian. The relevant text is C. 4.64.1:

> Imp. Gordianus A. Thraseae militi. Si, cum patruus tuus venalem possessionem haberet, pater tuus pretii nomine, licet non taxata quantitate, aliam possessionem dedit, idque quod comparavit non iniuria iudicis nec patris tui culpa evictum est, ad exemplum ex empto actionis non immerito id quod tua interest, si in patris iura successisti, consequi desideras. At enim si, cum venalis possessio non esset, permutatio facta est idque, quod ab adversario praestitum est, evictum est, quod

457 See also Paul, D. 18.1.1.1: ‘Nam ut alius est vendere, aliud emere, alius emptor, alius venditor, sic alius est pretium, alius merx: quod in permutatione discerni non potest, uter emptor, uter venditor sit’; Paul, D. 19.4.1.*pr*: ‘Sicut alius est vendere, aliud emere, alius emptor, alius venditor, ita pretium alius, alius merx. At in permutatione discerni non potest, uter emptor vel uter venditor sit, multumque different praestationes.’

458 Cic., *Top.*, 3.16: ‘A differentia: Non, si uxori vir legavit argentum omne quod suum esset, idcirco quae in nominibus fuerunt legata sunt. Multum enim differt in arcane positum sit argemum an in tabulis debeatur.’ (‘A differentia: If a man has bequeathed all the silver that was his to his wife, he has not therefore bequeathed things that are owed to him. For it makes a great difference whether silver is kept in a strong-box or is on his books’).
The Emperor Gordian to the soldier Thrasea. When your paternal uncle had land for sale and your father has given another tract by way of price, although the value was not appraised, and if what he bought was evicted not by an injustice of the judge, nor by your father’s fault, you are right to wish to recover the amount of your interest by means of an *actio ad exemplum ex empti* if you have succeeded to the rights of your father. But if the barter took place when the land was not for sale, and if what was offered by the other party was evicted, you will reasonably demand a restitution of what is given (by your father) if you will have chosen to do so. Published on the eighth of the Ides of November, during the Consulate of Pius and Pontianus [238]

In this constitution, which dates from 238, the Emperor Gordian dealt with two cases of barter. In the first case, A had land for sale and B gave a tract by way of price. The jurists of the chancery of Gordian regarded such an exchange as a kind of sale. This opinion accords with that of Caelius Sabinus, as described by Gaius (3.141). If the land B had bought was evicted, the son of B who succeeded to his father’s rights could get an indemnification twice the value of the tract from A by means of an action of purchase, i.e., *actio ad exemplum ex empti*. In the second case, the land had not been explicitly offered for sale. Such an exchange was barter. This opinion was in accordance with the Proculian view that barter and sale were two distinct legal concepts. In that case, the son could demand the restitution of the tract, given by his father, by means of a *condictio*.

A constitution of the Emperors Diocletian and Maximian, which dated from 294 AD, stated that the Proculian opinion prevailed. The relevant text is C. 4.64.7:

CHAPTER XV

The Emperors and Caesars Diocletian and Maximian to Timotheus. It has long been decided that sale cannot take place by (giving) things. So, when you assert that you have given a certain amount of grain to Callimachus and Acamatus so that they would furnish you a specified quantity of oil and if they broke the agreement that had been made without the solemnity of a stipulatio, then you can – if you wish to do so – claim by means of a condictio as much as you have given on the ground that their part of the deal was not carried out. Subscribed on the eighth of the Kalends of November during the Consulate of the Caesars. [294]

According to Diocletian and Maximian (or the jurists of their chancery), the decision that barter and sale were two distinct legal concepts had been taken long before their own constitution. Unfortunately, Diocletian and Maximian did not specify who had made that decision. When A had already transferred the property of a certain amount of grain to Callimacus (B) and Acamatus (C) and they did not keep their counter-promise to deliver a specified quantity of oil, this was barter and A could bring a condictio causa data causa non secuta against B and C for the restitution of the grain he had given. In this case, which corresponds to the second case in the rescript of Gordian, the Proculian view was applied. An action to enforce the fulfilment of the counter-promise only came into existence at a later stage, i.e., in the post-classical period: the actio praescriptis verbis. Henceforth, barter was qualified as an innominate and real contract (do ut des). Both parties had the duty to dare, i.e., to transfer the promised thing into the ownership of the other party. In Diocletian’s day, however, this was not yet possible.

According to Justinian, finally, the Proculian opinion rightly prevailed. In his Institutiones, the legal problem about the nature of the price in a contract of sale was repeated in almost the

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459 According to KASER, RPR, I, p. 550, n. 43, and KASER, RPR, II, p. 277, n. 25, another text in the Codex of Justinian suggests that the Sabinian view did not entirely disappear in the classical period. The relevant text is C. 4.64.2: ‘Imp. Diocletianus et Maximianus AA. Primitivae. Permutationem re ipsa utpote bonae fidei constitutam, sicut commemos, vicem emptionis obtinere non incogniti iuris est.’ (The Emperors Diocletian and Maximian to Primitiva. It is a well-known rule of law that barter takes the place of sale because it is based on good faith as you mention’).

However, the text does not suggest a reference to the Sabinian view. Both contracts are based on bona fides and, therefore, they are equivalent.

460 The condictio causa data causa non secuta is also known as a condictio ob rem dati or a condictio ob causam datorum.
same words as in the text of Gaius. Only the last part of this text (‘Sed Proculi sententia’) deviated from Gaius. The relevant text is Inst., 3.23.2:461

Item pretium in numerata pecunia consistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut fundus aut toga alterius rei pretium esse possit, valde quaererebatur. Sabinus et Cassius etiam in alia re putant posse pretium consistere: unde illud est, quod vulgo dicebatur per permutationem rerum emptionem et venditionem contrahi eamque speciem emptionis venditionisque vetustissimam esse: argumentoque utebantur Graeco poeta Homero, qui aliqua parte exercitum Achivorum vinum sibi comparasse ait permutatis quibusdam rebus, his verbis:

ē̂θεν ἄρ’ οἰνίζοντο καρηκομώντες Ἀχαιοί,
ἄλλοι μὲν χαλκῷ, ἄλλοι δ’ αἰθωνι σιδήρῳ,
ἄλλοι δὲ ρινοῖς, ἄλλοι δ’ αὐτῆςι βόσσι,
ἄλλοι δ’ ἰδραπόδεσσι.

Diversae scholae auctores contra sentiebant, aliudque esse existimabant permutationem rerum, aliud emptionem et venditionem. Alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse: nam utramque videri et venisse et pretii nomine datam esse rationem non pati. Sed Proculi sententia dicentis permutationem propriam esse speciem contractus a venditione separatam merito praevaluit, cum et ipse aliis Homericis versibus adiuvar et validioribus rationibus argumentatur. Quod et anteriores divi principes admiserunt et in nostris digestis latius significatur.

Likewise, the price has to consist of cash money. There was, however, much question whether the price could consist of other things, for example, whether a slave, or a piece of land, or a toga could serve as price for another thing. Sabinus and Cassius think that the price can also consist of another thing. Hence their opinion commonly is that by barter of things a contract of sale is concluded and that this is the eldest form of a contract of sale. And by way of argument they brought forward the Greek poet Homer, who at one place says that the Achaean army procured wine for themselves by exchanging certain things, in these lines: ‘Thence the long-haired Achaeans procured wine, some in exchange for bronze, others in

exchange for gleaming steel, some for hides and others for the cattle themselves, and some for slaves.’ The authorities of the other school had a different opinion and held that barter of things is one thing and that sale is another. Otherwise, when things are exchanged one cannot determine which thing is considered as having been sold and which as given by way of price, since it did not make sense that the same thing was regarded as sold and as having been given by way of price. But the opinion of Proculus, who said that barter was an independent contract quite distinct from sale, rightly prevailed, because he himself also relies on some Homeric lines and adduces stronger arguments as proof. Also earlier emperors have accepted this and it is explained more thoroughly in our Digest.

In the final part of this text (‘Sed Proculi sententia … ’), Justinian explained why the Proculian opinion rightly prevailed. It is remarkable that Justinian mentioned as first reason that, apart from the Sabinians, also Proculus could rely on some Homeric lines. Probably, Justinian referred to the Homeric passage about the exchange of armours between Glaukos and Diomedes that was quoted by Paul (D. 18.1.1.1) to undermine the Sabinian view. The second, more serious reason is that the Proculians could base their opinion on arguments that were stronger than those of the Sabinians. These have been explained more thoroughly (latius) in the Digest, namely, in Paul, D. 18.1.1.1 and D. 19.4.1.pr. By adding that the decision in favour of the Proculian opinion had already been taken by some earlier emperors, he was referring to the constitution of Diocletian and Maximian from the year 294, which is previously cited. Justinian may have also referred to a constitution of an earlier period, i.e., to the constitution to which Diocletian and Maximian had also referred.
XVI. MANDATUM

1. Gai., 3.161: Text and Interpretation

Cum autem is, cui recte mandaverim, egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest inplesse eum mandatum, si modo implere potuerit; at ille mecum agere non potest. Itaque si mandaverim tibi, ut verbi gratia fundum mihi sestertiis C emeres, tu sestertiis CL emeris, non habebis mecum il mandati actionem, etiamsi tanti velis mihi dare fundum, quanti emendum tibi mandassem; idque maxime Sabino et Cassio placuit. Quod si minoris emeris, habebis mecum scilicet actionem, quia qui mandat, ut C milibus emeretur, is utique mandare intellegitur, uti minoris, si posset, emeretur.

When he, to whom I have given a valid mandate, has exceeded the mandate, I certainly have an *actio mandati* against him up to the extent of my interest in his performance of the mandate if he could have performed it. But he cannot bring an action against me. So, if I have given you a mandate, say, to buy for me a piece of land for 100 sesterces and you bought it for 150 sesterces, you will have no *actio mandati* against me, even if you want to give me the piece of land for as much as I have commissioned you to buy. And this view was preferred above all by Sabinus and Cassius. But if you bought it for less, you will of course have an action against me, because a person, who gives a mandate that something is bought for 100, is certainly taken to authorize that it is bought for less, if possible.

Gai., 3.161 is situated in the part on the law of obligations and, more precisely, in the part on *mandatum*, which covers Gai., 3.155-162. In a contract of mandate, the mandatary binds himself to undertake a gratuitous service, which has been requested from him by the mandator. Such a contract is based on the consent of the contracting parties.\(^{462}\)

\(^{462}\) Paul, D. 17.1.1. *pr.*
CHAPTER XVI

In Gai., 3.161, Gaius did not mention a controversy, but only discussed the opinion of Sabinus and Cassius.\footnote{463} The Proculian view is known through other texts.\footnote{464} The legal problem that caused the controversy and the way it was dealt with by the Sabinians will be discussed first.

Gaius first discussed the case of a mandatory, who exceeded the terms of the mandate, although it had been possible to perform it within its limits.\footnote{465} In that case, the mandatory had an \textit{actio mandati} against the mandatory up to the amount of his interest in the performance of the mandate. Apparently, the mandatory could claim some kind of indemnification.\footnote{466} The mandatory, on the other hand, did not have a claim against the mandatory for the entire sum.\footnote{467}

\footnote{463} However, the words '\textit{idque maxime Sabino et Cassio placuit}' imply that there had been another view, probably that of the Proculians. According to V. ARANGIO-RUIZ, Notelle Gaiane, in: U. WILCKEN-M. SAN NICOLÓ-A. STEINWENTER (eds.), \textit{Festschrift für Leopold Wenger, II}, München 1945, pp. 56-72, esp. p. 64, and F. PRINGSHEIM, Noch einmal Gai. 3.161 und Inst. Just. 3.26.8 (see infra).


\footnote{465} Paul (D. 17.1.5 pr-1) as well suggests that a mandatory, who exceeded the mandate, was liable.

\footnote{466} In his commentary on the Provincial Edict, Gaius (D. 17.1.41) repeated the general rule. An \textit{actio mandati} could be given in respect of one party only. Whereas the mandatory, who exceeded the mandate, did not have a claim, the mandatory had an \textit{actio mandati} against the mandatory. See also Gai., \textit{Ep.}, 2.9.20.
Gaius illustrated the issue with an example. A mandator commissioned a mandatary to buy a piece of land for 100,000 sesterces. The mandatary, however, bought it for 150,000 sesterces. According to Gaius, the mandatary did not have an _actio mandati contraria_ for the entire sum and not even for the 100,000.

It was generally accepted that a mandatary, who exceeded the limits set in the mandate, could never claim more than the authorised price. However, a legal problem arose when the mandatary was prepared to pay the difference out of his own pocket and to transfer the piece of land to the mandator at the fixed price: ‘Is the mandator liable for the fixed price or can he refuse to acknowledge this sale?’ According to Sabinus and Cassius, the mandator could not be forced by the mandatary to accept the piece of land for 100,000 sesterces. Only when the mandatary had paid less and thus had carried out the mandate properly, he could claim his expenses by means of an _actio mandati contraria_. Here, Gaius provided us with an argument, namely, that the greater includes the less.

In a later text in the Digest, Paul mentioned the Sabinian opinion together with another argument in support of their view. The relevant text is Paul, D. 17.1.3.2:

PAULUS libro trigensimo secundo ad edictum. Quod si pretium statui tuque pluris emisti, quidam negaverunt te mandati habere actionem, etiamsi paratus esses id quod excedit remittere: namque iniquum est non esse mihi cum illo actionem, si nolit, illi vero, si velit, mecum esse.

PAUL, book 32, _ad edictum_. However, if I have determined a price and you have bought for more, some have denied that you have an _actio mandati_, even if you may have been prepared to remit the excess, because it is unfair that no action is granted to me against him if he does not want (to do so), but that he would have an action against me if he wants it.

In this text, the Proculian opinion has been omitted again. Paul only mentioned the Sabinian view: if a mandatary bought something for more than the authorised price, some (quidam) denied that he had an _actio mandati contraria_, even if he was willing to pay the exceeding excess.

468 See also Paul, D. 17.1.5.5.
sum himself. Obviously, the term ‘quidam’ refers to Sabinus and Cassius. The expression ‘quidam negaverunt’ may even indicate that the Sabinian opinion had become the opinion of a minority. In the final sentence, Paul mentioned an argument in support of the Sabinian view. This argument may already have been used by the Sabinians, but perhaps it was only introduced by Paul.\footnote{ARANGIO-RUIZ (1945), p. 68; ARANGIO-RUIZ (1965), p. 183, has correctly observed a switch from the second \textit{(teque, te)} to the third person \textit{(ille)} for referring to the mandatary in Paul, D. 17.1.3.2. According to KLAMI (1966), pp. 65-66, this was not a sufficient reason for considering the argument interpolated and I agree with him.} The argument may be interpreted in the following way.\footnote{In modern literature, this argument has been interpreted in many different ways. PRINGSHEIM (1955), pp. 61-63, and NELSON-MANTHE (1999), p. 358, gave the following interpretation to it. The Sabinians did not grant an \textit{actio mandati contraria} up to the extent of the price fixed for the following reason. If a mandatary would be allowed to claim the authorized price (i.e., 100,000 sesterces), he could compel the mandator to accept a degrading gift and the Sabinians wanted to avoid this. WATSON (1961), pp. 188-190, explained the Sabinian opinion in another way. In his view, the following situation gave rise to the opinion of Sabinus and Cassius. When a mandator gave a mandate to a person, who was not a close friend, to buy a piece of land for him at a fixed price, such a situation could easily lead to abuse. The mandatary, finding that he could not buy the piece of land at the fixed price, bought it for 150,000 sesterces with the intention to resell it for his own profit. Then if it was impossible for him to sell it satisfactorily, he could try to transfer it to the mandator. Sabinus and Cassius wanted to prevent that the mandatary used the mandator as a guarantee that his loss would never be more than the difference between the price he paid and the maximum price fixed. Finally, WUBBE (1968), pp. 253-256, gave yet another explanation. In the case, as described by Paul, the mandatary did not have the possibility to buy the piece of land for 100,000 sesterces and, therefore, bought it for 150,000. According to the Sabinians, it would be \textit{iniquum} when the mandatary could decide at his own discretion whether to keep the piece of land for himself or to force the mandator to take it for 100,000 sesterces, whereas the mandator in his turn did not have an action. Since the mandatary had not had the possibility to perform properly, he was not liable.} Paul considered it unfair \textit{(iniquum)} that the mandatary would have an \textit{actio mandati contraria} if he was prepared \textit{(si velit)} to pay the exceeding sum out of his own pocket, whereas the mandator did not have an \textit{actio mandati directa} to make him do so. Therefore, the mandatary should not have an action either.

2. The Proculian View and Justinian

Although the Proculian view was not mentioned in the \textit{Institutiones} of Gaius, it came down to us through the Digest, namely, in the second book of Gaius’ \textit{Res Cottidianae}. The relevant text is Gai., D. 17.1.4:
GAIUS libro secundo rerum cottidianarum. Sed Proculus recte eum usque ad pretium statutum acturum existimatur, quae sententia sane benignior est.\textsuperscript{471}

GAIUS, book 2, \textit{Res Cottidianae}. But Proculus correctly holds that he (i.e., the mandatary) will have an action up to the price, which had been fixed. This certainly is the more reasonable opinion.

This text immediately follows the text of Paul (D. 17.1.3.2), which is cited above, in the Digest of Justinian. Both texts are mentioned in book 17 under the first title ‘Mandati vel contra’. According to this text, Proculus took the view that a mandatary did have an \textit{actio mandati contraria} and could sue up to the agreed price. In other words, Proculus held the mandator liable up to the price fixed. The word \textit{recte} even suggests that the Proculian opinion had already prevailed in the time the \textit{Res Cottidinae} were written.\textsuperscript{472} However, there is no certainty about the author or about the time at which the \textit{Res Cottidianae} were composed. It is possible that Gaius wrote this work in the 2\textsuperscript{nd} century AD, but the authorship may also be assigned to a pseudo-Gaius, who lived in the post-classical period. If the authorship is assigned to Gaius himself, then there arises a problem as there is a contradiction with Gai., 3.161.\textsuperscript{473} Whereas the former text, i.e., Gai., D. 17.1.4, suggests that the Proculian opinion had already prevailed in the time of Gaius, the latter text only mentions the opinion of the Sabinians. However, the authorship of the former text may be accorded to a pseudo-Gaius. The final phrase, ‘quae sententia sane benignior est’, may be taken to be the author’s personal approval of Proculus’ opinion.

By Justinian’s time, Proculus’ opinion definitely prevailed.\textsuperscript{474} The relevant text is \textit{Inst.}, 3.26.8.\textsuperscript{475}

\textsuperscript{471} According to PRINGSHEIM (1939, pp. 331-332; PRINGSHEIM (1955), p. 66; ARANGIO-RUIZ (1965), p. 171; and BUIJÁN (1988), pp. 1301-1302, the phrase ‘quae sententia sane benignior est’ is an interpolation, because the terms \textit{benignus} and \textit{benignitas} are post-classical. CHOE (1993), p. 132, however, has taken the view that this phrase is classical. Since both terms were already known at the beginning of the Principate (see C.T. LEWIS - C. SHORT, \textit{A Latin Dictionary}, Oxford 1955, pp. 232-233), I also maintain that the phrase is classical.

\textsuperscript{472} The word ‘recte’ may also be an interpolation, since the opinion is in agreement with the decision of Justinian.

\textsuperscript{473} According to PRINGSHEIM (1955), p. 68, and NELSON-MANTHE (1999), p. 357, the word ‘recte’ in Gai., D. 17.1.4 (and \textit{Inst.}, 3.26.8) does not relate to \textit{existima(n)}, but to \textit{acturum} (in the sense of ‘to successfully have an action’). In this way, they have tried to reconcile the apparent contradiction between Gai., 3.161 and Gai., D. 17.1.4.

\textsuperscript{474} According to PRINGSHEIM (1955), pp. 54-89, the Sabinian opinion prevailed in the post-classical period until Justinian decided otherwise. RICCOBONO (1939), pp. 381-384, and WUBBE (1968), pp. 246-262, on the other hand, hold that the Proculian opinion already prevailed in the classical period and I agree with them.
Is qui exsequitur mandatum non debet excedere fines mandati. Ut ecce si quis
usque ad centum aureos mandaverit tibi, ut fundum emeres vel ut pro Titio
sponderes, neque pluris emere debes neque in ampliorem pecuniam fideiubere; alioquin
non habebis cum eo mandati actionem: adeo quidem, ut Sabino et Cassio
placuerit, etiam si usque ad centum aureos cum eo agere velis, inutiliter te
acturum: diversae scholae auctores recte te usque ad centum aureos acturum
existimant: quae sententia sane benignior est. Quod si minoris emeris, habebis
sicicet cum eo actionem, quoniam qui mandat, ut sibi centum aureorum fundus
emeretur, ut utique mandasse intellegitur, ut minoris si posset emeretur.

The person who executes a mandate must not exceed the limits of the mandate. So,
for instance, if someone has given you a mandate to buy a piece of land or to stand
as guarantor for Titius up to the amount of a hundred gold pieces, then you must
not buy for more nor go surety for more money. Otherwise, you will have no actio
mandati against him. Even to this extent that Sabinus and Cassius have decided
that, even if you wish to bring an action against him only to the extent of a hundred
gold pieces, the action will be ineffective. The authorities of the other school
correctly hold that you can bring an action up to a hundred gold pieces. This is
certainly the more reasonable opinion. But if you have bought for less, you will of
course have an action against him, because the person who gives a mandate that
land be bought for him for a hundred gold pieces, is naturally taken to have given a
mandate that it be purchased for less, if possible.

This text is the only one that puts together the Sabinian and Proculian opinion regarding the
excess of a mandate. The text begins with the general rule that a mandatary must not go
beyond the limits of the mandate, and then illustrates the issue with two examples. A
mandatary, who had been commissioned to purchase a piece of land for a hundred gold pieces,
was not entitled to exceed this figure. If he did, the mandatary could never claim the entire
figure from the mandator by means of an actio mandati contraria. The other variant is that of
a mandate to stand surety. In such cases, Sabinus and Cassius did not even grant the

476 The suggestion of NELSON-MANTHE (1999), p. 357 that the example of a mandate to give surety has not
been added by Justinian himself, but was taken from an earlier source, seems to be plausible. First, the
Institutiones of Justinian refer to a sponsio (ut pro Titio sponderes) and then to a fideiussio. If the example of the
mandate to give surety had been added in the time of Justinian, the sponsio, which was rescinded long ago, would
not have been mentioned.
mandatary an action when he was prepared to pay the exceeding sum out of his own pocket. Justinian, however, gave preference to the more reasonable opinion of the Proculians (‘Diversae scholae auctores recte ...existimant’). In their view, the mandator remained liable up to the 100 gold pieces. However, if a mandatary bought for less, he carried out the mandate properly and could claim his expenses.

3. The Controversy in Gai., 3.161: Modern Theories

Falchi explained the controversy in terms of conservative versus progressive.\textsuperscript{477} In his view, the Sabinians refused to give an actio mandati contraria to the mandatary, because he had performed an act that was radically different from the mandate. The progressive Sabinians attached great importance to the voluntas of the contracting parties. By exceeding the mandate, the mandatary had violated the will of the mandator. Consequently, the act performed by the mandatary was invalid. The traditional Proculians, on the other hand, were indifferent to the voluntas of the mandator. According to Falchi, they were loyal to the traditional structure of the contract of mandate. Every activity that was performed by the mandatary within the scope of the mandate was valid. Therefore, the Proculians did grant an actio mandati contraria to the mandatary, who had exceeded the mandate, up to the extent of the mandate.

Falchi maintained that the Sabinians set great store on the intention of the contracting parties. However, the parties had different interests. According to Falchi’s theory, the Sabinians only took into account the mandator’s voluntas and not that of the mandatary, who wanted the mandator to be liable up to the fixed price. Moreover, Falchi’s explanation is unclear, since he failed to explain the meaning of ‘the traditional structure of the contract of mandate’.\textsuperscript{478}

\textsuperscript{477} FALCHI (1981), pp. 177-179.
\textsuperscript{478} CHOE (1993), pp. 133-134, convincingly refuted Falchi’s theory.
More recently, also Behrends and Nörr explained the school controversy in terms of conservative versus progressive. In their view, however, the Sabinian opinion was conservative and the Proculian opinion progressive.\footnote{BEHRENDTS (1993), pp. 48-51; NÖRR (1993:1), pp. 13-37.}

According to Behrends, the Sabinians, who were true to the tradition of the veteres, maintained that a mandate was not a consensual, but a real contract. This means that a contract of mandate was only created by way of an exact performance of what was commissioned. Since the ‘mandatary’ exceeded the price, he performed something else (\textit{aliud}) and did not create a contract of mandate (see Paul, D. 17.1.5: ‘Diligenter igitur fines mandati custodiendi sunt: nam qui excessit, aliud (!) quid facere videtur …’).\footnote{The limits of a mandate must be observed diligently. For someone who has exceeded them, is taken to do something else …’} Therefore, the rigorous Sabinians held that neither the mandator had an \textit{actio mandati directa}, or the mandatary an \textit{actio mandati contraria}. In support of the view that neither the mandator, nor the mandatary had an action, Behrends refers to Paul, D. 17.1.3.2: ‘Namque iniquum est non esse mihi cum illo actionem, si nolit, illi vero, si velit, cum esse’.\footnote{‘For it is unfair that no action is granted to me against him if he does not want (to do so), but that he would have an action against me if he wants it’. See BEHRENDTS (1993), pp. 48-49: ‘Zunächst wird festgestellt, dass der Auftraggeber keine Erfüllungsklage hat. Im Anschluß daran wird auch der Auftraggeber die Regreßklage verweigert. Denn würde man ihn mit der Regreßklage zulassen, dann müsste man immer dann, wenn er die Regreßklage wählte, auch den Mandanten mit der \textit{actio mandati directa} zulassen. Der Mandatar hätte die freie Wahl, ob er klagen wollte: der Mandant hingegen könnte, wenn der Mandatar nicht wollte, nicht klagen, wäre also vom Mandatar abhängig. Diese Ungleichheit soll nicht sein.’} Henceforth, the mandate was a consensual contract. The Proculians decided that, if the mandatary exceeded his instructions, the mandator had an \textit{actio mandati directa} to claim his interest (see Gai., 3.161) and that the mandatary had an \textit{actio mandati contraria} to recover his expenses up to the price fixed (see Gai., D. 17.1.4).

The theory of Behrends is not convincing for two reasons. First, Behrends did not refer to any source in support of his view that the ‘Altsabinianer’ regarded the performing of a mandate as a \textit{res}. Second, the theory of Behrends implies that Gaius referred to the Proculian opinion at the beginning of Gai., 3.161: ‘When he, to whom I have given a valid mandate, has exceeded the mandate, I certainly have an \textit{actio mandati} against him up to the extent of my interest in

his performance of the mandate if he could have performed it.\(^{482}\) However, it is unlikely that Gaius mentioned the Proculian opinion without identifying it as such and without indicating that it was innovative. If Gaius wanted to refer to the innovative Proculian opinion, he would have put it at the end of his text, following the chronological order, and not at the beginning. Therefore, the first sentence of Gai., 3.161 does not describe the Proculian opinion, but only introduces the case of excess of mandate.

According to Nörr, the Sabinian view was harsh. If a mandatary had exceeded the mandate, the mandator had an *actio mandati* (*directa*) to claim his interest. If the mandatary was condemned, he became *infamis*. The Proculians, on the other hand, maintained that the mandatary could force the mandator to accept the mandate for the fixed price. In this way, they spared the mandatary a condemnation. Nörr explained the harshness of the Sabinian sanction by uncovering the socio-historical and socio-ethical foundations of the contract of mandate. Originally, the mandate was not a contract, but a demand based on friendship and *fides*. After some time, the extralegal notion of *fides* was transformed into a legal notion of *bona fides* and the Romans structured the legal institution of a mandate.\(^{483}\) Whereas *fides* as oath or promise required strict obedience, *bona fides* was a more open concept. According to Nörr, the harshness of the Sabinian opinion was closely connected with their strict notion of *fides*, which originated from the early or preclassical mentality of law. Moreover, the *veteres* were inclined to severely sanction even the slightest deviation from what was agreed upon in the contract.\(^{484}\) The conservative Sabinians maintained that, if a mandatary promised to perform a mandate, he was bound by that promise. Therefore, an excess of mandate was a violation of *fides* and of friendship. Unlike the Sabinians, the Proculians assumed the relevance of the *bona fides* not only in the promise, but in the entire legal relation of the mandate. Therefore, they maintained that a deviation from the contract of mandate was legitimate under certain conditions.\(^{485}\)

Nörr’s theory is not persuasive. In his view, the controversy between the Sabinians and the Proculians concerned the question of whether *infamia* was to be avoided for a mandatary, who

\(^{482}\) Gai., 3.161: ‘Cum autem is, cui recte mandaverim, egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest inplesse eum mandatum, si modo implere potuerit.’  
CHAPTER XVI

had exceeded the mandate. However, the sources do not mention infamia as an issue in the controversy. Nörr does not mention any sources either in support of his view about the socio-historical and socio-ethical foundation of a contract of mandate. Finally, Paul (D. 17.1.3.2) maintained that the Sabinian opinion was reasonable. This statement in the sources is at odds with Nörr’s interpretation of the Sabinian view.

Choe maintained that the arguments in support of the Sabinian and the Proculian views, as mentioned in the sources, are inadequate to explain the controversy. According to Choe, the controversy can be explained by means of the ‘unterschiedlichen jurisprudentiellen Denkweisen der beiden Schulen’: the Sabinians were rigorous and the Proculians reasonable and rational. According to Choe, the Sabinians maintained that a mandatary had to perform his mandate accurately. If the mandatary had performed an act, going against the mandator’s interest, for example, by exceeding the instructions on the price, the Sabinians decided that he did not have an actio mandati contraria. In order to demonstrate the Sabinian rigorousness, Choe refers to a text of Papinian, namely, D. 3.5.30(31).4. According to Choe, this jurist belonged to the Sabinian school. In this text, the following case is described. A testator has charged his heir with a fideicommissum: the testator’s freedmen were to get a specified sum of money to pay for the testator’s gravestone. If the freedman spent more than the sum fixed, Papinian argued that the freedmen should not have an action to claim it from the heir either. If the action was refused even when the testator’s will was unknown, the action should certainly be refused when the mandator’s will was known. According to Choe, the Proculian view was rational and ingenious. They decided that the mandatary could bring an actio mandati contraria up to the authorized price, since the mandatary had fulfilled the main obligation, i.e., the purchase of the piece of land. Finally, Choe has added that the Sabinian Iulianus (D. 17.1.33) took the same view as the Proculians.

