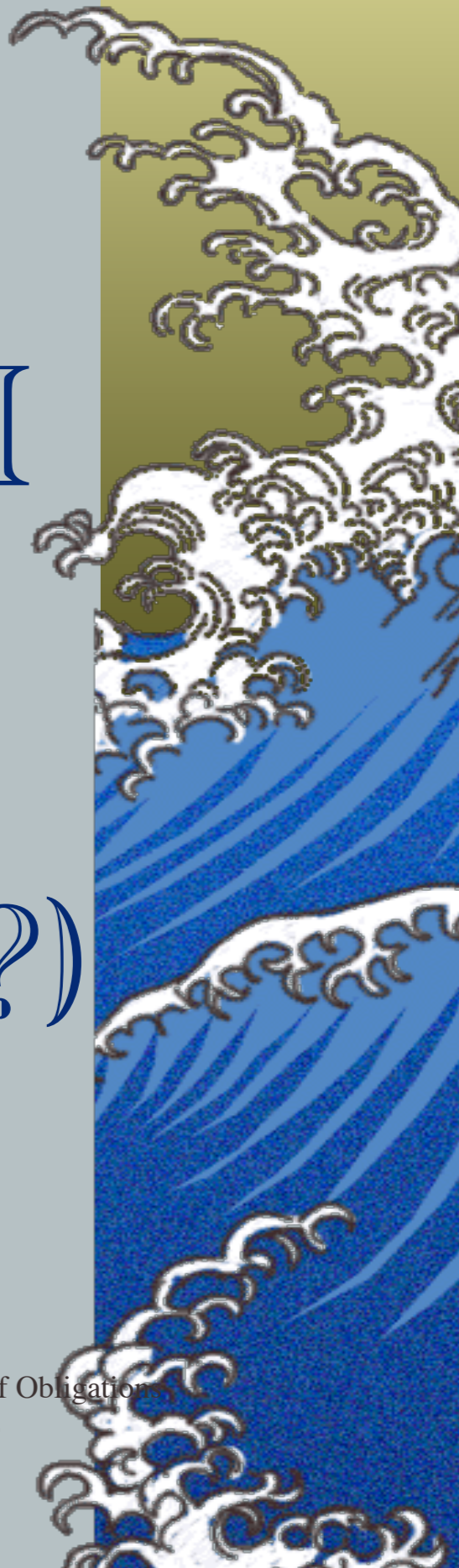
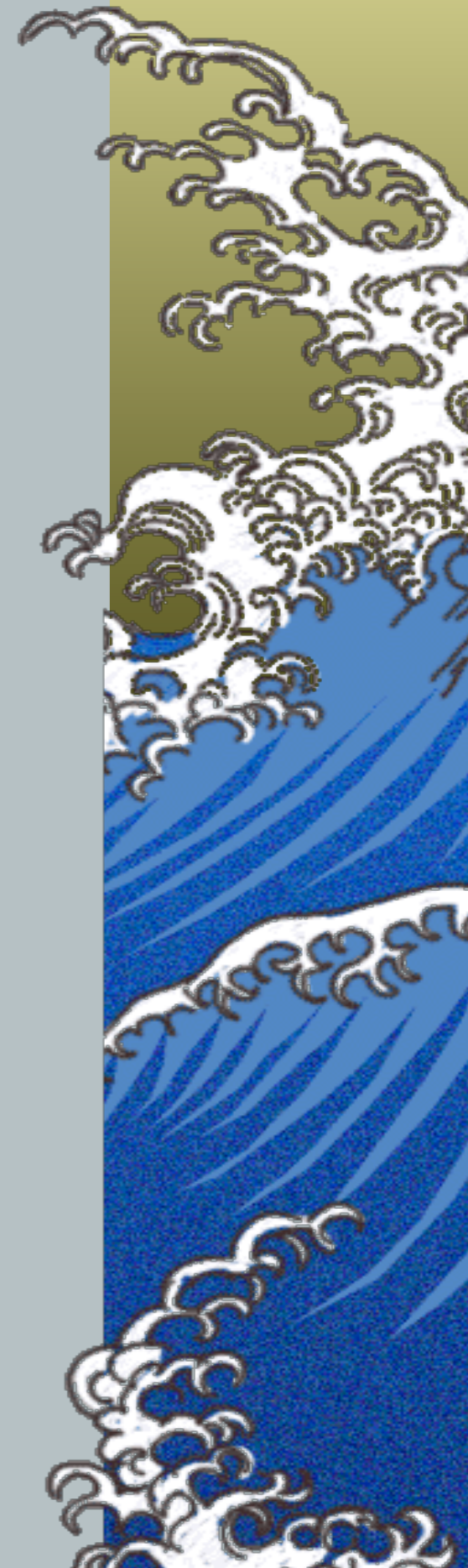


SOLUTIO INDEBITI

undue payment =
unjustified enrichment (?)



Unjustified enrichment (?)



Unjustified enrichment (?)

- Titius' father imposed upon him by testament the obligation to transfer to Marcus the slave Stichus. Titius did so, and some time later a new testament was found, in which nothing was left to Marcus.

Quid iuris?



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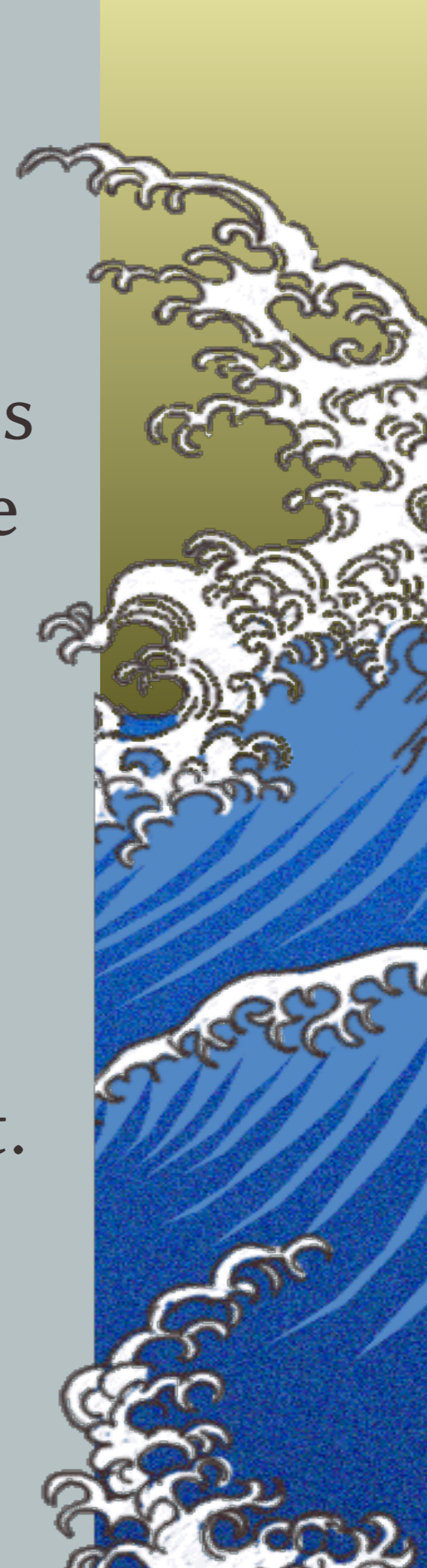


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- *Condictio = datio*



?Unjustified enrichment? & condictio



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& condictio

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- *Condictio indebiti*



?Unjustified enrichment?

& condictio

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- *Condictio indebiti*
- Let Caius Aquilius be judge. If it appears that the Defendant ought to give 1000 to the Plaintiff on the basis on civil law (*dare oportere*), which is the case-matter here,
- Let the judge condemn the Defendant in favour of the Plaintiff for 1000, if it does not appear, let the judge acquit him.



