Distinguishing Cases and Conditions in Roman Legislation

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A common form of legislative declaration in many legal traditions is the "casuistic" rule, so called because its application is limited to the "case" defined by the rule itself, rather than being general or indeterminate in scope.[1] The first sentence of the Twenty-fifth Amendment to the U.S. Constitution is an example:

> U.S. CONST. amend. XXV, § 1
> 1. *In case of the removal of the President from office or of his death or resignation*, **the Vice President shall become President**.

It will be seen that there are two constituents to such a rule. One is a statement of the case (in this instance, cases) to which the rule applies. The other is a declaration of the "legal action" that constitutes the substance of the legislative commandment. In this and all the

[1] Use of the term "casuistic" in this sense is common in scholarship on ancient near eastern legal traditions. The usage was apparently coined by A. ALT, *Die Ursprünge des Israelitischen Rechts* (Leipzig 1934), rep. in *Kleine Schriften zür Geschichte des Volkes Israel* (Munich 1959), and translated by R. A. WILSON as "The Origins of Israelite Law" in *Essays on Old Testament History and Religion* (Oxford 1966, Garden City 1967) p. 101-171. Applying the method of "form criticism" to biblical law, Alt distinguished "casuistic" from "apodictic" rules. He considered the former to be marked not only by specification of the "case" to which the rule applies, but also by an impersonal discourse mode. Conversely, the apodictic rule is typically unqualified as to its application and typically enjoins an addressee in the second person (p. 112-117, 133-137). I thank my colleague, Bernard M. Levinson, for this reference and for helpful comments on an earlier draft of this article. In what follows I use the term "casuistic" somewhat more broadly than Alt. It refers to any rule that specifies a "case," whether in the form of a grammatical condition or otherwise.

examples to follow, case statements are printed in *italics* and action statements in **bold face**.

Casuistic rules are pervasive in Roman legislation and legal discourse of all periods, including the XII Tables, comitial laws, the edicts of magistrates, imperial constitutions, and juristic restatements of law. In this essay I seek to focus attention on the structural constituents of such rules, with the aim of emphasizing an important difference in function between two of them. It will be argued that a failure to recognize this difference can lead to misconstruction of a statute's meaning, purpose, and effect. Most of my illustrations will be taken from the XII Tables, because of their relative syntactic simplicity; yet the principles to be set forth apply equally well to more complex legislative declarations, as will also be shown.

Probably the most common form of casuistic rule in Roman legal discourse is the conditional sentence. The following law from the XII Tables is typical.

> XII Tables, VIII.10C[2] = VIII.21R[3]
> 2. *si patronus clienti fraudem fecerit,* **sacer esto**.[4]

In Example 2, the action constituent takes the common form of a command in the imperative mood, while the "case" is expressed by means of a conditional clause. Either constituent can assume a different form elsewhere. For example, the verb of the action statement might be a subjunctive, future indicative, or other verb phrase of appropriate modal force (*e.g.*, *oportere*, *necesse est*, etc.). Cases too can be expressed in a variety of ways. In place of a conditional protasis, any adverbial construction with circumstantial force will serve the purpose. Particularly common are temporal clauses: *e.g.*, *ubi pacunt*, **orato** (*"When* [*the parties*] *agree*, **[he] shall proclaim it.**"): XII Tables, I.6C = I.6R**.** Relative (adjective) clauses are also common: *e.g.*, *cui testimonium defuerit*, **is tertiis diebus ob portum obvagulatum ito** ("*For whomever testimony is lacking*, **he**

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[2] C = M. H. CRAWFORD (ed.), *Roman Statutes,* 2 vols., Bulletin of the Institute of Classical Studies 64 (London 1996), vol. II *ad loc.*

[3] R = S. RICCOBONO *et al.* (edd.), *Fontes Iuris Romani Anteiustiniani*, 2nd ed. (Florence 1968) vol. I *ad loc.* Riccobono reads *si patronus*, preserving the order of Servius, *ad Aen.* VI.609.