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487 CHOE (1993), pp. 132-139.
The theory of Choe fails to persuade for four reasons. First, Choe underrates the importance of the arguments that are mentioned in the sources. Second, the text of Papinian, to which Choe refers in order to demonstrate that the Sabinians were rigorous, is inadequate. The case, as described by Papinian is not similar to the case underlying the controversy, because the freedman did not offer the gravestone for the specified sum of money. Third, there is no reason to assume, as Choe does, that Papinian belonged to the Sabinian school. Fourth, Choe fails to take into account those controversies, in which the Sabinians obviously did not abide by a rigorous line.\footnote{488}

Last but not least, Backhaus did not try to explain the controversy between the Sabinians and the Proculians about the excess of mandate, but merely focussed on the final part of Gai., 3.161. He did so in a more general article about the clause ‘in maiore minus est’. Backhaus noticed that Roman jurists used the clause ‘in maiore minus inest’ as an argument on a regular basis.\footnote{489} Since this argument cannot remotely be qualified as juridical, Backhaus took the view that it was not created by jurists. He argued in a very convincing way that the jurists had adopted this argument from rhetoric and, more specifically, from the topica. The main line of his reasoning is as follows.\footnote{490}

According to Backhaus, the clause ‘in maiore minus inest’ was a special type of argumentum a maiore ad minus. Aristotle was the first to mention the topos ἐκ τοῦ μᾶλλον καὶ ἴππον.\footnote{491} Backhaus also referred to Cicero, who repeatedly mentioned the locus ex comparatio and the argumentum a maiore ad minus in his Topica as well as in some of his other works.\footnote{492} According to Backhaus, however, the most relevant reference to this argument was found in the Institutio Oratoria of Quintilian.\footnote{493} From these data, Backhaus drew the conclusion that the argument ‘in maiore minus inest’ originated from rhetorical catalogues of topoi and then found its way into the ius civile.

\footnote{488 See, e.g., the controversy in Gai., 2.244.}
\footnote{489 The Roman jurists used it often enough for Justinian to incorporate the rule ‘in maiore minus inest’ in his catalogue of Various Rule of Early Law (“Diversae regulae iuris antiqui”): see Paul, D. 50.17.110.pr.}
\footnote{490 BACKHAUS (1983), pp. 140-145, 172-178.}
\footnote{491 Ar., Ret., 1.7.1; 2.23.4.}
\footnote{492 Cic., Top., 3.11; 4.23; 18.68; Cic., Part. orat., 1.2.7; and Cic., De orat., 2.172.}
\footnote{493 Quint., Inst. Or., 5.10.87-90.}
CHAPTER XVI

Then, Backhaus made a connection between the argument ‘in maiore minus inest’, on the one hand, and the argumentation at the end of Gai., 3.161, on the other. Gaius described the case of a mandatary, who bought for less than authorised. Such a mandatary could claim his expenses by means of an actio mandati contraria, ‘because a person, who gives a mandate that something is bought for 100, is certainly taken to authorize that it is bought for less, if possible’. Although a literal citation of the words ‘in maiore minus inest’ is lacking, the rhetorical clause in question is obviously underlying the argumentation in Gai., 3.161. Backhaus did not explain the controversy about the excess of mandate.

4. Comparatio in Gai., 3.161

The excess of mandate may have been a common problem in Roman practice. Gaius illustrated the issue with a concrete example. A mandator commissioned a mandatary to buy a piece of land for 100,000 sesterces. However, the mandatary failed to seize the opportunity to buy it within the price limit and bought it for 150,000 sesterces. The controversy arose when the mandatary was willing to pay the price difference out of his own pocket, but the mandator refused to accept the deal. Thereupon, the mandatary wanted to bring an actio mandati contraria against the mandator in order to claim the 100,000 sesterces. First, the Sabinian opinion in support of the mandator will be discussed and then the opinion of the Proculians in support of the mandatary.

4.1 The Sabinian View

The mandator may have asked the Sabinians the following legal question: ‘If the mandatary bought a piece of land at a price higher than commissioned and offers it to me for the fixed price, can I refuse it?’ The Sabinians answered affirmatively and added that the mandatary should not have an actio mandati contraria up to the fixed price. The Sabinian argumentation in support of their view will be reconstructed on the basis of the final part of Gai., 3.161.

If a mandatary buys for less, it is reasonable that he has an action against the mandator to claim his expenses, for the greater includes the less. Here, ‘the greater’ refers to the price agreed upon in the contract of mandate and ‘the less’ to the price that was actually paid for it. However, if the mandatary buys above the fixed limit, he does not have an action, for the less does not include the greater. Here, ‘the less’ refers to the price agreed upon in the contract of mandate and ‘the greater’ to the price paid by the mandatary. In that case, it is not reasonable to keep the mandator to his contract. In other words, the Sabinians used a variant of the ‘in maiore minus inest’ argument; they turned it around: the greater includes the less, but the less does not include the greater.

As Backhaus already argued, the argument ‘in maiore minus inest’ had its origin in rhetoric and, more specifically, in the *locus ex comparatione*. In order to demonstrate this, Backhaus referred to texts of Aristotle, Cicero, and Quintilian. In his view, the most relevant reference to the *argumentum a maiore ad minus* is to be found in the *Institutio Oratoria* of Quintilian. In this context, especially the reasoning from the greater (*ex maiore*) is relevant: since the greater is permitted also the less is permitted. Since a mandatary was commissioned to buy a piece of land for 100,000 sesterces, he was also commissioned to buy it for less. Then, the Sabinians went one step further and turned this reasoning *ex maiore* around. The fact that the less is permitted does not (necessarily) imply that the greater is permitted as well. The fact

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495 Quint., *Inst. Or.*, 5.10.87-90.
that a mandatary was commissioned to buy a piece of land for 100,000 sesterces, does not imply that he was commissioned to buy it for 150,000.

In support of the Sabinian view, Paul (D. 17.1.3.2) added yet another argument. Since the mandator did not have any action to make the mandatary stick to the contract and make him pay the extra fifty out of his own pocket, it would be unfair (*iniquus*) if the mandatary would have an action to make the mandator stick to the contract. This argument serves two purposes. First, it depicts the Proculian argument as *iniquus*, since they did make the mandator stick to the contract. Second, it suggests that the Sabinian view was equitable (*aequus*): if the mandator does not have an action, it is only fair that the mandatary does not have an action either. This view is likely to have been drawn from the *loci aequitatis*.

According to Cicero, both the *locus ex comparatione* and the *loci aequitatis* were particularly suitable for *qualitas*. Indeed, the *status* of the conflict was that of *qualitas*, since the central question ‘Is the mandator entitled to refuse the mandate if the mandatary exceeded the price?’ corresponds best to the question ‘*Quale sit?*’ of the *status qualitatis*.

The Sabinian argumentation in support of the mandator can now be reconstructed on the basis of the text of Gaius.

- The greater includes the less, but the less does not include the greater.
- Therefore, a mandatary, who buys a piece of land above the limit fixed by the mandator, does not bind the mandator.
- A commissioned B to buy a piece of land for 100,000 sesterces and B bought it for 150,000.
- Therefore, A does not have to accept the land and pay 100,000 sesterces to B.

The argumentation on the basis of the text of Paul may be reconstructed as follows:

- Since a mandator has no action against a mandatary who does not want to remit the excess,
- it would be unfair that the mandatary would have an action against the mandator when he is prepared to remit the excess.

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496 In Cic., *Top.*, 23.90, Cicero refers to the collective name of *loci aequitatis*.
497 Cic., *Top.*, 23.89-90.
A commissioned B to buy a piece of land for 100,000 sesterces and B bought it for 150,000, but was prepared to remit the excess.

Therefore, B does not have an action against A to make him stick to the contract.

4.2 The Proculian View

The mandatary may have asked the Proculians the following legal question: ‘Can I force the mandator to accept the mandate for the fixed price, when I have exceeded the mandate?’ The Proculians answered affirmatively and maintained that the mandatary could sue up to 100,000 sesterces by means of an *actio mandati contraria*. What kind of argumentation did the Proculians use?

Although the Proculian argumentation is not explicitly mentioned in the sources, it almost goes without saying that they made use of the same argument as the Sabinians: ‘In maiore minus inest’. However, they applied it in a different way. In their argument, ‘the greater’ refers to the exceeding price of 150,000 sesterces and ‘the less’ to the fixed price of 100,000 sesterces. Since the mandatary bought the piece of land for 150,000, he also bought it for 100,000. In other words, the price that was actually paid by the mandatary included the set price. If, therefore, the mandatary wanted to transfer the piece of land for the fixed price, the mandator could be forced to accept it. Since this argument is merely another application of the clause ‘in maiore minus inest’, it is also found under the *locus ex comparatione*. [498]

From Gai., D. 17.1.4, another argument in support of the Proculian view may be deduced. In this text, Gaius (or a pseudo-Gaius) stated that the Proculian view was the more reasonable one: ‘Quae sententia sane benignior est’. It is not certain whether this argument had already been used by Proculus or whether it had only been introduced by the author of the text. However, it is obvious that this argument is also found under the *loci aequitatis*.

The argumentation of Proculus in support of the mandatary may be reconstructed as follows:

- The greater includes the less.

[498] A similar argument, namely ‘for the smaller is contained in the greater’ or ‘in maiore minus esset’ has also been used by Labeo (in Lab., D. 32.29.1).
- The mandatary who buys a piece of land above the fixed limit binds the mandator for
  the price set by him, because the higher price includes the fixed one.
- A commissioned B to buy a piece of land for 100,000 sesterces and B bought it for
  150,000.
- Therefore, A is bound to accept the land and pay 100,000 sesterces to B.
XVII. SERVUS COMMUNIS

1. Gai., 3.167a: Text and Controversy

For a proper understanding of the school controversy in Gai., 3.167a, it is necessary to read it in combination with the preceding paragraph, namely, Gai., 3.167:

167. Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando [vel mancipiando] aut mancipio accipiendo illi soli acquirit, velut cum ita stipuletur: TITIO DOMINO MEO DARI SPONDES? aut cum ita mancipio accipiat: HANC REM EX IURE QUIRITIUM LUCII TITI/ DOMINI MEI ESSE AIO, EAQUE EI EMPTA ESTO HOC AERE AENEAQVE LIBRA. 167a. Illud quaeritur, an quod domini nomen adiectum efficit, idem faciat unius ex dominis iussum intercedens. Nostri praeceptores perinde ei qui iussisset, soli adquiri existimant, arque si nominatim ei soli stipulatus esset servus mancipiove quid accipisset; diversae scholae auctores proinde utrisque adquiri putant, ac si nullius iussum intervenisset.

167. It is certain that a servus communis acquires for his masters in proportion to their shares, except that, when he stipulates or receives by mancipatio for one of them by name, he acquires for him alone. For example, when he stipulates like this: ‘DO YOU PROMISE TO GIVE TO MY MASTER TITIUS?’ or when he receives by mancipatio like this: ‘I SAY THAT THIS THING BELONGS TO MY MASTER LUCIUS TITIUS BY QUIRITARY TITLE, AND LET IT BE BOUGHT FOR HIM BY THIS BRONZE AND THIS BRONZE SCALE’. 167a. It is a disputed point whether the order given by one of the owners has to same effect as the addition of that owner’s name. Our teachers are of the opinion that there is acquired only for him who has given the order, exactly as though the slave had made a stipulatio or had received by means of a mancipatio, naming him alone. The authorities of the other school think that there is acquired for both masters, just as though no order had been given by any of them.
CHAPTER XVII

This text is situated in the part on the law of obligations (Gai., 3.88-225) in Gaius’ *Institutiones*. After a discussion at length of the four different kinds of contract (real, verbal, literal, and consensual contracts), Gaius (3.163-167a) turned to contracts made through other persons.

According to Gaius (3.167), a *pater familias* does not only acquire claims through his own contracts, but also through those entered into by persons who are in his *potestas*, *manus*, or *mancipium*.\(^499\) In the texts under consideration, Gaius has discussed the acquisition of claims and things by a *servus communis*, i.e., a slave who belongs to two or more owners. The basic rule in respect of a *servus communis* is that anything he acquired belonged to all his masters in proportion to their share in him. To this rule, at least one exception is made. When a *servus communis* explicitly mentioned the name of one of his owners in the *stipulatio* or in the *nuncupatio*, he acquired exclusively for that owner.\(^500\) In case of a *stipulatio*, the *servus communis* asked the question: ‘Do you promise to give to my master Titius?’ When the property of a thing was being transferred to a *servus communis* by means of a *mancipatio*, the latter grasped the thing and pronounced the *nuncupatio*: ‘I say that this thing belongs to my master Lucius Titius by Quiritary title and let it be bought for him by this bronze and this bronze scale.’ Since the *servus communis* explicitly added the name of his owner in both cases, it was undisputed that he acquired the claim or the thing for that owner alone.

However, the legal question as described in Gai., 3.167a gave rise to a controversy between the Sabinians and the Proculians: ‘When a *servus communis* made a *stipulatio* or a *mancipatio* by order of one of his masters without mentioning his name in the *stipulatio* or the *nuncupatio*, did he acquire for that master alone or did he acquire for all his masters for the share in which they owned him? In other words: ‘Did the order given by one of the owners have the same legal effect as the addition of his name?’ This question gave rise to a controversy because the *servus communis*, although he was ordered by one of his masters, did not explicitly mention that master’s name.\(^501\) According to the Sabinians (‘nostri praeceptores’), the order had a

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\(^{499}\) In the subsequent paragraphs, Gaius (3.164-166) mentions certain other cases in which a *pater familias* acquires through contracts made by others.

\(^{500}\) See also Iul., D. 41.1.37.3.

restrictive effect and the *servus communis* acquired only for that master, who had given the order. They position made an analogy to the rule that a common slave, who mentioned the name of one of his masters in the question of the *stipulatio* or the *nuncupatio* of the *mancipatio*, acquired for that master alone. In their view, the order of the contract had the same effect as the addition of that master’s name. The Proculians (‘diversae scholae auctores’), on the other hand, maintained that the order did not have a restrictive effect and that the *servus communis* acquired for all his owners, as if no order had been given by any of them. They emphasised the difference between the order by one of the masters and the addition of that master’s name.

### 2. Texts in the Digest

In book 45 of the Digest under title 3 ‘De stipulatone servorum’, three texts regarding the consequences of legal acts, performed by a *servus communis*, follow each other: 1) Ulp., D. 45.3.5; 2) Pomp., D. 45.3.6; and 3) Ulp., D. 45.3.7. The text of Pomponius splits the text of Ulpian into two parts and was clearly inserted by the Justinian compilers. Since the third text does not deal with the issue of the controversy, only the former two will be discussed.\(^{502}\)

In his commentary *ad Sabinum*, Ulpian discussed the Sabinian view, omitting the Proculian opinion. The relevant text is Ulp., D. 45.3.5:

> ULPIANUS libro quadragensimo octavo ad Sabinum. Servus communis sic omnium est non quasi singulorum totus, sed pro partibus utique indivisis, ut intellectu magis partes habeant quam corpore: et ideo si quid stipulatur vel quaqua alia ratione adquirit, omnibus adquirit pro parte, qua dominium in eo habent. Licet autem ei et nominatim alicui ex dominis stipulari vel traditam rem accipere, ut ei

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\(^{502}\) In Ulp., D. 45.3.7. *pr*, Ulpian discussed how the claims, that are acquired by a *servus communis* by order of some of his masters, have to be divided among the common owners, who had given that order.
soli adquirat. Sed si non nominatim domino stipuletur, sed iussu unius dominorum, hoc iure utimur, ut soli ei adquirat, cuius iussu stipulatus est.

ULPIAN, book 48 *ad Sabinum*. A common slave belongs to all his masters, not as if he belongs as a whole to each of them individually, but surely in undivided shares, so that they have notional rather than corporeal shares. And if, therefore, he makes a *stipulatio* or acquires on some other ground, he acquires for all his masters for the share in which they have ownership in him. However, he may stipulate or receive a thing by *traditio* for one of his masters by naming him, so that he acquires exclusively for him. But if he does not make a *stipulatio* for a master by name, but by order of one of his masters, we adopt the rule that he acquires exclusively for him at whose order he made the *stipulatio*.

Ulpian commenced with a definition of the term *servus communis*. Such a slave did not belong to each master in its entirety, nor did the masters own a specific, physical part of the slave (e.g., a leg or an arm). The owners rather had notional shares in the slave (e.g., one third). Next, Ulpian mentioned the basic rule. When a *servus communis* made a *stipulatio* or acquired on some other ground, the claims or things went to each owner in proportion to his share in the slave. Then, Ulpian mentioned the generally accepted exception to this rule. A *servus communis* could acquire exclusively for one particular owner by adding that owner’s name in a *stipulatio* or a *traditio*.503 Finally, Ulpian discussed the controversial case. If a *servus communis* made a *stipulatio* for a master, not by naming him but by his order, Ulpian adopted the Sabinian rule (‘Hoc iure utimur’): the slave acquired exclusively for that master at whose direction he had made the *stipulatio*.504

The second text (Pomp., D. 45.3.6) is ascribed to Pomponius. Therefore, it predates the text of Ulpian.

503 It is not clear whether Ulpian originally referred to *traditio* or to *mancipatio*. Since *mancipatio* gradually lost its importance in the Principate, Ulpian may have referred to *traditio*. However, it is also possible that the words *rem traditam* are interpolated.

504 According to NELSON-MANTHE (1999), p. 378, the words ‘hoc iure utimur’ seem to suggest that, in the time of Ulpian, the Sabinian view had already prevailed.
POMPONIUS libro vicensimo sexto ad Sabinum. Ofilius recte dicebat et per traditionem accipiendo vel deponendo commodandoque posse soli ei adquiri, qui iussit: quae sententia et Cassii et Sabini dicitur.

POMPONIUS, book 26 ad Sabinum. Ofilius used to say rightly that, in cases of receiving by traditio, or in case of deposit, and of loan for use, there could be acquired exclusively for him, who has given an order. And this is said to be the opinion of Cassius and Sabinus too.

Since the former text of Ulpian concerned the legal implications of acts, performed by a servus communis, it may be assumed that Pomponius’ text discussed the same issue. When such a slave received something by traditio, or made a contract of depositum, or of commodatum by the order of one of his owners, he acquired exclusively for that owner. In case of depositum and commodatum, he acquired the right to claim back what was deposited or was lent for use. This was the view of the late republican jurist Ofilius and later of Cassius and Sabinus. The term recte suggests that Pomponius either shared the view of Ofilius, Cassius, and Sabinus or that the Sabinian opinion was already prevailing in his day.\textsuperscript{505}

Since Ofilius lived under the late Republic, way may assume that the legal problem in question had existed of old. In later times, especially the case where a servus communis made a stipulatio or a mancipatio by order of one of his masters without mentioning his name gave rise to difficulties, because it made a difference whether or not his name was explicitly mentioned in the stipulatio or the nuncupatio.

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\textsuperscript{505} In spite of BRETONE (1958), pp. 87-89, who held that the word recte was added by the compilers and that, in this case, Pomponius was an adherent of the Proculian view (see Fr. Vat. 75.4; Pomp., D. 45.3.17). According to Bretone, moreover, the Proculian opinion had been situated at the end of the text, but was removed at a later stage, probably in the Justinian time, when the Sabinian opinion had prevailed. However, Bretone has to assume too many interventions of the compilers to make his theory plausible. In Pomp., D. 45.3.17, moreover, Pomponius discusses a case that is different from the one at the root of the controversy. If a common slave made a stipulatio for a via, or for an iter, or an actum without the addition of the owners’ names, Pomponius stated that he acquired only for that owner, who had land in the vicinity. From this text, therefore, it cannot be concluded that Pomponius followed the Proculian view.
3. The Controversy in Gai., 3.167a: Modern Theories

Both Bretone and Falchi explained the controversy in terms of conservative versus progressive. In their view, the Sabinian opinion was conservative and the Proculian opinion progressive. Bretone maintained that the Sabinian opinion dated back to that of the *veteres* and, more specifically, to that of Ofilius. The Sabinians took their decision that only the owner, who had given the order, acquired, because they wanted to take into account the *voluntas* of that owner, which had been expressed in the *iussum*.

Since Ofilius lived in the late Republic, Bretone automatically presumed that his view was conservative. However, Ofilius’ opinion does not necessarily have to be conservative. Since it is unknown what view prevailed in the days of Ofilius, he may have been a dissident just as well.

According to Falchi, the conservative Sabinians attached great importance to the intention of the *servus communis* (*stipulator*). Therefore, they stated that the slave acquired the claims exclusively for the owner who had given him the order. The progressive Proculians, on the other hand, did not take into account the intention of the *stipulator*. They defended the legal structure of the *stipulatio* and maintained that the claims had to be divided among all the masters of the slave. According to Falchi, the Proculians regarded the specific fact that one of them had given an order to be irrelevant.

Falchi’s theory is not persuasive. He does not take into account the arguments that are mentioned by Gaius. Clearly, the Sabinians reached their view that a *servus communis* acquired exclusively for the master at whose direction he made a *stipulatio*, through an analogy with the rule that he acquired for the master whose name he had added. Whereas the Sabinians emphasised the similarity between a *nominatio* and a *iussum*, the Proculians stressed the difference. They argued that the name of the master was explicitly stated both in the question of the *stipulatio* and in the *nuncupatio* of a *mancipatio*, whereas the order had been given in an informal way.

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4. *Ratiocinatio in Gai., 3.167a*

The controversy may have arisen in the 1st century AD. A slave (S) belonged to two owners (A and B). One of his masters (A) ordered S to stipulate something from D. However, S did not explicitly mention the name of A in the question of the *stipulatio* and merely asked: ‘Mihi dari spondes?’ Consequently, confusion could arise about the question whom the creditor was and in whose favour D had to perform. In two ways this could lead to a conflict. First, the debtor (D) could choose to perform to A and B in proportion to their shares. In this case, A could bring an *actio ex stipulatu* or a *condictio* against D in order to claim the remainder of the performance. A may have turned to the Sabinians, who stated that it could be defended that the acquisition by a *servus communis* by order of A, was for A alone. The debtor (D), in his turn, may have consulted the Proculians. They responded that it could be argued that a *servus communis*, who made a *stipulatio* by order of A, acquired proportionally for all owners. The second possibility is that the debtor (D) performed exclusively to A. In this case, B could bring an action against D to claim his portion.

In the following paragraphs, the former case will be taken as a starting point to examine which *topos* the Proculians and the Sabinians may have used to find an argument in support of their view.

4.1 The Proculian View

The debtor (D) may have asked the following question to the Proculians: ‘When a *servus communis* (S) stipulated something from me by order of one of his masters (A), but without mentioning his name in the *stipulatio*, for whom did he acquire?’ The Proculians maintained that it could be argued that S acquired proportionally for all his owners, as though no order had been given by any of them.

In their argumentation, the Proculians emphasised the difference between a *iussum* and a *nominatio*. They argued that the name of A was not mentioned in the question of the *stipulatio*
and that, therefore, an order by one of the masters differed from the addition of that master’s name.

The Proculians made use of the status doctrine to build up this argumentation. Since the interpretation of the words of the stipulatio had given rise to a conflict, one of the four status legales was pertinent. In this case, the Proculian made use of ratiocinatio, i.e., reasoning in terms of analogy or a reasoning a contrario. They stressed the difference between a iussum, on the one hand, and a nominatio, on the other. Whereas, in the latter case, the name of the master was explicitly mentioned in the question of the stipulatio, the order had been given by one of the masters in an informal way. The difference between the addition of one of the masters’ name, on the one hand, and his order, on the other, justified their distinct legal effect. When A ordered his servus communis (S) to stipulate something from D and S made a stipulatio without mentioning the name of A, then D was indebted to A and B in proportion to their shares in the common slave.

A reconstruction of the Proculian argumentation is as follows:

- Because a iussum is an order, given by one of the masters of a servus communis, and a nominatio is the explicit addition of that master’s name in the question of the stipulatio.
- A iussum by one of the masters of a servus communis is different from a nominatio.
- A ordered S to stipulate something from D and S made a stipulatio without mentioning the name of A.
- Therefore, S acquired proportionally for A and B.

4.2 The Sabinian View

A, who had ordered S to stipulate something from D, expected to acquire the entire claim. Instead, the debtor (D) performed to A only in proportion to his share in the slave. He wanted to claim the other part and, therefore, turned to the Sabinians: ‘When I have ordered S to stipulate something from D, he acquires only for me, isn’t it?’ The Sabinians confirmed that it

507 Regarding ratiocinatio, see Cic., De inv., 2.148-153.
could be argued that S acquired only for him, who gave the order, exactly as though the slave had made a *stipulatio*, naming him alone.

In their argumentation, the Sabinians underlined the similarity between a *iussum* and a *nominatio*.\(^{508}\) They had to admit that they differed as to the form, but argued that there was no intrinsic difference between them. Therefore, the Sabinians maintained that an order given by one of the masters to make a *stipulatio* should have the same legal effect as the addition of that master’s name in the question of the *stipulatio*. Obviously, the Sabinians used a reasoning by means of analogy (*ratiocinatio*) to support their opinion. This means that a *servus communis* (S), who stipulated something from D by order of A without mentioning A’s name, acquired only for A, so that D should have performed entirely to him.

A reconstruction of the Sabinian argumentation can now be made.

- Since there is no intrinsic difference between a *iussum* and a *nominatio*,
- a *servus communis* acquires exclusively for that master who has given an order to make a *stipulatio*, even if he did not mention that master’s name.
- A ordered S to stipulate something from D.
- Therefore, S acquired exclusively for A.

### 5. The Controversy Decided

As appears from the texts cited earlier, the Sabinian view had already become predominant in the classical period. In a constitution, dating from 530, Justinian decided that the Sabinian view prevailed. The relevant text is C. 4.27.2(3).2:\(^{509}\)

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Imp. Justinianus A Iuliano pp. Quod enim saepe apud antiquos dicebatur iussionem
domini non esse absimilem nominationi, tunc debet obtinere, cum servus iussus ab
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\(^{508}\) SCHULZ (1930), p. 236, as well admitted that the Sabinians made use of the similarity between a *iussum* and a *nominatio* to argue that the *servus communis* acquired exclusively for that master who had given the order: ‘Die Sabinianer stellten den iussus der nominatio gleich und ließen den Jubenten allein erwerben.’

\(^{509}\) About this constitution, see F. SCHULZ, Nachklassische Quaestionen in den justinianischen Reformgesetzen des Codex Justinianus, SZ 50 (1930), pp. 212-248, and K. SCHINDLER, Justinians Haltung zur Klassik, Köln-Graz 1966, pp. 329-332.
The Emperor Justinian to Iulianus, praefectus praetorio. What used to be said repeatedly by the ancients, that the order of a master does not differ from a nominatio, must apply then, when a slave is ordered by one of his masters to make a stipulatio and has done so without mentioning his name. Then indeed he acquires exclusively for him, who has given the order. If, however, he mentioned another of his masters, it is necessary that the acquisition is exclusively for him: for it is proper that the mentioning of the owner’s name is worth much more than his order. Given on the fifteenth of the Kalends of December, during the fifth Consulate of Lampadius and Orestes. [530]

According to Justinian, the statement of the antiqui that the order of a master did not differ from a nominatio ought to apply when a servus communis made a stipulatio by order of one of his masters without mentioning his name. In this case, the slave acquired exclusively for the owner, who had given the order. At the end of the text, Justinian mentioned a different case, which will not be discussed.510

Another text in the Institutiones of Justinian (Inst., 3.17.3) confirms that the Sabinian view prevailed:511

Servus communis stipulando unicuique dominorum pro portione dominii adquirit, nisi si unius eorum iussu aut nominatim cui eorum stipulatus est: tunc enim soli ei adquiritur. …

By making a stipulatio, a servus communis acquires for each of his masters in proportion to their ownership, unless he made a stipulatio by order of one of them or for one of them by name. In such case, there is acquired exclusively for him. …

510 About C. 4.27.2(3), pr-1, see SCHULZ (1930), p. 232.
The title of book 3.17 is ‘De stipulatione servorum’. In this text, Justinian briefly summed up the three different cases. The view adopted in this text is that of the Sabinians.

A third text, Inst., 3.28.3, explicitly referred to the controversy and confirmed that the Sabinian view prevailed:\textsuperscript{512}

Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut per traditionem accipiendo illi soli adquirit, veluti cum ita stipuletur: “Titio domino meo dare spondes?” Sed si unius domini iussu servus fuerit stipulatus, licet antea dubitabatur, tamen post nostram decisionem res expedita est, ut illi tantum adquirat, qui hoc ei facere iussit, ut supra dictum est.

It is certain that a \textit{servus communis} acquires for his masters in proportion to their shares, except that, when he stipulates or receives by \textit{traditio} for one of them by name, he acquires for him alone. For example, when he stipulates like this: ‘Do you promise to give to my master Titius?’ But if the slave made a \textit{stipulatio} by order of one of his owners, although formerly there were doubts, yet, after our decision, the matter is settled, so that he acquires exclusively for him, who ordered him to do so, as said above.