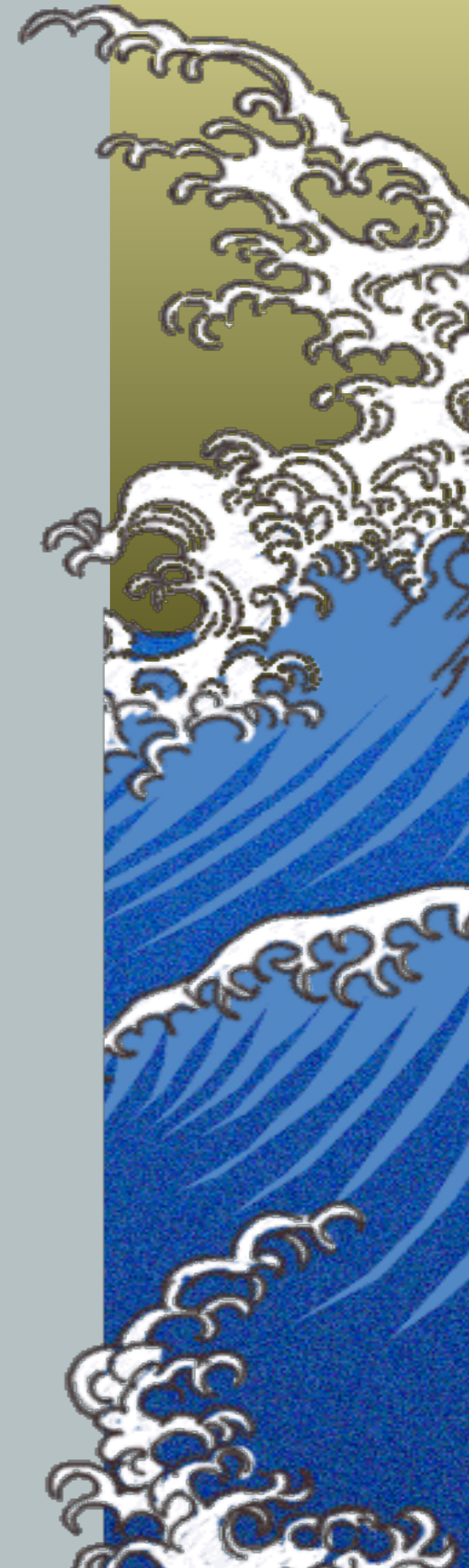
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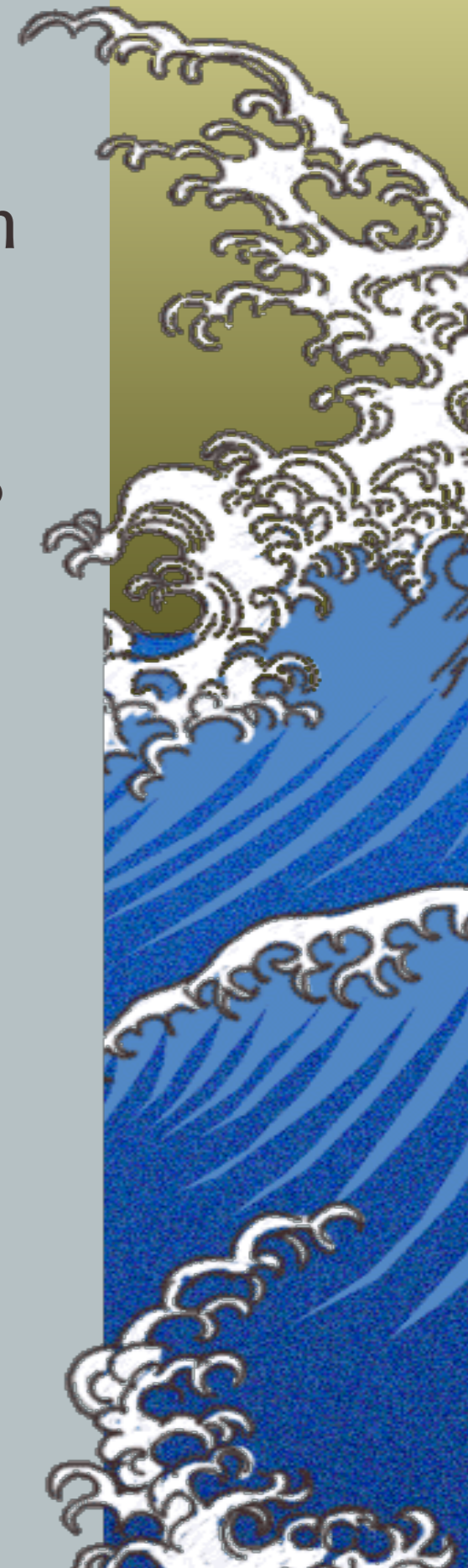


Condictio and undue payment



Condictio and undue payment

- You buy from me a slave, Stichus, together with his peculium. Stichus steals one of my favourite horses. Assuming it to be part of Stichus' peculium, you sell the horse for 1000. Quid iuris? What if the horse dies in power of the buyer?



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- *Africanus, Questions, Book VIII (D. 3,5,48): Where a slave whom I have sold steals something from me, his vendor, and the purchaser sells the article, and then it ceases to exist, an action for the price should be granted me on the ground of business transacted; as would be the case if you had attended to some business which you thought to be yours, when in fact it was mine ...*



an excursus:
negotiorum gestio
agency without
authorisation



NEGOTIORUM GESTIO

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- The actions (based on good faith):

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causa data causa non secuta



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Seia gives as a dowry to her future husband, Titius, jewels for value of 10.000. The day settled for the wedding, Titius does not appear. Some days later Seia meets Marcia in the theatre, adorned with her jewels. Titius is now engaged to Marcia, and has given her the jewels as bridal present. Quid iuris?



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☀ *When is ownership transferred, and why?*



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- ☀ *When is ownership transferred, and why?*
- ☀ *What effect has the cancellation of the planned marriage?*



Traditio

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is the transfer justified?

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Ownership transferred



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Y

Ownership transferred

N

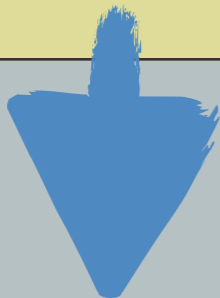
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Traditio

CAUSE (near): iusta causa acquirendi:
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Ownership transferred



CAUSE (remote): iusta causa retinendi:
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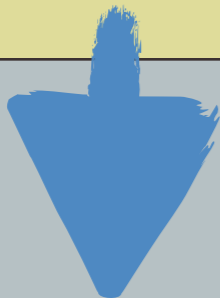
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Solutio indebiti

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Solutio indebiti
condictio

A SUM-UP

• Modern: Unjustified enrichment (cf. The concept of *versio*: in *actio de in rem verso*)

versus

• Roman Undue payment (*solutio indebiti*)



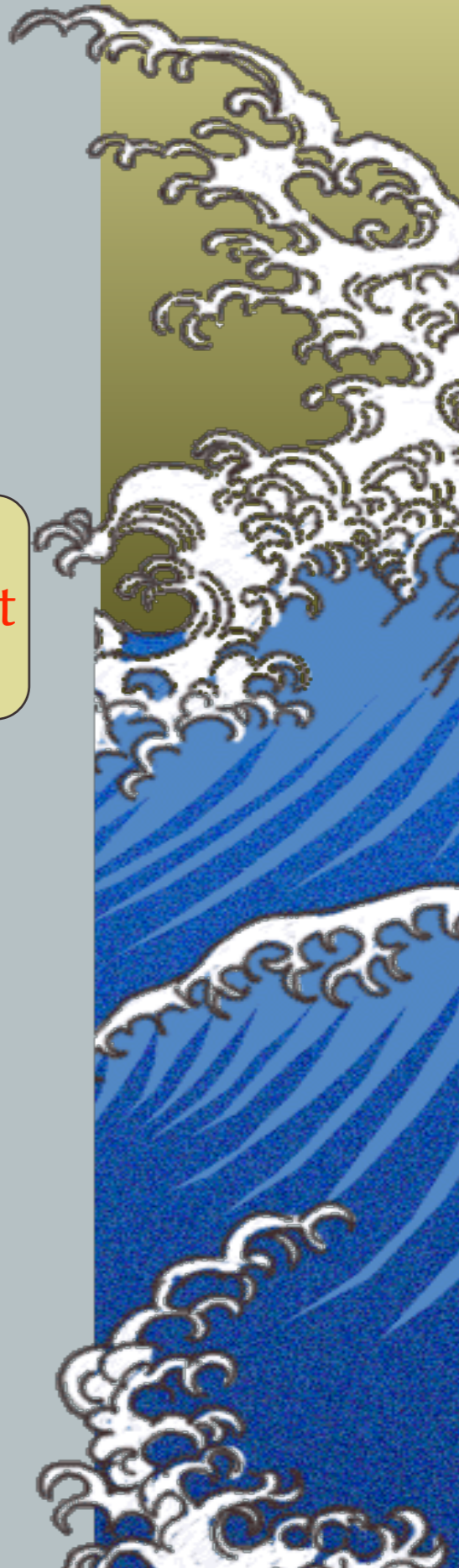
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claim available
always as long as there is enrichment
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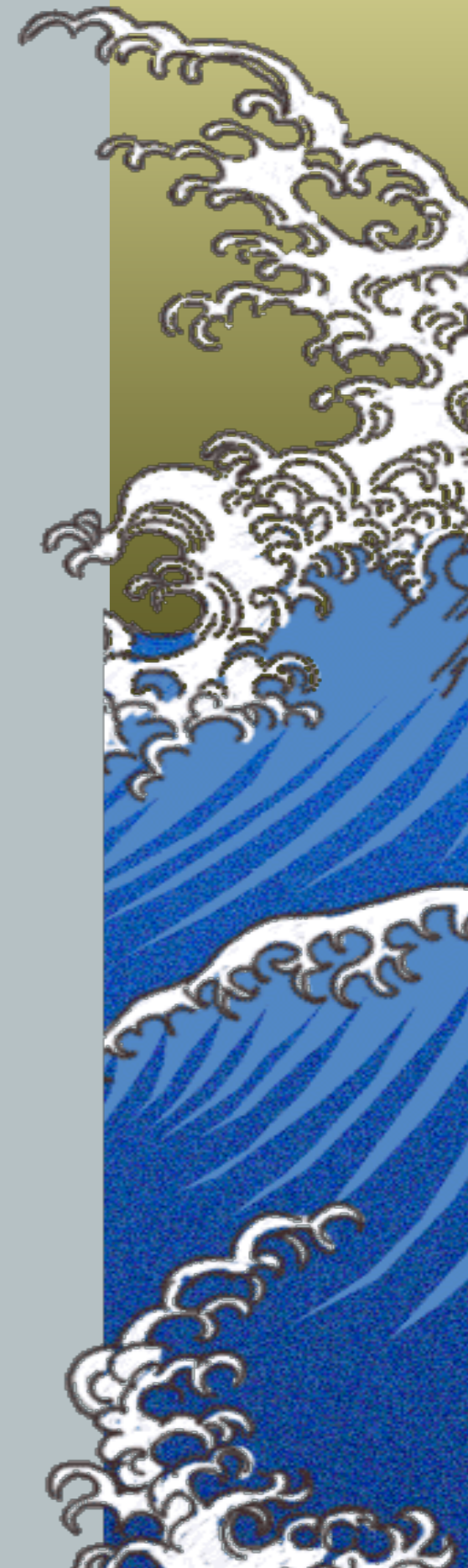
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claim available only if the was *datio*
(payment), enrichment irrelevant



