THE TWO SCHOOLS OF JURISTS IN THE EARLY ROMAN PRINCIPATE

PETER STEIN

The jurists of the early Principate were divided into two groups, the Proculians and the Sabinians, but the nature of the division has proved to be a perennial problem of Roman legal history. Pomponius tells us that the Proculians regarded Labeo as their founder and the Sabinians Capito, and he gives lists of their respective leaders for more than a century. Furthermore, we know of more than two dozen particular problems which provoked disputes between the two groups. But the sources provide little express evidence as to the underlying opposing principles, if indeed there were any, which were espoused by them. Pomponius says that Labeo and Capito "first made, as it were, two sects: for Ateius Capito held fast to what had been handed down to him, whereas Labeo, a genius, with confidence in his own scholarship, a man who had studied several other branches of knowledge, set out to make many innovations" (D.1.2.2.47). Yet, when the various controversies are considered, the school of Labeo does not seem to champion doctrines which are especially progressive and that of Capito does not seem particularly conservative.

Traditionally the humanist jurists tried to find philosophical criteria for the school differences. A number of essays on this topic were collected in 1724 by Gottlieb Slevogtius of Jena under the title De sectis et philosophia iurisconsultorum opuscula. One or two of the disputes are indeed explicable on the basis that the schools adopted opposing philosophical doctrines. The dispute about specificatio, the ownership of a thing made by A out of material belonging to B, is the stock example (Gaius, 2.79; D.41.1.7.7, Gaius, 2 rer. cottid.). The Sabinians, who attributed ownership to B, adopted the Stoic doctrine that the essence of a thing was the substance of which it was made, whereas the Proculians, who gave the thing to A, followed the Aristotelian doctrine that what made a thing a thing was its form. But such philosophical explanations have no general


2 Sokolowski, Philosophie im Privatrecht, I.69; F. De Zulueta, Digest 41. 1 and 2, p. 13.
application to the controversies. The jurists did not differ in their approach to life, but only in their approach to law.

More recently some historians have suggested that the two schools adopted contrasting criteria of legal interpretation. But equally unconvincing cases have been made for the proposition that it was the Sabinians who favoured an equitable interpretation and the Proculians who favoured a strict interpretation and for the exactly opposite proposition.

Most modern histories deny the possibility of identifying any substantial doctrinal difference between the schools. Jolowicz finds it "necessary to conclude that the difference between the two schools was personal rather than doctrinal" and De Zulueta comments that "no one has been able to reduce the differences of view to any principle." Such statements take the line of least resistance, and fail to take adequate account of Pomponius' assertion, when describing the origin of the schools, that in law Labeo was an innovator and that Capito was a traditionalist. As we have noted, it is not possible to categorise the legal views of the schools as progressive or conservative. But Pomponius does not specifically say that it was in substantive legal doctrine that Labeo innovated. It is possible that his new ideas were more in the field of legal method and technique. It is the purpose of this paper to test that idea.

I

We are not entitled to assume that a difference of view which may have provided the raison d'être for the two opposing schools in the time of their founders necessarily remained constant throughout their existence. For once the two schools became established, their rivalry would engender its own momentum, and they could therefore continue to exist as separate institutions even after the theoretical justification for the original division among the jurists had disappeared. In fact, the evidence, such as it is, supports such an assumption. Referring to the time of Labeo and Capito, Pomponius speaks of diversae sectae. Sectae may mean schools of thought, and, with regard to their earlier protagonists, it is dissensiones, differences of opinion, which Pomponius emphasises. Gaius, on the other hand, consistently speaks of two scholae, as does also the younger Pliny, who refers to Cassius as Cassianae scholae auctor et princeps (Ep.7.24.8.). It seems therefore that the differences of opinion go

4 The Institutes of Gaius, II (1953), p. 10.
back to Labeo and Capito, but as established institutions, whether or not they provided courses of instruction, the schools were founded by Proculus and Cassius.

So we should concentrate our inquiry on the earlier rather than the later champions of the schools. We have little evidence of Capito's legal opinions or methods, but since Pomponius characterised him as a traditionalist, we may assume that he opposed whatever new methods were introduced by Labeo and preferred the traditional methods of the late Republican jurists. By contrast, we have a good deal of evidence of Labeo's particular opinions. About 500 of his legal decisions are mentioned in the Digest, and about half of them contain some reasoning or justification of the decision. They show that to a considerable degree he shared the Republican jurists' view of the law and its sources, but in certain significant respects he went further than they did.

The standard list of the sources in which the basis of a legal decision in the late Republic could be found is that of the Auctor ad Herennium, 2.10.4, who speaks of lex, mos, natura and aequum et bonum. That Labeo initially approached a legal problem by seeking the origin of the relevant law in such sources is demonstrated by a text concerning the actio aquae pluviae arcendae, D.39.3.1.23 (Ulpian, 53 ad dictum).

Labeo's method is to look first for a lex as the source of the relevant law. Lex was not confined to the statutory law set out in a lex publica of the comitia, but in a wider sense covered any authoritative written source for a legal decision. In this sense it included both public leges, in the sense of enactments of the comitia or the administrative orders setting out the relationship of different plots when an area of land was first settled, and also private leges, such as agreements attached to mancipationes, stipulatory promises and testamentary dispositions. The common denominator of all these leges was that they provided a fixed text, and so the legal problem resolved itself into an interpretatio verborum.

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8 Discussed in Horak, op. cit. pp. 279–280.
10 Cicero, Partitiones Oratoriae, 37.130; Scriptorum autem privatum allud est, publicum allud. Publicum lex, senatusconsultum, foedus: privatum tabulae, pactum conventum, stipulatio.
In the instant case, Labeo is confronted by a case in which it is alleged that a lower-lying plot of land is subject to another higher plot, and asks first if there is an express grant in favour of the higher plot contained in a *lex agro dicta*. If there were such a grant, that would dispose of the matter conclusively. In the absence of such an authoritative source of law, Labeo looks at the *natura agri*, the circumstances of the relative situation of the plots of land. Such consideration might indicate that, to minimise the inconvenience of geography in the interest of both parties, the lower land must accept water flowing from the higher, and so the owner of the higher land would have the action if some change in the lower land impeded the flow and caused flooding on the higher land. Alternatively, if no *lex* were found, appeal might be made to long use, for, says Labeo, antiquity (*vetustas*) has the force of a *lex*. The language ("found ") in this instance suggests that if there was a long-standing practice that the lower plot should receive water from the higher, this should be regarded (fictitiously) as a right imposed by a *lex dicta* which had been lost. The practice had to exceed living memory (*nec memoria extare, quando facta est*), says Labeo of a ditch, D.39.3.2.1.1.