This text is found in book 3 of the \textit{Institutiones} under title 28 ‘Per quas personas nobis obligatio adquiritur’ or ‘The persons through whom we acquire an obligation’. Justinian opened by stating that formerly there was a dispute (‘licet antea dubitabatur’) about the question of whether a \textit{servus communis}, who made a \textit{stipulatio} by order of one of his masters without mentioning his name, acquired exclusively for that master or proportionally for all of his masters. The words ‘post nostram decisionem res expedita est’ suggest that Justinian put an end to the controversy. He may have already done so in his constitution of 530, i.e., C. 4.27.2(3).2.\textsuperscript{513} The final words in the text under consideration ‘ut supra dictum est’ refer to the

\textsuperscript{512} THOMAS (1975), pp. 252-253.
\textsuperscript{513} According to SCHULZ (1930), pp. 236-237, the controversy had already been settled definitely in the time of Ulpian and Paul: ‘Wenn Justinians Institutionen (3, 28, 3) so sprechen, wie wenn der Streit erst durch Justinian seine Entscheidung gefunden hätte, so will das nichts besagen. … In einer früheren Stelle, auf die unser § 3
text in the *Institutiones*, which is formerly mentioned, i.e., *Inst.*, 3.17.3. Probably, the controversy had already been decided in 530 in favour of the Sabinian view. The two texts in the *Institutiones* of Justinian refer back to that decision.
XVIII. DATIO IN SOLUTUM


Tollitur autem obligatio praecipue solutione eius, quod debeatur. Unde quaeritur, si quis consentiente creditore aliud pro alio solverit, utrum ipso iure liberetur, quod nostris praecceptoribus placet, an ipso iure maneat obligatus, sed adversus petentem exceptionem doli mali defendi debeat, quod diversae scholae auctoribus visum est.

Now, an obligation is discharged primarily by *solutio* of what is due. Hence the question whether someone, who has performed something else instead of what was due with the consent of the creditor, is released *ipso iure*, as our teachers have held, or whether he remains obligated *ipso iure*, but must be defended against the creditor suing him by means of an *exceptio doli mali*, as the authorities of the opposite school have thought.

The text is situated in the part on the law of obligations (Gai., 3.88-225) and, more precisely, at the beginning of the part where Gaius (3.168-181) discussed the modes of extinction of contractual obligations.

Gaius stated that an obligation was discharged by payment or performance of what was due: ‘Solutione eius, quod debeatur’.\textsuperscript{514} According to the general rule, the debtor had to perform exactly what he owed under the contract in order to discharge the obligation and to be released *ipso iure*. If, however, the debtor did not perform exactly what was agreed upon in the contract, but gave something else instead (*aliud pro alio*), the creditor could either refuse or accept the substituted performance. If the creditor refused, the performance was invalid.

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\textsuperscript{514} In the context of the law of obligations, the common meaning of the term *solutio* was ‘discharge of an obligation by performance’. From this, a new meaning derived: ‘performance’ or ‘payment’. Regarding the double meaning of the term *solutio*, see P.G.W. GLARE, *Oxford Latin Dictionary*, 8\textsuperscript{th} edn., Oxford 1982, p. 1789: ‘5. the discharge (of a debt), payment (of a sum owed)’ and NELSON-MANTHE (1999), p. 386. In ‘solutione eius, quod debeatur’ in Gai., 3.168, the word *solutio* has the second meaning of ‘performance’ or ‘payment’.
and the obligation was not discharged.\textsuperscript{515} If the creditor did accept the substituted performance, it was called a \textit{datio in solutum}.

As to the legal effects of such a \textit{datio in solutum}, the following question arose: ‘When a debtor performed something else instead of what he owed with the consent of the creditor, is he released \textit{ipso iure} or \textit{ope exceptionis}?’ This question gave rise to a controversy between the Sabinians and the Proculians.\textsuperscript{516} The Sabinians took the former view. They maintained that a debtor, who performed \textit{aliud pro alio} with the creditor’s consent, was released immediately and at civil law. If the creditor would as yet claim the original performance, the praetor should deny him the action.\textsuperscript{517} The Proculians, on the other hand, took the latter view. They maintained that the debtor remained obligated \textit{ipso iure}. However, if the creditor should appeal to the \textit{ius civile} and claim the original performance, the debtor had the possibility to bar the creditor’s action by means of an \textit{exceptio doli mali}.

\section{The Controversy in Gai., 3.168: Modern Theories}

Some Romanists have explained the school controversy in terms of conservative versus progressive. Whereas Steiner qualified the Sabinian view as traditional and the Proculian view as progressive,\textsuperscript{518} Falchi explained the relation between the schools the other way around.\textsuperscript{519}

\begin{thebibliography}{99}
\bibitem{515} Paul, D. 12.1.2.1.
\bibitem{517} The \textit{Epitome} of Gaius does not mention the controversy, but only takes into consideration the Sabinian opinion. The relevant text is Gai., \textit{Ep.}, 2.10.
\bibitem{518} STEINER (1914), pp. 45-47, 142-144.
\end{thebibliography}
First, Steiner’s theory will be discussed. In his view, *solutio* originally included *dato in solutum*, for both Ulpian (D. 42.1.4.7) and Paul (D. 46.3.54; D. 50.16.47) included the substituted performance into their definition of *solutio* and *solvere*. When, in ancient Rome, a debtor had given something else than money by way of performance and had done so with the creditor’s consent, he was released *ipso iure*. In the course of time, the meaning of the term *solutio* changed. Henceforth, the term only referred to the exact performance of what was due under the contract and no longer to a substituted performance as well. As a consequence, the *dato in solutum* became an institution that was independent and different from the *solutio*. At this point, it became possible to raise objections against the *ipso iure* effect of a *dato in solutum*, for, in spite of the substituted performance, the original debt had not been paid. According to Steiner, in the time of Gaius, a controversy arose between the Sabinians and the Proculians regarding this issue.\(^{520}\) The Sabinians, on the one hand, adhered to the ancient view that the debtor was released *ipso iure* by a substituted performance. The Proculians, on the other, stated that a substituted performance could not discharge the obligation. However, they wanted that an *exceptio doli mali* was granted to the debtor to bar an action of the creditor.

For several reasons, Steiner’s theory is unconvincing. He referred to the definition of the term *solvere* by Ulpian and Paul in order to demonstrate that, in ancient Rome, a *dato in solutum* was a species of *solutio*. However, Ulpian and Paul lived in the 2\(^{nd}\) and 3\(^{rd}\) centuries AD. Therefore, their definition of the term *solvere* does not provide any relevant information about its definition in ancient Rome. What is more, Ulpian and Paul did not explicitly mention the *dato in solutum* in the texts cited. Steiner also assumed that the controversy arose in the time of Gaius, but he adduced no argument in support of his view. In the sources, there is no support for this statement either. In 3.168, Gaius referred to the Sabinians by the words ‘nostri praeceptores’ and to the Proculians by the words ‘diversae scholae auctoribus’. However, these expressions do not necessarily suggest that the controversy arose in the time of Gaius, i.e., at the end of the 2\(^{nd}\) century AD. The same expressions were used in Gai., 3.141, but Paul (D. 18.1.1.1) learns us that the controversy about the nature of the price in a contract of sale had already arisen in the 1\(^{st}\) century AD, for he ascribed the opinion of the authorities of the Sabinian school to ‘Sabinus et Cassius’ and that of the Proculian school to ‘Nerva et Proculus’.


\(^{520}\) STEINER (1914), p. 142.
According to Falchi, the Proculian view was traditional and the Sabinian view progressive. The Proculian orientation was rather rigid: a substituted performance did not discharge the obligation. Furthermore, the Proculians were ‘fedeli alla tradizionale struttura degli istituti’. Nonetheless, they wanted to avoid that a creditor could claim the original performance even though the debtor had already performed *aliud pro alio*. Therefore, the Proculians came to an equitable view that, if the creditor claimed the original performance, an *exceptio doli mali* had to be conceded to the debtor. According to Falchi, the progressive Sabinians, on the other hand, attached great importance to the intention of the contracting parties. The debtor and the creditor wanted the obligation to be discharged by means of a substituted performance. Therefore, the Sabinians held that a debtor, who performed *aliud pro alio*, was released *ipso iure*.

Apparently, Falchi used the *status of verba* and *voluntas* to explain the controversy. However, this antithesis does not explain this controversy, because, in the end, both the Sabinians and the Proculians aspired at the same result: the protection of the debtor and the rejection of the creditor’s claim.

Melillo explained the controversy in terms of conservative versus progressive as well, but he tried to demonstrate that the controversy had a more profound foundation as well, namely, a political one. The progressive Sabinians maintained that a debtor was released *ipso iure* by means of a substituted performance, because the creditor had given his consent. The conservative and formalistic Proculians, on the other hand, denied that the debtor was released *ipso iure* in case of a *datio in solutum*, for he had not respected the terms of the obligation. According to Melillo, the relationship between the *ius civile* and the *ius honorarium* was the key to find a less narrow interpretation of the controversy. Melillo cited a text, in which Ulpian (D. 50.16.19) referred to Labeo’s definition of *contractus*. A contract fell under the *ius civile* and gave rise to an *obligatio civilis* that could be enforced by an *actio*. Against the contract, Labeo set the *conventio*. The characteristic legal remedy for a *conventio* was an *exceptio* to be granted by the praetor. The Proculians applied this interpretation of Labeo to the case of a *datio in solutum*. Since a contract made part of the *ius civile* and a debtor, who

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performed *aliud pro alio*, did not observe the rules of the *ius civile*, the Proculians refused to release him *ipso iure*. Instead, they took the view that a praetorian *exceptio doli mali* had to be granted to him to bar an action of the creditor. In this way, the Proculians wanted to privilege the *ius praetorium*, because of its roots in the most profound structures of the Republic.

Melillo’s theory is not convincing either. According to Melillo, the Sabinians took the view that a debtor, who had performed something else instead of what he owed, was released *ipso iure*, because the creditor had given his consent. According to Gaius, however, the creditor’s consent is a condition for the *datio in solutum* to be valid and not an argument in support of the Sabinian view. A more fundamental point of criticism is the following. The controversy involved a *datio in solutum*, which may bring about the extinction of a contractual obligation. A contract or a *conventio*, on the other hand, served to create an obligation. Therefore, the comparison, made by Melillo, does not make sense. Melillo mainly focussed on the Proculian view and its explanation, but neglected the Sabinian view.

Finally, there is one author who does not explain the controversy in terms of conservative versus progressive. According to Stein, the controversy in Gai., 3.168 was due to a different view on methodology between the two schools: whereas the Proculians were analogists, the Sabinians were anomalists. In his view, ‘the Proculians consistently held that an *obligatio* had certain determinate features: it could be created and dissolved in certain ways recognised by the law; and people who entered into obligations had to accommodate themselves to these characteristics and could not alter them to suit themselves.’ In case of a substituted performance, the contracting parties had not respected these features: ‘The obligation was not dissolved, for performance can only extinguish an obligation if it is performance of what is due’. Therefore, the Proculians decided that the debtor was not released *ipso iure*, but only *ope exceptionis*. The Sabinians, on the other hand, decided that the debtor was released *ipso iure*, ‘no doubt on the practical ground that if the creditor voluntarily accepted a substituted performance, he had nothing left to claim from the debtor.’

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525 MELILLO (1970), pp. 81-82.
CHAPTER XVIII

Stein regards the Proculians as analogists, but, in the case of *datio in solutum*, the method of analogy seems to have been used by the Sabinians to justify their decision. In their view, a *datio in solutum* with the consent of the creditor had the same legal effect as a regular *solutio*, i.e., the discharge of the obligation and the *ipso iure* release of the debtor. The Proculians, on the other hand, have underlined the difference between a *datio in solutum* and a regular *solutio*.

3. The Controversy in Gai., 3.168: Karlowa and Kretschmar

Another theory has been elaborated by Karlowa and Kretschmar. They did not try to explain the controversy between the Sabinians and the Proculians. Instead, they made a connection between the school controversy, on the one hand, and the two different options, mentioned in the sources, for a creditor who had been evicted from the *res in solutum data*.

The debtor gave another object instead of the one owed and the creditor was subsequently evicted by a third party. Then, it was relevant for the creditor to know whether he could still sue the debtor on the basis of the original obligation or whether he would have to find some other way to claim his damages. According to Marcian (D. 46.3.46.*pr*), the former solution was pertinent:

**MARCIANUS libro tertio regularum.** Si quis aliam rem pro alia volenti solverit et evicta fuerit res, manet pristina obligatio. Etsi pro parte fuerit evicta, tamen pro solido obligatio durat: nam non accepisset re integra creditor, nisi pro solido eius fieret.

**MARCIAN, book 3, Rules.** If someone performed one thing instead of another to a willing creditor and if the thing was evicted, the original obligation remains in existence. Even if it was evicted partially, the obligation stands in its entirety, for the creditor would not have accepted the thing as a whole if it did not became his in its entirety.

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529 Karlowa (1901), pp. 1380-1383; Kretschmar (1906), pp. 50-58.
530 See also C. 7.45.8.
If the thing given by the debtor by way of substituted performance was lost through eviction, Marcian took the view that the original obligation remained in existence (‘manet pristina obligatio’). Presumably, the creditor could bring his claim against the debtor in court. According to Karlowa and Kretschmar, the jurist Marcian seems to follow the Proculian way of reasoning. Since the Proculians maintained that a debtor, who performed something else instead of what was due, was not liberated *ipso iure*, they may also have taken the view that the creditor, who was evicted, could sue upon the original obligation. In this case, the debtor obviously could not bar the creditor’s action by means of an *exceptio doli mali*.

However, Ulpian suggested another solution when the *res in solutum data* was evicted. The relevant text is Ulp., D. 13.7.24.

Eleganter apud me quaesitum est, si impetrasset creditor a Caesare, ut pignus possideret idque evictum esset an habeat contrarium pigneraticiam. Et videtur finita esse pignoris obligatio et a contractu recessum. Immo utilis ex empto accommodata est, quemadmodum si pro soluto ei res data fuerit, ut in quantitatem debiti ei satisfiat vel in quantum eius intersit, et compensationem habere potest creditor, si forte pigneraticia vel ex alia causa cum eo agetur.

This question was elegantly put to me. If a creditor had effected from Caesar that he would possess a pledge and then was evicted from it, does he have the *actio pigneraticia contraria*? The pledge obligation is considered to have been extinguished and withdrawn from the contract. Instead, an *actio utilis ex empto* is adapted to this case, as for the case in which a thing has been given to him by way of substituted performance, so that the action satisfies him up to the amount of the debt or his damages. The creditor can also have a compensation, if for instance there is brought an *actio pigneraticia* or an action on some other cause against him.

In this text, Ulpian decided that a creditor, who acquired a pledge or a *res in solutum data*, and subsequently was evicted from it, could not sue the debtor on the basis of the original contract. Instead, the evicted creditor had an *actio utilis ex empto*. This means that, in case of eviction, the *datio in solutum* was regarded as a kind of sale: the creditor was treated as

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531 See also C. 8.44(45).4.
though he had bought the res in solutum data and was then evicted. Karlowa and Kretschmar stated that Ulpian followed the Sabinian way of reasoning. Since the Sabinians maintained that a datio in solutum discharged the obligation ipso iure, they may also have taken the view that the evicted creditor could not sue upon the original obligation, but had to take recourse to an actio utilis exempto.

In modern literature, different attempts have been made to reconcile the antinomy between these two options for a creditor who had been evicted from the res in solutum data, but an overview of these attempts would lead us too far. Only the attempt of Karlowa and Kretschmar has been discussed, for they made a connection between these two options and the school controversy.

Against Karlowa and Kretschmar, both Solazzi and Astuti have argued that no such connection existed. Although their view seems correct, their arguments are faulty. They bring to mind that the Sabinians attributed to a datio in solutum the same legal effects as to a solutio, i.e., the ipso iure release of a debtor. From this follows that also an eviction of a res in solutum data had to bring about the same legal effect as an eviction in case of a regular solutio. Since an eviction invalidated the payment (or solutio), letting subsist the obligation, the same effect was expected in case of a datio in solutum. According to Solazzi and Astuti, the Sabinians thus maintained that, in case a res in solutum data was lost through eviction, the datio in solutum became invalid and the original obligation subsisted. This outcome is at odds with the Sabinian point of view, taken in Gai., 3.168, that the debtor who performed aliud pro alio was released ipso iure. Therefore, there is no connection between the Sabinian view in Gai., 3.168, on the one hand, and the option of the evicted creditor to bring an actio utilis exempto against the debtor, on the other. However, this remark of Solazzi and Astuti is incorrect, for an eviction did not invalidate the payment or solutio. On the contrary, the performance of the debtor endured, discharging the obligation, but the creditor lost it to a third party.

Solazzi and Astuti also pointed out that both the Sabinians and the Proculians used the expression dare in solutum and that dare meant ‘to transfer ownership’. If, therefore, the

532 For an extended bibliography, see MUSUMECI (1969), pp. 526-527, n. 9.
creditor had not acquired the *res in solutum data*, but was evicted, both the Sabinians and the Proculians had to agree that no *datio (in solutum)* had taken place. In this case, the debtor was not released (neither *ipso iure*, nor *ope exceptionem*). However, this remark does not sustain either, for ‘dare’ does not necessarily mean ‘to transfer ownership’; it could also mean ‘to give’. 534

Indeed, there is no connection with the controversy, contrary to what Karlowa and Kretschmar suggested, but for different reasons than Solazzi and Astuti forwarded. The case of eviction is different from that underlying the school controversy: the creditor’s position is fundamentally different. If the creditor was evicted, his intention to bring an action against the debtor was reasonable and justified. In this case, the following legal question arose: ‘In what way could the evicted creditor sue the debtor who had performed with his consent something else instead of what he owed?’ The legal question at the root of the school controversy, on the other hand, was as follows: ‘In what way is a debtor who performed *aliud pro alio* with the consent of the creditor released: *ipso iure* or *ope exceptionis*?’ If, in this case, the creditor wanted to claim as yet the original obligation, his position was not reasonable and the praetor would either deny him the action or grant the debtor an *exceptio doli mali*. The error of Karlowa and Kretschmar may have been caused by their too dogmatic way of thinking and their zeal to create one system for two distinct cases.

4. The *Locus a Similitudine* and the *Locus a Differentia* in Gai., 3.168

As stated above, the following legal problem gave rise to a controversy between the Sabinians and the Proculians. If a debtor made a different performance than the one initially agreed upon, with the consent of the creditor, the question arose whether he was released *ipso iure* or *ope exceptionis*. According to the Sabinians, the debtor was released immediately and at civil law. The Proculians, on the other hand, maintained that the debtor remained obligated *ipso iure*, but was released *ope exceptionis*. In practice, however, both the Sabinian and the Proculian opinion brought about the same result. The creditor’s intention to claim as yet the

original obligation would be hindered in one way or another. Whereas the Sabinians maintained that the praetor should deny an action to the creditor, for the debtor had been released *ipso iure*, the Proculians stated that the debtor had the possibility to bar the creditor’s action by means of an *exceptio doli mali*. Therefore, it may be assumed that the legal problem underlying the controversy in Gai., 3.168 involved a mere theoretical problem instead of a practical one.

The theoretical problem may also be formulated as follows: ‘What kind of legal effect does a *datio in solutum* bring about?’ or, in more general terms, ‘What is a *datio in solutum*?’ In other words, the central question of the conflict involved a matter of *definitio*. In this part, it will be argued that the Sabinians and the Proculians made use of *topoi* to form their opinion on the matter and to construct a pertinent definition. First, the Sabinian opinion will be discussed and then the Proculian one.

### 4.1 The Sabinian View

The Sabinians may have given the following definition of a *datio in solutum*: ‘A *datio in solutum* is the payment or performance by the debtor of something else than what is due under the contract with the consent of the creditor, so that the obligation is discharged and the debtor is released *ipso iure*.’ Whenever the central question of a conflict involves a matter of definition, the theory of *topica* advances *topoi* that may be useful to build up pertinent arguments. According to Cicero (*Top.*, 23.87-88), the following eight *topoi* were particularly suitable for a matter of *definitio*: the *locus a definitione*, *a similitudine*, *a differentia*, *a consequentibus*, *a repugnantibus*, *a causis*, and *ab effectis*.

The Sabinians arrived at their definition of *datio in solutum* by using an argumentation *a similitudine*.535 They emphasised the similarity between a *datio in solutum* and a regular *solutio*. In both cases, the position and interests of the creditor were well protected: he received a performance from the debtor. In case of *solutio*, the creditor received the exact performance of what was agreed upon in the contract and, in the case of *datio in solutum*, he

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535 About this *topos*, see Cic., *Top.*, 3.15; 10.41-45.
accepted a substituted performance. Since a regular \textit{solutio} brought about the obligation’s extinction and the debtor’s immediate release, the Sabinians maintained that a \textit{datio in solutum} should have the same legal effects.

Although modern scholars, including Baviera, Musumeci, and Nardi, acknowledged that the Sabinians based their view upon the similarity between a \textit{datio in solutum} and a \textit{solutio}, they fail to admit the influence of \textit{topoi} on legal argumentations, in general, and of the \textit{locus a similitudine} on this Sabinian argumentation, in particular.\textsuperscript{536}

The Sabinian argument may be reconstructed as follows:

- Both in case of a \textit{solutio} and of a \textit{datio in solutum}, respectively, the creditor receives a performance from the debtor either of what was due (under the contract) or of something else instead with his consent.
- Since a \textit{solutio} brought about the extinction of the obligation and the immediate release of the debtor, a \textit{datio in solutum} should have the same legal effects.
- A debtor performed something else instead of what he owed under the contract and did so with the consent of the creditor.
- Therefore, the debtor was released \textit{ipso iure}.

\section{4.2 The Proculian View}

The Proculians, on the other hand, gave another definition of the term \textit{datio in solutum}: ‘A \textit{datio in solutum} is the payment or performance by the debtor of something else than what is due under the contract with the consent of the creditor, so that the debtor is released \textit{ope exceptionis}.’ The Proculians made use of the \textit{locus a differentia} to underline the difference between a \textit{datio in solutum}, and a regular \textit{solutio}.\textsuperscript{537} In case of a \textit{datio in solutum}, the debtor performed something else instead of what he owed under the contract. Although the debtor did so with the creditor’s consent, such a performance was different from a \textit{solutio}. In case of a regular \textit{solutio}, the debtor performed exactly what he owed under the contract. Because of this difference, a \textit{datio in solutum} should not have the same legal effects as a regular \textit{solutio}.


\textsuperscript{537} Regarding the \textit{locus a differentia}, see Cic., \textit{Top.}, 3.16; 11.46.
CHAPTER XVIII

The Proculian maintained that a *datio in solutum* did not discharge the obligation and did not release the debtor *ipso iure*, but *ope exceptionis*. If, therefore, the creditor should appeal to the *ius civile* and claim the original performance, the debtor had the possibility to bar the creditor’s action by means of an *exceptio doli mali*.

Some Romanists, such as Nardi, Nelson, and Manthe, did acknowledge that the Proculians based their decision upon the difference between a *datio in solutum* and a regular *solutio*. However, they did not acknowledge that the Proculian argument may have been taken under the influence of the *locus a differentia*.

The Proculian argumentation can now be reconstructed.

- Although a debtor, who performed something else instead of what he owed under the contract, did so with the consent of the creditor, such a *datio in solutum* differed from a regular *solutio*.
- Therefore, a *datio in solutum* should not have the same legal effects as a *solutio*.
- A debtor performed something else instead of what he owed under the contract and did so with the consent of the creditor.
- Therefore, the debtor was not released *ipso iure*, but *ope exceptionis*.

5. The Controversy Decided

As appears from some texts in the Digest, the Sabinian opinion may have already been predominant in the classical period. In the time of Diocletian and, more precisely, in 293 AD, the Sabinian view seems to have been enacted as law. The relevant text is C. 8.42(43).17:

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539 Ulp., D. 12.6.26.4: ‘Licet enim placuit rem pro pecunia solutum parere liberationem.’ (‘For though it is decided that a thing instead of money does discharge’); Ulp., D. 13.5.1.5: ‘Sed cum iam placet rem pro re solvi posse.’ (‘Since it is already decided that one thing can be given for another’); Paul, D. 23.3.25: ‘Secundum id quod placuit rem pro re solvi posse et liberationem contingit.’ (‘According to the established rule that one thing can be given for another and effects a release’).
The Emperors Diocletian and Maximian to Cassius. It is a clear rule of law that an established obligation is discharged when someone else performs for the debtor as well as when thing are given instead of money with the consent of the creditor. On the Kalends of December, ordered at Sirmium, during the consulate of the emperors, [293]

As appears from *Inst.*, 3.29.*pr*, the Sabinian view had certainly gained the upper hand by Justinian’s time:540

Now any obligation is discharged by *solutio* of what is due or if someone, with the consent of the creditor, performed something else instead of what was due. Nor does it make any difference who performs, whether the debtor himself or another for him. For he is released even when another performs, whether he is cognisant or ignorant or whether the performance is made without his consent. Likewise, if a principal debtor has performed, also his guarantors are liberated.541 The same holds good the other way around if a guarantor performed: not only he himself is liberated, but also the principal debtor.

Unlike Gaius (3.168), Justinian added the word *omnis* before *obligatio* in the first sentence. Whereas Gaius restricted himself in Gai., 3.168-181 to the extinction of contractual

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541 THOMAS (1975), p. 254 has omitted the translation of the sentence: *‘Item si reus solverit, etiam ii qui pro eo intervenerunt, liberantur’*. 
obligations, Justinian seems to have regarded the modes of extinction applicable to contractual obligations as well as to delictual and quasi-delictual obligations.

We may conclude that the sources implicitly followed the Sabinian view. Moreover, the legal question that is asked in Gai., 3.168 did not return in the other sources. They only stated that an obligation was discharged when a debtor performed *aliud pro alio* with the creditor’s consent. The case that a creditor as yet wanted to claim the original obligation did not recur.
XIX. **NOVATIO**

1. **Gai., 3.177-178: Text and Controversy**

   177. Sed si eadem persona sit, a qua postea stipuler, ita demum novatio fit, si quid in posteriore stipulatione novi sit. Forte si condicio vel sponsor aut dies adiciatur aut detrahatur. 178. Sed quod de sponsore diximus, non constat: nam diversae scholae auctoribus placuit nihil ad novationem proficere sponsoris adiectionem aut detracionem.

   177. But if the person, from whom I stipulate later, is the same, there is novatio only if there is a new element in the later stipulatio. For instance, if a condition, or a sponsor, or a date is added or removed. 178. But what we have said about the sponsor is not settled: for the authorities of the other school have taken the view that the addition or removal of a sponsor does not produce a novatio.

These texts are situated in the part on the law of obligations in Gaius’ *Institutiones* and, more specifically, in the part where Gaius (3.176-179) discussed the discharge of obligations by novatio.

Novatio is the transformation of an earlier obligation into a new obligation created by stipulatio, so that the previous obligation is discharged ipso iure and is substituted by the

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544 Sometimes by a dotis dictio (see Ven., D. 46.2.31.1) or by nomina transscripticia (see Chapter 13).
new one. In order to make a valid novatio, the new obligation had to contain a new element, called a novum (Gai., 3.177: ‘Si quid in posteriore stipulatione novi sit’). This requirement was fulfilled if either the debtor or the creditor had been replaced. If the new stipulatio was concluded between the same contracting parties, Gaius suggested that the addition or removal of a condicio, a sponsor, or a dies led to novatio. The Proculians (‘diversae scholae auctoribus’), however, did not regard the addition or removal of a sponsor as a novum. In 3.179, Gaius dealt with the consequences of adding or removing a condition. About the addition or removal of a dies, he did not give any further information.

The school controversy, mentioned by Gaius, concerned the addition or removal of a sponsor. A sponsor is a surety who would become liable when the principal debtor failed to perform his debt to the creditor. Normally, the principal agreement was followed immediately by a stipulatio for idem from the additional debtor (i.e., from the sponsor) in the following words: ‘Idem dari spondes?’ A sponsio could only guarantee a principal obligation, which itself had been created by a stipulatio. If the principal obligation had been created in another way, a novatio had to take place first in order to convert it into an obligation by stipulatio. Only then could the sponsio follow.

As appears from Gai., 3.177-178, the following legal question gave rise to a school controversy: ‘Does the addition or removal of a sponsor to an earlier obligation produce a novatio?’ Whereas the Sabinians maintained that the addition or removal of a sponsor was a novum and that, therefore, a novatio was brought about, the Proculians thought that was not.

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545 Gaius (3.176) has given the following description of novatio: ‘Nam interventu novae personae nova nascitur obligatio et prima tollitur, translata in posteriorem.’ (‘For by the intervention of a new person a new obligation arises and the former is discharged, being transformed into the later one’). Ulpian (D. 46.2.1.pr) gave a more elaborated definition: ‘Novatio est prioris debiti in aliam obligationem ... transfusio atque translatio, hoc est cum ex praecedenti causa ita nova constituatur, ut prior perematur.’ (‘Novatio is the transformation and transferring of a previous debt into another obligation. This is when, from the preceding cause, a new obligation is so constituted that the previous is extinguished’).

546 See also Inst., 3.29.3: ‘Sed si eadem persona sit a qua postea stipuleris, ita demum novatio fit, si quid in posteriore stipulatione novi sit, forte si condicio aut dies aut fideiussor adiciatur aut detrahatur.’ (‘But if the person from whom you stipulate later, is the same, there is novatio only if there is a new element in the later stipulatio, for example if a condition, or a dies, or a fideiussor is added or removed’).

