The Term *Species* in Justinian's Digest: Against the Object of a 'General' Jurisprudence

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ABSTRACT

This paper studies the meaning of the term *species* in Justinian's Digest. It considers the uniqueness to the jurisprudential meaning of this concept in the works of the classical Roman jurists and how this meaning rivals that of the theory of forms derived from dialectical and classificatory methods found in Greek philosophy. The paper, offering a reading of fragments of the Digest, argues that the word *species* refers there to the product of a casuistic approach to jurisprudence, interested in the 'juridical morphology' of cases as well as objects. Such *species* are shown to 'repeal' rather than reproduce the taxonomy of general laws and generic classes, pursuing a thought that is at odds with the aim of a 'general' jurisprudence. It is hoped that this paper may help point to new approaches to studying the relationship between legal institution and the life sciences, drawing attention to the limitation for legal thought in a dominant biological understanding of the species-concept.

1. Introduction

The word *species* appears 298 times in Justinian's Digest. The use of this word in the classical Roman jurisprudential sources collated there no doubt poses difficulties in how to convey the meaning, for example in English, in the variety of contexts in which it appears. Apart from dealing with the multilayered nature of the word itself – attested to at least by the range of meanings ascribed to it in the Oxford Latin-English dictionary: 'visual appearance; look; sight; outward appearance; semblance; pretence; display, splendour, beauty; vision; image, likeness; species; artistic representation' (Glare 2012) – legal translators have faced, as they often do, the additional problem of recognising when such a term should be read as either a technical term of art, and thus kept consistent throughout the

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text, or rather within one or more of these general meanings which may be selected depending on the context. Examples abound in the Digest, of course, of words that the translator often elects or is forced to retain in Latin not because of its untranslatability, but in order to signal the particular sites of technicity that exist in the juridical performance of the language.[1]

A further level of difficulty may also be added however when one acknowledges that the word '*species*' enjoys a polyvalency not just as a matter of its indexical reference but also in its conceptual register, putting as it does this same distinction between the specific and the generic, form and substance, appearance and existence into play. To what extent did those classical jurists whose work was extracted in the Digest intend to follow and rehearse existing philosophical questions and commonplaces to which the Greek word *eidos* for instance was already attached: questions about whether forms exist independently of the objects and substances that bear them; whether one may know universals or ideas separable from that of perceivable phenomena? And to what extent did they rather depart from or reorient these questions, producing in their work a wholly original (juridical) meaning?

These questions are of course by no means new. Dieter Nörr (1972) and Mario Talamanca (1977) have revealed the deep attention that had already been given in the scholarship of the early twentieth century to problems of the relation between *genus* and *species* in the work of Roman law by analysing the various versions of *diairesis* operative in both Greek and Roman philosophy at relevant periods: Nörr showing how the particular distinction between *divisio* and *partitio* in Cicero's *Topica* helps to answer a legal-historical problem concerning the place of customary law in the catalogues of legal sources in Roman jurisprudence; Talamanca with a broader study of the philosophical sources thought to influence the techniques of division in Roman juridical science of

[1] Watson's English translation edition of the Digest for instance includes a glossary of Latin terms which also serves as a glossary of many legal terms. Many of these words, such as *heres*, *fideicommissum*, *peculium*, *stipulatio* and so forth are retained because of the technical meaning that they have in the juridical literature. A few others, such as *crimen* which the glossary notes 'can refer to a criminal charge or criminal proceedings as well as the crime itself' or *familia* which can refer either to a family or to one's whole household, are also difficult to translate into a single English word. Watson notes in the preface to the work that some guidelines for translators were produced, namely that 'some Roman technical terms were to be translated always in the same prescribed way; others, where no English equivalent could be simply expressed, were to be left in Latin.' (Watson 1985, 'Preface to the Original Edition'). It was those in the latter category that were included in the glossary.

which Cicero's appears to be more isolated that first thought. But while Talamanca, offering a careful and detailed picture of the existing approaches to this question, acknowledges that the *genus-species* scheme can indeed 'be used, beyond an exclusive classificatory intent, as a type of argument for the solution of concrete particular cases', his work carefully surveys the philosophical terrain with the aim of elucidating, not its casuistry, but the scope of 'the conscious use - by Roman jurisprudence - of classificatory schemes' (Talamanca 1977: p 4 [trans.]).

In this paper, I wish to give a narrower focus: first of all to the Digest itself, a single written instrument through which much of the classical tradition of Roman jurisprudence survives. Then to what appears in it: i.e. the word itself and to the juridical (especially casuistic) contexts in which that word is given meaning. Finally, to the decisiveness of the term in the thought of the main exponents of the jurisprudential tradition in question: the Roman jurists. Where the previous literature, in other words, has given its focus firstly to the techniques of classification present in Roman legal science and then sought to explain these by reference to the reception of Greek philosophical models of *diairesis*, I wish to focus instead simply on the appearances of the word *species* itself in the Digest, avoiding a presupposition of any classificatory part played by it in juridical thought and instead giving voice to the individuality of instances in which it acquires a particularly juristic meaning.[2] The purpose of the study is not necessarily to provide an exhaustive philological investigation of the meaning of this term, which would be beyond the scope of an article of this length, but to open new perspectives not just upon the kind of intellectual work associated with the use of a word and concept such as *species* in the juridical literature and juridical science of the era from which the main works collected in the Digest were produced and hence also upon the difficulties of the translation of it into English, but also on the originality that jurisprudence introduces to a notion to which the tradition of Western philosophy still gives a decisive role in ordering – conceptually and institutionally – distinct forms of nature and life.

To contemplate the notion of a 'juridical species', in other words – especially from the perspective of someone interested in how the lives of certain other *species* such as those of non-human animals may be encounted in law – it

[2] It is also for this reason, namely to avoid a classificatory or divisional bias in the meaning of the word that I prefer to focus here on the word '*species*' itself rather than on the combination of the two terms *genus-species* as a single conceptual schema.

is helpful to begin with the juristic tradition in which it first developed as an explicit term, and to focus not just on the main source of it, but on the instances that give the word itself a unique place in the creativity of its medium: the law (*ius*). What this study shows is that the classical jurists used the term *species* in many different contexts and with many different meanings, but that the use in nearly all of these contexts, was one that was highly adapted to their art and method. It shows that there is a conceptual coherence and originality to the way the concept is used in their work. Far from just borrowing straightforwardly from the Greek philosophical tradition in which the theory of 'forms' played a pivotal part in the development of a scientific and classificatory process of *diairesis*, Roman jurisprudence in fact rivals it with a conception of its own: one that pays close attention to the names and shapes under which individual cases, things, obligations, actions and so on enter the register of juridical thought. The story of this meaning of '*species*' reveals an intellectual tradition aware of its radical divergence from the one to which virtually all scientific attempts to classify various forms of life today return. *Species*, for the jurists whose work is recorded in the Digest are not the products of classification: whether logical or biological or even in the most part juridical. On the contrary, the word often names a resistance to an underlying logic which reaches from the specific to the general, the particular to the universal, the case to the norm and back again, subsuming one under another. True to the casuistic method in which it appears in the Digest, the word *species* indicates – as we shall see – a 'case' or 'instance' and, in a more technical sense, that which, subtracting itself from the legal world of classification and generalisation, is instead individualised by the formulae through which it is grasped and claimed as an object of legal procedure.

I divide the following discussion of the meaning of the term *species* into two aspects: the first centres upon 'cases' and the unique meaning that the classical jurists give to the opposition between *species* and *genus*, while the second centres upon the procedural rather than metaphysical differentiation that the jurisprudence of the Digest produces between the *species* as the 'form' or 'shape' of objects in law on the one hand and their substance or material on the other. Exploring these sources of jurisprudence, I believe, offers a key perspective not just upon a term which – tied as it is to the biological sciences – even today finds itself translated uncritically into juridical settings, but also upon the jurisprudential method itself of the classical Roman jurists which, I would suggest, challenges rather than entrenches certain contemporary orthodoxies of understanding the relation that a '*species*', whether biological or not, has to the law.

2. The *species* repeals the *genus*: cases of jurisprudence

The legal case: species and genus

Let's deal first with the ordinary and unremarkable. Among the various meanings of the word *species* in Justinian's Digest, one that is frequently used is as reference simply to a 'case' or 'instance' introduced for deliberation or as an example or demonstration. In the translations of both Samuel Parsons Scott and in Alan Watson's English edition of the Digest, the word is indeed rendered in English in this context as 'case' or 'instance' and sometimes 'situation', 'sort of thing', 'form'. The following phrases for example are used in a non-formulaic way throughout the text: *haec species* ('this case');[3] *in hac specie*,[4] *cum ea specie*,[5] *in illa specie*[6] ('in this case'); *in huiusmodi specie*,[7] *talis species*[8] ('in such case'); *quae species ostendit* ('this case shows');[9] *eam quoque speciem* ('also in these cases');[10] *referendae sunt nobis quaedam species* ('we refer to certain cases').[11]

[3] D 19.5.5.4, Paul, *Quaestionum*, book 5**:** '*haec species tractatus plures recipit*'. Watson's edition in fact translates *species* here as 'type' – 'this type allows much discussion'. The reference is to the last of the following four ways that an obligation may arise by agreement: 1) that I give in order than you give, 2) that I give in order than you do, 3) that I do in order than you give, or 4) that I do in order than you do.

[4] D 7.5.10, Ulpian, *Ad edictum*, book 79. Watson's editions says 'in this particular case' and Scott 'in this particular instance'; D 10.3.14.1, Paul, *Ad Plautium*, book 3; D 19.2.51, Javolenus, *Epistularum*, book 11; D 19.5.5.pr, Paul, *Quaestionum*, book 5; D 19.5.15, Ulpian, *Ad sabinum*, book 42; D 28.6.31. Julian, *De ambiguitatibus*, sole book; D 31.67.8, Papinian, *Quaestionum*, book 19; D 33.2.15.1, Marcellus, *Digestorum*, book 13; D 36.1.3.pr, Ulpian, *Fideicommissorum*, book 3; D 40.1.15, Marcellus, *Digestorum*, book 23; D 40.4.47.1, Papinian, *Quaestionum*, book 6; D 40.5.6. Paul, *Ad edictum*, book 60; D 40.7.31.1, Gaius, *Ad legem Juliam et Papiam*, book 13; D 45.3.18.2, Papinian, *Quaestionum*, book 27; D 49.17.19.5, Tryphoninus, *Disputationum*, book 18.

[5] D 19.1.13.26, Ulpian, *Ad edictum*, book 32.

[6] D 17.1.36.1, Javolenus, *Ex Cassio*, book 7.

[7] D 10.3.19.4, Paul, *Ad Sabinum*, book 6; D 19.1.13.6, Ulpian, *Ad edictum*, book 32; D 33.8.8.7, Ulpian, *Ad Sabinum*, book 25; D 36.1.23.pr, Ulpian, *Disputationem*, book 5; D 38.11.1.1, Ulpian, *Ad edictum*, book 47.

[8] D 16.3.1.37, Ulpian, *Ad edictum*, book 30: '*Apud Iulianum libro tertio decimo digestorum talis species relata est*' ('In the thirteenth book of his Digest, such a case has been dealt with by Julian').

[9] D 10.4.5, Ulpian, *Ad edictum*, book 24.

[10] D 19.1.43, Paul, *Quaestionum*, book 5.

[11] D 12.1.9.3, Ulpian, *Ad edictum*, book 26: '*referendae sunt nobis quaedam species*' ("we refer to certain cases"). Watson's edition gives 'types' rather than 'cases' here even though what is provided thereafter are certain fact patterns associated with the suitability of the *condictio* for a fixed claim.