Many cases could no doubt be settled by reference to three sources of *lex*, *natura*, and *vetustas*. Labeo was particularly interested in the problems of *interpretatio verborum*, offered by *leges*, where the decision turned on the meaning given to a text, whether of public or private origin. We know he was interested generally in problems of language and grammar and this interest seems to have led him to look as far as possible for a precise objective meaning for any set of words which was submitted to him, and to apply that meaning, without regard to whether it represented the subjective intention of the author of the text in question. A number of examples illustrate his reluctance to go beyond the ordinary meaning of the words.

Labeo refused to interpret the word *fugitivus* in the praetor’s edict to cover a child born to a female slave who had fled from her owner, as well as the slave herself (D.11.4.1.5, Ulpian, 1 *ad edictum*). He would not extend the meaning of *occidere*, kill, in the *lex Aquilia* to cover the case where someone offered a slave a cup of poison, which the slave then took in his hands and drank (D.9.2.9pr., Ulpian, 18 *ad edictum*). Again, when a testator, who had four goblets of a certain design, bequeathed *pocula paria duo, paria* meaning either

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12 Cf. the doctrine of the lost modern grant in the English law of easements.
the substantive "pairs" or the adjective "similar," Labeo insisted that the legacy was of two similar goblets and not two pairs, since to achieve the latter meaning, the testator should have said either *bina paria*, "both pairs," or *poculorum paria duo," "two pairs of goblets" (D.32.30pr., Labeo, 2 post. 

These examples raise problems of *lex*, or as a later jurist 14 called it, *ius quod constat ex scripto*, which was the appropriate field for the application of the rhetorical topic *scriptum-sententia*, letter-spirit. 15 The terms of the rule under discussion might be ambiguous, or it might be unclear whether the rule as stated in those terms covered the facts of the case, but at least there was no argument over the existence of the rule or about its formulation. In cases of doubt, Labeo preferred a literal interpretation. In contracts he placed the emphasis on *quod actum est*, the arrangement as shown by the formulation (D.18.1.77, Javolenus, 4 ex post. Labeonis). The author of a statement submitted for interpretation must be assumed to have known the meaning of what he was saying and it was up to him to make his meaning clear. So Labeo interpreted the terms of a contract of sale against the seller who framed it, because, as he explained, the seller could have expressed himself more clearly before the contract was concluded (*quia potuit re integra apertius dicere*, D.18.1.21, Paul, 5 ad Sabinum).

As we shall see, however, most of the school disputes were not about *interpretatio verborum* but arose rather from the unwritten law, the *ius quod sine scripto venit compositum a prudentibus* (Pomponius in D.1.2.2.5). 16 This kind of law raised methodological problems quite different from those presented by written law, and it is difficult to resist the impression that the theories which labelled the juristic schools as favouring the letter or the spirit were developed by scholars who instinctively thought of law as written law. No statement of a rule by a jurist has the force of a statement in a *lex* or of a statement in the praetor's edict. In the case of written law there may be doubt about the meaning of the statement but at least its terms are given and beyond dispute. In the case of the unwritten law there is assumed to be a rule but the declaration of the rule by the jurist is merely evidence of its terms. Naturally the more distinguished the jurist, the more authority his statements of the unwritten law possessed. But a statement by a jurist could never have the final

14 Ulpian, in D.1.1.6.


given quality in its terms which was enjoyed by a statement in the edict or a lex.

Where the case could not be settled by the technique of interpretatio verborum, Labeo was ready in the first instance to turn to established practice, and this was especially appropriate in cases involving conflicting property rights, such as that in D.39.3.1.23. In such cases the main purpose of the law is to make clear what vested rights competing land owners have acquired and to protect them. Certainty is all-important. But in other areas, where there is a conflict of interest, appeal to long-established practice is not so obviously relevant, or such practice might not exist. In such cases Labeo exercised his gift for finding the mot juste to define certain legal institutions, the limits and scope of which had become blurred in practice.

In this work of definition he made use of techniques developed by the rhetoricians. They held that a definition should have as its object the identification of the essential elements of what was defined. When confronted by a case of negotiorum gestio, an unauthorised act on behalf of another, Labeo laid down that if the gestor wished to claim his expenses from the principal, the essential point he must show is that his act was utiliter gestum, i.e., beneficial to the principal at the time (D.3.5.9.(10).1, Ulpian, 10 ad edictum). So also it was Labeo who recognised that the essential feature of the delict of iniuria, which marked it off from other kinds of delictual conduct, was contumelia, insult (D.47.10.15.46, Ulpian, 57 ad edictum). The identification of this characteristic allowed iniuria to be marked off from the delict of damnum iniuria datum, sanctioned by the lex Aquilia, which was the causing of actual financial loss.17

Labeo was adept at making distinctions which showed when one action applied rather than another and when an action could be brought and when it could not. If the statue of your father, which has been erected on his tomb, has been destroyed by people throwing stones, you cannot bring the actio sepulchri violati, he says, but you can sue them by the actio iniuriarum (D.47.10.27, Paul, 27 ad edictum). When a partner injured himself in trying to stop some slaves belonging to the partnership from running away, Labeo held that he could not claim his medical expenses from the other partners in the actio pro socio, because although they were expenses resulting from the partnership (propter societatem), they were not expenses incurred for partnership purposes (in societatem) (D.17.2.60.1, Pomponius, 13 ad Sabinum).