No datio, yet condictio available



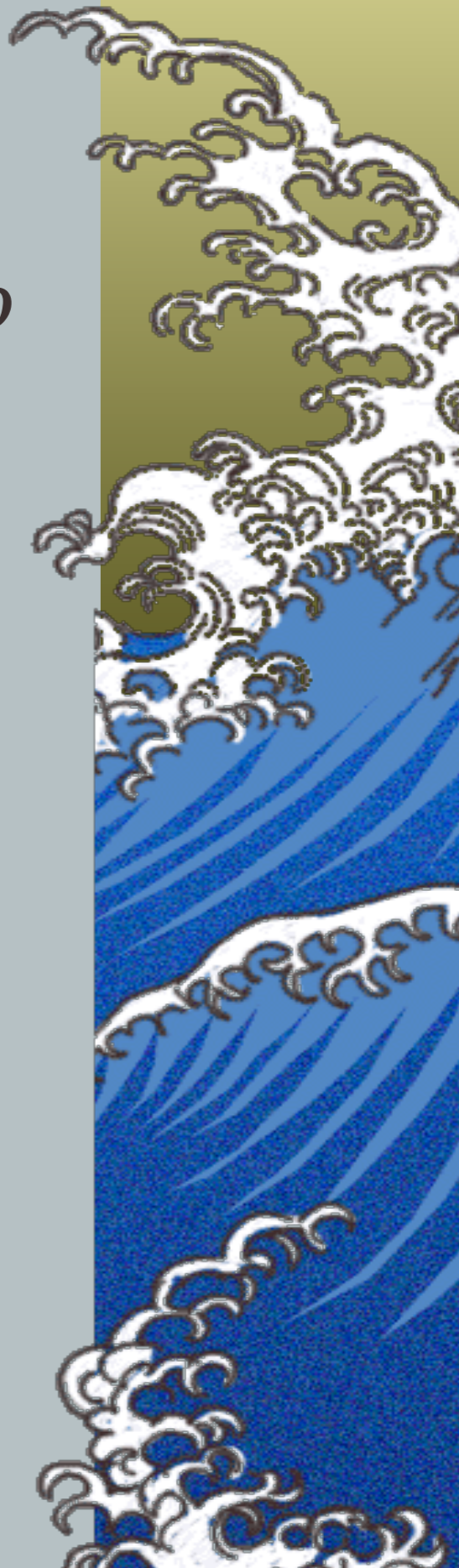
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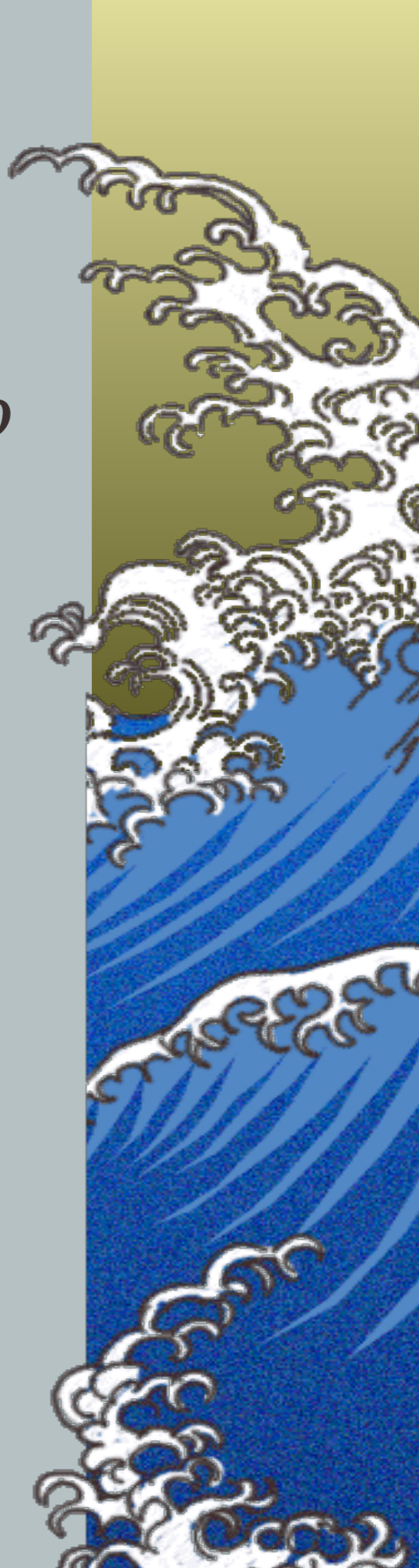
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- *Condictio ???*

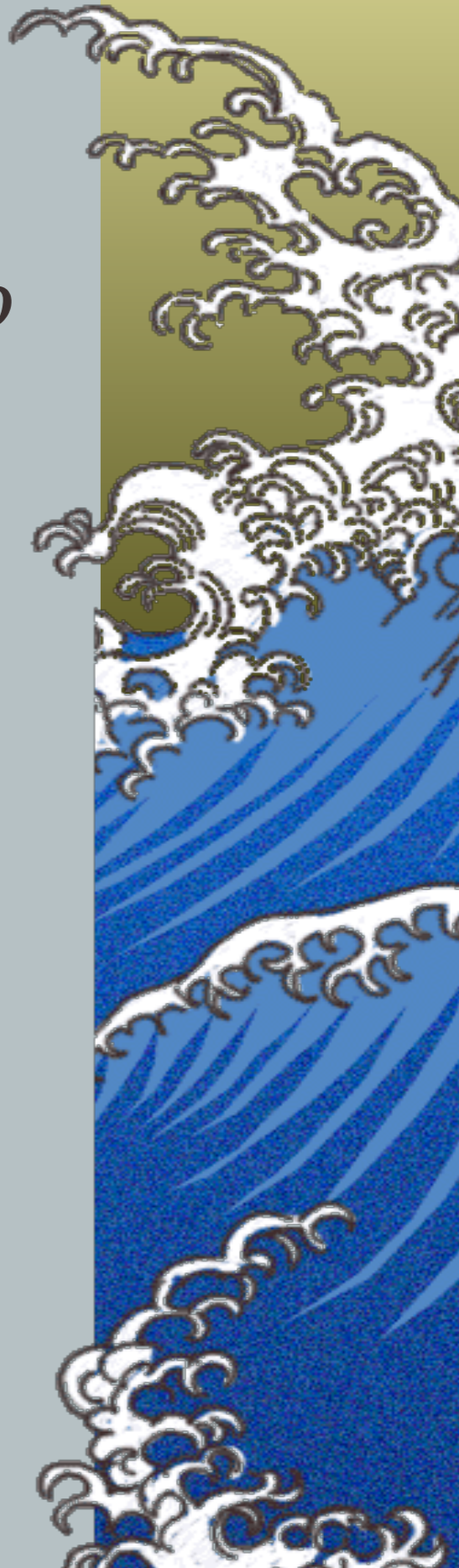


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- *Condictio ???*
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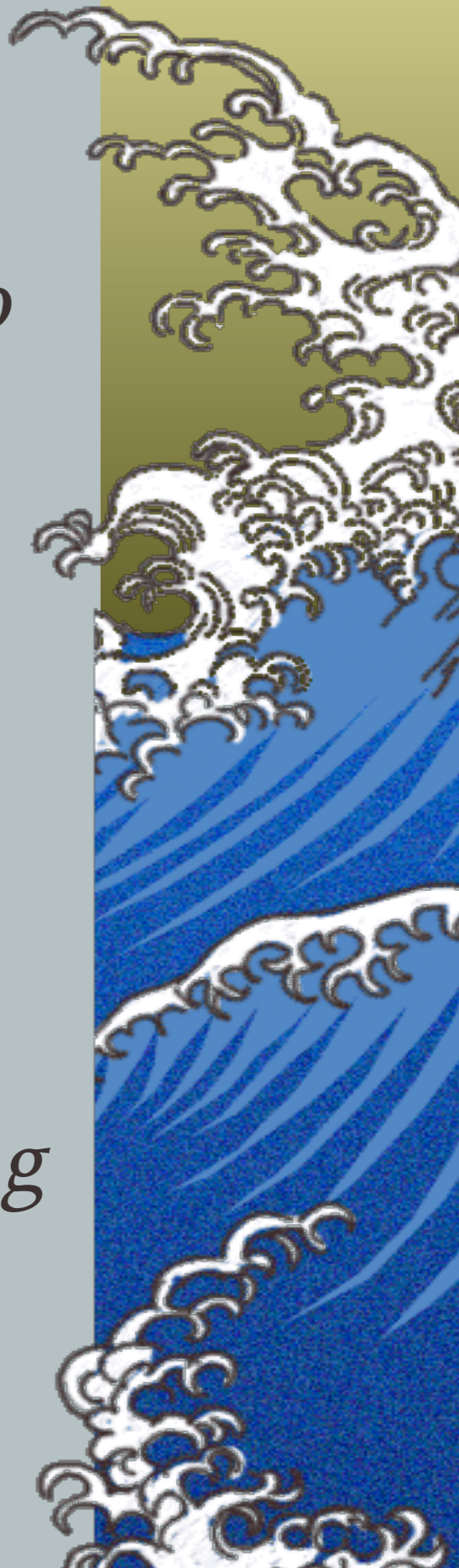