[4] "*If a patron commits fraud upon a client,* **let him be accursed**." Unless noted otherwise, all translations are mine.

shall go on third days to the door to complain"): XII Tables, II.1C = II.3R. Cases can be expressed by non-clausal predications: *e.g.*, *aeris confessi <iudicatique>* **?XXX? dies iusti sunto** ("*For a sum admitted <and adjudged>* **let 30**(?) **days be lawful** [before the creditor may seize the debtor]"): XII Tables, III.1C = III.1R.[5] Finally, a case can be expressed by nothing more than the fronting of a focal word or phrase: *e.g.*, *Adsiduo* **vindex adsiduus esto**. *Proletario* ?*civi*? **quis volet vindex esto** ("*For a propertied man* **let there be a propertied *vindex***. *For a* [*citizen*?] *of no property rating* **let anyone who wishes be the *vindex***"): XII Tables, I.4C = I.4R.[6] In this last example the fronted words of the paired rules are the topics of their respective sentences. They mark contrasting cases by means of the rhetorical antithesis. Although the syntactic differences illustrated in this paragraph may have some historical importance,[7] all case and all action statements, regardless of how they are expressed syntactically, perform respectively identical functions as the constituents of casuistic rules.

A third constituent of every casuistic rule is the "legal subject." This is the person or entity that a rule's action empowers, obligates, changes in status, or otherwise calls to account. In Example 2 (above) the legal subject is the *patronus*. The rule regulates the *patronus* by linking a sanction upon that person to misconduct by that person. Sometimes the legal subject of a rule is not merely part of the case, but the entirety of it, as in the rule we have already quoted: *cui testimonium defuerit*, **is tertiis diebus ob portum obvagulatum ito**.

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[5] Riccobono: *aeris confessi rebusque iure iudicatis***.**

[6] Riccobono: *proletario* [*iam civi*] *quis volet …*.

[7] See, *e.g.*, D. DAUBE. *Forms of Roman Legislation* (Oxford 1956). Daube distinguishes the "who[ever] does…" type of case from the "if [someone] does …" type. The former, he asserts, is more abstract and implies a consciousness of legal categories, while the latter reflects an *ad hoc* approach to legislation. According to Daube, the former type of case statement tends to replace the latter over time. Additionally, while one finds compound constructions of case statements with appended qualifications, such as "who[ever] … if [anyone] … then…," Daube claims that one never finds "if [anyone]… who[ever] … then…." This distribution, Daube argues, indicates that the "who[ever]" type is of more general scope than the "if [anyone]" type, and reflects a more advanced stage of legal development (1956: 6-7). Among many other interesting observations Daube also illuminates historically important nuances in the difference between action statements using a verb like *oportere* and action statements with imperative verbs (1956: 8-23).

This rule applies to, which is to say *in the case of*, a litigant whose witness has not appeared or has not consented to appear. Less commonly the legal subject is referenced only by a rule's action-statement and is not part of the case-definition at all. Example 3 illustrates the type.

> XII Tables, V.5C = V.5R
> 3. *si agnatus nec essit, gentiles* **familiam ?pecuniamque? h[abento]**.[8]

The legal subject of this rule is the **gentiles** ("clan-relatives"). It is they who are designated as the group upon whom the rule confers rights and/or obligations.

In addition to the case, the action, and the legal subject, casuistic rules can contain one or more provisos that limit their applicability. I shall refer to these statutory provisos as "conditions," using the term not in a grammatical sense but in the legal sense of, *e.g.*, a condition to a contract.[9] A contractual condition is a term of the contract that

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[8] "*If there is no agnate,* **let the clan-relatives have the household** [**and the money**]." Riccobono: *adgnatus … escit …* **familiam** [**habento**]. This provision is part of a larger set of rules that are not relevant to the present discussion.