Labeo's method presupposed that beneath the rules of the

unwritten law, which were waiting to be defined by the jurists, was a sub-structure of rational principles, and it was these rational principles which indicated, in cases of doubt, the limits of the rules themselves.

Up to this point, the only difference between Labeo's methods and those of earlier jurists, is that Labeo carried on the process of defining and distinguishing more rigorously than they and insisted on laying down precisely what they were ready to leave undefined, if it was not necessary for the decision of the cases submitted to them. But Labeo justified his decisions with reasons, and this naturally led him to refer to other cases in which the same reasoning applied.

If one member of a banking partnership makes a pact with a debtor of the partnership, can the exceptio pacti be pleaded against the other partner? Labeo says no, and adds "nor can one partner novate the obligation, although payment of the debt can validly be made to him" (D.2.14.27pr., Paul, 3 ad edictum). To explain his decision Labeo goes to the basic principle that the character of the obligation can only be altered by all the partners and illustrates it by another example of its implications. Again, if an infans does damage he is not liable under the lex Aquilia. But, says Labeo, if an impubes (i.e., one below the age of puberty but old enough to understand what he was doing) did it, since he is liable for theft, he is also liable to the Aquilian action (D.9.2.5.2, Ulpian, 18 ad edictum). The same principle must apply to both delicts; it would be irrational to have different rules for them. This way of thinking involves the use of analogy and that technique Labeo took over from the grammarians.18

The Greek grammarians had been divided into two schools, the analogists and anomalists. The former considered that language was something inherently orderly, and sought to show that nouns and verbs could be classified into declensions and conjugations on the basis of similarity of form. The opposing school rejected the notion that language was governed by general principles, pointed out that the rules postulated by analogists had a large number of exceptions, and stressed that language was the product of nature and could not be confined within rules. The Latin grammarians were influenced by the controversy between the analogists and anomalists, but the most influential of them, Varro, attempted a compromise between the two positions, pointing out that they were not so far apart as their protagonists believed.19 Correct speech, said Varro, derived from

four elements, *natura, analogia, consuetudo, auctoritas*. Varro's classification became established among students of language with only slight modifications. Quintilian, I.6.1, speaks of language as based on *ratio*, or on *vetustas, auctoritas* and *consuetudo*. He replaced nature by antiquity and the technical *analogia* by the somewhat wider *ratio*. After Varro it was accepted that where custom was thoroughly established, it must prevail. The argument between the analogists and anomalists was now confined to the area of *dubius sermo*, where usage itself varied. The former held that, where there was doubt, it was the form of expression suggested by analogy which was correct speech.

Labeo is known to have been an analogist in matters of grammar, and Aulus Gellius says expressly (13.10.1) that he used his linguistic expertise to solve knotty problems in law (*ad iuris laguos enodandos*). He must have noticed the similarity between the lists of the sources of language and those of law, and it was almost certainly he who added *ratio* to the list of sources of law. For the method of analogy became accepted as a regular technique of Roman law in his work. This method presupposes that the law is based on a set of coherent rational principles, but it is only applied in those areas where the relevant rule is in doubt.

If a testator bequeathed merely the use (*usus*) of a piece of land, this was clearly something less than the usufruct. But what did it include? Labeo points out that the beneficiary can live on the land and can exclude the owner from it, but he cannot exclude the owner's tenant or his slaves who are there to cultivate the land. On the other hand the owner's domestic slaves can be excluded on the same principle (*ratio*) as that on which the owner himself can be excluded (D.7.8.10.4, Ulpian, 17 *ad Sabinum*). Again, can the slave of one who is born after my death be instituted as my heir? Labeo holds that he can be instituted, and justifies his decision *manifesto argumento*, by citing the case of a slave belonging to the estate of a deceased person, whose heir has not yet entered on the inheritance. Such a slave could validly be instituted heir in someone else's will, although at the time when the will was made he belonged to no one (D.28.5.65, Javolenus, 7 *epistularum*). Bremer \(^{29}\) cites eleven texts in which Labeo uses analogical argument of this kind.

Analogy not only provided an argument for laying down a new rule deriving from the same principle as an old rule; it also showed the limits of particular actions, and Labeo was rigorous in confining the scope of contractual actions to their proper field. Thus where the owner of goods had contracted with the captain of a ship, but it was

\(^{29}\) *Iurisprudentia Antehadriana* (1898), 2.1.10 et seq.
not clear whether he had hired the ship (conductio rei) or had entrusted the goods for carriage (locatio operis), he refused to allow either the actio ex conducto or the actio ex locato and gave an actio in factum, setting out the special facts and expressing a duty at civil law (D.19.5.1.1, Papinian, 8 quaestionum). On the other hand, when there was no such demarcation problem, Labeo was more liberal than his contemporaries. He held, for example, that the residual actio de dolo should be allowed not only where there was no other action but also where there existed a doubt whether there was another action or not (si dubitetur an alia sit, D.4.3.7.3, Ulpian, 11 ad edictum), and thus ensured that the victim of fraud always had a remedy.

Although Labeo made good use of analogy, it was by no means his only form of argument, and he did not use it to excess. It was perhaps its use as an instrument for enunciating new rules derived from established principles, which were implied in the law rather than expressly stated, which encouraged him to think of law in a new way. The experience of the English common law has shown that the conception of the law as unwritten custom can produce two contrasting lines of thought. One is that law is essentially old and unchangeable, the immemorial custom of a particular people, and the other is that law is continually developing to meet new social conditions. His studies of language enabled Labeo to think of law in the second way, as a set of rules, based on a firm foundation of basic principles, but needing to be reformulated to meet changing circumstances.21

Later jurists recognised Labeo's emphasis on the need to control the development of the law by the application of rational principles. In one case Javolenus, a Sabinian, says that Labeo's opinion was based on good reason, although legal practice was otherwise (Labeonis ... sententia rationem quidem habet, sed hoc iure utimur, D.40.7.39.4, Javolenus, 4 ex post. Labeonis), this neatly pinpointing the respective orientations of the two juristic schools.

II

In the light of these remarks, we turn now to the school disputes themselves.