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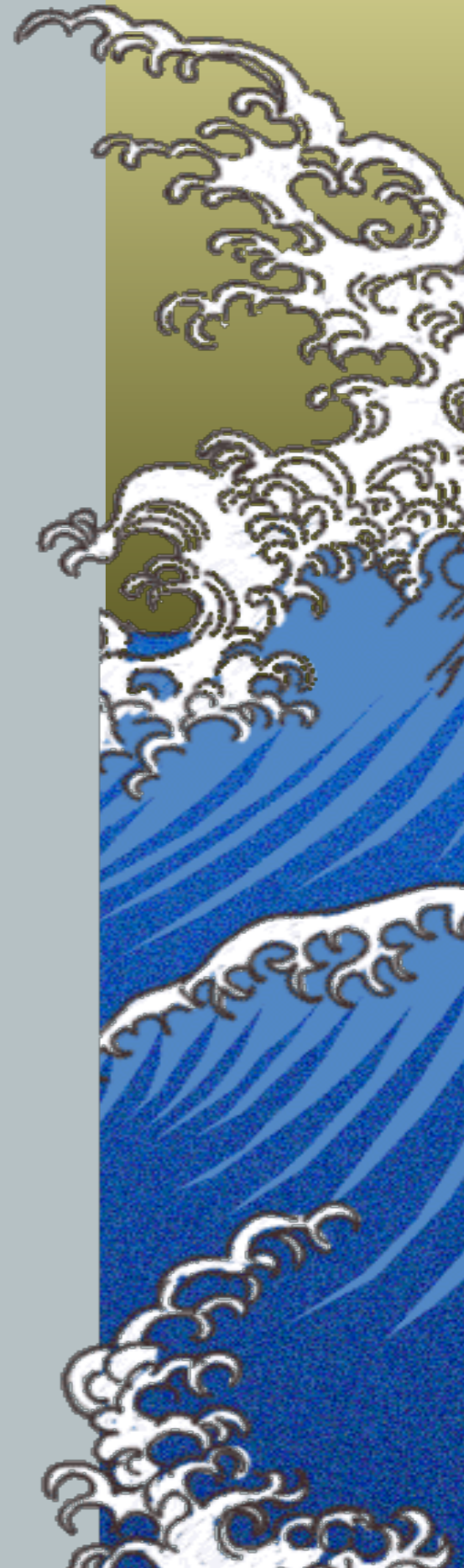
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 - *Condictio furtiva*



problems concerning the cause



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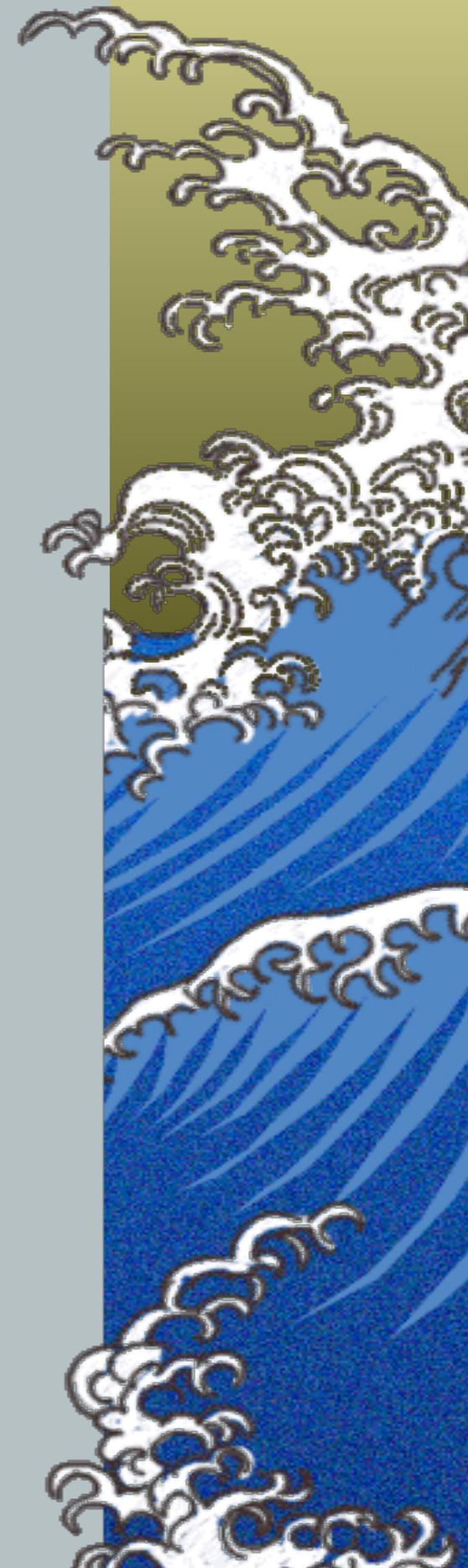


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- You buy a gold ring, and it's agreed that the price will be paid in a month. The month passes and you have no money for paying. Can the ring be claimed back?



ob rem datam



ob rem datam

- I give you 10.000 so that you free a slave of yours, that happens to be my natural son. But the slave seriously offends you and you decide not to give him his freedom, and to keep the amount in compensation for the offence. Quid iuris?



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- *Condictio ob rem*



wrong motivations

- Pomponius, *On Quintus Mucius*, Book XXVII (D. 12,6,52): We make payment either because a cause, or for a purpose, and because of the already happened cause, for example, where I make payment because I have obtained something from you or something has been done by you, so that, even if the cause is false, no action will lie for the recovery of the money; but payment for a purpose is made where some act is to be performed, and if this does not take place, a suit for the recovery of the money will lie.



When is the claim available



When is the claim available

- D. 12.4.1 pr. (Ulpianus, On the Edict, Book XXVI)
Where money is paid on account of some act which is not dishonourable, as that a son shall be emancipated, or a slave manumitted, or a suit abandoned; then, if the act is performed, an action for the recovery of the money will not lie.



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[as long as the purpose was **honest**]



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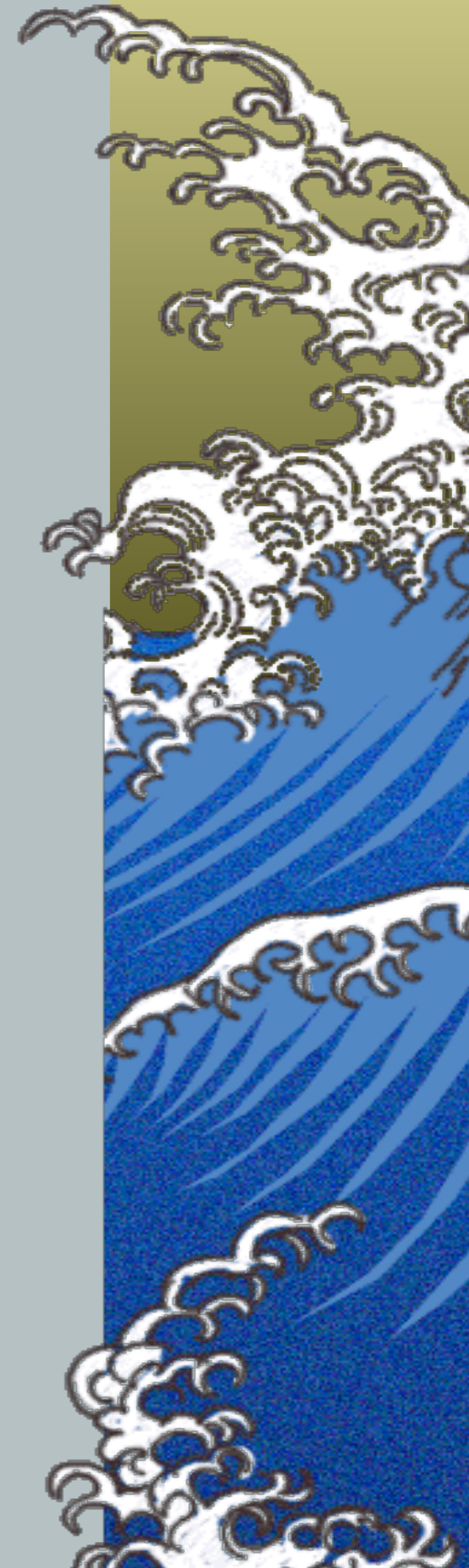
– if the purpose of the payment has been accomplished

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CLAIM only available if the purpose has not been achieved



When is the claim available



When is the claim available

D. 12.5.1.2 (Paulus, On Sabinus, Book X)

Where, however, the receiver is the one guilty of immorality, even though the purpose be accomplished, an action can be brought for the recovery of the gift.