These 'cases' however, which are referred to by the word *species*, are not just any set or arrangement of facts, but ones that hold a particular juridical significance. Julian is said by Ulpian, *Edict* book 18, to have put forward the '*species*' (case) of a shoemaker who struck his pupil, not out of malice but in the course of instructing him, in order for the jurist to examine the limits of the action for insult.[12] The verb used there *proponere* (to 'put' or 'propose') in the phrase *proponitur autem apud eum species* ('however he put such a case'),[13] in addition, reflects the casuistic activity of Roman classical jurisprudence which James Gordley identifies as a way of refining concepts by 'putting particular cases' (Gordley 2013: 13). And it indicates that the *species* (in its meaning as 'case') is a matter produced particularly by juristic craft and not necessarily by accident or by nature as would be appropriate for the similar term '*casus*' which the translators of Watson's edition also render where it appears in the Digest by such words as 'case' and 'situation' but also more tellingly by 'accident', 'chance', 'circumstance', 'eventuality', 'contingency'.[14] The word *casus* is used when referring to case-events, in so far as they may or may not happen and especially in

[12] D 9.2.5.3. Ulpian, *Ad edictum*, book 18.

[13] Ibid.

[14] E.g. D. 2.9.6, Paul, *Ad Sabinum*, book 11: '*casus libertatis*' (Watson's edition gives us 'the chance of freedom' while Scott's 'the attainment of freedom'); D. 3.3.39.6, Ulpian, *Ad edictum*, book 9: '*Est et casus*' (Watson 'There are also circumstances', Scott's 'There is a case'); D. 4.6.26, Ulpian, *Ad edictum*, book 12: '*multi enim casus*' (Watson: 'many eventualities', Scott: 'many instances'); D. 7.1.13, Ulpian, *Ad Sabinum*, book 18: Here the word *casus* is translated in Watson as 'cases' and in Scott as 'instances', namely of the type which may or may not come under the scope of an Aquilian action; D. 9.2.31, Paul, *Ad Sabinum*, book 10: '*ut casus eius evitari possit*' (Both Watson and Scott: 'the accident could/might be avoided'); D. 10.2.51.pr, Julian, *Digestorum*, book 8: '*nullus casus intervenire*' (Watson: 'no circumstance can arise', Scott: 'no instance can occur'); D. 15.1.16, Julian, *Digestorum*, book 12. The fragment asks in what 'case' a *peculium* of a common slave may be owned only by one of his masters; D. 16.3.1.35, Ulpian, *Ad edictorum*, book 30: '*casus fortuitos*' (Watson: 'act of God', Scott 'accidents'); D. 18.1.34.2, Paul, *Ad edictum*, book 33: '*nec enim fas est eiusmodi casus exspectare*' (Watson and Scott: 'for it is contrary to morality/not right to anticipate such a contingency'); D. 24.3.56, Paul, *Ad Plautiam*, book 6: '*omnes hi casus continentur*' (Watson: 'covers all these eventualities', Scott: 'all such accidents are included'); D. 27.3.1.2, Ulpian, *Ad edictum*, book 36: '*sed nonnullos casus posse existere*' (Watson: 'but there can be some cases', Scott: 'but some instances may arise'); D. 27.8.1.11, Ulpian, *Ad edictum*, book 36: '*futuros casus et fortunam*' (Watson: 'future chance events', Scott: 'future events and accidents'); D. 28.2.10, Pomponius, *Ad Sabinam*, book 1: '*Si alteruter casus omissus fuerit*' (Watson: 'If either event has been omitted', Scott: 'If either of these contingencies are omitted', referring to whether a child is born during the father's lifetime or after death); D. 28.2.29, Scaevola, *Quaestiones*, book 6: '*enim casus*' (Watson: 'these cases', Scott: 'these instances'), '*ceteri casus*' (Watson and Scott: 'other cases'), '*hic casus*' (Watson and Scott: 'this case'), '*ille casus in*

so far as they may or may not fall under the terms of a statute, a *lex*, but rarely for those cases which – as specific objects of juristic construction – are not meant to be imagined as other than what they are.

Now if one were to take all these regular examples of the word *species* on their own, they would appear to be little more than idiomatic. The material itself places no additional emphasis, beyond the casuistic method, upon the use of the word *species* rather than any other in one context or another in which it appears.[15] And while the 'cases' themselves, in this sense of the word *species*,

difficili est' (Watson: 'this case is difficult', Scott: 'the following case is a difficult one') referring to different situations in which a *suus heres* may be born after the death of a testator especially in relation to whether these fall under the *lex Vellea*; D. 29.1.3, Ulpian, *Ad sabinum*, book 3: '*propter fortuitos casus*' (Watson: 'take account of possible accidents', Scott: 'on account of the accidents'); D. 29.5.1.23, *Ad edictum*, book 50: '*mortis casus*' (Watson: 'the way in which his death happened', Scott: 'the manner of his death'); D. 29.7.16, Paul, *Quaestiones*, book 21: '*nam unus casus est*' (Watson: 'for it is one eventuality', Scott: 'for only one case was taken into consideration'); D. 30.90, Papinian, *Quaestiones*, book 18: '*sed non absimilis est prioris casus*' (Watson: 'but the case is not dissimilar to the former one', Scott 'this instance is not unlike the former one'); D. 35.2.84, Julian, *Digestorum*, book 13: '*Repperitur casus*' (Watson: 'The case can be found', Scott: 'A case sometimes occurs'); D. 36.1.17(16).17, Ulpian, *Fideicommissorum*, book 4: '*Talis quoque casus*' (Watson: 'the following case', Scott: 'the following matter') referring to something which was decided by the divine Pius; D. 31.1.60(58).6, Papianian, *Responsorum*, book 9: '*usus et casus*' (Watson: 'wear and tear or accident', Scott: 'the use … and any losses incurred'; D. 36.2.13, Pomponius, *Ad Sabinum*, book 6: '*nisi alter casus vivo legatario exstiterit*' (Watson: 'unless one or other event have happened during the life of the legatee', Scott: 'unless one or the other of the conditions has been fulfilled during the lifetime of the legatee'); D. 37.10.11, Papinian, *Quaestionum*, book 13: '*enim casus*' (Watson: 'matters of that kind', Scott: 'these cases') referring to things that fall under the Carbonian Edict; D. 38.2.36, Javolenus, *Epistularum*, book 8: '*multi enim casus intervenire possunt*' (Watson: 'For there can be many reasons', Scott: 'For many reasons may arise'); D. 38.13.1, Julian, *Digestorum*, book 28: '*hic casus verbis edicti non continetur*' (Watson: 'This case does not fall within the words of the edict', Scott: 'this case is not included in the terms of the Edict'); D. 40.5.30, Ulpian, *Fideicommissorum*, book 5: '*Quicumque igitur casus inciderit*' (Watson: 'Hence, in any circumstances', Scott: 'Therefore, when any case occurs'); D. 40.9.6, Scaevola, *Quaestionum*, book 16: '*nec adventicii casus computandi sint*' (Watson: 'we should not reckon with incalculable eventualities', Scott: 'and accidents which may occur are not to be considered'); D. 41.7.5.1, Pomponius, *Ad Sabinum*. book 32: '*tamen eius fierent, cui casus tulerit ea*' (Watson: 'they yet become the property of the person to whom chance takes them', Scott: 'they, nevertheless, become the property of him who chance may favour'); D. 45.1.53, Julian, *Digestorum*, book 16: '*incertos casus*' (Watson: 'unforeseen circumstances', Scott: 'uncertain future events'); D. 50.4.3, Ulpian, *Ad Sabinum*, book 21: '*fortunam et casus tristiores*' (Watson: 'misfortune and sad mischance', Scott: 'misfortune and sad experience'); D. 50.17.85.1, Paul, *Quaestiones*, book 6: '*licet ille casus exstiterit*' (Watson: 'a state of affairs comes into existence' Scott: 'a case may arise').

[15] The jurists make use of a range of ways in language to draw attention to particular cases and instances and it is not apparent whether the choice of the term *species* was to have any additional nuance.

may be supposedly created more by the thought or imagination of the lawyer than by the 'accident' of external events, the word at first does not seem to necessarily elicit any special juridical purpose. One can remark about the frequency of such use of the term or its divergence from the more immediate meaning linked to 'sight' and 'vision' and 'appearance' rather than to any definite set of juridical problems.

A somewhat different perspective is revealed however through a narrower set of instances: namely those in which the jurists confront the meaning of *species* more explicitly by way of its contrast to the notion of *genus*. To begin with, consider this rather enigmatic statement from Papinian, *Quaestiones* book 33: '*In toto iure generi per speciem derogatur et illud potissimum habetur, quod ad speciem derectum est.*'[16] ('In the whole of law, the *genus* is repealed by the *species*, and the former is considered strongest in so far as the *species* is strictly legal.')[17] Here we have a rare occasion – from a passage unfortunately divorced by the compilers from its original context – in which the term *species* in both Watson's and Scott's English translation is rendered as 'species' and not as something else such as 'case', 'instance', 'appearance'.[18] Watson's edition, it should be noted, translates this whole phrase somewhat differently (Watson 1985): 'In the whole of law,' it says, 'species takes precedence over genus, and anything that relates to species is regarded as the most important.' There are some difficulties however with this rendition. Firstly, the pronoun *illud* ('this') whose gender is neuter does not agree with the noun *species* which is feminine but rather with *genus*, so that the phrase indicates more accurately that the *genus* is what is only considered *potissimum*, strongest/most important, in so far as the *species* is *derectum* i.e. direct, not curved, strictly legal. Secondly, the verb *derogare* which indicates taking away or derogating from, and which Watson's edition translates as 'taking precedence over', also has the legal meaning of 'to repeal, set aside or modify' (Latin-English Dictionary accessed at latin-english.com, 11 December 2021). Modestinus explains the meaning of the term in his *Rules*, book 7 where in contrast to 'abrogation' in which a law is en-

[16] D. 50.17.80. Papinian, *Quaestionum*, book 33.

[17] Author's translation.

[18] The word species in the Digest is generally only translated as 'species' in English in these contexts where the discussion elicits a dichotomy between species and genus. For the translators of the Digest this conceptual opposition tends to signal a philosophical register for the term species.

tirely abolished, 'derogation' refers to that situation where only part is removed.[19] In the juridical context, it is unlikely that this meaning would have been meant to have been excluded in the formulation regarding *species*. Rather than indicate that whatever is precisely specified by law (in the sense of an enactment) shall prevail over what is left in general terms, as this passage has sometimes been reinvented in modern statutory-interpretative contexts to mean,[20] it in fact draws attention to something quite different. The precise operation of the *species*, the 'case', is not merely to illustrate the more general law in its specific detail and application but rather to subtract or repeal what is general in the law in favour of the originality, the uniqueness of the juridical as a whole (*toto iure*).[21] The *species*, in other words, doesn't mean the law conveyed in special or specific terms, but the case individualised and particularised by its juridical form.

Legal species against the classification of nature

How does this opposition between *species* and *genus* appear elsewhere in the Digest? It is helpful to contrast it, firstly, with the conceptualisation that – at the time of the classical period of jurisprudence – was already well-known in Greek philosophy. In the Platonic and Aristotelian tradition, for instance, the notions of *species* and *genus* were understood as part of a general method of *diairesis* or division. The *genus* (*genos*) described a class, a kind, a family, or a predicate which may formally apply to and logically group together any number of items; the *species* (*eidos*) on the other hand was a form, an idea or type, a model of the universal of which the world of phenomena was to be considered a shadow or imitation and according to which it may be more adequately grasped.[22] In this schema, every *species* was related integrally to a *genus* which synthesised its essential characteristics and to which the *species* added a fundamental or essential distinction, a *differentia* or *diaphora*. 'Man' as *species*, for instance, could fall under the *genus* 'animal', with the specific distinction being that of having a 'rational nature'. An individual man, meanwhile, was a mere reflection of a form or

[19] D. 50.16.102, Modestinus, *Regularum*, book 7**:** "'*Derogatur" legi aut "abrogator". Derogatur legi, cum pars detrahitur: abrogatur legi, cum prorsus tollitur.*'

[20] See especially the extensive commentary on the *lex specialis* principle which is given importance in both international and certain domestic legal contexts.

[21] Compare with D. 50.17.1, Paul, *Ad Plautinum*, book 16, which tells us that the law may not be derived from a rule but a rule must arise from the law as it is.

