

Dictameny. - G. Liss.

THE
DIGEST OF
JUSTINIAN

LATIN TEXT EDITED BY
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WITH THE AID OF
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CONTENTS

Preface	xi
Glossary	xv
Headings/Titles	xxviii
The Composition of the <i>Digest</i>	xlvi
[The Whole Body of Law]	1
The Confirmation of the <i>Digest</i>	lv
The Ancient Writers	lxv

BOOK ONE 1

1	Justice and Law	1
2	The Origin of the Law and All the Magistracies and the Succession of the Jurists	3
3	Statutes, <i>Senatus Consulta</i> , and Long-Established Custom	11
4	Enactments by Emperors	14
5	Human Status	15
6	Those Who Are <i>Sui Juris</i> and Those Who Are <i>Alieni Juris</i>	17
7	Adoptions and Emancipations and the Other Forms of Release from Power	19
8	"Things" Subdivided and Qualitatively Analyzed	24
9	Senators	26
10	Duties of Consul	27
11	Duties of Prefect of the Praetorian Guard	28
12	Duties of Prefect of the City	28
13	Duties of Quaestor	30
14	Duties of Praetors	30
15	Duties of Prefect of the City Guard	31
16	Duties of Proconsul and of Legate	31
17	Duties of Prefect of Egypt	34
18	Duties of Governor	34
19	Duties of Imperial Procurator or <i>Rationalis</i>	37
20	Duties of the <i>Juridicus</i>	38
21	Duties of One to Whom Jurisdiction Is Delegated	38
22	Duties of Assessors	39

BOOK TWO 40

- 1 The Administration of Justice 40
- 2 The Same Rule Which Anyone Maintains against Another Is To Be Applied to Him 42
- 3 If Anyone Should Not Obey One Who Administers Justice 43
- 4 Summoning to Court 44
- 5 If Anyone Summoned to Court Does Not Appear or If Anyone Has Summoned One Whom in Accordance with the Edict He Ought Not To Have Summoned 47
- 6 Let Those Summoned Either Appear or Provide a Guarantor or Give an Undertaking 47
- 7 Let No One Remove by Force One Who Is Summoned to Court 47
- 8 Those Who Are Compelled To Give Security or Promise by Oath or Who Are Liable under Their Own Promise 48
- 9 How Provision for a Guarantee May Be Made Where a Noxal Action Is Brought 51
- 10 One Who Prevents Another Appearing in Court 52
- 11 If Anyone Does Not Honor a Promise Given on Account of Appearance in Court 53
- 12 Holidays, Adjournments, and Various Other Times 57
- 13 Formal Pronouncements 58
- 14 Pacts 62
- 15 *Transactiones* 74

BOOK THREE 79

- 1 Applications to the Magistrate 79
- 2 Persons Incurring *Infamia* 82
- 3 Procurators and Defenders 86
- 4 Actions in the Name of or against Any Corporate Body 96
- 5 Unauthorized Administration 98
- 6 Vexatious Litigants 109

BOOK FOUR 112

- 1 *Restitutiones in Integrum* 112
- 2 Acts Done under Duress 113
- 3 Malice or Fraud 119
- 4 Persons under Twenty-five 125
- 5 Change of Civil Status 138
- 6 The Grounds on Which Those over Twenty-five Obtain *Restitutio in Integrum* 140
- 7 Transfers Made in Order To Change the Condition of an Action 147
- 8 Matters Referred to Arbitration and Those Who Have Undertaken To Arbitrate in Order To Make an Award 149
- 9 Let Seamen, Innkeepers, and Stablekeepers Restore What They Have Received 160

BOOK FIVE 164

- 1 Actions: Where a Man Should Sue and Be Sued 164
- 2 The Undutiful Will 174
- 3 The Claim for an Inheritance 182
- 4 Claims for Part of an Inheritance 197
- 5 Possessory Claims for an Inheritance 200
- 6 Claims for an Inheritance Based on a *Fideicommissum* 200

BOOK SIX 201

- 1 *Vindicatio* of Property 201
- 2 The Publician Action *In Rem* 212
- 3 Where the Action is for Vectigalian, That Is, Emphyteutic Land 215

BOOK SEVEN 216

- 1 Usufruct and the Way in Which a Man May Exercise It 216
- 2 The Accrual of Usufruct 231
- 3 When the Legacy of a Usufruct Vests 234
- 4 The Ways in Which a Usufruct or a Right of Use Is Lost 234
- 5 The Usufruct of Things Which Are Consumed or Diminished by Use 239
- 6 The Actions for Claiming a Usufruct or Denying That Another Has a Right to One 240
- 7 The Services of Slaves 242
- 8 The Right of Use and the Right of Habitation 243
- 9 The Way in Which a Usufructuary Should Give Security 247

BOOK EIGHT 250

- 1 Servitudes 250
- 2 Urban Praedial Servitudes 252
- 3 Rustic Praedial Servitudes 258
- 4 Rules Common to Both Rustic and Urban Estates 264
- 5 Where an Action Is Brought To Recover a Servitude or To Contest Another's Right to One 267
- 6 How Servitudes Are Lost 272

BOOK NINE 276

- 1 If a Four-footed Animal Is Alleged To Have Committed *Pauperies* 276
- 2 The *Lex Aquilia* 277
- 3 Those Who Pour or Throw Things out of Buildings 293
- 4 Noxal Actions 297

BOOK TEN 306

- 1 The Action for Regulating Boundaries 306
- 2 The Action for Dividing an Inheritance 308
- 3 The Action for Dividing Common Property 322
- 4 The Action for Production 330

BOOK ELEVEN 336

- 1 Interrogations before the Magistrate and Interrogatory Actions 336
- 2 What Matters May Be Taken to the Same Judge 340
- 3 The Action for Making a Slave Worse 340
- 4 Runaway Slaves 344
- 5 Gamblers 346
- 6 If a Surveyor Gives a False Report about Measurements 347
- 7 Religious Things, Funeral Expenses, and the Right To Conduct Funerals 348
- 8 Burying the Dead and Building Tombs 356

BOOK TWELVE 357

- 1 Things Credited Giving Rise to Fixed Claims and the *Condictio* 357
- 2 Voluntary, Compulsory, and Judicial Oaths 364
- 3 Oaths as to the Value in Issue 372
- 4 The *Condictio* for Nonreciprocation 374
- 5 The *Condictio* for Immoral or Illegal Payments 377
- 6 The *Condictio* for Money Not Owed 379
- 7 The *Condictio* for No Fixed Cause 389

BOOK THIRTEEN 391

- 1 The *Condictio* for Theft 391
- 2 The *Condictio* under Statute 393
- 3 The *Condictio* for Fixed Quantities 393
- 4 Where the Obligation Is To Give at a Fixed Place 394
- 5 The *Constitutum* of Money 396
- 6 Loan for Use: The Actions for and against the Lender 401
- 7 *Pignus*: The Actions for and against the Pledgee 406

BOOK FOURTEEN 415

- 1 The Action against the Shipowner 415
- 2 The Rhodian Law of Jettison 419
- 3 The Action for the Business Manager's Conduct 422
- 4 The Action for Distribution 426
- 5 Transactions Allegedly Effected with a Person in the Power of Another 430
- 6 The *Senatus Consultum Macedonianum* 431

BOOK FIFTEEN 436

- 1 *The Peculium* 436
- 2 *The Action on the Peculium Which Prescribes in One Year* 450
- 3 *Benefit Taken* 451
- 4 *Authorized Transactions* 457

W Sri L. = copy? - Ulpian - look up date.

PREFACE

The compilation of Roman law which was enacted under the Byzantine emperor, Justinian I (c. 482–565), and which, together with that emperor's later laws, subsequently came to be known as the *Corpus Juris Civilis* has been without doubt the most important and influential collection of secular legal materials that the world has ever known. The compilation preserved Roman law for succeeding generations and nations. All later Western systems borrowed extensively from it. But even more significantly, that strand of the Western tradition encompassing the so-called civil law systems—the law of Western continental Europe, Latin America, the parts of Africa and other continents which were former colonies of continental European powers, and to some extent Scotland, Quebec, Louisiana, Sri Lanka, and South Africa—derives its concepts, approaches, structure, and systematics of private law primarily from the long centuries of theoretical study and putting into practice of the *Corpus Juris Civilis*.

Of the *Corpus Juris Civilis* the most important part is the *Digest*, the others being the *Code*, the *Institutes*, and the *Novels*.

Justinian became co-emperor with his uncle Justin in 527, and sole emperor when Justin died in the following year. At once he began to restate the law. He first appointed a commission to make a collection of imperial rescripts, that is, enactments or statements of the law. The rescripts were to be updated. This resulted in the first *Code* of 530 which has not survived because it was replaced by a revised *Code* in 534. The revised *Code* is in twelve books divided into so-called titles (or chapters), each devoted to a particular subject, in which the rescripts are arranged chronologically. After the first *Code*, Justinian turned his attention to the writings of the classical Roman jurists, primarily from the first century B.C. to the end of the first third of the third century A.D. Discussions of disputed points of law abounded in their works, and Justinian, to resolve some of the most important disputes, promulgated the *Fifty Decisions* which have not survived as an entity, but many of the individual decisions presumably remain as rescripts in the second *Code*. In December 530 he ordered the collection and abridgment of juristic writings which is called the *Digest*. He also ordered the preparation of a new elementary textbook for students, the *Institutes*, which was modeled primarily on the *Institutes* of the second-century jurist, Gaius, and which came into effect as statute on the same day as the *Digest*, December 30, 533. This elementary work is in four books; it is the most systematically arranged part of the *Corpus Juris Civilis*, and, directly and indirectly through the mediation of seventeenth- and eighteenth-century works modeled on it, it has become the basis for the structure of almost all of the modern civil codes. After the completion of the compilation of existing law, Justinian continued to legislate and these later rescripts are known as the *Novellae* or *New Constitutions*. They have had relatively little impact on later Western law.

The classical jurists wrote numerous books of various types: general commentaries on the civil law usually in the form of commentaries on the jurist Sabinus; general

commentaries on the Edict of the Praetor who was the elected official with control over the most important law courts; collections of their replies to legal questions, both hypothetical and real; monographs on particular legal subjects; and elementary textbooks. For the preparation of the *Digest* or *Pandects* Justinian ordered his quaestor, Tribonian, to have all the ancient books of authority read and the substance extracted. All superfluities were to be removed, as were obsolete rules and any that were already recorded in the *Code*. The task which the sixteen compilers completed in three years, although it is said that completion in ten was not thought possible, involved, according to Justinian, the reading of almost two thousand volumes. The compilers retained at the head of each extract the name of the author and the book in which it appeared. Justinian's instructions to his compilers and the prefaces issued on the completion of the undertaking appear at the beginning of this translation.

In the spring of 1978, the President of the Commonwealth Fund, Dr. Carleton B. Chapman, wrote to Alan Watson, Professor of Civil Law in the University of Edinburgh, and raised the question why there was no complete translation of the *Digest* into English, apart from the unsatisfactory one of S. P. Scott. Eventually, Alan Watson produced a proposal for a translation, the two met in New York in September, 1978, the proposal was approved by Carleton Chapman, and funding was generously provided by the Commonwealth Fund. By November 1978, Alan Watson had organized a team of translators who nearly completed their translation by the deadline of December 31, 1979. Each book, once translated, was sent to another scholar for revision; and the complete, revised translation was in the hands of Alan Watson by April 1980. Publication, again made possible through the generosity of the Commonwealth Fund, has taken longer.

From the outset, the director of the project enjoyed the enormous help of Mr. Grant McLeod as assistant director, who also prepared the glossary (with the assistance of Dr. Olivia Robinson). On Alan Watson's appointment to the University of Pennsylvania in September 1979, Professor J.A.C. Thomas of University College, London, assumed the post of assistant director which he retained until his death in June 1981. All who knew him will understand just how much energy and enthusiasm he injected into the project, and how much more difficult the task would have been without his never failing support. He translated and revised more books than anyone else. Another particularly tragic loss was Mr. Peter MacIntyre, assistant secretary of the University of Edinburgh, who was preparing an exceptionally detailed index. Without him, the index has had to be abandoned. The lack is serious, but the reader who is not a specialist in Roman law will easily find the *Digest* titles that are relevant to his studies. Then a reading of the appropriate pages in any of the standard textbooks will enable him to find the important *Digest* texts on the subject which are not cited in the obvious title.

The translators were as follows: preliminary matters, Dr. G. E. M. de Ste Croix; book one, Professor D. N. MacCormick; book two, Professor Geoffrey MacCormack; book three, Mr. Tom Kinsey; book four, Professor Geoffrey MacCormack; book five, Mr. Tom Kinsey; book six, Professor P. G. Stein; book seven, Mr. David Fergus; book eight, Mr. David Fergus; book nine, Dr. Colin Kolbert; book ten, Mr. Harry Hine; book eleven, Mr. Harry Hine; book twelve, Professor Peter Birks; book thirteen, Professor Peter Birks; book fourteen, Mr. Tony Weir; book fifteen, Mr. Tony Weir; book sixteen, Mr. R. Evans Jones; book seventeen, title one, Professor W. M. Gordon, Dr. Olivia Robinson, and Mr. David Fergus; book seventeen, title two, Dr. Peter Garnsey; book eighteen, Professor J. A. C. Thomas; book nineteen, Professor Bruce Frier; book twenty, Professor Tony Honoré; book twenty-one, Professor J. A. C. Thomas; book twenty-two, Professor A. M. Honoré; book twenty-three, Mr. Grant McLeod; book twenty-four, Mr. Grant McLeod; book twenty-five, Mr. Grant McLeod; book twenty-six, Dr. Susan Hart; book twenty-seven, Mr. Andrew Lewis; book twenty-eight, Professor W. M. Gordon; book twenty-nine, Professor W. M. Gordon; book thirty, Mr. Tom Braun; book thirty-one, Mr. Tom Braun; book thirty-two, Mr. Tom Braun; book thirty-

three, Mr. Robin Seager; book thirty-four, titles one through three, Dr. Shelagh Jameson; book thirty-four, titles four through nine, Mr. C. J. Tuplin; book thirty-five, Professor J. A. C. Thomas; book thirty-six, Mr. John L. Barton; book thirty-seven, Dr. Shelagh Jameson; book thirty-eight, Dr. Shelagh Jameson; book thirty-nine, Mr. C. J. Tuplin; book forty, Professor P. A. Brunt; book forty-one, Professor J. A. C. Thomas; book forty-two, Professor J. A. C. Thomas; book forty-three, Mr. Tom Braun; book forty-four, Professor Ben Beinart; book forty-five, Dr. Susan Hart, Mr. Andrew Lewis, and Professor Ben Beinart; book forty-six, Professor Ben Beinart; book forty-seven, Professor J. A. C. Thomas; book forty-eight, Dr. Olivia Robinson; book forty-nine, Dr. Olivia Robinson; book fifty, Dr. Michael Crawford.

With so many translators involved it was not thought possible or necessarily desirable to seek for consistency throughout the work. It was regarded as sufficient to have consistency within an individual book, hence that was the minimum unit ascribed to each translator. In addition some guidelines were produced: 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. The terms in the latter category are explained in the Glossary.

The facing Latin text is that of the great two volume edition of Theodor Mommsen, published in 1868 by Weidmann, Berlin. That was taken by the translators as the main text, but they could, and occasionally did, adopt any of the readings contained in the apparatus.

ALAN WATSON
Philadelphia,
October 1984

GLOSSARY

Abolitio. See *Accusatio*.

Acceptilatio (Formal Release). The method by which a creditor freed a debtor from his obligation under a verbal contract [*stipulatio* q.v.] producing the same effects as performance. See *D.46.4*.

Accessio (Accession). A general term for the acquisition of ownership by joining property to or merging it with something already owned by the acquirer. See *D.41.1*.

Accusatio (Accusation). The bringing of a criminal charge. Normally (exclusively until the early empire) this was left to the initiative of a private citizen acting as accuser [*delator*]. If a magistrate accepted the charge, he ordered its registration [*inscriptio*] on an official list. It could be removed from the list and so annulled [*absolutio*] during a public amnesty, or where the accuser withdrew the charge with the permission of the court. Unjustified withdrawal was a crime in itself [*tergiversatio*]. See *D.48.2,16*.

Actio Arbitraria. An action in which the judge could order the defendant to restore or produce the property at issue. If he failed to do so, the final judgment penalized him in various ways. See *D.6.1.35.1*; *D.4.2.14.4*.

Actio Civilis. See *Ius Civile*.

Actio Confessoria. See *Servitus*.

Actio Contraria. An action given to certain persons in particular legal situations where the normal direct action lay against them. See tutors [*tutor* q.v.] *D.27.4*; depositors *D.16.3*; borrowers for use *D.13.6.*; creditors in the contract of *pignus* [q.v.] *D.13.7*.

Actio Famosa. See *Infamia*.

Actio in Factum. An action given originally by the *praetor* [q.v.] on the alleged facts of the case alone, where no standard civil law [*ius civile* q.v.] action was directly applicable. The expression *actio utilis* is also found, referring to a praetorian action which extended the scope of an existing civil law action, for example, by means of a fiction. The exact difference, if any, between this and the *actio in factum* is not known. See *D.9.2*.

Actio in Personam (Personal Action). An action based on an obligation of the defendant, whether this arose from a contract, delict, or other legal circumstance. Such an action lay only against the person under the obligation. Cf. *Actio in Rem*.

Actio in Rem (Real Action). An action asserting ownership of property, or other related though more limited rights over it, for example, a servitude [*servitus* q.v.]. Such an action lay against anyone withholding the property. Cf. *Actio in Personam*.

Constitutio. The general word for imperial legislation of all kinds. See D.1.4.

Constitutum Debiti. A pact [*pactum* q.v.] consisting of an agreement to pay an existing debt, incurred by the party himself or some other person, at an agreed time. It gave rise to an *actio in factum* [q.v.] for half as much again as the original debt. See D.13.5.

Consul (Consul). The title of the two supreme magistrates of the republican constitution, elected annually. Consuls continued to be elected during the empire with various administrative and judicial powers, but the position became increasingly an honorary one until it was abolished by Justinian. See D.1.10.

Conubium. The right to contract a civil law [*ius civile* q.v.] marriage, possessed generally only by Roman citizens.

Crimen (Crime). This term can denote a criminal charge or criminal proceedings as well as the crime itself. See D.47.11.

Cura, Curatio (Care). These terms were applied to various institutions whereby the well-being and/or property of certain persons were legally safeguarded by someone else, a *curator*. The most important forms were care of a lunatic, of a spendthrift, and the guardianship of an independent [*sui iuris* q.v.] person who was a *minor* [q.v.]. See D.27.10; D.4.4.

Curator. See *Cura*.

Decurio (Decurion). A member of a municipal council. This body decided all local matters. During the later empire the office became more burdensome than desirable in many places. See D.50.2.

Defensor (Defender). A person who defends another's interests at a trial, often because of his legal relation to him, for example, as *tutor* [q.v.]. See D.3.3.

Delator. See *Accusatio*.

Delegatio. A form of novation [*novatio* q.v.] in which the alteration consisted of a change of the creditor or the debtor in relation to the other party. See D.46.2.

Deportatio (Deportation). The punishment of perpetual banishment. It was the most severe of kinds of banishment, since it involved confinement to a fixed place, confiscation of property, and loss of citizenship. See D.48.22.

Dies utiles. The days on which legal proceedings could be brought.

Divus (Deified). A title granted to an emperor after death if he had been officially consecrated as a state deity.

Edictum (Edict). A proclamation by a magistrate or the emperor. In the republic, the edicts which had the greatest effect on private law were those of the *praetores* [q.v.; see also *aedilis*]. Each praetor could issue a new edict for his year in office, setting out the actions he was prepared to allow, but in practice he took over much of the material from his predecessors. This led to the development of an almost standard body of rules known as the "Edict," containing the numerous praetorian extensions to the civil law [*ius civile* q.v.]. This process survived the transition to empire, but the Emperor Hadrian ordered the consolidation of the Edict early in the second century A.D.; thereafter it does not appear to have been a source of new law.

Emancipatio (Emancipation). Voluntary release from parental power [*patria potestas* q.v.], conferring independent [*sui iuris* q.v.] status. See D.1.7.

Emphyteusis. A real right over the property of another, consisting in a grant of land by the state or local authority on a long lease or in perpetuity for a groundrent. See D.6.3.

account of what ought to be done or given in good faith (*bona fides*) by the parties. This gave the judge wide discretion as to the amount of damages he could award. He could also take account of any defense [*exceptio q.v.*] even where it had not been expressly stated by the defendant.

Bonorum Possessio. A type of possession granted originally by the *praetor* [q.v.] giving rise to an extended or sometimes alternative system of succession, both testate and intestate, to that provided by the civil law [*ius civile q.v.*]. It was protected by an *interdictum* [q.v.] and an action. See D.37.1.

Calumniā. (a) In private law, vexatious litigation or receiving money for this purpose.

(b) In criminal law, the offense of maliciously or recklessly bringing a false criminal charge. See D.3.6.

Capitalis (Capital). A criminal matter where the penalty is death, loss of liberty, or loss of citizenship.

Capitis Deminutio (Change of Civil Status). A loss of or change in one or more of the three basic elements of civil status, that is, freedom, citizenship, and membership of a family. See D.4.5.

Castigatio (Corporal Punishment). This took a number of forms: *flagellatio* was generally a whipping for slaves; *fustigatio* was beating with a rod or club, mainly a military punishment; *verberatio* involved multiple lashes and seems to have been severe.

Cautio. (a) A guarantee, either real or personal, that certain duties will be fulfilled.

(b) A written document providing evidence of a contract, usually *stipulatio* [q.v.].

Census (Census). A public register of citizens, which estimated their property holdings and so assigned them to the various social classes. See D.50.15.

Codex. A collection, official or unofficial, of imperial enactments rather than a complete statement of the law as in a modern "code." See preface.

Cognitio. (a) A type of civil procedure, often referred to as *extra ordinem*, signifying its distinctness from the Formulary System [*formula q.v.*] of classical times, which it replaced in the third century A.D. The main difference was that under the *Cognitio* System the whole proceedings took place before an imperial magistrate.

(b) The term is also used in a more general way in administrative and criminal proceedings to cover the competent area of a judicial inquiry, or the investigation itself.

Collatio Bonorum. A contribution in respect of prior gifts which was required of emancipated [*emancipatio q.v.*] children who wished to benefit by intestate succession to their father. See D.37.6.

Collegium (Association). Any association, public or private, for religious, professional, or other purposes. Legal restrictions were placed on such associations to prevent subversive activities. See D.47.22.

Compensatio (Set-Off). The reduction of any claim by taking into account the defendant's counterclaim based on another transaction. See D.16.2.

Concubinatus (Concubinage). A legally and socially recognized monogamous relationship short of marriage. See D.25.7.

Condictio. A type of action alleging a civil law [*ius civile q.v.*] debt without mentioning any cause of action, available not only as a contractual remedy, but also on a quasi-contractual basis, where unjustified enrichment could be shown. Although its form was always the same, its name varied according to the situation involved, for example, the *condictio* for money not due [*indebiti*], that is, money paid in error. See D.12.4-13.3.

Exceptio (Defense). A defense, inserted originally in the *formula* [q.v.], which did not deny the *prima facie* validity of the claim, but adduced some circumstance which nullified it, for example, duress. There was a number of these defenses, each named after the fact they alleged, for example, the defense of fraud. See D.4.3.

Exhereditio (Disinheritance). The exclusion by a testator of his issue or other persons from taking benefit under his will. Many formal and material restrictions were placed upon such exclusion. See D.28.2.

Exilium (Exile). This term was often used to mean voluntary exile as well as involuntary banishment. Voluntary exile after, or to escape from, capital condemnation involved loss of citizenship and property as well as being made an outlaw.

Extraneus Heres. See *Heres*.

Extra Ordinem (Extraordinary). (a) In private law, this refers to the *Cognitio* System [cognitio q.v.] (b) In criminal law, it refers to proceedings other than those authorized for the *quaestiones perpetuae* [q.v.]. The criminal jurisdiction of, for example, the urban praefect [praefectus q.v.] was thus *extra ordinem*. See D.50.13.

Familia (Family). As well as a family in the modern sense this term sometimes also covers a person's whole household, including freedmen and slaves as well as relations. See D.50.16.195.

Fideicommissum. A charge in a will imposed on an heir or legatee to transfer property to someone else. See D.30-31.

Fideiussio (Verbal Guarantee). A verbal contract of personal guarantee, usually but not necessarily covering a principal debt contracted by *stipulatio* [q.v.], its form being a variant of that contract. See D.46.1.

Filiusfamilias (Son-in-Power). A son subject to the parental power [*patria potestas* q.v.] of the head of the household, the *paterfamilias* [q.v.]. He was subject to various disabilities, especially in the field of property, although his position was improved by the existence of the *peculium* [q.v.]. This subjection only applied in private law; in public law matters a son-in-power was in the same position as the head of the household.

Flagellatio. See *Castigatio*.

Formula. The Formulary System was a type of civil procedure introduced in the republic and continuing to operate until the third century A.D., though it was increasingly superseded and eventually replaced by the *Cognitio* [q.v.] System. However, many traces of it can still be found in the *Digest*. The procedure was controlled by the *praetor* [q.v.] who was required by the parties to frame a formal statement of the legal issues in the case, the *formula*. This was then passed on to a lay judge [*iudex* q.v.] for a hearing on the facts. Details of the various kinds of *formulae* available would be found in the Edict [*edictum* q.v.].

Fustigatio. See *Castigatio*.

Habitatio (Right of Habitation). The right to occupy a house for life. It was a personal servitude [*servitus* q.v.]. See D.7.8.

Heres (Heir). The person who inherits nearly all the rights and duties of the deceased by testate or intestate succession. There was a number of different kinds of heir. A *heres suus* was someone subject to the deceased's parental power [*patria potestas* q.v.] at the time of death; A *heres suus et necessarius* was such a person who became independent [*sui iuris* q.v.] by the death. This type of heir could not refuse the inheritance, as was also the case with the *heres necessarius*, a slave who was

manumitted [*manumissio* q.v.] for this purpose. An *extraneus heres* was someone not subject to the deceased's parental power at time of death, either being unrelated or, for example, emancipated [*emancipatio* q.v.]. A *heres legitimus* was a person who succeeded in accordance with the civil law [*ius civile* q.v.] rules on intestacy. See D.28.5.

Honestiores. See *Humiliores*.

Humiliores. Persons of low social status, in contrast to the upper classes, the *honestiores*. The main legal difference was that only the former were liable to certain kinds of punishment, for example, crucifixion, torture, and corporal punishment.

Hypotheca. A contract of pledge in which the creditor obtained neither ownership nor possession of the property pledged. See D.13.7.

Imperium (Authority). The power of the higher republican magistrates, including the *praetor* [q.v.], and later the emperor to issue orders and enforce them, in particular the right to administer justice and to give military commands.

Impubes. A person under the age of puberty, which was eventually fixed at twelve years of age for girls and fourteen for boys. Such persons lacked full legal capacity, and those who were independent [*sui iuris* q.v.] had to be in tutelage [*tutela* q.v.] See D.26.

Incola. A person domiciled in a city or community other than the one in which he was born. See D.50.1.

Infamia. A condition of disgrace resulting from certain types of immoral or wrongful conduct. It followed, for instance, on conviction for a crime, or condemnation in delictal actions and those involving breach of trust called *actiones famosae*. Many legal disabilities resulted from this condition. See D.3.2.

Infans. A child under the age at which rational speech was possible, later fixed at seven years old. Such persons were a type of *impubes* [q.v.] with few legal powers.

Inscriptio. See *Accusatio*.

Instititor. See *Procurator*.

Interdictum (Interdict). An order issued originally by the *praetor* [q.v.] or other magistrate in an administrative capacity, giving rise to further proceedings if disregarded. Many interdicts in private law were concerned with the protection of possession against unlawful interference in various circumstances. At times, interdicts were a procedural device for awarding interim possession, the party who acquired this becoming the defendant in a subsequent action. But they were also for many other private law and also public law purposes, for example, the interdict from fire and water was a form of banishment pronounced on a voluntary exile [*exilium* q.v.]. The complicated procedure required under the Formulary System [*formula* q.v.] for the use of interdicts became obsolete under the *Cognitio* [q.v.] System, and they were replaced by ordinary actions, although the issues and much of the terminology of the older system remained. See D.43.

Iudex (Judge). In the private law Formulary System [*formula* q.v.], the judge was a private individual chosen by the parties to decide the case on its facts, the legal issues having already been defined by the *praetor* [q.v.]. Under the later *Cognitio* [q.v.] System and in public and criminal matters, the term was used of any imperial official with jurisdiction, for example, a provincial governor [*praeses* q.v.]. See D.2.1.

Ius Civile (Civil Law). The original basic rules, principles, and institutions of Roman law, deriving from the various kinds of statute [*lex, senatus consultum, constitutio*

qq.v.] and from juristic interpretation. They were applicable directly only to Roman citizens, but in 212 A.D. the *constitutio Antoniniana* conferred citizenship on most of the inhabitants of the empire. The expression is sometimes used in a more philosophical sense to mean the law peculiar to any community or people, whatever its source. Cf. *ius gentium* and *ius honorarium*. See D.1.1.

Ius Gentium. The original meaning of this term was probably the body of rules, principles, and institutions developed in the late republic to cover commercial dealings with peregrines [*peregrinus* q.v.] and other noncitizens, who could not use the civil law [*ius civile* q.v.]. Its development may be connected with the peregrine praetor [*praetor* q.v.]. Less formalistic and more sophisticated than the civil law, it came to have a more philosophical sense of the law which was common to all peoples and communities, although its detailed provisions were Roman in character and treated as ordinary rules of law. Cf. *ius civile*. See D.1.1.

Ius Honorarium (Praetorian Law). The law introduced by magistrates, especially the praetor [*praetor* q.v.] by means of his Edict [*edictum* q.v.], to aid, supplement, or correct the existing civil law [*ius civile* q.v.]. It provided a large number of remedies which were often preferable to the civil law ones, for example, in the field of succession. See *bonorum possessio*. In juristic writings it was commonly treated as distinct from the civil law, although both were simply parts of Roman law as a whole. Cf. *ius civile*.

Iusiurandum (Oath). Oaths were used in a number of contexts. (a) In general, a party could choose to swear an evidential oath before a judge [*iudex* q.v.]. But certain oaths were compulsory, for example, as to the value of the property claimed and that *calumnia* [q.v.] was absent. See D.12.2, 3. (b) In certain actions, the parties could challenge each other to swear oaths as to the validity of their cases. If the challenge was refused, the person refusing lost his case, bringing the trial to a speedy conclusion. This type of oath was called "necessary." See D.12.2. (c) In any action, a party could offer to swear or challenge the other party to swear to the validity of his case. The challenge need not be accepted, but if it was, an action or defense of oath was allowed in any subsequent proceedings. Here the oath was called "voluntary." See D.12.2. (d) An oath was required of a slave about to be manumitted [*manumissio* q.v.] that he would promise to perform certain services for his former master [*patronus* q.v.]. See D.38.1.7.