547 Gai., 3.116.

548 Gai., 3.119.

2. The Legal Problem: Modern Theories

In modern literature, De Martino, Frezza, and Apathy have attempted to reconstruct the legal problem at the root of the controversy in different ways. Their reconstructions will be briefly discussed and critically assessed.\(^{550}\)

According to De Martino and Frezza, both the Sabinians and the Proculians maintained that a *sponsio* immediately had to follow the principal *stipulatio*. In case of a *sponsio*, an *unitas actus* was a necessity. If, therefore, the *sponsio* was to be concluded at a later stage, the two schools required that the principal *stipulatio* was reiterated. The legal problem then concerned the effect of the addition of a *sponsor*. According to the Sabinians, the addition (or removal) of a *sponsor* was a *novum*, so that the principal *stipulatio* was discharged. The Proculians, on the other hand, maintained that the addition (or removal) of a *sponsor* did not effect a *novatio* and that the reiterated *stipulatio* was *inutilis*. De Martino adds that the reiterated *stipulatio* was void, because of the principle that two ‘*obligationes de eadem re esse non possunt*’ (Pomp., D. 45.1.18).\(^{551}\)

Against this theory some points of criticism may be raised. First, the view of De Martino and Frezza that, in case of a *sponsio*, an *unitas actus* was required and that, therefore, the *sponsio* had to follow the principal *stipulatio* immediately does not find any support in the sources. Indeed, the formula of a *sponsio*, ‘*Idem dari spondes*?’, suggests that a *sponsio* used to follow the principal *stipulatio* immediately, but does not demonstrate that it was a necessity. Another point of criticism is that neither De Martino nor Frezza explained how the controversy could arise if the *sponsor* was not added, but removed.

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DE MARTINO (1940), p. 43.
Apathy as well discussed the legal problem at the root of the controversy. The Sabinians maintained that the addition or removal of a sponsor was a novum (Gai., 3.177). If, therefore, the sponsio did not immediately follow the principal stipulatio, a novatio of the original debt was brought about. In order to avoid this detrimental consequence, it was either necessary to observe the requirement of the unitas actus or to reiterate the principal stipulatio before the sponsio. The Proculians, on the other hand, did not regard the addition or removal of a sponsor as a novum (Gai., 3.178). Hence, in their view, a sponsio could be separated from the principal stipulatio without the necessity of reiterating the main legal act.

Apathy merely discussed the consequences of the Sabinian and the Proculian point of view, but failed to explain why the legal question whether or not the addition or removal of a sponsor was a novum had arisen.

3. The Legal Problem

The controversy may have arisen in the following way. Both a novatio and a sponsio were brought about by way of a stipulatio. Nonetheless, these stipulationes had distinguishing features. First, they were both concluded at different points in time. A stipulatio for the purpose of novatio did not immediately follow the creation of the original obligation, so that there was a time interval between both legal acts. A sponsio, on the other hand, normally followed immediately the stipulatio that had to be secured. As a consequence, both kinds of stipulationes had distinct formulae. Whereas the standard formula of a stipulatio that served to replace a debtor by novatio was ‘Quod mihi Seius debet, dare spondes?’, the question in a sponsio was: ‘Idem dari spondes?’ Finally, there was yet another distinguishing feature between a novatio and a sponsio. In order to make a sponsio, the principal obligation needed to have been created by a stipulatio. In case of a novatio, on the other hand, this was not necessary.

552 Ulp., D. 45.1.75.6.
554 APATHY (1971), pp. 399-401, also described the distinguishing features between a stipulatio for the purpose of novatio and a sponsio. However, he failed to subscribe this final distinction between a novatio and a sponsio.
However, the distinction between a *stipulatio* that served to replace a debtor by *novatio*, on the one hand, and a *sponsio*, on the other, became blurred, when the creditor wanted to appoint a *sponsor* at a later stage. As a consequence, the principal *stipulatio* and the *sponsio* were separated in time. Accordingly, the standard formula of the *sponsio* had to be changed, for the word *idem* did no longer suffice to define the debt. In all probability, its formula became similar or maybe even identical to that of a *stipulatio* that served to replace a debtor by *novatio*. Thus, the interpretation of the formula of a subsequently concluded *sponsio* could give rise to intricate problems. The Sabinians maintained that such a *sponsio* brought about a *novatio*, so that the *sponsor* was not an additional, but a new and principal debtor. The Proculians, on the other hand, took the view that it did not cause a *novatio* and that the *sponsor* was only an additional debtor.

This interpretation of the Proculian view is reflected in a text of Ulpian (D. 46.2.6.):

> **ULPIANUS libro quadragensimo sexto ad Sabinum.** Si ita fuero stipulatus: ‘quanto minus a Titio debitore exegissem, tantum fideiubes?’, non fit novatio, quia non hoc agitur, ut novetur.

> **ULPIAN, book 46 ad Sabinum.** If I will have stipulated as follows: ‘Do you promise to give as much as I do not obtain from my debtor Titius?’, this is not *novatio*, because there is no intention of *novatio*.

This text is situated in book 46.2 under the title ‘De novationibus et delegationibus’. Ulpian described the following case. A creditor wanted to add a surety to an earlier obligation. For this purpose, he used the following formula: ‘Quanto minus a Titio debitore exegissem, tantum fideiubes?’ In all probability, the term ‘fideiubes’ was interpolated. In the original text, Ulpian may have used the term ‘spondes’, for the surety was appointed by way of a

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555 APATHY (1971), pp. 427-428, attempted to reconstruct the formula of a subsequently concluded *sponsio* as follows: ‘Quod Seius mihi debet dare spondes?’ See also the reconstruction of ZIMMERMANN (1990), p. 119: ‘Quod Seius mihi dare spondit dari spondes?’ or ‘Decem, quae Seius mihi debet, dari spodnes?’ and of NELSON-MANTHE (1999), p. 421: ‘Quod Seius mihi debet, tu mihi dari spondes?’

556 In the same vein, FREZZA (1966), pp. 22-32; ZIMMERMANN (1990), p. 119; and NELSON-MANTHE (1999), pp. 422-423, 427-428. These modern scholars have already underlined the similarity and possible confusion between the formula of a *stipulatio*, that served to replace a debtor by *novatio*, on the one hand, and that of a *sponsio*, concluded at a later stage, on the other.

557 This interpretation has already been suggested by NELSON-MANTHE (1999), pp. 422-423, 427-428.
stipulatio. According to Ulpian, the addition of a sponsor at a later stage did not bring about a novatio. He even added an argument in support of this view: the animus novandi was lacking. It is noteworthy that this text was included in Ulpian’s commentary ad Sabinum. Apparently, he distanced himself from the Sabinian view and followed the Proculian view in this matter.

4. The Controversy in Gai., 3.177-178: Modern Theories

Both Levy and Falchi have explained the controversy in terms of conservative versus progressive. Levy qualified the view in Gai., 3.177 as traditional and the view in Gai., 3.178 as innovative. Falchi, on the other hand, maintained that the Proculian view was traditional and the Sabinian progressive.

Levy stated that, in Roman law, the sponsio immediately had to follow the principal stipulatio: an unitas actus was a necessity. When a sponio did not immediately follow the principal stipulatio, but was concluded at a later stage, the former obligation was discharged by means of novatio and the sponsor became the only debtor. In support of the view that a sponsor was a novum, he referred to Gai., 3.177. In order to avoid this “novatory” effect, the principal stipulatio needed to be repeated once more before the sponsor was added. In the time of Gaius, the simultaneous binding of the main debtor and the sponsor was still a necessity. According to Levy, the law gradually receded upon the necessity of an unitas actus and allowed that the sponsio did not immediately follow the principal stipulatio: see Gai., 3.178. Hence, a sponsio could be made without the repetition of the principal promise. If a sponsor was appointed at a later stage, it did not bring about a novatio.

Against Levy’s theory, four observations can be made. 1) Levy juxtaposed Gai., 3.177 and Gai., 3.178. Whereas, in the former text, Gaius discussed the ancient necessity of the unitas actus still valid in his day, he introduced the innovative Proculian view to abandon this necessity in the latter text. Indeed, Gaius juxtaposed two opinions in Gai., 3.177 and Gai., 3.178, but he did not state anywhere that the former was traditional and the latter innovative. 2) In support of his view that, originally, a sponsio had to follow the principal stipulatio

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immediately, Levy referred to Gai., 3.177. However, Gaius did not mention the necessity of an unitas actus in this text. He merely stated that there was novatio only if there was a new element in the later stipulatio, for instance, a condition, a sponsor, or a date. 3) Levy ascribed the opinion in Gai., 3.177 to Gaius alone, without even mentioning the possibility that it could also be ascribed to the Sabinians. However, the words ‘diversae scholae auctoribus’ in Gai., 3.178 seem to suggest that the opinion in Gai., 3.177 was that of the Sabinians. 4) The final observation is that the controversy did not regard the question whether or not the unitas actus was still a necessity, but whether or not the addition or removal of a sponsor was a novum. 559

Falchi closely followed Biscardi in maintaining that there was some kind of connection between several subsequent texts in Gaius’ Institutiones, namely, Gai., 3.177; 3.178; 3.179; and 3.180. 560 According to Gaius (3.180), the veteres maintained that, by the effect of a litis contestatio, the obligation (dare oportere) was discharged ipso iure and replaced by a new obligation (condemnari oportere). Next, Falchi (following Biscardi) confronted this conception of the litis contestatio with that of novatio, as described in Gai., 3.179. According to this text, the classical jurists maintained that a novatio was brought about only if the second obligation was valid and efficient. The veteres and Servius Sulpicius Rufus, on the other hand, maintained that a novatio was effected immediately (statim), even if the second obligation was invalid (e.g., because the condition failed). According to Falchi, Servius Sulpicius Rufus kept the first and the second obligation strictly separate. The first obligation was discharged immediately because of the parties’ intention to effect a novatio. The second, on the other hand, did not hold in spite of the parties’ intention, because the condition failed. Afterwards, Servius’ opinion was overruled by that of the classical jurists. In their view, the connection between the first and the second obligation was much closer. The former obligation was only discharged as soon as it had become certain that the second obligation could hold in accordance with the parties’ intention. According to Falchi, the Proculian view was consistent with the way of thinking of the veteres and of Servius Sulpicius Rufus. By adding a sponsor, the contracting parties certainly did not intend to discharge the first obligation. On the contrary, both parties wanted to preserve the first obligation and reconfirm its connection with the second obligation. Since the intention to create a novatio was lacking, the Proculians decided that the principal obligation was not discharged and that the addition

559 These criticisms have already been uttered by DE MARTINO (1940), p. 42, and APATHY (1971), p. 402.
560 A. BISCARDI, Lezioni sul processo romano antico e classico, Torino 1968, pp. 252-268.
of a sponsor did not result in a novatio.\textsuperscript{561} The Sabinians, on the other hand, showed themselves to be autonomous with regard to the traditional legal configuration of novatio. They wanted to secure the intention of the contracting parties.

Falchi’s theory does not convince either. Six points of criticism may be raised against his theory. First, there is no demonstrable connection between Gai., 3.177; 3.178; 3.179; and 3.180. These texts all discuss different legal issues. Second, Falchi did not respect the order of the texts, as applied by Gaius. If the Proculian way of reasoning is revealed in Gai., 3.179 and Gai., 3.180, the question needs to be raised why Gaius did not discuss these issues prior to the controversy. A third point of criticism can be raised against Falchi’s theory. In Gai., 3.179, Gaius had discussed the legal consequences of the addition of a condition to an earlier obligation. Falchi has extended the opinion of Servius Sulpicius Rufus on this matter to any kind of stipulatio for the purpose of novatio. Fourth, it is not in the least certain that Servius Sulpicius Rufus held on to the tradition of the veteres. Since that jurist lived in the late Republic, Falchi presumed that he followed the way of thinking of the veteres. Since it is unknown what view prevailed in the days of Servius Sulpicius Rufus, he may have been a dissident jurist as well. Fifth, Falchi stated that the Proculians followed the traditional and Servian conception of novatio. Servius Sulpicius Rufus maintained that a stipulatio for the purpose of novatio, to which a condition was added, took effect at once and that the principal obligation was discharged immediately. However, in respect of the addition of a sponsor, the Proculians had taken exactly the opposite view. They argued that the addition of a sponsor did not produce a novatio. Sixth, Falchi did not adequately explain the Sabinian view. He only stated that, in their view, the intention of the contracting parties had to predominate. However, it cannot possibly have been the creditor’s intention that the addition of a sponsor discharged the first obligation. The creditor wanted to add a surety and did not intend to replace one debtor for another.

5. *Ambiguitas in Gai.*, 3.177-178

The following problem may have caused the controversy between the Sabinians and the Proculians. A creditor (A) stipulated something from a debtor (B) and, after some time, the creditor (A) wanted to add a surety (C) by means of a *sponsio*. Because of the time interval, the standard formula of a *sponsio* was no longer adequate. Therefore, A may have asked the following question: ‘Quod B mihi debet, dare spondes?’ Since this formula was very similar if not identical to that, which served to substitute a debtor by way of *novatio*, a problem of interpretation could arise. In case A would claim the performance of the debt from the principal debtor (B), the latter could refuse to perform. B consulted the Sabinians and they maintained that it could be argued that the addition of a *sponsio* at a later stage had resulted into a *novatio*. Consequently, the first obligation was discharged and B was released from his debt. According to the Sabinians, C had become the new principal debtor. The creditor (A) turned to the Proculians. In their view, it could be argued that the *sponsio* had not led to a effect of a *novatio*, so that B remained the principal debtor and C the surety.

5.1 The Sabinian View

In this part, the Sabinian argumentation in the defence of B will be reconstructed and it will also be examined how the Sabinians made use of the *topica* to build up their argumentation.

As already stated, the legal problem turned on the interpretation of the *stipulatio*-formula, used by the creditor to appoint a surety at a later stage: ‘Quod B mihi debet, dare spondes?’ ‘Spondeo.’ This formula could be interpreted as a *sponsio*, but it could also be interpreted as a *stipulatio* that served to replace a debtor by *novatio*, for both formulae were similar. Obviously, the *status* of the conflict was that of *ambiguitas*, i.e., one of the four *status legales*.

In order to benefit B, the Sabinians ascribed a “novatory” effect to the formula. A *sponsio* that did not immediately follow the principal *stipulatio* led to a *novatio*. As a consequence, B

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562 Regarding *ambiguitas*, see Cic., *De inv.*, 2.116-121; Quint., *Inst. Or.*, 7.9.1-15.
was released from the original debt and C became the new principal debtor. In support of this view, the Sabinians may have argued that, just like the addition or removal of a condition or a date, also the addition or removal of a sponsor was a novum. The Sabinians may have found this argument by way of the locus a similitudine.563

The Sabinian argumentation in defence of B can now be reconstructed.

- Just like the addition or removal of a condition or a date, also the addition or removal of a sponsor is a novum.
- Therefore, a sponsio that does not immediately follow the principal stipulatio produces a novatio.
- A stipulated something from B and, after some time, appointed C as sponsor.
- Therefore, the sponsio brought about a novatio and B was released from the previous debt.

5.2 The Proculian View

The creditor (A) may have consulted the Proculians. In their view, the formula of a sponsio could not be interpreted as a stipulatio for the purposes of novatio. As a consequence, the previous obligation continued to exist and B was not released from his debt. They may have argued that the creditor (A) did not intend to bring about a novatio when he appointed C as a sponsor some time after the principal stipulatio. Admittedly, this argument is not mentioned by Gaius in his Institutiones. However, the text of Ulpian (D. 46.2.6.pr) may reflect the Proculians argumentation. The addition or removal of a sponsor was not a novum, since the animus novandi was lacking. The Proculians may have used the locus a differentia to construct their argumentation.564 A sponsio did not effect a novatio, because the distinguishing feature of a stipulatio for the purpose of novatio, namely, the animus novandi, was lacking.

Additionally, the Proculians may have refuted the Sabinian argument that, by analogy with the addition or removal of a condition and a date, also the addition or removal of a sponsor

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563 Cic., Top., 3.15: 10.41-45.  
564 Cic., Top., 3.16: 11.46.
was a *novum* (Gai., 3.177: ‘Forte si condicio vel sponsor aut dies adiciatur aut detrahatur’). The *sponsor* did not fit into this enumeration for several reasons. At the beginning of Gai., 3.177, Gaius stated the following: if a new *stipulatio* was concluded between the same contracting parties, there was *novatio* only if there was added a new element. Indeed, when a condition or a date were added to the new *stipulatio*, the contracting parties were the same. A *sponsio*, on the other hand, was not concluded between the same contracting parties. Yet another reason may be adduced why the analogy between a condition and a date, on the one hand, and a *sponsor*, on the other, does not sustain. Both a condition and a date could either be added or removed by making a new *stipulatio*. A *sponsor*, on the other hand, could be added by way of a *stipulatio*, but could not be removed in this way. Instead, the removal of a *sponsor* could be effected by an *acceptilatio*. By way of conclusion, it may be concluded that the Sabinian argument was not all that strong and I believe that the Sabinians were well aware of that. In order to cover up their weak analogy, they mentioned the *sponsor* in the middle of the enumeration.

The Proculian argumentation may be reconstructed as follows:

- Since the *animus novandi* is lacking in a *sponsio* that is concluded some time after the principal *stipulatio*,
- such a *sponsio* does not produce a *novatio*,
- A stipulated something from B and, after some time, appointed C as *sponsor*.
- Therefore, the *sponsio* did not bring about a *novatio* and B was not released from his debt.
1. **Gai., 4.78: Text and Controversy**

Sed si filius patri aut servus domino noxam commiserit, nulla actio nascitur; nulla enim omnino inter me et eum qui in potestate mea est, obligatio nasci potest. Ideoque etsi in alienam potestatem pervenerit aut sui iuris esse coeperit, neque cum ipso neque cum eo cuius nunc in potestate est agi potest. Unde quæritur, si alienus servus filiusve noxam commiserit mihi, et is postea in mea esse coeperit potestate, utrum intercidat actio an quiescat. Nostri praeceptores intercidere putant, quia in eum casum deducta sit, in quo consistere non potuerit, ideoque, licet exierit de mea potestate, agere me non posse; diversae scholae auctores, quamdiu in mea potestate sit, quiescere actionem putant, quia ipse mecum agere non possum, cum vero exierit de mea potestate, tunc eam resuscitari.

But if a son has committed a delict against his father or a slave against his master, no action arises, for no obligation at all can arise between me and someone who is in my *potestas*. Therefore, even if he has passed into the *potestas* of someone else or has started to be *sui iuris*, no action lies against himself nor against the person in whose *potestas* he now is. Hence the question whether, if another’s slave or son committed a delict against me and, afterwards, came into my *potestas*, the action is extinguished or dormant. Our teachers think that it is extinguished, because it has been drawn into a situation in which it could not subsist and, therefore, I cannot have an action, even if he passed out of my *potestas*. The authorities of the other school think that, as long as he is in my *potestas*, the action is dormant, because I cannot bring an action against myself, but that when he has passed out of my *potestas*, it revives.

This controversy is situated in the fourth book of Gaius’ *Institutiones*, which covers the law of actions, and, more precisely, in the part on *actiones noxales* (Gai., 4.75-81).

In Gai., 4.75, Gaius pointed out that, when a person *in potestate* or a slave committed a delict against someone, the injured party could bring an *actio noxalis* against the offender’s *pater familias* or against his master, respectively. This kind of action left the *pater familias* or the master the option to pay for the damages as if he had committed the delict himself or to surrender the offender to the injured party.\(^566\) Such a surrender is called *noxae deditio*. Gaius (4.77) also mentioned the maxim that noxal liability always followed the person of the offender: ‘Omnes autem noxales actiones caput sequuntur’.\(^567\) If an offender entered into the *potestas* of someone else, the *actio noxalis* came to lie against that other person. Did the offender become *sui iuris*, an *actio directa* came to lie against him personally. Conversely, it was also possible for an *actio directa* to become noxal. When a *pater familias* committed a delict against someone and then gave himself in *adrogatio* to someone else or became someone else’s slave, an *actio noxalis* could be brought against that person, when, before, an *actio directa* had laid against the offender himself.

Let us now turn to Gai., 4.78. When a son committed a delict against his own *pater familias* or a slave against his own master, the injured party did not have any action (*nulla actio nascitur*), for no obligation could be created between a man and those in his *potestas*. Since the possibility of an action was ruled out from the beginning, no action could ever arise, not even when the offender passed into someone else’s *potestas* or became *sui iuris*.\(^568\) Up to this point, the two schools were in agreement.

However, the following legal problem gave rise to a controversy between the Sabinians and the Proculians.\(^569\) Someone’s son or slave committed a delict against a third party and, after

\(^{566}\) See also Gai., D. 9.4.1 and Inst., 4.8.pr.

\(^{567}\) See also Ulp., D. 47.2.41.2.

\(^{568}\) See also Ulp., D. 47.2.17.pr-1.

some time, he passed into that person’s potestas. In this case, the question arose whether the actio noxalis of the injured party was extinguished or merely dormant (‘Unde quaeritur … utrum intercidat actio an quiescat’)? According to the Sabinians (‘nostri praeceptores’), the actio noxalis was extinguished as soon as the offender passed into the potestas of the injured party. They stated that the extinction was definite: the actio noxalis could never revive, not even when the offender left the potestas of the injured party. The Proculians (‘diversae scholae auctores’) held a different view. As long as the offender was in the potestas of the person against whom he had committed a delict, the actio noxalis was dormant. In other words, the action still existed, but could not be applied in a procedure. However, as soon as the offender left the potestas of the person whom he had previously injured, the action revived and could be brought against the new owner.

In the text under consideration, Gaius mentioned the argument in support of the Sabinian view. They argued that the actio noxalis was extinguished, because in the circumstances that had come about an action could not have subsisted. Since an injured party did not have an actio noxalis if the offender had been in his potestas at the moment he committed the delict, the actio noxalis was extinguished when the offender entered his potestas at a later stage. The Proculians, on the other hand, argued as follows. Since the actio noxalis had already been created at an earlier stage, it did not extinguish when the offender entered into the potestas of the injured party. Instead, it was dormant, because the injured party could not bring an action against himself. When the slave left his potestas, the action would revive.

In order to reinforce their points of view, the Sabinians and the Proculians applied a stylistic device, namely, a metaphor. According to the Sabinians, the actio noxalis was extinguished. The use of the verb intercidere symbolises the death of the action. The Proculians, on the other hand, maintained that the action was merely dormant as long as the offender was in the

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570 Gai., 4.78: ‘Quia in eum casum deducta sit, in quo consistere non potuerit’.
571 KRETSCHMAR (1899), pp. 6-12; C. FADDA, Concetti fondamentali del diritto ereditario romano, I, Napoli 1900, p. 306; and WESENBERG (1956), p. 555 argued that the Sabinians took the view that the actio noxalis was extinguished by confusio. KIEB (1995), p. 82, however, rejected this view, because there are no sources to confirm this interpretation and I think he is right.
potestas of the injured party, but revived as soon as he left his potestas. The use of the verbs quiescere and resuscitari implies that the action was asleep and then woke up again.\textsuperscript{572}

2. Texts in the Digest

In Paul, D. 47.2.18, Paul explicitly referred to the opinion of the Cassians:

\textit{PAULUS libro nono ad Sabinum.} Quod dicitur noxam caput sequi, tunc verum est, ut quae initio adversus aliquem nata est caput nocentis sequatur: ideoque si servus tuus furtum mihi fecerit et dominus eius effectus eum vendidero, non posse me agere cum emptore Cassiani putant.

\textit{PAUL, book 9 ad Sabinum.} What is said that liability follows the offender, is true in the sense that the liability which initially came into being against someone follows the wrongdoer. If, therefore, your slave has committed a theft against me and I, having become his owner, sell him, the Cassians think that I cannot bring an action against the buyer.

In this text, Paul seems to contradict himself. First, he states that noxal liability follows the offender: ‘Noxam caput sequi’. This maxim has also been mentioned by Gaius in Gai., 4.77. If an offender entered into the potestas of someone else, the liability, which initially came into being against someone, came to lie against that other person. Second, Paul describes the case that had given rise to the controversy. Someone’s slave committed a theft against a third person, then passed into that person’s potestas and, thereafter, entered into yet another person’s potestas (X). In this case, the Cassians maintained that the injured party could not bring an action against X. This example has also been mentioned by Gaius, namely, at the end of Gai., 4.78. Although the word ‘ideoque’ suggests that the second part of the text is a logical continuation of the first part, Paul’s example does not fit in with the maxim he mentioned at the beginning of the text. Since Paul supported the maxim that noxal liability

\textsuperscript{572} Gaius (4.78) used yet another stylistic device to embellish the text. The words ‘Ideoque etsi in alienam potestatem pervenerit aut sui iuris esse coeperit, neque cum ipso neque cum eo culius nunc in potestate est agi potest’ are part of a chiasm.
follows the offender, it would have been for more logical if he had mentioned the Proculian view that the injured party could bring an action against X instead of the Sabinian one. The inconsistency in the text of Paul can be explained if we assume that, originally, the text of Paul had been longer and more substantial. Gaius as well has given some additional information on the legal issue at the onset of Gai., 4.78. Therefore, it may be assumed that Paul, just like Gaius, had informed his reader more thoroughly on the matter, but that this part had been erased by the compilers of the Digest.

A text of Tryphonin, a jurist who lived at the end of the 2nd and the beginning of the 3rd century AD, seems to suggest that the Sabinian opinion had already prevailed in his day. The relevant text is Tryph., D. 9.4.37:

TRYPHONINUS, libro quinto decimo disputationum. Si alienus servus furtum mihi fecerit, qui postea in meum dominium pervenerit, extinguitur furti actio, quae mihi competierat, nondum in iudicium deducta, nec si postea alienavero eum, quem ante litem contestatam emergam, furti actio restaurabitur: quod si post litem contestatam eum redemero, condemnandus erit venditor.

In this text, Tryphonin describes the following case. Someone’s slave committed a theft. When, afterwards, the injured party became the new owner of the slave, the *actio furti noxalis* was extinguished and would not be restored if the injured party were to alienate him. Although Tryphonin adopted the Sabinian view, he did not refer to it as such. Then, Tryphonin mentioned a specific problem. When the injured party had brought an *actio furti noxalis*

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573 A. WATSON, *The Digest of Justinian, I*, 2nd edn., Philadelphia 1998, translated the words ‘condemnandus erit venditor’ as follows: ‘The vendor will be liable to pay’. However, this translation is incorrect, for the word used in Latin is *condemnari*, which means ‘to be condemned’. Moreover, the *litis contestatio* had already taken place. As a consequence, the obligation had been discharged *ipso iure* and replaced by a new obligation (*condemnari oportere*). See Gai., 3.180.
against the slave’s owner and then bought that slave after the *litis contestatio*, the action would not extinguish and the former master, i.e., the vendor, would have to be condemned.

3. **The Controversy in Gai., 4.78: Modern Theories**

At the end of the 19th century, Kretschmar explained the controversy between the Sabinians and the Proculians in terms of conservative versus progressive.\textsuperscript{574} He remarked that the argument in support of the Sabinian view, as mentioned in Gai., 4.78, was a common saying in legal texts. In support of this view, he refers to Marci., D. 34.8.3.2 and Marcell., D. 45.1.98.pr. He argued that the saying ‘*ea, quae initio recte constiterunt, resolvuntur, cum in eum casum reciderunt, a quo non potuissent consistere (incipere)*’ was a rule that was strongly connected with the theory of *confusio*. In its rigid form, moreover, the rule was an ancient axiom and it carried the signature of Republican jurisprudence. According to Kretschmar, the school controversy arose in the following way. Since the Sabinians wanted to defend the unquestioned validity of the rule ‘*quia in eum casum deducta sit, in quo consistere non potuerit*’, they maintained that the *actio noxalis* extinguished when the offender entered into the *potestas* of the person, whom he had previously injured. In other words, the Sabinians supported the radical effects of *confusio*. The Proculians, on the other hand, took a more liberal view. They did not bestow on this rule the status of an unquestioned axiom. If the rule brought about impractical results, the Proculians did not hesitate to disregard it. In the case at hand, they decided not to apply the rule: the *actio noxalis* was merely dormant while the offender was in the *potestas* of the injured party and would revive as soon as he passed out of it.

Two points of criticism may be raised against the Kretschmar’s theory. 1) From the mere fact that the saying ‘*ea, quae initio…*’ is mentioned in several texts, Kretschmar draws the conclusion that it was a rule. This saying, however, was not a rule, but an argument. The fact that an argument was regularly used, does not qualify it as a *regula iuris*. 2) According to Kretschmar, moreover, the controversy in question arose because the Sabinians and the Proculians took different views regarding the scope and implications of the following rule:

\textsuperscript{574} KRETSCHEMAR (1899), pp. 8-12, 23-24.
‘Ea, quae initio recte constiterunt, resolvuntur, cum in eum casum reciderunt, a quo non potuissent consistere’. However, the core of the controversy did not concern the impact of this rule. The core of the problem was whether or not the injured party could bring an actio noxalis against the new owner of his offender. 

Whereas Kretschmar qualified the Sabinian opinion as traditional and the Proculian opinion as progressive, Baviera and Falchi explained the controversy the other way around. In their view, the controversy arose because the Proculians and the Sabinians held different ideas about the purpose of an actio noxalis. The Proculians maintained that such an action served to lend the injured party the opportunity to take vengeance on his offender ‘in ipsorum corpora’. Both Baviera and Falchi qualified this purpose as traditional and primitive. If the offender passed into the potestas of the person, whom he had previously injured, the latter could not take vengeance, because, if he did, he would damage his own property. So, when the offender came under the potestas of the person, whom he had wronged, the purpose of the actio noxalis had not been fulfilled. Therefore, the Proculians decided that the action was merely dormant and would revive as soon as the offender had left the potestas. The Sabinians, on the other hand, held more progressive ideas about the purpose of an actio noxalis. In their view, the action served to indemnify the injured party for his damages by means of the actual surrender of the offender or by payment of the damages. As soon as the offender had entered into the potestas of the person whom he had wronged, this aim was fulfilled. Therefore, the Sabinians decided that, in such a case, the actio noxalis was extinguished.

The remark of Baviera and Falchi regarding the Proculian idea about vengeance as the purpose of an actio noxalis is rather surprising. Nowhere in the sources is it stated that the main goal of such an action was vengeance. Moreover, Gaius (4.78) does not make a connection between the Proculian view and the supposed purpose of the actio noxalis.