[22] On the meaning of species from its origin in the Platonic and Aristotelian tradition through to later controversies over its scientific definition see Wilkins (2009) and Wilkins (2011).

species: more or less realising this idea in its perfection and universality. According to this philosophical process, the whole of existence may be properly classified and divided by thought, reaching simultaneously down toward its *infima species* (the narrowest species which cannot be a genus to anything else) and up toward a *summum genus* (the most all-inclusive genus which is not a species of any other). In Plato's *Phaedrus*, Socrates affirms his great love of these processes of 'division and generalisation', and notes that 'division into species' must be done by the 'natural formation', 'where the joint is', and 'not breaking any part as a bad carver might' (Plato, *Phaedrus*, 265e and 266b).

Scholars such as Nörr – focusing on Cicero's interpretation of these philosophical schemes of division in his *Topica* – have shown how Roman jurisprudence must have received and relied on a more complex scheme that contrasted this *diairesis* or *divisio* in the strict sense, namely of the *genus* in its *species*, with a separate dividing procedure of *merismos* or *partitio* which instead divided the concrete whole into its constituent parts (Nörr 1972): a complication which Talamanca's analysis suggests remains isolated to the peculiarity of Cicero's text (Talamanca 1977: 171). However, the attempt to pin down these precise philosophical influences on the jurists does seem to become something of secondary importance when faced with the sheer creativity that they achieve in a mode of thought often consciously at odds with the aims of rhetoric, sceptical of 'definitions', and even rivalling in its methods the universalism of an abstract philosophical plan of 'truth'.[23] In the juridical material excerpted in the Digest, the instances in which the word *species* may be interpreted as the product of a strict *diairesis* are less decisive than those which, on the whole, tend to challenge its overarching scheme. It is, first of all, extremely rare to see the word *species* used in the Digest in a context associated with divisions or classifications particularly of the natural world. There is one example worth mentioning, from Gaius, *Twelve Tables* book 4, in which reference is made to two biological 'species' of fruit/plant. However far from confirming anything of the naturalistic and biological classification upon which the reference rests, the example in fact enlists it to describe the operation of a legal fiction that functions by analogy to a Greek figure of speech. 'The designation "acorn" (*glandis*) includes all fruit,'

[23] On the influence of the various models of *diairesis* on Roman jurisprudential thought see especially Nörr (1972), Talamanca (1977). See also more generally Giltaij (2016), Schiavone (2012), Schulz (1946), pp 62-69. On the characterisation of jurisprudence as a 'true' philosophy see the analysis by Schiavone (2012), chapter 21.

Gaius's text states citing Javolenus, 'following the example of Greek parlance among whom the *species akrodrya* designates all trees.'[24]

The more typical example concerns legal phenomena, where the situation is different. On the one hand, it is true that the word *species* is used in didactic contexts which indicate classification into types or sorts. For instance, in *Rules* book 2, Modestinus describes two *species* into which the 'general' legal notion of adoption may be divided.[25] Pomponius refers in *Sabinus* book 3 to two species of *postliminium* – either where one returns or where one recovers someone.[26] Ulpian tells us that there are three *species* of convention in *Edict* book 4,[27] three *species* of interdict in book 67 of that work,[28] three *species* of *mortis causa* gifts in *Sabinus* book 32,[29] and in *Edict* book 6 refers to 'theft, or other similar *species*'.[30] Paul says that the taking of an oath is a *species* of settlement in his *Edict* book 18,[31] and that possession may be 'divided into two *species*' in book 54,[32] and so on. Yet, these short didactic remarks should not be overplayed, and an interpretation that indicates in the word *species* a process of logical division is likewise not always apparent.[33] When Ulpian, in *Sabinus* book

[24] D. 50.16.236.1, Gaius, *Ad legem duodecim tabularum*, book 4**:** "'*Glandis" appellatione omnis fructus continetur, ut Iavolenus ait, exemplo Graeci sermonis, apud quos omnes arborum species akrodrua appellantur.*'

[25] D. 1.7.1. Modestinus, *Regularum*, book 2: *'Quod adoptionis nomen est quidem generale, in duas autem species dividitur, quarum altera adoptio similiter dicitur, altera adrogatio. adoptantur filii familias, adrogantur qui sui iuris sunt*'.

[26] D. 49.15.14.pr, Pomponius, *Ad Sabinum*, book 3: '*Cum duae species postliminii sint, ut aut nos revertamur aut aliquid recipiamus: cum filius revertatur, duplicem in eo causam esse oportet postlimini, et quod pater eum reciperet et ipse ius suum.*'

[27] D. 2.14.5, Ulpian, *Ad edictum*, book 4: '*Conventionum autem tres sunt species.*'

[28] D. 43.1.1.1, Ulpian, *Ad edictum*, book 67: '*Interdictorum autem tres species sunt, exhibitoria prohibitoria restitutoria: sunt tamen quaedam interdicta et mixta, quae et prohibitoria sunt et exhibitoria.*'

[29] D. 39.6.2, Ulpian, *Ad Sabinum*, book 32: '*Iulianus libro septimo decimo digestorum tres esse species mortis causa donationum ait, unam, cum quis nullo praesentis periculi metu conterritus, sed sola cogitatione mortalitatis donat. Aliam esse speciem mortis causa donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta.*'

[30] D. 3.2.6.2, Ulpian, *Ad edictum*, book 6: '*furti vel ex alia simili specie*'.

[31] D. 12.2.2, Paul, *Ad edictum*, book 18: '*Iusiurandum speciem transactionis continet maioremque habet auctoritatem quam res iudicata.*'

[32] D. 41.2.3.22, Paul, *Ad edictum*, book 54: '*Vel etiam potest dividi possessionis genus in duas species,ut possideatur aut bona fide aut non bona fide.*'

[33] Schulz in *History of Roman Legal Science* treats the study of *genera* and *species* in the work of the classical Roman lawyers together as a 'study of kinds' (Schulz 1946: 62). In this way, he treats the work of dividing up of the law into *genera*, such as where 'Mucius distinguished five kinds

43, describes that there is also 'this *species* of *condictio* for when someone makes a promise with no basis or pays what is not owed'[34] we sense that what is indicated is less an ideal type into which the formal claim can be divided than a mere instance that affords special consideration. And in *Edict* book 28 Ulpian again uses the word *species* twice in close succession in a way that challenges the tendency to think of the first as simply a 'type' of a broader class, rather than more closely connected to the second which quite clearly (based on the text which follows it) remains a reference to a 'case/instance': one that attracts the special interest of jurisprudence. 'Now we shall see,' Ulpian writes, 'in which *species* (type) of lending an action on loan for use will lie. And the earlier jurists deliberated over the following *species* (case).'[35]

In other situations, the logical or classificatory sense of the terms *species* and *genus* seem to be followed more closely. For example, Paul in *Edict* book 54 says that 'the *genus* of possession can be divided into two *species* according to whether it is bona fide or not'.[36] In his *Edict* book 28, Ulpian comments on the use of a word *commodatum* (loan) in the edict and compares it with *utendum datum* (give use of) which is the term used elsewhere. Between the two, he writes, 'Labeo says the only difference is as between *genus* and *species*, the

of tutorship, others … only three' etc, as equivalent to that of its division into *species*. However, while he considers this to be an attempt by the jurists to use the dialectical method to discover the 'governing principles' (Schulz 1946: 64) of *genera* and *species*, he doesn't apparently address the importance that the jurists themselves attached to the difference between these two concepts. It is worth noting that elsewhere he cautions not to attach too much importance to what he calls a 'maxim-jurisprudence' (where general rules are promulgated), as something that risks taking away from the central casuistic method of the main works (Schulz 1956: 51). Talamanca (1977: p 12) notes the strand of research including that of Michel Villey and Hans Joachim Mette that considered the metholodogical aspect of constructing a system based on division into *genus* and *species* to be limited, in the jurisprudential sphere, to its didactic literature. And even in closer analyses of those works themselves, such as Gaius's and Justinian's *Institutiones* where for e.g. G. 3.88-3.89 may be compared with I. 3.13.1-2, one has also required caution in terms of expecting to find a definitive philosophical meaning in the terms *genus* and *species* employed there. As Massimo Brutti observes, summarising a work by Riccardo Orestano on the use of dialectical procedures in Gaius's text: '*Species* and *genera* were relative categories, as they did not indicate ontologically fixed structures. The realities that they were meant to describe were investigated on the basis of *topoi*.' (Brutti 2021: 40-41).

[34] D. 12.7.1, Ulpian, *Ad Sabinum*, book 43: '*Est et haec species condictionis, si quis sine causa promiserit vel si solverit quis indebitum.*'

[35] D. 13.6.5.11, Ulpian, *Ad edictum*, book 28: '*Nunc videndum, in quibus speciebus commodati actio locum habeat. Et est apud veteres de huiusmodi speciebus dubitatum*.'

[36] D. 41.2.3.22, Paul, *Ad edictum*, book 54: '*Vel etiam potest dividi possessionis genus in duas species,ut possideatur aut bona fide aut non bona fide.*'

former applying only to movable things, not to land, the latter to land as well.'[37] Similarly, in book 43, Ulpian again notes that: 'What separates a "gift" (*donum*) from an "offering" (*munum*) is what separates *genus* from *species*: for on the one hand "gift" (*donum*) is a *genus* which Labeo says is from give/forgive (*donando*), whereas an offering is a gift with a cause (*causa*) as for instance for a birthday or a wedding.'[38] In these examples, the relation between *species* and *genus* is used to clarify by analogy the precise meanings of terms used in such legal declarations as the edict, more than giving those terms a strictly juridical sense.

Still, we find other examples that are not so straightforward. Paul's *On Degrees and Relationships by Marriage and their Names* states that: 'There is therefore the same difference between agnates (those related by sharing a common male ancestor) and cognates (blood relations) as there is between a *genus* and *species*; for a person who is an agnate is also a cognate, but a cognate is not also an agnate in the same way; for one is a civil and the other a natural name.'[39] Here again the relation is one of analogy and the sense does not stray far from the realm of logic. But the passage also seems to combine this meaning derived from the logic of classification (i.e. all agnates are cognates but not all cognates are agnates) with another that relates more specifically to the origins of the juridical names (i.e. the *genus*, cognate, referring to what is of natural or genetic origin, whereas the *species*, agnate, being an artifice, appearance, or purely civil name). In book 4 of his *Letters*, Javolenus tells us that 'estate' (*praedium*) is the general name for either 'field' (*ager*) or 'possession' (*possessio*) which he says

[37] D. 13.6.1.1, Ulpian, *Ad edictum*, book 28: '*Huius edicti interpretatio non est difficilis. Unum solummodo notandum, quod qui edictum concepit commodati fecit mentionem, cum Paconius utendi fecit mentionem. Inter commodatum autem et utendum datum Labeo quidem ait tantum interesse, quantum inter genus et speciem: commodari enim rem mobilem, non etiam soli, utendam dari etiam soli. Sed ut apparet, proprie commodata res dicitur et quae soli est, idque et Cassius existimat. Vivianus amplius etiam habitationem commodari posse ait.*'

[38] D. 50.16.194, Ulpian, *Ad edictum*, book 43: '*Inter "donum" et "munus" hoc interest, quod inter genus et speciem: nam genus esse donum Labeo a donando dictum, munus speciem: nam munus esse donum cum causa, ut puta natalicium, nuptalicium.*'

[39] D. 38.10.10.4, Paul, *De gradibus et adfinibus et nominibus eorum*, sole book: '*Inter adgnatos igitur et cognatos hoc interest quod inter genus et speciem: nam qui est adgnatus, et cognatus est, non utique autem qui cognatus est, et adgnatus est: alterum enim civile, alterum naturale nomen est.*'

are '*species* of this appellation',[40] suggesting less distinct types of a phenomenon than the particular legal meanings that are attached to names that might otherwise be considered synonyms. And further, in book 54 of his *Edict*, Paul tells us in relation to possession that: 'There are as many kinds (*genera*) of possession as there are causes upon which to acquire what is not ours, for example, as purchaser (*pro emptore*); as receiver of a gift (*pro donato*); by way of bequest (*pro legato*); dowry (*pro dote*); inheritance *(pro herede*); noxal surrender (*pro noxae dedito*); as one's own (*pro suo*) as in the case of those things which we catch on land or sea or which we seize from the enemy or which we ourselves have created. And in sum, possession as such is one *genus*, infinite *species*.'[41] Here the *species* is far from the product of a natural or logical division, since the passage seems to specially emphasise a contrast between the 'so many' *genera* spoken of in one breath and the 'one' *genus* which comprises 'infinite' *species* in another. This mismatch draws one's attention to the absence of any totalising division from which an essential definition of possession can proceed, but instead to two non-overlapping aspects: firstly the plural and non-totalisable set of *causae* (purchase, gift, bequest, dowry, etc.) seen as adaptale forms of legitimacy, in which alone possession finds its legal meaning, and secondly the fact that, on the other hand, the individual cases and particular legal shapes of possession are not limited to or exhausted by these forms.