Ius Naturale (Natural Law). A vague expression in Roman law. At times it was merely a synonym for the term *ius gentium* [q.v.]. It often means that the rule or principle in question was thought of as based on everyday experience, referred to as "natural reason" [*naturalis ratio*]. Sometimes it refers to the justice or fairness of a rule, but the view of natural law as a universal ideal order in any way contrasted with positive law is almost entirely absent. See D.1.1.

Legatus (Legate). A term with a number of meanings. (a) An ambassador. Such a person on an imperial mission was called a *legatus Augusti* (*Caesaris*). See D.50.7. (b) The deputy of a provincial governor [*proconsul* q.v.] with special delegated jurisdiction. See D.1.16. (c) A type of provincial governor was called a *legatus Augusti* (*Caesaris*) *pro praetore*. See D.1.18.1. (d) The commander of a legion.

Legitimus Heres. See *Heres*.

Lenocinium. See *Stuprum*.

Lex. (a) A statute passed by one of the popular assemblies of republican times. It normally took the gentile (middle) name of the proposer or proposers, the subject matter of the legislation sometimes also being indicated in the title, for example, the *Lex Cornelia* on Guarantors, the *Lex Fufia Caninia*. In the early empire some leg-

islation was passed in this way, but the practice was obsolete by the end of the first century A.D. Thereafter, *lex* is often used of any piece of imperial legislation. See D.1.3.4. (b) The term also occurs in connection with the *Twelve Tables* [*lex duodecim tabularum*], a collection of early rules traditionally dating from c. 450 B.C., and drawn up by ten commissioners, the *decemviri*. It is not extant, but there are many references to its supposed provisions in the *Digest* and other legal and literary sources. See D.1.2.4.-6. (c) A special clause in a contract, for example, the *lex commissoria*, which allowed a seller to call off the sale if the price was not paid by a certain time. See D.18.3.

Libertinus, Libertus (Freedman). A former slave who, on manumission [*manumissio* q.v.], became a freeman and a Roman citizen, though with extensive public law disabilities. He had many duties toward his former master, his patron [*patronus* q.v.]. An imperial freedman [*libertus Caesaris*] manumitted by the emperor, often obtained high governmental office in the early empire. See D.38.1-5.

Lictor (Lictor). An attendant of a higher magistrate with *imperium* [q.v.], whose main duty was to escort him during public appearances.

Maiestas. This term was applied to a number of criminal offenses including treason, sedition, and desertion. In the empire it covered any action which endangered the emperor or his family. The earlier crime of betrayal to an enemy, *perduellio*, was eventually held to be merely a way of committing this offense. See D.48.4.

Manumissio (Manumission). The release of a slave by his master during the latter's lifetime or in his will. See D.40.1-9.

Metallum (Mine). Condemnation to work in a mine was a capital punishment [*capitalis* q.v.] only slightly less serious than the death penalty. There was a milder form known as *opus metalli*. See D.48.19.

Minor. A person over the age of puberty [*impubes* q.v.] but under the age of twenty-five. Such persons who were independent [*sui iuris* q.v.] had in classical times full legal capacity, though they could be protected by a grant of *restitutio in integrum* [q.v.]. In later law, the development of the institution of *cura* [q.v.] gave them more protection but some disabilities. See D.4.4; D.26.7,8.

Missio in Possessionem. A remedy granted originally by the *praetor* [q.v.] allowing a person to take over in whole or in part the property of another with various legal results. It had many uses, for example, to protect a creditor's interest after judgment or where property was threatened by the ruinous state of that of a neighbor. See D.42.4; D.39.2.

Munera. Certain public services which every person was bound to perform on behalf of his community or state. Some services were personal, for example, tutelage [*tutela* q.v.], others were burdens on property. Certain taxes were included under this term, and money payments could often be made in lieu of actual labor, for example, in maintaining public roads. The grounds for exemption [*excusatio*] from most of these services were limited. See D.50.4.

Naturalis Ratio. See *Ius Naturale*.

Negotiorum Gestio (Unauthorized Administration). The performance of some service on behalf of another person, without his request or authorization. If the action was reasonable in the circumstances, there was an action for compensation. See D.3.5.

Novatio (Novation). The extinction of one or more obligations by replacing it or them with a new obligation in the form of a stipulation [*stipulatio* q.v.]. See D.46.2.

Noxae Dare (To Surrender Noxally). To hand over a slave or animal as compensation to the victim of a delict committed by him. This alternative was open to an owner only where there had been no complicity on his part in the delict. See *D.9.1.4*.

Obsequium. See *Patronus*.

Occupatio (Occupation). The acquisition of ownership by taking possession of a thing not previously owned, such as a wild animal, or a thing which has been abandoned by its owner. See *D.41.1*.

Opus Metallum. See *Metallum*.

Opus Publicum. Forced labor on public works. This criminal punishment could only be imposed on *humiliores* [q.v.]. Condemnation for life meant loss of citizenship, but lesser terms did not affect status. See *D.48.19*.

Oratio (Oration). A proposal put forward by the emperor for legislation by means of a *senatus consultum* [q.v.]. The approval of the senate became a mere formality, so that the term came to mean a piece of direct imperial legislation, a type of *constitutio* [q.v.].

Pactum (Pact). Any agreement which did not come within one of the recognized categories of contract. Such an agreement was not generally actionable, but was accepted as a defense [*exceptio* q.v.]. However, pacts added to a recognized contract in order to modify its normal obligations were enforceable, as were certain pacts unconnected with any contract, for example, *constitutum debiti* [q.v.]. See *D.2.14*.

Paterfamilias (Head of the Household). The oldest ascendant male agnate [*agnatus* q.v.] in any family was its legal head. He exercised considerable powers over his sons, daughters, and other descendants, that is, those dependent [*alieni iuris* q.v.] on him. They were subject to his control in many matters relating to their persons, for example, marriage, and were incapable of owning property. Apart from certain kinds of *peculium* [q.v.] and some special categories of property in later law, all they acquired passed to their *paterfamilias*. The powers of a *paterfamilias* did not cease when the person subject to them reached majority. Often the word "father" [*pater*] is used in this sense.

Patria Potestas (Parental Power). The power of a *paterfamilias* [q.v.] over those dependent [*alieni iuris* q.v.] on him. In private law, the expression "in power" [*in potestate*] refers either to someone subject to this or the power of master over his slave. See *D.1.7*.

Patronus (Patron). The former master of a slave, who after manumission [*manumissio* q.v.] has become his freedman [*libertus* q.v.]. A patron had many rights over his freedman, particularly with regard to the performance of certain agreed services [*opera*] and in connection with succession. A freedman had to show respect [*obsequium*] to his patron and could not bring criminal proceedings against him or actions involving *infamia* [q.v.]. See *D.37.14,15; D.38.1-4*.

Pauperies. Damage done by an animal, without fault on the part of its owner. An action was given for the value of the damage done with the alternative of noxal surrender [*noxae dare* q.v.]. See *D.9.1*.

Peculatus. The misappropriation of public money or property by theft, embezzlement, or any other means. See *D.48.13*.

Peculium. The sum of money or property granted by the head of the household [*paterfamilias* q.v.] to a slave or son-in-power [*filiusfamilias* q.v.] for his own use. Although considered for some purposes as a separate unit, and so allowing a business run by slaves to be used almost as a limited company, it remained technically the

property of the head of the household. From the early empire onward, special kinds of *peculium* came into existence, the "military" [*castrense*] and the "quasi-military" [*quasi castrense*] *peculium*, which were considered for many legal purposes to be the property of a son-in-power himself. See *D.15.1*; *D.49.17*.

Perduellio. See *Maiestas*.

Peregrinus (Peregrine). In classical times this term usually meant a member of a non-Roman community within the empire, who was subject to the law of his own state and had few of the public or private law rights of a Roman citizen, for example, *conubium* [q.v.]. A special *praetor* [q.v.] dealt with peregrines' transactions. After the *constitutio Antoniniana* [see *ius civile*], the expression came to be applied to foreigners living outside of the empire.

Pignus. A contract of pledge under which the creditor obtained possession of the property pledged, but ownership remained with the debtor. The expression was sometimes used as a general one for any form of real security, including *pignus* and *hypotheca* [q.v.]. See *D.13.7*.

Pollicitatio (Unilateral Promise). A promise made to city or community to make a gift of money or to erect a public building or monument. Such a promise was legally binding in most cases as a matter of public law. See *D.50.12*.

Postliminium. The regaining of most of a person's private and public law rights on returning from capture by the enemy. The main exception in classical law was that a marriage usually did not automatically revive. See *D.49.15*.

Potestas. See *Patria Potestas*.

Praefectus (Prefect). The title of various kinds of high officials and military commanders in the empire. The most important of these were the praetorian prefects [*praefecti praetorio*], the chief military and civil advisors of the emperor and governors of the four great prefectures into which the later empire was divided. They also had extensive private law and (from the the third century A.D.) criminal law jurisdiction, the courts over which they presided being the highest in the empire. But the two urban prefects [*praefecti urbi*], one at Rome and later one at Constantinople, exercised independent criminal and civil jurisdiction over their respective territories. Many of the lesser prefects in charge, for example, of the corn supply [*praefectus annonae*] or the city guard [*praefectus vigilum*], served under the urban prefect and their legal decisions could be appealed to him. The prefect of Egypt [*praefectus Augustalis* or *Aegypti*] was in a special position in a number of ways. See *D.1.11,12,15,17*.

Praelegare. To make a legacy of a specific thing to an heir [*heres* q.v.] in addition to his share of the inheritance.

Praeses (Governor). The general name for any provincial governor, who had judicial as well as administrative powers. See *D.1.18*.

Praetor (Praetor). In the republic, an important magistrate second only to the *consules* [q.v.], in charge of the administration of private law. As well as the urban praetor [*praetor urbanus*], probably the most important, there was also a peregrine praetor [*praetor peregrinus*] dealing with foreigners [*peregrinus* q.v.] and later there were a number of other judicial praetors dealing with specific issues [for example, *fideicommissum* q.v.]. However, because of the growth of a standard body of praetorian law [*ius honorarium* q.v.] leading to the consolidation of the Edict [*edictum* q.v.], these officials are referred to collectively in the texts as "the praetor." The praetor greatly extended and modified the civil law [*ius civile* q.v.] by means of his control over the Formulary System [*formula* q.v.] of civil litigation. Praetors continued to be appointed during the empire, but gradually their legal

- functions were taken over by other officials such as the various kinds of prefect [*praefectus* q.v.] and the office became largely honorary. See *D.1.2.27-34*; *D.1.14*.
- Praevaricatio*. Collusion between the accuser [*accusatio* q.v.] and accused in a criminal trial to secure acquittal, or between a lawyer and his client's enemy. See *D.47.15*.
- Precarium*. A grant of the possession and general use of property made gratuitously and revocable at any time. See *D.43.26*.
- Proconsul* (Proconsul). A kind of provincial governor with civil and criminal jurisdiction. See *D.1.16*.
- Procurator* (Procurator). This term has a number of meanings. (a) The representative of a party in a civil trial. (b) A general manager of another person's business or other affairs. This position was often given to a freedman [*libertinus* q.v.] or a slave. Occasionally, the term was applied to an agent for a single transaction. An earlier type of business manager [*institor*] came to be considered a kind of procurator. See *D.3.3*; *D.14.3*. (c) Many imperial officials were called procurators, for example, a *procurator Caesaris*, originally a fiscal agent but later given many administrative duties. See *D.1.19*.
- Quaestiones Perpetuae*. Permanent criminal courts, each dealing with one class of offense, the penalty for it being fixed by the relevant statute [*lex* q.v.], which also usually set up the court itself. They had large juries, from whose verdict there was no appeal. The *Cognitio* [q.v.] System was sometimes an alternative. See *D.48.18*.
- Quaestor* (Quaestor). A magistrate whose office was created in the republic, whose duties were mainly connected with public finances and provincial administration. Their importance declined during the empire. See *D.1.13*.
- Rei Vindicatio*. See *Vindicatio*.
- Relegatio* (Relegation). A form of banishment either for a fixed period or in perpetuity. It did not necessarily involve loss of citizenship or confiscation of property, but merely exclusion from a specified territory. See *D.48.22*.
- Repetundae*. Extortion or unlawful acquisition of money or property by a person in an official position, such as a provincial governor. See *D.48.11*.
- Rescriptum* (Rescript). A written answer, issued by the imperial civil service on behalf of the emperor, to legal and administrative questions. These were sent in by officials and private individuals. In principle, such decisions were only binding in the case at issue, but they often came to be considered as of general application.
- Restitutio in Integrum*. A remedy granted originally by the *praetor* [q.v.] annulling the normal civil law [*ius civile* q.v.] effect of some event or transaction which had unfairly prejudiced a person's position. It had many uses as a remedy against fraud, or even, in the case of a *minor* [q.v.], a bad bargain in certain circumstances. See *D.4.1,2,3,6*.
- Senator* (Senator). A member of the senate [*senatus*], the most important assembly of the republic, with enormous and undefined advisory, deliberative, judicial, and later legislative powers [*senatus consultum* q.v.]. It was largely composed of ex-magistrates. During the empire the political importance of the senate declined, but senators and their families were considered to belong to the privileged senatorian class [*ordo senatorius*]. But certain legal disabilities were also involved, for example, marriage with a freedman [*libertus* q.v.] or woman was prohibited. See *D.1.9*.
- Senatus Consultum*. A decision of the senate [*senator* q.v.], which during the republic technically took the form of advice to a high magistrate, for example, the

praetor [q.v.], who would then normally incorporate it in a statute [*lex* q.v.] or the Edict [*edictum* q.v.]. In the early empire, these decisions came themselves to have legislative force. But the increasing role of the emperor in the proceedings [*oratio* q.v.] and the rise of other forms of imperial legislation [*constitutio* q.v.] gradually made the process and its name obsolete. See D.1.3.

Servitus (Servitude). A right exercised over property belonging to another. When attached to land or a building for the benefit of whoever owned it, for example, a person's right of way across land adjacent to his own, it was called a praedial [*praediorum*] servitude. Where the right was for the benefit of a particular person, for example, *usufructus* [q.v.], it was called a personal [*personarum*] servitude in later law. The holder of the servitude had an *actio in rem* [q.v.] to assert his rights, called an *actio confessoria*. A person denying that a servitude existed over his property had an action called an *actio negatoria* or *negativa* for this purpose. See D.7, D.8.

Servus Poenae. A person condemned to slavery as a punishment for a crime, including someone awaiting the death penalty. He was not considered to have a master, and could never be manumitted [*manumissio* q.v.].

Solidus or *Aureus* (Gold Piece). The standard gold coin of the later empire, used in the *Digest* to express any actual sum of money mentioned in the texts.

Statuliber. A slave whose manumission [*manumissio* q.v.] under a will was subject to some condition not yet fulfilled. See D.40.7.

Stipulatio (Stipulation). A unilateral verbal contract, concluded, in its original form, by a formal question put by the creditor to the debtor and his answer to it, for example, "Do you solemnly promise that one hundred gold pieces will be given to me?" "I solemnly promise." Any kind of obligation could be expressed in this form, and existing obligations could be reduced to it by novation [*novatio* q.v.], making it perhaps the most common type of Roman contract. No witnesses were required, but it became the usual practice to record the stipulation in writing [*cautio* q.v.]. This was never legally necessary, and the question of whether the *cautio* was considered probative in later law is disputed. The appropriate action on a stipulation was usually a *condictio* [q.v.], although for some purposes there was an *actio ex stipulatu*. See D.45.1.

Stuprum. This term covered a range of sexual offenses from illicit intercourse with a respectable unmarried woman or widow to homosexual rape.

Substitutio (Substitution). The appointment of another heir [*heres* q.v.] or heirs to cover the possibility that the one first instituted might not or could not accept the inheritance, which would make the will void. See D.28.6.

Sui Iuris (Independent). Free from the parental power [*patria potestas* q.v.] of another. Where such a person was an *impubes* [q.v.], he would be subject to tutelage [*tutela* q.v.]. In later law, if a *minor* [q.v.], he would be in care [*cura* q.v.].

Superficies. The right to the surface of land belonging to another, originally only a public body, for building or other purposes in return for a rent. See D.43.18.

Supplicium Ultimum. An aggravated form of the death penalty, for example, by crucifixion or being thrown to wild beasts. See D.48.19.

Suus et Necessarius Heres. See *Heres*.

Suus Heres. See *Heres*.

Tergiversatio. See *Accusatio*.

Testamenti Factio. The right to make, take under, or witness a Roman will. See D.28.1.

Transactio. The compromise of legal proceedings, actual or contemplated, in return for payment or other consideration. See D.2.15.

Tutela (Tutelage). A form of guardianship over the person and property of an *impubes* [q.v.] exercised by a tutor appointed in various ways. The powers of the tutor varied according to the age of the child, being greater when he was an *infans* [q.v.]. The tutor was accountable at the end of his period in office, that is, when his ward reached puberty. It was considered a public duty [*munera* q.v.], though many exemptions from it were recognized. See D.26, D.27.

Tutor. See *Tutela*.

Twelve Tables. See *Lex*.

Usucapio (Usucapion). The acquisition of ownership by possession of property for a specified period of time and under certain conditions, for example, that the possession was in good faith. See D.41.3.

Usufructus (Usufruct). The right to use the property of another and take its fruits or profits [*fructus*] without diminishing its capital value. It was a personal servitude [*servitus* q.v.]. See D.7.1-6,9.

Usus (Right of Use). The right to use the property of another without taking its fruits or profits. It was a personal servitude [*servitus* q.v.]. See D.7.8.

Verberatio. See *Castigatio*.

Vicarius. (a) In private law, a substitute for another person or an underslave, a slave who is part of the *peculium* [q.v.] of another slave. (b) In public law, many kinds of deputy were given this name, as well as certain provincial governors of the late empire.

Vindicatio. A term commonly used for the action claiming ownership of property, its full title being *rei vindicatio*. It was sometimes also used to cover other kinds of mainly real actions [*actio in rem* q.v.]. See D.6.1.

Vis (Force). This expression has two different meanings: (a) In private law, it covered any action which might provoke fear [*metus*] in another, whether involving actual violence or not. Many of the interdicts [*interdictum* q.v.] of the *praetor* [q.v.] dealt with this matter. (b) In criminal law, it meant various kinds of violent assault and public disturbance, although it was also applied to certain offenses committed by officials. See D.4.2., D.43.16.

re vindicatio
action?

administration of justice either in entirety or for a particular case, and he to whom the administration of justice has been delegated acts in place of the person who has delegated, not in his own right.

- 17 ULPIAN, *Opinions, book 1*: The praetor can delegate the entire administration of justice to another just as he can delegate in respect of certain persons or a particular case, especially when he has a good reason in that before becoming a magistrate, he had been advocate for one of the parties.
- 18 AFRICANUS, *Questions, book 7*: If the parties agreed that a praetor other than the one to whom the administration of justice belongs should exercise jurisdiction and before application is made to him changed their minds, there is no doubt that no one is compelled to abide by an agreement of this kind.
- 19 ULPIAN, *Fideicommissa, book 6*: When a certain girl defended an action before a competent judge, then was condemned, and afterward married a man subject to another's jurisdiction, the question is asked whether the sentence of the former judge can be carried out. I said that it could because judgment has been pronounced beforehand. If the marriage had taken place after the start of the hearing but before the passing of sentence, I should think the same, and sentence is properly passed by the first judge. The same rule should be observed generally in all cases of this kind.
1. Insofar as a question of amount arises in determining jurisdiction, what is relevant is always the amount claimed not the amount owed.
- 20 PAUL, *Edict, book 1*: One who administers justice beyond the limits of his territory may be disobeyed with impunity. The same applies where he purports to administer justice in a case exceeding the amount established for his jurisdiction.

2

THE SAME RULE WHICH ANYONE MAINTAINS AGAINST
ANOTHER IS TO BE APPLIED TO HIM

- 1 ULPIAN, *Edict, book 3*: This edict has the greatest equity without arousing the just indignation of anyone; for who will reject the application to himself of the same law which he has applied or caused to be applied to others? 1. "If one who holds a magistracy or authority establishes a new law against anyone, he himself ought to employ the same law whenever his adversary demands it. If anyone should obtain a new law from a person holding a magistracy or authority, whenever his adversary subsequently demands it, let judgment be given against him in accordance with the same law." The reason, of course, is that what anyone believed to be fair, when applied to another, he should suffer to prevail in his own case. But we construe these words "what he who is in charge of the administration of justice has established" as referring to the effect of a decision not to the words in which it is formulated. Therefore, the edict does not apply if he wishes to establish a rule but is prevented, and the decree had no legal effect. For the word "established" means that the matter has been concluded and the wrong completed not merely begun. And, therefore, if anyone should administer justice between parties over whom he had no jurisdiction, since the proceedings are held to be void and there is no decision, we think that the edict is not applicable. For what harm has been done by an attempt when the wrong has had no effect?
- 2 PAUL, *Edict, book 3*: By this edict, the malice of one administering justice ought to be punished; certainly if, through the ignorance of an assessor, justice is not administered as it should have been, this should prejudice not the magistrate but the assessor himself.

- 3 ULPIAN, *Edict, book 3*: If anyone should obtain the application of an unjust law against another, he is subject to the same law only if this was brought about at his request. But if he did not himself make the request, he is not punished. However, if he succeeded in his object, he is punished under the edict, whether he used some law or obtained leave to use it although he did not put it to use. 1. If my procurator has made the request, the question arises to whom the same law should be applied. And Pomponius thinks that it should be applied to me alone, at least if I have given a mandate for this particular purpose or ratified the procurator's act. But if the tutor or curator of a lunatic or young person has made the request, he himself is punished under this edict. It is to be observed that the same applies to the procurator if he has been appointed to act on his own account. 2. This penalty is established for all who come within the scope of the edict at the suit not only of one who has been injured by such a person but of anyone who brings an action at any time. 3. If one on whose behalf you have become surety should obtain leave that some debtor of his should not raise a particular defense against him and then you in connection with the affair in which you have become surety wish to raise the defense, it will not be proper that either you or he obtain leave to do this even though in the meantime you suffer a wrong if your debtor is insolvent. But if you have fallen within the terms of the edict, the principal debtor, indeed, but not you, may raise the defense. Nor will the penalty falling on you affect the principal debtor, and, therefore, you will not have the action on mandate. 4. If my son in connection with a magistracy falls within the terms of this edict, does it apply to those actions which I bring on his behalf? And I do not think it applies, lest my position should be made worse. 5. But when the praetor states that a person is subject to the same law, is this penalty also to be transmitted to his heir? And Julian writes that the action is to be refused not only to the person himself but also to his heir. 6. He also writes, not without reason, that he suffers the penalty of the edict not only in respect of those actions which he had at the time when he fell within its scope but also in respect of those which are acquired for him afterward. 7. Julian thinks that this is not a ground for allowing recovery of what has been paid; for there remains a ground in natural law which prevents recovery.
- 4 GAIUS, *Provincial Edict, book 1*: The praetor appropriately introduces this defense "unless any of them should act against a person who himself had committed some of these acts." And this is right lest, of course, either a magistrate, while he is striving to maintain this edict, or a litigant, while he wishes to have its benefit, should himself incur the penalty of the very same edict.

3

IF ANYONE SHOULD NOT OBEY ONE
WHO ADMINISTERS JUSTICE

- 1 ULPIAN, *Edict, book 1*: All magistrates with the exception of *duumviri* are allowed, in accordance with the right inherent in their authority, to enforce their administration of justice by means of a penal judgment. 1. A person is not held to have obeyed one administering justice if he has not carried out the last step required in the exercise of justice. For example, if someone has not allowed a movable to be vindicated from him but has allowed it to be led or taken away, he is held to have obeyed. But if he has refused to allow even these subsequent measures, then he is not held to have obeyed. 2. If your procurator or tutor or curator has not obeyed one administering justice, he himself is punished, not the principal or the *pupillus*. 3. Labeo says that not only a defendant who has not obeyed is liable under this edict but also a plaintiff. 4. This action lies not for the plaintiff's interest but for the actual amount concerned in the litigation. And as it lies purely for a penalty, it is not given after a year nor against the heir.

BOOK FORTY-ONE

1

ACQUISITION OF OWNERSHIP OF THINGS

- 1 **GAIUS**, *Common Matters or Golden Things*, book 2: Of some things we acquire ownership under the law of nations which is observed, by natural reason, among all men generally, of others under the civil law which is peculiar to our city. And since the law of nations is the older, being the product of human nature itself, it is necessary to treat of it first. 1. So all animals taken on land, sea, or in the air, that is, wild beasts, birds, and fish, become the property of those who take them,
- 2 **FLORENTINUS**, *Institutes*, book 6: as also their offspring born when they are ours.
- 3 **GAIUS**, *Common Matters or Golden Things*, book 2: What presently belongs to no one becomes by natural reason the property of the first taker. 1. So far as wild animals and birds are concerned, it matters not whether they be taken on one's own or on someone else's land. Of course, a person entering another's land for the purpose of hunting or fowling can, if the latter becomes aware of it, lawfully be forbidden entry by the landowner. 2. Any of these things which we take, however, are regarded as ours for so long as they are governed by our control. But when they escape from our custody and return to their natural state of freedom, they cease to be ours and are again open to the first taker,
- 4 **FLORENTINUS**, *Institutes*, book 6: other than those tamed creatures which are in the habit of going and returning.
- 5 **GAIUS**, *Common Matters or Golden Things*, book 2: An animal is deemed to regain its natural state of liberty when it escapes our sight or, though still visible, is difficult of pursuit. 1. The question has been asked whether a wild animal, so wounded that it may be captured, is already ours. Trebatius approved the view that it becomes ours at once and that it is ours so long as we chase after it; but, if we abandon the chase, it ceases to be ours and is open to the first taker. Hence, if, during the period of our pursuit, someone else should take the animal, with intent to profit thereby, he is to be regarded as stealing from us. The majority opinion was that the beast is ours only if we have actually captured it because many circumstances can prevent our actually seizing it. And that is the sounder opinion. 2. Bees, again, are wild by nature and so those which swarm in our tree are, until housed by us in our hives, no more regarded as ours than birds which make a nest in our tree. Hence, if another should house or hive them, he will be their owner. 3. Again, honeycombs which they make can be taken by anyone with no question of theft though, as said earlier, one entering upon another's land can be lawfully barred by the owner who becomes aware of it. 4. A swarm which flies away from our hive is deemed still to be ours so long as we have it in sight and its recovery is not difficult; otherwise, it is open to the first taker. 5. The wild nature of peacocks and doves is of no moment because it is their custom to fly

away and to return; bees, whose wild nature is universally admitted, do the same; and there are those who have tame deer which go into and come back from the woods but whose wild nature has never been denied. In the case of these animals which habitually go and return, the accepted rule is that they are held to be ours so long as they have the instinct of returning; but if they lose that instinct, they cease to be ours and are open to the first taker. They are deemed to have lost that instinct when they abandon the habit of returning. 6. Poultry and geese are not wild by nature; for there obviously exist other species which are wild fowl and wild geese. Hence, if my geese or chickens be disturbed and fly so far away that I do not know where they are, nonetheless they remain my property so that anyone who takes them with a view to gain will be liable to me for theft. 7. Again, property taken from the enemy is forthwith the property of the taker under the law of nations,

6 FLORENTINUS, *Institutes*, book 6: so also are the young of animals which we own under the same law,

7 GAIUS, *Common Matters or Golden Things*, book 2: so that also freemen are reduced to slavery but those who escape the power of the enemy regain their original freedom. 1. Furthermore, what the river adds to our land by alluvion becomes ours by the law of nations. Addition by alluvion is that which is gradually added so that we cannot, at any given time, discern what is added. 2. But if the force of the river should detach part of your land and bring it down to mine, it obviously remains yours. Of course, if it adheres to my land, over a period of time, and trees on it thrust their roots into my land, it is deemed from that time to have become part of my land. 3. An island arising in the sea (a rare occurrence) belongs to the first taker, for it is held to belong to no one. An island arising in a river (a frequent occurrence), if indeed it appears in the midstream of the river, is the common property of those who have holdings on either bank of the river to the extent that those holdings follow the bank; but if it lies to one side of the river rather than the other, it belongs only to those who have holdings on that bank. 4. Now if a river should burst one bank and partly begin to flow in another channel and then this new stream return to the old channel, the land converted into an island by the two streams naturally remains the property of its former owner. 5. But if, wholly abandoning its natural bed, a river begins to flow along another course, the original bed becomes the property of those with holdings on the former banks to the extent of those holdings along the bank; the new bed, though, acquires the same character as the river itself, that is, it becomes public under the law of nations. But if, after some time, the river reverts to its former bed, the later bed again becomes the property of those with holdings along its bank. However, if the new bed occupies the whole of some person's land, then, even though the river returns to its original bed, the man whose land it was, strictly speaking, has no right in the newly

abandoned bed, because the relevant piece of land ceased to exist with the loss of its shape and form and, since the erstwhile owner has no neighboring land, he cannot have any interest in the bed by right of proximity; but it is scarcely likely that this argument would prevail. 6. It is quite a different matter when one's land is wholly flooded; for inundation does not change the aspect of the land; and so, when the waters recede, the land manifestly remains the property of its existing owner. 7. When someone makes something for himself out of another's materials, Nerva and Proculus are of opinion that the maker owns that 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 materials should be owner of what is made from them, since a thing cannot exist without that of which it is made. Let us say, by way of example, that I make some vase from your gold, silver or copper or a ship, cupboard or benches from your timber, a garment from your wool, mead from your wine and honey, a plaster or eye-salve from your drugs, wine, oil, or flour from your grapes, olives, or ears of corn. There is, however, the intermediate view of those who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius but that if it cannot be so reconstituted, Nerva and Proculus are sounder. Thus, a finished vase can be again reduced to a simple mass of gold, silver, or copper; but wine, oil, or flour cannot again become grapes, olives, or ears of corn; no more can mead be reconstituted as wine and honey or the plaster or salve as the original drugs. In my view, however, there are those who rightly say that corn threshed from someone's ears of corn remains the property of the owner of the ears; for since the corn already has its perfect form while in the ears, the thresher does not make something new, but merely uncovers what already exists. 8. When two owners willingly mix their goods, the resultant whole is their common property, whether those goods be of the same kind, as when wines are mixed or bars of silver worked together, or different, as when one contributes wine and the other honey or one gold and the other silver; this, despite the fact that the mead or the alloy has a new identity. 9. The same holds good, even if this should happen without the consent of the two owners, whether of different or of similar materials. 10. When someone builds on his own site with another's materials, he is deemed to be owner of the building because all that is built on it becomes part of the soil. However, the owner of the materials does not thereby lose his ownership of them; but he meanwhile cannot bring a *vindicatio* for them or an action for their production by reason of the *Law of the Twelve Tables* which provides that no one is required to give up materials of another built into his premises but that he must pay double their value. The term used is "beam" but, in fact, covers any building materials. Hence, if the house should collapse for some reason, the owner of the materials can have a *vindicatio* for them and have an action for their production. 11. The very proper question has been raised whether, if the builder sells the premises and the building collapses after the purchaser has usucaptured it, their owner can still have a *vindicatio* for the materials. The occasion for doubt is whether, when the whole is usucaptured as such, its individual parts are also usucaptured. That idea did not commend itself. 12. Conversely, if a person were to build with his own materials on someone else's site, he would make the building the property of the owner of the site, and if he knew that the site belonged to another, he would be treated as voluntarily parting with his materials so that even if the house should collapse, he would have no *vindicatio* for them. Of course, if the owner of the site were to claim the building but was unwilling to pay the value of the materials or the workers' wages, he could be resisted with the defense of bad faith, assuming the builder to have been unaware that the site belonged to someone else and to have genuinely built as though on his own land; but, if he knows the facts, his own fault will be imputed to him; for he rashly built on what he knew to be another's land. 13. If I plant someone else's cutting in my land, it will be mine; conversely, if I

plant my own cutting in someone else's land, it will be his, provided, in each case, that it roots itself. For until it takes root, it remains the property of its former owner. It follows that if I so pack earth around a neighbor's tree that it puts forth its root into my land, the tree becomes mine; for reason does not tolerate the idea that a tree should belong to anyone other than the person in whose land it is rooted. Hence, a boundary tree, if it extends roots into the adjoining land, belongs to both neighbors in common