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CLAIM AVAILABLE :

– if the receiver received immorally, no matter whether the purpose has been accomplished, **the money is to be claimed back**



When is the claim available

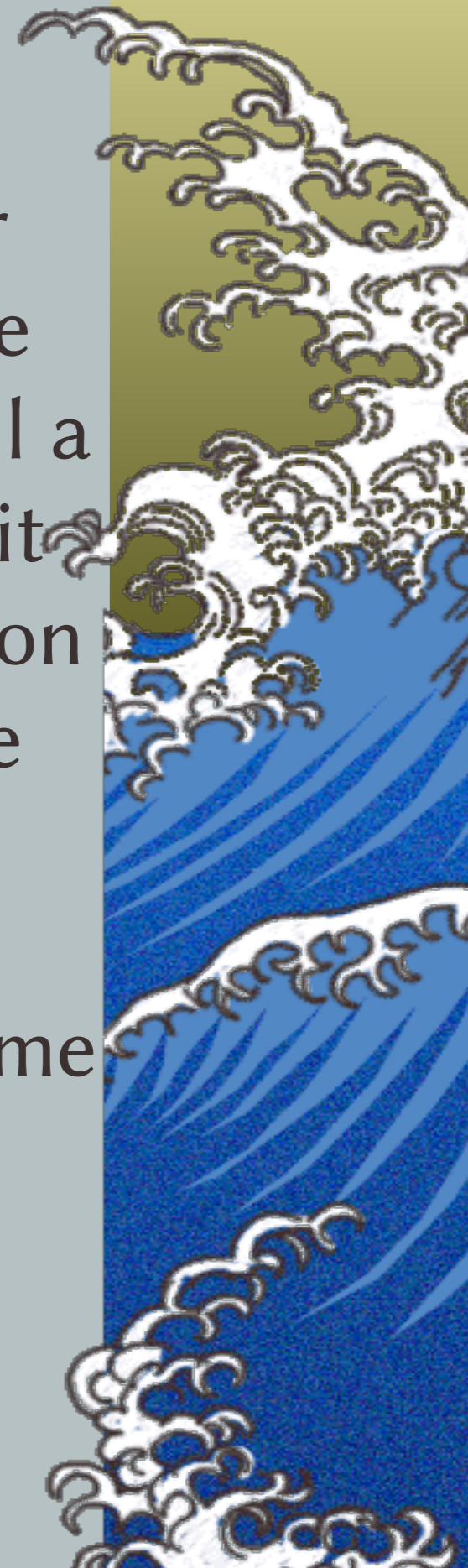


When is the claim available



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D. 12.5.2. Ulpianus, On the Edict, Book XXVI. For example, suppose I gave you something to induce you not to commit sacrilege or theft, or not to kill a man. In this instance, Julianus says that if I give it to you to prevent you from killing a man, an action for its recovery can be brought. (1) Moreover, the rule is the same, if I gave you something on the condition that you would return to me property which I deposited with you, or would restore to me certain documents.



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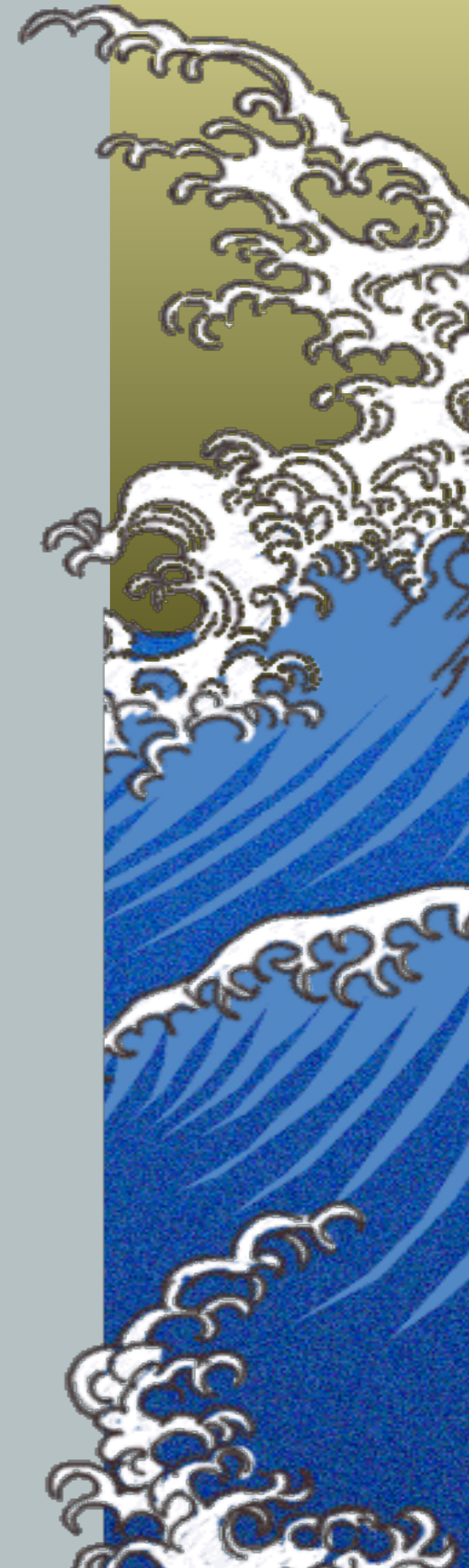
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condictio ob turpem causam



When is the claim available

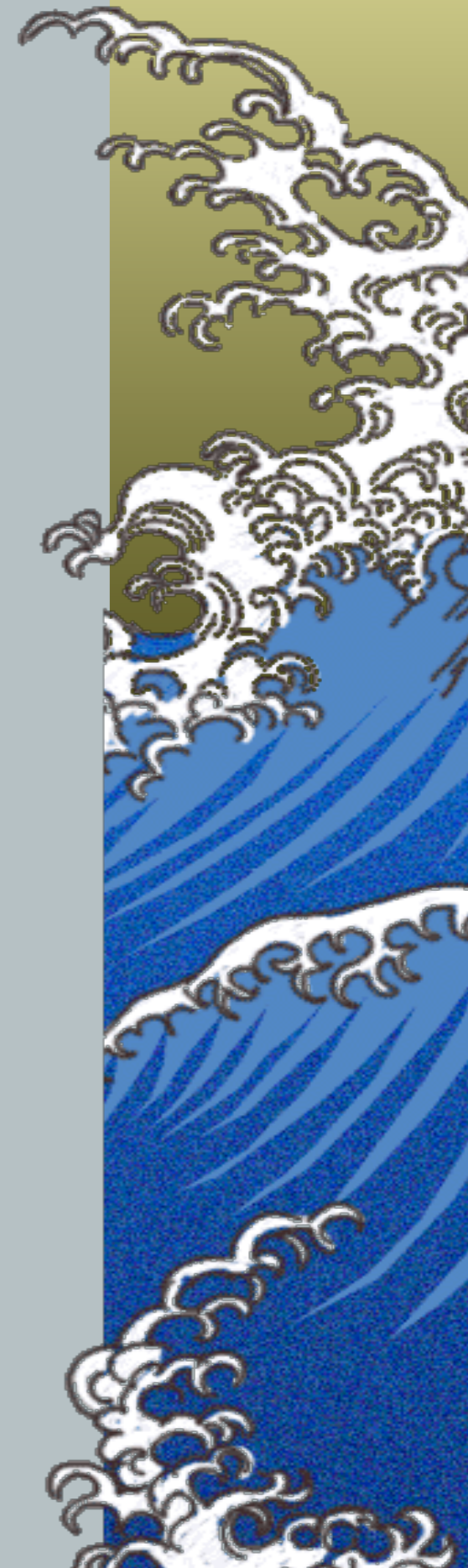


When is the claim available



When is the claim available

D. 12.5.3–4 Paulus, On Sabinus, Book X.



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Where both the giver and the receiver are guilty of immoral conduct, we hold that suit cannot be brought for the recovery of the donation; as, for instance, where money is paid in order that an unjust judgment may be rendered.



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The same rule applies where money is paid in consideration of prostitution, or where a party who has been caught in adultery purchases immunity, as no action for recovery will lie; and this is the opinion of Sabinus and Pegasus.¹ Moreover, where a thief pays to avoid being surrendered, since, in this instance, as both parties are guilty of immorality, no action for recovery will lie.