In specie: the very thing in its juridical form

This view of *species* brings the jurists back to a range of practical considerations that are distinctly their own: borne by concrete procedural problems more than by abstract ideas. The notion of *species* is connected, as we shall see, to certain modes of action by which one may claim from another. Here *species* may denote the right not just to the value or equivalent of what is claimed or in dispute, nor in a certain measure, or in one or more things of a certain type, but in *the very*

[40] D. 50.16.115, Javolenus, *Epistularum*, book 4: '*Quaestio est, fundus a possessione vel agro vel praedio quid distet. "Fundus" est omne, quidquid solo tenetur. "Ager" est, si species fundi ad usum hominis comparatur. "Possessio" ab agro iuris proprietate distat: quidquid enim adprehendimus, cuius proprietas ad nos non pertinet aut nec potest pertinere, hoc possessionem appellamus: possessio ergo usus, ager proprietas loci est. "Praedium" utriusque supra scriptae generale nomen est: nam et ager et possessio huius appellationis species sunt.*'

[41] D. 41.2.3.21, Paul, *Ad edictum*, book 54: '*Genera possessionum tot sunt, quot et causae adquirendi eius quod nostrum non sit, velut pro emptore: pro donato: pro legato: pro dote: pro herede: pro noxae dedito: pro suo, sicut in his, quae terra marique vel ex hostibus capimus vel quae ipsi, ut in rerum natura essent, fecimus. Et in summa magis unum genus est possidendi, species infinitae.*'

thing understood in its specific and unique legal form. 'The name thing (*rei*),' Paul notes in *Edict* book 6, 'does not signify *genus* but *species*.'[42] It is therefore necessary to enquire, for an action such as in the *rei vindicatio* in which a plaintiff demands the return of a thing that belongs to him or her, how specific one must be in describing the thing that is claimed. For clothes, for instance, do we have to give merely their number or also their colour? For a household vessel, is it enough to say 'dish' or rather also whether it is square or round, plain or engraved? For a slave, it would be best to give their name, but when one doesn't know it, would a description such as 'who is part of such inheritance' or 'who is the child of such a mother' be sufficient? A *species* refers to the very individual or thing in its legal form: not something of the same kind that may be substituted for it, as for instance in the case of a loan for consumption (*mutuum*) where the obligation presupposes an equivalence rather than an identity in its object. Paul, in book 28 of his *Edict*, states that in a loan for consumption, 'one does not get back the same *species* (otherwise it would be a loan for use or deposit) but the same *genus*' and this kind of loan applies only to 'those things which are dealt by weight, number or measure.'[43] When the text chooses to explain next that 'credit (*creditum*) differs from loan for consumption as *genus* from *species*'[44] since a credit can also exist for things other than those dealt by weight, number or measure, the repetition of the terms this time in a logical, classificatory register seems designed to emphasise the difference in meaning.

Genus and *species*, in other words, differ from one another here by more than just degrees since in jurisprudence it is not existence itself that must be rationally divided but definite assets. By *species* the law grasps irreplaceable items that cannot be divided without changing their identity, in contrast to everything that may be weighed, counted, measured and hence distributed in kind. Julian, in his *Digest* book 22, for example, tells us that for stipulations (verbal undertakings), 'some are concluded for *species* and some for *genera*.'[45] When one stipulates for *species*, the stipulation must be so divided between owners and heirs that parts of the whole are owed to each, whereas when one stipulates for *genera*, a quantitative division is made. 'So when someone who stipulated

[42] D. 6.1.6, Paul, *Ad edictum*, book 6: '*appellatio enim rei non genus, sed speciem significat*'.

[43] D. 12.1.2, Paul, *Ad edictum*, book 28: '*Mutuum damus recepturi non eandem speciem quam dedimus (alioquin commodatum erit aut depositum), sed idem genus: nam si aliud genus … Mutui datio consistit in his rebus, quae pondere numero mensura consistunt, quoniam eorum datione possumus in creditum ire, quia in genere suo functionem recipiunt per solutionem quam specie…*'

[44] Ibid: '*Creditum ergo a mutuo differt qua genus a specie*'.

[45] D. 45.1.54.pr, Julian, *Digestorum*, book 22: '*In stipulationibus alias species, alias genera deducuntur*.'

for Stichus and Pamphilus [two slaves] left two heirs in equal shares,' he adds by way of example, 'each must be owed a half share in Stichus and in Pamphilus; [but] if he had stipulated for two slaves, a single slave would be due to each heir.'[46] And in *Edict* book 72 the same jurist contrasts the situation where one stipulates for delivery of a hundred jars of wine with that where one promises delivery of a freeman 'when he becomes a slave'. Would either of these stipulations be valid? The answer provided by Paul is that: 'with the wine one stipulates not the *species* but the *genus* and a tacit temporal element is presumed [it can be provided after a reasonable time]; whereas a freeman comprises a *species*',[47] meaning a specific legal individual who is in fact at that time excluded from the world of commerce. The fragment tells us that neither natural nor civil law contemplates the misfortune that would render this freeman a slave and thus to fulfill the condition of the stipulation. It's not that man is a natural species whose definite or ideal form is recognised by a legal status (freedom) and by the deliberations of rational thinkers. In *species*, in a legal sense, the thing and the obligation coincide in a particular 'form', which the jurisprudence treats as an individual in so far as it is contemplated by the discrete transaction.

The species repeals the genus

The literature of the Digest doesn't stop there in isolating this distinction between *species* and *genus* in its jurisprudential significance. Some further instances show the extent to which the jurists contemplated and interrogated the originality of their conception of *species* through increasingly complex scenarios. Consider this fragment from Paul's *Sabinus* book 4: 'If the *peculium* has been prelegated (i.e. if the testator has made the property fall to the same person as both heir and as legatee) and freedom of the *vicarius* (the slave's attendant purchased from the *peculium*) has been directed, it is accepted that he shall be free. There is much that differs between *genus* and *species*: it is decided that the *species* be removed from the *genus*: what is in the bequeathed *peculium* and the

[46] Ibid: '*veluti cum Stichum et Pamphilum quis stipulatus duos heredes aequis partibus reliquit, necesse est utrique partem dimidiam Stichi et Pamphili deberi: si idem duos homines stipulatus fuisset, singuli homines heredibus eius deberentur.*' See also D. 46.3.29, Ulpian, *Ad edictum*, book 38.

[47] D. 45.1.83.5, Paul, *Ad edictum*, book 72: '*vini autem non speciem, sed genus stipulari videmur et tacite in ea tempus continetur: homo liber certa specie continetur*'.

manumitted *vicarius*.'[48] Here a person receives a *peculium* (part of the patrimony which had been assigned to the use of a slave) both as heir as well as by bequest. The testament also directs that the *vicarius* (a slave's attendant belonging to the *peculium*) shall be freed. However, what this person receives as heir, he cannot receive by bequest since this is considered to be already his. According to this principle, what can be bequeathed can only be the proportion of the estate for which he was not appointed heir.[49] Now, should one disregard that part of the testament which directs the freedom of the *vicarius*, since this clause introduces a discrepancy between what is strictly inherited and what is bequeathed? Or should one treat the *vicarius* as freed, and thus excluded from what is inherited as well as from what is bequeathed, in order to then calculate the proper proportions under the rest of the testament? The jurist indicates that the answer rests on the distinction in law between *species* and *genus*. The *species*, he says, in a way that marks a conscious rejection of the diairetic model, removes or exempts itself (*eximi*) from the *genus*. What is meant by *species*? It doesn't appear to simply refer to what is stated specifically in the will rather than what is left in general or more overarching terms, since what is stated is precisely the question that requires determination. Rather the *species* seems to constitute what is given special shape to in the law (here the *peculium* together with the *vicarius* who shall be freed), in contrast to the *genus* which is what would be left to apply as a generic rule. The former – in both the shape of the bequest (the *peculium*) and in the form of an individual (the manumitted *vicarius*) – separates itself from the latter and is not subsumed by it.

Something similar can be observed in Paul's *Meaning of Documents*. There again, it is made clear that the relation between *species* and *genus* in law doesn't go along with the classificatory logic that includes the particular under the general. 'If the slaves born in the household have been bequeathed to one person and the couriers to another,' Paul notes, 'and some slaves born in the household are also couriers, they will be included with the couriers, for the *spe-*

[48] D. 40.4.10.pr, Paul, *Ad Sabinum*, book 4: '*Si peculium praelegatum est et vicarius liber esse iussus sit, liberum eum esse constat. Multum enim interest inter genus et speciem: speciem enim eximi de genere placet: quod est in peculio legato et vicario manumisso.*'

[49] For instance, in a simple situation, if X is instituted heir for 70% of the estate and Y 30%, and certain property that is part of the estate is prelegated (bequeathed) in equal share between the two, X will receive only 30% of the bequeathed property (the portion that was not already his) and Y will receive 70% (see Buckland 1921: 349).

cies always repeals the *genus*. If each of the two are *in specie* or *in genere*, usually they will be shared.'[50] The jurist raises a fundamental distinction here between the function of the *genus* or 'category' into which many kinds of objects may be included, and that of the *species* or particular case/form which in law is treated as naming a definite object. The latter is not included within the former but taken outside of it. And Papinian, in book 7 of his *Replies* confirms this non-taxonomic relation by qualifying it with an exception. Where a bequest is made by excessive enumeration of the *species*, he says, the general bequest shall not be detracted from, 'however, if species of a certain number are pointed out, a limit to the class (*generi*) given with respect to these *species* is understood.'[51]

One final example serves perhaps to provide an even stronger confirmation. It is found in the following fragment from book 2 of Papinian's *Definitions* in the context, not of civil law, but of the imposition of statutory penalties. 'The sanction of the statutes (*sanctio legum*),' Papinian writes, 'which newly imposes a certain penalty on those who fail to obey the precepts of the statute, is not considered to extend to the same *species* to which a penalty is specifically attached by the statute itself. There is neither doubt that in all other respects in the law the *species* repeals the *genus*, nor indeed a likelihood that a single offense should be punished on different assessments under the same statute.'[52] Dieter Nörr refers to this passage only to emphasise that Papinian was a conscious user of the dialectical *genus-species* schema (Nörr 1972: 51),[53] however a word regarding the Roman *sanctio* I believe is necessary here in order to unravel a deeper and more originally jurisprudential meaning given to the notion of *species* in this fragment. As Yan Thomas explores, the Roman *sanctio* is not just a penalty imposed by law. It rather *equips* the law itself with a punishment which is thought to defend such laws against an attack and to make those laws inviolable (Thomas 1988). This specific passage from Papinian, as Thomas

[50] D. 32.99.5, Paul, *De instrumenti significatione*, sole book: '*Si alii vernae, alii cursores legati sunt, si quidam et vernae et cursores sint, cursoribus cedent: semper enim species generi derogat. Si in specie aut in genere utrique sint, plerumque communicabuntur.*'

[51] D. 33.10.9.pr, Papinian, *Responsorum*, book 7: '*Legata supellectili cum species ex abundanti per imperitiam enumerentur, generali legato non derogatur: si tamen species certi numeri demonstratae fuerint, modus generi datus in his speciebus intellegitur.*'

[52] D. 48.19.41, Papinian, *Definitionum*, book 2: '*Sanctio legum, quae novissime certam poenam irrogat his, qui praeceptis legis non obtemperaverint, ad eas species pertinere non videtur, quibus ipsa lege poena specialiter addita est. Nec ambigitur in cetero omni iure speciem generi derogare, nec sane verisimile est delictum unum eadem lege variis aestimationibus coerceri.*'