- 8 MARCIAN, *Institutes, book 3*: to the extent of their holdings. But if a stone appears on a boundary and the lands are common in undivided shares, then the stone will similarly be common property, if removed from the earth.
- 9 GAIUS, *Common Matters or Golden Things, book 2*: By the same reasoning that cuttings implanted in land become part of it, so seeds and corn sown in land become part of it. But just as one who builds on another's land can defend himself with the plea of bad faith, if the owner of the site claims the building, so can a man have the same defense who has sown another's land at his own expense. 1. Letters, even in gold, accede to the paper or parchment just as things built or sown become part of the land. Thus, if I wrote verse or a story or a speech on your paper or parchment, not I but you would be held to own the finished work. But should you claim your book or parchment from me but be unwilling to pay my writing expenses, I can, if I acquired your materials in good faith, resist you with the defense of bad faith. 2. Pictures do not accede to the tablets on which they are painted in the same way as writing to paper or parchment. On the contrary, the view established itself that the tablet accedes to the picture. Still it is appropriate that the owner of the tablet should be given an *actio utilis*, which he can bring to effect against the painter in possession of the tablet, if he pays the cost of the painting; in other circumstances, he will be met by the defense of bad faith; if it were a possessor in good faith who paid for and painted the tablet, we would give him a direct *vindicatio* against the owner of the tablet on his paying the value of the tablet; otherwise, he could be resisted with the defense of bad faith. 3. Those things, again, which are delivered to us become ours under the law of nations; for nothing is so conformable to natural equity as that effect should be given to the wishes of an owner wanting to transfer his thing to someone else. 4. It is of no consequence whether the owner delivers the thing personally or through someone acting on his behalf. Hence, if that other has been given free administration of the affairs of the owner, who is going on a journey, and he sells and delivers something, he makes it the property of the recipient. 5. Sometimes, indeed, the bare intent of the owner, without actual delivery, is sufficient to transfer a thing, as when I sell you something that I have already lent or let to you or deposited with you; for although I did not place the thing with you for that reason, now the fact that I allow it to remain with you on the ground of sale makes it yours. 6. Again, if someone sells the contents of a warehouse and, at the same time, hands over the keys of the warehouse to the purchaser, he transfers to him ownership of the contents. 7. Going even further, the will of the owner may confer ownership on an unidentified person; this is so when he showers largesse on a mob; he does not know who will pick up what, but because he wishes

anyone who picks something up to keep it, he makes him owner thereof forthwith. 8. It is another matter with those things which are jettisoned in stress of seas to lighten the vessel; they remain the property of their owners; for they are not cast overboard because the owner no longer wants them, but that the ship may have a better chance of riding the storm. Consequently, if anyone finds any such things washed up by the waves or, for that matter, in the sea itself and appropriates them with a view to gain, he is guilty of theft.

- 10 GAIUS, *Institutes*, book 2: We can make acquisitions not only personally and directly but also through those whom we have in power through slaves in whom we have a usufruct and through freemen and slaves of others whom we possess in good faith; all of these we will look at more carefully. 1. Anything which our slaves receive by delivery and anything which they acquire, whether on a stipulation or on any other ground, is acquired by us; for a person in the power of another can hold nothing for himself. Hence, if he be instituted someone's heir, the slave cannot accept the inheritance without our direction, and if, at our bidding, he does accept the inheritance, it becomes ours just as if we ourselves had been appointed as heirs. So also a legacy is acquired for us through the slave. 2. Not only ownership but also possession do we acquire through those in our power; for anything of which they take possession, we are deemed to possess. Thus, by their long possession, we also acquire ownership. 3. In respect of those slaves, however, in whom we have only a usufruct, the view established itself that we acquire whatever they obtain through our resources or through their own labors; but their acquisitions from any other source belong to their owner. Hence, if such slave is instituted an heir or given a legacy or gift, these things go not to me, the usufructuary, but to the owner of the slave. 4. The same rule as for the fructuary slave obtains for one whom we possess in good faith, be he free or in fact another's slave, as also for the possessor in good faith. Thus, anything that the man acquires other than under those two heads belongs to himself, if he be a freeman, or, if he be a slave, to his owner. 5. When a possessor in good faith usucapt a slave, he can, since he thus becomes his owner, acquire for himself through him on any ground; the usufructuary, on the other hand, cannot usucapt the slave, first because he does not possess him but has only the right to use and enjoy him and, second, because he knows the slave to belong to someone else.

- 11 MARCIAN, *Institutes, book 3*: A *pupillus*, for the purpose of making an acquisition, does not require the authority of his tutor; but he can alienate nothing without the presence of his tutor giving *auctoritas*, not even possession, which is a matter of fact; this was the view of the Sabinians and it is correct.
- 12 CALLISTRATUS, *Institutes, book 2*: Although a lake or pool may sometimes spread, sometimes dry up, it still retains its bounds and so no right of alluvion is recognized. 1. If something be made from the fusing of my copper and your silver, the thing is not our common property because, though copper and silver are different elements, they can be separated by craftsmen and returned to their original nature.
- 13 NERATIUS, *Rules, book 6*: If my procurator buys something for me at my behest and it is delivered to him in my name, ownership, that is, property, in it is acquired by me although I am unaware of the delivery. 1. In like manner, the tutor of a *pupillus* or *pupilla*, by purchasing in the name of that ward, acquires ownership for him or her, although he or she knows nothing about the transaction.
- 14 NERATIUS, *Parchments, book 5*: What a man erects on the seashore belongs to him; for shores are public, not in the sense that they belong to the community as such but that they are initially provided by nature and have hitherto become no one's property. Their state is not dissimilar to that of fish and wild animals which, once caught, undoubtedly become the property of those into whose power they have come. 1. We have then to consider the legal position of the site, if the building erected on the shore comes down; does it remain the property of the builder, or does it revert to its original state, so that it is public again as though nothing was ever built upon it? This latter is the better way of looking at the matter, so long as the original form of the shore is restored.
- 15 NERATIUS, *Rules, book 5*: But one who builds on the bank of a river does not make it his own.
- 16 FLORENTINUS, *Institutes, book 6*: In the case of lands measured out, it is generally agreed that the right of alluvion has no place. The deified Pius ruled to this effect and Trebatius says that land granted to defeated enemies on the condition that it becomes civic property does have the right of alluvion and is not measured out; but, in the case of land taken by force it is measured out so that it might be known what was given to whom, what was sold, and what remained public property.
- 17 ULPIAN, *Sabinus, book 1*: If two owners deliver a thing to their common slave, he acquires for each from the other.
- 18 ULPIAN, *Sabinus, book 4*: The heir cannot acquire through a slave belonging to the inheritance anything which is part of the inheritance and certainly not the inheritance as such.
- 19 POMPONIUS, *Sabinus, book 3*: If a freeman, in good faith, be acting as my slave, Aristo says that what he obtains through his own labors or my resources becomes mine beyond any doubt; but what he receives by gift or some transaction belongs to him. But an inheritance or legacy is not acquired for me through him; for it does not arise from his labors or my resources; he does nothing in respect of the legacy though he does in the case of an inheritance to the extent that he does make acceptance (a

point once doubted by Varius Lucullus); still the better view is that I do not acquire it through him, even though the testator may have intended me to benefit by it. But although the man's seeming owner does not acquire the estate in any way, nonetheless, it should be made over to him, if that was the manifest wish of the testator. Trebatius says that where a freeman, genuinely acting as a slave, accepts an inheritance at the direction of his seeming owner, he himself becomes heir because it is what he does and not what he thinks that makes him heir. Labeo holds differently, if he acted under pressure; but if he too wished to accept, then he becomes heir.

- 20 ULPIAN, *Sabinus*, book 29: Delivery should not and cannot transfer to the transferee any greater title than resides in the transferor. Hence, if someone conveys land of which he is owner, he transfers his title; if he does not have ownership, he conveys nothing to the recipient. 1. Now whenever ownership is transferred, it passes to the transferee in the same case as it was with the transferor; if the land was subject to a servitude, it passes with the servitude; if it was unencumbered, it passes in that state; and if, perchance, there should be servitudes due to the land, it passes with the servitudes due. Hence, if someone declared land to be unencumbered when he conveyed it and it was in fact subject to a servitude, he would in no way affect the validity of the servitude; but he would place himself under an obligation and have to make reparation for his assertion. 2. If Titius and I buy something and it is delivered to Titius as being my procurator, I think that I also acquire ownership because it is accepted that possession and, through it, ownership of anything can be acquired through a free person.
- 21 POMPONIUS, *Sabinus*, book 11: Proculus says that if my slave is serving you in good faith and buys and takes delivery of something, it does not become mine, because I am not in possession of the slave, and it does not become yours, because it was not bought with your resources. But if a freeman serving you in good faith buys something, it becomes his own. 1. If you are in possession of something of mine and I wish it to become yours, it will be yours, even though I am not in possession of it.
- 22 ULPIAN, *Sabinus*, book 40: No one possessing a slave by force, stealth, or *precarium* can acquire anything which the slave receives or for which he stipulates.
- 23 ULPIAN, *Sabinus*, book 43: When a man, be he free or someone else's slave, serves a person in good faith, anything that he acquires with that person's resources, he acquires for the person whom he is serving. So also does he acquire for him anything which he obtains by his own labors; for, in a way, his services are part of that person's resources, since by law he owes his service to one whom he serves in good faith. 1. Such acquisition, however, is effected only so long as he is serving in error in good faith. Let us, then, see for whom he acquires if he learns that he belongs to someone else or is in fact free. The issue here is whether we look to the beginning of the matter or to individual occasions; and it is more proper for us to take the latter course. 2. It is to be said generally that what he cannot acquire for his master in good faith from the latter's resources he will acquire for himself and what he cannot acquire for himself not from the latter's resources, he acquires for the person to whom he is in servitude in good faith. 3. If the man be serving two masters in good faith, he acquires for both, but for each separately with that one's resources. But in the case of what comes through the resources of one, let us see whether he acquires partly for his master in good faith and partly for his owner, if he is a slave, or for himself, if he is a freeman in servitude in good faith, or whether he should acquire exclusively for the person whose resources are used. Scaevola treats of this issue in the second book of his *Questions*, and he says that if another's slave is serving two masters in good faith and he makes some acquisition with the resources of one of them, reason requires that he acquires

only for that one. If he adds the name of the one for whom he stipulates, there can, he says, be no doubt that he acquires only for the person named; for even if he should stipulate in respect of that one's resources in the name of his other master, by the very fact of stipulating in his name, he would acquire the whole for him. He approves elsewhere that if he should stipulate in connection with my resources, even though without naming me and without my direction, when he is serving me among others, he acquires solely for me. For it has been accepted that whenever a slave held in common cannot acquire for all his masters, he acquires only for the one for whom he can do so. Frequently, I have reported Julian so to hold and that is the rule which we observe.

- 24 PAUL, *Sabinus*, book 14: It must be said of all things which cannot be restored to their original form that if the material remains though the form only is changed, as if you make a statue from my copper or a goblet from my silver, I remain owner of the objects,
- 25 CALLISTRATUS, *Institutes*, book 2: unless what was done was done in another's name with the owner's consent; for then, because of the owner's consent, the thing belongs wholly to him in whose name it is made.
- 26 PAUL, *Sabinus*, book 14: But if you make a ship with my planks, the ship is yours because the cypress wood no longer exists, as is also the case when some garment is made from wool; for there is now a thing made of cypress or of wool. Proculus intimates that we accept the view of the law which commended itself to Servius and Labeo. For them, we have to look at the overall character, so that if something be added, it becomes part of the whole. Thus, if a foot or a hand be added to a statue, a base or handle to a goblet, a post to a couch, a plank to a vessel, stone to a building, the whole belongs to the erstwhile owner of the statue, and so forth. 1. A tree, wholly uprooted and put in another place, remains the property of its former owner until it takes root, but once it takes root, it becomes part of the land where it does so, and should it be again uprooted, it does not revert to its former owner; for it has conceivably altered through nourishment in other soil. 2. If you dye my wool, the now purple wool nonetheless remains mine according to Labeo; for there is no distinction between dyed wool and that which, falling into mud or mire, loses its original color.
- 27 POMPONIUS, *Sabinus*, book 30: It is not to be said that the whole of the silver is yours, if you add some of another's unwrought silver to your own; but if, on the other hand, you solder your goblet with someone else's lead or you weld it with another's silver, there is no doubt that the goblet is yours and that you can lawfully bring a *vindicatio* in respect of it. 1. When several ingredients are contributed together to produce a single medicament or if we produce an unguent from various essences, neither former owner can say that the resultant product is his; it is thus overwhelmingly better to say that it belongs to him in whose name the compound was made. 2. If it be asked which cedes to the other, when elements belonging to each of two owners are welded together, Cassius says that an assessment is to be made of the respective portions of the final product or of the value of each element. But if there be no obvious accession of the one element to the other, we have to consider whether the product should not be declared the property of both, as in the case of a conflated mass, or rather that of him in whose name the welding was done. Proculus and Pegasus, however, hold that each retains his own material.
- 28 POMPONIUS, *Sabinus*, book 33: If your neighbor builds upon your wall, Labeo and Sabinus say that the product belongs to the builder. Proculus, however, says that it is yours alone, as that becomes yours which another builds on your soil. And his opinion is the more correct.
- 29 PAUL, *Sabinus*, book 16: An island arising in a river does not become the undivided

property of those who hold lands on one bank of the river, but is divided according to their particular areas. For each of them will hold it in appropriate areas to the extent that each previously held the bank, as though a straight line were drawn through the island.

- 30 POMPONIUS, *Sabinus*, book 34: Hence, if an island arising should pertain to my land and I sell the lower part of the plot to which no part of the island was fronting, no part of the island will belong to the purchaser for the reason that it would not have become his even if, at the time that the island arose, he was then owner of that part of the plot. 1. The younger Celsus says that if a tree should grow up on the bank of a river which marches with my land, it is mine because the land is my exclusive private property, although its use is regarded as public. Hence, when the riverbed dries up, it becomes the property of the neighboring owners because the public no longer avails itself of it. 2. There are three ways in which an island arises in a river: One is when the river flows around land which was not part of the bed; another is where land, part of the riverbed, is left dry by the river which begins to flow round it; the third is when the river, by gradual deposit, creates a higher part above the bed and augments it by alluvion. In each of the latter two cases, the island belongs only to him whose land was the closer when the island first appeared; for it is the nature of a river that a change in its course changes the character of its bed. And it matters not whether the issue be one only of the change of the riverbed or of the superfusion of ground and land; for each is in similar case. But, in the first case, no alteration in ownership is thereby effected. 3. Alluvion restores the land which the river wholly removed. Hence, if land lying between a public road and the river had been flooded by the river, whether gradually or not, but reappeared with the recession of the river waters, it would belong to its original owner; for rivers serve as public functionaries, making public that which was private and private that which was public. Thus, just as this land was public while it formed the riverbed, so on becoming private, it should belong to its former owner. 4. If I drive piles into the sea and build upon them, the building is immediately mine. Equally, if I build on an island arising in the sea, it is mine forthwith; for what belongs to no one is open to the first taker.
- 31 PAUL, *Edict*, book 31: Bare delivery of itself never transfers ownership, but only when there is a prior sale or other ground on account of which the delivery follows. 1. Treasure is an ancient deposit of money, memory of which no longer survives, so that it is without an owner; thus, what does not belong to another becomes the property of him who finds it. For the rest, if someone should hide something in the ground for gain or out of fear or for safekeeping, it is not treasure and to take it would be theft.
- 32 GAIUS, *Provincial Edict*, book 11: We acquire, even unwillingly, through our slaves on virtually every ground.
- 33 ULPIAN, *Disputations*, book 4: Marcellus, in his twentieth book, in respect of a legacy to a slave who is part of a *peculium castrense*, or a stipulation by the slave before the acceptance of the inheritance of the soldier son-in-power, treats of the question, from whose person the legacy or stipulation will take effect. I think that the more correct view is that of Scaevola, which Marcellus also discusses, that is to say, that if the inheritance is in fact accepted, all is to be regarded as in respect of an inherited slave; if it is not accepted, as in respect of the father's own slave; and if a usufruct is left to the slave, it is to be regarded, now as offered to the father, now to the heir, and not as passing from the one to the other. 1. The same distinction may be taken if something is stolen from the *peculium*; one will say either that the action for theft is no longer his if the inheritance is accepted under the will, since there can be no theft from a vacant inheritance, or that the action for theft, as also the *condictio*, will be given to the father, if the inheritance is not accepted. 2. Whenever the slave of an inheritance takes a stipulation or receives something by delivery, his act is effective by virtue of the

personality of the deceased, as Julian maintains; his view has prevailed that the person to whom to look is the testator.

- 34 ULPIAN, *Census*, book 4: For the inheritance sustains the personality of the deceased, not that of the heir, as has been established by many instances taken from the civil law.
- 35 ULPIAN, *Disputations*, book 7: If my procurator or a tutor should deliver his own thing to someone, thinking it to be mine or the property of his *pupillus*, he does not lose ownership in it, and the alienation is null, since no one can lose his property through error.
- 36 JULIAN, *Digest*, book 13: When we indeed agree on the thing delivered but differ over the grounds of delivery, I see no reason why the delivery should not be effective; an example would be that I think myself bound under a will to transfer land to you and you think that it is due under a stipulation. Again, if I give you coined money as a gift and you receive it as a loan, it is settled law that the fact that we disagree on the grounds of delivery and acceptance is no barrier to the transfer of ownership to you.
- 37 JULIAN, *Digest*, book 44: A creditor cannot acquire possession through a slave who is in pledge to him because although he has possession of the slave, he can acquire nothing, whether by stipulation or delivery or in any other way, through that slave.
1. If one of several owners should make a gift of money to a slave whom they own in common, it is for that owner to determine on what basis he gives it to the slave. For if his intention be only that the money comes out of his own account to become part of the slave's *peculium*, the money will remain the property of the same owner; but if he gave the money to the common slave in the same manner that we are accustomed to make gifts to the slaves of others, it will become the common property of all the owners in the same shares which they have in the slave himself.
2. To prepare the ground for the next question, let us suppose that the co-owner so gives money to the common slave that he wishes it still to remain his property. If the slave should buy land with that money, that land will be the common property of his owners in proportion to their shares in him; for if a common slave should buy land even with stolen money, it would belong to the co-owners in the same manner. For it is not the case that a slave owned in common does not acquire also for the one owner what he obtains through the substance of the other, as it would be the case that a fructuary slave would not acquire for his owner what he gets through the resources of his usufructuary. But in the same way that the positions of the fructuary slave and the common slave differ in respect of acquisitions from extraneous sources in that in such case, the former does not acquire for his fructuary, while the latter does acquire for his owners, so also an acquisition made with the resources of the fructuary alone will belong to the fructuary exclusively; but an acquisition by a common slave, which is made with the resources of one owner, will belong to both owners.
3. By taking delivery in the name of only one owner, as also by stipulating only in his name, a common slave acquires exclusively for that owner.
4. Should the slave of a single owner say that he accepts delivery in the names of his owner and of Titius, he acquires part for his owner, and in part, his action is nugatory.
5. If a fructuary slave should say that he is accepting delivery simply for his actual owner, even though the acquisition be made through the resources of the fructuary, he acquires exclusively for his owner; equally, if he stipulated for his owner in relation to the fructuary's property, he would acquire solely for his owner.
6. You wish to make me a gift, and I tell you to make delivery to the slave whom I own in common with Titius, and the slave receives the thing with the intention of acting only for Titius; the transaction is void; for even if you deliver a thing to my procurator to make it mine and he receives it as for himself, the transaction is void. If, on the other hand, a common slave should receive a thing with the intention of making it the property of both his owners in similar circumstances, the transaction will be void in respect of the other owner.
- 38 ALFENUS VARUS, *Digest*, *Epitomized by Paul*, book 4: Attius had a property adjoining a public road; beyond the road lay a river and the holding of Lucius Titius. The river gradually flowed over and ate away the land lying between the road and the

river and made away with the road and then gradually receded and, by alluvion, returned to its former bed. The opinion was that the river having destroyed the land and the public road, the land so destroyed became the property of the man who held the land beyond the river [that is, Lucius Titius]; but later, when the river slowly receded, it took the restored land away from the man who had acquired it and added it to that of the owner beyond the road [that is, Attius], since his land was nearest to the river; but what had been public became no one's property. And he said further that the road did not prevent the land again exposed, with the recession of the river, on the other side of the road from becoming the property of Attius, since the road itself was part of his land.

- 39 JULIAN, *From Minicius, book 3*: Even a stolen slave acquires, for the person who buys him in good faith, what he stipulates for or receives by delivery in respect of his purchaser's property.
- 40 AFRICANUS, *Questions, book 7*: The following question has been put: suppose that a person to whom a freeman is in servitude in good faith dies and that his heir is aware that the seeming slave is free; can the heir acquire anything through that man? [Julian] says that in no way can the heir be regarded as a possessor in good faith, since he assumes possession in the knowledge that the man is free; for equally, if a man should devise his own land, an heir who has knowledge of the bequest could, beyond all doubt, acquire no ownership in the fruits of that land; the case is still stronger if the testator should simply be the purchaser in good faith of another man's slave. In consequence, says [Julian], a like line of reasoning is to be adopted in respect of the services or labor of slaves so that, whether the slaves did not belong to the testator or, though his, they were specifically bequeathed or manumitted in his will, no acquisition can be effected through them for heirs who know the facts. In general, indeed, he says that the two issues go together so that where a possessor in good faith becomes owner of produce of land which has been consumed, he will likewise acquire through a slave through the latter's services or in respect of his own property.
- 41 ULPIAN, *Edict, book 9*: It is the case that statues set up in a *civitas* do not belong to the citizens; so, Trebatius and Pegasus; still the praetor should ensure that what has been set up in a public place with the intent that it should be public should not be allowed to be removed by a private individual, not even by the person who erected it. The citizens, therefore, are to be protected, being given a defense against one who claims the statue and an action against one who possesses it.
- 42 PAUL, *Edict, book 11*: A substitution which does not yet lie is no part of a man's estate.
- 43 GAIVS, *Provincial Edict, book 7*: A slave who is possessed in good faith does not acquire for his possessor what he acquires with the substance of his true owner. 1. It is obvious that incorporeal things do not admit of delivery and usucapion. 2. When a slave, in whom another has a usufruct, buys and takes delivery of a slave, the question for whom he acquires him is in suspense until he pays the price; if he pays it out of a *peculium* from the fructuary, he is deemed to acquire for the fructuary, but should he use a *peculium* which follows his actual owner, the slave purchased, by relation back, is held to belong and to have belonged to his owner.
- 44 ULPIAN, *Edict, book 19*: The following case is discussed by Pomponius: When wolves were carrying off pigs from my swineherd, a farmer on a neighboring estate, with some strong and powerful dogs which he kept to protect his own herd, pursued the wolves and snatched the pigs away from them; that or the dogs tore them away; but when my swineherd claimed the pigs, the question arose whether the pigs had become the property of their rescuer or remained mine; for, in a way, the dogs got them by hunting. He, however, used to ponder whether, since animals caught on land or sea cease to belong to their captors on regaining their natural freedom, so also things captured from a man's property by wild animals of land or sea cease to be his, when the beasts elude his pursuit. Who indeed can say that what a bird, flying by, takes from my threshing-floor or land or snatches from me myself remains mine? If, then, ownership is so lost, the thing will belong to the first taker on being freed from the beast's mouth, just as a fish, wild boar, or a bird, which escapes from our power, will become the property of anyone else who seizes it. But he thinks that rather is it the case that the thing remains ours so long as it can be recovered; what he writes about birds, fish, and wild animals, however, is true. He also says that what is lost in

a shipwreck does not cease forthwith to be ours; indeed, a person who seizes it will be liable for fourfold its value. And it is certainly preferable to say that what is seized by a wolf remains ours so long as it can be retrieved. If, then, it does so remain, I am of opinion that even the action for theft will lie; for even if the farmer did not give chase with the intent to steal, though he may have had that intent, still, even assuming that he did not give chase with that intent, nevertheless, when he does not restore on request, he appears guilty of detaining and appropriating. Accordingly, I am of the view that he is liable to both the action for theft and that for production; and the pigs, when produced, can be reclaimed from him by a *vindicatio*.

- 45 GAIUS, *Provincial Edict*, book 7: If a common slave makes an acquisition with the resources of one of his owners, nonetheless, the thing becomes common property; but the owner whose resources were used will have a preferred claim for the sum in an action to divide the common property; for it accords with good faith that each should have a prior claim to what the slave acquires with his resources. But if the slave makes an acquisition from any other source, he acquires for all the co-owners to the extent of the share of each in him.
- 46 ULPIAN, *Edict*, book 65: There is no novelty in the fact that one who does not have ownership may yet confer ownership upon another; a creditor, for instance, in selling a pledge, gives title to an ownership which he does not himself have.
- 47 PAUL, *Edict*, book 50: An inheritance cannot be acquired by a slave for his fructuary because an inheritance is not in the sphere of a slave's labor.
- 48 PAUL, *Plautius*, book 7: A purchaser in good faith undoubtedly acquires ownership for the time being by gathering fruits, even those of someone else's property, not only the fruits which are produced by his care and toil but all fruits, because, in the matter of fruits, he is virtually in the position of an owner. Indeed, even before he gathers them, the fruits belong to the purchaser in good faith as soon as they are severed from the soil. And it is of no consequence whether what I purchase in good faith can be acquired by long prescription or not; as would be the case if it belongs to a *pupillus* or was taken by force or presented to the governor in breach of the *lex repetundarum* and alienated by the governor to a purchaser in good faith. 1. Conversely, the question is raised, assuming that when the thing is delivered to me, I believe it to belong to the vendor and subsequently discover that it belongs to another, can I make the fruits mine, seeing that the period of prescription continues to run? Pomponius says that it is to be feared that although he may usucapt, such a person is not a possessor in good faith; usucaption is a matter of law, while the question whether a person is a possessor in good faith or in bad faith is a matter of fact; and there is nothing perverse in the continuance of prescription since, on the other hand, a man who cannot usucapt by reason of a flaw in the thing yet makes the fruits of it his own. 2. The young of sheep count as fruits and so belong to the purchaser in good faith, even if the sheep were pregnant at the time of sale or had been stolen. And, certainly, there can be no doubt that he takes ownership of their milk, even though they were sold with full udders; the rule is the same for their wool.
- 49 PAUL, *Plautius*, book 9: When a fructuary makes a gift out of his own property [to the slave he holds in usufruct], that is an acquisition with his resources; but if he did it with the intention that it should belong to the slave's owner, it must be said that the latter acquires it. But if some third party makes a gift to the slave without specification, it will be acquired exclusively for his owner. We say the same of a freeman in servitude to me in good faith, that is to say, that if I give him anything, it is mine. Consequently, Pomponius writes that even if I make him a gift of his labor, anything that he acquires through that labor is, nonetheless, mine.
- 50 POMPONIUS, *From Plautius*, book 6: Although what we erect on the shore or in the sea becomes ours, a decree of the praetor, nevertheless, should be obtained, authorizing the erection; indeed more, one should be physically prevented, if he builds to the inconvenience of the public; for I have no doubt that he has no civil action in the matter.
- 51 CELSUS, *Digest*, book 2: We recover a deserter by right of war. 1. And property of the enemy, which is on our territory, becomes not public property, but that of the first taker.