(a) Disputes concerning interpretatio verborum

The only dispute, which appears to turn on the meaning of a statutory provision, is that concerning the number of mancipations which were necessary to surrender a son noxally to the victim of a

21 It was Labeo who transmitted the story of how the introduction of the actio iniuriarum was forced on the praetor (because of the inadequacy of the fixed penalties for assault provided by the Twelve Tables), Aulus Gellius, 20.1.13.
The Twelve Tables laid down that if a father sold his son three times into bondage to the father’s creditor, so that son should work off the father’s debt, the father was to lose his paternal power over him. The pontifical lawyers used this rule to make possible the voluntary release of a son from paternal power by means of three successive sales to a friend. 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 Twelve Tables rule 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 Twelve Tables rule and that rule stipulated three mancipations.

A controversy over the meaning of a phrase in a will is recorded in D.30.26.2 (Pomponius, 5 ad Sabinum). If a testator bequeathed part of his goods (bonorum pars), Sabinus and Cassius regarded this as a bequest of the designated share of the value of the estate, whereas Proculus and Nerva held that it was a bequest of the designated share of the things themselves. They doubtless argued that there was no obscurity in the words, and, had the testator intended the legatee to have the value of the goods, he could easily have said so.

A controversy over the meaning of words contained in a stipulatory promise is mentioned in D.45.1.138pr. (Venuleius, 4 stipulationum). If a man promised that something should be paid on the days of a specified market (certarum nundinarum diebus dari). Sabinus held that his creditor could claim it on the first day of the market. Proculus and other (unnamed) Proculians considered that the claim could not be made until the market was entirely finished. Only then was the debtor in default. Similarly Sabinus held that a stipulated penalty for non-performance of a promise could be claimed as soon as performance was possible, whereas Pegasus, a Proculian, maintained that the creditor had to wait until performance was impossible (D.45.1.115.2, Papinian, 2 quaestionum). The problem would only arise where the promise was carelessly drafted and the Proculians, following Labeo, properly construed its terms against the creditor who had drafted it.

Another controversy over the effect of a stipulatory promise is recorded in Gaius, 3.103. If a man stipulates for himself and for Titius (who is not in his family), it was agreed that he could confer no enforceable benefit on Titius; nothing could be due to him (inutilis est stipulatio), since he was not a party to the contract. But what was due to the stipulator himself? The Sabinians answered that the whole was due to him, just as if he had not added Titius’ name. The Proculians replied that, since the part of the stipulation referring to Titius’ half was void, only half could be due to the stipulator.

We have seen that the Proculians took a similar view in cases of statute, testament and stipulatory promise. Their consistency in all questions of interpretatio verborum is confirmed by their attitude to the words of the formulae of actions. Gaius, 4.114, records a dispute over the effect of a payment by the defendant to the plaintiff after joinder of issue in the action, when the terms of the formula were settled, and before judgment. The Sabinians held that the iudex could in every case absolve the defendant, because all actions admit of absolution (omnia iudicia sunt absolutoria), presumably at all stages. The Proculians agreed where the action was bonae fidei, because the ex bona fide clause in the formula empowered the iudex to absolve, if he thought it right to do so; similarly in actions in rem, where the formula contained a clausula arbitraria, expressly conferring on the iudex the right to absolve if the thing claimed were restored to the plaintiff. But in stricti iuris actions the formula gave the iudex no such power, and since all his powers derived from the formula, the Proculians held that in such actions he could not formally absolve the defendant (although they would not, of course, have allowed the plaintiff to claim a second payment).

The strictness of the Proculian attitude to procedural formulae in general may be further illustrated by the dispute between the schools over the effect of specificatio, to which reference has been made. This was probably a by-product of a dispute over the necessity of a strict description of the object claimed in the formula of a vindicatio. The Proculians would have contended that if the appellatio of the thing in the formula had changed, it must be regarded as a different thing.

The Proculians’ strictness in adhering to the letter of a text is paralleled by their strict adherence to the form in those transactions which derived their legal validity from the carrying out of a particular

form. For example, a slave belonging to several owners, who received promises by stipulation or received something by mancipa-
tion, acquired benefits for them, in proportion to their respective shares in him. He could, however, acquire for one of his owners alone, but only if he stipulated expressly for that one or received in mancipation naming the particular owner expressly. Gaius, 3.167, reports a dispute over whether authorisation of the transaction by one of the owners had the same effect as naming him expressly in the stipulation or mancipation. The Sabinians thought that it did, whereas the Proculians held that the slave acquired for all his owners, just as if there had been no authorisation at all: Stipulation and mancipation were formal transactions and their legal effect derived from the relevant form. Whatever the intention of the parties, if they did not expressly incorporate a mention of the owner, whom it was intended to benefit, in the form, its ordinary effect could not be varied.

(b) Disputes concerning the principles of obligations

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.

Thus it was agreed that an obligation could only be novated if there was a clear difference between the old obligation and the new, that is, the difference had to be in the constituent elements of the obligation: the parties, or what is owed, or the conditions under which it is owed. The Sabinians considered that if there was a guarantor more or less, that was enough to distinguish the old and new obligations and would therefore justify novation. The Proculians denied that the addition or removal of a guarantor could have any such effect, presumably because it did not make any change in the obligation itself (Gaius, 3.177–8).

Again, suppose the debtor, with the creditor’s agreement, pays him something different to what was due (Gaius, 3.168). Is the obligation dissolved? The Sabinians said that it was dissolved 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. The Proculians, on the other hand, held that the obligation was not dissolved, for performance can only extinguish an obligation if it is performance of what is due. The debtor could, of course, resist any further claim from the creditor who had accepted the substituted performance by a plea of fraud.

Similarly, if a man’s son or slave commits a delict against his father or owner, no action can arise, because no obligation can be
created between a man and those in his power. Since there is no obligation, there can be no action, even if the son or slave passes into someone else’s power or becomes sui iuris. Suppose someone else’s son or slave commits a delict against me, in which case an obligation owed to me is created, and then he comes into my power, say by adoption or by purchase (Gaius, 4.78). I can bring no action while he is in my power, but is the action extinguished or merely dormant? The Sabinians said it was extinguished since the parties were in a relationship in which it could not have arisen. The Proculians thought that, although the action lay dormant as long as the delinquent was in my power, it revived if he left that power; presumably they argued that the obligatio, which had been created in this case, had not been extinguished. Again in most cases a buyer from me would be able to resist such an action on my account by pleading fraud.