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• NO CLAIM if both parties act immorally :
In pari turpitudine, melior condicio possidentis



Condictio ob turpem causam who is immoral?

- D. 12.5.4. Ulpianus, On the Edict, Book XXVI. (3) Money paid to a prostitute, however, cannot be recovered, as Labeo and Marcellus state; but the principle is not the same, as the question is not whether there is immorality on both sides, but that it exists only on the part of the giver; as the woman acts in an immoral manner because she is a harlot, but she is not immoral when she accepts the money since she is a harlot.



Condictio ob turpem causam who is immoral?

- D. 12.5.2.2 Ulpianus, On the Edict, Book XXVI. Where, however, I gave something on the condition that the judge would decide in my favour in a good cause, it has indeed, been stated that there will be ground for an action for recovery, but he who does this commits a crime, as he is held to corrupt the judge; and recently our Emperor decreed that he should lose his case.

immorality not always punished by
unavailability of the CLAIM



Active legitimation

- Your deceased uncle has instituted you as his only heir. Among the things you find in his house, there is a closed and sealed box containing, according to the attached note, 10.000 sesterii. You give that money away as a loan to Titius. Later on, you discover that the casket and the money belonged to a neighbour, Caius, who had deposited it with your uncle just to have it under safe custody while his house was being renovated. Who can claim the money back from Titius and with which action?
- *Reivindicatio* is possible for the owner, Caius, only if he can prove his ownership. If not?
- *Condictio*, for the one who gave the money. And Caius?



Pomponius,

On Plautius, Book VI (D. 12,1,12)

- When you receive money as a loan from an insane person, who you think is of sound mind, and the money is expended for your benefit, Julianus says the insane person will have a right of action for its recovery; for it is the rule that where a right of action is acquired by a party who is unaware of the fact, it is also, under the same circumstances, acquired by one who is insane. Moreover, if anyone makes a loan to a slave and afterwards becomes insane, and the slave spends the money for the benefit of his master, an action for recovery can be brought in the name of the insane person. And where anyone lends the money of another, and subsequently becomes insane, and the money is expended, the right to sue for its recovery is acquired by the insane person.
- Consumed the money by Titius, can Caius claim somehow against you?



The stolen marble

- Titius is having a luxurious villa built at his property in Baiae. One night, a thief enters the property, and takes the most valuable materials - marble, precious wood, semiprecious stones-. When he has already loaded his wagon and is about to leave, he is discovered. In the chase that follows, seeing that his speed is dramatically diminished by his charge, he leaves part of the materials at Caius' property, where a house is also being built. The next day, the constructor of Caius' house, assuming that the materials have been provided by Caius, uses them, in such a way that they cannot be separated any more from the building. Quid iuris?



Breaking the limits:
the new ways of contract
making in Rome



The Steps



The Steps

-  Contractual nominalism.



The Steps

- ➤ Contractual nominalism.
- ➤ the role of *stipulatio*



The Steps

- Contractual nominalism.
- the role of *stipulatio*
- ‘innominal’ contracts



The Steps

- § Contractual nominalism.
- § the role of *stipulatio*
- § ‘innominal’ contracts
 - § *condictio indebiti*



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The Steps

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 - § *actio civilis in factum in Labeo*
 - § *actio praescriptis verbis*



The Steps

- Contractual nominalism.
- the role of *stipulatio*
- ‘innominal’ contracts
 - *condictio indebiti*
 - *actio civilis in factum in Labeo*
 - *actio praescriptis verbis*
- *Pacta*



Stipulatory clause

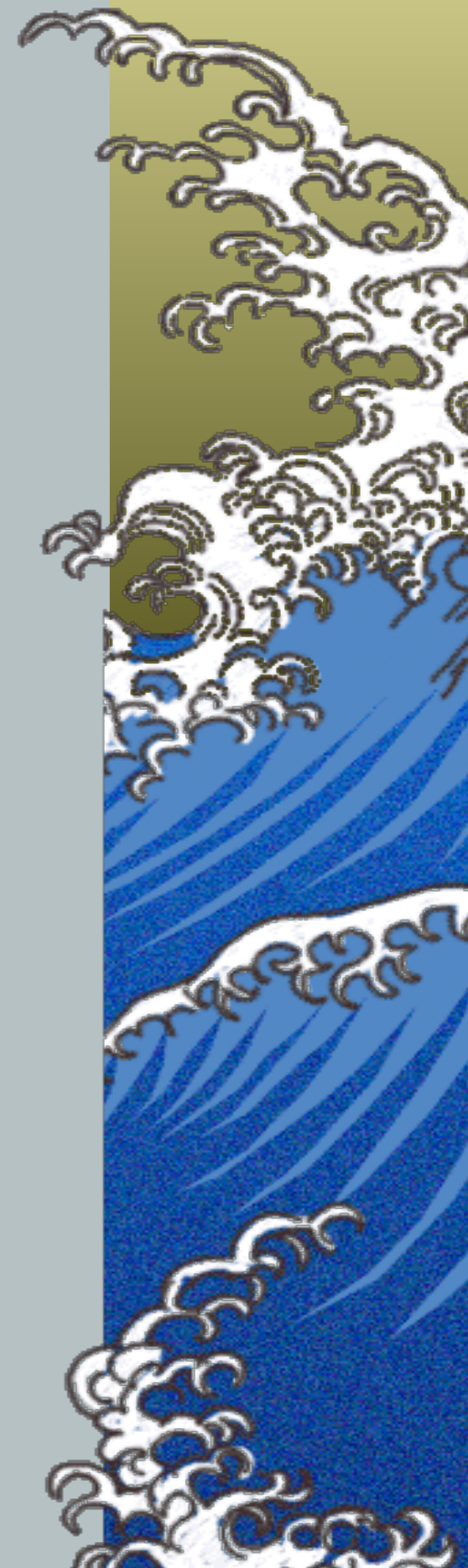
P. Col. X 227, 29. Nov. 225

. . the agreement set down in duplicate . . . [is normative] wherever it is brought forward and for whoever presents it on your behalf. Having been **asked** by you whether these things are well and correctly done, I have consented. Year 5 of Imperator Caesar Marcus Aurelius Severus Alexander Pius Felix Augustus, Choiak 3. I, Aurelius Areios son of Sarapion, have had measured out to me two artabas of wheat, and I shall pay as yield one artaba, and I shall repay the total three artabas of wheat as aforesaid, and, having been **asked** the formal question, I have **agreed** . . .

apsis.p.10
(P. Col. 277 [inv. 170])

P. Col. 2

Condictio



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Actio civilis in factum



Actio civilis in factum

- D. 19.5.20 Ulpianus, On the Edict, Book XXXII.
- It is asked by Labeo, "If I give you horses that I have for sale to be tried, under the condition that you will return them within three days if they do not please you, and you, being a performer in the circus, ride said horses and win the prize, and then refuse to buy them; can an action on sale be brought against you?" I think the better opinion is that an action should be brought for the construction of the contract, for it was agreed upon between us that you should take said horses for the purpose of trying them gratuitously, and not that you should enter them in a race.

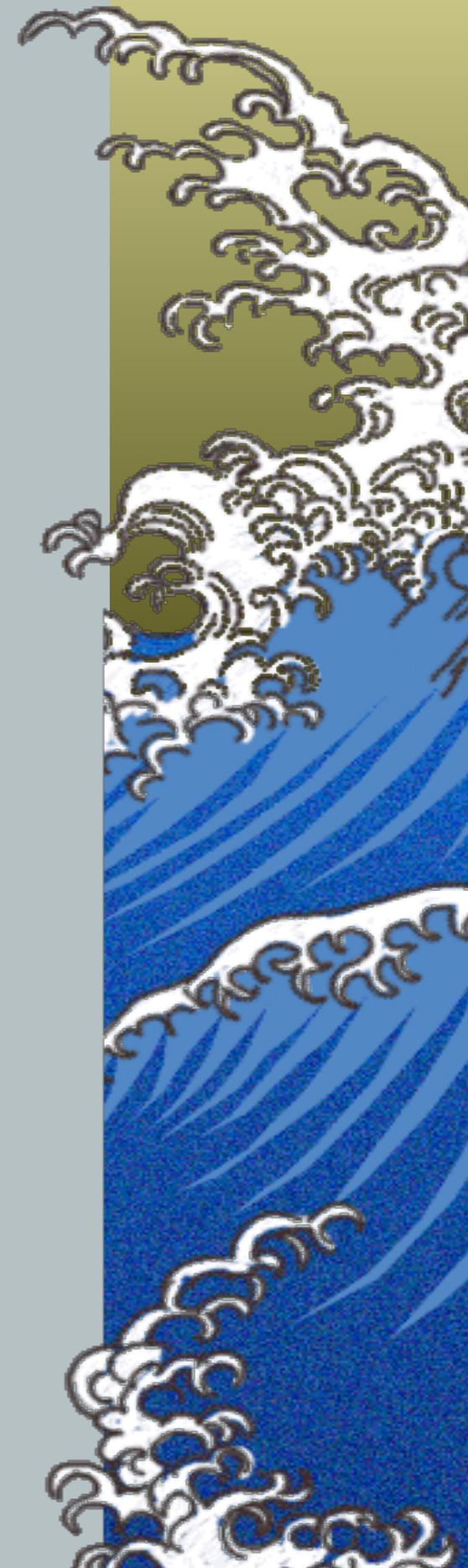


Actio civilis in factum

- D.18.1.50, Ulpianus, On the Edict, Book XI.
- Labeo writes that if you sell me a library on condition that the Campanian Decurions will sell me a site on which I can build and, I am to be blamed that I have not built in Campania, there is no doubt that an action de *praescriptis verbis* (on construction of a contract) can be brought to force me to comply. I think that an action on sale can also be brought, just as if the condition had been fulfilled, since the purchaser is responsible for its not having been done.
- cf. also *locatio-conductio* in maritime transport



Actio civilis in factum



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- used by Labeo for the situations in which the parties attempted to make a valid civil law contract, yet there would be doubts as to its efficacy (and hence of the availability of the traditional actions, *e.g.* a. empti/locati...)