- 52 **MODESTINUS**, *Rules*, book 7: We are deemed to have a thing among our assets whenever, being in possession of it, we have a defense or, on losing it, have an action to recover it.
- 53 **POMPONIUS**, *Quintus Mucius*, book 14: What is acquired by civil law methods, say on a stipulation, by those in our power is acquired by us; what is acquired naturally, possession, for instance, we acquire through anyone at all when we wish to possess.
- 54 **POMPONIUS**, *Quintus Mucius*, book 31: A freeman cannot acquire an inheritance for us. Such a one, in servitude to us in good faith, acquires the inheritance for himself, so long as he accepts it of his own will and knowing his true status; if, though, he accepts it at our behest, he acquires it neither for himself nor for us, if he has not the intent to acquire for himself; but if he has such intent, he acquires for himself. 1. A freeman, in servitude to us in good faith, by operation of law, can incur an obligation to us by promising in a stipulation as also by buying or selling or letting or hiring. 2. And by causing damage, he will be liable to us for damage wrongfully inflicted; but we should not require of him in the matter of causing damage the slight degree of fault that would suffice in the case of a stranger but rather gross negligence. 3. Now if, on our instruction, such persons conduct some transaction or act in our absence as our procurators, an action will be given against them. 3a. They will have the same liability, not only when we have bought them but also if they came to us as a gift or by way of dowry or legacy, and not only if we think them to be our own but also if we think that we are co-owners of them or have a usufruct in them, though, of course, they do not acquire for us what they would not have acquired if they, in fact, had been common or fructuary slaves. 4. Now whatever a freeman or someone else's slave in servitude to us in good faith does not acquire for us he acquires for himself, if free, for his real owner, if a slave. There is, however, the exceptional case that the freeman could scarcely usucapt the thing by possessing it, because a man cannot be regarded as in possession who is himself possessed by another. No more can the owner of a slave, who is in servitude to us in good faith, unknowingly usucapt through that slave on the ground of his *peculium*, just as he cannot do so through a runaway slave whom he does not possess.
- 55 **PROCLUS**, *Letters*, book 2: A wild boar fell into a trap which you had set for such purpose, and when he was caught in it, I released him and carried him off. Am I, then, to be seen as stealing your boar? And supposing him to be yours, would he cease to be or remain your property if, having released him, I set him free in a wood? Again, if he ceased to be yours, what action would you have against me? Should it be an *actio in factum*? These are my questions. The answer was this: Let us consider whether it be relevant that I set the trap on private land or on public land and, if on private land, whether it was my own or another's and, if another's, whether I set the trap with the owner's permission or without it; furthermore, let us consider whether the boar was so caught that he could not extricate himself or could do so only by lengthy struggling. Still I think that the cardinal rule is that if he has come into my power, the boar has become mine. And if you release my boar into his natural state of freedom and thereby he ceased to be mine, I should be given an *actio in factum*, as was the opinion given when someone threw another's cup from a ship.
- 56 **PROCLUS**, *Letters*, book 8: An island arose in a river, so facing the frontage of my land that its length did not extend beyond the frontage of my land; subsequently, the island gradually grew and extended opposite the frontage of both my superior and lower neighbors. My question is whether the accretion is mine, because it has been added to what is mine, or is it in the same position at law that it would have been if the island had been of its present length when it arose? Proculus replied: If that river in which, you write, an island arose, not exceeding the length of your frontage, is subject

to the right of alluvion and the island arose nearer your land than that of the owner on the other bank, the whole island is yours, and the subsequent accretion to it, by alluvion, is also yours, even though it be such as to extend the island beyond the frontages of your neighbors on either side or even to bring it nearer to the land of the owner on the other bank. 1. I have another question: The island having arisen nearer my bank, should the whole river subsequently begin to flow between me and the island, abandoning the former bed over which the main stream formerly flowed, do you in any way doubt that the island remains mine and equally that the soil which the river deserts also becomes mine? I ask you to write me your opinion. Proculus replied as follows: Assuming the island to have arisen nearer to your land in the first place, then, if the whole river, leaving its principal bed, which lay between the island and the land of your neighbor on the other bank, begins to flow between the island and your land, nonetheless, the island remains yours. But the bed previously existing between the island and your neighbor's land should be divided down the middle, so that the part nearer to your island should be deemed to be yours and the part nearer to your neighbor his. I naturally take the point that when the river bed on the other side of the island has dried up, it ceases to be an island, but to make the issue more readily intelligible, the land which was an island is still styled an island.

- 57 PAUL, *Plautius*, book 6: Julian writes that no acquisition is made for the donee through a slave given by her husband, even in respect of the donee's property; this has been allowed only in the case of persons in servitude in good faith.
- 58 JAVOLENUS, *From Cassius*, book 11: Nothing salvaged from the sea becomes the property of the salvor until its owner has begun to treat it as abandoned.
- 59 CALLISTRATUS, *Questions*, book 2: A thing purchased on my mandate does not become mine until delivered to me by the actual purchaser.
- 60 SCAEVOLA, *Replies*, book 1: Titius erected his new mobile barn, made of wooden planks, on Seius's land. The question is: Which of the two is owner of the barn? The reply was that on the facts as stated, it has not become the property of Seius.
- 61 HERMOGENIAN, *Epitome of Law*, book 6: In many fields of law, an inheritance is treated as though it were an owner; and so an acquisition too may be made for the inheritance, as for an owner, through a slave of the inheritance. Naturally, however, where the act of a person, or some genuine activity, is necessary, nothing can be acquired for the inheritance through a slave. Consequently, although a slave of an inheritance can be instituted heir to another, since there is yet lacking the personality of a master to authorize him to accept, the heir of the inheritance must be awaited. 1. A usufruct, which cannot exist without a person, cannot be acquired for an inheritance by a slave.
- 62 PAUL, *Handbook*, book 2: Those things which cannot be alienated individually may pass as part of the estate to the heir, for example, dotal land and things which cannot be the object of acquisition by a given person; although these last could not be bequeathed as legacies to him, nevertheless, as the instituted heir, he becomes their owner.
- 63 TRYPHONINUS, *Disputations*, book 7: When someone in another's power finds treasure, this must be said in relation to the person for whom he acquires it, that if he finds it on a third person's land, he acquires part for that person, but if he finds it on the land of his head of household, the whole belongs to the head of household, but if it be found on another's land, only part. 1. If a slave owned in common finds treasure on a third person's land, does he acquire for his masters in proportion to the share that each has in him or for all of them equally? The case is similar to that of an inheritance or legacy or a gift to the slave by third parties; for treasure too is regarded as the gift of fortune, so that the part of it which falls to the finder belongs to the slave's co-owners in proportion to their respective shares in the slave. 2. Should a slave owned in common find treasure on the private land of one of his owners, there is no doubt that so far as concerns the share which always falls to the landowner, it belongs exclusively to the

owner of the land; but we have to consider whether his co-owner gets a share in the other half and whether the case is not similar to that where the slave stipulates at the direction of one master alone or takes delivery of something or does so specifically for one; this is the more probable view. 3. But if a slave, in whom someone has a usufruct, finds treasure on the land of his real owner, does it all go to that owner; and if he finds on someone else's land, does he acquire the finder's share for his owner or for the fructuary? The question to be considered is whether it is acquired by the slave's labors. Suppose that he found it while digging the land; it might be said to be the fructuary's; but what he comes across by chance in a secluded spot, while simply rambling aimlessly, would go to his owner. Myself, I think that, not even in the former case, does the half go to the fructuary. For no one looks for treasure through the offices of a slave, and the slave was not digging for that purpose; but he was laboring on one thing, and fortune gave him the other. Hence, even if he found it on the fructuary's own land, I think that the latter would get only the half that goes to the landowner, the other half going to the slave's owner. 4. If a creditor should find treasure [on land pledged to him], he is held to find it on someone else's land, and he allocates half for himself and half to the debtor; and when the debt has been paid, he will not have to yield up that half of the treasure which was his as finder and not as creditor. Things being so, even when a creditor begins, by imperial decree, to hold for himself as owner, the case is still one of pledge, while the time for redemption is still running; but once that period has expired without payment having been made, he will keep the whole of the treasure. But if the debt be tendered within the appointed period, since all must be made good which must be given back in the case of an ordinary creditor, the treasure too must be restored, but only half of it because it is settled that the finder always retains half.

64 QUINTUS MUCIUS SCAEVOLA, *Definitions, sole book*: Someone else's property, which a person enters as his own in the census, does not thereby become his.

65 LABEO, *Plausible Views, Epitomized by Paul, book 6*: If I send you a letter, it will not be yours until it has been delivered to you. PAUL: Quite the contrary; for if you send your letter-carrier to me and I send you a letter in reply, it will become yours as soon as I hand it to the carrier. The same is true of any letter which I send you exclusively for your own purposes, say, if you have asked me to give you a testimonial and I send you the testimonial. 1. If some island in a river is your property, there is no public right. PAUL: No; with islands of this kind, the river banks and seashore are public, no differently from that which applies to the mainland. 2. If an island should arise in a public river nearer to your land, it is yours. PAUL: Let us consider whether this is not wrong in respect of an island which does not cohere to the actual riverbed, but which is held in the river by brushwood or some other light material in such a way that it does not touch the riverbed and can itself be moved; such an island would be virtually public and part of the river itself. 3. PAUL: If an island arising in a river is yours and then another island arises between it and the opposite bank, measurements should be taken in respect of it from your island and not from your riparian holding; for what is the relevance of the character of the land on account of proximity to which the issue of ownership of the second island arises? 4. LABEO, *same book*. If that which arises naturally or is built in a public place is public, an island arising in a public river ought to be public too.

66 VENULEIUS, *Interdicts, book 6*: If a pregnant woman be bequeathed or usucapted or alienated in some other manner and then gives birth, her issue will belong to her owner at the time of the birth, not to him who then owned her when she conceived.

ACQUISITION AND LOSS OF POSSESSION

1 PAUL, *Edict, book 54*: Possession is so styled, as Labeo says, from "seat," as it were "position," because there is a natural holding, which the Greeks call *κατοχή* by the person who stands on a thing. 1. The younger Nerva says that the ownership of things originated in natural possession and that a relic thereof survives in the attitude to those things which are taken on land, sea, or in the air; for such things forthwith become the property of those who first take possession of them. In like manner, things captured in war, islands arising in the sea, and gems, stones, and pearls found on the seashore become the property of him who first takes possession of them. 2. Now we can acquire possession in person. 3. A madman, however, and a *pupillus* acting without his tutor's authority cannot begin to possess because they have not the intention to hold, whatever their physical contact with the thing, as when one places something in the hand of a sleeping man. A *pupillus*, though, who acts with his tutor's authority does take possession. Ofilius, indeed, and the younger Nerva say that a *pupillus* can commence possession even without his tutor's authority, since the issue is one of fact, not of law; this view may be accepted if the young people be of such an age that they have understanding. 4. Should a husband yield up possession to his wife by way of gift, the general view is that she is now in possession, since an issue of fact cannot be invalidated by the civil law; and what point would there be in saying that the wife is not in possession in view of the fact that the husband lost possession as soon as he decided no longer to possess? 5. Similarly, we acquire possession through a slave or son in our power and, indeed, in the case of those things which they hold in *peculium*, we do so, even without being aware of the fact; this was the view of Sabinus, Cassius, and Julian, since those are deemed to possess with our consent whom we have allowed to have a *peculium*. In consequence, in relation to the *peculium*, even an infant or lunatic acquires possession and may usucapt, so also the heir, if a slave, part of the inheritance, buys something. 6. Furthermore, we acquire possession through someone whom we possess in good faith, whether he be in fact a freeman or the slave of another. But if we possess him in bad faith, I do not think that we can acquire possession through him; at the same time, one in the possession of another cannot acquire possession either for his true owner or for himself. 7. We acquire possession also through a slave owned in common as we would through one owned exclusively, any given owner acquiring possession alone, if the slave have in mind to acquire only for him, as would be the case also for the acquisition of ownership. 8. We can also possess through a slave whom we have in usufruct, just as we acquire through his labor; and it is not to the point that we do not possess him; for neither do we possess a son-in-power. 9. However, the person through whom we seek to possess must be such as to have an understanding of possession. 10. Hence, if you send a lunatic slave so that you may take possession, you are in no way regarded as having taken possession. 11. If, though, you send an *impubes*, you commence possession, just as a

pupillus, certainly when he has his tutor's authority, acquires possession. 12. Then there is no doubt that you can take possession through a female slave. 13. A *pupillus* acquires possession through a slave, whether above or below the age of puberty, if he directs that slave, with his tutor's authority, to enter into possession. 14. The younger Nerva says that we can possess nothing through a runaway slave, despite the fact that, so long as he is in no one else's possession, he is possessed by us and so can even be usucapted. But reasons of convenience established the rule that his usucapion may be completed so long as no one else has taken possession of him. On the other hand, it is the view of Cassius and Julian that we can acquire possession through the runaway, just as we would through slaves whom we have in a province. 15. Julian says that we do not acquire possession through a slave physically delivered up by way of pledge (for he is deemed to be possessed by the debtor for one purpose only, that of usucapion); but he does not acquire possession for the creditor either, because the creditor, even though in possession of him, does not acquire through him, whether on a stipulation or on any other ground. 16. The earlier jurists took the view that we cannot acquire through a slave, part of the inheritance, anything else from the same inheritance. Accordingly, there has been discussion whether this rule is to be taken further so that if several slaves be bequeathed, the issue is whether the others can be possessed through one of them by the legatee. The same problem arises if they are bought or donated together. The truer view, however, is that I can, through one, possess the rest. 17. If a slave be bequeathed to someone instituted as part heir, that heir acquires possession of land, part of the inheritance, through the slave, by virtue of the share that he has in him through the legacy. 18. The same must be said if I direct a slave, whom I own in common, to accept an inheritance; for I acquire it by reason of my share in him. 19. What we have said about slaves holds good, provided that they themselves wish to acquire possession for us; for if you bid your slave to take possession and he does so with the intent to possess not for you, but rather for Titius, you do not acquire possession. 20. We acquire possession through a procurator, tutor, or curator. But should they take possession in their own name and not merely by way of making available their services, we cannot make an acquisition through them. Otherwise, if we say that we cannot acquire possession through someone who takes in our name, the position would be that neither he to whom the thing is delivered will have possession, because he does not intend to possess, nor he who makes delivery, because he has ceased to possess. 21. If I bid the vendor to deliver a thing to my procurator, the thing being then present, Priscus says that it is to be held to have been delivered to me and that the same is true if I direct my debtor to give the money to a third party. For he says that there is no need for actual physical contact in order that possession may be taken; but that it can be done by sight and intent is demonstrated in the case of those things which, because of their great weight, cannot be moved, columns, for instance; for they are regarded as delivered, if the parties agree on their transfer in the presence of the thing; so also wines are deemed delivered when the keys of the cellar are delivered to the purchaser. 22. Citizens of a municipality can possess nothing of themselves, because the consent of all is not possible. Hence, they do not possess the marketplace, public buildings, and the like, but they use them in common. The younger Nerva, however, says that they can both possess and usucapt through a slave what he has acquired through his *peculium*; there are, though, those who think differently, since the citizens do not own the slaves themselves.

- 2 ULPIAN, *Edict, book 70*: The rule that we observe, however, is that citizens of a municipality can both possess and usucapt and thus that they can acquire through a slave and through a freeman.
- 3 PAUL, *Edict, book 54*: Those things can be possessed which are corporeal. 1. Now we take possession physically and mentally, not mentally alone or physically alone. But when we say that we must take possession both physically and mentally, that should not be taken to mean that one seeking to possess an estate must go round every part of it; suffice it that he enters some part of the estate, but with the intent and awareness that thereby he seeks to possess the estate to its utmost boundaries. 2. No one can possess an indeterminate part of a thing, as in the case that you are of a mind also to possess whatever Titius possesses. 3. Neratius and Proculus say that there can be no acquisition of possession by intent alone, unless there be a previous physical holding of the thing. Thus, if I know that there is treasure buried in my land, I possess it as soon as I form the intention to possess it, because what is lacking in actual holding is made up by my intention. On the other hand, the opinion of Brutus and Manilius that one who acquired ownership of land by long possession thereby also acquired treasure buried in it, although unaware of its existence, is not correct. Indeed, if he does know, he does not acquire it by long possession since he knows it to be the property of someone else. There are those who hold to be more correct the view of Sabinus, namely, that one aware of the existence of the treasure begins to possess it only when it is removed from the soil because, until then, it is not in his keeping; with these jurists, I am in agreement. 4. We can possess the same actual thing on a variety of grounds; hence, there are those who think that a man completing usucapion may have done so both as a purchaser and in his own name; suppose that I become heir to one in possession, as a purchaser, I possess that same thing both as purchaser and as heir; for unlike ownership which can be based on only one ground, possession may be held under a variety of heads. 5. By contrast, several persons cannot possess the same thing exclusively; for it is contrary to nature that when I hold a thing, you should be regarded as also possessing it. Sabinus, it is true, writes that one who grants a thing by *precarium* himself possesses it, as also does the grantee. Trebatius takes the same view and thinks that there can be simultaneously a just and an unjust possessor but not two just or two unjust possessors. Labeo takes him to task on the ground that, on the issue of possession, it is irrelevant whether a person is in lawful or in unlawful possession; and that is the more correct view. For it is no more possible that the same possession should be in two persons than that you should be held to stand on the same spot on which I stand or to sit in the place where I sit. 6. Again, for the loss

of possession, the possessor's mental attitude must be considered; if you are on a piece of land and lose the will to possess it, you immediately cease to possess it. Hence, possession can be lost, though it cannot be acquired, by will alone. 7. But should you be in possession by will alone, you continue to possess the land, even though someone else be physically present on it. 8. If someone should inform the owner that his house has been occupied by brigands and, in terror, the owner does not return there, he has certainly lost possession of the house. But if the slave or tenant, through whom I was physically in possession, should die or go away, I retain possession solely by intent. 9. If I deliver a thing to someone else, I lose possession of it. For it is settled that we remain in possession until either we voluntarily abandon it or we are ejected by force. 10. If a slave of whom I was in possession should, as did Spartacus, comport himself as though he was a freeman and be prepared to go through with litigation over his free status, he cannot be regarded as possessed by the master to whom he is ready to be an opponent in the courts. This, however, is true if he has been some time in a state of liberty; if, on the other hand, while possessed as a slave, he maintains that he is free and seeks a trial of the issue, he remains, notwithstanding, in my possession, and I possess him by will until he shall have been declared a freeman. 11. We possess by will summer and winter pastures, even though we desert them at given periods. 12. But we possess by our own intent, although through the corporeal act of another, as we have said of the slave and the tenant, and it should cause us no concern that even unknowingly, we possess certain things, namely those which a slave acquires by virtue of his *peculium*. For such things we are held to possess both physically and by intent. 13. The younger Nerva says that, leaving aside a slave, movable things are possessed by us only so long as they are in our keeping, that is, so long as we can, if we so choose, take physical control of them. For once an animal strays or a vase falls, so that it cannot be found, it immediately ceases to be in our possession, even though it is possessed by no one else; this differs from the case of something which is still in our keeping, though not immediately traceable; because the fact remains that it is still there, and all that is necessary is a diligent search for it. 14. Then again, we possess those wild animals which we have penned up or the fish which we have placed in tanks. But those fish which live in a lake or beasts which roam in an enclosed wood are not in our possession, because they are left in their natural state of liberty. Any other view would mean that the purchaser of a wood thereby should be held to possess all the animals in it; and that is not true. 15. We possess also birds which we keep in cages or which, being domesticated, are under our control. 16. It is, further and correctly, the view of some that we possess doves which fly from our cotes, as also bees which fly from our hives, they having the habit of returning. 17. Labeo and the younger Nerva ruled that I cease to possess land which is inundated permanently by a river or by the sea. 18. If you meddle with a thing which I have deposited with you, with a view to stealing it, I cease to possess it. But if you do not

move it from its position, though having the intention to deny the deposit, the majority of the older jurists, as also Sabinus and Cassius, rightly ruled that I remain possessor of it because there can be no theft without physical meddling; and we do not accept the idea of theft simply by intent. 19. The earlier jurists further laid down that no one can for himself change the title by which he possesses something. 20. But if someone who has deposited something with me or lent it to me, then sells or donates the thing to me, I am not regarded as changing the ground of my possession because, previously, I did not even possess the thing. 21. There are as many kinds of possession as there are grounds for acquiring what does not belong to us, for example, possession as purchaser, on gift, legacy, dowry, inheritance, noxal surrender, as one's own, 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. All in all, possession as such is one in nature, but its varieties are infinite. 22. Or, again, possession as such can be divided into two categories, according as it is held in good faith or in bad faith. 23. It was, though, very stupid of Quintus Mucius to include among the instances of possession those cases in which we possess something by magisterial order in order to preserve it, because the magistrate who sends a creditor into possession to preserve the thing, or because an undertaking has not been given in respect of threatened damage or in the interests of an unborn child, does not grant possession proper but only the guarding and custody of the thing. Hence, when we are granted possession because our neighbor will not give an undertaking against threatened damage, if this continues for some time, then the praetor, after investigating the matter, allows us to have possession proper and to acquire ownership by long possession.

- 4 ULPIAN, *Edict*, book 67: Whatever a son takes by right of *peculium*, his head of household possesses forthwith, even though unaware that the son is in his power. Moreover, this holds good, even if the son is possessed by someone else as a slave.
- 5 PAUL, *Edict*, book 63: If I owe you Stichus on a stipulation and do not deliver him but you obtain possession of him, you are a robber; equally, if I sell a thing and do not deliver it, but you obtain possession of it without my consent, you do not possess it as purchaser but are again a robber.
- 6 ULPIAN, *Edict*, book 70: We say that a person possesses by stealth who has entered furtively into possession without the knowledge of him who, he suspects, would oppose his taking, and he is fearful that this would happen. On the other hand, a person, not in clandestine possession, who has concealed himself is not in such case that he should be held to possess by stealth; for the factor to be considered is not the manner of holding possession but its original acquisition; and no one acquires possession by stealth who takes possession with the knowledge or consent of the thing's owner or on any other ground of good faith. Pomponius accordingly says that a person acquires

possession by stealth who enters furtively into possession, fearing opposition and without the knowledge of the man of whom he is apprehensive. 1. Suppose a man to go to market without leaving someone in charge and, while he is returning from market, someone seizes possession; Labeo says that this person possesses by stealth, and so the man who went to market remains in possession; but if the trespasser does not admit the owner on his return, he is regarded as possessing by force rather than by stealth.

- 7 PAUL, *Edict, book 54*: But if the owner declines to return to his land because he fears superior force, he will be deemed to have lost possession. Neratius writes the same.
- 8 PAUL, *Edict, book 65*: Just as no possession can be acquired except physically and with intent, so none is lost unless both elements are departed from.
- 9 GAIUS, *Provincial Edict, book 25*: In general, we are held to possess a thing, whoever be holding in our name, say, a procurator, a guest or a friend.
- 10 ULPIAN, *Edict, book 69*: Suppose a man first to have hired and then to have obtained a *precarium* of something; he is deemed to have resiled from the hiring. But if he first obtained the *precarium* and then hired, he will be held to be a hirer. For it is what is done last which is held operative; and so says Pomponius. 1. The same Pomponius most admirably treats of the case of one who, having rented land, then gets a *precarium* of it, the object of the *precarium* being not that he should have possession, but that he should be in possession of it (for there is no small difference; it is one thing to possess a thing and quite another to be in possession of it; persons holding a thing for its preservation or on account of legacies or by reason of threatened damage do not possess it, but are in possession of it to keep it safe); in such a case, he holds both as hirer and as grantee at will. 2. If someone hires a thing and obtains a *precarium* to possess it, then, if the hiring be for a single coin, there is no doubt that only the *precarium* is effective; for a hiring for a single coin is a nullity; but if the hiring were for a genuine rent, we must distinguish according to which transaction came first.
- 11 PAUL, *Edict, book 65*: A man possesses lawfully who possesses by the praetor's authority.
- 12 ULPIAN, *Edict, book 70*: A person who has a usufruct is regarded as possessing only in fact. 1. Ownership has nothing in common with possession; hence, a man who institutes a *vindicatio* for land will not be refused the interdict *uti possidetis*; for he is not deemed to have renounced possession by asserting ownership.
- 13 ULPIAN, *Edict, book 72*: Pomponius discusses the question whether, when stones

had been sunk in the Tiber in a shipwreck and some time later salvaged, the ownership of them remained intact throughout the time that they were submerged. My view is that I remain owner of them but I do not possess them; the case is not like that of a runaway slave; for the slave is held to be still possessed simply so that he shall not, by his own act, deprive his master of possession; the stones are a different matter.

1. When we invoke some support derived from our predecessor in title, we must accept it with all its incidents and defects; thus, when we count for ourselves the period of holding of our predecessor, there is the possibility that he possessed by force, stealth or *precarium*.

2. Another question is this: Suppose that a purchaser returns a slave to his vendor; can the vendor count for himself the period that the purchaser possessed him? There are those who think that he cannot, since the return puts an end to the sale; others hold that the vendor can add the period of holding of the purchaser and the purchaser that of the vendor; and this I think the view to be endorsed.

3. If, when in servitude in good faith, a freeman, or a third person's slave, buys and acquires possession of something for his seeming owner, neither the freeman nor the slave's owner can avail himself of that person's period of possession.

4. The question has been put whether, if an heir has not possessed, his testator's period of possession runs for him. In respect of purchasers, in such a case, possession is interrupted; now the majority of jurists do not take the same view of heirs, because the right of succession is more comprehensive than that of purchase; but it is more fitting to approve the same rule for an heir as for a purchaser.

5. The heir takes the benefit of not only the possession which his testator had at death but also of any that he ever had.

6. Similarly, if a thing be given in or returned from a dowry, the addition of periods of holding will be granted, as appropriate, to the husband or to the wife.

7. If a grantor of a *precarium* wishes to include the period of possession of his grantee, the question is whether he can do so. I am of opinion that so long as such a grant lasts, the grantor cannot do so; but should he resume possession, breaking the *precarium*, it must be said that he can avail himself of the period of possession under the *precarium*.

8. In a specific case, the question is raised whether, if a manumitted slave holds a thing, part of his *peculium*, which has not been granted to him, the master, having revoked his possession, can validly count that period of possession for himself. The view adopted was that such possession, acquired by stealth, cannot be included.

9. If, by judicial order, there be restored to me something held by a robber, I must, it is accepted, be allowed to count for myself his period of holding.

10. It should also be known that a legatee can call in aid the period for which his testator possessed the thing. Whether he can also avail himself of the heir's possession of it is a matter for consideration. My own view is that, whether the legacy be absolute or conditional, the legatee profits by the heir's period of possession, whether that be before the condition is satisfied or before the actual delivery of the thing. The testator's possession always redounds to the legatee's advantage, whether there be in truth a legacy or a *fideicommissum*.

11. A donee may claim for his own benefit the period of possession of his donor.

12. Such additions of possession are relevant, however, in respect of those who themselves possess things; they are of no advantage to one who does not himself

- possess. 13. Furthermore, no possession can be added to one which is flawed; and equally, a flawed possession cannot be added to an unflawed possession.
- 14 PAUL, *Edict, book 68*: If my slave or son-in-power should sell something, the purchaser can utilize the time that the thing was in my control, naturally on the assumption that the sale was made with my consent or that the object came from a *peculium* of which I had granted free administration. 1. Equally, when a tutor or curator sells, there is an addition of the period of possession of the *pupillus* or the lunatic.
- 15 GAIUS, *Provincial Edict, book 26*: We are deemed to lose possession of a thing appropriated from us in the same way that we lose what is taken by force. But should it be someone in our power who makes such appropriation, we do not lose possession, so long as it is in his charge; for it is through such persons that we acquire possession. This is the reason that we are held to possess a runaway slave because, just as he cannot intercept possession of other things, so he cannot intercept possession of himself.
- 16 ULPAN, *Edict, book 73*: What a wife gives as a present to her husband or a husband to his wife is possessed simply as possessor.
- 17 ULPAN, *Edict, book 76*: If a person be evicted forcibly from possession, he is treated as still possessing, since he has the ability to recover possession by the interdict *de vi*. 1. There is this difference between ownership and possession: that a man remains owner even when he does not wish to be, but possession departs once one decides not to possess. Hence, if someone should transfer possession with the intention that it should later be restored to him, he ceases to possess.
- 18 CELSUS, *Digest, book 23*: What I possess in my own name I can possess in that of another; and I do not thereby change the ground of my possession, but rather do I cease to possess and make the other person possessor through my agency. For it is one thing to possess and another to possess on someone else's behalf; he is the possessor in whose name a thing is possessed; the procurator simply provides the agency of another's possession. 1. Suppose that you deliver a thing to a lunatic, whom you think to be of sound mind, perhaps because he had the aspect of appearing undisturbed; you cease to possess although he does not acquire possession; for it is sufficient to give up possession, even though you do not transfer it. For it is ridiculous to say that a man intends to give up possession only if he transfers it; rather does he give up possession because he intends to transfer it. 2. If I instruct the vendor to leave at my house what I have bought, it is certainly the case that I possess it, even though no one has yet touched it; again, if my vendor points out to me from my turret the neighboring land which I have bought and declares himself to be giving me vacant possession, I begin to possess it no less than if I set foot within its boundary. 3. If, while I am in

one part of my estate, someone else enters by stealth, intending to possess the estate, I am not to be held at once to lose possession, since I can easily eject him as soon as I am aware of his presence. 4. Likewise, if an army has entered with great force, it holds only that part which it has occupied.

- 19 MARCELLUS, *Digest*, book 17: A man who, in good faith, bought someone else's land, hired it from the owner. I ask whether or not he ceases to possess it. My reply was that he clearly ceases to possess. 1. When the earlier jurists write that no one can change the ground of his own possession, this may be thought tenable of one who, being already physically and with intent in possession, merely decides to possess by some other title; it does not apply to one who, giving up his previous possession, intends to obtain a new possession by a different title.
- 20 MARCELLUS, *Digest*, book 19: If a person lends a thing for use and then sells it and directs the borrower to deliver the thing to the purchaser and he does not do so, the borrower, in some cases, will be held to have appropriated to himself the vendor's possession, in other cases, not. For the vendor does not always lose possession at the time when the thing lent for use is not returned to him on demand; what, for instance, if the borrower has some other lawful and reasonable ground for not returning it without any intention of usurping possession of it?
- 21 JAVOLENUS, *From Cassius*, book 7: Sometimes a man can confer on another possession of a thing which he does not himself possess; this happens, for instance, when, before he has thereby acquired ownership, a person possessing as heir obtains a *precarium* of it from the actual heir. 1. What has been cast up from a shipwreck cannot be the object of usucapion, because it has been not abandoned but lost. 2. I think that the same rule holds good for jetsam; for what is temporarily cast away in the interests of safety cannot be held to have been abandoned. 3. Should one who has obtained a *precarium* of a thing then hire it from the owner, possession of the thing returns to the owner.
- 22 JAVOLENUS, *From Cassius*, book 13: A man is not regarded as having possession who so acquired it that he cannot retain it.
- 23 JAVOLENUS, *Letters*, book 1: When we are instituted heirs, once we accept the inheritance, all the rights pertaining thereto belong to us; but possession does not become ours unless we physically take it. 1. A particular provision exists for those who fall into enemy hands in respect of their retention of rights in their assets; they do indeed lose physical possession; for no one can be held to possess who is himself possessed by others; it follows, therefore, that on their return, they must take up a new possession, even though no one, during their absence, possessed their goods. 2. I have another question: Suppose that I fetter a freeman in such a way that I possess him; do I thereby possess through him all that he possesses? The reply was: If you bind a freeman, I do not think that you do possess him; such being the case, still less do you possess through him his own possessions; and, in the nature of things, it cannot be accepted that we can possess something through one whom we do not have in our power at civil law.
- 24 JAVOLENUS, *Letters*, book 14: You do not possess what, without your knowledge,

your slave possesses by force, because one in your power, without your knowledge, can acquire for you only lawful possession, not that which exists only in fact; thus, he possesses what comes to him through his *peculium*. A master is said to possess, in such circumstances, through his slave and, indeed, with every justification, because what the slave physically holds, by lawful title, is in the slave's *peculium* and the *peculium*, which the slave, of course, cannot possess at civil law, but can hold only in fact, his owner is held to possess. But what comes his way through wrongdoing does not become a possession of his owner, because he does not obtain it by reason of the *peculium*.