A number of disputes turned on what was necessary to constitute a particular type of contract and what was the scope of the actions arising out of that contract. The 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 recognition of new actions. In this regard they followed the traditional republican reliance on fictions which treated cases which were analogous as if they were identical. The Proculians 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.

The famous dispute over whether the price in sale had to be in money is an example of a dispute over the limits of a particular type of contract (Gaius, 3.141; D.18.1.1.1, Paul, 33 ad edictum). In essence the dispute was over the question whether barter could be regarded as a type of sale. Sabinus and his followers, who held that it could, cited in support of their contention common opinion and antiquity and also the authority of the poet Homer. They thus relied on the standard anomalist arguments of vetustas and auctoritas. The Proculians rejected the assimilation of barter with sale, on account of their essential difference and the difficulty, in the case of barter, of distinguishing buyer and seller.

There seem to have been similar school disputes in connection

with the contract of hire, which Gaius (3.144–5) says was governed by similar rules to those for sale. If I give clothes to a cleaner to be cleaned, and no reward is fixed, it being understood that I will pay later whatever we shall have agreed, there is a question (quaeritur) whether a contract of hire is formed. Likewise, if I lend you something for your use and receive in return something for my use, quaeritur whether that is hire. The Sabinian Gaius does not answer his own questions. Since, however, his example of the similarity of the rules of sale and hire is the rule that hire requires a merces certa to have been fixed, we may assume that the debate was going against the empirical Sabinian view, which would have answered both questions in the affirmative.

There were parallel disputes over the scope of contractual actions. Sabinus and his followers granted the contractual action in sale in a number of cases where the contract was void, because the object of the sale had ceased to exist, or turned out to be legally incapable of being sold, but the buyer had a claim against the seller. The Proculians, on the other hand, denied that a contractual action could be available if there was no contract in existence and gave the aggrieved party either an actio de dolo, following Labeo’s liberal use of that action, or an actio in factum. Where there was a contract to sell for a certain figure plus the profit—or a share of it—on a resale, the Sabinians allowed the seller to enforce payment of the profit by the actio ex vendito, whereas the Proculians required an actio in factum.

Another dispute over the appropriate action to enforce an obligation is mentioned in D.39.6.35.3 (Paul, 6 ad leg. Iul. et Pap.). A gift in contemplation of death (donatio mortis causa) became absolute only when the expected death occurred and until then it was revocable by the donor. There were two forms of gift. In the first, it was subject to a suspensive condition; the thing was handed over to the donee, but ownership did not pass to him until the donor’s death. In such a case, if the donor revoked the gift, he could bring a vindicatio as owner to recover the thing. In the second form, ownership passed to the donee on delivery, but if the donor revoked, or recovered his health, the donee was obliged to reconvey the thing back to the donor. What action did the donor have in this case to enforce that obligation? The Sabinians gave the donor a condictio, quasi re non secuta, on the analogy of the cases of condictio where something had been

handed over on the understanding that some return would be made and that return did not follow. What action the Proculians gave is not stated. Almost certainly they rejected the analogy as false, since in the cases mentioned the transaction was a bilateral contract. They would have followed Labeo, who conceived of contractus as covering exclusively transactions creating obligations on both sides (contractum autem ultero citroque obligationem (D.50.16.19, Ulpian, 11 ad edictum). Donatio, on the other hand, is unilateral. Regarding the case as sui generis, they would have given the donor an actio in factum.

As long as the action referred to a recognised obligation, however, the Proculians rigorously granted it, even in cases where the Sabinians did not. A accepts a mandate from B to buy a thing for B with a limit of price. If A buys the thing at a higher price, can he make B take it at the limited price? The Sabinians thought not, on the ground that when he bought it at a price exceeding that stated in the mandate, he was buying on his own account. On the other hand, A, who after all was acting gratuitously, out of amicitia for B, once he had gone to the trouble of attending the sale, might have found that he could obtain the thing for a price only slightly above the limit stated. In such circumstances, he might well have thought it worth while to buy it at that price, rather than waste his journey, in the expectation that B would probably pay the difference, but that if he did not, he (A) would do so. In such a case, the law should not enable B to think better of making the purchase and avoid the liability which he had undertaken in the contract to reimburse A up to the stated limit. The Proculians therefore allowed A to sue up to the agreed price (Gaius, 3.161, who gives only the Sabinian view; D.17.1.4, Gaius, 2 rerum cottidianarum, giving the view of Proculus; Just. Inst. 3.26.8).

An obligation which gave rise to several jurisprudential problems was that imposed by a testator on the heir named in his will to give certain legacies to third parties (legacy per damnationem). The Proculians insisted that this obligatio had similar characteristics to obligations created in other ways.

If the testator bequeathed a legacy subject to an impossible condition (e.g., if he touch the sky with his finger), the Sabinians held that it should be treated as if it had been left unconditionally (Gaius, 3.98). The Proculians, on the other hand, pointed out that a promise by stipulation, subject to an impossible condition, was invalid.

and that on the same principle the legacy should be equally invalid. Even the Sabinian Gaius had to admit the difficulty of providing a satisfactory basis for the distinction (vix idonea diversitatis ratio reddi potest).

Again, if the testator purported to give a legacy per damnationem to one who was in the power of the heir, the Proculians held that it was void, whether the legacy was conditional or unconditional, because an obligation—be it conditional or unconditional—cannot be created between a man and one who is in his power (Gaius, 2.244). The Sabinians thought that if the legacy was conditional, it was good, on the ground that the legatee might have left the heir's power by the time the condition was fulfilled. However, a conditional obligatio was still an obligation and the Sabinian view involved a breach of principle.