[53] Nörr (1972) also refers to the possibility (but not certainty) that the second sentence of the fragment is interpolated.

notes, thus 'prohibits imposing punishment for violation of one particular article of the law (*species*) at the same time as for violation of the law in general (*genus*)' (Thomas 1988: 66 (fn 15)). It is thus firstly not simply a matter of resolving a contradiction or inconsistency within a statutory context between terms that exist on the same plane: for example to what extent one particular provision shall take precedence over another. There are in fact two entirely separate bases for accusation: one under the statute for violating the specific provision in question; another, under the *sanctio*, for mounting an attack against the law itself, the statute itself. On the basis of this technical opposition, the jurist secondly – and more importantly for our purposes – realises a more precise conceptualisation of *genus* and *species*. We are not invited to imagine these as part of a philosophical-rhetorical schema applied unproblematically to the juridical material. Nor is the rule that the *species* derogates from or repeals the *genus* (of whatever origin) treated as a straightforward solution to the interpretive difficulty. The *sanctio*, for one, has a no-less specific form than the statutory penalty itself. Instead, this juridical idea is lent a further level of precision by being set against the very idea of statutory inviolability (including that of non-repealability) in the concept of the *sanctio legum*. Not only does the *genus-species* schema offer its associative weight to the frame of argumentation for the immediate case; the situation of the *sanctio* also casts the notion that the *species* repeals the *genus* into something of a borderline scenario. The notion of species comes to the aid of the jurist in treating the one action as separate cases: one that elicits the statutory penalty; another that elicits the punishment of the *sanctio*. It is true, he indicates, that this *species* subtracts itself or repeals the *genus*: if not to the point of repealing the statute itself, which the *sanctio* explicitly forbids, then at least to the point of provisionally withholding what might be taken as a 'generic' applicability.

3. *Species*: the legal shape of objects

Juridical identification of species: individual objects

In the Digest, a *species* does not just refer to an individual case: it also refers to an individual object. What kind of object? Once again, one cannot obtain a clear or definitive answer to this question through abstract conceptual analysis alone. It is necessary to work through the concrete examples that the text provides us with, their jurisprudential context, and to focus in particular on the flexibility

that the word *species* affords the jurist in confronting a set of technical juridical problems that are at its heart.

The examples are indeed many. The Digest is replete with a detailed casuistry relating to objects and their relation to one another in connection to which the word *species* plays an important part: questions about the mixing of objects, the joining of one to another e.g. by welding or soldering and so on, the containment of some within another such as objects in a chest or safe, the specification by weight or number or by particular description, the alteration from one form to another, their loss or extinguishment, objects such as islands that spontaneously arise within or alongside one's property, objects that move from one legal state or regime to another such as from sacred to profane. The ultimate question underlying these scenarios was one of identifying whether an object, which had undergone some change or addition, was still the same object for the purposes of the law or whether it constituted a new *species*. The medieval glossators and commentators approached questions of this type in the Digest under a rubric they called *specificatio* (see Nicholas 1962: 136-138). For instance, if a painter painted a picture on a tablet belonging to someone else, could the owner of the tablet claim it back, or did the tablet become absorbed in the picture which was to be considered a whole new object?[54] *Species* was a term used by the jurists in confronting such difficult situations and which lent its name, in the medieval reception of the work, to the category of legal acquisition over things that were fashioned from someone else's material.

Underlying the attention to this casuistry is an important caveat: while the works sometimes appear to treat what is ultimately a procedural juridical matter as if it were part of a metaphysics of identity, the Roman jurists did not – despite the similarity sometimes in the problems they posed to those which were already commonplace in philosophy[55] – ostensibly apply philosophical method to the contemplation of these objects. Theirs was a formulary and nominalist tradition. The term *species* in such a tradition, in other words, was connected not so much with ultimate truths or ideals which the law could attempt to realise through relatively practical means, but with the simple procedural necessity of

[54] See the elegant exploration of this concept in relation to painting in Madero 2010.

[55] A number of textbook writers for instance suggest that the Proculians and Sabinians were influenced by different philosophical doctrines, either Aristotle in the case of the Proculians or the Stoics in the case of the Sabinians. See e.g. Nicholas 1962: 137; Mousourakis 2015: 119 (fn 104).

identifying, preferably by name, the object over which there was to be a discrete legal claim.

Species indicates therefore less the type of article in question, the proper definition of it's 'essence' or true nature, than the apparent individuation of its legal identity. In book 3 of *From Minicus* Julian states, with regard to the question of where to draw the line to distinguish between whether one or more trees have been unlawfully cut down for the purposes of an action under the *Lex Aquilia* or *Twelve Tables*, that 'if it be a twin tree and the join appears above ground, it is held to be a single tree. But if the join be not visible, there are as many trees as there are *species* of them existing above the ground.'[56] In *Edict* book 6, as mentioned above, Paul says in a more general sense that for *rei vindicatio* the *species* in the sense of the individual object of the claim needs to be designated and he entertains the degree of specificity that would be required for such designation in some detail.[57] And in book 28, discussing the nature of 'fixed claims', the same jurist citing Pedius explains that a *species* is 'fixed' (*certum*) either by name or by something which performs the role of a name such as pointing out with a finger or describing it in so many words.[58] Watson's edition translates *species* in the latter passage as the 'identity' of the subject-matter (Watson 1985): 'There is a fixed claim when the identity or quantity of the subject matter of the obligation is indicated by a name...' As Yan Thomas also argues about the Roman concept of *res*, this identity is not so much real as it is procedural and jurisdictional (Thomas 2002). It is the identity conferred on a claim or a right from the point of view of the proceedings in which these are held. *Species* does not necessarily refer to the 'thing in itself' here, as one might guess from the contemporary legal use of the term *in specie* to refer to the transfer of an asset in its actual current form rather than its monetary equivalent. Gaius, in his *Institutes* IV, 48 in fact indicates that, for Roman formulary procedure that involved *condemnatio*, the practice of requiring a defendant to deliver the very thing (*ipsa res*) that was claimed: land, a slave, a garment, gold or silver, rather

[56] D. 47.7.10, Julian, *Ex Minicus*, book 3: '*Si gemina arbor esset et supra terram iunctura eius emineret, una arbor videtur esse. Sed si id qua iungeretur non exstaret, totidem arbores sunt, quot species earum supra terram essententiarum*.'

[57] D. 6.1.6, Paul, *Ad edictum*, book 6.

[58] D. 12.1.6, Paul, *Ad edictum*, book 28: '*Certum est, cuius species vel quantitas, quae in obligatione versatur, aut nomine suo aut ea demonstratione quae nominis vice fungitur qualis quantaque sit ostenditur. Nam et Pedius libro primo de stipulationibus nihil referre ait, proprio nomine res appelletur an digito ostendatur an vocabulis quibusdam demonstretur: quatenus mutua vice fungantur, quae tantundem praestent*.'

than its estimated monetary value, was superseded quite early in its development.[59] And Paul in *Sabinus* book 15 indicates that a difference separates the *species* from the actual object in question when he acknowledges that in the situation where a building from which eavesdrip was discharged 'is taken down and replaced by one of the same *species* and character', it is only utility that requires us to understand it to be the self-same building. A strict approach would require us to imagine the usufruct to be demolished along with the original edifice.[60]

Physical form and juridical form of objects

The word *species* does not just indicate the individual objects recognised in the law, but also the form of individual objects of which the jurists take special interest in isolating the juridical from the physical. In Julian's *Digest* book 64, the word *species* is used to indicate the various juridical forms through which something of value may pass in order to distinguish this form both from the physical object itself as well as from the value it holds in a proceedings. Julian says that: 'If the thing itself (*ipsa res*), which fell into another's hands, perishes, we say that his wealth has not been increased.' However, on the other hand, if it has been converted into something else such as money, it isn't necessary to investigate any further into any diminishing of value by this conversion: he is taken to have profited by no less than what the thing itself represents. This, he says, is based on the fiction derived from an imperial rescript relating to the value of things in an inheritance that held that, even where one party no longer has the property in his hands, 'regardless of how often the *species* has been changed', he is placed under an obligation 'just as if the body itself (*ac si corpora ipsa*) had remained in the same *species*'.[61] Watson's edition translates this final passage as 'just as if

[59] Gaius, *Institutiones*, IV, 48: '*Omnium autem formularum, quae condemnationem habent, ad pecuniariam aestimationem condemnatio concepta est. itaque et si corpus aliquod petamus, uelut fundum, hominem, uestem, aurum, argentum, iudex non ipsam rem condemnat eum, cum quo actum est, sicut olim fieri solebat, sed aestimata re pecuniam eum condemnat.*

[60] D. 8.2.20.2, Paul, *Ad Sabinum*, book 15: '*Si sublatum sit aedificium, ex quo stillicidium cadit, ut eadem specie et qualitate reponatur, utilitas exigit, ut idem intellegatur: nam alioquin si quid strictius interpretetur, aliud est quod sequenti loco ponitur: et ideo sublato aedificio usus fructus interit, quamvis area pars est aedificii.*'

[61] D. 4.2.18, Julian, *Digestorum*, book 64: '*Si ipsa res, quae ad alium pervenit, interiit, non esse locupletiorem dicemus: sin vero in pecuniam aliamve rem conversa sit, nihil amplius quaerendum est, quis exitus sit, sed omnimodo locuples factus videtur, licet postea deperdat. Nam et imperator Titus Antoninus Claudio Frontino de pretiis rerum hereditarium rescripsit ob id ipsum peti ab eo hereditatem posse, quia licet res quae in hereditate fuerant apud eum non sint, tamen pretium earum quo, locupletem eum vel saepius mutata specie faciendo, perinde obligat, ac si corpora ipsa in eadem specie mansissententiarum.*'

they had physically retained the same form'. However, it is precisely I think in order to distinguish the meaning of *res* (which describes the contested object or subject-matter retaining its identity in the value of the claim), on the one hand, from that of *corpora* (the physical object) on the other, that the word *species* derives its significance here. The conversion of something from one *species* to another does not primarily describe a change in its physical form but a change in the legal regime that takes hold of it. Thus, the procedural estimation of the value of the thing (*res*) – itself a necessarily administrative intellectual exercise – can be based on the fiction that the very physical object (*corpora*) remained in its original legal shape (*species*) – that is, as a part of this inheritance.