- 25 POMPONIUS, *Quintus Mucius*, book 23: If we possess something and lose it in such circumstances that we do not know where it is, we lose possession of it. 1. We possess also through our tenants, agricultural or urban, and through our slaves; and should they die or lose their reason or let to someone else, we are deemed to retain possession. No difference exists between the agricultural tenant and the slave through whom we retain possession. 2. But in respect of what we possess solely by intent, the question arises whether we possess it only until another enters upon the thing, so that his physical possession is the stronger, or rather (and this appears the preferred view) we possess until someone excludes us on our return or until we cease to have the possessory intent because we suspect that we may be excluded by the intruder; this latter seems the more practical view.
- 26 POMPONIUS, *Quintus Mucius*, book 26: A specified portion of an estate can be possessed and thereby taken into ownership by long possession as can also a specific undivided share, whether it derive from a sale, a gift, or any other source. But a non-specific part can be neither transferred nor usucapted, as when I transfer to you "whatever right I have in the land"; for one unaware of the facts can neither deliver nor accept what is unparticularized.
- 27 PROCULUS, *Letters*, book 5: If a person retaining possession of pastures by intention loses his senses, he cannot, during his period of unreason, lose possession of the pasture because a lunatic cannot lose possession by intention.
- 28 TERTULLIAN, *Questions*, book 1: Suppose that I possess something and subsequently hire it; do I lose possession of it? In such matters, it is of great importance what the parties intended; in the first place, do I, or do I not, know that I possess the thing; then, do I hire the thing as being, or not being, mine; and, if I know it to be mine, do I hire in respect of its ownership or only its possession? For even if you possess my thing and I buy from, or stipulate from you for, the possession of it, the purchase or stipulation will be valid. It follows that equally a *precarium* or a hiring will be valid, if the intention be directed specifically to hiring the possession or obtaining it by *precarium*.
- 29 ULPIAN, *Sabinus*, book 30: It is established law that a *pupillus* cannot lose possession without his tutor's *auctoritas*; this meaning that though he loses possession physically, he cannot do so by intent; for he can lose what is a matter of fact. The case,

though, is different if perchance he wishes to abandon possession by intention; this he cannot do.

- 30 PAUL, *Sabinus*, book 15: A person possessing a building as a whole is not deemed to possess the individual things in the building. The same applies to a ship and to a cupboard. 1. There is a variety of ways in which we lose possession; we may, for instance, inter a corpse in land which we possess; for we cannot possess a religious or sacred place, even though we personally spurn religion and regard the land as private; the same is true of a freeman. 2. In similar manner, if the praetor should order entry into possession of something, because security has not been given in respect of it against threatened damage, Labeo says that the owner, against his will, loses possession of it. 3. Likewise, we cease to possess what is occupied by the sea or a river or if the person in possession should pass into the power of another. 4. Then, again, a movable thing we may cease to possess in a variety of ways; it could be that we do not wish to possess it or that we manumit a slave, for instance, or that what we possess is converted into a new form, as when a garment is woven out of wool. 5. What I possess through my tenant my heir cannot possess, unless he personally takes possession of it; for though we can retain possession by intention, we cannot so acquire it. Still what I possess as purchaser, albeit through a tenant, my heir will also be able to usucapt. 6. If I lend you something for use and you lend it to Titius who thinks it to be yours, I possess it, nonetheless. The same holds good if my tenant lets the land or if my depositee redeposits the thing with someone else. This rule must apply, if such process continue through several other persons.
- 31 POMPONIUS, *Sabinus*, book 32: If a tenant farmer should quit the land without the intention to abandon possession of it and then return there, the landlord is held to continue to possess.
- 32 PAUL, *Sabinus*, book 15: Although a *pupillus* does not come under an obligation without his tutor's *auctoritas*, nevertheless, we can retain possession through him. 1. Suppose that the hirer of a thing sells it and then hires it from the purchaser and pays rent to each of his lessors; the earlier lessor is most correctly held to retain possession through the hirer. 2. An infant can legally possess if he takes possession with his tutor's *auctoritas*, because the tutor's *auctoritas* supplements the infant's judgment; this has been accepted on grounds of expediency, since there would otherwise be no sense in the infant's accepting possession. A *pupillus*, on the other hand, can take possession even without his tutor's *auctoritas*. Again, an infant can possess through a slave in respect of the latter's *peculium*.
- 33 POMPONIUS, *Sabinus*, book 32: Even though the vendor of land may have charged someone to give the purchaser vacant possession of it, the purchaser will not lawfully come into possession until that happens. Likewise, if, on the vendor's death, his friend, whether in ignorance of the death or with the consent of the heirs, discharges his commission, possession will have been lawfully delivered. The converse will be true, however, if he so act, knowing the owner to be dead or that the heirs do not wish it.
- 34 ULPIAN, *Disputations*, book 7: If you send me into vacant possession of the Cornelian estate and I think that you are sending me into the Sempronian but I enter upon

the Cornelian, I do not acquire possession of it, unless it chance that we are agreed on the estate and in error only over its name. But even when we are not agreed on the object, it can be a matter of doubt whether possession still does not depart from you, since both Celsus and Marcellus write that we can both shed and change possession by simple intent; and if possession can be acquired simply by intent, should it not be acquired in the present instance? Personally, however, I do not think that one in error can take possession; it follows that a person does not lose possession who withdraws, as it were under a condition, from possession. 1. But if you deliver possession not to me, but to my procurator, it is a matter for consideration whether possession be acquired for me, supposing me to be in error but my procurator not. Since it has been accepted that acquisition is possible for one in ignorance, so is it also for one in error. Conversely, if my procurator should be in error but not I, the better view is that I acquire possession. 2. Again, my slave acquires possession for me, even though I be unaware thereof. For, as Celsus writes, even someone else's slave, whether possessed by me or by no one, can acquire possession for me, if he takes it in my name. This also must be conceded.

- 35 **ULPIAN**, *All Seats of Judgment*, book 5: The outcome of a dispute over possession is simply this: that the judge makes an interim finding that one of the parties possesses; the result will be that the party defeated on the issue of possession will take on the role of plaintiff when the question of ownership is contested.
- 36 **JULIAN**, *Digest*, book 13: A person making over land to his creditor by way of pledge is deemed to possess it. Now if he should seek a *precarium* of it, nevertheless, he can acquire it by long possession; for the creditor's possession not preventing such acquisition, still less should holding by *precarium* be an obstacle; for one possessing by *precarium* has a better possessory title than one who does not possess at all.
- 37 **MARCIAN**, *Action on a Mortgage*, sole book: When a thing is given in pledge and possession of it is transferred and then it is hired by the debtor from the creditor, it is agreed that the person making the hypothec is held to be a tenant in respect of both land and houses; the creditor is deemed to possess through such persons.
- 38 **JULIAN**, *Digest*, book 44: One who writes to his absent slave that he is to be in a factual state of liberty does not have the intention to yield up forthwith possession of the slave but rather to defer his decision until the slave is apprised of the facts. 1. If someone so convey possession of land that he declares himself only to transfer it, if the land be his, possession is not held to be delivered, if the land belongs to another person. Developing this, it must be accepted that possession can be delivered conditionally in the same way that ownership can be transferred in such wise that it

becomes the recipient's only if the condition be realized. 2. Should someone who sold a slave to Titius deliver the slave to Titius's heir, the heir, through the slave, will be able to take possession of assets of the inheritance, because it is not the slave, but the action on purchase in respect of the slave that comes to him by hereditary title; for even if a slave was due to the testator under a stipulation or a will and the heir accepted him, he would not be precluded from acquiring, through such slave, possession of things, part of the inheritance.

- 39 JULIAN, *From Minicius, book 2*: I think it a matter of importance with what intention a thing is deposited with a sequestrator. For if it was done to break a possession and this has been clearly demonstrated, his possession will not avail the parties for the purpose of usucapion; but if the deposit is for safekeeping, his possession will certainly avail the party successful in the dispute for usucapion.
- 40 AFRICANUS, *Questions, book 7*: [Julian] says that if your slave should evict you from the land which I gave you in pledge when I possessed it, you still possess it because you continue to possess through the very slave himself. 1. If the tenant farmer, through whom the landowner possesses, should die, it has been accepted on grounds of convenience that possession is retained and continued through the tenant, and on his death, it is not to be said that possession is broken forthwith but only when the owner fails to take possession. A different view is to be taken, he says, if the tenant goes out of possession of his own accord. All this, however, is true, only if no stranger has taken possession meanwhile but the land has remained throughout in the tenant's inheritance. 2. I bought your slave in good faith from Titius and took possession of him on delivery; then, when I discovered that he belonged to you, I began to conceal him, lest you should claim him from me. [Julian] says that I am not to be held, on that account, to possess him by stealth during that period; for conversely, if I knowingly buy your slave from a nonowner and, having commenced possession of him by stealth, I subsequently inform you, I do not thereby cease to be in clandestine possession of him. 3. His answer was that if I take my slave away by stealth from his purchaser in good faith, I am not to be regarded as in clandestine possession, because an owner is not bound by a *precarium* or a hiring of his own thing; and the case of clandestine possession cannot be separated from those two grounds.
- 41 PAUL, *Institutes, book 1*: One who enters a friend's land by right of their friendship is not held to possess it because, although he is physically on the land, he does not enter with the intent to possess it.
- 42 ULPIAN, *Rules, book 4*: Although a slave owned in common may be possessed by one of his owners in the name of all, he is treated as possessed by them all. 1. If, on his principal's mandate, a procurator buys something, he acquires possession of it for him forthwith; but if he buys it on his own initiative, only if his principal ratifies the purchase.
- 43 MARCIAN, *Rules, book 3*: Suppose a man to buy land, a small part of which he knows to belong to another. Julian says that if he knows that that other's share is defined, he

can obtain ownership of the remaining parts by long possession; but if it is an undivided share, although he does not know its location, he can equally acquire because the share believed to belong to the vendor passes, without harm to anyone, to the purchaser by long possession. 1. Again, Pomponius, in the fifth book of his *Miscellaneous Readings*, writes that if a purchaser in good faith knows or thinks that someone else has a usufruct in the thing, he can still acquire ownership by long possession in good faith. 2. He says that the same applies also, if I buy a thing which I know to be subject to a pledge.

44 PAPIANIAN, *Questions, book 23*: A man about to go on a journey buried money in the earth for safekeeping; the question was asked whether, if, on his return, he could not recall the hiding-place, he ceased to possess the money or, if he subsequently remembered the spot, he immediately began to possess it. I said that since it was stated that the money was buried for safekeeping, the concealer's right of possession did not appear to have been taken away from him and a lapse of memory does not adversely affect a possession which no one else has infringed; otherwise, we would have to answer that we have lost possession from one minute to another of slaves who are not in our sight. And it is of no consequence whether I buried the money on my own or on someone else's land, since, if someone else buried money on my land, I would possess it only if I obtained possession of it above ground. Hence, the fact that the land is another's does not take away my possession, since it is of no consequence whether I possess above or below ground. 1. The question was asked why possession is acquired for those who know nothing of it through a slave in respect of his *peculium*. I said that for reasons of convenience, the rule was adopted as an exception so that owners would not be obliged to find out at any given time the forms and titles of *peculia*. This does not mean, however, that the owner acquires possession by intent alone; for if something is acquired other than through the *peculium*, the owner's intention is indeed necessary; but possession is acquired physically through the slave. 2. These explanations given, I may say that when the question is one of the loss of possession, it is of great relevance whether we possess personally or through someone else; for in the case of things that we ourselves physically hold, we lose possession by intent, or even physically, if we leave the thing with the intention not to possess it; but possession of what is physically held by a slave or a tenant is lost only if someone else enters upon it; and it is then lost even without our knowledge of the fact. This distinction also exists in the matter of loss of possession. For summer and winter pastures of which possession is retained by intent,

45 PAPIANIAN, *Definitions, book 2*: even though we have no slave or tenant there,

46 PAPIANIAN, *Questions, book 23*: the previous possessor is said to possess even though another has entered the pasture with the object of possessing it, so long as he is in ignorance of the entry. For just as the bond of an obligation is released in the same

way that it is normally created, so also possession which is held solely by intention should not be taken away from one ignorant of the facts.

- 47 PAPINIAN, *Questions, book 26*: A reply was given that if you decide to possess and not to return a movable thing which has been deposited with or lent to you, I immediately lose possession, even though I do not know it; the explanation for this, perhaps, is that, in the case of movables, neglect or failure to keep them safe is generally deleterious to the erstwhile possession even though no one else intrudes upon it; the younger Nerva reports this rule in his work on usucapions. He also writes that the case is different with failure to keep safe a borrowed slave; for the original possession of him continues so long as no one else takes possession of him, doubtless because, by resolving to return, a slave, through whose person we can possess other things, can preserve his master's possession of himself. Accordingly, possession is lost forthwith of irrational and inanimate things, but assuming their intention to return, slaves are retained.
- 48 PAPINIAN, *Replies, book 10*: A man made a gift of land with slaves and stated in writing that he had delivered possession of them. Even if only one of the slaves given with the land should come to the donee and by him be sent back shortly to the land, it will be manifest that possession of the land and of the other slaves is acquired through that slave.
- 49 PAPINIAN, *Definitions, book 2*: Possession is also acquired through a slave in whom I have a usufruct in respect of my resources or through his labor; for the slave is held in fact by the usufructuary and possession borrows heavily from right. 1. Those in another's power can hold a thing in *peculium*, but they cannot have and possess it, because possession is a matter not merely of fact but also of right. 2. Although possession is acquired through a procurator, even by one who does not know it, usucapion will run only for one aware of his possession; the action for eviction against the vendor, however, is not granted to the principal without the procurator's consent, but the latter will be required by the action on mandate to cede it to the principal.
- 50 HERMOGENIAN, *Epitome of Law, book 5*: By a reasonable error, I think someone to be my son and in my power; through him, not possession nor ownership nor anything else is acquired for me in respect of my property. 1. Possession is acquired for us through a runaway slave, so long as he is not possessed by someone else or he does not believe himself free.
- 51 JAVOLENUS, *From the Posthumous Works of Labeo, book 5*: Labeo says that there are some things of which we get possession by intention; suppose that I buy a pile of logs and the vendor tells me to take them away; as soon as I put a guard upon them, they are regarded as delivered to me. The same rule applies in respect of wine sold, if all the jars of wine are then together. But, he says, let us consider whether actual physical delivery is not made in such cases; for it is of no moment whether safekeeping be given to me personally or to anyone whom I direct. I think that the crux of the matter is whether, although the pile of logs or the jars are not physically taken up, nonetheless, they are regarded as delivered; I see no significance in whether I myself

or another at my behest guards the logs; in either case, possession must be determined, in some degree, by intention.

- 52 VENULEIUS, *Interdicts, book 1*: The grounds of possession and those of usufruct must not be confused any more than possession and ownership should be confused; for it is no barrier to possession that another has enjoyment and no one's usufruct is diminished by another's possession. 1. One forbidden to build is obviously barred also from possession. 2. One way of introducing into possession is to prohibit the use of force against one entering; for [the praetor] bids the opponent to yield forthwith and to leave possession vacant; and that is much more than restoration.
- 53 VENULEIUS, *Interdicts, book 5*: Against third parties, even vicious possession is normally of avail.

3

USUCAPIONS AND USURPATIONS

- 1 GAIUS, *Provincial Edict, book 21*: Usucapion was introduced for the public weal, to wit, that the ownership of certain things should not be for a long period, possibly permanently, uncertain, granted that the period of time prescribed should suffice for owners to inquire after their property.
- 2 PAUL, *Edict, book 54*: Usurpation is an interruption of usucapion; usurpation, however, is also a term used by orators to mean frequent use.
- 3 MODESTINUS, *Encyclopaedia, book 5*: Usucapion is the acquisition of ownership by continued possession for the period prescribed by law.
- 4 PAUL, *Edict, book 54*: Our next task is to discuss usucapion. And following the same order, we must consider who can usucapt, what he may usucapt and within what period. 1. Obviously, a head of household can usucapt. A son-in-power who is a soldier in camp also usucapt what he acquires by reason of his service. 2. If a *pupillus* takes possession with his tutor's *auctoritas*, he may usucapt; but we must say that even if he takes possession without such *auctoritas* but with the intention of possession, he may equally usucapt. 3. A lunatic may usucapt what he began to possess before losing his reason. But such person may usucapt, only if he possesses the thing on a ground from which usucapion follows. 4. A slave cannot possess as an heir. 5. Produce, the issue of slave-women, and the young of cattle, assuming that they are not dead, can be usucaptured. 6. Now, when the *lex Atinia* says that a stolen thing can be usucaptured only if it has first returned into the power of the person from whom it was appropriated, this is to be interpreted as meaning that it must return into the power of its actual owner, not into that of the person from whom it was in fact taken. Hence, if a pledge be stolen from the pledgee or a borrowed thing from the borrower, the thing must return to the power of its real owner. 7. Labeo says further that if a thing from my slave's *peculium* be stolen without my knowledge thereof and the slave later takes possession of it, it is deemed to have returned into my power; it would more appositely be said that it returns to my power if I know of the fact (for it is not enough that the slave should take the thing which he lost when I knew nothing of the matter); but this is so only if I wished it still to be part of the *peculium*; should that not be the case, it is necessary that I acquire disposal of the thing. 8. Thus, supposing my slave himself to take something from me and then to replace it, it can be usucaptured, as though it has returned into my power, granted my ignorance thereof; if I knew the circumstances, we would insist that I should know that it has returned into my power. 9. Then again, if the slave held the thing which he appropriated by virtue

of his *peculium*, Pomponius says that it is not regarded as returned to my power, unless I have begun to possess it again as I did previously, before the appropriation, or, having retaken it, I allow him again to hold it in *peculium*; Labeo says the same.

10. Suppose that I deposit a thing with you and you sell it with a view to gain and then, out of remorse, you re-acquire it and hold it as it was before: whether I know or do not know that these things have happened, the thing is deemed to have returned to my power according to the view of Proculus, which is correct.

11. If a thing be stolen from a *pupillus*, it must be said that it is enough that his tutor knows it to have been returned to the house of the *pupillus*; and in the case of a lunatic, that his curators know.

12. A thing is to be held to have returned to its owner's power when he has taken lawful possession of it, so that it cannot be taken away, and as his own thing; for if I unwittingly buy a thing which was stolen from me, it is not regarded as returning to my power.

13. But if I bring a *vindicatio* for a thing stolen from me and accept an award of damages in respect of it, then, although I do not actually take possession of it, it becomes capable of usucapion by others.

14. The same holds good if it is delivered to a third party by my wish.

15. An heir, who succeeds to the rights of the deceased, does not usucapt when a slave-woman, whom he does not know to be stolen, conceives and is delivered, while in his possession.

16. The question has been asked whether I can usucapt the child, conceived when his mother is among my assets, of a stolen slave-woman given to me by my slave to obtain his own freedom. Sabinus and Cassius think not because the possession, viciously acquired by a slave, adversely affects his master; and that is the correct rule.

17. Equally, if some third party should give me a stolen slave-woman, so that I should manumit my slave, and she conceives while with me and brings forth a child, I do not usucapt it. The answer would be the same, even if the person gave her to me in exchange or in discharge of an obligation or as a gift.

18. If her purchaser should learn, before she gives birth, that the woman belongs to someone else, we have said that he cannot usucapt; but if he remains ignorant of the fact, he can usucapt. Now should he, in the course of usucapion, learn that she belongs to another, we must look to the beginning of his usucapion as is the accepted rule in respect of things bought.

19. The wool of stolen sheep cannot be usucaptured, if they are sheared when with the thief, but can be, if they are with a purchaser in good faith; since wool is produce, it does not require usucapion, becoming at once the property of the purchaser. The same is to be said of lambs, if they have been disposed of; and that is correct.

20. If you make a garment out of stolen wool, the truer view is that we look to the material, and so the garment will also be a stolen thing.

21. If the debtor removes and sells a thing which he has given in pledge, Cassius writes that the thing can be usucaptured because it is seen to have returned into the power of its owner, the pledgor, even though the action for theft will lie against him; I think this to be rightly said.

22. If you forcibly expel me from the possession of land and do not yourself take possession but Titius enters into vacant possession, ownership of the land can be acquired by long possession; for although the interdict *unde vi* will lie, since it is true that I was forcibly evicted, it is not true that the land is possessed by force.

23. But even if you evict me who am possessing land in bad faith and sell the land, it cannot be usucaptured, because the fact is that it is possessed by force, although not against the owner.

24. The same holds good of one who evicts a person possessing as heir, because, although he knows the land to be part of an inheritance, he possesses it by force.

25 (26). If the owner of land evicts one who took possession of it by force, Cassius says that the land is not regarded as having returned into his power, since he will be restored to possession by the interdict *unde vi*.

26 (27). If I have a right of way over your land and you expel me from it by force, I will lose the right of way by nonuse over a long period, because an incorporeal right cannot be regarded as possessed and no one can be evicted from a right of way, that is, a pure right.

27 (28). Again, if you take vacant possession and then refuse entry to the owner who comes along, you will not be held to possess by force.

28 (29). The truer view is that release from servitudes can be usucaptured, because the *lex Scribonia* abolished the usucapion which creates a servitude but not that which grants liberty,

- removing the servitude. Hence, if I am under a servitude to you, say, not to build above a certain level and I have had a building above that level for the prescribed period, the servitude will be discharged.
- 5 GAIUS, *Provincial Edict*, book 21: Possession is broken in fact when someone is forcibly evicted from possession or the thing is seized from him. And, in such a case, the possession is broken not only against the person who seizes the thing but against everyone. In these cases, it matters nothing whether the usurper is the owner of the thing or not; no more does it matter whether he possesses as his own or on a profitable ground.
- 6 ULPIAN, *Edict*, book 11: In the matter of usucapion, we do not count from minute to minute, but to the very end of the last day.
- 7 ULPIAN, *Sabinus*, book 27: Consequently, one who commenced possession at the sixth hour on the first of January will complete usucapion at the sixth hour of the day before the first of January next.
- 8 PAUL, *Edict*, book 12: Labeo and Neratius say that things which slaves acquire by way of their *peculium* can be usucapted because their owners usucapt such things, even when they do not know of them; Julian writes to the same effect. 1. Pedius writes, however, that one who can usucapt nothing in his own name cannot do so either through a slave.
- 9 GAIUS, *Provincial Edict*, book 4: Corporeal things especially are the objects of usucapion, with the exception of sacred and dedicated things, the public property of the Roman people and of *civitates*, and also freemen.
- 10 ULPIAN, *Edict*, book 16: If a third person's thing be bought in good faith, the question arises whether, for usucapion to run, we require good faith at the very inception of the sale or at the moment of delivery. The view of Sabinus and Cassius has prevailed that we look to the moment of delivery. 1. The rule which we observe is that servitudes can never be usucapted of themselves, but they can be with buildings. 2. Scaevola, in the eleventh book of his *Questions*, writes that Marcellus held the opinion that if a stolen ox should conceive, while with the thief or his heir, and give birth while with the thief's heir, the calf cannot be usucapted by the heir, any more, he says, than could the child of a slave-woman. Scaevola, though, writes that his own view is that the calf and the child can be usucapted; for the issue is no part of the stolen thing. If, indeed, it were part, it could not be usucapted, even if the birth took place when the mother was in the hands of a purchaser in good faith.
- 11 PAUL, *Edict*, book 19: A slave cannot possess nor can a master who is a prisoner of war possess through a slave.
- 12 PAUL, *Edict*, book 21: If you knowingly buy something from one forbidden by the praetor to alienate his property, you cannot usucapt it.
- 13 PAUL, *Plautius*, book 5: We do not usucapt what we hold in pledge because we possess it as another's. 1. The answer was that one can usucapt what one buys in good faith from a lunatic. 2. If I gave you a mandate to buy land, you will acquire ownership of it, on its delivery to you, by long possession, even though you could be regarded as not possessing for yourself, since it makes no difference that you are liable to the action on mandate.
- 14 PAUL, *Plautius*, book 13: The period that the vendor possessed before the sale runs for the purchaser. But if the vendor acquires possession after the sale, that does not avail the purchaser. 1. In respect of the thing bequeathed to him, the legatee is, for the purpose of counting the period of the testator's possession, in a sense in the position of an heir.

- 15 PAUL, *Plautius, book 15*: If one possessing as a purchaser should be captured by the enemy before usucapion has been completed, we have to consider whether usucapion continues to run for his heir; for the usucapion has been broken, and if it would not avail the purchaser himself on his return, how can it benefit his heir? It is, after all, true that he has ceased to possess during his lifetime and *postliminium* does not avail him, so that he should be regarded as having usucaptured. But if the slave of a prisoner of war should buy something, Julian says that the matter of its usucapion is in suspense; for if the master returns, he is deemed to have usucaptured; if, though, he should die in enemy hands, a doubt arises whether, through the *lex Cornelia*, his successors own it. Marcellus says that the legal fiction should be accepted to its full extent. For in the same way, one returning with *postliminium* can have a greater right in what his slaves have done than in what he possessed, personally or through a slave, at the time of his capture. An inheritance is in certain respects held to represent the person of the deceased. In consequence, usucapion is not held to run for successors. 1. If a slave whom I was possessing should run away, he is deemed to be possessed by his owner, if he conducts himself as a freeman. But this is to be held applicable only if, when re-taken, he is not prepared to litigate the issue of his free status; for if he is so prepared, he is not held to be possessed by the owner to whom he makes himself ready as an opponent in legal proceedings. 2. If a possessor in good faith should learn, before completing usucapion, that the thing belongs to a third party and then, having lost possession, subsequently regain it, he cannot usucapt because the commencement of his second possession is flawed. 3. If a thing due to us under a will or a stipulation is delivered, it is our state of mind at the time of delivery which is to be considered; for it is acknowledged that one may stipulate for something which does not belong to the promisor.
- 16 JAVOLENUS, *From Plautius, book 4*: An action for production, in respect of a slave given in pledge, may be brought against the pledgee, not the pledgor, because one who gives a pledge possesses only for the purpose of usucapion but, for all other purposes, the pledgee is possessor, so that there may be computed also the period of possession of the pledgor.
- 17 MARCELLUS, *Digest, book 17*: If, in error, I commence possession of a stranger's land as having been awarded from land owned in common, by an adjudication in an action to divide common property, I can become owner of it by long possession.
- 18 MODESTINUS, *Rules, book 5*: Although usucapion does not run against the imperial treasury, nevertheless, one who purchases land from an estate which, though vacant, has not yet been claimed for the public, will lawfully acquire ownership of it by long possession; this has been stated in an imperial ruling.
- 19 JAVOLENUS, *Letters, book 1*: Suppose that you buy a slave with a provision that if a certain condition should eventuate, he will be unsold, that the slave is delivered to you, and that subsequently the sale goes off under the condition; I think that the period that the slave is with the purchaser accrues to the vendor because a sale so

avoided is like the case of rescission in which I have no doubt that the period of holding by the person returning the slave accrues to the vendor, because the transaction cannot be properly called a sale.

- 20 JAVOLENUS, *Letters, book 4*: The testator's possession runs for his heir, provided that there is no intervening possession by another.
- 21 JAVOLENUS, *Letters, book 6*: I let land to one against whom I was usucapting as heir; my question is whether this letting is of any consequence; and if you think it irrelevant, are you of opinion that the usucapion still runs? I ask further: If I should have sold the land to the same person, what is your view of these issues which I have put to you? The reply was that if one possessing land as heir let it to its owner, the letting would be nugatory because the owner would be hiring his own thing; accordingly, it follows that the lessor would not even retain possession; and so long-term prescription would not continue. The rule in respect of letting applies also to sale, since one cannot purchase one's own property.
- 22 JAVOLENUS, *Letters, book 7*: Although heir and inheritance have separate designations, they fill the place of one person.
- 23 JAVOLENUS, *Letters, book 9*: I think that one who buys a building possesses only the building itself; for if he be deemed to possess the individual elements, he will not possess the building as such; for the individual elements of which the building is composed being detached, one cannot conceive of the building as a unit. It follows that if someone says that he possesses individual items, it would be necessary that he should say that there is scope for the possession of the surface area only for the period ordained for movables but of the soil over a longer period. But it would be absurd, and quite incompatible with the civil law, that the same thing should be usucapied at different times; suppose a building to consist in two elements, the site and the surface, and their totality should vary the possession period of all the immovables. 1. But if you should be evicted from a column, I think that you can validly bring the action on purchase against the vendor, and in this way, the whole thing will be conserved. 2. Now if a house should be demolished, the movable items can be possessed, once more, so that they may be usucapied during the period laid down in respect of the usucapion of movable things. And you cannot legally invoke in aid the period that they were part of the building. For, in the same way that you did not possess them separately and apart from the building as such, so also these items are not with you, separately and individually when the building is pulled down, but cohering in the building which comprises them. Nor can it be accepted that the same thing can be possessed both as part of the land and as a movable in itself.
- 24 POMPONIUS, *Quintus Mucious, book 24*: Where statute prohibits usucapion, possession in good faith avails no one. 1. Sometimes, though, even though it was not the deceased who initiated possession, the possession runs for his heir; suppose, for instance, that a defect, emanating not from the person of the possessor, but from the circumstances themselves, should be remedied, as when a thing ceases to belong to the treasury or to be stolen or possessed by force.
- 25 LICINNIUS RUFINUS, *Rules, book 1*: Without possession, there can be no usucapion.
- 26 ULPIAN, *Sabinus, book 29*: The surface can never be acquired by long possession without the underlying soil.
- 27 ULPIAN, *Sabinus, book 31*: Celsus, in his thirty-fourth book, says that those people are mistaken who hold that if a man takes possession of a thing in good faith, he can

usucapt it as his own, and it is irrelevant whether he did or did not buy it, whether or not it was given to him, provided that he thinks he bought it or received it as a gift, because there is no effective usucapion unless there be, in truth, a legacy, a gift, or a dowry, although the recipient believes so. The same applies in respect of an award of damages in lieu of restoration of the thing itself in that unless the party concerned genuinely accepts an award of damages, the thing will not be open to usucapion.