[9] Use of the term "condition" to refer to statutory provisos can be traced to G. COODE, *On Legislative Expression; or, the Language of the Written Law*, 2nd ed. (London 1852) rep. in the appendix to E. A. DRIEDGER, *The Construction of Statutes* (Ottawa 1976) p. 339-42. Coode was not a scholar but a practitioner and legislative draftsman. His interests lay not in legal history but in promoting the drafting of clear, rational, and efficient legislation in the English law-reform movement that began with Jeremy Bentham and largely tracked the codification movement on the continent. In place of Coode's "conditions," Bahtia prefers "qualifications," but that term is less satisfactory, because it uses it to include subsidiary case statements as well. See V. BAHTIA, "Cognitive Structuring in Legislative Provisions", chapter 4 in *Language and the Law*, ed. J. GIBBONS (London 1994) at p. 149-150. Coode's adoption of the term "condition" to refer to a statutory proviso may have been influenced by Gaius' use of the term *condicionalis* in his description of the Roman formulary system of pleading. The formulary system was poorly understood before Niebhur's discovery of the first nearly complete text of the *Institutes* in 1816. Coode's analysis of the constituents of casuistic rules is remarkably similar to Gaius' account of how a *formula* is put together. Specifically, the "case" corresponds to the *intentio* of the *formula* in defining the matter to be adjudicated. The "action" corresponds to the *condemnatio* of the *formula* in specifying the legal consequence of proving the facts defined in the *intentio*. The "condition" corresponds to the affirmative defenses (*exceptiones*) that can be introduced into the *formula* as a bar to the plaintiff's case. Further, Gaius describes *exceptiones* as *condicionale[s]... id est ne aliter iudex eum cum quo agitur condemnet*. Gaius IV.119, ed. F. DE ZULUETA, *The Institutes of Gaius*,

must be satisfied before an obligor's performance under the contract becomes enforceable. Roman statutory conditions are often introduced by the conjunction *dum* or *dummodo* ("provided that"), or other words of similar meaning, such as *praeterquam* ("apart from"), *excepto* or *nisi quod* ("except that"), etc. The following example from the possibly Gracchan *Lex Repetundarum* contains multiple conditions. Here and elsewhere in this essay statutory conditions are marked with underlining.

> *Lex Repetundarum*, Crawford no. 1, lines 55-56
> 4. [*sei is ex h(ace) l(ege) condemnatus a*]*ut apsolutus erit*, **quom eo h(ace) l(ege)**, nisei quod postea fecerit aut nisei quod praevaricationis causa factum erit au[t nisei de leitibus] aestumandis aut nisei de sanctioni hoiusce legis, **actio nei es[to**.[10]

As quoted, Example 4 prescribes a very broad principle of *res judicata*. It declares that a person cannot be tried twice under this *lex*, apparently for any offense(s).[11] But there are four exceptions to the prohibition. A second indictment and trial *can* proceed if: (1) the conduct for which the charge is brought occurred after the prior judgment; or (2) the conduct involves collusion in the prior trial; or (3) the matter to be tried concerns the assessment of damages arising out of the prior trial; or (4) the matter to be tried concerns the *sanctio*

Part I, (Oxford 1946) rep. 1985, p. 280. Finally, Coode recommends that in a well drafted law, "condition" constituents should follow "cases" and precede "actions," precisely the same sequence that the corresponding constituents normally take in a *formula* (p. 328-329). On the constituents of the *formula* and their sequence, see M. KASER. *Das Roemische Zivilprozessrecht*, 2nd ed. rev. by K. HACKL (Munich, 1996) p. 260-261, but also see p. 311 n.3.

[10] "[*If someone is condemned* o]r *acquitted under t(his) s(tatute)*, **with him [under] this statute**, unless he does something afterward, or unless something is done in furtherance of collusion, or [unless concerning the damages] to be assessed, or unless concerning the 'sanctio' of this statute, **let there be no [further] action**."