More recently, also Kieß attempted to reconstruct the Sabinian and Proculian way of reasoning. In his view, the Sabinians decided that the actio noxalis was extinguished because of the following reason. Whenever a slave had committed a delict, his value was decreased, because an actio noxalis was lying against his owner. Nonetheless, the injured

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party, after he himself had become owner of his offender, sold the slave to another for the full price. The Sabinians argued that the injured party could not receive the full price and, at the same time, an indemnification. According to them, the full price entailed whatever the injured party could have received by means of an *actio noxalis*. The Proculians, on the other hand, followed a different way of reasoning. According to them, an *actio noxalis* could only be extinguished by a *noxae deditio* or by the payment of a penalty and they strictly abided by that concept of the action. If, therefore, the offender entered into the *potestas* of the person whom he had wronged the action did not extinguish, but was merely dormant. Furthermore, the Proculians maintained that an *actio noxalis* arose anew with every new receiver and that, therefore, it was no problem that the action temporarily did not exist at the time when the injured person and the defendant were one and the same person.

Although Kieß’ discussion of the controversy in Gai., 4.78 is very clear, I do not agree with him. The problem is that he fails to take into account the Sabinian argument that is mentioned by Gaius (and by Justinian). Instead, he reconstructs a totally new argumentation. Moreover, it is unknown to which price the injured party had sold the slave to another person.

4. **The Locus a Similitudine, the Locus ex Contrario, and the Locus a Differentia in Gai., 4.78**

The controversy under consideration is pointless, unless it is assumed that a concrete problem, arising from daily life, was at the root of it. Someone’s son or slave (A) committed a delict against another person (B). For some reason or another, B did not immediately bring an *actio noxalis* against the *pater familias* or the *dominus* of A. Thereafter, the offender (A) came under the *potestas* of the person, whom he had previously injured (B). While A was in his power, B could bring no action. When A left the *potestas* of B and entered into the *potestas* of someone else (C), B saw his chance to bring as yet an *actio noxalis* against C. He stated that A had committed a delict against him and that C had to pay for the damages. A conflict may have arisen when the praetor granted an *actio noxalis* to B, whereas C argued that this action had extinguished. C turned to the Sabinians, who supported his view. B, in his
turn, consulted the Proculians, who replied that the action could have been merely dormant and then revived.

4.1 The Sabinian View

When B brought an *actio noxalis* against C, the latter asked the following legal question to the Sabinians. A has committed a delict against B, entered into his *potestas* and, finally, came under my *potestas*. Is it possible in this case for B to bring an *actio noxalis* against me or did the *actio* extinguish, when A was in his *potestas*? According to the Sabinians, the *actio* was extinguished, because in the circumstances that had come about it could not have subsisted (Gai., 4.78: ‘Quia in eum casum deducta sit, in quo consistere non potuerit’).

The Sabinians may have found this argument by means of the *locus a similitudine*. They addressed this case by making an analogy with a similar case, addressed at the beginning of Gai., 4.78, namely, that of a son or slave who committed a delict against his own father or master, respectively, and later became *sui iuris* or entered into someone else’s *potestas*. In this case, the rule held that the father or former master could not bring an *actio noxalis* against the perpetrator or against the new owner because the *actio* had never been born in the first place (‘nulla actio nascitur’). Indeed, no obligation at all could be born between a *pater familias* or master and a person in his *potestas*. As the *actio noxalis* had not been born, it could not arise or exist later.

The Sabinians considered the case under consideration analogous. When A who had committed a wrong against B entered into that person’s *potestas*, the *actio noxalis* fell into a situation in which it could not be born. By consequence, it could not subsist and, thus, died. If, therefore, A left the *potestas* of B and entered into that of C, the action remained extinct.

To make their argumentation more evocative, the Sabinians may also have used a *locus ex contrario* in playing with the opposite terms *nascere* and *intercidere*. Something which falls into a situation in which it could not be born, cannot subsist and, thus, dies. In *Top.*, 11.47-49,

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577 Regarding the *locus a similitudine*, see Cic., *Top.*, 3.15; 10.41-45.
Cicero enumerates four kinds of contraries. The first class contains ‘things which belong to the same class, but differ absolutely’. He quotes wisdom and folly as example. These he calls opposites (*adversa*). *Nascere* and *intercidere* clearly fall under this category.

The reconstruction of the Sabinian argumentation now runs as follows:

- In the case of a son or slave committing a delict against his father or master, *no actio noxalis* is born, so that it cannot exist after he has left the *potestas*.
- Likewise, when someone has committed a delict against a person who later comes to hold him in the *potestas*, the *actio noxalis* entered into a similar situation, so that it could not subsist and, therefore, died.
- A committed a delict against B, fell under his *potestas* and then entered into that of C.
- Therefore, the *actio noxalis* had died and B could bring no *actio noxalis* against C

### 4.2 The Proculian View

The Proculians, on the other hand, argued that B could take an *actio noxalis* against C, because the action had merely been dormant during the time A was in the *potestas* of B and could, thus, have revived. They may have argued that the analogy between the two cases the Sabinians had put on a line did not hold, because in the case under consideration the *actio noxalis* had been born, while it has not in the case the Sabinians had referred to. As it had been born, it became merely dormant once the son or slave fell into the *potestas* of the injured party, because ‘[he] could not bring an action against [him]self’ (‘Quia ipse mecum agree non possum’).

This argument the Proculians found through a *locus a differentia*. The two cases were different because in the one case an action had not been born, and in the other it had. In the first case, the delict was committed while the son or slave was in the *potestas* of the injured party; thus an action could not be born, ‘for no obligation at all can arise between me and someone who is in my *potestas*’. 578 In the second case, the delict was committed against a third person (B), who only later obtained *potestas* over A. Thus, an action was born at the

578 Gai., 4.78: ‘Nulla enim omnino inter me et eum qui in potestate mea est, obligatio nasci potest.’
time the delict was committed. In this way, the Proculians invalidated the analogy used by the Sabinians and, thus, indirectly found support for their view that the action was merely dormant when A had come under the *potestas* of B.

The Proculians also played on the terminology by opposing the terms *quiescere* and *resuscitari*. Like the Sabinians, they also may have used an argument *ex contrario* for this purpose.

The argumentation of the Proculians can now be reconstructed.

- Whereas in the case of a delict committed against a father or master by his son or slave who then later left the *potestas*, an *actio noxalis* had not been born and thus could not exist,
- In the case of a son or slave who had committed a delict against a person in whose *potestas* he only later fell, an *actio noxalis* had already been born and thus remained merely dormant and could revive.
- A committed a delict against B, fell under his *potestas* and entered into that of C.
- Therefore, the *actio noxalis* had only been dormant and B could bring an *actio noxalis* against C.

5. The Controversy Decided

The texts cited earlier seem to suggest that the Sabinian view already became predominant in the classical period. Justinian (*Inst.*, 4.8.6) adopted the Sabinian opinion:579

> Si servus domino noxiam commiserit, actio nulla nascitur: namque inter dominum et eum qui in eius potestate est nulla obligatio nasci potest. Ideoque et si in alienam potestatem servus pervenerit aut manumissus fuerit, neque cum ipso, neque cum eo cuius nunc in potestate sit, agi potest. Unde si alienus servus noxiam tibi commiserit et is postea in potestate tua esse coeperit, intercidit actio, quia in eum casum deducta sit, in quo consistere non potuit: ideoque licet exierit de tua

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CHAPTER XX

potestate, agere non potes, quemadmodum si dominus in servum suum aliquid commiserit, nec si manumissus vel alienatus fuerit servus, ullam actionem contra dominum habere potest.

If a slave has committed a delict against his master, no action arises, for no obligation can arise between a master and someone in his potestas. And, therefore, if the slave has passed into another’s potestas or has been manumitted, no action lies against himself, nor against the person in whose potestas he now is. Hence, if another’s slave committed a delict against you and, afterwards, came into your potestas, the action is extinguished, because it has been drawn into a situation, in which it could not exist. Therefore, you cannot bring an action, even if he passed out of your potestas. Just as if a master committed something against his slave, the slave does not have any action against his master, not even if he was manumitted or alienated.

Justinian does not refer to the controversy. He adopts the Sabinian view, but does not ascribe it to that school. When an offender passed into the potestas of the person, whom he had previously wronged, the actio noxalis was extinguished. Justinian cites the same argument in support of the Sabinian view as Gaius did. In addition to the text of Gaius, Justinian states that, when a master committed a delict against his slave, no action arises either, not even if, subsequently, the slave was manumitted or transferred into another’s potestas.
XXI. *NOXAE DEDITIO*

1. Gai., 4.79: Text and Controversy

Cum autem filius familias ex noxali causa mancipio datur, diversae scholae auctores putant ter eum mancipio dari debere, quia lege XII tabularum cautum sit, <ne aliter filius de potestate patris> exeat, quam si ter fuerit mancipatus; Sabinus et Cassius ceterique nostrae scholae auctores sufficere unam mancipationem crediderunt, et illas tres legis XII tabularum ad voluntarias mancipationes pertinere.

Now, when a filius familias is given in mancipium on account of an actio noxalis, the authorities of the other school think that he must be given in mancipium three times, because the Law of the Twelve Tables provides that a son passes out of his father’s potestas only if he has been mancipated three times. Sabinus and Cassius and the other authorities of our school believed that a single mancipatio suffices and that the three laid down in the Law of the Twelve Tables apply to voluntary mancipationes.

Just like the text discussed in the previous chapter (Gai., 4.78), also this text is included in the part about actiones noxales (Gai., 4.75-81). If a person in potestate or a slave committed a delict, the injured party could bring an actio noxalis against the offender’s pater familias or against his master, respectively. This kind of action left the defendant the option to either pay for the damages as if he had committed the delict himself or to surrender the offender to the injured party. Such a surrender was called noxae deditio.

This text concerns the noxae deditio of a filius familias and discusses the way in which it had to carried out. According to Gaius (4.79), the surrender of a son took place by way of a mancipatio.\footnote{See also Gai., 1.140-141. Mancipatio did not only serve to transfer property of res mancipi; it also served to transfer power over persons. When a person in potestate was mancipated by his father, he passed into the mancipium of the receiver. This situation, which is called ‘in mancipio esse’, strongly resembled slavery (Gai., 1.123: ‘servorum loco’). Nonetheless, the person in mancipio maintained his status of free citizen and could, therefore, have legitimate children. The subjection of a person in mancipio was lifelong, unless it was ended by a...} However, the opinions differed on the number of mancipationes that were...
required. The following legal question gave rise to a controversy between the Sabinians and the Proculians:581 ‘When a father intended to surrender his son to the injured party on account of an *actio noxalis*, did a single *mancipatio* suffice or was he compelled to mancipate his son three times?’ Whereas the Proculians (‘diversae scholae auctores’) insisted on a triple *mancipatio*, the Sabinians (‘Sabinus et Cassius ceterique nostrae scholae’) required only one. It is remarkable that, in this text, Gaius first discussed the opinion of the Proculians, whereas, thus far, he always mentioned the opinion of his own school first.

Gaius mentioned both the argument in support of the Proculian view as that in support of the Sabinian view. First, the Proculian argument will be taken into consideration. The Proculians required a triple *mancipatio* for the *noxae deditio* of a *filius familias*, because it was stated in the Law of the Twelve Tables that a son only left the paternal *potestas* if he had been mancipated three times (Gai., 4.79: ‘Quia lege XII tabularum cautum sit, <ne aliter filius de potestate patris> exeat, quam si ter fuerit mancipatus’). It must be taken into account that part of the Proculian argumentation is lacking in the original text of Gaius and that it has been completed in the text edition.582 The rule from the Twelve Tables to which the Proculians refer is XII T.4.2b and runs as follows: ‘Si pater filium ter venum duit, filius a patre liber esto’ or ‘if a father has sold his son three times, the son shall be free of the father’.583 This rule determined that, when a father had sold his son three times, the son was freed from his father’s *potestas* once and for all.

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582 According to G. STUDEMUND, *Gaii Institutionum, Commentarii Quattuor*, Osnabrück 1874 (repr. 1965), p. 218, the words ‘ne aliter filius de potestate patris’ were not included in the manuscript. As a consequence, the text, as written down by Gaius, is a grammatically incorrect. It may be assumed that Gaius made a mistake here.

By and large, the rule from the Twelve Tables is regarded as a restriction imposed by the *decemviri* on a father’s right to sell a son (*filius*) that was under his *potestas*. The *patria potestas* over a son could “survive” two sales, no more. This meant that a son who had been sold by his father and was released after some time automatically returned into the *potestas* of his father. If he was sold a second time and then became free, the son returned once more into his father’s *potestas*. However, if the son had been sold and was released for the third time, he was permanently freed from the *potestas* of his father. In other words, the *patria potestas* was permanently extinguished after three sales. It is possible that originally, i.e., prior to the Twelve Tables, a father could sell his sons by a *mancipatio* without any limitation. The rule from the Twelve Tables may have intended to put an end to an abuse of the *patria potestas* and to punish a greedy father, who sold his son three times for money. Since the rule from the Twelve Tables presupposed that a father could have sold a son three times, it has been suggested that a conveyance in *mancipio* used to be for a limited time only.

This explanation of the rule from the Twelve Tables prevails in modern literature: see, among others, R. MONIER, *Manuel élémentaire de droit roman*, I, 6th edn., Paris 1947, p. 273; A.-E. GIFFARD, *Précis de droit romain*, I, 4th edn., Paris 1953, p. 216; W. KUNKEL, Auctoratus, *Eos* 48/3 (1956), pp. 207-226, esp. pp. 210-211; KAUFMANN (1964), pp. 45-50; YARON (1968), pp. 57-72; RABELLO (1979), pp. 93-104. LÉVY-BRUHL (1947), pp. 80-94; H. LÉVY-BRUHL, *La vente de la fille de famille à Rome*, in: H. BATIFFOL (ed.), *Festschrift Hans Lewald*, Basel 1953, pp. 93-100, on the other hand, has given an alternative interpretation of XII T.4.2b. In his view, the rule did not serve to combat a malpractice, but was introduced to end the *patria potestas* over a son in a solemn way in case of *noxae deditio*. Only later, the triple *mancipatio* was used for the purposes of *adoptio* and *emancipatio* as well. Support for the interpretation of Lévy-Bruhl came from M. KASER, *Zur altrömischen Hausgewalt*, *SZ* 67 (1950), pp. 474-483; KASER, *RPR*, I, pp. 70-71; T. MAYER-MALY, *Das Notverkaufsrecht des Hausvaters*, *SZ* 75 (1958), pp. 116-155, esp. p. 120. This view has been criticised and rejected by Kunkel, Kaufmann, Yaron, and Rabello.

Different possibilities have been suggested. A *pater familias* may have transferred his son with the fiduciary agreement for *remancipatio* after a certain time has passed. According to YARON (1968), p. 71, however, there was a law (or a legal custom) which determined that the status ‘in mancipio esse’ was limited in time. After this time span had passed, the son had to be manumitted. According to J.M. KELLY, A Note on ‘Threefold Mancipation’, in: A. WATSON (ed.), *Duabus Nostis. Essays in Legal History for David Daube*, Edinburgh-London 1974, pp. 183-186, the rule did not envisage a full sale, but a more limited transaction akin to hire, perhaps for a year or for an agricultural season.

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584 Whereas the term *filius* is the one actually used, both H. KAUFMANN, *Die altrömische Miete: ihre Zusammenhänge mit Gesellschaft, Wirtschaft und staatlicher Vermögensverwaltung*, Köln 1964, pp. 45-47, and R. YARON, Si pater filium ter venum duit, *TR* 36 (1968), p. 64, have suggested that the rule was meant to cover daughters and grandchildren as well. H. LÉVY-BRUHL, *Nouvelles Études sur le très ancien droit romain*, Paris 1947, pp. 83-84, on the other hand, maintains that the term *filius* has to be interpreted in a strict sense. In his view, the rule from the Twelve Tables only applied to sons.

585 This explanation of the rule from the Twelve Tables prevails in modern literature: see, among others, R. MONIER, *Manuel élémentaire de droit roman*, I, 6th edn., Paris 1947, p. 273; A.-E. GIFFARD, *Précis de droit romain*, I, 4th edn., Paris 1953, p. 216; W. KUNKEL, Auctoratus, *Eos* 48/3 (1956), pp. 207-226, esp. pp. 210-211; KAUFMANN (1964), pp. 45-50; YARON (1968), pp. 57-72; RABELLO (1979), pp. 93-104. LÉVY-BRUHL (1947), pp. 80-94; H. LÉVY-BRUHL, *La vente de la fille de famille à Rome*, in: H. BATIFFOL (ed.), *Festschrift Hans Lewald*, Basel 1953, pp. 93-100, on the other hand, has given an alternative interpretation of XII T.4.2b. In his view, the rule did not serve to combat a malpractice, but was introduced to end the *patria potestas* over a son in a solemn way in case of *noxae deditio*. Only later, the triple *mancipatio* was used for the purposes of *adoptio* and *emancipatio* as well. Support for the interpretation of Lévy-Bruhl came from M. KASER, *Zur altrömischen Hausgewalt*, *SZ* 67 (1950), pp. 474-483; KASER, *RPR*, I, pp. 70-71; T. MAYER-MALY, *Das Notverkaufsrecht des Hausvaters*, *SZ* 75 (1958), pp. 116-155, esp. p. 120. This view has been criticised and rejected by Kunkel, Kaufmann, Yaron, and Rabello.

586 Different possibilities have been suggested. A *pater familias* may have transferred his son with the fiduciary agreement for *remancipatio* after a certain time has passed. According to YARON (1968), p. 71, however, there was a law (or a legal custom) which determined that the status ‘in mancipio esse’ was limited in time. After this time span had passed, the son had to be manumitted. According to J.M. KELLY, A Note on ‘Threefold Mancipation’, in: A. WATSON (ed.), *Duabus Nostis. Essays in Legal History for David Daube*, Edinburgh-London 1974, pp. 183-186, the rule did not envisage a full sale, but a more limited transaction akin to hire, perhaps for a year or for an agricultural season.
Let us now turn to the argument in support of the Sabinian view. They argued that one *mancipatio* was sufficient for the *noxae deditio* of a *filius familias* and that the three laid down in the Law of the Twelve Tables only applied to voluntary *mancipationes* (Gai., 4.79: ‘Et illas tres legis XII tabularum ad voluntarias mancipationes pertinere’). By voluntary *mancipationes*, the Sabinians meant *emancipatio* and *adoptio*. Indeed, in classical Roman law, the rule from the Twelve Tables had become the legal basis for the permanent extinction of the paternal power in case of *emancipatio* and *adoptio*.\(^{587}\) Whereas in these two cases, the *pater familias* wanted to set his son free, the Sabinians argued that a *noxae deditio* was not a voluntary act of the *pater familias* and that, therefore, the rule from the Twelve Tables did not form its legal basis. According to the Sabinians, one *mancipatio* sufficed in case of the *noxae deditio* of a *filius familias*. Eventually, the controversy lost its relevance, because the *noxae deditio* of sons had been abolished in the time of Justinian.\(^{588}\)

### 2. The Controversy in Gai., 4.79: Modern Theories

Both Kaser and Falchi explained the controversy in terms of conservative and progressive. Whereas the former only mentioned this interpretation of the controversy in passing,\(^{589}\) the latter elaborated his view more thoroughly.\(^{590}\)

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\(^{587}\) Both in case of *emancipatio* and in case of *adoptio*, the termination of the *patria potestas* was effected in the same way. When a *pater familias* wanted to set his son free from his *potestas*, he had to transfer him three times to a third party by means of a *mancipatio*. After the first and the second *mancipatio*, the receiver had to liberate the son by means of a *manumissio vindicta*. Thereupon, the son automatically returned into his father’s *potestas*. After the third *mancipatio*, the *patria potestas* had been terminated and the son was *in mancipio* of the receiver. Up to this point, the formal procedures for *emancipatio* and *adoptio* were identical. From then onwards, the procedure for *emancipatio* was as follows. After the third *mancipatio*, the son found himself *in mancipio* of the holder, who subsequently transferred him back to his own father by means of a *remancipatio*, so that the father himself could manumit his son and have certain privileges, being the *parens manumissor*. Let us now turn to the procedure of *adoptio*. When a son was *in mancipio* of the holder after the third *mancipatio*, the procedure for an *adoptio*, which was initiated by a father to bring his son under the *potestas* of an adopting *pater familias*, continued as follows. The holder transferred him back to his father by means of a *remancipatio*. Thereafter, the *pater familias*, who wanted to adopt, had to claim him as his own son by means of a fictitious *vindicatio*. Regarding the termination of *patria potestas* by means of *emancipatio* and *adoptio*, see DE ZULUETA (1963), pp. 42-44, and KASER, *RPR*, I, pp. 67-69.

\(^{588}\) *Inst.*, 4.8.7. The *noxae deditio* of daughters had been abolished even earlier.

\(^{589}\) KASER (1950), p. 475: ‘Und da diese Regelung (i.e., the opinion of the Proculians) schwerfälliger ist als die sabinianische, die sich stets mit einmaliger Manzipation begnügt, haben wir keinen Grund zu bezweifeln, dass die Prokulianer der älteren Auffassung gefolgt sind.’ However, YARON (1968), p. 59, n. 8, made the following pertinent remark: ‘Clumsier ergo earher seems a fallacious conclusion.’

According to Falchi, the Proculian view that, in case of a noxae deditio of a filius familias, three mancipationes were required, was traditional and conservative. The Proculians strictly abided by the requirements of the traditional structure of the noxae deditio, i.e., the formal extinction of all ties of power over the son. Therefore, a triple mancipatio was necessary. Moreover, the Proculians interpreted the noxae deditio of a filius familias in accordance with the tradition of the Law of the Twelve Tables. The Sabinians, on the other hand, held a more progressive view and maintained that a single mancipatio would suffice. According to Falchi, they regarded the mancipatio merely as an instrument to serve the interests of the injured party and to meet with the intention of the pater familias to abandon his son.

Falchi’s theory is not convincing, for Falchi failed to sufficiently take into account the arguments that are mentioned by Gaius (4.79). Instead, he invented new criteria to explain the controversy. In his view, the Proculians abided by the traditional structure of the noxae deditio and the Sabinians took into consideration the intention of the parties involved. However, these criteria are not mentioned in the sources.

Stein, on the other hand, touched upon the key to explain the controversy in question. He correctly qualified the controversy between the Sabinians and the Proculians concerning the number of mancipationes which were necessary to surrender a filius familias, as a dispute turning on the meaning of a statutory provision. Stein stated: ‘It seems to have been agreed by both Proculians and Sabinians that mancipation for the purpose of noxal surrender of the son involved the extinction of paternal power. The only question was whether one mancipation was sufficient or three were needed. The Sabinians held to the former view, on the ground that the rule from the Twelve Tables applied only to voluntary mancipations, and in practice this was the normal situation in which the rule was applied. The Proculians held that three mancipations were required in the case of noxal surrender just as in others. The only way a son could pass out of paternal power was under the rule from the Twelve Tables and that rule stipulated three mancipations.’

Whereas the Proculians argued that, by analogy with the rule from the Twelve Tables, three mancipationes were necessary in case of a noxae deditio of a son, Sabinians maintained that the rule from the Twelve Tables only applied to voluntary mancipationes and that, in this case,

591 STEIN (1972), pp. 16-17.
one *mancipatio* was sufficient. Although Stein correctly stated that the Proculians took their view by analogy with the rule from the Twelve Tables and that the Sabinians argued *a contrario*, he failed to make a connection with the pertinent rhetorical status that covers such a situation, i.e., *ratiocinatio*.

### 3. *Ratiocinatio* in Gai., 4.79

The legal problem whether the surrender of a *filius familias* on account of an *actio noxalis* required a single or a triple *mancipatio* seems to be a dogmatic and a theoretical problem rather than a practical one.

The Proculians required a triple *mancipatio* for the *noxae deditio* of a son, because the Law of the Twelve Tables stated that the *patria potestas* was permanently extinguished after a father had sold his son three times. Thus, the effect of the three *mancipationes* in case of a *noxae deditio* was the integral extinction of the *patria potestas*. The Sabinians, on the other hand, argued that, in this case, a single *mancipatio* was sufficient. However, the intention of the Sabinians is not clear. Did they aim at an integral extinction of the *patria potestas*, just like the Proculians had done? If so, they regarded one *mancipatio* to be sufficient to attain this effect. Or did they want to avoid that the paternal power was permanently extinguished. If so, one *mancipatio* would allow the *patria potestas* to revive after a manumission of the son.

Although the legal problem underlying the controversy did not concern a practical problem, the rhetorical *status* doctrine did influence the argumentations of the Sabinians and the Proculians. In his *status* doctrine, Hermagoras determined that a conflict could either relate to facts or to the application of the law to these facts. When a discussion focussed on the facts, it had to be classified under one of the four *status rationales*. If, on the other hand, the discussion turned upon the application of the law, one of the four *status legales* was pertinent.

The conflict in question turned upon the application of the Law of the Twelve Tables. Therefore, the conflict is to be classified under the *status legales*. Hermagoras has

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592 1) The *status coniecturalis*; 2) the *status definitivus*; 3) the *status qualitatis*; and 4) *translatio*. 
distinguished four of them: 1) scriptum et voluntas; 2) leges contrariae; 3) ambiguitas; and 4) ratiocinatio. The first instance is pertinent when one party gives a literal interpretation of the text, whereas the other party is more interested in the spirit of the text or the intention of its author. In the case of leges contrariae, both parties appeal to two contradictory laws. In the third case, the parties explain an ambiguous text in two different ways. Finally, it is a matter of ratiocinatio, when one party maintains that the case is not provided for by the law, whereas the other party wants to subsume the case under an already existing law for analogous cases.

Obviously, the case under consideration was a matter of ratiocinatio, for it turned on the question whether or not the law had to be applied to an analogous case, namely, that of noxae deditio. The Proculian argumentation will be discussed first.

### 3.1 The Proculian View

The Proculians maintained that, in case of a noxae deditio of a filius familias, three mancipationes were necessary. They took this view by analogy with the statement in the Law of the Twelve Tables that a son was freed from the paternal power after he had been sold three times. The Proculians required that, on the basis of this rule, a father had to mancipate his son three times in order to permanently terminate the patria potestas. The Proculians argued that the rule from the Twelve Tables was not only the legal basis for emancipation and adoptio, but also for noxae deditio.

The following reconstruction of the Proculian view can be made:

- Since the Law of the Twelve Tables provides that a son passes out of his father’s potestas only if has been mancipated three times (Gai., 4.79: ‘Quia lege XII Tabularum cautum sit, <ne aliter filius de potestate patris> exeat, quam si ter fuerit mancipatus),
- a triple mancipatio is required in case of a noxae deditio of a filius familias as well.
- A pater familias intended to surrender his son to the victim of a delict committed by that son.
- Therefore, the pater familias had to mancipate his son three times.

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594 Regarding ratiocinatio, see Cic., De inv., 2.148-153.
3.2 The Sabinian View

It is already clear that the conflict turned upon the application of a rule from the Twelve Tables and that it is classified under one of the status legales, namely, ratiocinatio. The Sabinians acknowledged that the rule from the Twelve Tables was the legal basis for emancipatio and adoptio and that, in these cases, three mancipationes were required to extinguish the patria potestas. However, they refuted that the rule also applied to a noxae deditio.

In his De inventione, Cicero discussed some of the loci communes, which could be used by persons who were opposing the extension of the law. The relevant text is Cic., De inv., 2.151:

Contra autem qui dicet, similitudinem infirmare debeat; quod faciet, si demonstrabit illud, quod conferatur diversum esse genere, natura, vi, magnitudine, tempore, loco, persona, opinione; si, quo in numero illud quod per similitudinem afferetur, et quo in loco illud cuius causa afferetur, haberì conveniat, ostendetur; deinde, quid res cum re differeat, demonstrabitur, ut non idem videatur de utraque existimari oportere.

But the person who speaks up against it (i.e., against the extension of the law) will have to invalidate the similarity. This he will do if he demonstrates that what is brought together is different in kind, nature, meaning, magnitude, time, place, person, or opinion. Also if it is shown in what category it is proper to put that what will be brought on as similar and in what place that what will be brought on as the cause of this similarity, and if, subsequently, it is demonstrated that there is a difference between these two things, so that it may seem that it is not proper to take the same position in regard to both.

The Sabinians argued that the rule from the Twelve Tables was applied to emancipatio and adoptio, but that these were voluntary acts. This means that the pater familias wanted to end the patria potestas over his son. A noxae deditio, on the other hand, was not a voluntary act of
the *pater familias*. Instead, it occurred ‘ex noxali causa’.

Therefore, the rule from the Twelve Tables did not apply to a *noxae deditio*, so that one single *mancipatio* was sufficient.

A reconstruction of the Sabinian argumentation can now be made.

- Since the three *mancipationes* laid down in the Law of the Twelve Tables apply to voluntary *mancipationes* (Gai., 4.79: ‘Et illas tres legis XII tabularum ad voluntaries mancipationes pertinere’) and since a *noxae deditio* of a *filius familias* was not a voluntary act of the *pater familias*,
- the rule of the Twelve Tables did not apply to it and one *mancipatio* was sufficient.
- A *pater familias* intended to surrender his son to the victim of a delict committed by that son.
- Therefore, the *pater familias* had to mancipate his son one time.

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595 Gai., 4.79.
CONCLUSION

The central question in this book is whether the use of topical argumentation could be the key to solving the problem of the controversies between the Sabinians and the Proculians. It has also been suggested that the controversies were not primarily of a theoretical, but rather of a practical nature and that the heads of the schools were vested with the *ius publice respondendi ex auctoritate principis*. This means that they were authorised by the emperor to give advice. Therefore, they were often solicited to render advice to parties locked in a trial. If both heads were asked for counsel and gave conflicting *responsa* in a specific case, the judges were bound by both pieces of advice and a so-called controversy arose. Since the Sabinians and the Proculians wanted to support the party who had consulted them, they were in need of adequate arguments. For this purpose, they used rhetoric and the theory of *topoi*.

In this study, the view, commonly held in modern literature, that the Sabinians and the Proculians were ‘schools of thought’, which each adhered to a fundamentally different theoretical conception of law, is rejected. By and large, modern scholars have sought to explain the antagonism between the schools as a confrontation between two opposing traditions, assuming that the positions of the Sabinians and those of the Proculians were internally consistent. This one-sided way to interpret the opposition of the schools reveals the impact of the dogmatic approach to Roman law. The assumption that the controversies were part of an attempt to systematise Roman law has constricted the debate on the controversies and prevented scholars from exploring other directions.