- 28 POMPONIUS, *Sabinus*, book 17: If a thing be delivered to the slave of an infant or of a lunatic, it is settled law that such persons can usucapt through the slave.
- 29 POMPONIUS, *Sabinus*, book 22: Although, in fact, I was sole heir, I thought that you were also an heir in part and delivered to you assets of the inheritance accordingly. The more appropriate answer is that these things cannot be usucaptured because one cannot usucapt, under the title of heir, what one possesses as, in fact, heir and there is no other ground of possession. This, though, holds good so long as what was done was not done by way of *transactio*. We would say the same if you thought yourself to be heir; for, here again, the possession of the true heir would be an obstacle to you.
- 30 POMPONIUS, *Sabinus*, book 30: The question has been posed whether the mixing-up of things breaks the erstwhile usucapion of each element. Now there are three kinds of things: One is that suffused by a single spirit, which the Greeks call unitary, a slave, for instance, a beam of wood, a stone, and the like; another is that compounded of cohering individual elements, which is described as constructed, a house, say, a ship, or a cupboard; the third is that which is composed of individual entities, subsumed under one designation, such as a nation, a legion, or a flock. That the first kind should be open to usucapion presents no problem, but the other two do. 1. Labeo says in his *Posthumous Works* that if a man who needs ten days to complete usucapion of tiles or columns should incorporate them into a building, he will usucapt all the same, if he possesses the building. What, then, of things which do not become embedded in the soil but remain removable, say, jewels in a ring? In such a case, it is true that since each remains intact, both the gold and the jewel can each be possessed and usucaptured. 2. We must now look to the third case. A flock or herd is not usucaptured in the same way as individual things nor yet as those which are constructed or put together. What, then, is the position? Although the essence of a flock is such that it subsists through the accretion of animals, there is no usucapion of the flock as such; just as there is possession of individual animals, so also is there usucapion of them. Hence, if a purchased beast be incorporated with a view to augmenting the flock, the ground of its possession is not changed so that if the rest of the flock belongs to me, I own this beast also. But the individual animals have their own grounds of acquisition, and so if any of the flock be stolen animals, they are still not usucaptured.
- 31 PAUL, *Sabinus*, book 32: An error of law never benefits the possessor in the matter of usucapion. Accordingly, Proculus says that if a tutor gives *auctoritas* in error to his *pupillus* at the beginning of a sale or even some time well after the sale, there can be no usucapion by reason of the error of law. 1. In the usucapion of movables, a continuous period is computed. 2. Though living in a state of liberty, a slave possesses nothing nor does anyone else possess through him. But if, while at liberty, he takes possession of something in another's name, he acquires possession for that other. 3. If my slave or son-in-power holds anything by way of *peculium* or in my name, I possess or even usucapt it through him, although I am unaware of it; and if he should go mad, then, so long as the thing remains in the same condition, it is to be understood that possession remains in me and usucapion continues to run, just as would be the

case if such person was asleep. The same is to be said in respect of a tenant, agricultural or urban, through whom one possesses. 4. If someone should acquire possession of a thing by force, stealth, or *precarium*, and subsequently go mad, the possession and the ground thereof remain in the case of what the lunatic holds by *precarium*, so that the interdict *uti possidetis* may properly be brought in the name of the lunatic in respect of the possession which he acquired before losing his reason or which he acquired, after going mad, through another. 5. The time that an inheritance lies vacant, whether before or after its acceptance, runs for the heir. 6. Julian says that the heir usucapt a thing which the deceased bought but which he, the heir, thinks to have been possessed by way of gift.

32 POMPONIUS, *Sabinus*, book 32: If a thief should buy the stolen thing from its owner and hold it as having been delivered, he ceases to possess it as stolen and begins to possess it as his own. 1. Should a person believe that statutes do not allow him to usucapt something which he possesses, it must be said that even though he be mistaken, usucapion does not run for him, either because he is not to be regarded as possessing in good faith or because usucapion does not run for one mistaken in law. 2. No one can possess an unquantified share; and so Labeo writes that if there be several people on a piece of land and they do not know what share each has, none of them possesses by mere supposition.

33 JULIAN, *Digest*, book 44: Not only a purchaser in good faith but anyone possessing on a ground from which usucapion follows acquires by usucapion the child of a stolen slave-woman; this I judge to have been introduced by legal logic; for assuming the *Twelve Tables* and the *lex Atinia* to present no barrier, whatever the ground on which a person is usucapturing the woman, on the same ground the child perforce is usucaptured, if it be conceived and born in his household before he is aware that the mother is stolen. 1. The common proposition that a man cannot change the ground of his own possession is true whenever a person knows that he does not possess in good faith and begins to possess with a view to his own gain. This can be demonstrated as follows. If a man buys land from one whom he knows not to be its owner, he will possess it simply as possessor; but if he then buys the same plot from its owner, he begins to possess it as purchaser, and he is not to be regarded as himself having changed the ground of his possession. The law will be the same if he buys from a nonowner, believing him to be owner. So also, if he be instituted heir by the owner or given *bonorum possessio* of the latter's estate, he will begin to possess the land as heir. Moreover, if he should have good ground for believing that he is heir of the owner or the *bonorum possessor* of the owner's estate, he will possess the land as heir and will not be regarded as himself changing the ground of his possession. Now, granted that all this applies in respect of one who has possession, how much more should it not be applicable to the agricultural tenant who has no possession, whether the owner be alive or dead? Certainly, though, if the tenant, on the death of the owner, were to buy the land from one whom he believed to be the heir of the owner or the possessor of his estate, he will begin to possess it as purchaser. 2. Should the owner of land think that armed men are approaching and on that account take flight, he is to be regarded as forcibly evicted, even though none of them enters on his land; all the same, that land, even before its return to the owner's control, could be usucaptured by a possessor in good faith because the *lex Plautia* and also the *lex Julia* forbid only usucapion of what is possessed by force, not of that of which one is forcibly dispossessed. 3. Suppose that Titius from whom I wish to claim a piece of land should cede possession of it to me; I will have a valid title for usucapion. Furthermore, a man from whom I wished to claim a piece of land by virtue of a stipulation would, by yielding up possession of it to me in satisfaction of his obligation, automatically entitle me to acquire ownership of the land by long possession. 4. A person giving a thing in pledge usucapt it so long as it is in the creditor's

hands; but if the creditor delivers possession of it to someone else, the usucapion is broken. In the matter of usucapion, the case is similar to that of one who deposits or lends something for use; it is obvious that they cease to usucapt if the thing deposited or lent be transferred to another by the depositee or borrower. But if the creditor takes only a bare hypothec of the thing, the debtor's usucapion continues to run. 5. Suppose that I possess something of yours in good faith and I give it to you in pledge, you being unaware that the thing is yours; I cease to usucapt because no one is deemed to contract a pledge of his own property. But if the pledge was by mere agreement, I will still continue to usucapt because in this case no pledge is regarded as actually given. 6. Should a slave of the creditor steal a pledged thing which the creditor possesses, the debtor's usucapion is not interrupted, because the slave does not oust his master from possession. Even if a slave of the debtor stole it, then, although the creditor ceases to possess it, the debtor's usucapion continues to run, regardless, no less than if the creditor himself delivered the thing to the debtor; for in the matter of usucapion, slaves cannot prejudice their masters' position by stealing the thing. This is more obvious in the case of a slave appropriating from a debtor holding the thing at the creditor's will. Hiring, again, produces the same result. But if the thing be in the creditor's hands, he is then its possessor. Now if the debtor both got a *precarium* of and hired the pledge, the creditor is to be held possessor and the *precarium* does not bring it about that the debtor has possession but only that he may hold the thing.

- 34 ALFENUS VARUS, *Digest, Epitomized by Paul, book 1*: If a slave, his owner being unaware of the transaction, sells something belonging to his *peculium*, the purchaser can usucapt it.
- 35 JULIAN, *Urseius Ferox, book 3*: Suppose that a slave, in whom a usufruct has been bequeathed, be stolen before the heir ever takes possession of him; the question has been raised whether he can be usucaptured, since the heir has no action for theft in respect of him. The answer of Sabinus is that there can be no usucapion of one in respect of whom the action for theft lies and the potential usufructuary can bring the action for theft. This assumes that the fructuary could use and profit by him; otherwise, the slave does not come into the reckoning; but if a slave be stolen from one using and profiting by him, not only the fructuary but also the heir can bring the action for theft.
- 36 GAIUS, *Common Matters or Golden Things, book 2*: There are many ways in which it can happen that a person, laboring under a misapprehension, may sell or give as his own what in fact belongs to another and yet the thing can be usucaptured by a possessor in good faith; for instance, an heir, thinking the thing to belong to the deceased, may alienate what was only lent, let to, or deposited with the deceased. 1. Similarly, if someone, under a false delusion, believe that an inheritance belongs to him, when it does not, and he alienate a thing, part of the inheritance, or again if one, having the usufruct of a slave-woman, think her offspring to be his property, since the issue of cattle belong to the fructuary, should dispose of the child,
- 37 GAIUS, *Institutes, book 2*: he does not commit theft; for no theft is committed unless a theftuous intention exists. 1. Again, one can acquire possession of someone else's land without force; it could be that the land lies vacant through the owner's neglect of it or because he has died without a successor or because he has been long absent from it.
- 38 GAIUS, *Common Matters or Golden Things, book 2*: There is land which a man cannot usucapt for himself, because he knows that he possesses someone else's thing and is thus in possession in bad faith. But if he delivers it to someone else who accepts it in good faith, the latter can usucapt it, because he possesses what has come into his possession neither by force nor by stealth; for we have discarded the view of some of

the earlier jurists who took the line that there can also be theft of land or sites.

- 39 MARCIAN, *Institutes*, book 3: If the land itself can not be usucapted, neither can its surface.
- 40 NERATIUS, *Rules*, book 5: It has been ruled that a usucapion begun by the deceased can be completed even before the inheritance is accepted.
- 41 NERATIUS, *Parchments*, book 7: If my procurator should obtain a thing taken from my possession, since it is now generally agreed that we acquire possession through a procurator, it is to be held that the thing thereby returns to my possession and may be usucapted; any other rule would be captious.
- 42 PAPINIAN, *Questions*, book 3: When a husband sells dotal land, whether or not the purchaser knows that it is part of a dowry, the sale is not valid. It can be agreed to confirm it, after the death of the wife during the subsistence of the marriage, if the whole dowry redounds to the husband's benefit. The same rule applies if one who sells a stolen thing later becomes the heir of the owner.
- 43 PAPINIAN, *Questions*, book 22: The heir of a purchaser in good faith does not usucapt the thing, when he knows that it belongs to someone else, if possession is delivered to him personally; but continuation of the purchaser's possession would not be affected adversely by the heir's knowledge. 1. It is certain that the head of household will not usucapt what his son buys, if either he or the son knows the thing to belong to another.
- 44 PAPINIAN, *Questions*, book 23: Laboring under an honest error, I thought that Titius was my son and in my power, although there had been no valid *adrogatio*; I am of opinion that I cannot acquire through him in respect of my property. For in such a case, there has not been adopted the rule which was accepted for a freeman in a state of servitude in good faith; for there, by reason of the regular, daily traffic in slaves, it was in the public interest to adopt the rule which we have; we frequently in ignorance buy freemen; but the adoption or *adrogatio* of sons is neither so simple nor so common. 1. It is settled that if you sell me someone else's thing, I being aware of the fact, but you deliver it only once the owner has ratified the transaction, it is the time of delivery to which we look, and the thing becomes mine. 2. Although, for the purposes of usucapion, it is the commencement of possession, not the initiation of the transaction, to which we look, it not infrequently happens that we look not to the beginning of the present possession, but to the earlier ground of the delivery, founded on good faith; for instance, in respect of the issue of a slave-woman whom one begins to possess in good faith, nonetheless, one will usucapt the child, although one becomes aware, before it is born, that the mother belongs to someone else. The same is true of a slave returning with *postliminium*. 3. The period that an inheritance remains unaccepted runs for usucapion, whether a slave of the inheritance buys something or the deceased had begun to usucapt; these lines, however, are followed by way of an exception. 4. A son-in-power who buys someone else's thing, when he is unaware that he has become independent, himself begins to possess the thing when it is delivered to him; why should he not usucapt it, since good faith was present at the taking of possession, even though he mistakenly thought that he was one who could not possess for himself a thing obtained by way of *peculium*? The same is to be said if, having good grounds for his belief, he thinks the thing bought to have come to him from his father's inheritance. 5. Supervening usucapion as purchaser or heir does not prevent a claim for a pledge; for, just as usufruct cannot be usucapted, so a claim for pledge, which is linked with no community of ownership but is created purely by agreement, is not destroyed by usucapion of the thing. 6. If a man goes mad after commencing usucapion, reasons of convenience say that he can in every way complete usucapion so that the affliction of his mind shall not also affect his substance. 7. If a slave or son should buy something while the head of household is in enemy hands, does the latter begin to hold it? If, indeed, the thing be possessed by way of *peculium*, usucapion begins and the master's captivity is no obstacle, since his knowledge is not necessary, even if he were in the *civitas*. But if it be not acquired as *peculium*, he cannot be deemed to usucapt it or to acquire it by *postliminium* because it is first necessary for a thing to

be usucaptured that it be possessed. Now if the head of household should die in captivity, since such persons are treated as dead from the moment of their capture, the son can be said to have possessed for himself and to have usucaptured.

- 45 PAPINIAN, *Replies*, book 10: Prescription by long possession is not conceded by the law of nations for the acquisition of public land. This is the case if, when the building which he had erected on the seashore is totally demolished (perhaps he pulled it down or abandoned it), a man opposes another subsequently building and occupying in the same place, or again, if a person, because he alone has fished in a reach of a public river for some years, refuses someone else the same right. 1. Suppose that after the master's death, a slave of his inheritance should begin to hold a thing by way of *peculium*; usucapion will first commence upon the acceptance of the inheritance; for how could there be usucapion of what the deceased did not previously possess?
- 46 HERMOGENIAN, *Epitome of Law*, book 5: A man usucapt in satisfaction a thing which he receives in respect of a debt; and not only the actual thing due but anything given in respect of a debt can be usucaptured under this head.
- 47 PAUL, *Neratius*, book 3: If my procurator should buy and take a thing in my name without my knowledge, then, although I possess it, I will not usucapt it; for it is accepted that usucapion in ignorance is applicable only to things in a *peculium*.
- 48 PAUL, *Handbook*, book 2: If I deliver something to you, thinking that I am under a duty to do so, usucapion will follow only if you also think that it is due to you. It would be another matter if I thought myself liable on a sale and therefore delivered it to you; for, in this case, if there be no prior purchase, there can be no usucapion as purchaser. The ground of distinction is this: in other cases of performance, we look to the time of performance, and when I stipulate, it does not matter whether I know the thing to belong to someone else or not; it is enough that I think the thing yours when you make performance; but in the case of sale, we consider both the time of contract and the time of performance; and a nonpurchaser cannot usucapt as purchaser or in satisfaction as in other contracts.
- 49 LABEO, *Plausible Views*, *Epitomized by Paul*, book 5: If something be stolen, it cannot be usucaptured until it has returned to the control of the owner. PAUL: No, quite the contrary; for if you take away what you gave me in pledge, it will become a stolen thing; but as soon as it comes back into my control, it can be usucaptured.

4

USUCAPION AS PURCHASER

- 1 GAIUS, *Provincial Edict*, book 6: A possessor who submits to a judicial assessment of the value of the thing begins to possess as a purchaser.
- 2 PAUL, *Edict*, book 54: A person possesses as purchaser who genuinely purchases a thing, and it is not sufficient for him simply to be of the belief that he possesses as purchaser; there must be an underlying purchase. Now if, thinking that I have to, I deliver a thing to you who are unaware of my belief, you will usucapt the thing. Why, then, should you not usucapt when I think that I have sold you what I deliver to you? It is because in other contracts the time of delivery alone suffices so that if in full knowledge I stipulate for a thing belonging to another, I will usucapt it if at the time of delivery I believe it now to belong to the transferor; but in the case of sale, we look also to the time of contracting so that a person must both have purchased in good faith and taken delivery in good faith. 1. The grounds of possession and of usucapion are distinct; for a man may be rightly held to have purchased, but in bad faith; so that one who knowingly buys what belongs to another possesses it as purchaser although he does not usucapt it. 2. If a sale be made subject to a condition, the purchaser cannot usucapt while the condition is pending. The same applies if he thinks that it has been realized when it has not; for he is like someone who thinks that he has made a pur-

chase. But if the condition has been realized but he does not know it, we can say with Sabinus to whom fact is more important than opinion that he usucapt. There is this difference: When he thinks the thing to be someone else's and it is in fact the vendor's, he has the mental attitude of a purchaser, but when he thinks that the condition has not been realized, he thinks that he has not yet bought it. It can be more obviously questioned, when the deceased bought something which is delivered to his heir, who is unaware of the deceased's purchase and thinks it delivered on some other ground, whether usucapion does not run. 3. Sabinus says that if a thing be sold with a provision that if the price be not paid by a certain date, the sale will be off, there will be no usucapion if the price has not been paid. Let us, though, consider whether the provision is a condition or rather a pact; if it be the latter, it is a matter of dissolving the contract not of implementing it. 4. If a sale be made with an *in diem addictio*, that is, unless someone shall have made a better offer, in Julian's opinion, the sale is perfected, the produce becomes the property of the purchaser and usucapion runs; other jurists think that such a sale, too, is contracted subject to a condition, but he says that it is not contracted conditionally but is defeasible conditionally; and that is the correct opinion. 5. Again, that sale is unconditional in which it is agreed that if the thing proves unsatisfactory within a given period, the sale will be off. 6. I bought Stichus and Dama but delivered instead, I being ignorant of the fact; Priscus says that I do not usucapt him because what has not been bought cannot be usucaptured as purchaser. But if land is purchased and more is possessed than was bought, the whole can be acquired by long possession, because the estate as such is purchased, not its individual parts. 7. You bought the estate of someone with whom slaves had been deposited; Trebatius says that you do not usucapt them because they were not part of the purchase. 8. A tutor buys, at the auction of the property of his *pupillus*, something which he thinks the property of the *pupillus*. Servius says that he can usucapt it; he was led to this opinion by the fact that the *pupillus* incurs no detriment in having a purchaser close to him, and if the tutor should buy cheaply, he would be liable in the action on tutelage, just as he would if he had knocked the thing down to someone else at a low price; this is also said to have been a ruling of the deified Trajan. 9. Again, many are of opinion that if a procurator buys something at an auction which he conducts on his principal's mandate, reasons of convenience allow him to usucapt it. On the same ground, the same rule would apply to one buying something when administering the affairs of another in the latter's ignorance. 10. If your slave buys, by way of *peculium*, something which belongs to another, you will not usucapt it, even though you do not know it to belong to another. 11. Celsus writes that if my slave takes possession of something in respect of the *peculium*, I usucapt it even though I do not know of it; but in the case of his acquisition on any other ground, my knowledge is essential for usucapion; and if he takes possession viciously, my possession will be vicious. 12. Again, Pomponius says that in cases where slaves possess something in their master's name, it is the mind of the master rather than that of the slave to which we must look; but in respect of things in the *peculium*, to the mind of the slave. And if the slave possesses something in bad faith and the master comes to hold it in his own name, say, by revoking the *peculium*, it must be said that the ground of possession remains the same, and so the master will still not usucapt the thing. 13. Celsus says that if a slave buys something in good faith under the head of *peculium* and, when I first hear of it, I know it to belong to someone else, usucapion will still run for me because possession began without flaw; but if, at the time of his purchase, I know the thing to be another's, though the slave was in good faith, I will not usucapt it. 14. Celsus further says that if my slave buys in bad faith something which he gives me in return for his liberty, I still will not usucapt it because the first ground of possession remains. 15. If I should buy something from a *pupillus* without his tutor's *auctoritas*, believing him to be over puberty, we hold usucapion to run so that here belief prevails over fact; if, on the other hand, you know him to be a *pupillus* but think that

pupilli can conduct their affairs without the *auctoritas* of their tutor, you will not usucapt because an error of law avails no one. 16. If I buy something from a lunatic whom I think to be sane, it is settled that on grounds of convenience, I will usucapt it, although the sale is void; and so I will have no action in the event of eviction and no *actio Publiciana*, and I cannot count the time for which the lunatic held the thing. 17. If you sell to me a thing which you are usucapting as purchaser and I know that it belongs to someone else, I will not usucapt it. 18. The possession of the deceased will run for the ultimate heir, even though the intermediate heir did not take possession of the thing. 19. If the deceased bought something in good faith, the thing will be usucaptured, although the heir knows that it belongs to another. The same applies to a *bonorum possessor* of an inheritance, to beneficiaries under a *fideicommissum* to whom the estate has been transferred under the *senatus consultum Trebellianum*, and to other praetorian successors. 20. The period of possession of the vendor counts in the purchaser's favor. 21. If I buy a third person's thing and, while I am usucapting it, the owner claims it from me, my usucapion is not broken by joinder of issue. But if I choose to accept an award against me of the value of the object in dispute, Julian says that the ground of possession changes for one who so elects and that the same would hold good if the owner made a gift to the purchaser of what he bought from a nonowner; this opinion is correct.

3 ULPIAN, *Edict*, book 75: A judicial award of the value is akin to a purchase.

4 JAVOLENUS, *From Plautius*, book 2: The purchaser of an estate was aware that part of it belonged to another. The answer given was that he could usucapt none of the land. I think that this is true, if the purchaser does not know which part it is; but if he knows the specific plot, I do not doubt that he can acquire ownership of the rest by long possession. 1. The law is the same if a person who buys a whole estate knows that an unspecified part of it belongs to another; that part alone he will not usucapt; but there is nothing to prevent his acquisition of the rest by long possession.

5 MODESTINUS, *Encyclopaedia*, book 10: If I snatch away the thing which I gave you in pledge and sell it, there has been doubt over usucapion; but the better view is effectively to allow the period of usucapion.

6 POMPONIUS, *Sabinus*, book 32: A man who asks a *precarium* of something which he is usucapting as heir or as purchaser cannot usucapt; there is no difference between these cases because, either way, one who asks a *precarium* ceases to possess on the original ground of possession. 1. Suppose that I buy ten slaves and I think that some belong to another and I know who they are; I usucapt the rest; but if I do not know who they are, I usucapt none of them. 2. If the time necessary to complete usucapion expires after the death of the purchaser of a slave, the slave will belong to the heir, although the latter has not yet taken possession of him, provided that no one else has possessed him meanwhile.

7 JULIAN, *Digest*, book 44: A man possessing land as a purchaser died before completing the necessary period of possession; the slaves who were left in possession of the land quit with the intention of abandoning the land; the question was put whether the period of long possession nonetheless ran for the heir. I replied that despite the departure of the slaves, time ran for the heir. 1. If I am acquiring the Cornelian estate by long possession as purchaser and add to it part of an adjoining estate, do I acquire the whole by completing my time as purchaser or will the full period be necessary in respect of the addition? I replied that the parts added to the estate purchased have their own separate condition; and so possession must be taken of them separately, and the full period of long possession of them satisfied. 2. My slave gave Titius a mandate to buy an estate for him, and on the slave's manumission, Titius gave him possession of it; the question was: Could he acquire it by long possession? I replied: Even if, at the

time of the grant of possession by Titius, the slave thought that his *peculium* had been granted to him or, indeed, was unaware that it was not granted to him, the slave could in no way acquire by long possession, because he either knows or should know that his *peculium* has not been granted to him and consequently he is like one who pretends to be a creditor. However, if Titius knew that the freedman had not been granted his *peculium*, he should be deemed to make a gift rather than to make over land which was not due. 3. If a tutor should appropriate a thing belonging to his *pupillus* and sell it, there can be no usucapion of it until it returns into the control of the *pupillus*; for a tutor is regarded as an owner in the affairs of his ward, only when he is administering his guardianship, not when he is despoiling the *pupillus*. 4. A man who buys a third person's land in good faith and loses possession of it and, by the time that he regains possession of it, knows that it belongs to another does not acquire it by long possession because the inception of his second possession is not without defect; the case is not unlike that of a purchaser who, at the time of sale, believes the thing to belong to the vendor but, at the time of delivery, knows that it is a third person's; for once possession has been lost, one has to look to the start of the possession recovered. Hence, if a slave be returned, on the rescission of a sale, at a time when the vendor knows him to belong to someone else, there can be no usucapion, although, before the sale, he was in a position to usucapt. The law is the same in the case of one evicted from land who recovers possession of it by interdict, then knowing that it belongs to someone else. 5. One who knowingly buys something from one whom the praetor has forbidden to diminish the inheritance, as being a suspect heir, will not usucapt. 6. Suppose that your procurator, who could have obtained a hundred gold pieces for the land, asks only thirty for the sole purpose of causing you loss; there can be no doubt that, he being unaware of this fact, the purchaser will acquire title by long possession; for even when one aware of the facts sells a third person's land to one who is not, nothing prevents long possession. But if the purchaser should be in collusion with the procurator, bribing him to sell at an uneconomic price, he will not be held a purchaser in good faith and so will not usucapt the land. And if, when the principal sues, the purchaser should invoke the defense that the thing was sold with his consent, a replication of fraud will be effective against him. 7. Even if he possess it, a thing is not held to have returned to the control of its owner, if he does not know that it had ever been stolen from him; accordingly, if, you being ignorant of the circumstances, I give you in pledge a slave who had been stolen from you, and, the debt being paid, I sell the slave to Titius, Titius cannot usucapt him. 8. A freeman who is in servitude to us in good faith acquires for us in respect of our property by the same methods by which we are accustomed to acquire through our own slave; wherefore, both by delivery and by usucapion, we make a thing our own through a freeman intermediary, and if a purchase be made by him through a *peculium* which pertains to us, we usucapt it, even unwittingly.

8 JULIAN, *From Minicius, book 2*: If someone who knows that the vendor will immediately squander the money buys slaves from him, there are many who expressed the view that the purchaser is nonetheless in good faith, and that is the more correct view; for how can a man be regarded as buying in bad faith, if he buys from the owner, unless it chance that a purchaser would not usucapt the slaves, if he bought from a wanton who would forthwith lavish the money on a harlot?

9 JULIAN, *Urseius Ferox, book 3*: A man who accepts in return for his liberty a stolen slave-woman from his slave can usucapt her offspring as if he had bought her.

10 JULIAN, *Minicius, book 2*: A slave gave his master a slave-woman whom he had stolen in return for his liberty; the woman conceived. The question was whether the master could usucapt her child. This was the answer: The master can usucapt the child as though he had bought it; for he has parted with property in return for the woman

and a kind of sale has been concluded between the master and his slave.

- 11 AFRICANUS, *Questions*, book 7: The common opinion that one, who thinks himself to have bought something when in fact he has not, cannot usucapt, is, says [Julian], true insofar as the purchaser has no good ground for his mistaken belief; for if the slave or procurator whom he charged to buy the thing should persuade him that he had bought it and, on that ground, deliver it, the better view is that usucapion will follow.
- 12 PAPINIAN, *Replies*, book 10: When a legatee is given *missio in possessionem*, the goods will be usucaptured but without affecting the praetorian pledge.
- 13 SCAEVOLA, *Replies*, book 5: A man bought in good faith a third party's site and, before completing the requisite period of possession, began to build there; he continued the building despite being given notice by the owner of the land while the requisite period of possession was still running; my question is whether his possession is thereby broken or, having started, continues. The reply was that on the case stated, there is no interruption of possession.
- 14 SCAEVOLA, *Digest*, book 25: The inheritance of their intestate sister devolved upon her two brothers, one of whom was present, the other, absent; the brother who was present conducted also the business of the absentee and, in the name of his brother and his own, sold all the land from the inheritance to Lucius Titius who bought it in good faith. The question was: When he knows that part belongs to an absentee, can the purchaser usucapt the whole? The reply was that if he believed the vendor to have his brother's mandate to sell, he would acquire ownership by long possession.

5

USUCAPION AS HEIR OR AS POSSESSOR

- 1 POMPONIUS, *Sabinus*, book 32: Nothing can be usucaptured as heir from the estate of a living person, even though the possessor thinks the thing to be that of a dead man.
- 2 JULIAN, *Digest*, book 44: A person granted *missio in possessionem* for the preservation of legacies does not interrupt the possession of one usucapt as heir, because he holds the thing only for safekeeping. What, then, is the position? Even if usucapion be completed, such person will still retain his lien, so that he will not withdraw unless the legacy has been made over to him or he has been given security in respect of it.
 1. The commonly stated general proposition that no one can change the ground of his own possession must be interpreted to cover not only legal possession but also factual possession. Accordingly, it has been ruled that a tenant, deposittee, or borrower cannot, for his own benefit, usucapt as heir.
 2. Then, Servius says that a son cannot usucapt as heir a gift made to him by his head of household, doubtless because he was of opinion that the son had factual possession of it while the father was alive. It follows that a son instituted heir by his father cannot usucapt things, part of the inheritance, which were given to him by his father, so far as co-heirs' shares are concerned.
- 3 POMPONIUS, *Quintus Mucius*, book 23: There were many who thought that if I am heir and believe something to be part of the inheritance when it is not, I can usucapt it.
- 4 PAUL, *Lex Julia et Papia*, book 5: It is settled that one who has *testamenti factio* [as heir] can usucapt as heir.

6

USUCAPION ON THE GROUND OF GIFT

- 2 PAUL, *Edict*, book 54: A person usucapt on the ground of gift to whom the thing was delivered by way of gift; it is not enough that he should think that there has been a gift; there must in fact be a gift.
 1. If a head of household gives something to his son-

BOOK FORTY-ONE/USUCAPION ON THE GROUND OF ABANDONMENT

in-power and then dies, the son will not usucapt the thing on the ground of gift because gift there was none. 2. If a gift be made between husband and wife, no usucapion follows. Similarly, Cassius held that if a husband should make a gift to his wife and then divorce follows, there will be no usucapion because she cannot herself change the ground of her possession; but, he says, after the divorce, if the man leaves the thing with his ex-wife, she will usucapt as though the gift was made at that time. Still Julian thinks that a wife possesses what is given to her by her husband.

- 2 MARCELLUS, *Digest*, book 22: If a man who has made a gift of something decides to revoke it, usucapion will run for the donee, even though the donor institutes proceedings and raises a *vindicatio* to recover the thing.
- 3 POMPONIUS, *Quintus Mucius*, book 24: Suppose that a husband makes a gift to his wife or a wife to her husband; if the thing given belongs to someone else, the view of Trebatius is correct, that is to say, that so long as the donor is not made poorer by the gift, usucapion will run for the possessor.
- 4 POMPONIUS, *Sabinus*, book 32: A head of household makes a gift to his daughter-in-power and then disinherits her; if his heir ratifies the gift, she will usucapt it as from the date of the heir's ratification.
- 5 SCAEVOLA, *Replies*, book 5: A man who had begun to usucapt a slave on the ground of gift achieved nothing by purporting to manumit him, because he had not yet acquired ownership of him; the question asked was whether he ceased to usucapt the slave. I replied that the man in question appeared to have abandoned possession, and so his usucapion was broken.
- 6 HERMOGENIAN, *Epitome of Law*, book 2: Where a sale is made to mask a gift, the thing, when delivered, will be usucaptured on the ground of gift not that of purchase.