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Contractus reales innominati



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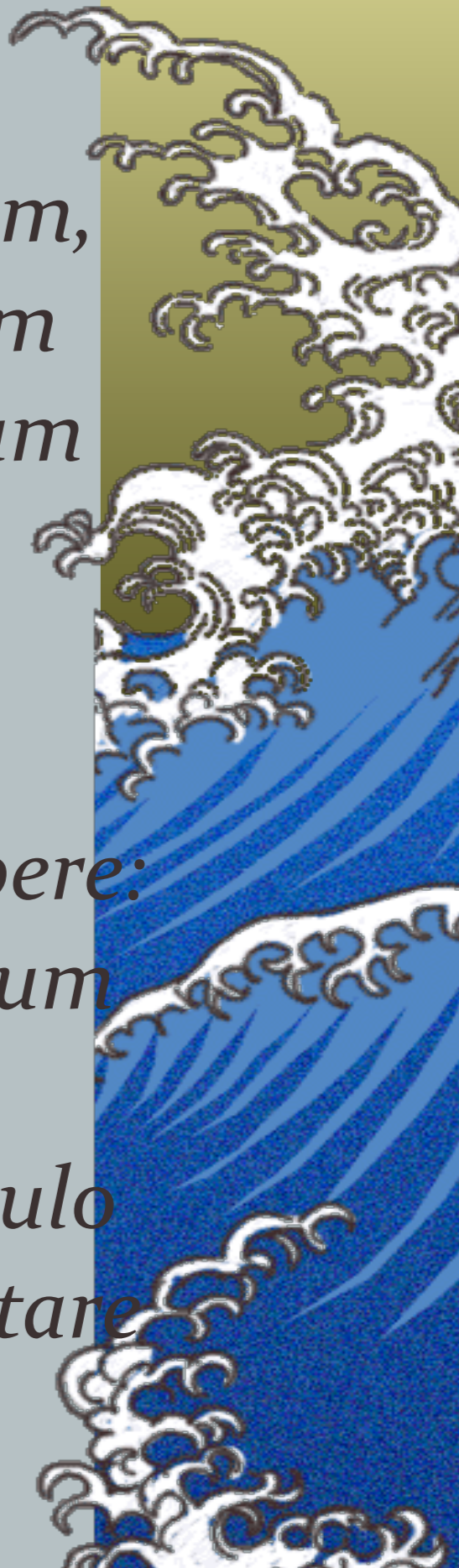
D. 19.5.5: Paulus, *Questions*, book 5

My natural son is your slave, and yours is my slave. We have agreed so that I would manumit yours and you mine. I have manumitted but you have not. The question has arisen as to under what action you will be liable to me. In the consideration of this point every kind of transaction relative to the delivery of property must be taken into account which is shown in the following example, namely: I either give to you that you may give to me, or I give to you that you may perform some act, or I perform some act that you may give to me, or I perform some act for you that you may perform another for me. In these cases it may be asked what obligation arises.



Contractus reales innominati

- 1. *Et si quidem pecuniam dem, ut rem accipiam, emptio et venditio est: sin autem rem do, ut rem accipiam, quia non placet permutationem rerum emptionem esse, dubium non est nasci civilem obligationem, in qua actione id veniet, non ut reddas quod acceperis, sed ut damneris mihi, quanti interest mea illud de quo convenit accipere: vel si meum recipere velim, repetatur quod datum est, quasi ob rem datum re non secuta. Sed si Scyphos tibi dedi, ut Stichum mihi dares, periculo meo Stichus erit ac tu dumtaxat culpam praestare debes. Explicitus est articulus ille do ut des.*



Contractus reales innominati

• (1) *If, in fact, I give money that I may receive some property in return, the transaction is one of purchase and sale. If, however, I give an article in order to receive another, for the reason that it is not held that an exchange of property is a purchase, there is no doubt that a civil obligation arises on account of which an action can be brought, not to compel you to return what you have received, but that you may indemnify me to the extent of my interest in receiving the article which was the subject of the contract; or if I prefer to receive my property, an action can be brought to recover what was given, because property was given on one side but not on the other. If, however, I gave you certain cups in order that you might give Stichus to me, Stichus will be at my risk, and you will be responsible only for negligence. This is the explanation of the agreement, "I give in order that you may give."*

Contractus reales innominati



Contractus reales innominati

• *Do ut des*



Contractus reales innominati

- *Do ut des*
- *Do ut facias*



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Contractus reales innominati

• *Do ut des*

• *Do ut facias*

• *Facio ut des*

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• *Examples:*

• *aestimatum,*

• *permutatio,*

• *transactio,*

• *donatio*

with a conditional order



Pacta

- D. 2.14.7.7 (Ulpianus, on the Edict, book 4):
The praetor announces: “I shall protect pacts agreed upon, which have not been entered into maliciously or contrary to the laws, plebiscites, Decrees of the Senate, or Edicts of the Emperors, where no fraud appears in any of them.”



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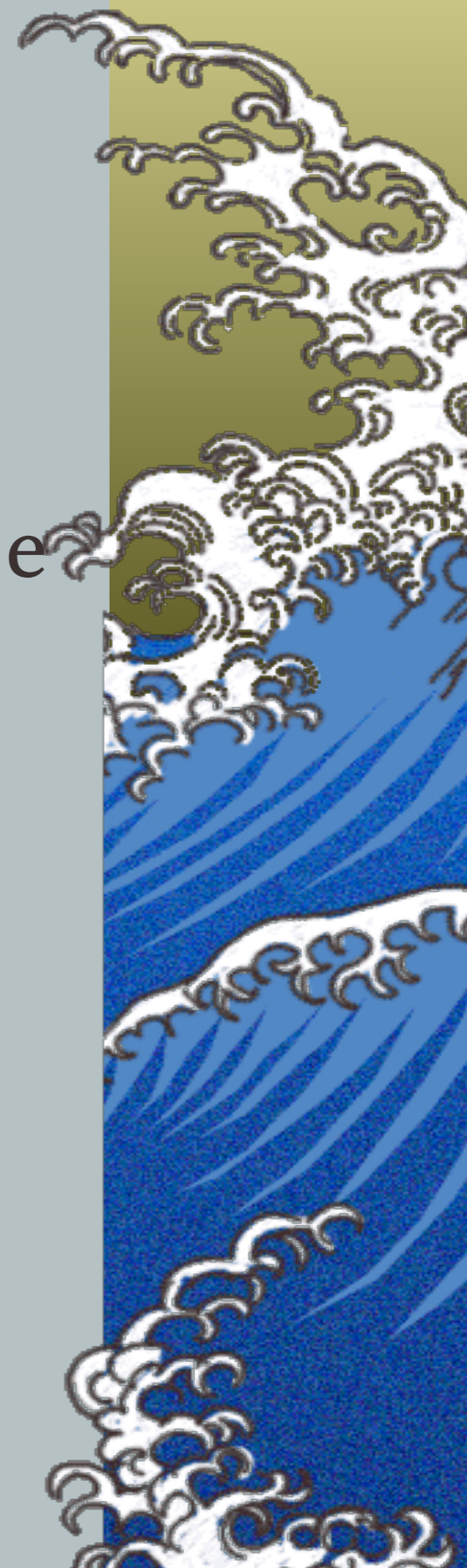
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Pacta sunt servanda



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- D. 23.4.5 Paulus 7 ad Sabinum pr. Illud convenire non potest, ne de moribus agatur vel plus vel minus exigatur, ne publica coercitio privata pactio tollatur.
- 1. Ac ne illa quidem pacta servanda sunt, ne ob res donatas vel amotas ageretur, quia altero pacto ad furandum mulieres invitantur, altero ius civile impugnatur.
- 2. Et si convenerit, ne ob impensas necessarias ageretur, pactum non est servandum, quia tales impensae dotem ipso iure minuunt.