The classical jurists also don't always draw, through their use of the term *species* in the Digest, any clear boundary between corporeal objects and incorporeal or purely jurisdictional ones. Ulpian for instance, in *All Seats of Judgment* book 3, uses the term *species* to describe a delegation of praetorian power or jurisdiction stating that the Praetor is accustomed to delegate either all of his jurisdiction or 'only a *species*' thereof.[62] In book 2 of his *Replies*, the term *species* is used by Modestinus in a matter concerned with a cause to do with the administration of a curator, to distinguish the respective parts of a litigious matter on which a judgment can bear, and which may be decided independently of one another.[63] Ulpian makes reference to the statutory/formulary construction when he notes in *Edict* book 18 that it is 'one *species* of damage to spoil or alter a thing for the purposes of giving an action under the *lex Aquilia* and another when, without changing the substance, you mingle something with it, the separation of which would be difficult.'[64] And in Scaevola's *Digest* book 16, discussing a case where a testatrix produced a will that left to her grandson lands together with the wine, grain and a book of accounts, adding also 'whatever shall exist in that region at the time of my death, in whichever *species* it shall be in that region, as far as it is mine', the jurist's opinion was that there was no reason to

[62] D. 2.1.16, Ulpian, *De omnibus tribunalibus*, book 3: '*Solet praetor iurisdictionem mandare: et aut omnem mandat aut speciem unam: et is cui mandata iurisdictio est fungetur vice eius qui mandavit, non sua.*'
[63] D. 4.4.29.1, Modestinus, *Responsorum*, book 2: '*Ex causa curationis condemnata pupilla adversus num caput sententiae restitui volebat, et quia videtur in ceteris litis speciebus relevata fuisse, actor maior aetate, qui adquievit tunc temporis sententiae, dicebat totam debere litem restaurari. Herennius ""Modestinus respondit, si species, in qua pupilla in integrum restitui desiderat, ceteris speciebus non cohaeret, nihil proponi, cur a tota sententia recedi actor postulans audiendus est.*'
[64] D. 9.2.27.14, Ulpian, *Ad edictum*, book 18: '*nam alia quaedam species damni est ipsum quid corrumpere et mutare, ut lex Aquilia locum habeat, alia nulla ipsius mutatione applicare aliud, cuius molesta separatio sit.*'

exclude debts owed to the testatrix by a third party under a judgment from such notion of *species*.[65]

The word also finds a use in contexts where jurists seek to indicate the juridical outline or shape of an obligation together with what it consists of. Take for instance the reference from book 10 of Modestinus's *Replies* to the situation where a testatrix had charged one of her daughters to manumit a slave of the inheritance, referring in her will to a bequest of a certain number of other slaves for her daughter's service, but where this bequest did not actually exist. The jurist mentions that this situation is equivalent to where 'she said she made a bequest, but added no *species* of the bequest...', suggesting by *species* both the object as well as the specific form of it.[66] Paul says, in *Sabinus* book 5 that the '*species* of servitude' must be expressly stated when conveying property, meaning its specific shape, since 'if it is stated in general terms that it is subject to a servitude, either this statement will be ineffectual because it is uncertain what servitude is meant to be reserved, or it will require every servitude to be imposed.'[67] And Papinian similarly in his *Questions* book 17 refers to the fact that a debtor doesn't always have the right to bequeath what he owes, 'but only in so far as there is more in the *species* of the bequest', meaning most likely that the

[65] D. 33.7.6, Scaevola, *Digestorum*, book 16: '*Nepoti legaverat quae certa regione praedia habuerat ut instructa sunt, cum vino grano calendario, et adiecerat haec verba: "Quidquid erit cum moriar in illa regione, et quidquid in quacumque specie erit in illa regione, vel quod meum erit". Viva testatrice unus ex debitoribus condemnatus vivente testatrice satis non fecit: quaesitum est, an quod ex sententia iudicis deberetur ad nepotem pertineret. Respondit nihil proponi, cur non deberetur.*'

[66] D. 31.34.pr, Modestinus, *Responsorum*, book 10: '*Titia cum testamento facto decederet heredibus institutis Maevia et Sempronio filiis suis ex aequis partibus, petit a Maevia, ut Stichum servum suum manumitteret, in haec verba: "A te autem, Maevia filia carissima, peto, ut Stichum servum tuum manumittas, cum in ministerio tuo tot capita servorum tibi his codicillis legavero", nec legavit. Quaero, quid his verbis relictum videatur, cum, ut supra cautum est, duobus heredibus institutis defunctam testatricem et mancipia hereditaria duarum personarum fuisse, et codicillis nihil relictum sit de praestandis mancipiis nec possit utile fideicommissum putari, quod datum non sit, cum legasse se dixerit nec adiecerit legati speciem nec ab herede uti praestarentur mancipia petierit. Modestinus respondit ex verbis consultationi insertis Maeviam neque legati neque fideicommissi petitionem habere neque libertatem servo suo dare compelli.*' Watson's edition (Watson 1985) translates the phrase *legati speciem* as 'specification of the legacy', while Scott's says 'what it consisted of'.

[67] D. 8.4.7.pr, Paul, *Ad Sabinum*, book 5: '*In tradendis unis aedibus ab eo, qui binas habet, species servitutis exprimenda est, ne, si generaliter servire dictum erit, aut nihil valeat, quia incertum sit, quae servitus excepta sit, aut omnis servitus imponi debeat.*'

complete bequest must exceed any debts passed on with it, not just in terms of its overall value but in terms of its overall legal form.[68]

Reference is sometimes also made to a 'species of obligation' in order to emphasise the several individual grounds upon which one may bring suit with respect to a given matter. Venuleius for example tells us in *Stipulations* book 3, that 'if one co-stipulator becomes heir to the other, he sustains two *species* of obligation'[69] just as Ulpian in *Sabinus* book 46 says that 'if a person liable on a promise becomes heir to another liable on the promise, he bears two *species* of obligation', indicating that while both these obligations subsist in the one individual, they are not added cumulatively to one another but may be pursued as alternatives.[70] And Papinian in *Questions* book 8, says that where a slave agent paid money to another in the master's absence which was stated to be on a certain basis, for instance for money owed on purchase or rent, and it turned out that the master had a good defence to paying on such a ground, 'ownership of the coins would not be transferred in respect of that *species* of obligation for which the relief of a defence was available, although the payment be said to be under that *species*.'[71] *Species* refers in all these cases to the identity of a procedural object or form rather than a physical one: something from which a possibility of legal action arises, but which is not simply reducible to the 'thing in question', the *res de qua agitur*. In Watson's edition, *species* is translated in this context as 'head', as in 'head of obligation'.

Now, in contrast to these examples, there appears to be hardly a limit to the description of the kinds of physical objects or substances that in their relation to the law can bear the name *species*. It is enough to refer to the long list of items of commerce that Marcian in *Delatores*, rather than encapsulating them

[68] D. 31.66.pr, Papinian, *Quaestionum*, book 17: '*Debitor autem non semper quod debet iure legat, sed ita, si plus sit in specie legati: si enim idem sub eadem condicione relinquitur, quod emolumentum legati futurum est?*' Watson's edition elides the meaning of form in the term *species* here and inserts a comparison to the value of the debt by translating as 'but only when there is more [than the debt] in the legacy', Scott's similarly states 'the property contained in the legacy must be of greater value than the debt.'

[69] D. 45.2.13, Venuleius, *Stipulationes*, book 3: '*Ideoque et si reus stipulandi heres exstiterit, duas species obligationis eum sustinere.*'

[70] D. 46.1.5, Ulpian, *Ad Sabinum*, book 46: '*si reus stipulandi exstiterit heres rei stipulandi, duas species obligationis sustinebit*'.

[71] D. 46.3.94.3, Papinian, *Quaestiones*, book 8: '*Cum vero servus Titii actor absente domino pecuniam solverit, ne dominium quidem nummorum in eam speciem obligationis, quae habuit auxilium exceptionis, translatum foret, si ex ea causa solutio facta proponeretur.*' Watson's edition translates *speciem obligationis* as 'head of obligation', Scott 'kind of obligation'.

under a general rule, names as individual '*species*' which are subject to vectigal (tax): 'cinnamon; long pepper; white pepper; pentasphaerum leaf; barbary leaf; costum; costamomum; nard; stachys; Tyrian casia; casia-wood; myrrh; amomum; ginger; malabrathrum; Indic spice; galbanum; asafoetida juice; aloe; lyceum; Persian gum; Arabian onyx; cardamonum; cinnamon-wood; cotton goods; Babylonian hides; Persian hides; ivory; Indian iron; linen; all sorts of gem: pearl, sardonyx, ceraunium, hyacinth stone, emerald, diamond, sapphire, turquoise, beryl, tortoise stone; Indian or Assyrian drugs; raw silk; silk or half-silk clothing; embroidered fine linen; silk thread; Indian eunuchs; lions; lionesses; pards; leopards; panthers; purple dye; also: Moroccan wool; dye; Indian hair.'[72] Clearly these species do not refer purely to biological species nor to individual objects but to what in law can be individualised by a name. And when Paul in *Replies* book 13 interprets the word *species* in the following testamentary passage which sought to pass on certain land – 'together with all the slaves, herd animals, draft animals, and the whole of all the other *species* that shall be on the same land' – so that it in fact excluded documents relating to the purchase of slaves, other deeds and contracts which were found there, it is clearly a situation where the broader context takes precedence over the interpretive scope of the word.[73] It is not that the documents and instruments could not be considered *species* in the same sense as a herd animal might, but that there was no purpose to include such documents within what was intended to be bequeathed to one daughter, rather than understanding them to be owned in common between all the heirs.

Undoubtedly this polysemy in the word *species* – combining both the outer form of some individual thing and the unique juridical shape of it – is a factor in the scope of its jurisprudential applications. The following passage confirms even more emphatically that what is meant by *species* in the Digest is

[72] D. 39.4.16.7, Marcian, *De Delatoribus*, sole book: '*Species pertinentes ad vectigal: cinnamomum: piper longum: piper album: folium pentasphaerum: folium barbaricum: costum: costamomum: nardi stachys: cassia turiana: xylocassia: smurna: amomum: zingiberi: malabathrum: aroma indicum: chalbane: laser: alche: lucia: sargogalla: onyx arabicus: cardamomum: xylocinnamomum: opus byssicum: pelles babylonicae: pelles parthicae: ebur: ferrum indicum: carpasum: lapis universus: margarita: sardonyx: ceraunium: hyacinthus: smaragdus: adamas: saffirinus: callainus: beryllus: chelyniae: opia indica vel adserta: metaxa: vestis serica vel subserica: vela tincta carbasea: nema sericum: spadones indici: leones, leaenae: pardi: leopardi: pantherae: purpura: item marocorum lana: fucus: capilli indici.*' The English translation of these terms is taken directly from Watson's edition (Watson 1985).

[73] D. 32.92.pr, Paul, *Responsorum*, book 13: '*item cum omnibus mancipiis pecoribus iumentis ceterisque universis speciebus*'.

not just the physical form but the distinctly juridical register in which the individuality of an object is realised. In book 2 of his *Common Matters or Golden Things*, Gaius describes the rule that when a river changes its course and covers the entirety of a person's land, what was previously owned privately becomes public under the law of nations, such that if the stream later returns to the original riverbed, ownership in the land which was previously covered by the river is not thereby revived, since the property ceased to exist with the loss, he says, of its own form (*propria forma*).[74] In the following passage however, the word '*species*' – which may at first seem to be used synonymously with 'form/ *forma*' – indicates an important difference. 'It is quite a different matter when one's land is inundated,' Gaius's text reads, 'for inundation does not change the *species* of the land, and for that reason when the water recedes, the land manifestly remains the same as whoever's it was.'[75] Inundation is not the same legal phenomenon as when a river covers the entirety of one's land, because in the latter the *species* of the site is changed irreversibly – through the legal status of a river being 'public' rather than part of anyone's patrimony. Whereas in the former, the water changes nothing in the *species* of the land underneath. Although its physical shape would appear to have undergone the same transformation, the legal shape has remained unchanged.