7

USUCAPION ON THE GROUND OF ABANDONMENT

- 1 ULPIAN, *Edict*, book 12: If a thing be treated as abandoned, it ceases forthwith to be ours and will at once belong to the first taker because things cease to be ours by the same means by which they are acquired.
- 2 PAUL, *Edict*, book 54: If we know that the owner regards a thing as abandoned, we can acquire it. 1. Now Proculus says that such a thing does not cease to be the owner's until it is possessed by another; but Julian says that it no longer belongs to the abandoner but will become another's only when taken into possession; and that is correct.
- 3 MODESTINUS, *Distinctions*, book 6: A common question is whether a thing can be deemed abandoned in part. And indeed, if one co-owner should abandon his share in a thing owned in common, it ceases to be his for what one can do with the whole, one can do with a part. But the owner of a whole cannot bring it about that he retains one part while abandoning another.
- 4 PAUL, *Sabinus*, book 15: We can usucapt what we believe to have been and to be abandoned, even though we do not know by whom it has been abandoned.
- 5 POMPONIUS, *Sabinus*, book 32: Suppose that you are possessing something as having been abandoned, and I, knowing that to be the case, buy it from you; it is settled law that I will usucapt it, and it is no obstacle thereto that the thing is not part of your assets; for the law would be the same if I bought from you a thing given to you by your wife, because you made the sale, as it were, by the will and consent of the owner. 1. What someone has abandoned becomes mine immediately; just as, when someone scatters largesse or releases birds, although he does not know the person whom he

wishes to have them, they yet become the property of the person to whom chance takes them, so a person who abandons something is deemed to wish it to become the property of another.

- 6 JULIAN, *Urseius Ferox*, book 3: No one can usucapt on the ground of abandonment who erroneously thinks the thing to be abandoned.
- 7 JULIAN, *From Minicius*, book 2: If someone finds goods jettisoned from a ship, the question arises whether he is unable to usucapt them because they are not regarded as abandoned. The more correct view is that he cannot usucapt them on the ground of abandonment.
- 8 PAUL, *Replies*, book 18: Sempronius sought to raise an issue over the status of Thetis as having been born of his slave-woman. Confronted, before witnesses, by Procula, the foster mother of Thetis, in proceedings for the payment of maintenance, he replied that he had not the means to pay for the maintenance of Thetis and that she should be returned to her father, Lucius Titius; and Procula made a written record that she would, thereafter, not endure any proceedings by the said Sempronius and that Lucius Titius, having paid Seia Procula for the girl's maintenance, manumitted Thetis before the magistrate. My question is whether Thetis's freedom can be rescinded. Paul replied: Since the owner of the slave-woman to whom Thetis was born appears to have abandoned Thetis, she could properly be raised to a state of liberty by Lucius Titius.

8

USUCAPION ON THE GROUND OF LEGACY

- 1 ULPIAN, *Disputations*, book 6: A person to whom a thing is bequeathed is held to possess it by way of legacy; possession and usucapion on the ground of legacy are open to no one other than the legatee.
- 2 PAUL, *Edict*, book 54: If I possess a thing in the belief that it has been bequeathed to me, when it has not, I do not usucapt it on the ground of legacy,
- 3 PAPINIAN, *Questions*, book 23: any more than one thinking that he has bought a thing which he has not bought.
- 4 PAUL, *Edict*, book 54: A thing can be usucaptured on the ground of legacy, whether it be the testator's own or that of someone else, if it has been bequeathed but it is not known that it has been adeemed in codicils. For in their case, there is a lawful ground which suffices for usucapion. The same may be said, if there be uncertainty of identity, as when a legacy is left to Titius, when there are two Titii and each believes that he is the intended beneficiary.
- 5 JAVOLENUS, *From Cassius*, book 7: A thing delivered as a legacy nonetheless will be usucaptured on the ground of legacy, even though the owner of it is alive,
- 6 POMONIUS, *Sabinus*, book 32: if the recipient believes it the property of a dead person.
- 7 JAVOLENUS, *From Cassius*, book 7: No one can usucapt on the ground of legacy save one who has *testamenti factio* [as legatee], because such possession stems from the law of wills.
- 8 PAPINIAN, *Questions*, book 23: If the legatee acquires without flaw possession which is not delivered to him, usucapion of the thing bequeathed will run.
- 9 HERMOGENIAN, *Epitome of Law*, book 5: A man usucapt on the ground of legacy to whom a thing has been lawfully bequeathed; but, after much vacillation, it has been accepted that even if the legacy is irregular or has been adeemed, the thing can be usucaptured on the ground of legacy.

USUCAPION ON THE GROUND OF DOWRY

- 1 ULPIAN, *Sabinus*, book 31: A most fitting title to usucapion is that styled "on the ground of dowry" whereby one who receives a thing by way of dowry can usucapt over the fixed period over which men usucapt as purchasers. 1. It matters not whether individual things or a collectivity of them be given in dowry. 2. Now we will first consider the time from which a person may usucapt on the ground of dowry after the marriage or even before it takes place. A common question is whether a fiancé (that is, one not yet married) can usucapt a thing on the ground of dowry. Julian says that if the future bride delivers a thing to her fiancé with the intention that it shall not become his until the nuptials follow, usucapion will not begin; and if it be not clear what was intended, says Julian, it should be held that the intention was that the things should become the man's forthwith so that, if they belong to a third party, they can be usucapted; this to me is the more plausible view. But before the marriage, he will usucapt as his own not on the ground of dowry. 3. While the marriage subsists, there will be usucapion on the ground of dowry between the married parties; if, though, the marriage ends, Cassius says that usucapion will cease because there is now no dowry. 4. The same jurist writes that, equally, if a man thought himself married, when there was in fact no marriage, he could not usucapt because there would be no dowry. There is reason in this view.
- 2 PAUL, *Edict*, book 54: If a thing be delivered at a valuation before the marriage, it is, until the marriage, not usucapted either on the ground of purchase or on that of dowry.
- 3 SCAEVOLA, *Digest*, book 25: Two daughters were the heiresses of their intestate father, and they gave in dowry slaves whom they owned in common; then, some years after the father's death, an action was brought between the daughters to divide the inheritance. The question was whether their husbands, having possessed for several years as dotal the slaves whom they received in good faith, could be seen to have usucapted them, assuming that on receipt of them, they believed that they were the property of the wife delivering them. The reply was that nothing had been advanced to show why they should not have usucapted.

USUCAPION FOR ONESELF

- 1 ULPIAN, *Edict*, book 15: This is the nature of possession for oneself; when we believe that we have acquired ownership of a thing, we possess it both on the ground of acquisition and for ourselves; for instance, on the ground of purchase, I possess both as purchaser and for myself, and similarly, I possess a thing given or bequeathed to me both on the ground of gift or legacy and for myself. 1. But if a thing be delivered to me on a lawful ground, say purchase and I usucapt it, I begin to possess it for myself even before usucapion. Whether, after usucapion, I cease to do so as purchaser is a matter of uncertainty; Maurician is reported as holding that I do not.
- 2 PAUL, *Edict*, book 54: There is a type of possession styled "for oneself." By this title, we possess all that we catch by land, sea, or in the air, and what becomes ours through the alluvion of rivers. Similarly, we possess by this title the offspring which we possess of another's property, for instance, the child of an inherited or purchased slave-woman, so also the produce of a thing bought or received by way of gift, or which is found in an inheritance.
- 3 POMPONIUS, *Sabinus*, book 22: You delivered to me a slave whom, erroneously, you thought that you owed me on a stipulation; if I know that nothing is due to me, I will

not usucapt him; but if I do not know, the more correct view is that I do usucapt him, because the very delivery, on a ground which I believe to be true, suffices to bring about the result that I possess for myself what is delivered to me. This was the recorded view of Neratius and I think it to be correct.

- 4 POMPONIUS, *Sabinus*, book 32: Trebatius says generally that if you bought a stolen slave-woman in good faith, you so possessed the child conceived by and born to her while she was with you that though you learned, within the period laid down for usucapion, that the mother was stolen, what was so possessed would be usucaptured. For myself, I think that the following distinction should be taken; if, within the statutory period, you do not know whose slave she was, or if, though you know, you could not inform the owner, or if you both could and did inform the owner, you usucapt the child; but should you know and be able to, but not inform the owner, the contrary would hold good; for, then, you would be regarded as possessing by stealth, and the same person cannot be held to possess both for himself and by stealth. 1. Suppose a head of household to have divided out with his sons the assets which he has, and on that account, the sons hold the property after the father's death, because they agree to ratify the division; usucapion for himself will run for each in respect of any third person's goods which are found in the father's estate. 2. A thing, in fact not bequeathed, is wrongly delivered by the heir; it is the general view that it can be usucaptured by the "legatee" because he possesses it for himself.
- 5 NERATIUS, *Parchments*, book 5: The usucapion of things, though sometimes granted on other grounds on the basis of which we think that we are possessing what is ours, was established so that there might be an end to litigation. 1. But a man may usucapt a thing which he believes to be his, although his belief is unfounded. This, however, is to be understood in the sense that a reasonable and plausible error will not prevent the usucapion of a possessor, for instance, if I possess a thing because erroneously I think that my slave or the person in whose shoes I stand through the law of succession bought it; for an error is excusable where the act of a third person is concerned.

BOOK FORTY-SEVEN

1

PRIVATE DELICTS

- 1 **ULPIAN**, *Sabinus*, book 41: It is the established rule of the civil law that heirs and other successors are not liable in penal actions, and so they cannot be sued for theft. But although they are not liable to the action for theft, they should be liable to the action for production, if they are in possession of or have fraudulently ceased to possess stolen goods; and on production, they will be liable in a *vindicatio*; the *condictio* also lies against them. 1. It is, however, equally established that an heir can bring the action for theft; for in the case of several delicts, heirs are allowed to prosecute claims; thus, an heir can bring an action under the *lex Aquilia*. But the action for insult does not lie to heirs. 2. Not only in respect of theft but also in other actions founding in delicts, be the actions civil or praetorian, it is the rule that liability follows the miscreant.
- 2 **ULPIAN**, *Sabinus*, book 43: Where several delicts run together, it is never the case that immunity is given in respect of any of them; nor does one delict reduce the penalty for another delict. 1. Consequently, a man who steals and kills a slave will be liable for the abduction by the action for theft and for the killing by the Aquilian action, and neither action excludes the other. 2. Similarly, if he take the slave by force and kill him, he will be liable to the action for goods taken by force for the former wrong and to the Aquilian action for the killing. 3. The question has been asked whether, having recovered the value of the slave by the *condictio* for theft, the owner can nonetheless proceed by the Aquilian action. Pomponius writes that he can because the Aquilian action proceeds on one basis of assessment and the *condictio* for theft on another; for the Aquilian action comprises assessment at the highest value in the past year while the *condictio* does not go beyond the value at the time of bringing the action. If a slave were the wrongdoer, whichever the action in respect of which he be surrendered as the culprit, the other action will lapse. 4. Again, if someone stole a

slave and whipped him, he would be liable to both actions, that for theft and that for insult; and should he kill him, he would be liable to three actions. 5. Then, if a person abducted another man's female slave and debauched her, he would be liable in both actions, that for making a slave worse and the action for theft. 6. And if someone wounded the slave whom he stole, both the Aquilian action and that for theft would lie.

- 3 ULPIAN, *Duties of Proconsul, book 2*: When someone wishes to proceed with an action arising from delict, if he wants to have a pecuniary award, he must have recourse to the ordinary law and will not need to launch a criminal prosecution; but if he seeks the extraordinary punishment of the miscreant, he must institute a prosecution against him.

2

THEFTS

- 1 PAUL, *Edict, book 39*: Theft, says Labeo, derives its name from the dark, that is, from black; it is what happens furtively and by stealth, most frequently by night; for Sabinus, it comes from fraud; or it comes from taking and carrying away or from the language of the Greeks who style thieves *φῶραι*; indeed, the Greeks derive *φῶραι* from *ἀπὸ τοῦ φέρειν* (to take away). 1. Hence, mere theftuous intent does not make a thief. 2. Thus, one who denies the existence of a deposit with him does not at once become liable for theft but only if he conceal the thing with a view to appropriating it. 3. Theft is a fraudulent interference with a thing with a view to gain, whether by the thing itself or by the use or possession of it. This natural law proscribes.
- 2 GAIUS, *Edict, book 13*: Theft is of two kinds: either it is manifest or it is not manifest.
- 3 ULPIAN, *Sabinus, book 41*: A thief is manifest whom the Greeks describe as *ἔπι ἀντοφῶρῳ*, that is, one caught in the act of theft. 1. And it makes little difference whether he be caught by the owner of the thing or by someone else. 2. But is a thief manifest only if he be caught in the act or also if he be apprehended elsewhere? The better view is that which appears in the writings of Julian, that is to say, that although he be not taken at the scene of the offense, he will still be a manifest thief if he be taken with the stolen thing, before he has taken it to its intended destination.
- 4 PAUL, *Sabinus, book 9*: "Destination," for this purpose, means "the place where he aimed to remain that day with the stolen thing."
- 5 ULPIAN, *Sabinus, book 41*: Consequently, whether he be apprehended in a public place or in a private one, before he gets the thing to its intended resting place, he is in such a case that he will be a manifest thief, if caught with the stolen goods; so wrote Cassius. 1. But if he should have reached his destination, then, although he later be found with his booty, he will not be a manifest thief.
- 6 PAUL, *Sabinus, book 9*: Although there may be theft where there are frequent interferences, nevertheless, it is to the beginning, that is, the time of the first such interference, that we must look to decide whether the theft be manifest or not.

- 7 ULPIAN, *Sabinus*, book 41: Suppose a man to have perpetrated a theft while he was a slave but to have been apprehended after he had been manumitted; let us consider whether he be a manifest thief. Pomponius, in his ninth book from *Sabinus*, says no, because the origin of the theft, when he was in servitude, was not manifest. 1. In the same book, Pomponius makes the elegant observation that it is apprehension which makes a thief manifest; hence, if, when I committed theft from your house, you concealed yourself lest I should kill you, although you saw the theft take place, it will still not be manifest. 2. Celsus, though, on the issue of apprehension, adds that if, when you saw the thief in the act and ran to arrest him, he made his escape by discarding his loot, he would be a manifest thief. 3. And he thinks that it is of little consequence whether it be the owner, his neighbor, or any passer-by who makes the arrest.
- 8 GAIUS, *Provincial Edict*, book 13: What constitutes nonmanifest theft is now apparent; for that which is not manifest is obviously nonmanifest.
- 9 POMPONIUS, *Sabinus*, book 6: Where a person already has an action for theft, repeated interference with the thing by the thief does not give rise to a further action for theft, not even where the stolen thing has been increased. 1. But if I have brought my *vindicatio* against the thief, I will still have the *condictio*; it can, though, be said that it is within the sphere of the judge who decides the issue of ownership to order restitution of the thing to the owner only if the latter surrender his *condictio*; but if the defendant has already been subjected to an assessment of value in the *condictio*, having been found liable, it will be for the judge in the *vindicatio* either to absolve the defendant or [preferably], if the plaintiff be prepared to refund the assessment but the slave be not restored to him, to condemn the slave's possessor to the plaintiff for the amount that the plaintiff has sworn in the proceedings.
- 10 ULPIAN, *Sabinus*, book 29: A person who has an interest in the thing not being stolen will have the action for theft.
- 11 PAUL, *Sabinus*, book 9: The person with such interest will have the action for theft, if the basis of his interest be honest.
- 12 ULPIAN, *Sabinus*, book 29: And so a fuller who accepts garments for cleaning and attention will always have the action because he is liable for their safekeeping. But if he should be insolvent, the action reverts to the owner; for nothing is at the risk of one who has nothing to lose. 1. But the action for theft is not given to a person in bad faith, even though he may have an interest in the nontheft of the thing, because it is, of course, at his risk; no one acquires an action in respect of his own wrongdoing, and so only a possessor in good faith, not one in bad faith, will be given the action for theft. 2. If a thing given in pledge be taken from the creditor, we grant him the action for theft although the pledge is not one of his assets; indeed, we grant him the action not only against a third person but even against the owner of the thing; and so wrote Julian. Sometimes, the owner also is given the action as when he is not liable for theft and can sue. In such a case, creditor and owner both get the action because each has an interest in the thing. Now does the creditor always have such interest or only when the pledgor is insolvent? Pomponius thinks that he always has an interest, a view endorsed by Papinian in the twelfth book of his *Questions*; and, indeed, it is the more correct view that the creditor be regarded as always having an interest. Julian repeatedly wrote to this effect.
- 13 PAUL, *Sabinus*, book 5: A person to whom a thing is due under a stipulation does not have the action for theft when the thing is stolen if it was not the debtor's fault that he did not deliver it.

14 ULPIAN, *Sabinus*, book 29: Celsus wrote that a purchaser to whom the thing has not been delivered does not have the action for theft which still lies to his vendor. Of course, the vendor should authorize the purchaser to bring the action for theft, as also the *condictio* and *vindicatio*, and whatever be forthcoming from these actions should go to the purchaser. This is the correct view which is also that of Julian. And, indeed, the thing is at the buyer's risk, save that the seller has the safekeeping of it until delivery. 1. So far is the purchaser not entitled to the action for theft before delivery that the question has been aired whether he could himself be liable to theft proceedings if he remove the thing. Julian, in the twenty-third book of his *Digest*, writes that if the purchaser of a thing, with the safekeeping of which the vendor is charged, should appropriate the thing after the price has been paid, he is not liable to the action for theft. Of course, if he removed the thing before paying the price, he would be so liable, just as if he appropriated a pledge. 2. Moreover, agricultural tenants, although they are not owners, have the action for theft because they have an interest in their holding. 3. Now let us consider whether a person with whom a thing is deposited has the action for theft. Since such a person is liable only for deliberate misconduct, it is held that he does not have the action for theft; for what interest has he, if he abstain from fraud? And if he should act dolosely, though the risk in the thing will then indeed be his, he should not be allowed the action for theft in respect of his own fraud. 4. Julian wrote in the twenty-second book of his *Digest* that since it has been ordained in the case of all thieves that they cannot have the action for theft in respect of what they themselves steal, a depositee will not have the action for theft, even though the thing becomes at his risk when he tampers with it. 5. Papinian deals with this case; if I accept two slaves in pledge in respect of ten gold pieces and one of them be abducted but the other, who remains with me, is worth not less than ten, do I have the action for theft only in respect of five gold pieces because I am secure, in the remaining slave, for the other five, or since he might die, should it not be said that my action will be for ten despite the fact that the slave whom I still have is of great value? His view is that we should not look to the slave who has not been snatched away but to the one who has. 6. Papinian also writes that where ten are owing to me and the slave given to me in pledge for them is stolen, if I should recover for ten in the action for theft, I will not have a second action if the slave be taken off again, since my interest in him ceased when I was successful in the first action. That holds, though, if his abduction was not my fault; for if it were attributable to me, since I would myself be liable to the action for pledge, I would be able to sue for theft. But if I was not at fault, the second action, which does not lie to the creditor, would undoubtedly be available to the slave's owner. This view is approved also by Pomponius in the tenth book of *Sabinus*. 7. These authors further say that if the two slaves be taken away together, the creditor will have the action for theft in respect of each of them not for the whole amount in each action, but for the portion representing his interest when the whole sum due is apportioned between the individual slaves; if, though, the slaves be stolen separately and the creditor recovers in full in respect of one of them, he will recover nothing for the other. 8. Pomponius also says in the tenth book of *Sabinus* that if the person to whom I lent something for use deal fraudulently with it, he will not have the action for theft. 9. He says the same in respect of a person who undertakes to carry something on the request of another. 10. The question arises whether the father whose son has borrowed something has the action for theft. Julian says that he does not because he does not have the duty of safekeeping of the thing; in like manner, he says, the verbal guarantor of a borrower does not have the action for theft. For, he says, it is not everyone who, in the wide sense, has an interest in the thing's not being lost, who has the action

for theft, but the person who is liable in respect of the thing because it has been lost through his fault. Celsus endorses this view in the twelfth book of his *Digest*. 11. If a person gets a *precarium* of a slave and the slave is stolen, it may be asked whether he has the action for theft. Since there is no civil action against him (such a grant being like a gift) and, on that account, the interdict [*de precario*] was thought necessary, he will not have the action for theft. Of course, after the issue of the interdict, I think that he is liable for fault and then he can have the action for theft. 12. And if a person hire a thing, he will have the action for theft, provided that it was through his fault that the thing was stolen. 13. If a son-in-power be stolen, it is patent that his father has the action for theft. 14. If a thing be borrowed and the borrower dies, although there can be no theft from a vacant inheritance and so the borrower's heir cannot sue, the lender can certainly proceed for theft; and the same applies in respect of a thing hired out or given in pledge. For although the action for theft does not lie to the inheritance, it does to someone who has an interest in the thing. 15. The action for theft lies to the borrower not only in respect of the borrowed thing but also in respect of what is connected with it, because he is liable for the safekeeping of that also. Thus, if I lend you a slave, you bring the action for theft also in respect of his clothing, even though I did not lend you the garment he was wearing. In like manner, if I lend you work horses which have a foal, I am of the opinion that you have the action for theft in respect of the foal too, although he was not lent to you. 16. The nature of the action for theft granted to a borrower for use has been in issue. I think that in the case of everyone who has another's thing at his own risk, that is, on loan, on hire, or in pledge, the action for theft is available if the thing be stolen; but the *condictio* lies only to the owner of the thing. 17. If a letter which I sent you should be intercepted, who has the action for theft? The first question is: Whose is the letter, the writer or the addressee? If, indeed, I gave it to the addressee's slave, it immediately becomes his; so also if I gave it to his genuine procurator (for possession can be acquired through a free person); certainly is this so if he has an interest in having it. But if I so sent the letter that it should be returned to me, I remain owner because I did not wish to lose or transfer ownership of it. Who then sues for theft? He who has an interest in the letter's not being stolen, that is, the one to whose advantage the writing pertains, can bring the action for theft. And therefore the question can be raised whether the carrier of it may bring the action for theft. If he be liable for safekeeping of the letter, he can sue, as also if he has an interest in returning the letter. Suppose the letter to have been such that something was to be returned to him or become his; he can have the action for theft, as also if he undertakes safekeeping of it or receives a reward for the delivery. In such a case, he will be like an innkeeper or ship's master; for we give them the action for theft, assuming their solvency, since goods are at their risk.

- 15 PAUL, *Sabinus*, book 5: A creditor from whom the pledge is stolen can sue for theft not only to the value of the debt but for the full value of the thing; he, however, will be liable, through the action on pledge, to make over to the debtor all excess over the amount of the debt. 1. An owner who takes away the thing in which another has a usufruct will be liable for theft to the usufructuary. 2. Pomponius writes, though, that it is settled that if your lender take away the thing which you borrowed, he will not be liable to you for theft, because you have no interest in the thing and, indeed, are

not liable to the action on loan. Still if you had the right to retain the thing by reason of some expenditure that you had incurred in respect of the thing, you would have the action for theft, even against the owner, if he took it away, because in such a case, the thing would be like a pledge to you.

- 16 PAUL, *Sabinus*, book 7: That a head of household cannot proceed against his son for theft is not a ruling of the civil law as such; the very nature of the case makes it impossible; for we can no more sue those in our power than we can sue ourselves.
- 17 ULPIAN, *Sabinus*, book 39: Our slaves and sons-in-power can commit theft against us, but they are not subject to the action for theft; for one who can himself ordain against the thief has no need to litigate with him; accordingly, the action was denied him by the early jurists. 1. The question then arises: If the slave be alienated or manumitted, will he be liable to the action for theft? The accepted view is that he will not; for an action which did not exist from the beginning cannot later come into being against the same thief. Of course, if, after manumission, he should wrongfully interfere with the thing, it must be said that he will be liable to the action for theft because it is now that he commits the theft. 2. However, when I return the slave whom I bought and who was delivered to me, the case is not such that he should be regarded as never having been mine but that he has been and has now ceased to be mine. And so Sabinus says that if he stole from me while with me, the case is such that an action for theft in respect thereof is not possible. But though this be not possible, an account will still be taken of what he did, when about to be returned, in the action for rescission. 3. It has also been queried whether, if a fugitive slave commit theft against his owner, the owner has the action for theft against the person who began to possess the slave in good faith when he had not returned into his owner's power. The question is prompted by the consideration that though I am not liable as owner in an action for theft, as though he were not in my power, I am regarded as possessing the slave while he is at large. That I am deemed so to possess him, writes Julian, is pertinent only to usucapion. And so Pomponius, in the seventeenth book on *Sabinus*, says that the action for theft does lie to the owner of the runaway slave.
- 18 PAUL, *Sabinus*, book 9: When it is said that liability follows the wrongdoer, this is true in the sense that redress which became available when the deed was done follows the person of the miscreant. And so the Cassians think that if your slave perpetrate a theft from me and, having become his owner, I sell him, I will not be able to proceed against his purchaser.
- 19 ULPIAN, *Sabinus*, book 40: In the action for theft, it is enough to particularize the thing in a way in which it can be identified. 1. It is not necessary to specify the weight of utensils; it is sufficient to say, "plate, disc, or platter"; but it must be added of what material it is, silver, gold, or whatever. 2. But if one claim unwrought silver, one must state the extent of the mass and its weight. 3. In the case of coined money, the number of coins must be included so that the plaintiff is lacking more or less gold pieces. 4. In respect of garments, it has been asked whether the color should be specified. And it is true that the color should be stated so that as, in respect of utensils, one may speak of a gold platter, so the color of a garment should be declared. Of course, if the plaintiff declare on oath that he simply cannot state the color, he must be relieved of the need to do so. 5. One who gives a thing in pledge and then takes it away will be liable in the action for theft. 6. The owner of a thing given in pledge is deemed guilty of theft of it, not only if he take it from a pledgee possessing or holding

it but even if he removed it after he no longer possessed it, as when he had sold it; for this too, it is settled, is theft on his part. And so wrote Julian.

- 20 PAUL, *Sabinus*, book 9: When copper be given in pledge but it is said to be gold, although the proceedings be discreditable, there is no theft. But if, having given gold, the debtor then, on the pretext of weighing it or sealing it up, substitute copper, he commits theft. For he has substituted the thing given in pledge. 1. If you buy my thing in good faith and I made off with it or, if you have a usufruct in it and I improperly interfere with it, I will be liable to you in the action on theft, although I own the thing. But in these cases, there is no bar to usucapion of the thing as being, so to speak, stolen, because even if someone else took the thing and it returned into my power, it would be open to usucapion.
- 21 PAUL, *Sabinus*, book 40: It is a common question whether a person who takes a *modius* from a heap of corn steals the whole heap or only what he removes. Ofilius thinks that he steals the whole heap; for similarly, Trebatius says that one who touches the ear of a person touches the whole person. And in the same way, one who opens a wine jar and abstracts a small quantity of wine therefrom is deemed a thief not only of what he takes but of the whole contents. But the truth is that these people are liable in the action on theft only for what they took. If a man opened a cupboard, too heavy for him to carry away, and handled all its contents and then, having gone away, came back and extracted a particular item but, before reaching his destination with it, was apprehended, he would be both a manifest and a nonmanifest thief of one and the same thing. Again, if a man cut a crop by day and thereby wrongfully interfere with it, he is both a manifest and a nonmanifest thief of what he has cut. 1. If a person deposited a purse containing twenty coins and received another purse containing thirty, the giver being in error, it is settled that he is liable in theft only for ten, if he think that his twenty are included in the purse. 2. If a man steal copper, thinking it to be gold, or vice versa, according to Pomponius in the eighth book on *Sabinus*, his liability may be less rather than more; for he steals what he takes in fact. Ulpian says the same. 3. Again, if one theftuously remove two purses, one containing ten and the other twenty coins, and he thinks one to be his own but knows the other to belong to someone else, we say at once that he commits theft only of the one that he knows to belong to another, just as if he took two goblets, one of which he thought to be his own, the other he knew to belong to a third person, he will commit theft only of one of them. 4. And, whether he think the handle on the goblet to be his or it be in fact so, Pomponius wrote that he is a thief of the whole goblet. 5. But if, from a loaded ship, a person theftuously abstract but a pint of corn, does he steal the whole cargo or only the pint? The question is more easily put in respect of a full granary: it is certainly severe to say that he steals the whole. And, again, what are we to say of a cistern of wine or for that matter, a cistern of water? Then, in the case of a wine ship (there are many into which the wine is just poured in), what do we say of one who taps the wine? Is he to be held to steal the whole? The better view is that we answer in the negative. 6. Of course, if you put the case of a vintner's establishment from which jars of wine are abstracted, there is a theft of the individual jars not of the whole contents; the same would apply where one of the numerous individual movable items in a warehouse

was removed. 7. A person who enters an enclosure for the purpose of theft is not yet a thief even though he entered for an unlawful purpose. What then? By what action will he be liable? It could be the action for insult or he could be [criminally] charged with violence, if he made a forcible entry. 8. If, again, a person open or break into something of too great weight to be removed, an action for theft will lie against him, not for the whole contents but only for what he removes, because he could not remove the whole thing. In the same way, suppose the man opened a closet that he could not remove in order to steal, and he did handle some of the contents; although he could remove the individual items within it, if he could not remove the whole closet, he would be a thief of the things that he did take but not of the rest. But if he could take the whole receptacle, we say that he is thief of all, even though he opened it to take one or some items; and so says Sabinus. 9. If two or more removed a single beam which, individually, none of them could have managed, it must be said that all of them are liable in full for theft, although each alone could not move or theftuously deal with the thing; and that is the law which we apply; for it cannot be said that the individuals are thieves in part; they steal the one thing together; so it comes about that each is liable for theft. 10. Although a man may be liable in theft for things that he does not take, a *condictio* will not lie against him in respect of those things; and that, because it is a thing which has been removed for which a *condictio* will lie. And Pomponius also wrote to this effect.