In D.29.7.14, Scaevola (8 quaestionum) reports the following case. The testator made a will instituting certain persons as heirs and substituting others as heirs, if those instituted failed to take the inheritance. The instituted heirs died in his lifetime, and after their death he made codicils revoking or adding legacies. The school dispute was over the validity of such revocation or addition. Sabinus and Cassius held that they were valid, because there was a general principle that codicils are regarded as part of the will and that, if the will is valid, they take effect and preserve the formal validity and legal declaration made in the will (observationemque et legem iuris inde traditam servent). Proculus argued from the accepted rule that a legacy was void if it was given by a codicil to a man who was alive when the will was made but had died when the codicil was made. In this case the heir, to whom the legacy (per damnationem) was addressed, had died and so the legacy was equally void. Proculus then adds significantly that one should check the existence of the parties before seeking the principle behind the law (non ante iuris ratio quam persona quaerenda sit). The Sabinians had attempted to throw at Proculus the usually Proculian argument based on the ratio iuris and he replied, in effect, that ratio iuris had no place in a situation where the constitutive elements for the legal relationship in question were not all present.

In each of these three cases, the Sabinians clearly wanted to give effect to the will of the testator by holding the legacy to be valid. In the case of the legacy subject to an impossible condition, it could reasonably be objected that a testator, who made his gift conditional on the legatee doing something that he could not in fact do, did not really want him to have it. In the other two cases the Proculian view is that a testator cannot play fast and loose with the fundamental requirements of legal relationships, such as the necessity for an
obligation to be constituted between two parties in existence, neither being in the power of the other.

(c) Disputes concerning wills and succession

Where no basic principles such as those considered above were involved, the Proculians were anxious to give effect to the testator's expressed will.

An illustration of the Proculian use of reason and logic to validate an unusual testamentary provision is their attitude to the question of the validity of the appointment in a will of a tutor, which preceded the institution of the heir (Gaius, 2.231). It was an accepted rule that a legacy or gift of freedom, which preceded the institution of the heir, was invalid. The Sabinians held that the same rule must apply to the appointment of a tutor. The Proculians, before extending the rule, asked what was its ratio. They observed that grants of legacies and manumissions were both provisions which diminished the inheritance, and were therefore prejudicial to the heir, so that logically they should follow his institution. This reasoning did not apply to the appointment of a tutor, and therefore such an appointment was valid, even though it preceded the institution of the heir.

The Proculians showed a similarly liberal view in another case on the validity of a will (Gaius, 2.123). It was trite law that if a son, who was in his father's power, was neither instituted heir nor expressly disinherited, but was just passed over, in the father's will, that will was invalid. But suppose the son died in his father's lifetime. The Sabinians held that the will was invalid, ab initio, and the son's death could not validate it. The Proculians held that it should take effect. They emphasised that a will takes effect only on the testator's death, and at that moment there was nothing standing in the way of its validity.

An analogous problem arose when there was a child en ventre sa mère at the time of the testator's death, and that child would, if he were born, be a suus heres; in such a case, if the testator passed him over, the will was void. What was birth for this purpose? The Sabinians held that if the child were born and died without uttering a cry, the will would still be invalidated. We have no express statement of the Proculians' position, but almost certainly they held that at least a cry was necessary as proof of a live birth (C.6.29.3). They wished to give effect to the will if possible, and so they required stricter proof of a live birth which would invalidate it.

The familiar Proculian reasoning was deployed on the question of the effect of a surrender of the inheritance by a necessary heir (Gaius, 2.37 and 3.87). It was agreed that if an ordinary heir,
instituted in a will, accepted the inheritance and then made in iure cessio of it to another (i.e., surrendered it en bloc in court), he remained liable to the creditors of the inheritance for the debts owed by the deceased, the debts owed to the inheritance by debtors of the deceased were extinguished, and corporeal things in the inheritance passed to the surrenderee, just as if they had been surrendered one by one. A necessary heir was a slave who was liberated and made heir by the will. He became heir without the need for acceptance, whether he wanted to be heir or not, so that the testator, whose estate might be insolvent, should not suffer the posthumous indignity of having no heir. Could such an heir validly surrender the inheritance? The Sabinians denied this on the ground that, being an involuntary heir, he could not give up his position. The Proculians held that a surrender in this case had the same effect as a surrender made by other heirs who had accepted the inheritance. For an heir is an heir, whether he achieves that position by formal acceptance or by acting as heir, or by necessity, and he cannot be deprived of the legal powers of an heir. Furthermore the purpose of instituting a necessary heir would still be achieved, since, although he had transferred the corporeal assets to another, he would still be the testator’s heir and liable to the testator’s creditors for his debts.

Sometimes the Proculians appear to carry their abhorrence of illogical reasoning to extremes. Two disputes in which they give an impression of undue rigidity concern legacy per vindicationem, which operated as a direct conveyance from the testator to the legatee, as soon as the heir entered on the inheritance. Did a thing so bequeathed become the legatee’s property immediately at that moment, whether he knew about it or not (Gaius, 2.195)? The Sabinians thought that it did, but that, if the legatee later repudiated the legacy, it was treated retroactively as never having been his. The Proculians held that the legatee acquired no title until he accepted and that meanwhile the thing was res nullius. Again, if such a legacy was bequeathed conditionally, to whom did it belong, pending the condition? The Sabinians compared the case of the statuliber, a slave manumitted by the will subject to the fulfilment of a condition, who remained the property of the heir until fulfilment, and held that the legacy also belonged to the heir pending the condition. The Proculians held that, as in the case where the legatee had not yet accepted, the thing was res nullius.

At first sight there seems to be little to say in favour of the Proculian view, but the Sabinian doctrine involved some rather circular reasoning.\(^{32}\) The repudiation was an alienation, in that the

\(^{32}\) P. Voci, *Diritto ereditario romano*, II (1963), pp. 372 et seq., 388 et seq.
things moved out of the ownership of the legatee (cf. Ulpian in D.27.9.5.8). Yet its retrospective effect implies that the thing has never belonged to the legatee, and that suggests that the alienation was invalid. Furthermore, although the principle of retroactivity works satisfactorily as between the heir and the legatee, a third party who receives the thing from the heir must be satisfied that the latter acquired it by a recognised mode of acquisition. How precisely had the heir acquired it? Again, with regard to the conditional legacy pending the condition, if the heir is owner, in principle he has the rights of the owner over the thing; but, once the condition has been fulfilled, ownership passes automatically to the legatee and he has a right to the thing as it was when the heir entered on the inheritance. The Proculian view avoids these complications, although at the cost of the thing belonging for a period to no one, which might in practice be unsatisfactory.