[11] The statute is very fragmentary, and Crawford proposes the following supplement before the words quoted above: "... *quoius nomen qua de re ex h. l. delatum erit, de ea re, sei is ex h. l. condemnatus...*" etc., *i.e.*, "... whose name will have been the subject of an indictment concerning a matter arising from this statute, concerning that matter, if that person is condemned..." etc. CRAWFORD (n. 2 above) p. 106. If accepted, the supplement would narrow the scope of the *res judicata* to re-trial on the same matter as the prior trial.

provision(s) of this statute.[12] If any one or more of these conditions is satisfied, then the prohibition against retrial is blocked. This nullifying function is the signal characteristic of statutory conditions. Instead of specifying circumstances under which a legal action is triggered, statutory conditions specify circumstances under which an otherwise authorized legal action is blocked. In Example 4, the provisory nature of the conditions is unambiguously marked by the conjunctions *nisi quod … aut nisi quod … aut nisi …* etc. Not infrequently, however, conditions are expressed in a form that is indistinguishable from that of a case or part of a case. The remainder of this essay will be devoted to that phenomenon and to the potential it can create for misconstruing the meaning of a statute.

Example 5, another rule from the XII Tables, is presented in two formats that respectively yield two rules of quite different meaning and effect. Although each is theoretically possible, only one conforms to an expectation of legal plausibility.

> XII Tables, VIII.11C = VIII.22R
> 5(a) *Qui se sierit testarier libripensve fuerit, ni testimonium fariatur,* **inprobus intestabilisque esto**.
>
> 5(b) *Qui se sierit testarier libripensve fuerit,* ni testimonium fariatur, **inprobus intestabilisque esto**.[13]

The legal subject of Example 5 is expressed by its first clause: "whoever consents to testify or acts as a scales-holder."[14] It constitutes at least part of the case constituent of the rule, but does it constitute all of it? The answer to the question turns on how the intermediate clause of the rule is to be understood. Is that clause also part of the case, as indicated by the format of 5(a), or is it a condition, as indicated by the format of 5(b)? The form and syntax of the rule provide no guidance.

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[12] Whether the *sanctio* is a reference to punishment prescribed under the statute or to a savings clause in the statute is not clear, but it makes no difference to my argument.

[13] Riccobono: [*fatiatur*]. The translation of 5(a) = "*Whoever consents to testify or acts as a scales-holder, if he does not provide the testimony,* **shall be deemed wicked and incompetent to testify [in future]**;" 5(b) = "*Whoever consents to testify or acts as a scales-holder,* unless he does not provide the testimony, **shall be deemed wicked and incompetent to testify [in future]**."

[14] The *libripens* ("scales-holder") is a term of art referring to a participant in the legal ceremony conducted *per aes et libram*. A. BERGER, *Encyclopaedic Dictionary of Roman Law* (Philadelphia 1953) *s.v.*

As a matter of plausible legal policy, however, 5(a) makes far better sense. The rule of 5(a) prescribes an action (here the imposition of a sanction) consequent upon the failure of certain persons to provide testimony after they have agreed to do so. In other words, the rule applies *in the case of such persons failing to testify*. Rule 5(b), on the other hand, effectively classifies all persons who agree to testify as malfeasant and incompetent, subject to an exception — they can escape the classification by testifying. I take it as self-evident that the first interpretation reflects the more plausible legislative intent. It makes the purpose of the rule to encourage testimony by those who have consented to be witnesses, not to punish potential witnesses *unless* they testify. Still, this conclusion rests on one's subjective sense of legal plausibility, not on any objective formal criteria.

Example 5 can be contrasted with another rule from the XII Tables, once again presented in two formats.

XII Tables, I.13C = VIII.2R

6(a) *Si membrum rupit, ni cum eo pacit*, **talio esto**.

6(b) *Si membrum rupit,* ni cum eo pacit, **talio esto**.[15]

The structure of Example 6 is similar to that of Example 5. The rule authorizes the punishment of talion for the infliction of certain physical injuries, but talion is not permissible if the parties have composed their dispute. Example 6(a) makes the lack of composition part of the case of the rule, meaning that talion is triggered only when two sets of circumstances are established: (1) an injury, and (2) no composition. Example 6(b) makes the lack of composition a statutory condition: talion applies to *all* cases of injury *unless* there is composition. This might appear to be a distinction without a difference, but the distinction has significant consequences for the parties' burdens at trial. If composition is part of the case, a plaintiff will be required to prove not only that there was an injury, but to prove a negative: that there was no subsequent composition. If composition is a condition, the need to prove a negative is removed. Further, the burden of proof regarding composition now falls on the