It's in the context of this sort of difference between the material, the individual article, and the juridical shape of it that a range of other scenarios, in which the term acquires an increasingly specialised jurisprudential meaning, are explored. Neratius in *Parchments* book 5 analogises the seashore as a legal '*species*' to that of wild animals, where building on the site is an ownership equivalent to acquiring by fishing or hunting.[76] What is the legal position of the site of the building? he asks. More specifically: 'if the building erected on the shore comes down, does it remain the property of the builder or does it revert to its

[74] D. 41.1.7.5, Gaius, *Rerum cottidianarum sive aureorum*, book 2: '*cuius tamen totum agrum novus alveus occupaverit, licet ad priorem alveum reversum fuerit flumen, non tamen is, cuius is ager fuerat, stricta ratione quicquam in eo alveo habere potest, quia et ille ager qui fuerat desiit esse amissa propria forma et, quia vicinum praedium nullum habet, non potest ratione vicinitatis ullam partem in eo alveo habere: sed vix est, ut id optineat.*'

[75] D. 41.1.7.6, Gaius, *Rerum cottidianarum sive aureorum*, book 2: '*Aliud sane est, si cuius ager totus inundatus fuerit: namque inundatio speciem fundi non mutat et ob id, cum recesserit aqua, palam est eiusdem esse, cuius et fuit.*'

[76] D. 41.1.14.pr, Neratius, *Membranarum*, book 5: '*Quod in litore quis aedificaverit, eius erit: nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt: nec dissimilis condicio eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fiunt.*'

original state, so that it is public again as though nothing was ever built on it? This latter,' he adds, 'is the better way of looking at the matter, so long as it returns to the original *species* as seashore.'[77] What matters here is not the physical form itself, but the extent to which this form constitutes a juridical shape that distinguishes public from private things. And in book 35 of his *Digest*, Julian uses the word *species* to distinguish the juridically identifiable shape of goods, not just from the 'material' of which they are made, but also the underlying 'substance'. When someone bequeaths a usufruct of a site, for example, it doesn't matter that the building that was on that site no longer remains there. 'The reason,' Julian states, 'is that he who bequeaths the usufruct of his own goods is considered to bequeath the usufruct not only of that which is in *specie* but also of the whole substance, and the site is indeed in the substance of those goods.'[78]

Crafting species

Now among all of these circumstances in which the word *species* is used to describe objects and obligations in the Digest, perhaps those which enliven the juridical imagination the most are those cases that concern crafted or made items, particularly where the claims to such *species* is divided or distributed between the one who gives shape to it on the one hand and another from whose materials it was produced. The classical jurists appear to draw from a common pool of imagery and intellectual resources to address such problems which the later glossators and commentators, as mentioned, came to organise under a doctrine of *specificatio*. Gaius affirms, in *Common Matters and Golden Things* book 2, that an object that is voluntarily made from a combination of the materials of two owners shall be held in common between the two even where the new 'bodies' (*corporis*) are '*species*', meaning things with a legal form distinct from the objects from which they were created.[79] But he tells us that 'if someone makes some *species* for himself out of another's material, Nerva and Proculus

[77] D. 41.1.14.1., Neratius, *Membranarum*, book 5: '*Illud videndum est, sublato aedificio, quod in litore positum erat, cuius condicionis is locus sit, hoc est utrum maneat eius cuius fuit aedificium, an rursus in pristinam causam reccidit perindeque publicus sit, ac si numquam in eo aedificatum fuisset. quod propius est, ut existimari debeat, si modo recipit pristinam litoris speciem*.'

[78] D. 7.1.34.2, Julian, *Digestorum*, book 35: '*quoniam qui bonorum suorum usum fructum legat, non solum eorum, quae in specie sunt, sed et substantiae omnis usum fructum legare videtur: in substantia autem bonorum etiam area est*.'

[79] D. 41.1.7.8, Gaius, *Rerum cottidianarum sive aureorum*, book 2: '*Voluntas duorum dominorum miscentium materias commune totum corpus efficit, sive eiusdem generis sint materiae, veluti vina miscuerunt vel argentum conflaverunt, sive diversae, veluti si alius vinum contulerit alius mel, vel alius aurum alius argentum: quamvis et mulsi et electri novi corporis sit species*.'

are of the opinion that the owner is the maker of the thing because what has just been made previously belonged to no-one. Sabinus and Cassius, on the other hand, take the view that natural reason requires that the owner of the material should be owner of what is made from it, since without material no species is capable of being brought about.' And he also presents the intermediate view (*media sententia*) which holds, correctly according to the jurist, that 'if the *species* can be returned to its material, the better view is that propounded by Sabinus and Cassius but that if it cannot be so returned, Nerva and Proculus are sounder.' The jurist draws upon a typical set of examples of *species* here. A vase made from another's gold; a ship or cupboard made from another's timber; a garment from another's wool. These may be distinguished from the flour made from someone else's corn, or the wine made from another's grapes, mead from another's wine and honey. Gaius finally gives his own opinion that a thresher retains no claim to the threshed corn 'since the corn is already a perfect or complete *species*, while by removing the ears, the thresher does not make a new *species*, but merely uncovers what already exists.'[80] The constitution of a *species* is far from a recognition then for the labour that may be mixed with the thing, but an association that the visible form of it seems to retain with the unique imagination of it as an object of law.

These examples are referenced, reiterated and built upon in other sections of the Digest, exploring various combinations of materials and different modes of combining them. Book 2 of Callistratus's *Institutes* for instance confirms that for 'something made from my copper and your silver, the resulting *species* will not be our common property because although copper and silver are

[80] D. 41.1.7.7, Gaius, *Rerum cottidianarum sive aureorum*, book 2: '*Cum quis ex aliena materia speciem aliquam suo nomine fecerit, Nerva et Proculus putant hunc dominum esse qui fecerit, quia quod factum est, antea nullius fuerat. Sabinus et Cassius magis naturalem rationem efficere putant, ut qui materiae dominus fuerit, idem eius quoque, quod ex eadem materia factum sit, dominus esset, quia sine materia nulla species effici possit: veluti si ex auro vel argento vel aere vas aliquod fecero, vel ex tabulis tuis navem aut armarium aut subsellia fecero, vel ex lana tua vestimentum, vel ex vino et melle tuo mulsum, vel ex medicamentis tuis emplastrum aut collyrium, vel ex uvis aut olivis aut spicis tuis vinum vel oleum vel frumentum. Est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et Sabinus et Cassius senserunt, si non possit reverti, verius esse, quod Nervae et Proculo placuit. Ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest: ac ne mulsum quidem ad mel et vinum vel emplastrum aut collyria ad medicamenta reverti possunt. Videntur tamen mihi recte quidam dixisse non debere dubitari, quin alienis spicis excussum frumentum eius sit, cuius et spicae fuerunt: cum enim grana, quae spicis continentur, perfectam habeant suam speciem, qui excussit spicas, non novam speciem facit, sed eam quae est detegit.*'

diverse materials they can be separated by expertise and returned to their original material.'[81] Paul, in his *Sabinus* book 15, states that 'one may cease to possess a movable thing in a variety of ways' such as when 'what we possess is converted into another *species*, as when a garment is woven out of wool.'[82] In book 14 too he says that: 'of all things that are not able to be restored to their *species*, that if the material remains the same though the *species* would perchance have changed, as if you made a statue from my copper or a goblet from my silver, I remain the owner of them.'[83] And Ulpian in *Edict* book 16 Digest 6.1.5.1, refers to the differing opinions on mead, which is made from my honey and your wine, some jurists saying that it is held in common whereas another with which Ulpian agrees that it belongs to the maker since it 'does not comprise its former *species*', whereas for lead which is mixed with silver, an action *in rem* can be brought since their detachment from each other is possible.[84] Lastly, in book 20 of his *Sabinus*, the jurist addresses gems set in gold or silver, referring to the view of Sabinus that they are an accessory to the gold or silver, 'for the one which is greater is the *species*', meaning that which the other object is deemed to adorn or be an accessory to.[85]

The jurisprudence tends to confirm, in these sources once more, a more complex and technical meaning for *species* than what might be expected for a casuistry that does not admittedly stray too far from everyday concrete objects. It is in neither the subjective intention nor in the objective substance that

[81] D. 41.1.12.1, Callistratus, *Institutionum*, book 2: '*Si aere meo et argento tuo conflato aliqua species facta sit, non erit ea nostra communis, quia, cum diversae materiae aes atque argentum sit, ab artificibus separari et in pristinam materiam reduci solet*.'

[82] D. 41.2.30.4, Paul, *Ad Sabinum*, book 15: '*Item quod mobile est, multis modis desinimus possidere: si aut nolimus, aut servum puta manumittamus, item si quod possidebam in aliam speciem translatum sit, veluti vestimentum ex lana factum*.'

[83] D. 41.1.24, Paul, *Ad Sabinum*, book 14: '*In omnibus, quae ad eandem speciem reverti non possunt, dicendum est, si materia manente species dumtaxat forte mutata sit, veluti si meo aere statuam aut argento Scyphum fecisses, me eorum dominum manere*.'

[84] D. 6.1.5.1, Ulpian, *Ad edictum*, book 16: '*Idem scribit, si ex melle meo, vino tuo factum sit mulsum, quosdam existimasse id quoque communicari: sed puto verius, ut et ipse significat, eius potius esse qui fecit, quoniam suam speciem pristinam non continet. Sed si plumbum cum argento mixtum sit, quia deduci possit, nec communicabitur nec communi dividundo agetur, quia separari potest: agetur autem in rem actio. Sed si deduci, inquit, non possit, ut puta si aes et aurum mixtum fuerit, pro parte esse vindicandum: nec quaquam erit dicendum, quod in mulso dictum est, quia utraque materia etsi confusa manet tamen*.'

[85] D. 34.2.19.13, Ulpian, *Ad Sabinum*, book 20: '*Perveniamus et ad gemmas inclusas argento auroque. Et ait Sabinus auro argentove cedere: ei enim cedit, cuius maior est species. Quod recte expressit: semper enim cum quaerimus, quid cui cedat, illud spectamus, quid cuius rei ornandae causa adhibetur, ut accessio cedat principali. Cedent igitur gemmae, fialis vel lancibus inclusae, auro argentove*.'

the species resides. Celsus refers in book 19 of his *Digest* to the fact that the *species* is primary in relation to the substance of which it is made, so that the fact that what is often designated in a will as 'furniture' for instance used to be made from earthenware, wood, glass, bronze and so on, whereas now is customarily made of ivory, tortoiseshell, silver, gold and jewels, doesn't matter from the point of view of the administration of the property. Rather than the substance, it is necessary to consider the form enclosed by a name and its relation to others used to refer in a legal sense to the goods that are part of a household: 'stores', 'silver', 'clothing', 'ornaments'.[86] And we can notice the way that Marcellus in the sole book of his *Replies*, deftly separates the juridical question of the birth or extinction of a *species* from that which would problematise the subjective intention of the one in whose power of divestment those things lie, such as in a case where a testatrix had bequeathed 'my large pearl with the hyacinths'. 'If it can be proved,' he says, 'that Seia [the testatrix] had altered the large pearl and some hyacinths into another *species* of ornament ..., could [the beneficiary of the bequest or trust] sue for these large pearls or hyacinths and can the heir be compelled to remove them from the latter ornament and hand them over?' The jurist says that it isn't possible to sue, since 'how can it happen that a bequest or *fideicommissum* is thought to subsist when the subject matter of the bequest has not remained in its own *species* but is in a certain way extinct? – omitting for the moment the fact that disassembling and altering would also seemed to have changed her will.'[87] The *species* doesn't describe the identity of the things, the pearl and hyacinths which remain as part of another ornament, but rather what was specifically given existence by the legal instrument of the bequest, and which must remain in this identity from its creation to its ultimate disposition as part of a proceedings. It is the same in the context of the *lex Falcidia* in relation to which

[86] D. 33.10.7.1, Celsus, *Digestorum*, book 19: *'Tubero hoc modo demonstrare supellectilem temptat: instrumentum quoddam patris familiae rerum ad cottidianum usum paratarum, quod in aliam speciem non caderet, ut verbi gratia penum argentum vestem ornamenta instrumenta agri aut domus. Nec mirum est moribus civitatis et usu rerum appellationem eius mutatam esse: nam fictili aut lignea aut vitrea aut aerea denique supellectili utebantur, nunc ex ebore atque testudine et argento, iam ex auro etiam atque gemmis supellectili utuntur. Quare speciem potius rerum, quam materiam intueri oportet, suppellectilis potius an argenti, an vestis sint.'*

[87] D. 34.2.6.1, Marcellus, *Responsorum*, sole book: *'Item quaero, si probari possit Seiam uniones et hyacinthos quosdam in aliam speciem ornamenti, quod postea pretiosius fecit additis aliis gemmis et margaritis, convertisse, an hos uniones vel hyacinthos petere possit et heres compellatur ornamento posteriori eximere et praestare. Marcellus respondit petere non posse: nam quid fieri potest, ut legatum vel fideicommissum durare existimetur, cum id, quod testamento dabatur, in sua specie non permanserit, nam quodammodo extinctum sit? Ut interim omittam, quod etiam dissolutione ac permutatione tali voluntas quoque videatur mutata.'*

Maecian in *Fideicommissa* book 8, states that in the calculation of the quarter of an estate that must be left to the heirs after accounting for any external bequests, the heirs shall not be liable for any portion of bequeathed property which is lost, nor even for the value of such property, 'any more than if all the things had been enumerated by *species*.'[88] It is as if the certainty that may be gained with regard to the proportional value of the property represented by the designation of every part of it by *species* – leaving none of it in uncertain or general terms – is unable to fill the real gap left by the simple absence of any one of those *species*.