The Proculians were less tolerant than the Sabinians of historical survivals which constituted exceptions to the system of rules which had been developed. A legacy per praeceptionem was in the form: “Let Titius take in advance (praecipito)” (Gaius, 2.216–222). In the Sabinian view, which seems to have been historically correct, a legacy in this form was valid only if the legatee was himself an heir and the thing bequeathed had belonged to the testator at death, and it was enforceable only in the action for partition of the inheritance (actio familiae erciscundae). The Proculians held that the prefix prae was superfluous and that praeципito should be construed as capito. As a result the legacy could be considered to have been given per vindicationem and, if it had belonged to the deceased, the thing bequeathed could be vindicated by the legatee. It is somewhat surprising to find the Proculians not giving precise weight to a testamentary formulation. It seems, however, that legacy per praeceptionem went back to a time before the development of the classical system of succession which attributed to each co-heir an undivided share of the inheritance and its existence as a separate category of legacy was anomalous; it derogated, for example, from the rule heredi a semet ipso inutiliter legatur. The Proculians, in their desire to implement the will of the testator, boldly proposed a conversion of the institution into another, more regular, type of legacy.

(d) Miscellanea

Most of the school disputes were about interpretatio verborum, the basic principles of obligations or testamentary provisions. In

the occasional disputes on other topics, the Proculians adopt the same approach which has been noted with regard to these.

The schools disagreed over the moment when a male child reached the age of puberty, so that he was freed from tutela (Gaius, 1.196; Ulp. 11.28). The Sabinians said that it depended on the individual's physical development, but in the case of those who were naturally impotent, the usual age must be taken. The Proculians argued that puberty must be judged by age alone and that a boy reached puberty when he became fourteen years. In this case the Sabinians clearly adopt an anomalist, empirical principle whereas the Proculians favour the analogist preference for one objective rule for all cases.  

Another dispute on a similar point concerned the moment at which animals became res mancipi (Gaius, 2.15). Only those animals which were broken in for pulling and carrying (quae collo dorsove domantur) fell into this category, and consequently could be transferred only by the formal mancipatio or in iure cessio, instead of by mere delivery. The Sabinians considered that such animals were res mancipi from birth, while the Proculians held that they were res mancipi only when they were broken in, but if they proved to be too wild to be broken in, then they were to be considered res mancipi at the usual age for breaking in.

Why did the Proculians not prefer a simple, straightforward rule, as they did in the case of the age of puberty? Here the social function of the rule has to be considered. In a primitive economy the main value of cattle was as agricultural instruments for such purposes as pulling ploughs or carts. They had only minor importance in the production of milk or meat, which was largely supplied by sheep and goats. The traditional explanation is that cattle became fit subjects for formal conveyance by mancipatio only when they were old enough to be trained to pull or carry. As calves they would be transferable by simple delivery. Thus the Proculian view would be the older, and the Sabinian view, which did not distinguish between calves and fully grown cattle, would be the more recent. This explanation has recently been rebutted by Nicosia, who observes that a widening of the category of animals who were res mancipi would have been contrary to the recognised trend to restrict the category, as shown by the refusal to include elephants and camels in it, even though they were trained to pull and carry. He shows that the Sabinian view was the

34 Huvelin, Etudes, cit., ante, n. 26, p. 778; T. Mayer-Maly, "Die Grundlagen der Aufstellung von Altersgrenzen durch das Recht" (1970) Zeitschrift für das gesamte Familienrecht 618, sees the dispute as a choice between "individualisier." and "type-formation."


older, and that the Proculians aimed to restrict the scope of the category and so allow animals which were destined for meat to be transferred by informal delivery. This was in the interest of the big beef producers on the large estates, which grew up in the late Republic, where it might sometimes have been difficult to bring together the six Roman citizens required by \textit{mancipatio}. The Proculians doubtless favoured a rule that only animals which were actually tamed were \textit{res mancipi}, but they accepted a modification of it to the extent that animals which reached the normal age for taming were also \textit{res mancipi}, whether they were actually broken in or not. Such a modification would have been inexplicable, if the Proculians were defending an old view against a Sabinian attempt to extend the category, but is understandable as a concession to make their newer view acceptable.

Finally, there was a dispute about the effect of the abandonment of a thing by its owner (D.41.7.2.1, Paul, 54 \textit{ad edictum}: D.47.2.43, 5, Ulpian, 41 \textit{ad Sabinum}). Sabinus and Cassius held that it immediately ceased to be his, whereas, in the view of Proculus, it continued to be his, until it was taken into possession by someone else. The Sabinian view is again probably the older and seems more natural. It could, however, lead to abuse.\footnote{D. Daube, \textit{"Derelictio, occupatio and traditio: Romans and Rabbis"} (1961) 77 L.Q.R. 389, suggesting that the object of abandonment was to avoid land-tax. But Italic land, alone the object of \textit{dominium}, was not subject to \textit{tributum}, and in any case it is difficult to imagine treasury officials falling for such a ruse.} An owner could avoid liability for \textit{damnnum infectum} by abandoning the land which was harming his neighbour (D.39.2.6, 7.2).\footnote{Cf. the opinion of Proculus in D.3.5.9.1, and that of Labeo in D.8.5.6.2 (on abandonment to avoid liability in respect of a servitude \textit{oneris faciendi}).} If the owner declared that he was abandoning the part of his land which was subject to the claim for \textit{damnun}, and if that declaration was immediately effective in divesting him of ownership, he could plead that he was no longer liable.\footnote{S. Romano, \textit{Studi sulla derelizione nel diritto romano} (1933), pp. 50, 142-145.} Access to the abandoned land by strangers might be impossible except through other land retained by the owner, so that there would be little risk of someone else occupying it. Then after an appropriate interval, the owner would proceed to reacquire it. Proculus' reinterpretation of abandonment was an attempt to forestall such dodges, and is in accord with Labeo's forward-looking conception of law as requiring adaptation in the face of new situations.\footnote{The Proculian school was particularly interested in the jurisprudential analysis of possession, especially with regard to the mental element. It was probably Labeo who first formulated the proposition that we acquire possession \textit{animo} of certain things, such as those which we have bought and placed a guard over (D.41.2.51). Proculus and Neratius laid down that, provided that \textit{naturalis possessio} already exists, possession can be acquired \textit{solo animo} (D.41.2.3.3). G. MacCormack, in his careful study of \"The role of \textit{animus} in the classical law of possession\" (1969) 86 \textit{Zeitschrift der Savigny Stiftung für Rechts-geschichte} (rom.Abt.) 105-145, points out that \"the Proculians were cautious
III