[15] Riccobono: *rup*[*s*]*it*. The translation of 6(a) = "*If* [*someone*] *has broken* [*another's*] *limb*, [*and*] *if he has not reached agreement with him*, **there shall be retaliation in kind;**" 6(b) = "*If* [*someone*] *has broken* [*another's*] *limb*, unless he has reached agreement with him, **there shall be retaliation in kind.**"

defendant. This interpretation of the rule appears to be a far more plausible reading of the statutory intent. It makes the purpose of the rule to encourage composition between the parties, not to circumscribe a plaintiff's opportunities for recovery. It also incentivizes the defendant to propose composition, rather than incentivizing the plaintiff to oppose it.

Examples 5 and 6 demonstrate that although both rules are similar in form, the intermediate clauses of each serve different functions.[16] The *ni*-clause of Example 5(a) sets forth circumstances that must obtain in order for the legal action to be authorized. The *ni*-clause of Example 6(b) sets forth circumstances that must *not* obtain in order for the legal action to be authorized.

The blocking function of statutory conditions accounts for their tendency to be expressed as negative propositions. As Gaius says of affirmative defenses in a judicial *formula*: *in contrarium quam adfirmat is cum quo agitur*.[17] The principle applies in the same way to conditions in a statute.[18] As demonstrated by Example 5(a), however, the negative form of a proposition does not make it into a condition. Moreover, positive conditions are possible, even if less common. When stated as a positive proposition, a condition serves to block the legal action if it is *not* satisfied.[19] This makes positive conditions even

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[16] It might be objected that this difference is somehow due to the dissimilar case-statements of the two rules. Example 5 begins with a relative clause in contrast to the conditional clause of Example 6. As argued earlier, however, such a difference has no bearing on the constituent function of the clause in question. For an example of a compound case-statement that itself begins with a conditional clause, one may look to the probable text of XII Tables I.1: *si in ius vocat, ni it,* **antitestamino** ("*If* [*a plaintiff*] *summons* [*a defendant*] *to law, if the defendant does not go*, **[the plaintiff] shall call witness**"). On the textual issue see Daube (n. 10 above) p. 28-29.

[17] Gaius IV.119 DE ZULUETA.

[18] KASER (n. 9 above) notes that a completed *formula* is the functional equivalent of a statute: "Die Prozessformel hat die Funktion, für das eingesetzte Urteilsgericht als Satzung zu dienen..." p. 309.

[19] *E.g.*, to take an English language illustration, the rule in the United States Constitution relating to the election of the President by the members of the Electoral College: "*The Person having the greatest Number of Votes* **shall be the President**, <u>if such Number be a Majority of the whole Number of Electors appointed</u>." U.S. CONST. Art. II, § 1[3]. The majority requirement of the underlined constituent is presented as an *exception* to the otherwise mandatory outcome. If not satisfied, it blocks the conferral of the Presidency upon the individual who has received the most electoral votes.

harder to distinguish from cases, but it does not diminish the significance of the difference in function between the two constituents. To illustrate, I take one of the preserved chapters of the probable *Lex Julia Agraria* of 59 BCE, preserved in the late antique corpus of the writings of the Roman *agrimensores*.[20] Let us first consider the law without any mark-up of its constituents.

Lex Julia Agraria, Crawford no. 54 § 5 *init.*

7. [**Rule 1**] *Qui hac lege coloniam deduxerit, municipium praefecturam forum conciliabulum constituerit, in eo agro, qui ager intra fines eius coloniae municipii fori conciliabuli praefecturae erit, limites decumanique ut fiant terminique statuantur curato;* [**Rule 2**] *quosque fines ita statuerit, ii fines eorum sunto, dum ne extra agrum colonicum territorium fines ducat.*[21]