This book departs from a historical approach to Roman law that allows steering the debate into a totally different direction. Two keys have been suggested to address the question of the school controversies, namely, the interaction between jurisprudence and practice and between jurisprudence and topical argumentation.

1. The Methodological and Substantive Shortcomings of Modern Literature
In order to validate these theses, a close analysis of twenty-one passages in Gaius’ *Institutiones*, dealing with as many controversies, has been made. One of the legal problems underlying the controversies concerned the law of persons,\(^596\) two of them regarded property law,\(^597\) eight of them concerned the law of succession,\(^598\) another eight concerned the law of obligations,\(^599\) and two of them regarded the law of actions.\(^600\)

Gaius has described every legal problem at the root of a controversy in a very concise way. Nevertheless, he has proven surprisingly informative on the legal problem underlying the controversies as well as on the argumentations. To uncover these, a meticulous exegesis and textual reading were indispensable. However, such modern scholars, as Karlowa, Voigt, Baviera, Betti, Stein, Liebs, Scacchetti, and Stolfi, generally refrained from a systematic and thorough analysis of the primary sources and have overlooked the significance of understanding the actual legal problem and the circumstances of the case underlying the controversy. They often limited themselves to a mere literal reiteration of the legal question, quoted from Gaius, without trying to understand why and how it arose. Moreover, they often steered clear of the complexities of each controversy. Falchi, on the other hand, gave a more thorough analysis of the legal problems at the root of the controversies. However, his analyses are so predetermined by his overall interpretation of the antagonism between the schools in terms of conservative and progressive that an unbiased discussion of the legal problems has proven to be impossible.

1.1 Methodological Shortcomings

This lack of a thorough analysis of the sources in modern literature is a methodological shortcoming that has several serious consequences. First, the majority of modern theories is based upon mere assumptions and has little if any support in the sources. Frequently, scholars have invented criteria to explain the opposite positions of the Sabinians and the Proculians.

\(^596\) (1) Gai., 1.196.
\(^597\) (2) Gai., 2.15 and (3) Gai., 2.79.
\(^598\) (4) Gai., 2.123; (5) Gai., 2.195; (6) Gai., 2.200; (7) Gai., 2.216-222; (8) Gai., 2.231; (9) Gai., 2.244; (10) Gai., 3.85-87; and (11) Gai., 3.98.
\(^600\) (20) Gai., 4.78 and (21) Gai., 4.79.
The criterion of conservative versus progressive, for example, is not in the least persuasive to explain the controversies. Nowhere in the sources are any convincing indications found that the Sabinians or Proculians were either conservative or progressive.

Second, for every controversy, Gaius has mentioned (either explicitly or implicitly) the arguments in support of the opposite positions. However, modern scholars have been so preconceived by the dogmatic approach to Roman law that they failed to recognise the importance of these arguments in the explanation of the controversies.601

Third, some scholars even go one step further: they explicitly reject the arguments as written down by Gaius. For example, Betti, in his explanation of the *specificatio* controversy (Gai., 2.79), explicitly rejects the Sabinian and the Proculian arguments as mentioned in Gai., D. 41.1.7.7.602 More recently, Choe maintained that the arguments in support of the Sabinian and the Proculian views, as mentioned in the sources (Paul, D. 17.1.3.2; Gai., D. 17.1.4), are inadequate to explain the controversy about the excess of mandate in Gai., 3.161 (16).603

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601 Due to the lack of a thorough analysis of the sources, both BETTI (1915), pp. 27-29, and STEIN (1972), p. 20, failed to correctly define the legal problem underlying the controversy in (15) Gai., 3.141 and misinterpreted the arguments that are mentioned by Gaius. They assumed that the legal question at issue was whether the price in a contract of sale necessarily had to consist of money and whether barter was a *species* of sale. However, only the former question was at stake. The Sabinian statement that barter was a *species* of sale was an argument and not a dogmatic issue; the same holds for the Proculian statement that barter and sale were two distinct contracts. Betti and Stein failed to recognise the argumentative value of these assumptions and took their reasoning even one step further. They maintained that, in the end, the legal problem was whether the actions of sale could also be applied to barter. However, the question about the actions was not in the least the core of the legal problem. The actual legal question only came up after the contract of sale had been concluded and the buyer had offered to pay *in natura* instead of in money. Then the question arose whether the price in a contract of sale necessarily had to consist of money.

602 BETTI (1942), p. 406 (in translation): ‘The Sabinians hold it praiseworthy that the interest of the *dominus materiae* prevails, not so much because of the formal reason that “sine materia nulla species efficiti potest”, but because of a conservative political-legislative criterion … The Proculians, on the other hand, give preference to the interest of the maker, probably, not so much because of the formal reason of the novelty of the *species* (*quia quod factum est, antea nullius fuerat*), but for a political reason of social progress.’

603 CHOE (1993), p. 132: ‘Nun stellt sich die in juristischen Hinsicht allein interessierende Frage, worauf diese Meinungsverschiedenheit zurückzuführen ist. Als Argument für die sabinianische Auffassung, die sich ausdrücklich in den Quellen finden läßt, kommt anscheinend allein der „*namque iniquum*”-Satz in Paulus 32 ed. D. 17.1.3.2 in Betracht, während für die proculianische Ansicht nur eine knappe Wertung ohne eigentliche Begründung, die aber zugleich auch als eine Begründung aufzufassen ist: „*sententia benignior*” in Frage kommt. Es liegt demnach sehr nahe, daß der wahre Grund des Meinungsunterschiedes sich aus der bloßen Beschäftigung mit äußeren Argumenten nicht zufriedenstellend ermitteln läßt, sondern vielmehr nur unter gründlicher Berücksichtigung der jeweils unterschiedlichen jurisprudentiellen Denkweisen (diversa prospettiva) der beiden Schulen zu erschließen ist.’
1.2 Substantive Shortcomings

My criticism on modern scholarship goes beyond method, it also concerns substance. In modern literature, all sorts of attempts have been made to explain the controversies between the schools in terms of a foundational theory behind each school. However, these attempts of modern scholarship to disclose the alleged foundational theory of the schools have made them underplay the legal character of the controversies. Moreover, the analysis of the controversies presented here has invalidated those attempts for each single controversy.

It has been suggested that the Sabinians and the Proculians were influenced by a specific philosophical tradition, such as the Stoa and the Peripatetics. The antagonism between the schools has also been explained in terms of conservative versus progressive. Furthermore, it has been suggested that the two schools held different views about methodology. Some modern scholars believed that the Sabinians and Proculians were influenced by distinctly political doctrines. The sceptical view, finally, deviates from the general assumption that the controversies revealed a fundamental difference between the schools and assumes that there was no internal consistency among the positions of the Sabinians or among the positions of the Proculians.

The thesis that the controversies can be explained in terms of the schools adhering to opposed legal conceptions rests on three closely interwoven assumptions. First, that it is possible to capture all controversies under one single denominator. Second, that the opposition between the schools was fundamental and consistent. Third, that there was an internal consistency among the positions taken by the school representatives throughout the controversies. These three assumptions have proven unsustainable.

1.2.1 Not One Single Denominator

First, modern scholars have never been able to identify one single theoretical criterion that explains all the controversies. None of the above-mentioned theoretical differences explains more than a handful of the controversies.
It has been suggested that the opposition between the schools was of a philosophical nature. Whereas the Sabinians were influenced by the Stoa, the Proculians stood in the tradition of Aristotle and the Peripatetics. The stock example to demonstrate this is the controversy about *specificatio* in Gai., 2.79 (3). When somebody (A) made wine for himself by processing the grapes of someone else (B) without mutual agreement, the Sabinians granted the ownership of the new thing to the owner of the grapes. This decision may have been founded on the Stoic principle that the essence of a thing was its substance or material (οὐσία). The Proculians, who granted the ownership of the wine to its maker, may have applied the Peripatetic doctrine that the form (εἶδος) was the essence of the thing.

The main representative of this philosophical explanation is Sokolowski. He studied the controversy about *specificatio* and, on the basis of that single controversy, he drew conclusions about the nature of the schools in general. What about the other controversies in Gaius’ *Institutiones*? The only controversy that has also been explained in terms of philosophy is the controversy in Gai., 3.141 (15). According to Nelson and Manthe, the Sabinian view that the price in a contract of sale did not necessarily have to consist of money was taken under the influence of the Stoa. The Proculians, on the other hand, who maintained that the price necessarily had to consist of money, were influenced by Aristotle. However, the philosophical approach to explain this controversy has proven to be unsustainable. Although the philosophical interpretation may have been plausible for the controversy in Gai., 2.79 (3), it does not apply to the other twenty controversies in Gaius’ *Institutiones*.

Some of the controversies about the law of succession, furthermore, seem particularly useful to illustrate Voigt’s theory that the Sabinians abided by *rigor iuris* and *verbi ratio* – which is said to stand for a conservative attitude – and the Proculians by *aequitas* and *voluntatis ratio* – which is said to indicate a progressive attitude. Whereas the Sabinians have not been willing to validate a testament or a legacy with deficiencies, the Proculians have proved more liberal in these cases. However, two of the controversies regarding the law of succession demonstrate incontestably that Voigt’s theory is incorrect: Gai., 2.244 (9) and Gai., 3.98 (11). In these cases, the Sabinian and Proculian opinions cannot be reconciled with their presumed attachment to *rigor iuris/verbi ratio* and *aequitas/voluntatis ratio*, respectively. In the former controversy (9), the Sabinians maintained that a legacy which was bequeathed conditionally to

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604 (4) Gai., 2.123; (5) Gai., 2.195; (6) Gai., 2.200; (7) Gai., 2.216-222; (8) Gai., 2.231.
a person in the heir’s *potestas* was valid if the legatee had left the heir’s *potestas* before the condition was fulfilled. The Proculians, on the other hand, maintained that such a legacy was void. In the latter controversy (11) as well, the Sabinians proved themselves to be less strict than the Proculians. If a legacy was bequeathed under an impossible condition, the Sabinians maintained that the condition was held to be unwritten and that, therefore, the legacy was valid. According to the principle of *rigor iuris*, however, a legacy under an impossible condition would inevitably be void. Moreover, considering a condition unwritten can hardly be regarded as an example of *verbis ratio*. The Proculians, on the other hand, maintained that a legacy under an impossible condition was void. Since we do not know the intention of a testator who added an impossible condition to a legacy, it cannot be stated that the Proculian opinion was in accordance with the testator’s will (*voluntatis ratio*).

The fact that such theoretical oppositions do not offer an overall explanation for the antagonism between the schools does not mean that they never played a role in the opposition of the schools. However, their impact is not at all of a systematic nature and, therefore, the opposition between the schools cannot be captured under one single denominator.

### 1.2.2 No Fundamental or Consistent Opposition

The general assumption in modern literature that the schools were fundamentally opposed has proven to be incorrect. The sources provide no ground for this assumption and the mere existence of the controversies, although they at first sight seem to point in that direction, does not necessarily imply that the schools really were basically opposed. Several examples from the analysis of the controversies support this.

In the controversy about *specificatio* (3), both the Sabinian and the Proculian opinion were derived from the application of one and the same concept, i.e., *naturalis ratio*. This indicates that, at least in this respect, there is no fundamental difference between the schools.

In Gai., 3.98 (11), moreover, Gaius conceded that he could hardly provide a satisfactory reason for the difference of opinion between the Sabinians and the Proculians: ‘Et sane vix idonea diversitatis ratio reddi potest’. These words are in direct conflict with the modern
assumption that there was a fundamental difference of a theoretical nature between the Sabinians and the Proculians. If, indeed, the controversies could be explained in terms of one single theoretical criterion, Gaius would have found no difficulties in interpreting the controversy in question.

The difference of opinion in Gai., 3.140 (14) also incontestably demonstrates that the contrast between the Sabinians and the Proculians was not as radical as has been assumed thus far. The legal question at the root of this controversy was the following: ‘Is the rule “pretium certum esse debet” observed, when the determination of the price in a contract of sale is left to a third party?’ According to Labeo and Cassius, the rule was not observed and, therefore, the transaction was void. Ofilius and Proculus, on the other hand, stated that a price that had to be determined by a third party was certain and that the transaction was a contract of *emptio venditio*. This text does not refer to a controversy between the Sabinians and the Proculians, because there are some peculiarities in the text. Although M. Antistius Labeo and Proculus had both been leaders of the same school, they disagreed on this matter. A second peculiarity is that C. Cassius Longinus, a Sabinian, supported the view of the Proculian M. Antistius Labeo. Furthermore, Proculus approved of the view of Ofilius, a jurist who lived in the 1st century BC and had been a teacher of the ‘Sabinian’ Capito. The controversy in Gai., 3.140 is not a genuine school controversy, but a common controversy between individual jurists. As such, it sheds a new light on the widespread ideas about the schools. Apparently, it could occur that the leaders of the opposite schools agreed with each other on some points of law. This contradicts the general assumption that there was a fundamental opposition between the two schools.

### 1.2.3 No Internal Consistency

The analysis of the controversies has indicated that there was no internal consistency among the positions of the Sabinians or among the positions of the Proculians. The controversy in Gai., 3.140 (14) has already shown that the leaders of one and the same school, namely, Labeo and Proculus, could take opposing views on a certain point of law.
Furthermore, the controversy in Gai., 2.216-222 (7) demonstrates that the Sabinian school was not in the least a monolithic school of thought and that, even within that school, disagreements could arise. Up to the point that the beneficiary of a *legatum per praeceptionem* had to be one of the testamentary heirs, the Sabinians agreed: if it was bequeathed to an *extraneus*, i.e., to a person who had not been instituted as heir, the legacy was void under the *ius civile*. Within the Sabinian school, however, a disagreement emerged between Sabinus, on the one hand, and Iulianus and Sextus, on the other, about the question of whether a *legatum per praeceptionem* to an *extraneus* could be validated by the *Senatus Consultum Neronianum*. According to Massurius Sabinus, the *SC Neronianum* could not be applied in this case. A century later, however, Salvius Iulianus and Sextus (Africanus) took the opposite view and maintained that the *SC* could validate such a legacy.

Another indication that there was no internal consistency among the positions of the Sabinians or among the positions of the Proculians is to be found in comparing the controversy in Gai., 2.123 (4) with the one mentioned in Gai., 2.244 (9). Although these controversies were caused by two similar legal problems, neither the Sabinians nor the Proculians were consistent in their opinions. Whereas, in Gai., 2.123 (4), the question had been raised at what particular moment an *heredis institutio* had to be valid, in Gai., 2.244 (9), the question had been raised at what particular moment a conditional legacy had to be valid. In the former controversy (4), the Sabinians maintained that the *heredis institutio* had to be valid from the very moment the testament was made, but in controversy 9, the Sabinians moved to a totally different position. There, they maintained that the legacy only needed to be valid at the moment of the *dies cedens*. The Proculians also reveal a shift in their stance. In controversy 4, they maintained that the *heredis institutio* only needed to be valid at the moment of the testator’s death. In Gai., 2.244 (9), however, they maintained that a conditional legacy had to be valid from the moment the testament was made.

The pragmatic approach of the Sabinians and the Proculians in these two controversies offers a strong argument for the claim that the controversies arose from legal practice. The opinions rendered by the jurists were tailored to the interests of their clients.
2. The Two Keys to Solving the Riddle of the School Controversies: *Topica* and Legal Practice

2.1 Rhetoric and *Topoi*

The analysis of the twenty-one controversies from Gaius’ *Institutiones* has demonstrated that, for each controversy, the representatives of the two schools operated the argumentation theory of the *topica* to construct and argue their legal opinion. It has proven possible for each controversy to discover the different topical arguments of both sides which effectively supported the respective opinions of the jurists involved. The textual and contextual readings of Gaius’ *Institutiones* has shown most helpful to this end. It has often appeared that the topical arguments were either expressly mentioned by Gaius or strongly implied. In the table below, an overview of the specific *topoi* used in each controversy by the two schools is presented, together with the pertinent references to Cicero’s *Topica* and *De inventione* and to Quintilian’s *Institutio Oratoria*:

<table>
<thead>
<tr>
<th>The Controversy</th>
<th>The <em>locus</em> of the Sabinians</th>
<th>The <em>locus</em> of the Sabinians: Source</th>
<th>The <em>locus</em> of the Proculians</th>
<th>The <em>locus</em> of the Proculians: Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Gai., 1.196</td>
<td><em>locus a differentia</em></td>
<td>Cic., <em>Top.</em>, 3.16; 11.46</td>
<td><em>locus a similitudine</em></td>
<td>Quint., <em>Inst. Or.</em>, 5.11.34</td>
</tr>
<tr>
<td>(6) Gai., 2.200</td>
<td><em>locus a similitudine</em></td>
<td>Cic., <em>Top.</em>, 10.44</td>
<td><em>locus a similitudine</em></td>
<td>Cic., <em>Top.</em>, 3.15; 10.41-45</td>
</tr>
<tr>
<td>(7) Gai., 2.216-222</td>
<td><em>locus ex notatione</em></td>
<td>Cic., <em>Top.</em>, 2.10; 8.35</td>
<td><em>locus a similitudine</em></td>
<td>/</td>
</tr>
<tr>
<td>(8) Gai., 2.231</td>
<td><em>ratiocinatio</em>: analogy</td>
<td>Cic., <em>De inv.</em>, 2.148-153</td>
<td><em>ratiocinatio</em>: a contrario</td>
<td>Cic., <em>De inv.</em>, 2.151</td>
</tr>
<tr>
<td>(9) Gai., 2.244</td>
<td><em>ratiocinatio</em>: a contrario</td>
<td>Cic., <em>De inv.</em>, 2.151</td>
<td><em>ratiocinatio</em>: analogy</td>
<td>Cic., <em>De inv.</em>, 2.150</td>
</tr>
<tr>
<td>(11) Gai., 3.98</td>
<td><em>ratiocinatio</em>: /</td>
<td>/</td>
<td><em>ratiocinatio</em>: <em>locus a differentia</em></td>
<td>Cic., <em>Top.</em>, 3.15</td>
</tr>
<tr>
<td>(12) Gai., 3.103</td>
<td><em>ambiguitas</em></td>
<td>Cic., <em>De inv.</em>, 2.116-121</td>
<td><em>ambiguitas</em></td>
<td>Cic., <em>De inv.</em>, 2.116-121</td>
</tr>
<tr>
<td>(13) Gai., 3.133</td>
<td><em>locus a differentia</em></td>
<td>/</td>
<td><em>locus a similitudine</em>; <em>locus ex genere</em></td>
<td>Cic., <em>De or.</em>, 2.167</td>
</tr>
</tbody>
</table>
As appears from this table, two topoi were by far the most popular, the *locus a similitudine* and the *locus a differentia*. They are closely linked to the status of *ratiocinatio*, which juxtaposes reasoning by analogy and *a contrario*. Thus, arguments based upon similarity and difference were most frequently used by the representatives of the schools.\(^{605}\) Whereas the *locus* most currently applied by the Sabinians was that *a differentia*,\(^ {606}\) the one most currently used by the Proculians was the *locus a similitudine*.\(^ {607}\)

\(^{605}\) See Appendix 3.

\(^{606}\) The Sabinians made use of the *locus a differentia* in four controversies: (1) Gai., 1.196; (10) Gai., 3.85-87; (11) Gai., 3.98; (13) Gai., 3.133.

\(^{607}\) The Proculians made use of the *locus a similitudine* in six controversies: (1) Gai., 1.196; (6) Gai., 2.200; (7) Gai., 2.216-222; (10) Gai., 3.85-87; (11) Gai., 3.98; (13) Gai., 3.133.
At times, one and the same *topos* was used to construct and argue two opposite legal opinions. This conclusion refutes the assumption in modern literature that there was a fundamental difference between the Sabinians and the Proculians once again. Another important conclusion to be drawn from the table above is that, almost for each separate controversy, the Sabinians used the *topica* in a different way. The same goes for the Proculians. This demonstrates once more the incorrectness of the assumption in modern literature that the opinions of the Sabinians and of the Proculians were internally consistent. Instead, it shows that the representatives of the schools have constructed an adequate argumentation for each and every legal problem presented to them by conflicting parties.

From the analysis of the controversies (and from the table above), it appears that the Roman jurists adhered to the topical tradition as it had been set out in Cicero’s *Topica*. Quintilian’s *Institutio Oratoria* came too late to be of direct impact on most of the school controversies. His work was the culmination of a rhetorical tradition and, indeed, a considerable number of topical arguments used by the two schools concur with Quintilian’s work. These two works, which are almost one and a half centuries apart, are the main survivors and probably two of the most influential works of a longstanding rhetorical tradition that was contemporary and closely connected to the school controversies.

There are certainly some striking textual similarities between the legal reasoning in Gaius’ *Institutiones*, on the one hand, and the ways of argumentation in Cicero’s *Topica* and – to a lesser extent – Quintilian’s *Institutio Oratoria*, on the other hand.

The most significant example is to be found in Gai., 2.79 (3). In this controversy, the Sabinian argumentation is almost identical with the words used by Cicero in his discussion of the *locus ex causis*. When somebody (A) made wine for himself by processing the grapes of somebody else (B) without mutual agreement, the Sabinians argued that B should become the owner of the wine, ‘quia sine materia nulla species effici possit’ (Gai., D. 41.1.7.7). In other words, the grapes were the cause of the wine without which the wine could not have been produced.

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608 See (4) Gai., 2.123: *locus ex causis*; (5) Gai., 2.195: *locus ex causis*; (6) Gai., 2.200: *locus a similitudine*; (12) Gai., 3.103: *ambiguitas*; (16) Gai., 3.161: *locus ex comparatione* and *loci aequitatis*. In Gai., 3.140 (14), the arguments to support the opposite views were also found by using one and the same *topos*, i.e., the *locus a tempore*. However, the controversy in Gai., 3.140 was not a genuine school controversy and, therefore, does not reveal any information about the topical argumentations used by the Sabinians and the Proculians.
Indeed, Cicero (Top., 15.58) mentioned different kinds of causes including those ‘without which an effect cannot be produced’ or ‘sine quo effici non possit’. The textual similarity between Gai., D. 41.1.7.7 and Cic., Top., 15.58 demonstrates in a very convincing way that the Sabinians were influenced by the topical tradition as described by Cicero.

A second example can be found in Gai., 2.200 (6). When something was bequeathed conditionally in a *legatum per vindicationem*, the Sabinians argued that the thing belonged to the heir while the condition was pending, ‘exemplo statuliberi’ or ‘by analogy with a *statuliber*’. In his discussion of the *locus a similitudine*, Cicero (Top., 10.44) mentioned the citing of examples as one way to argue from similarity: ‘Ex eodem similitudinis loco etiam exempla sumuntur’.609 He even added that the citing of examples was frequently used by jurists in their *responsa*.610 From the fact that Cicero explicitly stated that jurists often used examples as a means of argumentation and that Gaius (2.200) used the word ‘exemplum’ in his description of the Sabinian argument, it can be deduced that the Sabinians have been influenced by the topical argumentations as described by Cicero.

The textual similarity between the Proculian argument in Gai., 3.98 (11) and Cicero’s example of an argument *a similitudine* provides a third example. According to the Proculians, a legacy that was bequeathed under an impossible condition was as void as a *stipulatio* that was made under such a condition: ‘… Non minus legatum inutile … quam stipulationem’. When giving an example of an argument from similarity, Cicero (Top., 3.15) used a comparable expression: ‘… Non magis quam …’

The fourth example is drawn from the controversy about the nature of the price in a contract of sale (15). The Proculians argued that the price had to consist of money, for barter and sale were two distinct contracts (Gai., 3.141: ‘… Aliudque esse … permutationem rerum, aliud emptionem et venditionem’). The Proculian argumentation is similar to the example of an argument *a differentia*, given by Quintilian (Inst. Or., 5.10.60). In this text, Quintilian made a distinction between a slave and a person in servitude for debt by using the following words: ‘Ut aliud est servum esse, aliud servire’. The similarity in wording between Gai., 3.141 and Quint., Inst. Or., 5.10.60 is striking. Gaius used the same words to describe the distinction

609 In translation: ‘From the same *topos* of similarity, also examples are drawn.’
610 Cic., Top., 10.44: ‘Quae commemoratio exemplorum valuit, eaque vos in respondendo uti multum soletis.’ (‘Such a mentioning of examples was effective and you (jurists) tend to use them a lot in giving *responsa*’).
CONCLUSION

between barter and sale as Quintilian had used to make a distinction between a person in servitude for debt and a slave. This suggests that the Proculians had used the *locus a differentia* to stress the difference between barter and sale. In his *Topica*, moreover, Cicero (*Top.*, 3.16) had also provided an example of the *locus a differentia*. The relevant words ‘multum enim differt’ are similar to those used by Paul in D. 19.4.1.pr (15), namely, ‘multumque different praestationes’.

Even when explicit textual similarities are lacking, in all cases the *topoi* as described by Cicero were used. Therefore, it can be argued that Cicero’s *Topica* is representative for the topical tradition as known and used by the Roman jurists. Moreover, it now becomes clear that the topical tradition, as embodied by Cicero’s *Topica*, was far more instrumental in the development of Roman jurisprudence than has been recognised thus far.

Some modern scholars did notice the influences of topical argumentation in the arguments mentioned by Gaius. However, premised as they were by the dogmatic paradigm, they refrained from pursuing this point. Schermaier, for example, perceived the similarity in the wordings between the Sabinian argument in the *specificatio* controversy (3) and Cicero’s description of the *locus ex causis* in Cic., *Top.*, 15.58. Furthermore, Daube stated the following in regard with the controversy in Gai., 3.141 (15): ‘Still, writers like Cicero (*Topica* 20.78) and Quintilian (*Institutio Oratoria* 5.11.36-37) do state that a persuasive force attaches to the opinions of illustrious poets’. However, both Schermaier and Daube disregarded the possibility that the Sabinians actually used the *topica* to find these arguments.

Other scholars unwittingly placed topical labels on the arguments mentioned by Gaius. In regard to the controversy in (7) Gai., 2.216-222, Leuba noticed that the Sabinians used an etymological explanation of *praecipere* in support of their view that a *legatum per praeceptionem* could only be bequeathed to one of the testamentary heirs. In respect of the same controversy, Baviera maintained that the Proculian view that such a legacy could also be bequeathed to an *extraneus*, was based upon the assimilation between a *legatum per praeceptionem* and a *legatum per vindicationem*. Furthermore, in discussing (8) Gai., 2.231, Stolfi acknowledged that the Sabinians used an argument by analogy, whereas the Proculians used an argument *a contrario*, but did not designate this reasoning by its appropriate rhetorical term, namely, *ratiocinatio*. Wolff stated that, in Gai., 3.98 (11), the Sabinians took their view
that a legacy under an impossible condition was valid by drawing a distinction between a *stipulatio* under an impossible condition and a legacy under such a condition. Regarding the Sabinian view in Gai., 3.168 (18), modern scholars, including Baviera, Musumeci, and Nardi, acknowledged that the Sabinians based their opinion about the legal effects of a *datio in solutum* on its similarity with a regular *solutio*. In Gai., 4.79 (21), finally, Stein qualified the controversy concerning the number of *mancipationes* which were necessary for the *noxae deditio* of a son as a dispute turning on the meaning of a statutory provision, namely, a rule from the Twelve Tables. Although Stein correctly stated that the Proculians took their view by analogy with the Twelve Tables and that the Sabinians argued *a contrario*, he failed to make a connection with the pertinent rhetorical *status*, namely, *ratiocinatio*.

In short, scholars have failed to acknowledge the topical bearings on the Sabinian and Proculian argumentations. One exception to this rule is Backhaus. He did recognise the influence of rhetoric and *topoi* on the way in which arguments were formed. Backhaus argued in a very convincing way that the Roman jurists had adopted the argument ‘in maiore minus inest’, that was mentioned in Gai., 3.161 (16) as well as in other juridical texts, from rhetoric and, in particular, from the *topica*.611

### 2.2 Legal practice and the *Ius Respondendi*

On the basis of a close analysis of twenty-one relevant passages from Gaius’ *Institutiones*, it has been shown that topical argumentation played an instrumental role in the school controversies. This offers a strong indication of the close interplay between legal practice and the school controversies, which is the other key to answer the question of the origins of the school controversies.

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CONCLUSION

2.2.1 Legal Practice

Both conclusions that there was no internal consistency among the legal opinions of the representatives of each school and that the jurists used topical argumentation in a pragmatic and flexible way, indicate that the jurists were wont to adjust their opinions and argumentations to the dictates of circumstances. It stands to reason that these circumstances were nothing but an actual legal dispute, often a court case. In this context, the jurist who had been consulted by one side had to render persuasive legal advice that served the purpose of his client. This is by far the most plausible context in which the need arose to persuasively argue two opposing legal opinions.

Many controversies arose when a legal problem presented itself for which the law did not suggest an unequivocal solution and admitted for two diverse, but plausible interpretations.\(^{612}\) In some, the one opinion clearly surpassed the other one in logic or plausibility.\(^{613}\) This offers another argument for the claim that the controversies arose from legal practice. If the arguments and/or opinions of one side are much weaker than those of the other, it is hard to believe that it was a sheer academic debate. Instead, it makes much more sense that the weaker advice was made up because a jurist had been consulted by a citizen having to defend his weak position in court.