This survey of the different school controversies shows, I submit, the nature of the Proculian approach to legal problems and the extent to which it differed from that of the Sabinians. We must now assess the significance of these differences.

Throughout the Republic, law, *ius*, was not thought of as a set of rules. It was originally an amorphous notion, indicating what was right in a particular situation. It was not a man-made product but part of the Roman way of life, and it could be manifested in various ways. Primarily it was declared expressly in a *lex*, which could either have a general application or merely express what was right between certain parties (*lex privata*). Alternatively, the law could be indicated by custom and practice or the nature of the case might suggest what was right. In the last century of the Republic, the jurists felt the need to set out this law in a series of propositions, which were normally formed by generalising the effect of particular decisions. These so-called *definitiones* were given technical precision in the pioneer work of Q. Mucius Scaevola, and, by the end of the Republic, some lists of the places in which the law was to be found included the opinions of the jurists and the edicts of the praetors, alongside the traditional sources of law.41

Labeo now carried the process of development one stage further. His interest in linguistic analogy led him to make a systematic introduction of certain techniques of analogy into Roman legal thinking. It was probably Labeo who introduced the notion of *regula*, which was not just a descriptive generalisation, like *definitio*, but a normative proposition, covering cases which fell outside its terms but within its *ratio*, or basic principle.42 Labeo did not abandon the more traditional techniques of law-finding; he added new ones.

Labeo's methods were adopted by the Proculians, while the Sabinians stuck to the traditional Republican ways. This does not mean, however, that their disputes resolve themselves into battles between analogists and anomalists.43 Many disputes were not directly

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43 As argued by M. Schanz, "Die Analogisten und Anomalisten in römischen Recht" (1884) 42 Philologus 312 et seq.; for a more reasonable view, H. Dirksen, "Über die Schulen der römischen Juristen," Beiträge zur Kunde des römischen Rechts (1825), pp. 1-158.
related to that controversy and the opposing positions were more complex than such labelling suggests.

In the face of cases in which the law was in doubt or the situation was unforeseen, the Proculians had at their disposal a wider range of techniques than were available to their opponents. On the other hand, when the case could be categorised as involving interpretatio verborum, they could afford to stand firm on the application of the objective meaning of the words, in the interests of certainty and the encouragement of exact drafting. The first group of cases shows how consistently they took this line.

Where the relevant law was unwritten, it was not necessarily uncertain. The notion of obligation had been so refined by juristic discussion, that its basic structure was solidly established. The second group of cases shows that the Proculians insisted that this structure was a coherent, rational whole and that effect should be given to its component principles, wherever they applied. Further, legacies per damnationem were essentially obligations imposed on the heir, and consequently could not be treated differently from other kinds of obligation.

This consideration apart, the Proculians consistently gave effect to the intention of the testator, as expressed in his will or codicil, without requiring him to be specially scrupulous in observing the customary modes of expression. The disputes on succession matters, other than those involving legacies per damnationem, show the Proculians taking a positively liberal line. Only when a suggested solution to a problem seemed to be illogical or to flout basic principles, did they demur.

Often the disagreement of the schools was not over whether there should be a remedy but over which action it should be. The Proculians cared more than did their opponents about preserving the lines which marked off the areas of application of the established actions. They realised that only by so doing could they recognise when a new situation had arisen and so take a deliberate decision about the appropriate way to deal with it. Only at this point did the Proculians turn to analogy proper, for the techniques of analogy enabled them to provide for new cases, without disturbing the rational structure of the existing law. That is why it was the Proculian methods which were adopted increasingly by the imperial chancery, although Labeo himself had been a staunch political opponent of Augustus and stood for a return to republican government.

The Sabinians, on the other hand, did not give an impression of consistency. They did not adhere so strictly to the objective meaning of texts, if they were implementing what they thought the parties wanted. They did not worry much about infringing the principles of obligation, if the solution they advocated seemed to be satisfactory.
in the given situation. They did not look below the surface of a case, nor did they trace the implications of a decision in situations other than that in which it was given. They relied on the experience of the past and had a limited vision of the capabilities of the law in the face of new situations. Thus, by contrast with the Proculians, the Sabinians sometimes appear liberal and sometimes conservative. They would no doubt have agreed with Justice Holmes when he began *The Common Law* with the words: “the life of the law has not been logic: it has been experience.” Like the traditional common lawyers, they distrusted dogmatic, rationalist arguments and were more interested in the decisions themselves than in the manner in which they were reached. As Daube observed,\(^4\) with regard to the Sabinians’ wholesale granting of the contractual action in sale, “there was a danger that this approach might interfere with the subtle, classical system in which each contract had its own, individual rules adapted to a narrow field. . . . The Proculians would look on too rash an expansion of *ex vendito* as leading to confusion, to a law of ‘mish-mash’.”

Had it not been for the Proculian emphasis on rationalism, the classical Roman law would not have acquired that particular characteristic of empiricism within the framework of basic principles which has proved its attraction to later ages.\(^5\)


\(^5\) I am most grateful to Mr. J. A. Crook, F.B.A., for commenting critically on this paper.