This long sentence contains two complex casuistic rules, which I have labeled respectively "Rule 1" and "Rule 2." Rule 1 begins with *qui hac lege* and ends with *curato*; Rule 2 begins with *quosque* and ends with *ducat*. Looking at Rule 2 first, we can see that it has a tripartite structure containing a case, an action and a condition as follows: [Rule 2] *quosque fines ita statuerit*, **ii fines eorum sunto**, dum ne extra agrum colonicum territorium fines ducat.[22] The effect of Rule 2 is to legitimate the magistrate's discretion in drawing up municipal boundaries, but only on condition that he places those boundaries within the authorized territory. It is to be emphasized that the rule does *not* leave to the magistrate's discretion any determination of the extent of the colonial land or available territory. Under Rule 2, a magistrate's situating of boundary markers in violation of the statutory condition will not be legally valid. This

[20] On the identification of the law see M. H. CRAWFORD, "The *Lex Julia Agraria*," *Athenaeum* 67 (1989)179-90.

[21] Crawford translates the excerpt as follows: "Whoever shall have founded a colony or constituted a *municipium*, prefecture, *forum* or *conciliabulum* according to this statute, he is to see that boundaries and *decumani* be drawn and boundary markers be set up on that land, which shall be within the boundaries of that colony, *municipium, forum, conciliabulum* or prefecture; and whatever boundaries he shall have established in this way, they are to be their boundaries, provided that he do not draw boundaries outside the colonial land or the territory." CRAWFORD (n. 3 above) p. 765.

[22] "[*W*]*hatever boundaries he shall have established in this way*, **they are to be their boundaries**, provided that he do not draw boundaries outside the colonial land or the territory." Crawford's translation (n. 21 above) with my mark-up.

statutory condition would likely be crucial in any litigation regarding or implicating the colonial boundary. Rule 2 makes it clear that the magistrate's determination of territorial boundaries shall not be evidence of what those boundaries actually are. In the absence of such a condition, one can easily imagine an enterprising litigant arguing that the magistrate's determination of the boundaries was, or should be, legally conclusive. That, after all, is what Rule 2 is intended to accomplish with regard to boundaries that do comply with the statutory condition.

Turning now to Rule 1 of Example 7, we once again have a tripartite structure. The first compound clause, running from *qui* to *constituerit*, is the legal subject of the rule and clearly part of the case. The main clause, beginning with *limites,* ending with *curato,* and itself containing a compound consecutive clause, is clearly part of the action constituent. The intermediate term, running from *in eo agro* through *erit*, is formally ambiguous. Three possible interpretations are presented in Table 1.

Table 1
Constituent Structure of Rule 1 in Example 7

7(a)	*Qui hac lege coloniam deduxerit, municipium praefecturam forum conciliabulum constituerit*, **in eo agro, qui ager intra fines eius coloniae municipii fori conciliabuli praefecturae erit, limites decumanique ut fiant terminique statuantur curato**; ...	"*Whoever shall have founded a colony or constituted a* municipium, *prefecture,* forum *or* conciliabulum *according to this statute*, **he is to see that boundaries and *decumani* be drawn and boundary markers be set up on that land, which shall be within the boundaries of that colony, *municipium, forum, conciliabulum* or prefecture**; …"
7(b)	*Qui hac lege coloniam deduxerit, municipium praefecturam forum conciliabulum constituerit in eo agro, qui ager intra fines eius coloniae municipii fori conciliabuli praefecturae erit,* **limites decumanique ut fiant**	"*Whoever according to this statute leads out a colony* [*or*] *establishes a* municipium, *prefecture,* forum [*or*] conciliabulum *in land that shall be within the boundaries of that colony,* municipium, forum, conciliabulum *or prefecture*; **he shall see to it that the boundaries and *decumani* be**

	terminique statuantur curato; ...	**established and the boundary-markers be erected**; …"
7(c)	*Qui hac lege coloniam deduxerit, municipium praefecturam forum conciliabulum constituerit*, in eo agro, qui ager intra fines eius coloniae municipii fori conciliabuli praefecturae erit, **limites decumanique ut fiant terminique statuantur curato**; ...	"*Whoever according to this statute leads out a colony,* [*or*] *establishes a* municipium, *prefecture,* forum [*or*] conciliabulum, [provided it be] in land which is within the territory of that colony, *municipium*, *forum*, *conciliabulum* or prefecture, **shall see to it that the boundaries and *decumani* be established and the boundary-markers be erected**; ..."