\(^{612}\) (1) Gai., 1.196; (2) Gai., 2.15; (3) Gai., 2.79; (4) Gai., 2.123; (7) Gai., 2.216-222; (8) Gai., 2.231; (9) Gai., 2.244; (10) Gai., 3.85-87; (11) Gai., 3.98; (12) Gai., 3.103; (14) Gai., 1.140; (16) Gai., 3.161; (17) Gai., 3.167a; (18) Gai., 3.168; (20) 4.78; (21) Gai., 4.79. The controversy in Gai., 1.196 is also a typical example of a legal problem that can be challenged in both ways. According to the Sabinians, the criterion that had to be applied to determine when a male adolescent reached puberty was sexual maturity. This opinion could easily be challenged by the Proculians, for eunuchs could never meet this criterion. The Proculians argued that the criterion had to be age by analogy with the criterion for the beginning of girl puberty. The Sabinians, in their turn, could easily challenge the Proculian view, because the analogy did not fully apply. Whereas girls reached adulthood at the age of twelve, boys reached adulthood at the age of fourteen.\(^{613}\) In Gai., 2.195 (5), the Sabinians had a position that, from a legal perspective, was clearly the more convincing one. The legal question when and how an ignorant legatee acquired ownership of a thing bequeathed to him in a legatum per vindicationem was answered differently by the Sabinians and the Proculians. According to the former, the ignorant legatee acquired the bequeathed thing immediately and ipso iure after the heir had accepted the inheritance. The Proculians, on the other hand, took the view that the legatee did not become the owner of the bequeathed thing until he had indicated his intention to have it. In other words, the Proculian view implied that the legatee could not acquire a bequeathed thing unknowingly. However, from a legal perspective, it certainly is possible to acquire something (i.e., in this case, a thing bequeathed in a legatum per vindicationem) while being unaware of it. Whereas in Gai., 2.200 (6), the Proculian opinion has proven to be less persuasive than that of the Sabinians, it was the other way around in Gai., 3.141 (15) and in Gai., 3.177-178 (19).
In other words, interpreting the controversies as actual legal disputes which occurred in reality makes them more intelligible.614 Moreover, in some cases, the legal problem could only be reconstructed by using the relevant formula. There, clues could be found as to the elucidation of the legal problem and of the argumentations by the jurists.615 The fact that some controversies turned on the question of whether a certain formula could or could not be applied serves in itself as yet another indication of the practical nature of the controversies.

Nevertheless, a small minority of the legal problems which led to a controversy did not stem from legal practice.616 The most obvious example is to be found in Gai., 2.15. The legal question at the root of this controversy was which particular moment makes beasts of draught and burden become res mancipi, that of birth or that of domestication. In the early Principate, the distinction between res mancipi and res nec mancipi had lost its relevance and, therefore, it is remarkable that the Sabinians and the Proculians bothered to disagree on the matter. Even if a res mancipi was not delivered by way of a mancipatio, but by a mere traditio, from the late Republic onwards the praetor granted ownership to the transferee. The question of whether a young and untamed beast of draught and burden belonged to the category of res mancipi did not have any implications for legal practice. Therefore, it may be assumed that the controversy in Gai., 2.15 merely involved a theoretical problem.

### 2.2.2 Ius Respondendi

Now that it has been shown that, for the most part, the school controversies emerged from legal practice and thus that the heads of the schools were legal practitioners, it remains to be seen whether the analysis of the controversies has yielded more arguments for the hypothesis that the heads of the schools were invested with the ius respondendi.

614 The legal problems underlying the following controversies lend themselves for a convincing reconstruction of the actual legal dispute: (3) Gai., 2.79; (4) Gai., 2.123; (5) Gai., 2.195; (6) Gai., 2.200; (7) Gai., 2.216-222; (8) Gai., 2.231; (9) Gai., 2.244; (11) Gai., 3.98; (12) Gai., 3.103; (13) Gai., 3.133; (15) Gai., 3.141; (16) Gai., 3.161; (17) Gai., 3.167a; (19) Gai., 3.177-178. The controversy in Gai., 4.78 (20), moreover, is pointless, unless it is assumed that a concrete problem, arising from daily life, was at the root of it.

615 Particularly in two controversies, the use of the formula was very helpful: (3) Gai., 2.79 and (15) Gai., 3.141. 616 (2) Gai., 2.15; (10) Gai., 3.85-87; (18) Gai., 3.168; (21) Gai., 4.79. The legal problem underlying the controversy in Gai., 3.140 (14) did not stem from legal practice either, but this was not a genuine school controversy.
CONCLUSION

First, the use of the verbs in the sources to indicate the opinions of the Sabinians and the Proculians is examined. When the opinion of the Sabinians was expressed, the jurists used the verbs *putant*, *existimant*, *dicunt*, *placuit*, *visum est*, and *crediderunt*. For the Proculian view, they used the following verbs: *putant*, *existimant*, *placuit*, and *visum est*. Thus, the verbs do not offer an additional indication that the heads of the schools were vested with the *ius respondendi*, for nowhere the verb *respondere* (*publice*) is used.

It has also been checked which jurists instigated the controversies. An opinion of the authorities of the Sabinian school was ascribed to ‘Sabinus quidem et Cassius ceterique nostri praeceptores’, to ‘Sabinus et Cassius’, to ‘nostri praeceptores’, once to the ‘Cassiani’, and once to ‘Sabinus’. An opinion of the Proculian school, on the other hand, was assigned to ‘Nerva et Proculus et ceteri diversae scholae auctores’, to ‘Nerva et Proculus’, to ‘Proculus’, to ‘diversae scholae auctores’, and to the ‘Proculiani’. The following designations were only used once: ‘Nerva vero et Proculus ceterique illius scholae auctores’; ‘Labeo et Proculus’; and ‘Nerva’.

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617 (1) Gai., 1.196; (3) Gai., 2.79; Gai., D. 41.1.7.7; (5) Gai., 2.195; (6) Gai., 2.200; (7) Gai., 2.217; Gai., 2.220; (9) Gai., 2.244; (10) Gai., 2.37; (11) Gai., 3.98; (12) Gai., 3.103; (15) Gai., 3.141; Paul, D. 18.1.1.1; *Inst.*, 3.23.2; (20) Gai., 4.78.


621 (13) Gai., 3.133.

622 (21) Gai., 4.79.

623 (1) Gai., 1.196; (2) Gai., 2.15; (3) Gai., 2.79; Gai., D. 41.1.7.7; (4) Gai., 2.123; (5) Gai., 2.195; (6) Gai., 2.200; (7) Gai., 2.221; (10) Gai., 3.87; (17) Gai., 3.167a; (20) Gai., 4.78; (21) Gai., 4.79.


626 (3) Gai., 2.79; (18) Gai., 3.168.

627 (1) Gai., 1.196; (5) Gai., 2.195; (21) Gai., 4.79 (*Sabinus et Cassius ceterique nostrae scholae auctores*).

628 (3) Gai., 2.79; (3) Gai., D. 41.1.7.7; (9) Gai., 2.244; (13) Gai., 3.133; (15) Paul, D. 18.1.1.1; *Inst.*, 3.23.2; (16) Gai., 3.161; *Inst.*, 3.26.8; (17) Pomp., D. 45.3.6.

629 (4) Gai., 2.123; (6) Gai., 2.200; (7) Gai., 2.217; Gai., 2.219-220; (8) Gai., 2.231; (10) Gai., 2.37; Gai., 3.87; (11) Gai., 3.98; (12) Gai., 3.103; (15) Gai., 3.141; (17) Gai., 3.167a; (18) Gai., 3.168; (19) Gai., 3.178; (20) Gai., 4.78.

630 (1) Ulp., *Ep.*, 11.28.


632 (2) Gai., 2.15.

633 (3) Gai., D. 41.1.7.7; (15) Paul, D. 18.1.1.1.


635 (1) Gai., 1.196; (3) Gai., 2.79; (4) Gai., 2.123; (6) Gai., 2.200; (7) Gai., 2.221; (9) Gai., 2.244; (10) Gai., 2.37; Gai., 3.87; (11) Gai., 3.98; (12) Gai., 3.103; (15) Gai., 3.141; *Inst.*, 3.23.2; (16) *Inst.*, 3.26.8; (17) Gai., 3.167a; (18) Gai., 3.168; (19) Gai., 3.178; (20) Gai., 4.78; (21) Gai., 4.79.

636 (1) Ulp., *Ep.*, 11.28; (3) *Inst.*, 2.1.25.

637 (5) Gai., 2.195.

638 (8) Gai., 2.231.

- 338 -
CONCLUSION

As appears from these data, most of the controversies go back to Sabinus and Cassius and to Nerva and Proculus. This is supported by Pomponius’ remark that Nerva *pater* and Massurius Sabinus ‘had even increased the dissensions’. At least of Sabinus it is certain that he held the *ius respondendi*. It makes sense to assume that also Nerva had this privilege, as well as Cassius and Proculus. Another conclusion which can be drawn from these data is that the later leaders of the schools did not instigate as many controversies as their predecessors. The probable reason for this is that later emperors, namely, the Flavians, Nerva, and Trajan, included the leaders in their *consilium principis* and involved them in central government. In this way, they could avoid public discussions about the law.

The way in which the controversies were brought to an end is informative as well. A number of controversies lost their relevance in the course of time and, therefore, did not need to be settled. One of the controversies was temporarily settled by a decision of L. Iavolenus Priscus, who was the head of the Sabinian school and likely to have been invested with the *ius respondendi*. Some controversies were brought to an end by way of a constitution or a decision of an emperor. Another possibility is that the later jurists no longer referred to the controversy between the Sabinians and the Proculians as such, but simply adopted one of the two opinions. Finally, some controversies may never have been decided in either way so that jurists could continue to take various points of view on the matter.

In later times, no preference was shown for either of the two schools: whereas the Sabinian opinion prevailed seven times, the Proculian opinion did so five times. Both the
controversy about *specificatio* (3) and the controversy in Gai., 3.140 (14) were settled by the prevalence of a *media sententia*.

From these data, it may be concluded that many of the controversies were settled either through a *media sententia* or through an imperial decision. Both ways suggest that the two opinions which constituted the controversy could not easily be brushed away and that, if no compromise was reached, a decision could only come from imperial authority. Apparently, the *responsa ex auctoritate principis* could only be abolished and replaced by another privileged jurist, through compromise, or by an authority that was higher than the jurist who gave such *responsa*, i.e., by the emperor himself.

3. The Riddle of the Controversies Solved

In this study, the question about the *raison d’être* of the Sabinian school and the Proculian school and about the nature of their opposition has been addressed and answered. The legal problems underlying the controversies arose in legal practice when two parties locked in a trial needed pertinent advice. Since the heads of the schools were vested with the *ius publice respondendi ex auctoritate principis*, their *responsa* carried special authority, namely, that of the emperor, and were binding on the judge. If, therefore, one of the opposing parties turned to the head of one school and the other party to the head of the other school, a school controversy arose. Obviously, the heads of the schools needed pertinent arguments to render their *responsa* convincing. For this purpose, they used rhetoric and *topica*. The two keys to solve the riddle of the school controversies were the connection between Roman jurisprudence and legal practice on the one hand and between Roman jurisprudence and *topica* on the other. This means that the three-cornered relationship between Roman jurisprudence, legal practice, and *topica* provided the necessary means to satisfactorily explain the existence of the two schools and the controversies between them.

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647 The Proculian opinion prevailed in (1) C. 5.60.3; *Inst.*, 1.22.*pr*; (8) *Inst.*, 2.20.34; (12) Pomp., D. 45.1.110,*pr*; *Inst.*, 3.19.4; (15) C. 4.64.7; *Inst.*, 3.23.2; (16) Gai., D. 17.1.4; *Inst.*, 3.26.8.
648 (3) *Inst.*, 2.1.25; (14) C. 4.38.15.1-3; *Inst.*, 3.23.1.*pr*-1.
As appears from this study, the dogmatic approach to Roman law has put modern scholars on the wrong track for more than a century. The historical approach allowed the schools and the controversies to be studied from a new and enlightening perspective. The results of this study argue in favour of this approach and imply that it may serve a better understanding of Roman law. Roman law is not so much to be seen as a system, but as ‘case law’ and, consequently, Roman jurists are first and foremost to be regarded as legal practitioners.
POMPONIIUS. Libri singulari enchiridii. 47. Post hunc maximea auctoritatis fuerunt ATEIUS CAPITO, qui Ofilium secutus est, et ANTISTIUS LABEO, qui omnes hos audivit, institutus est autem a Trebatio. Ex his Ateius consul fuit: Labeo noluit, cum offerretur ei ab Augusto consulatus, quo suffectus fieret, honorem suscipere, sed plurimum studiis operam dedit: et totum annum ita diviserat, ut Romae sex mensibus cum studiosis esset, sex mensibus secederet et conscribendis libris operam daret. Itaque reliquit quadringenta volumina, ex quibus plurima inter manus versantur. Hi duo primum veluti diversas sectas fecerunt: nam Ateius Capito in his, quae ei tradita fuerant, perseverabat; Labeo ingenii qualitate et fiducia doctrinae, qui et ceteris operis sapientiae operam dederat, plurima innovare instituit. 48. Et ita Ateio Capitoni MASSURIUS SABINUS successit, Labeoni NERVA, qui adhuc eas dissensiones auxerunt. Hic etiam Nerva Caesari familiarissimus fuit. Massurius Sabinus in equestri ordine fuit et publice primus respondit: posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi concessum erat. 49. Et, ut obiter sciamus, ante tempora Augusti publice respondendi ius non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant: neque responsa utique signata dabant, sed plerumque iudicibus ipsi scribabant, aut testabantur qui illos consulebant. Primus divus Augustus, ut maior iuris auctoritas haberetur, constituit, ut ex auctoritate eius responderent: et ex illo tempore peti hoc pro beneficio coepit. Et ideo optimus princeps Hadrianus, cum ab eo viri praetorii peterent, ut sibi liceret respondere, rescriptis eis hoc non peti, sed praestari solere et ideo, si quis fiduciam sui haberet, delectari se populo ad respondendum se praepararet. 50. Ergo Sabino concessum est a Tiberio Caesare, ut populo responderet: qui in equestri ordine iam grandis natu et fere annorum quinquaginta receptus est. Huic nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustentatus est. 51. Huic successit GAIUS CASSIUS LONGINUS natus ex filia Tuberonis, quae fuit neptis Servii Sulpicii: et ideo proavum suum Servium Sulpicium appellat. Hic consul fuit cum Quartino temporibus Tiberii, sed plurimum in civitate auctoritatis habuit eo usque, donec eum Caesar civitate pelleret. 52. Expulsus ab eo in Sardiniam, revocatus a Vespasiano diem suum obit. Nervae
successit PROCULUS. Fuit eodem tempore et NERVA FILIUS: fuit et alius LONGINUS ex equestri quidem ordine, qui postea ad praeturam usque pervenit. Sed Proculi auctoritas maior fuit, nam etiam plurimum potuit: appellatique sunt partim Cassiani, partim Proculiani, quae origo a Capitone et Labeone coeperat. 53. Cassio CAELIUS SABINUS successit, qui plurimum temporibus Vespasiani potuit: Proculo PEGASUS, qui temporibus Vespasiani praefectus urbi fuit: Caelio Sabino PRISCUS IAVOLENUS: Pegaso CELSUS: Patri Celso CELSUS FILIUS et PRISCUS NERATIUS, qui utrique consules fuerunt, Celsus quidem et iterum: Iavoleno Prisco ABURNIUS VALENS et TUSCIANUS, item SALVIUS IULIANUS.

POMPONIUS, book 1 of the Manuel. 47. After him ATEIUS CAPITO, who followed up Ofilius, and ANTISTIUS LABEO, who listened to all of the above, but was instructed by Trebatius, have held the greatest authority. Of these two, Ateius has been consul. Labeo did not want to accept office when the consulship, whereby he would have become consul suffectus, was offered to him by Augustus. Instead he bestowed the greatest care on his studies. And he had divided the entire year so that for six months he was in Rome with his students and for six months he withdrew (from the city) and bestowed care on the writing of books. As a result, he left four hundred manuscript rolls most of which are passed on from hand to hand. These two men set up for the first time opposite sectae, so to say, for Ateius Capito persevered with the line, which had been handed down to him. Labeo, who had also bestowed care on other branches of knowledge, set out to make many innovations on account of the quality of his genius and the faith in his own learning. 48. And so MASSURIUS SABINUS succeeded Ateius Capito and NERVA Labeo and they have even increased these dissensions. This Nerva was also on the most intimate terms with the emperor. Massurius Sabinus was of equestrian rank and the first to respond publice. Afterwards, this came to be granted as a privilege. To him, however, it had been conceded by the emperor Tiberius. 49. And to clarify the point in passing: before the time of Augustus the ius publice respondendi was not granted by principes, but those who had confidence in their own studies gave advice to those who consulted them. Nor did they always give advice under seal, but mostly they wrote to the judges themselves, or they testified to those who consulted them. In order for law to attain greater auctoritas, divus Augustus was the first to
establish that they would give advice under his authority. And from that time this began to be asked as a privilege. And, therefore, when men of praetorian rank asked him to allow them to give advice, our most excellent princeps Hadrian answered them in a rescript that this is not usually asked for, but earned and that, if someone had faith in himself, he would be delighted that he would prepare himself to give advice to the people. 50. So, it was conceded to Sabinus by the emperor Tiberius, that he could give advice to the people. He was admitted to the equestrian rank when already of mature age and nearly fifty years old. He did not have substantial means, but was mainly supported by his auditors. 51. GAIUS CASSIUS LONGINUS followed him up. He was born from the daughter of Tubero, who was the granddaughter of Servius Sulpicius: and, therefore, he calls Servius Sulpicius his great-grandfather. In the days of Tiberius, he was consul together with Quartinus, but he had the greatest authority in the city right up to the time when the emperor expelled him from the city. 52. After he had been expelled by him to Sardinia, he died on the day he was recalled by Vespasian. PROCULUS was the successor of Nerva. In the same period of time, there was also NERVA FILIUS and another LONGINUS from equestrian rank, who subsequently attained praetorship. But the authority of Proculus was superior, for he was also of the greatest ability. They were partly called Cassiani and partly Proculiani. This distinction originally began with Capito and Labeo. 53. CAELIUS SABINUS, who had the most potential in the days of Vespasian, was the successor of Cassius. PEGASUS, who was praefectus urbi in the days of Vespasian, was the successor of Proculus and IAVOLENUS PRISCUS of Caelius Sabinus and CELSUS of Pegasus. Celsus Pater was succeeded by CELSUS FILIUS and by NERATIUS PRISCUS, both of whom were consuls and Celsus even a second time. Iavolenus Priscus was succeeded by ABURNIUS VALENS, by TUSCIANUS as well as by SALVIUS IULIANUS.
APPENDIX 2

The Leaders of the Schools

First, a biographical sketch of the leaders of the Sabinian school will be given. Then, the same will be done for the leaders of the Proculian school.

The Sabinian C. Ateius Capito was a jurist of a modest senatorial family. He died in 22 AD. According to Pomponius, he was a follower of the jurist Aulus Ofilius. Pomponius qualifies Capito as a traditional jurist. In 5 AD, he held the office of *consul sufffectus* and, since 13 AD, he was as *curator aquarum* in charge of the water supply. The work of Capito has not survived and is known only through quotations by other jurists.649

After C. Ateius Capito, Massurius Sabinus became head of the Sabinian school, which was named after him. He lived in the early 1st century AD. Because he was not a member of the Senate and did not have a political career, he occupied a particular position among the jurists. He only attained equestrian rank when nearly fifty years old. His financial means were so limited that he had to be supported by his students. Nevertheless, Tiberius conceded to him the *ius publice respondendi ex auctoritate principis* and, according to Pomponius (D. 1.2.2.48), he was the first to be so honoured. His most important work was a systematic treatise on the *ius civile*, which is called *Libri tres iuris civilis*. This work was extensively commented on by Sextus Pomponius, Paul, and Ulpian. These commentaries were entitled *Ad Sabinum*.650

In the sources, the Sabiniani are also designated as the Cassiani, named after Sabinus’ successor C. Cassius Longinus. This jurist lived in the 1st century AD. About his family background we are well informed. He was a descendant of one of the murderers of Julius

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Caesar. On his mother’s side, he descended from two renowned jurists; his mother was a daughter of Q. Aelius Tubero and a granddaughter of Servius Sulpicius Rufus. Moreover, his marriage with Iunia Lepida, a great-granddaughter of Augustus, connected him to the imperial house. Thus, C. Cassius Longinus belonged to the top tiers of the Roman aristocratic elite. After a career as praetor, consul suffectus (30 AD), governor of Asia Minor (40-41), and of Syria (45-49), he was exiled under Nero to Sardinia (65). He was recalled by Vespasian, but died on the day he returned. Apart from being a politician, Cassius was also a renowned jurist. His chief work was one on the ius civile. It is known partly from quotations by other authors and partly from excerpts in the Digest from Iavolenus’ Libri ex Cassio.

Caelius Sabinus succeeded C. Cassius Longinus as head of the Sabinian school. He may already have assumed the leadership of the school when C. Cassius Longinus was in exile in Sardinia. Caelius Sabinus was consul in 69 AD (Tac., Ann., 1.77) and, according to Pomponius (D. 1.2.2.53), he had much influence in the days of Vespasian (plurimum potuit). Aulus Gellius (4.2.3) stated that he wrote a commentary on the aedilician edict.

L. Iavolenus Priscus, a jurist who lived in the second half of the 1st century AD, took over the position of Caelius Sabinus as head of the Sabinian school. He was the teacher of Salvius Julianus. He held two legionary commands, one in Dalmatia and the other in Africa. Next, he became legal assessor (iuridicus) in Britain and, in 86 AD, he became consul suffectus. Thereafter, he was governor in turn of Germania superior, Syria, and Africa. In Rome, L. Iavolenus Priscus was pontifex. In one of his letters, Pliny the Younger (6.15) states that L. Iavolenus Priscus was a member of the consilium of the Emperor Trajan and that he gave legal advice ‘publice’. The latter remark probably refers to Iavolenus having held the ius respondendi. His legal responsa were published in his most important work, i.e., Epistulae.

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651 Tac. Ann., 16.7.2; Suet., Nero, 37.1; Dio, 59.29.3.
655 Iul., D. 40.2.5.
656 See infra: § 3.
Furthermore, there are excerpts in the Digest from his *Libri ex Cassio* and *ex Plautio* and from an epitome of Labeo’s *Posteriores*.657

After L. Iavolenus Priscus, Salvius Iulianus led the Sabinian school together with the lesser known Aburnius Valens and Tuscianus. Salvius Iulianus was a very important if not the most important jurist of the 2nd century AD, and the last known head of the Sabinian school. His political career certainly was impressive: he held many offices including those of quaestor, praetor, consul (148), and pontifex. Between 150 and 161, he was governor of *Germania inferior* and, after 161, of Hispania *citerior*. Furthermore, he was governor in Africa between 166 and 169. In 130, at the request of Hadrian, Salvius Iulianus produced a definite edition of the praetor’s edict, i.e., the *edictum perpetuum*. The most important work of this jurist is his *Digesta* in ninety books. It is frequently quoted by later jurists and extensively used in the Digest of Justinian. Salvius Iulianus also wrote commentaries on works of two earlier, little known jurists, Urseius Ferox and Minicius, and a booklet *De ambiguitatibus*.658 Aburnius Valens lived under the reign of Hadrian and Antoninus Pius. He wrote a treatise on *fideicommissa*.659 On Tuscianus, no additional information is known.660

Let us now turn to a brief biographical sketch of the leaders of the Proculian school, to begin with M. Antistius Labeo. He was an exceptionally gifted jurist, who was born in the middle of the 1st century BC and died between 10 and 21 AD. His father was the late-republican jurist Pacuvius Antistius Labeo.661 According to Pomponius, M. Antistius Labeo was instructed by the jurist C. Trebatius Testa. Unlike his contemporary C. Ateius Capito, Labeo was an innovator of the law, who, at the same time, stayed attached to the republican principles.662 He held the senatorial rank and, in 18 BC, he became a member of a commission to reconstitute

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661 Pomp., D. 1.2.2.44.

the Senate.\textsuperscript{663} He also held the office of praetor, but, according to Pomponius, refused the office of \textit{consul suffectus}, when it was offered to him by Augustus.\textsuperscript{664} According to Tacitus (\textit{Ann.}, 3.75), however, the position was never offered to him. Pomponius’ statement that his intellectual interests were not limited to the law is confirmed by Aulus Gellius. According to the latter, Labeo was not only well-versed in law, but also in grammar, dialectics, literature, and etymology. He applied his knowledge of etymology to solve knotty points of law.\textsuperscript{665} According to Pomponius, Labeo divided his time equally: he remained in Rome for six months together with his students. The other six months he retired from Rome to write books. At his death, he left 400 manuscript rolls. He wrote a commentary on the Law of the Twelve Tables, one on the praetorian edicts, a treatise on pontifical law as well as his \textit{Responsa, Epistulae}, and \textit{Pithana}.\textsuperscript{666}

M. Antistius Labeo was succeeded by M. Cocceius Nerva or Nerva \textit{pater}. According to Pomponius, the range of disagreements, initiated under Capito and Labeo, even increased under their immediate successors, Massurius Sabinus and M. Cocceius Nerva (Pomp., D. 1.2.2.48: ‘… Qui adhuc eas dissensiones auxerunt’). M. Cocceius Nerva (Nerva \textit{pater}) was a descendant of M. Cocceius Nerva, who had been consul in 36 BC. He was also the grandfather of the later Emperor Nerva. Before 24 AD, Nerva \textit{pater} was \textit{consul suffectus} and, since 24 AD, he was \textit{curator aquarum}. He was on the most intimate terms with Tiberius and accompanied him first to Campania and, next, to Capri, where he committed suicide in 33 AD.\textsuperscript{667} So, whereas Pomponius presented Labeo as a political adversary of Augustus, it appears that his successor, Nerva \textit{pater}, put aside his enmity towards the emperor.\textsuperscript{668}

Proculus succeeded Nerva \textit{pater} as the head of the Proculian school and lent his name to it. Very little is known about this jurist, who lived in the 1\textsuperscript{st} century AD. Since Pomponius does not refer to any of his other names, there are doubts about his exact identity. Whereas some

\textsuperscript{663} Dio, 54.15.7; Suet., \textit{Aug.}, 54.
\textsuperscript{664} Pomp., D. 1.2.2.47.
\textsuperscript{665} Gellius, \textit{Noctes Atticae}, 13.10.1.
\textsuperscript{667} Tac., \textit{Ann.}, 4.58.1 (Campania); Tac., \textit{Ann.}, 6.26.1; Dio, 58.21.4.
\textsuperscript{668} About M. Cocceius Nerva, see BERGER, p. 595; R. HANSLIK, Cocceius (5), \textit{Der kleine Pauly} 1 (1964), c. 1236; KUNKEL (1967), p. 120; JOLOWICZ (1972), p. 382.
APPENDIX 2

authors, such as Honoré and Bauman, argue that this jurist can be identified with Sempronius Proculus, Kunkel suggests that he may be identified with Cn. Acerronius Proculus. Some fragments of his Epistulae have survived.

According to Pomponius (D. 1.2.2.52), Proculus shared the leadership of the Proculian school with M. Cocceius Nerva (Nerva filius) and Longinus. Nerva filius was the son of M. Cocceius Nerva and, probably, the father of the Emperor Nerva. In 40 AD, he was consul. Longinus was of equestrian rank, but subsequently attained the praetorship. Since Pomponius only mentions the cognomen of this jurist, nothing more can be found out about him.

Pomponius also maintained that the authority of Proculus was superior to that of Nerva filius and Longinus, for he was of the greatest ability (D. 1.2.2.52: ‘Sed Proculi auctoritas maior fuit, nam etiam plurimum potuit’). The meaning of the words ‘nam etiam plurimum potuit’ is not clear; it may refer to a significant influence in matters of law, or Proculus may have distinguished himself either by his political career or by his background.

After Proculus, Pegasus was the head of the Proculian School. According to the scholia of Juvenal, he was the son of a trierarchus, i.e. of a naval captain. If so, he belonged to a humble family. It is uncertain whether he may be connected with the two senatus consulta that are passed ‘Pegaso et Pusione consulibus’. He was praefectus urbi under Vespasian (Pomp., D.