Pacta sunt servanda

- D. 23.4.5 Paulus, On Sabinus, Book VII.
- A pact cannot be made which will prevent the husband from taking action in case of the immorality of his wife, or which will permit him to collect more or less than the law allows under such circumstances; for the right to inflict public punishment cannot be annulled by a private agreement.
- (1) Pacts shall not be safe-guarded if they establish that an action for the recovery of property donated or removed will not be pursued because in one instance, women are invited to steal, and in the the, the Civil Law is violated.
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Pacta sunt servanda

- *Pacts at negotia bonae fidei*
- *Pacts pacta at negotia stricti iuris*
 - *Pactum de non petendo*
 - *Exceptio pacti/exceptio doli*

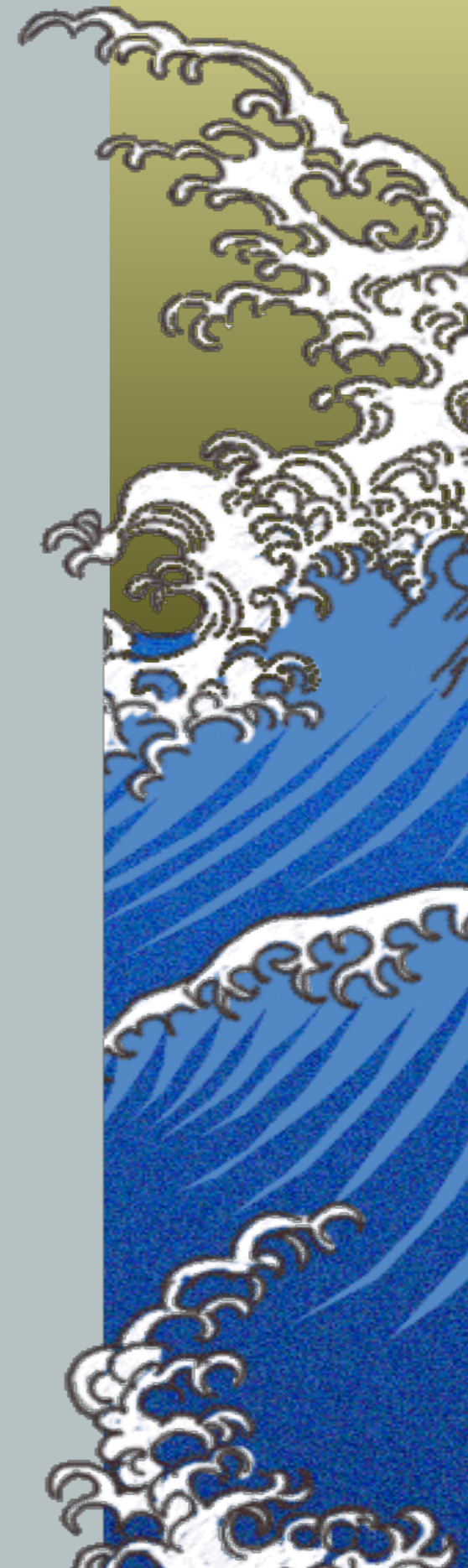


Exceptio pacti conventi/doli

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Si paret Numerium Negidium Aulo Agerio sestertium decem milia dare oportere qua de re agitur,

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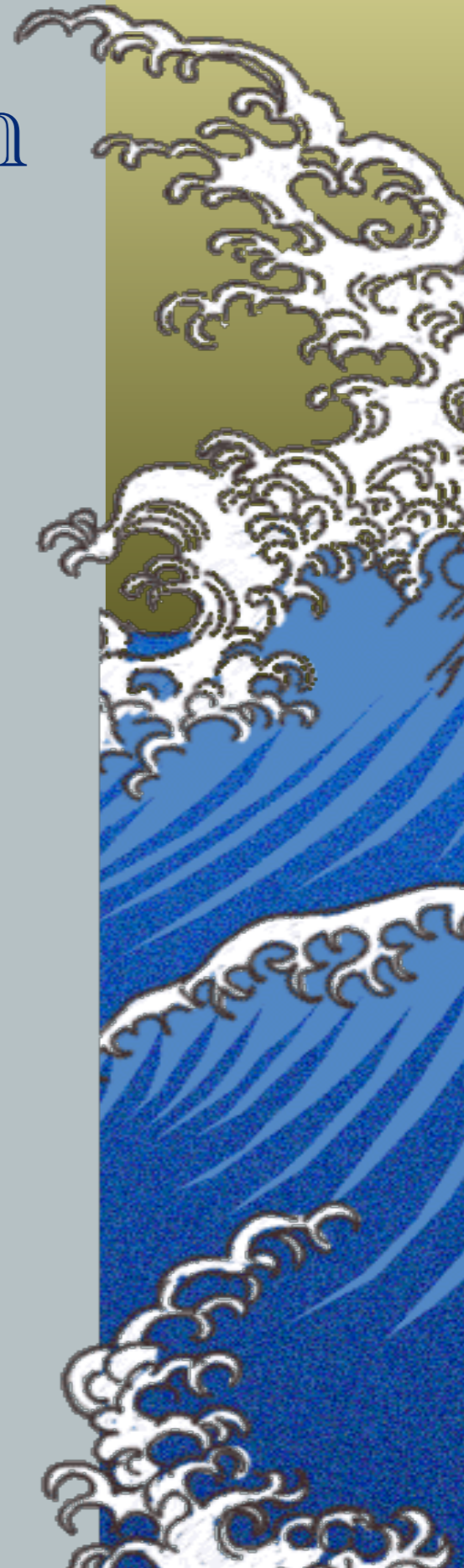
- **si inter Aulum Agerium non convenit, ne ea pecunia peteretur.**
- **or: si in ea re nihili dolo malo Aulii Agerii factum sit neque fiat,**

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Typical pacts

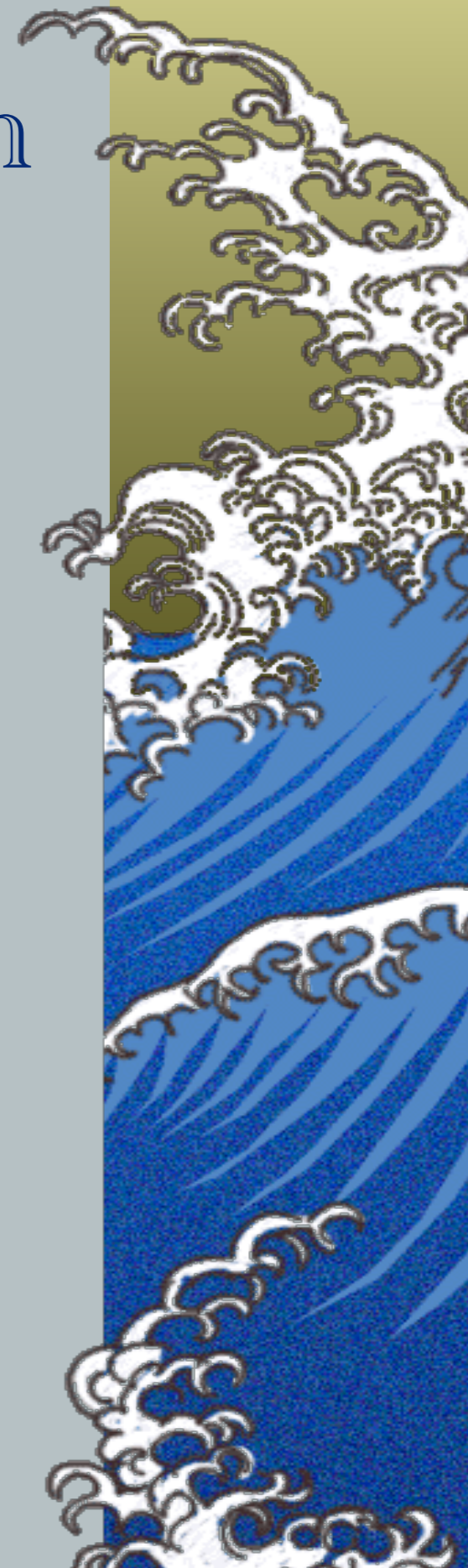
giving rise to a praetorian action



Typical pacts

giving rise to a praetorian action

- *Constitutum debiti proprii/alieni*
 - actio de pecunia constituta
- *Receptum arbitrii*
- *Receptum argentarii*
- *Recepta nautarum cauponarum et stabulatorium*
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Post-classical times:

imperial pacts (*pacta legitima*)



“Pacta” sunt servanda



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- *Factual contact freedom in the postclassical times, yet never expressively stated*



“Pacta” sunt servanda

- *Factual contact freedom in the postclassical times, yet never expressively stated*
- *rise in the Middle Ages thanks to the impact of Canon law.*



Undue dowry

- D. 12.4.7.pr Julianus, Digest, Book XVI. Someone who thought that he owed a certain sum of money to a woman promised her betrothed, at her request, to pay it to him as dowry, and did so; and afterwards the marriage did not take place. The question arose whether the party who paid the money could recover it, or whether the woman could do so? Nerva and Atilicinus answered that since the party thought that he owed the money, and could have defended himself by an exception based on fraudulent intent, he himself could bring suit; but if he was aware that he did not owe the woman anything, and made the promise, the woman would have the right of action because the money would belong to her. If, however, he had been actually her debtor, and had paid the money before marriage, and the marriage did not take place; he can bring an action to recover the money, and no other right of the woman to payment of the debt would remain than that the debtor could be compelled to assign to her his right of action for recovery, and would be subject to no further liability.