The constituent structure of Rule 1 as presented in format 7(a) is that seemingly implied by Crawford's translation of this statute, which is reproduced in the right hand column of the first row in the table. Crawford's translation suggests (perhaps inadvertently) that the magistrate's charge under Rule 1 includes a determination of what constitutes the authorized territory for the colony, *municipium*, etc. While such an interpretation is possible for Rule 1 in isolation, it must be rejected in light of Rule 2 in the same legislative sentence. As we have seen, Rule 2 contains a proviso clause that makes the situating of boundaries within the authorized territory a condition of their validity and not a matter subject to the magistrate's discretion. The same proviso clause of Rule 2 will also invalidate the interpretation suggested by format 7(b) in the second row of Table 1. If the locus of the boundaries is considered part of the case of the first rule, then the situation contemplated by the proviso clause of Rule 2 can never come into being. That is because Rule 1, as formatted in 7(b), does not even contemplate the possibility that boundaries will be placed outside the colonial territory. Taking Rule 1 as formatted in 7(b) would either make the proviso clause of Rule 2 a nullity or the two rules contradictory. The only interpretation of Rule 1 that is entirely consistent with the unambiguous meaning of Rule 2 is that indicated by format 7(c). The intermediate term in Rule 1 is a positive condition to the validity of the boundaries that the magistrate is charged with establishing. Rule 2, in turn, prescribes that the magistrate's decisions will be conclusive as to those boundaries, *on condition* that he has complied with the condition already stated in Rule 1. Crawford's

translation is therefore to be rejected as either ambiguous or misleading. The apparent meaning of this statute is more accurately expressed by a translation that brings out the provisory force of the intermediate constituent, like that in the right hand column of the third row of Table 1.

Examples 5 and 6 have demonstrated that the difference between a case and condition is likely to affect the burden of proof in litigation based on the rule in question. Example 7 demonstrates that the same difference can play a role in determining which issues may be relevant in such litigation. To repeat, if the intermediate term of Rule 1 in Example 7 is read as a condition, the fact of where the magistrate placed a boundary is irrelevant to adjudication of the actual boundaries of a colony, *municipium*, etc. A third consequence that turns on the difference between a case and a condition is the policy served by the rule in question. All of these issues — burden of proof, justiciable issues, and legislative policy — are implicated in my final example, which is presented in alternative formats in Table 2.

Table 2
Example 8: XII Tables, VI.1C = V.1R[23]

8(a) *Cum ?faciet nexum? mancipiumque, uti lingua nuncupassit*, **ita ius esto**.	*When* [*someone*] *makes a nexum and a* mancipium, *as he has orally declared*, **so the law must be.**
8(b) *Cum faciet nexum mancipiumque,* uti lingua nuncupassit, **ita ius esto**.	*When* [*someone*] *makes a nexum and a mancipium*, [only insofar] as he has orally declared, **so [*i.e.* to that extent and no further] the law must be.**

[23] Riccobono reads *nexum faciet mancipiumque*, the text as preserved in Festus, quoting Cincius. Crawford reverses the sequence of *faciet* and *nexum* on the ground that the hyperbaton is Cincius' "improvement" of the text.

The rule reproduced in Example 8 has been much discussed in connection with the many uncertainties surrounding the institution of *nexum* and its connection with *mancipium* in early Roman law.[24] The following discussion is not intended to engage that controversy directly, but instead to focus simply on the statutory language.