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671 According to B. KÜBLER, Rechtsschulen, RE 2.1 (1914), c. 380, Proculus shared the leadership of the Proculian school with Nerva filius and Longinus. J.W. TELLEGEN, Gaius Cassius and the Schola Cassiana in Pliny’s Letter VII 24.8, SZ 105 (1988), p. 286, on the other hand, argued that Pomponius only mentioned the jurists Nerva filius and Longinus to prevent any confusion with Nerva pater and C. Cassius Longinus.
672 About Nerva filius, see BERGER, p. 595; KUNKEL (1967), p. 130.
673 About Longinus, see KUNKEL (1967), p. 131.
674 This phrase was used several times by Pomponius. According to KUNKEL (1967), pp. 123-124, it meant that Proculus, like the other jurists of whom it was used, attained consulship. This view is criticized by HONORÉ (1962:2), pp. 489-490, and by KRAMPE (1970), pp. 5-6.
675 Gai., 1.31; Gai., 2.254.
1.2.2.53) and under Domitian (Juv., Sat., 4.76-77). Pegasus is cited by later writers, but nothing from his work has survived.\footnote{About Pegasus, see BERGER, p. 625; KUNKEL (1967), pp. 133-134; JOLOWICZ (1972), p. 383; D. MEDICUS, Pegasos (2), Der kleine Pauly 4 (1972), cc. 582-583; E. CHAMPLIN, Pegasus, ZPE 32 (1978), pp. 269-278.}

After Pegasus, Celsus \textit{pater} was the head of the Proculian School. Of this jurist, almost nothing is known. According to his son P. Iuventius Celsus, Celsus \textit{pater} was a member of the \textit{consilium} of the consul Publius Ducenius Verus for one particular case.\footnote{KUNKEL (1967), pp. 137-138.} Although it is uncertain whether Celsus \textit{pater} belonged to equestrian or senatorial rank, the senatorial career of his son suggests that Celsus \textit{pater} was not of low birth.\footnote{Ulp., D. 1.1.1.pr: ‘Law is the art of good and just’.}

Celsus \textit{pater} is succeeded by his son P. Iuventius Celsus (Celsus \textit{filius}) and by L. Neratius Priscus. Celsus \textit{filius} lived in the 2\textsuperscript{nd} century AD and had a brilliant political career. He was prae
tor in 106 or 107 AD, governor of Thrace and, later, of Asia. In 129, he even became consul for the second time. He was also a member of the \textit{consilium} of Hadrian. To him we owe concise statements, such as the classical definition of law: ‘Ius est ars boni et aequi’.\footnote{About Celsus \textit{filius}, see BERGER, p. 385; KUNKEL (1967), pp. 146-147; T. MAYER-MALY, Iuventius (3), \textit{Der kleine Pauly} 3 (1969), c. 31; JOLOWICZ (1972), p. 384; H. HAUSMANINGER, Publius Iuventius Celsus: Persönlichkeit und juristische Argumentation, ANRW 2.15 (1976), pp. 382-407.}

His main work was his \textit{Digesta} in thirty-nine books. Many extracts from his Digest have survived in Justinian’s work of the same name, along with many citations of his views, especially by Ulpian. Celsus \textit{filius} also wrote \textit{Epistulae}, \textit{Commentarii}, and \textit{Quaestiones}.\footnote{Historia Augusta: \textit{Vita Hadriani}, 18.1.}

Celsus \textit{filius} headed the Proculian school along with his colleague, L. Neratius Priscus, a jurist who lived at the end of the 1\textsuperscript{st} and the beginning of the 2\textsuperscript{nd} century AD. He was \textit{consul suffectus} in 97 and, later, governor of \textit{Germania Inferior} and Pannonia. He belonged to Hadrian’s \textit{consilium}.\footnote{About L. Neratius Priscus, BERGER, p. 595; KUNKEL (1967), pp. 144-145; JOLOWICZ (1972), p. 384; T. MAYER-MALY, Neratius (4), \textit{Der kleine Pauly} 4 (1972), c. 67; V. SCARANO USSANI \textit{Empiria e dogmi. La scuola proculiana fra Nerva e Adriano}, Torino 1990, pp. 21-75.}

APPENDIX 3

THE SABINIANS AND THE PROCULIANS: TOPOI

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<td>2.9.20</td>
</tr>
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<td>Pauli <em>Sententiae</em>:</td>
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</tr>
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</tr>
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<td>Ulpianus, <em>Epitome</em>:</td>
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<tr>
<td>2.1-6</td>
<td>3.139</td>
<td>19.1</td>
</tr>
<tr>
<td>10.1</td>
<td>3.140</td>
<td>19.12-15</td>
</tr>
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<td>3.141</td>
<td>22.14</td>
</tr>
<tr>
<td><em>Corpus Iuris Civilis</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Institutiones</em>:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.2.8</td>
<td>3.133</td>
<td>2.20.32</td>
</tr>
<tr>
<td>1.22.pr</td>
<td>3.134</td>
<td>2.20.34</td>
</tr>
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<td>3.135</td>
<td>3.17.3</td>
</tr>
<tr>
<td>2.13.pr</td>
<td>3.136</td>
<td>3.19.4</td>
</tr>
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</tr>
</tbody>
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### Digesta:

<table>
<thead>
<tr>
<th>Digesta:</th>
<th>1.1.1.pr</th>
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</tr>
</thead>
<tbody>
<tr>
<td>1.2.2.41</td>
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<td>18.1.35.1</td>
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</tr>
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<td>45.1.98.pr</td>
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</tr>
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<td>10.2.26</td>
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</tr>
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</tr>
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<td>10.2.42</td>
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<td>35.5.15(16)</td>
<td>45.1.126.2</td>
<td></td>
</tr>
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<td>10.2.43</td>
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</tr>
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<td>10.2.51.pr</td>
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<td>45.3.6</td>
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</tr>
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<td>12.1.2.1</td>
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<td>45.3.17</td>
<td></td>
</tr>
<tr>
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<td>12.6.26.4</td>
<td>28.2.8</td>
<td>40.1.11</td>
<td>46.2.1.pr</td>
<td></td>
</tr>
<tr>
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<td>13.5.1.5</td>
<td>28.3.16</td>
<td>40.2.5</td>
<td>46.2.6.pr</td>
<td></td>
</tr>
<tr>
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<td>13.7.24.pr</td>
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<td>46.2.31.1</td>
<td></td>
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<td>17.1.1.pr</td>
<td>28.5.46(45)</td>
<td>41.1.3.pr</td>
<td>46.3.54</td>
<td></td>
</tr>
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<td>6.1.66</td>
<td>17.1.3.2</td>
<td>30.17.2</td>
<td>41.1.7.7</td>
<td>46.3.46.pr</td>
<td></td>
</tr>
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<td>17.1.4</td>
<td>30.41.1-2</td>
<td>41.1.11</td>
<td>47.2.17.pr-1</td>
<td></td>
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<td>17.1.5.5</td>
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</tr>
<tr>
<td>7.4.16</td>
<td>17.1.33</td>
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<td>41.1.37.3</td>
<td>47.4.1.1</td>
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<td>17.1.41</td>
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<td>42.1.4.7</td>
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</tr>
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<td>17.2.76</td>
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<td>45.1.1.5</td>
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<td></td>
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<td>9.4.1</td>
<td>18.1.1.pr</td>
<td>31.32.1</td>
<td>45.1.18</td>
<td>50.17.29</td>
<td></td>
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<td>9.4.37</td>
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<td>31.80</td>
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<td>50.17.110.pr</td>
<td></td>
</tr>
</tbody>
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### Codex:

<table>
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<th>Codex:</th>
<th>4.27.2(3).pr-1</th>
<th>4.64.1</th>
<th>6.29.3.1</th>
<th>8.42(43).17</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.27.2(3).2</td>
<td>4.64.2</td>
<td>6.37.12</td>
<td></td>
<td>8.44(45).4</td>
</tr>
<tr>
<td>4.38.15.1-3</td>
<td>4.64.7</td>
<td>6.43.2</td>
<td></td>
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</tr>
<tr>
<td>4.38.15.1</td>
<td>5.60.3</td>
<td>7.45.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4.44.9</td>
<td>6.23.24</td>
<td>8.42.16</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
# 2. RHETORICAL SOURCES

**Aristotle, *Retorica***:
1.7.1
2.23.4

**Cicero, *Brutus***:
39.145-41.152

**Cicero, *De inventione***:
- 2.116-154
- 2.116-121
- 2.122-143
- 2.144-147
- 2.148-153
- 2.148
- 2.148-154
- 2.150
- 2.151
- 2.153-154

**Cicero, *De oratore***:
- 1.5
- 1.187-190
- 1.212
- 1.239-240
- 2.167
- 2.172

**Cicero, *Partitiones Oratoriae***:
1.2.7

**Cicero, *Pro Roscio Comoedo***:
- 1.1-5.14
- 1.2
- 1.4
- 2.5
- 3.8
- 3.9
- 5.14

**Cicero, *Topica***:
- 1.1-5
- 2.6-4.24
- 2.7-8
- 2.8
- 2.9
- 2.10
- 3.11
- 3.12
- 3.13
- 3.14
- 3.15
- 3.16
- 3.17
- 4.18
- 4.19
- 4.20
- 4.21
- 4.22
- 4.23
- 4.24
- 4.25-20.78
- 6.26-29
- 8.35-37
- 10.41-45
- 11.46
- 11.50
- 12.51
- 12.53
- 14.58-17.66
- 14.58
- 15.59
- 15.60-16.61
- 15.62-17.64
- 16.62
- 16.62-17.64
- 17.65
- 17.66
- 19.73-20.78
- 20.78
- 21.79-26.99
- 21.81-23.90
- 23.87-88
- 23.87
- 23.89-90
- 23.90
- 26.96
- 26.100
3. OTHER LITERARY SOURCES

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5.30

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4.2.3 13.10.1 13.13.1
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54.15.7 58.21.4 59.29.3

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68.15

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18.1

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1.430
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1.77 4.58.1 6.26.1 16.7.2
3.75 6.26 14.42-45 16.8

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2.6.3 2.7.6 2.8.3
GAIUS ONTMOET CICERO: RECHT EN RETORICA IN DE
SCHOOLCONTROVERSEN
Nederlandse samenvatting

Tijdens de 1ste en 2de eeuw n. Chr. waren er in Rome twee rechtsscholen, de Sabiniani en de Proculiani. De vertegenwoordigers van deze scholen hebben voor een aantal privaatrechtelijke problemen een tegengesteld standpunt ingenomen. Deze meningsverschillen tussen de Sabiniani en de Proculiani zijn in de literatuur beter bekend als de schoolcontroversen. Zowel Gaius als Justinianus verwijzen naar een aantal van deze controversen.

De twee rechtsscholen en de controversen die er tussen hen bestonden zijn één van de meest omstreden onderwerpen op het gebied van Romeins recht. Het onderwerp roept tal van vragen op: Wat is de *raison d’être* van deze rechtsscholen en waarmee hielden hun vertegenwoordigers zich precies bezig?; Hoe is de tegenstelling tussen deze scholen in het leven gekomen?; Waarom en hoe zijn de controversen tussen hen ontstaan?

Tot dusver zijn geleerden er niet in geslaagd om de tegenstelling tussen de Sabiniani en de Proculiani en de oorsprong van de controversen tussen hen op een overtuigende manier te verklaren. Het gros van de geleerden heeft aangenomen dat aan alle controversen één specifieke theorie of traditie ten grondslag lag en dat elke school één zijde van deze theoretische medaille vertegenwoordigde. Zij geloofden dat de studie van de controversen de aard van deze theorie of traditie zou ontsluieren. De tegenstelling tussen de scholen zou verklaard kunnen worden als een confrontatie tussen twee intern consistente en eenduidige opvattingen over het recht. Sommige geleerden hebben beweerd dat de vertegenwoordigers van de scholen deel uitmaakten van tegengestelde filosofische stromingen. Anderen hebben beweerd dat de controversen ontsproten aan een fundamenteel verschillende opvatting over de maatschappij, de juridische methodologie of de politiek.

Vanuit deze invalshoek is het echter onmogelijk gebleken om de aard van de scholen en de controversen die er tussen hen bestonden te verklaren. De moderne geleerden zijn er immers nooit in geslaagd om één enkele theorie of traditie te ontdekken die aan alle controversen ten grondslag lag. Ze hebben ook nooit kunnen aantonen dat de juridische standpunten van elke
school intern consistent waren, noch dat er een fundamenteel onderscheid tussen beide scholen bestond.

Er kunnen verschillende redenen aangebracht worden om deze mislukking in de moderne literatuur te verklaren. Het moderne debat omtrent de scholen en de controversen stond en staat nog steeds onder invloed van enkele vastgeroeste opvattingen over het klassieke Romeins recht en over de rol van de Romeinse juristen in de Vroege Keizertijd.


De dogmatische benadering van het Romeins recht heeft ook de moderne opvattingen over de Romeinse jurist beïnvloed. Romeinse juristen worden doorgaans gezien als een aparte klasse van wereldvreemde kamergeleerden. In de hoedanigheid van theoretici worden ze lijnrecht tegenover redenaars geplaatst. Volgens het gros van de moderne rechtshistorici traden de redenaars op als advocaat, maar hadden ze weinig kennis van het recht. In de modern literatuur is het algemeen aanvaard dat er, tegen het eind van de 1ste eeuw v. Chr., tussen juristen enerzijds en advocaten anderzijds een nagenoeg volledig scheiding bestond en dat ze elkaar met wederzijdse minachting behandelden. Hoewel de rechtsleer en de advocatuur inderdaad twee verschillende bezigheden waren, is er geen scherp en absoluut onderscheid tussen beiden. Romeinse juristen behoorden tot dezelfde elite en bewogen in dezelfde kringen
als advocaten en redenaars. Bovendien hielden Romeinse juristen zich voornamelijk bezig met de rechtspraktijk. Ze vonden niet enkel inspiratie in de Griekse filosofie, maar ook in de retorica. Omdat de traditionele, dogmatische benadering steeds is uitgegaan van een fundamenteel verschil tussen recht en praktijk (met inbegrip van retorica), is de invloed van retorica op het recht stelselmatig ondergewaardeerd. Dit verklaart waarom de rechtshistorici nooit een verband hebben willen/kunnen zien tussen de controversen enerzijds en de retorica anderzijds. Het verband tussen recht en retorica biedt nochtans de tweede sleutel om het vraagstuk van de controversen op te lossen.

De eerste sleutel: recht en praktijk. Het verband tussen de controversen en het *ius respondendi*

In dit boek wordt het vraagstuk over de oorsprong van de controversen bekeken vanuit een historische invalshoek. Teneinde het Romeins recht te doorgronden en correct te begrijpen moet het in zijn historische context geplaatst en bestudeerd worden. De Sabiniani en de Proculiani – zoals de meeste Romeinse juristen van hun tijd overigens – waren in de eerste plaats mannen van de praktijk. Hun meest belangrijke activiteit was het geven van adviezen of *responsa* in rechtzaken en andere juridische conflicten. De controversen ontstonden hoogstwaarschijnlijk wanneer vertegenwoordigers van beide scholen geraadpleegd werden door twee partijen die met elkaar in een conflict verzeild waren en wanneer ze vervolgens twee tegengestelde adviezen hebben verleend. Er was echter een belangrijk verschil tussen de schoolcontroversen enerzijds en gewone meningsverschillen tussen juristen anderzijds. De leiders van de scholen hadden naar alle waarschijnlijkheid het *ius publice respondendi ex auctoritate principis* en daarom waren hun adviezen bindend voor de rechtbank.

De juristen aan wie het *ius respondendi* werd verleend, mochten op gezag van de keizer adviezen verlenen. Deze adviezen waren bindend voor de rechter. Latere keizers, zoals Caligula (37-41 n. Chr.) en Nero (54-68 n. Chr.), hebben uit politieke overwegingen (‘divide et impera’) aan de leiders van beide scholen het *ius respondendi* toegekend. Wanneer zowel het hoofd van de Sabiniani als van de Proculiani een bindend advies verleenden naar aanleiding van een concreet juridisch geschil, waren de rechters in principe door beide adviezen tezelfdertijd gebonden en ontstonden de zogenaamde schoolcontroversen.
De tweede sleutel: recht en retorica. Het verband tussen de controversen en de topica

De belangrijkste stelling in dit boek is dat juristen – net als redenaars en advocaten – gebruik hebben gemaakt van de retorica en van de topica om hun standpunten kracht bij te zetten. Zoals hierboven al werd gezegd, hielden Romeinse juristen zich in de eerste plaats bezig met de praktijk. Hun belangrijkste activiteit was het geven van adviezen naar aanleiding van specifieke casussen. Omdat het recht geen eenduidige oplossing voorziet voor elk juridische probleem, is de jurist aangewezen op de interpretatie van het recht. Wanneer een juridisch probleem op meer dan één manier kon worden opgelost, moesten de juristen hun standpunt onderbouwen met overtuigende argumenten. Het spreekt voor zich: Retorica en voornamelijk de topica waren uitermate geschikt als methodologische instrumenten voor het vinden van geschikte argumenten.

Topica is een onderdeel van de retorica en meer bepaald van de inventio, het systeem om argumenten pro en contra een bepaalde stelling te formuleren. De term topica is afgeleid van het Griekse woord topos en betekent letterlijk plaats. Topoi zijn plaatsen waar argumenten zich schuilhouden. De belangrijkste bron over dit onderwerp is de Topica van Cicero. Ook Quintilianus’ Institutio Oratoria bevat waardevolle informatie over retorica en topica, zij het in mindere mate dan Cicero’s Topica.

In de analyse van deze teksten komen de volgende onderwerpen aan bod. Eerst wordt het juridische probleem omschreven dat aan de oorsprong van de controverse lag. Ten tweede worden de tegengestelde standpunten van beide scholen besproken evenals de argumenten. Ten derde wordt elke paralleltekst besproken die in het Corpus van Justinianus of in een andere bron wordt vermeld. Ten vierde worden de moderne theorieën en verklaringen voor de desbetreffende controverse samengevat en wordt uitgelegd waarom deze theorieën de controversen niet afdoende verklaren. Ten vijfde wordt onderzocht hoe de argumenten van de juristen zich verhouden tot de topische argumentatietheorie zoals die beschreven is door Cicero in zijn Topica en door Quintilianus in zijn Institutio Oratoria. Als de controverse op een later moment in het voordeel van de Sabiniani of de Proculiani is beslist, dan wordt, ten zesde, vermeld door wie, wanneer en hoe dit gebeurde.

Een grondige analyse van de controversen in de Institutiones van Gaius heeft aangetoond dat de vertegenwoordigers van de scholen voor elke controverse gebruik hebben gemaakt van de topica om hun juridisch standpunt te formuleren en te onderbouwen. De vertegenwoordigers van de scholen hebben dus voor elk juridisch probleem afzonderlijk een specifiek standpunt en een specifieke (topische) argumentatie geformuleerd. Het feit dat de juristen telkens een ad hoc redenering hebben gebruikt, impliceert dat er geen eenduidige en coherente theorie schuilgaat achter de standpunten van beide scholen en weerlegt op een overtuigende manier de mythe dat het Romeins recht een systematisch karakter heeft.

De analyse van de relevante teksten in de Institutiones van Gaius heeft dus aangetoond dat topische redeneringen een belangrijke rol hebben gespeeld in de schoolcontroversen. Dit verband tussen de controversen enerzijds en de topica anderzijds is op haar beurt een belangrijke aanwijzing voor de interactie tussen de controversen enerzijds en de rechtspraktijk anderzijds.

Het feit dat de standpunten van de scholen niet intern consistent zijn en dat de juristen op een pragmatische en flexibele manier gebruik hebben gemaakt van topische argumenten toont aan dat de juristen hun standpunten en argumenten telkens aan de omstandigheden hebben aangepast. Het spreekt voor zich dat deze omstandigheden niets anders waren dan een feitelijk juridisch conflict en, naar alle waarschijnlijkheid, een rechtszaak. In deze context moest de
jurist die door één van beide partijen werd geadviseerd een overtuigend juridisch standpunt formuleren ten voordele van zijn cliënt.
# CONTENT

**INTRODUCTION** ..................................................................................................................- 1 -

1. The Sabinians and the Proculians ..........................................................................................- 3 -
2. The Controversies between the Sabinians and the Proculians: Status Quaestionis ....- 5 -
   2.1 The Philosophical Explanation ......................................................................................- 5 -
   2.2 The Social Explanation: Conservative versus Progressive ........................................- 7 -
   2.3 The Methodological Explanation ..................................................................................- 11 -
   2.4 The Political Explanation ............................................................................................- 13 -
   2.5 The Sceptical View .....................................................................................................- 14 -
   2.6 Status Quaestionis: Conclusion ...................................................................................- 16 -
3. The First Key: Jurisprudence and Legal Practice. The Connection between the Controversies and the Ius Respondendi ......................................................- 20 -
4. The Second Key: Jurisprudence and Rhetoric. The Connection between the Controversies and the Topica .......................................................................................- 27 -
   4.1 Topica .........................................................................................................................- 31 -
   4.2 Topica: The Sources ...................................................................................................- 33 -
   4.3 The School Controversies and the Topica .................................................................- 38 -

## I. MALE PUBERTY .................................................................- 45 -

1. Gai., 1.196: Text and Controversy ......................................................................................- 45 -
2. Ulp., Ep., 11.28: The Third Opinion of Priscus .................................................................- 47 -
3. The Controversy in Gai., 1.196: Modern Theories ..............................................................- 49 -
4. The Locus a Similitudine and the Locus a Differentia in Gai., 1.196 ......................- 52 -
   4.1 The Proculian View .....................................................................................................- 52 -
   4.2 The Sabinian View .....................................................................................................- 53 -
5. The Decision on the Controversy ......................................................................................- 54 -

## II. RES MANCIPI .............................................................................- 59 -

1. Gai., 2.15: Text and Controversy ......................................................................................- 59 -
2. The Controversy in Gai., 2.15: Modern Theories ..............................................................- 62 -
3. The Locus ex Notatione and the Locus a Genere in Gai., 2.15 ..............................- 67 -
   3.1 The Proculian View .....................................................................................................- 67 -
   3.2 The Sabinian View .....................................................................................................- 68 -

## III. SPECIFICATIO .............................................................................- 71 -

1. Gai., 2.79: Text and Controversy ......................................................................................- 71 -
2. The Media Sententia ..........................................................................................................- 76 -
3. The Controversy in Gai., 2.79: Modern Theories ..............................................................- 79 -
4. The Locus ex Causis and the Locus ex Adiunctis in Gai., 2.79 ...........................- 84 -
   4.1 The Proculian View .....................................................................................................- 84 -
   4.2 The Sabinian View .....................................................................................................- 87 -
   4.3 The Media Sententia and the Ius Respondendi ..............................................................- 90 -

## IV. FILIUS PRAETERITUS ..............................................................- 93 -

1. Gai., 2.123: Text and Controversy ......................................................................................- 93 -
2. The Controversy in Gai., 2.123: Modern Theories ..............................................................- 95 -
3. The Locus a Tempore in Gai., 2.123 ..............................................................................- 97 -
   3.1 The Proculian View .....................................................................................................- 98 -
   3.2 The Sabinian View .....................................................................................................- 99 -
4. The Controversy Decided ....................................................................................................- 100 -

## V. LEGATUM PER VINDICATIONEM (1) ......................................- 103 -

1. Gai., 2.195: Text and Controversy ......................................................................................- 103 -
2. The Controversy in Gai., 2.195: Modern Theories .................................................- 105 -

3. The Locus ex Causis in Gai., 2.195 ........................................................................- 107 -
  3.1 The Proculian View ...................................................................................- 108 -
  3.2 The Sabinian View ...................................................................................- 109 -

4. The Afterlife of the Controversy .............................................................................- 110 -

VI. **LEGATUM PER VINDICATIONEM** (2) .................................................................- 113 -

1. Gai., 2.200: Text and Controversy ......................................................................- 113 -

2. The Controversy in Gai., 2.200: Modern Theories .................................................- 115 -

3. The Locus ex Causis in Gai., 2.200 ........................................................................- 116 -
  3.1 The Proculian View ...................................................................................- 117 -
  3.2 The Sabinian View ...................................................................................- 118 -

4. A Controversy Fading Away ..................................................................................- 119 -

VII. **LEGATUM PER PRAECEPTIONEM** .................................................................- 121 -

1. Gai., 2.216-222: Text and Controversy .................................................................- 121 -
  1.1 The Beneficiary ..............................................................................................- 124 -
  1.2 The Object .......................................................................................................- 126 -
  1.3 The Legal Remedy ..........................................................................................- 127 -
  1.4 Summary ........................................................................................................- 128 -

2. The Controversy Decided .......................................................................................- 130 -

3. The Controversy in Gai., 2.216-222: Modern Theories ..........................................- 132 -

4. The Locus ex Notatione and the Locus ex Causis in Gai., 2.216-222 .................- 134 -
  4.1 The Sabinian View .......................................................................................- 135 -
  4.2 The Proculian View .......................................................................................- 136 -

5. A Controversy within the Sabinian School regarding the SC Neronianum ............- 138 -

VIII. **DATIO TUTORIS** ..........................................................................................- 141 -

1. Gai., 2.231: Text and Controversy ......................................................................- 141 -

2. The Controversy in Gai., 2.231: Modern Theories .................................................- 143 -

3. Ratiocinatio in Gai., 2.231 ...................................................................................- 146 -
  3.1 The Sabinian View .......................................................................................- 147 -
  3.2 The Proculian View .......................................................................................- 148 -

4. The Decision on the Controversy .........................................................................- 150 -

IX. **REGULA CATONIANA** ...................................................................................- 153 -

1. Gai., 2.244: Text and Controversy ......................................................................- 153 -

2. The Regula Catoniana ..........................................................................................- 156 -

3. The Argumentation ..............................................................................................- 157 -

4. The Controversy in Gai., 2.244: Modern Theories .................................................- 159 -

5. Ratiocinatio in Gai., 2.244 ...................................................................................- 161 -
  5.1 The Sabinian View .......................................................................................- 162 -
  5.2 The Proculian View .......................................................................................- 164 -

6. The End of the Controversy ..................................................................................- 166 -

X. **IN IURECESSIOHEREDITATIS** ...........................................................................- 169 -

1. Gai., 3.85-87: Text and Controversy ...................................................................- 169 -

2. The Controversy in Gai., 3.87: Modern Theories .................................................- 175 -

3. The Locus ex Notatione and the Locus a Similitudine in Gai., 3.87 .................- 178 -
  3.1 The Proculian View .......................................................................................- 178 -
  3.2 The Sabinian View .......................................................................................- 179 -

XI. **CONDICIOIMPOSSIBILIS** .............................................................................- 183 -

1. Gai., 3.98: Text and Controversy ......................................................................- 183 -

2. Later Texts in the Digest and Institutiones of Justinian .........................................- 186 -
NEDERLANDS SAMENVATTING

XII. STIPULATIO FOR A THIRD PERSON ............................................................... 195
1. Gai., 3.103: Text and Controversy ................................................................. 195
2. The Controversy in Gai., 3.103: Modern Theories ......................................... 197
3. Ambiguitas in Gai., 3.103 ................................................................................ 199
   3.1 The Proculian View .................................................................................... 200
   3.2 The Sabinian View .................................................................................... 201
4. The Controversy Decided .............................................................................. 202
XIII. LITERAL CONTRACT ....................................................................................... 205
1. Gai., 3.133: Text and Controversy ................................................................. 205
2. The Controversy in Gai., 3.133: Modern Theories ......................................... 208
3. The Locus a Similitudine, the Locus ex Genere, and the Locus a Differentia in Gai., 3.133 .............................................................. 210
   3.1 The Proculian View .................................................................................... 210
   3.2 The Sabinian View .................................................................................... 211
XIV. EMPTIO VENDITIO (1) .................................................................................. 213
1. Gai., 3.140: Text and Controversy ................................................................. 213
2. The Locus a Tempore in Gai., 3.140 ............................................................... 217
   2.1 The View of Ofilius and Proculus .............................................................. 217
   2.2 The View of Labeo and Cassius ................................................................. 218
3. The Difference of Opinion Decided ............................................................... 219
XV. EMPTIO VENDITIO (2) .................................................................................. 223
1. Gai., 3.141: Text and controversy ................................................................. 223
2. Texts in the Digest: Paul ................................................................................ 226
3. The Controversy in Gai., 3.141: Modern Theories ......................................... 229
4. The Locus a Specie, Auctoritas, and the Locus a Differentia in Gai., 3.141 ........................................................................ 234
   4.1 The Sabinian View .................................................................................... 235
   4.2 The Proculian View .................................................................................... 238
5. The Controversy Decided .............................................................................. 240
XVI. MANDATUM ................................................................................................ 245
1. Gai., 3.161: Text and Interpretation ............................................................... 245
2. The Proculian View and Justinian ................................................................. 248
3. The Controversy in Gai., 3.161: Modern Theories ......................................... 251
4. Comparatio in Gai., 3.161 ............................................................................. 256
   4.1 The Sabinian View .................................................................................... 256
   4.2 The Proculian View .................................................................................... 259
XVII. SERVUS COMMUNIS ................................................................................... 261
1. Gai., 3.167a: Text and Controversy ............................................................... 261
2. Texts in the Digest ........................................................................................ 263
3. The Controversy in Gai., 3.167a: Modern Theories ......................................... 266
4. Ratiocinatio in Gai., 3.167a ......................................................................... 267
   4.1 The Proculian View .................................................................................... 267
   4.2 The Sabinian View .................................................................................... 268
5. The Controversy Decided .............................................................................. 269
XVIII. DATIO IN SOLUTUM .................................................................................. 273
2. The Controversy in Gai., 3.168: Modern Theories .................................................. 274
3. The Controversy in Gai., 3.168: Karlowa and Kretschmar ................................... 278
4. The Locus a Similitudine and the Locus a Differentia in Gai., 3.168 .................... 281
   4.1 The Sabinian View ......................................................................................... 282
   4.2 The Proculian View ....................................................................................... 283
5. The Controversy Decided ....................................................................................... 284

XIX. NOVATIO ........................................................................................................... 287
1. Gai., 3.177-178: Text and Controversy ................................................................. 287
2. The Legal Problem: Modern Theories ................................................................. 289
3. The Legal Problem ............................................................................................... 290
4. The Controversy in Gai., 3.177-178: Modern Theories ......................................... 292
5. Ambiguitas in Gai., 3.177-178 ............................................................................ 295
   5.1 The Sabinian View ......................................................................................... 295
   5.2 The Proculian View ....................................................................................... 296

XX. ACTIO NOXALIS ................................................................................................. 299
1. Gai., 4.78: Text and Controversy ......................................................................... 299
2. Texts in the Digest .................................................................................................. 302
3. The Controversy in Gai., 4.78: Modern Theories ................................................. 304
4. The Locus a Similitudine, the Locus ex Contrario, and the Locus a Differentia in Gai., 4.78 - 306 -
   4.1 The Sabinian View ......................................................................................... 307
   4.2 The Proculian View ....................................................................................... 308
5. The Controversy Decided ....................................................................................... 309

XXI. NOXAE DEDITIO ............................................................................................... 311
1. Gai., 4.79: Text and Controversy ......................................................................... 311
2. The Controversy in Gai., 4.79: Modern Theories ................................................. 314
3. Ratiocinatio in Gai., 4.79 ................................................................................... 316
   3.1 The Proculian View ....................................................................................... 317
   3.2 The Sabinian View ......................................................................................... 318

CONCLUSION .............................................................................................................. 321
1. The Methodological and Substantive Shortcomings of Modern Literature .......... 321
   1.1 Methodological Shortcomings ....................................................................... 322
   1.2 Substantive Shortcomings ............................................................................. 324
2. The Two Keys to Solving the Riddle of the School Controversies: Topica and Legal Practice ........................................................ 329
   2.1 Rhetoric and Topoi ....................................................................................... 329
   2.2 Legal practice and the Ius Respondendi ......................................................... 335
3. The Riddle of the Controversies Solved ................................................................ 340

APPENDIX 1 .................................................................................................................. 343
APPENDIX 2 .................................................................................................................. 346
APPENDIX 3
THE SABINIANS AND THE PROCULIANS: TOPOI
SAMENVATTING