Corpora, res, species

It remains for us to consider how the work in the Digest conceives of objects which are not *species* such as those which Paul tells us in his note on the action of *rei vindicatio* in *Edict* book 6, as mentioned above, can be accounted for only by their weight, number, measure: an amount of money, a certain weight of silver or gold, so-many head of cattle, a certain volume of wine and so on.[89] Once again, the jurists set themselves the task not so much of cataloguing these types of items, but rather of surveying a more precise contour to them. They ask such things as how and when certain goods that can be subject to a claim cease to be capable of being identified by measurement or kind, but only by an individual form. In an action for deposit, for instance, where gold or silver is claimed, Ulpian asks in *Edict* book 30, 'whether the *species* or the weight should be grasped?'[90] And in the following passage, where a sealed chest is deposited, he again questions 'whether it suffices for the chest alone to be asked for or the *species* enclosed in it?'[91] In *Sabinus* book 20, the same jurist notes Pomponius's view that, with regard to a bequest of silver, it is critical whether a weight of silver is left or simply 'worked silver': where the silver includes a gold ornament this will only be included in the case of 'worked silver' since 'an adjunct to a *species* of silver is subsumed' under it.[92] And in book 19, commenting on a testamentary

[88] D. 35.2.30.6, Maecian, *Fideicommissorum*, book 8: '*Res tamen, quae interierint, pro nulla parte ac ne aestimatio quidem debeatur, non magis quam si omnes res per speciem enumeratae relictae essententiarum*.'
[89] D. 6.1.6, Paul, *Ad edictum*, book 6.
[90] D. 16.3.1.40, Ulpian, *Ad edictum*, book 30: '*Si quis argentum vel aurum depositum petat, utrum speciem an et pondus complecti debeat?*'
[91] D. 16.3.1.41, Ulpian, *Ad edictum*, book 30: '*Si cista signata deposita sit, utrum cista tantum petatur an et species comprehendendae sint?*'
[92] D. 34.2.19.5, Ulpian, *Ad Sabinum*, book 20: '*Simili modo quaeritur, si cui argentum legetur, an emblemata aurea quae in eo sunt eum sequantur. Et Pomponius libro quinto ex Sabino distinguit multum*

clause which stated: 'Let my heir pay the money which I have bequeathed, and for the payment of which I have not set a time, at the end of one, two, and three years', Ulpian states that this shall apply only to things other than *species*, and that therefore 'if money is bequeathed which is in a safe, or wine which is in a cellar, the clause must be said to be inapplicable'.[93] What is critical here is neither the amount nor the volume nor the type of thing itself but the function of a container: any definite outer shape appears sufficient to convert what would otherwise be a generic quantity (*genus*) into what the law considers a case or an individual item (*species*).

The meaning of *species* is distinguished, last of all, not just from generic objects but also just as importantly from other kinds of individual objects: *corpora* (bodies) and *res* (things). It can be noted that a single thing or a single body may contain multiple *species*, while a single *species* may be comprised of multiple bodies or things. Consider the following passage from Ulpian's *Sabinus* book 46, which is necessary to quote in full:

> We ought to know that in the case of stipulations there are as many stipulations as there are sums and as many stipulations as there are *species*. Accordingly, it happens that when a single sum or *species* is introduced, which was not in the preceding stipulation, there is no novation [renewal], but it brings about two stipulations. However, although it is agreed that there are as many stipulations as there are sums and as many as there are things (*res*), yet if a person stipulates money which is in full view, or a heap of money, there are not as many stipulations as there are actual coins, but a single stipulation; for it is ridiculous that there should be individual stipulations for each individual denarius. It is also clear that a stipulation of legacies is single, although there may be more than one object or more than one legacy. A stipulation of a household or of all the slaves is also single; and so is a stipulation of a four-horse team or litter-bearers. But if a man stipulates this and this, there are as many stipulations as there are objects (*corpora*) stipulated.[94]

interesse, certum pondus ei argenti facti legetur an vero argentum factum: si pondus, non contineri, si argentum factum, contineri, quoniam argento cedit, quod ad speciem argenti iunctum est, quemadmodum clavi aurei et purpurae pars sunt vestimentorum. Idem Pomponius libris epistularum, etsi non sunt clavi vestimentis consuti, tamen veste legata contineri.'

[93] D. 30.30.6, Ulpian, *Ad Sabinum*, book 19: '*Item si legetur pecunia quae in arca est vel vinum quod in apothecis est, dicendum est cessare clausulam, quoniam quotiens species legetur, cessare diximus.*'

[94] D. 45.1.29.pr, Ulpian, *Ad Sabinum*, book 46: '*Scire debemus in stipulationibus tot esse stipulationes, quot summae sunt, totque esse stipulationes, quot species sunt. Secundum quod evenit, ut mixta una summa*

It is helpful to focus here on the iteration of the formula ('there are as many stipulations...') in its relation to each of the terms *species*, *res* (thing) and *corpora* (object/body). Ulpian repeats this key phrase three times: the first time by affirming what we 'ought to know' about this rule, that it truly holds for '*species*' so that the introduction of a new *species* necessarily means that it is covered by a new stipulation; the second time by dismissing – by way of an *argumentum ad absurdum* – the common idea that it necessarily holds for 'things (*res*)'; and the third by stating the condition upon which it may hold occasionally for 'objects/bodies (*corpora*)', namely where the individual objects are themselves specified in the stipulation. Through this passage, the jurist undertakes a whole meditation on the meaning of these terms: encouraging the reader to take care not to conflate *species* with either *res* or *corpora*, even though it may be common in the contemplation of typical legal situations for them to coincide with one another. We can add to this meditation that of Paul in book 21 of his *Edict* where *species* appears to be tied to the legal 'life' of a body or object. After discussing the possibility of bringing a *rei vindicatio* for things that have been joined, either for instance by welding where the substances are merged, or by soldering where they remain distinct, he points out that: 'in relation to bodies (*corporibus*) in which separate bodies exist, it is understood that the individual parts retain their own *species*, as individual men or individual sheep. Thus, I can vindicate a flock of sheep, even though your ram is mixed in with them, and you can vindicate the ram. The situation is different where the parts of the whole are stuck together; for if you fix an arm from someone else's statue on to my statue, it cannot be said that the arm is yours, because the whole statue comprises a single life (*spiritus*).'[95]

And it would not be out of place to refer, last of all, in this context to Papinian who in his *Questions* book 17, makes an individual thing considered

vel specie, quae non fuit in praecedenti stipulatione, non fiat novatio, sed efficit duas esse stipulationes. Quamvis autem placuerit tot esse stipulationes, quot summae, totque esse stipulationes quot res: tamen si pecuniam quis, quae in conspectu est, stipulatus sit, vel acervum pecuniae, non tot sunt stipulationes, quot nummorum corpora, sed una stipulatio: nam per singulos denarios singulas esse stipulationes absurdum est. Stipulationem quoque legatorum constat unam esse, quamvis plura corpora sint vel plura legata. Sed et familiae vel omnium servorum stipulatio una est. Itemque quadrigae aut lecticariorum stipulatio una est. At si quis illud et illud stipulatus sit, tot stipulationes sunt, quot corpora.'

[95] D. 6.1.23.5, Paul, *Ad edictum*, book 21: '*At in his corporibus, quae ex distantibus corporibus essent, constat singulas partes retinere suam propriam speciem, ut singuli homines singulae oves: ideoque posse me gregem vindicare, quamvis aries tuus sit immixtus, sed et te arietem vindicare posse. Quod non idem in cohaerentibus corporibus eveniret: nam si statuae meae bracchium alienae statuae addideris, non posse dici bracchium tuum esse, quia tota statua uno spiritu continetur.*'

under multiple '*species* of law' (*speciebus iuris*) tend toward iteration rather than duplication of the right attached to it. Confronting the case of a legatee who obtained an amount of money on a judgment against a single heir for a thing left in a bequest and where afterwards a codicil was opened which charged all the heirs to leave the same thing to the legatee, the fragment states that he cannot demand ownership of the thing a second time since 'he who uses many species of law does not bequeath the same thing more than once but says it more than once.'[96]

4. Conclusion

With this term, *species*, the classical jurists face the world of physical and social transformations and phenomena, the flux and mixture and contamination of real bodies, with a certain means of practical abstraction. But these abstractions, through which lawyers attempt to formalise the amorphous relations of facts to the certainty of laws, constitute as Yan Thomas says, the 'names of objects, under the appearance of being the names of ideas' (Thomas 2006: 196). The jurists don't order their whole universe into *species* in order to take hold of it from a certain theoretical, dialectical and taxonomic point of view. They prefer to imagine the form of legal obligation as though it were inextricably tied, under the sign *species*, to the endurance or extinction of a specific thing, an actual object.

Would it be possible to summarise the meaning of a term – *species* – used in a work such as Justinian's Digest, where the contexts, the thinkers, the problems, the interpretations and receptions, in which that term appears, as we have seen, are varied and famously, irretrievably, divorced from their original textual contours? It is more than a rigid legal technicality that justifies taking a closer look at a single word in the context of its place and function in a work of juridical literature. The casuistic method common to the Roman classical jurists lends its originality to the way in which the word *species* features in this body of work and ensures that the choice of it in certain contexts is dictated by reasons that are far from dogmatic, not entirely idiomatic, and which in fact return to a unique set of techniques for fashioning an intellectual object: the case.

This paper has not sought to critique the translations of the word *species* in the main English editions of the Digest. Any translation requires, of

[96] D. 31.66.5, Papinian, Quaestionum, book 17: '*eum enim, qui pluribus speciebus iuris uteretur, non saepius eandem rem eidem legare, sed loqui saepius*.'

course, the choice of a range of words to replace the diversity of meanings enclosed in the Latin and the English. But, just as this juridical tradition makes use of words for more than what they represent or signify in ordinary language, but also in what they formulate, in precise ways, with precise effect, on a legal plane, one should not discount the unique function that sometimes attaches to a single term in its jurisprudential contours. In this way, when translation into another language necessarily substitutes one word for another, it cannot also avoid subtracting sometimes something of the techniques and operations attached to the original words – occasionally over-emphasising a doctrinal meaning, while other times foregrounding the intellectual or conceptual over the procedural and so on.

The word *species* refers in the Digest both to putting of individual cases as well as to the naming of individual objects: the products not of nature, chance or social development, but of a definite juristic craft. These artefacts can bear only a coincidental relation to the world of *phenomena* and *noumena*. They refer no more to the data of actual experience as they do to the things-in-themselves. Whenever the word *species* is used in the juridical texts, one can notice an attempt to highlight a disjunction operating at various levels in the law: between, firstly, the underlying material of an object and the outer form given to it, between the physical form and the procedural identification or evaluation of the thing, and finally between the merely procedural identity or value and its individual and unique juridical shape. In *species*, a thing realises the independence of an identity and life in a jurisprudential operation that grasps it. It is quite clearly much more than the product of a classificatory science. The world is neither divided into nor ordered by juridical *species*. On the contrary, between the words that in law remain formulaic and the things whose material form constitute the basis of legal action, as Yan Thomas observes, the law produces 'a specific world of *realia*' (Thomas 1978: 112): a world of which the reality, the originality and specificity is accounted for by *species*.

What did the classical Roman jurists have at stake in the fashioning, the identification, the elaboration, the theorisation of *species*? What this analysis of the use of this term in the Digest shows is that to the extent that they were inclined to think the law by way of *species*, they did not just receive and re-employ a theory of forms and a method of scientific classification unquestioningly from the Greeks, but in fact actively recruited it to a jurisprudential project which remained their own. There is much innovation to the work of Roman lawyers when, like lawyers today, they construct ideas that are neither confirmed

nor disproved by the experience of the natural or social world, but which grasp an important institutional shape of what they deal with. Instead of realising in *species* the contour to ideal forms and perpetual essences in nature and in relation to which everyday objects are mere reflections, instead of subsuming the particular under the general or pursuing the general 'form' of law itself as the object of 'general jurisprudence', the lawyers realise the unique 'juridical morphology' in everyday objects (Thomas 1999: 217), in the increasingly singular objects that concern them: that is, individual cases for jurisprudence.

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