On its face the rule of Example 8 serves to validate the legal effect of a *nuncupatio*. Presumably such a rule would be unnecessary unless the *nuncupatio* could somehow become the subject of a dispute between the parties or their successors. The function of the *nuncupatio* clause in this rule is therefore crucial to the statute's purpose and meaning. Is it part of the rule's case, or is it a statutory condition? The format of 8(a) presents the *nuncupatio* clause as part of a compound case statement and, therefore, merely a formal requirement for making valid *nexum* agreements with *mancipium.* This is the interpretation favored by Crawford, who states: "The text as preserved endorses the validity of a procedure or procedures *per aes et libram*."[25] By this interpretation the reference to *nuncupatio* is to be understood metonymically as a reference to the procedure *per aes et libram*. However, this would effectively render the *nuncupatio* provision otiose. According to Crawford's interpretation, the rule would have precisely the same legal effect even if the *nuncupatio* clause had been omitted. For that reason Crawford is unpersuasive when he hypothesizes that the point of the statute is "to make it clear that... [t]he magistrate has only to establish that the transaction has actually occurred and the debtor is in the same position as a *confessus* or *iudicatus*."[26] This fails to account for why *nuncupatio*, which is only one of several formal requirements in the ceremony *per aes et libram*, is singled out for explicit attention in this statute.

Example 8(b) takes the middle term of the rule as a condition and, therefore, as a limitation on the enforceability of otherwise valid agreements of *nexum* with *mancipium.*[27] This is the more plausible

[24] See A. WATSON, *Rome of the Twelve Tables* (Princeton 1975) p. 111-121, 144-145; O. BEHRENDS, *Der Zwölftafelprozess* (Göttingen 1974) p. 152-159; CRAWFORD (n. 3 above) p. 652-656.

[25] CRAWFORD (n. 3 above) at p. 654.

[26] CRAWFORD (n. 3 above) at p. 655.

[27] Without explicitly saying so, Watson (n. 30 above) appears to take the clause as a statutory condition, and he suggests that its purpose is to give effect to "reservations

interpretation. The statute does not mean that *nexum* agreements with *mancipium* as evidenced by *nuncupatio* are enforceable. It means that *nexum* agreements with *mancipium* will *not* be enforced, *except* according to the terms of the *nuncupatio*. What difference does it make? First, it makes a difference regarding the necessity of proving not only the fact but also the content of an alleged *nuncupatio*. If the content of the *nuncupatio* is not a contested part of the case, then it (*i.e.* what the transferee or transferor actually said) need not even be addressed in litigation based on this rule. Second, as a consequence of the first effect, the distinction will determine the issue of which party to the litigation has the burden of proving something about the *nuncupatio*. The interpretation indicated by 8(a) makes proof of the *fact* of *nuncupatio* part of the plaintiff's burden, since there would be no enforceable transaction without *nuncupatio* (along with the other formal requirements of a successful conveyance *per aes et libram*). The interpretation indicated by 8(b) shifts the burden of proof to the defendant, since the *content* of the *nuncupatio* (*i.e.* what, precisely, the declarer verbally and ritually committed himself to) now becomes a means of limiting enforcement of the transaction at issue. Finally, the distinction between the two interpretations makes a very significant difference in how to understand the policy served by the rule. Rule 8(a) *promotes* the enforceability of duly executed *nexum* agreements. Rule 8(b) *restricts* the enforceability of *nexum* agreements, even when the requisite formalities have been observed.

In conclusion, we have seen that interpretation of the meaning, legal effect, and policy goals behind a rule can turn on the distinction between a case and a condition. In Roman casuistic legislation, this distinction can be obscured by frequent formal similarity between the two constituents. If a statutory condition is not signaled by unambiguous formal means (*e.g.*, the conjunction *dum* and its synonyms) the potential for significant misconstruction of a statute is great, particularly if the condition is expressed as a positive proposition. Sometimes ambiguity as to the status of a constituent can be resolved by reasoning from the rule's apparent intent, though this method runs the risk of circularity. Sometimes ambiguity can be resolved by reference to the larger statutory context, if that is

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in the *mancipatio* [procedure] such as would create servitudes in favor of the transferor" (p.145).

available. Ultimately, however, the potential for misconstruction must be recognized before any strategy can be invoked to interpret an ambiguous constituent. This essay has sought to promote recognition of that potential.