- 22 PAUL, *Sabinus, book 9*: If a thief broke or fractured something which he handled without the intention of stealing it, he could not be sued for theft in respect of it. 1. If a chest be broken into so that, say, pearls may be removed and they are handled with theftuous intent, it is only of them that theft may be held to be committed; this is true. The remaining things, set aside to get at the pearls, are not tampered with for the purpose of their theft. 2. A person, who scrapes off a platter, steals the whole of it and is liable in the action for theft for the owner's full interest.
- 23 ULPIAN, *Sabinus, book 41*: Julian wrote in the twenty-second book of his *Digest* that an *impubes* can commit theft, if he be already capable of guilty intent; similarly, it is possible to proceed against such a person for damage wrongfully inflicted since theft can be committed by him. But, he says, there is a limit on this; for it does not apply to infants. Our view is that one can proceed with the Aquilian action against an *impubes* capable of fault. What Labeo says is also true, that is to say, that an *impubes* is not liable as an accomplice in respect of a theft.
- 24 PAUL, *Sabinus, book 9*: No less can the *condictio* be brought against an *impubes*, writes Julian.
- 25 ULPIAN, *Sabinus, book 41*: It is true, as most writers testify, that there can be no theft of land. 1. Therefore, it has been asked whether one forcibly evicted from land can have a *condictio* against the evictor. Labeo says: "No"; but Celsus is of opinion that there can be a *condictio* of possession of the land just as in respect of a movable thing which is stolen. 2. But of those things taken from land, such as trees, stones, gravel, or fruits which someone removes with theftuous intent, there is no doubt that he can be sued for theft.
- 26 PAUL, *Sabinus, book 9*: If wild bees make a honeycomb in a tree on your land and someone removes the bees or the comb, he will not be liable to you for theft because they did not belong to you; the same is true of things caught on land, sea, or in the air. 1. Again, it is settled that an agricultural tenant at a money rent will have the action for theft against the man who takes his standing crop, because it became the tenant's as soon as the miscreant cut it.

- 27 ULPIAN, *Sabinus*, book 41: One who takes away documents or *cautiones* is liable in theft not only for their intrinsic value but for what they represent, which means the amount of the sum contained in the document, if, that is, their interest is that great; thus, if a document records a sum of ten gold pieces, we say that that is the sum to be doubled. But what if it be seemingly valueless, recording a payment received, should there not be an assessment of the value of the materials only? For what other value does it have? Yet it can be said that because debtors not infrequently seek to recover their notes, since no less infrequently they are falsely alleged not to have paid, the creditor has an interest in the document as averting controversy over the matter. Generally, it is to be said that the plaintiff should have double the value of his interest in the document. 1. Then it can be asked whether, if a person has other proofs and a record of the account when he suffers the theft of his document, the value of the document as such should be doubled. Why not, indeed, since the plaintiff has no other interest? For what disadvantage can he face when he can establish the debt from other sources, as where the document is recorded in two copies? Nothing seems to be lost if it be the case that the creditor has the security of the other document. 2. Again, if a receipt be stolen, it must be said that there will be an action for theft for the value of it; but, in my view, it has no value if there be other evidence that the money has been paid. 3. But if a person does not remove a document of this kind but defaces it, not only the action for theft will lie but also the Aquilian action; for one who defaces is regarded as destroying.
- 28 PAUL, *Sabinus*, book 9: If a man steal a document before defacing it, he will be liable for the owner's interest in not having it stolen; the defacing adds nothing to the penalty.
- 29 ULPIAN, *Sabinus*, book 41: Moreover, an action for production can be brought and the interdict for *bonorum possessio*,
- 30 PAUL, *Sabinus*, book 9: if testamentary documents be defaced.
- 31 ULPIAN, *Sabinus*, book 41: If someone deface a portrait or book, he is again liable for damage wrongfully caused as if he had destroyed it. 1. If someone take or deface documents of a *res publica* or a municipality, Labeo says that he is liable to the action for theft; he says the same in respect of other public bodies and of corporations.
- 32 PAUL, *Sabinus*, book 9: There are those who think that only an assessment of the value of the materials of a document should be made in an action for theft because, if it be provable to the judge in the action for theft how much was due, that can also be proved before the judge in an action to claim the amount; and if it cannot be proved in the trial of the action for theft, then there cannot even be established the plaintiff's interest in the document. But having recovered the document after the theft, the individual can be a plaintiff to prove thereby what would have been his interest if the document had not been stolen. 1. In respect of the *lex Aquilia*, the principal problem is, how his interest can be established; for if it may be established by other means, he has suffered no loss. What, then, if, say, money be advanced conditionally, the fact of which might be proved by persons who might die before the condition be realized? Or suppose me to have thought something due to me and, because I do not have present witnesses and signatories who have knowledge of the fact, and, being defeated, I lose

the case. I can now utilize, when I sue for theft, their knowledge and their presence to testify to the existence of the loan.

- 33 ULPIAN, *Sabinus, book 41*: A tutor does have the administration of the estate of his *pupillus*, but he is not allowed to pillage it; hence, if he should take something with a view to theft, he commits theft, and the thing is incapable of usucapion. And he is liable to the action on theft, even though he is also liable to the action on tutelage. What has been written in relation to the tutor of a *pupillus* applies also to the case of a *minor* and to other curators.
- 34 PAUL, *Sabinus, book 9*: One who is an accomplice in a theft never finds himself liable for manifest theft; it can happen, thus, that a person, who is liable as an accomplice, is guilty of nonmanifest theft, while the person apprehended is liable as a manifest thief in respect of the same matter.
- 35 POMPONIUS, *Sabinus, book 19*: If someone accept a thing to deliver and he should know it to be a stolen thing, it is settled that with that knowledge, he alone is, if apprehended, a manifest thief; if not, he is neither sort of thief because he is not a thief and has not been apprehended. 1. If one of your slaves drew off some liquid and got away with it while another was caught in the act of siphoning off, you will be liable for the former as a nonmanifest, in the case of the other, as a manifest thief.
- 36 ULPIAN, *Sabinus, book 41*: One who persuades a slave to run away is not a thief. For one who gives another evil counsel of this sort is no more liable for theft than one who advises another to throw himself from a height or to kill himself; such conduct does not give rise to the action for theft. But if one person persuade the slave to run away, so that he may be taken by a third person, the persuader will be liable for theft as an accomplice. Pomponius writes further that although the persuader is not guilty of theft in the meantime, he does become so liable when someone becomes thief of the slave, the theft being regarded as committed with his connivance. 1. Likewise, it is accepted that one who abets his son, slave, or wife in the commission of a theft is liable for theft, even though the principal cannot be sued in the action for theft. 2. Pomponius also says that if a runaway slave takes goods with him, the person who incited him can be sued in respect of the goods as an accomplice of the actual wrongdoer. Sabinus is to the same effect. 3. If two slaves incite each other and run away together, neither is thief of the other. But what if they hide one another? Can it be that they are thieves then, one of the other? It can be said that each steals the other just as, if third persons took them individually, they would be liable as if each had abetted the other; in like manner, says Sabinus, each would be liable also for goods which the other carried away.
- 37 POMPONIUS, *Sabinus, book 19*: If, when my tame peacock escaped from my house, you chased it so that it disappeared, I could have the action for theft against you if someone else should take it.
- 38 PAUL, *Sabinus, book 9*: The mother of a son who is stolen has no right of action. 1. In respect of free persons, although an action for theft will lie, there will be no *condictio*.
- 39 ULPIAN, *Sabinus, book 41*: It is true that if someone abduct or conceal the prostitute slave-woman of another, this is not theft; one must look not to the fact but to the motive thereof, and that is not appropriation but lust. Hence, if a man forces an entrance to a prostitute's quarters out of lust and thieves, not introduced by him but entering separately, remove the woman's goods, he will not be liable for theft. But will a man who conceals a harlot for lust be liable under the *lex Fabia*? I think not and said so when it once happened. He acts more heinously than does a thief, but the ignominy

that he thereby incurs makes up for that; certainly, he is no thief.

40 PAUL, *Sabinus*, book 9: A man who takes horses which he has borrowed further than he should or who uses another's property without the owner's consent is guilty of theft.

41 ULPIAN, *Sabinus*, book 41: If theft be committed against one in the hands of the enemy and he returns with *postliminium*, one may say that he has the action for theft.

1. Of course, an *adrogator* can take proceedings for theft in respect of a theft committed against the person he adrogated before the fact of *adrogatio*. In respect of a theft after *adrogatio*, there is no doubt. 2. So long as the thief is alive, the action for theft is not extinguished; for either the wrongdoer is independent, and the action lies against him personally, or he has entered into the power of another, and the action for theft lies against the person who has power over him. This is what is meant by "liability follows the wrongdoer." 3. We must consider whether the action is extinguished if, after committing a theft, the wrongdoer becomes a slave of the enemy. Pomponius writes that the action is so extinguished but that it should revive if he returns through *postliminium* or in some other way; and that is the rule which we observe.

42 PAUL, *Sabinus*, book 9: If, without his master's authority, a slave takes charge of a ship, in respect of any goods lost on board, the ordinary formula will be granted against the master but, in respect of the misdeeds of others, "to the extent of the slave's *peculium*"; in respect of the slave operator's own wrongdoing, there is added: "to surrender him noxally." And if the slave should have been manumitted, an action in respect of the *peculium* will continue available against the master for a year while the delictal action will lie against the freedman himself. 1. It sometimes happens that both the person manumitted and the manumitter are liable for theft, if the manumission was effected to avoid the action for theft; but if proceedings be taken against the master, *Sabinus* says that the freedman is automatically released from liability as if the decision had been made.

43 ULPIAN, *Sabinus*, book 41: A false creditor, that is, one who pretends to be a creditor, commits theft if he accepts payment; and the money does not become his. 1. A false procurator, too, is regarded as committing theft. But *Neratius* says that we must consider whether this view be true but subject to a distinction; if the debtor gave him those coins with the intention that those very coins should be taken to the creditor by him, the proposition is true, if the procurator appropriate them; for the coins remain the property of the debtor since the procurator does not accept them in the name of the person whom the debtor wishes to have them and, by appropriating them without the owner's will, he undoubtedly commits theft. But, says *Neratius*, if the debtor so gave the money that it should become the procurator's, then in no way does he commit theft since he receives the coins with the owner's consent. 2. If a man, receiving a payment not due to him, should ask that it be made to someone else, there will be no action for theft against him, if he were not present when the payment was made; the case, though, would be different if he were present and he would be guilty of theft. 3. If a man does not lie with respect to his identity but does use words misleadingly, he is a fraud not a thief; for example, he says that he is wealthy or that he intends to put the money he receives into trade or that he will provide suitable verbal guarantors or that he will make speedy repayment of the money. In all these instances, he is guilty of deception, not theft, and so he cannot be sued for theft. But since he has been fraudulent, the action for fraud will lie against him, unless some other action be available. 4. A man who, for personal gain, takes away a thing belonging to another is guilty of theft, whether he knows the identity of the owner or not; for it in no way minimizes the fact of theft that the owner of the object is unknown. 5. If its owner has abandoned something, I will not commit theft of it, even though I take it with theftuous intent; for there can be no theft without an owner of the object; in the case posited, the thing belongs to no one; for the view of *Sabinus* and *Cassius* has commended itself that

a thing ceases to be ours as soon as we abandon it. 6. Even if the taker only thought it abandoned when it was not, he would not be liable for theft. 7. And if he picked up a thing, just lying there, which was not and which he did not think to be, abandoned, with the object not of personal profit but of returning it to its owner, he would not be guilty of theft. 8. That being so, let us consider the case that not knowing whose it was, he took it, intending to return it to the person who claimed it or proved that it was his; is he guilty of theft? I think not. For there are many who do this sort of thing and put up a notice saying that they have found the thing and will return it to the claimant; such persons show that they have no theftuous intent. 9. But what if the finder claim a reward, *ἐνρετρα*, as it is called? I do not think that even he commits theft, although his asking for something is conduct not to be condoned. 10. If someone deliberately discards or jettisons a thing, but not with the intention of abandoning it, and you take the thing, are you liable for theft? That is the question posed by Celsus in the twelfth book of his *Digest*. He says that if you thought that it was abandoned, you will not be so liable; but if you did not think that way, he says that there is room for doubt; still, on the whole, he would say that there is no liability in theft because there cannot be a deliberate appropriation of what another deliberately discards. 11. If a person take what is jettisoned from a ship, is he liable for theft? The issue turns on whether the goods are abandoned or not. If the mind of the jettisoner were such that since he expected that the goods would be lost and thus that whoever found them would appropriate them, a not unreasonable general assumption, there would be no theft. But if he were not of that mind but of the conviction that if the thing survived, it would still be his, then it could be taken away from the finder. And if the latter had an idea that this was so but took the thing with theftuous intent, he would be liable for theft. If, though, he took it with a view to preserving it for its owner, he would not be liable for theft. Nor would he be if he thought it to have been simply discarded. 12. Even if I become part-owner of a slave who previously stole something of mine, the better view is that though I am owner only in part, my right of action is ended; for if from the outset a person had a share in the thieving slave, he would have no action for theft. Of course, if I acquired a usufruct in such slave, it must be said that I would not lose my right of action because a fructuary is not an owner.

44 POMPONIUS, *Sabinus*, book 19: If the false procurator of a creditor receive something from a third person on the debtor's instructions, he is personally guilty of theft from the debtor and the coins remain the debtor's property. 1. If I should give you, as being yours, a thing which you know to be mine, the better opinion is that you are guilty of theft, if you accepted with a view to gain. 2. If a slave, being part of the estate of a deceased whose heir has not yet accepted the inheritance and, moreover, being manumitted in the will, should steal from the estate, he will be liable to the action for theft since there was no time when the heir was his owner.

45 ULPIAN, *Sabinus*, book 41: If an owner in common commit theft of a thing (for a common owner can certainly commit such a theft), it must be said that without doubt, the action for theft lies.

46 ULPIAN, *Sabinus*, book 42: It is universally accepted that even though the stolen thing no longer exists, the action for theft is still available against the thief. And even if a stolen slave be dead, the action for his theft lives on. Nor does manumission extinguish the action; for manumission is not unlike death in the matter of depriving a master of his slave. It thus emerges that however the slave be taken away from his master, the action for theft nonetheless survives against the thief; and that is the rule which we observe; the action lies not because he is now absent but because he ever was away to the thief's advantage. The same applies also in respect of the *condictio*; for the thief can be sued by *condictio*, although the thing, for whatever reason, no longer exists. The same is to be said, if the thing has fallen into the hands of the enemy; it is settled that an action for theft may be brought in respect of it. Indeed, even if the owner has subsequently abandoned it, he can nonetheless bring the action for

theft. 1. If a fructuary slave be stolen, both the fructuary and the owner have the action for theft. The action is thus divided between fructuary and owner; the fructuary sues for twofold the value of the fruits or for his interest in the slave's not being stolen; the owner for his interest in his property not being stolen. 2. When we say "twofold," that should be understood as "fourfold," if the theft be manifest. 3. This action should be held competent also for one who has only the use of the slave. 4. And if it be advanced that a person had the slave pledged to him, then the pledgee also has the action for theft in respect of him; but the debtor also has the action if the slave be worth more than the amount of the debt. 5. But the actions available to the different parties are such that if one compound with the thief, it must be said that only he loses his cause of action; but the other's survives; hence, if a slave, jointly owned, be stolen, as you suggest, and one of his owners compound, the other, who did not do so, still has his action for theft. 6. Again, the owner has the action for theft against his usufructuary if the latter do anything to conceal or suppress the fact of ownership. 7. It is rightly said that no one who thinks the owner to consent to his dealing with the thing is guilty of theft; for how does a person deal dolosely with a thing, when he thinks the owner to be in agreement, whether his belief be sound or unfounded? He alone is a thief who tampers with a thing in the knowledge that its owner would not consent. 8. The converse case: I think that I am doing something without the owner's consent when, in fact, he is amenable; the question is: Do I commit theft? Pomponius says that I do; but the truth is that if the owner be agreeable to a course of conduct, although the other party does not know it, that other will not be liable for theft. 9. If a stolen thing return to the control of its owner and then be stolen again, the owner will have a second action for theft.

47 PAUL, *Sabinus*, book 9: If, for some reason, the ownership of a stolen thing should change, the action lies to the present owner, say, an heir or a *bonorum possessor*, an adoptive father, or a legatee.

48 ULPIAN, *Sabinus*, book 42: Someone lost a silver vase and brought the action for theft in respect of it; a dispute arising over the weight of the vase, which the plaintiff put higher than it was, the thief produced the vase and the plaintiff, to whom it belonged, promptly appropriated it. The thief was nevertheless condemned for double its value, and the decision was undoubtedly correct. For in the penal action, the stolen thing itself does not come into issue, whether the action be for manifest or for non-manifest theft. 1. A person who knows who is the thief, whether or not he names him, is not himself a thief; for it is of great significance whether a person conceals a thief or simply does not point him out. One who merely knows the identity of a thief is not himself a thief; one who conceals a thief is. 2. A person who receives a slave with the owner's consent is, beyond dispute, neither a thief nor a kidnapper; who could be described as a thief, who holds with the owner's agreement? 3. If a person took a thing, when forbidden by the owner to do so, he would not be a thief, if he had no intention of concealing it; but once he did so conceal it, he would be a thief. So one who takes but does not conceal a thing is no thief even though he lacks the owner's authority. We regard as a prohibiting owner one who does not know, one, in short, who does not actively agree. 4. If I charged you by the contract of hiring with cleaning some garment and, whether I knew or would not agree, you lent the garment to Titius from whom it was stolen, you would have the action for theft in respect of it, because you were liable for its safekeeping, and I would have a similar action against you because you should not have lent the garment and, by doing so, you committed theft; it can thus happen that even the thief himself has an action for theft. 5. If a slave-woman be stolen who is already pregnant or who conceives while in the thief's hands, her child is also stolen property, whether born in the thief's ménage or that of a possessor in good faith. In the latter case, however, the action for theft ceases to lie. If,

personally not be liable to his father in an action for theft, he can be so liable in respect of a slave, part of his *peculium castrense*, if the slave should steal from his father.

5. But we must consider whether I can validly proceed against my son who has *peculium castrense* and who steals from me; for he does have the means to satisfy a judgment. It can be argued that action is possible.

6. Let us see whether a father can be liable to his son, if he should steal something of the son's *peculium castrense*; I think that he can; for he not only steals from his son but is liable in respect thereof.

7. Mela says that a creditor who does not return the pledge when the debt has been paid is liable for theft, if he holds on to the thing with a view to concealing it; I think that Mela is right.

8. If there be sulphur pits on land and a third person should enter and abstract some sulphur, the owner of the land will have the action for theft; but the tenant of the land, by the action on hiring, will then secure that the proceeds of the theft action be transmitted to him.

9. If your slave or son accept clothes for cleaning, it may be asked whether you have the action for theft. If the slave's *peculium* be solvent, you can have the action, but if it be insolvent, the answer must be that the action is not open to you.

10. If a person unwittingly buy a stolen thing and it be stolen from him, he will have the action for theft.

11. It is said by Labeo that if a person tells a corn merchant to give flour to anyone who may come and ask for it in his name and a passer-by who heard this does so ask, and get the flour, it is against him, not against me, that the corn merchant will have the action for theft; for the merchant conducted his own transaction, not mine.

12. If a person secure the release of my runaway slave as his own from a *duumvir* or other officials having authority over prisons or places of custody, is he liable for theft? The correct view is that if he gave verbal guarantors, I have an action as owner against the officials for them to make available their actions to me; but if they took no guarantors but handed over the slave as though to his owner, I, the true owner, will have the action for theft directly against the wrongdoer.

13. If someone knock gold or silver coins or some other thing out of a person's hand, he will be liable for theft, if he did this for others to pick the coins up and they did so.

14. If someone steal my unwrought silver and make goblets, I can have the action for theft and the *condictio* in respect of either the goblets or the metal. The same applies for grapes, must, and grapeskins; for I can have the action for theft and the *condictio* in respect of the grapes, the must, and the skins.

15. A slave who asserts that he is free, in order to obtain an advance of money, does not commit theft; for he does no more than assert that he is a suitable borrower. The same is true of a son-in-power who states that he is a head of household, the more easily to procure a loan.

16. In twenty-second book of his *Digest*, Julian writes that if someone accept money from me to pay to my creditor and, since he owes the creditor the same amount, he pays it over on his own behalf, he is guilty of theft.

17. If Titius sells another's thing and receives the price from the purchaser, he does not commit theft of the coins.

18. If there be two partners in a partnership of all assets and one receive a pledge which is then stolen, Mela says that only the recipient, not the other partner, has the action for theft.

19. No one commits theft by word or writing; our rule is that there can be no theft without wrongful physical interference; again only in such a case will aiding and abetting import liability.

20. If someone drove off my male ass and set him loose among his own mares to impregnate them, he will not be guilty of theft unless he has a theftuous intent; I gave this reply to my pupil, Herennius Modestinus, who consulted me from Dalmatia concerning horses to which a man was alleged to have submitted his mares for the same purpose, that he would be liable for theft if he had guilty intent, otherwise an *actio in factum* would lie.

21. I wish to lend money to a respectable Titius and you present to me a penniless Titius, as if he were opulent, and then share the money with him; you will be liable for theft since theft is committed through your advice and assistance; Titius will also be liable for theft.

22. Someone lent you heavier weights when you were buying by weight; Mela writes that he will be

liable to the vendor for theft as also will you if you are aware of the facts; for you do not acquire the goods with the owner's consent when he is in error over the weight. 23. If someone persuaded my slave to remove his name from, say, a document of purchase, Mela wrote, and I think, that I can proceed against him for theft. 24. But if the slave were persuaded to transcribe my document, then, if the slave be suborned into doing so, the action for making a slave worse would lie; if the inciter himself made the copy, the action would be that for fraud. 25. If a string of pearls be stolen, the number of them must be stated. So also, if proceedings for theft are taken in respect of wine, it must be specified how many flagons were taken. If receptacles be stolen, their number must be asserted. 26. If my slave, who had free administration of his *peculium*, should make a nongratuitous compact with someone who had stolen an item from the *peculium*, that should be seen as a valid *transactio*; for although the action for theft would lie to the master, the matter relates to the slave's *peculium*. Should the full penalty of double the value be paid to the slave, the thief will undoubtedly be released from liability. It follows that if the slave receives from the thief what is regarded as adequate compensation, there is deemed to be a regular *transactio*. 27. If someone aver an oath that he did not commit theft and subsequently wrongfully appropriate the stolen thing, the owner, though his action for theft is indeed destroyed, will retain his proprietary redress. 28. If a slave be stolen who has been named as heir in a will, the plaintiff, in the action for theft, will recover also the value of the inheritance, if the slave be dead before he could accept the estate at his master's direction. So also with the *condictio*. 29. If a *statuliber* be stolen or the object of a conditional legacy and the condition be satisfied before the inheritance is accepted, there will be no action for theft because the heir no longer has an interest; but while the condition is pending, assessment is to be made on the basis of what he would fetch from a purchaser.

53 (52.30) ULPIAN, *Edict*, book 38: If someone forcibly remove something from a house which has no occupant, he may be sued by the action for goods taken by force for fourfold or for nonmanifest theft; obviously, in the event of no one seeing him in the process of depredation.

54 (53) PAUL, *Edict*, book 39: If someone break open a door by way of insult, then, although things are thence removed by others, he will not be liable for theft; the intention and purpose of the delinquent distinguish the offenses. 1. If a slave who has been lent steal something and the borrower be solvent, Sabinus says that the action on loan is possible against the borrower as also the action for theft against the owner in the name of the slave. But if the money demanded by the owner be paid, the action for theft disappears; the same is true if the owner waives his action on the loan. 2. But if your own slave steal something which you have borrowed, there will be no action for theft against you, the thing being at your risk; but only the action for loan will lie. 3. One who applies himself to the affairs of another will not have the action on theft, although the thing would be lost at his risk; but he will be condemned in the action for unauthorized administration only if the owner cedes to him the action for theft. The same is to be said of one who acts as a tutor or of a tutor who owes a duty of care, for instance, a tutor being one of several named in a will who, having given due security, undertakes sole administration of the ward's estate. 4. If you hold something of mine because a third person gave it to you and I take it away, Julian says that you could have the action for theft against me, only if you have an interest in retaining possession of it; instances would be that you defend the donated slave in noxal proceedings or give him attention when sick, so that you would have a good ground for retaining the slave against one asserting title to him.

55 (54) GAIUS, *Provincial Edict*, book 13: If a creditor make use of the pledge, he is liable for theft. 1. When a person to whom something was lent for use himself lent it to a third person, the ruling was that he was guilty of theft. It adequately emerges

from this that theft appears to have been committed if a person appropriate to his own profit the use of another's thing. One should not be disturbed by the seeming fact that he does nothing for personal profit; it is a form of gain to make large with another's property and thereby to acquire a debtor who is under obligation to one. Thus, a person is liable for theft who removes a thing to give it to a third party. 2. The *Law of the Twelve Tables* allowed a man, caught by day in the act of theft, to be killed only if he defended himself with a weapon. The term "weapon" comprises a sword, club, stone, and generally anything which could inflict harm. 3. Since the action for theft looks to the recovery of a penalty, while the *condictio* and *vindicatio* lie for the recovery of the thing, it is clear that though the thing be recovered, the action for theft remains intact while the other two remedies become otiose; conversely, though the penalty of fourfold or twofold may have been paid, the *vindicatio* and *condictio* remain intact. 4. One who knowingly lends implements for the breaking-in of a door or a cupboard or who, equally, lends a ladder for getting in will be liable to the action for theft, although there was no initial counsel on his part for the commission of the theft. 5. If a tutor who administers the estate, or a curator, make a *transactio* with the thief, the action for theft lies no more.

56 (55) ULPIAN, *Disputations*, book 3: When a creditor removes a thing pledged to him, he is not regarded as wrongfully appropriating the thing but as looking after his pledge.

57 (56) JULIAN, *Digest*, book 22: Sometimes, a thief becomes bound again in certain cases, while already liable to penalty, so that it is possible to proceed against him several times for theft of the thing. The first instance occurs where the ground of possession is changed, as when the thing has returned into its owner's control and the same thief steals it again, whether from the same owner or from the person to whom he has sold or lent it. But if the identity of the owner has changed, another liability is created. 1. One who takes a thief before the prefect of the watch or the provincial governor is deemed to have chosen the manner in which he wishes the issue to be dealt with. And if the matter is ended there, and the thief being condemned, the amount of the stolen money is recovered, the action for theft is removed; certainly so, if not only is the thief ordered to restore the stolen thing but the judge adjudicate something more against him. But even if he be ordered to do no more than return the stolen thing, by the very fact that the thief had been in danger of a greater punishment, the action for theft ceases to lie. 2. If a thing, part of a *peculium*, return into the control of the slave, the theftuous taint of it is purged, and it thereby becomes part of the *peculium* again and in the possession of his master. 3. When a slave abstracts with theftuous intent a thing which is part of his *peculium*, so long as he holds it, its legal state is unchanged (for the master loses nothing); but if he deliver it to someone else, he commits theft. 4. An administering tutor can make a *transactio* with the thief, and if he recovers the stolen thing into his control, it is no longer a stolen thing; for a tutor is in the position of an owner. The same must be said if the curator of a lunatic, who so far has the role of an owner that even by delivering a thing belonging to the lunatic, he is deemed to alienate it. A tutor and the curator of a lunatic can also bring a *condictio* for stolen goods in the name of the *pupillus* or lunatic. 5. If two of your slaves steal a garment and some silver, one action for theft lies against you for the garment, another for the silver; no defense to the second will be granted on the ground that proceedings have already been brought over the garment.

- 58 (57) ALFENUS, *Digest, Epitomized by Paul, book 4*: If someone dig a hole to remove lime and he does remove it, he is a thief, not for digging but for taking.
- 59 (58) JULIAN, *Urseius Ferox, book 4*: If theft be committed against a son-in-power, he may, on becoming a head of household, properly take proceedings in respect thereof. The same would apply, granted the same circumstances, where a hired thing had been stolen from him.
- 60 (59) JULIAN, *From Minicius, book 3*: If a person, having lent a thing, should stealthily take it away from the borrower, he cannot be sued for theft because he is taking back his own property and the borrower will be under no liability on the loan. At least, this is so if there be no circumstances which give the borrower a right to retain the thing; for if the borrower made necessary expenditure in respect of the thing, he would have a greater interest in keeping the thing in his hands than in bringing the action on loan, and in such a case, he would have the action for theft.
- 61 (60) AFRICANUS, *Questions, book 7*: Just as a runaway slave-woman is regarded as stealing herself, so she makes her child a stolen thing.
- 62 (61) AFRICANUS, *Questions, book 8*: If a slave owned in common should commit theft from one of his owners, the correct view is that proceedings should be by the action for dividing common property, and it will be for the judge's discretion to decide that his loss be made good by the other co-owner or that the latter give up his share. It can be seen to follow that likewise, if he should alienate his share, he can proceed for theft against the purchaser so that, in a way, the delictal action follows the person of the wrongdoer. This, says [Julian], is not to be carried to the length that we should say that proceedings could be taken against the slave personally if he should become free, any more than they could be if he had been the victim's exclusive property. It thus becomes obvious that if the slave be dead, there is nothing for which the victim can claim, unless perhaps his co-owner has derived some benefit from the thing stolen. 1. [Julian] follows up by saying that if, again, the slave whom you gave me in pledge should commit theft against me, I will recover by the counteraction on pledge, so that either you pay the damages or abandon the slave to me as having been noxally surrendered. 2. The same is to be said of one sued for rescission of a contract of sale, so that, just as the purchaser has to return any accessions to or fruits of the thing, so the vendor will be under obligation either to accept condemnation or to leave the slave with the purchaser as being noxally surrendered. 3. Further to all this, if a person knowingly give a thief to an unsuspecting creditor by way of pledge, in every way, he will have to make good any loss suffered by the pledgee; for this is in accord with the dictates of good faith. 4. In an action on purchase, it has particularly to be queried what sort of slave the vendor promised. 5. In the matter of a mandate, [Julian] says, there is room for doubt whether it should be equally said that all loss should be made good, but in fact, the principle should hold good even more than in the cases already discussed; so that, even if the person, who asked that a particular slave be purchased for him, did not know that the slave was a thief, he is nonetheless liable in full; for the person who accepted the mandate to purchase could, with every justification, say that he would not have incurred loss, if he had not accepted the mandate; the result is even more obvious in the case of deposit. For, although, other things being equal, it appears equitable that a person should not incur, through a slave, greater loss than the slave himself is worth, it is still more equitable that no one should be at a loss by reason of a transaction which he entered into for the benefit of the other party and not for his own. And just as in the contracts previously discussed—sale, hire, and pledge—it is to be said that the fraud of one who knowingly conceals the facts should be penalized, so in these cases, fault should be to the disadvantage of the person for whom the contract is made and not to that of the contracting party. And certainly, in the case of mandate, it is fault on the part of the mandator to request the purchase of such a slave, as also for a depositor not to be more circumspect in giving warning of the kind of slave that he is depositing. 6. In the matter of loan for use, a different view may properly

be taken, clearly, since only the benefit of the borrower is in issue. Hence, just as in letting and hiring, the lender will, if he be in any way dolose, not lose more than the value of the slave in which connection we should not be too punctilious in determining what is fraud because, as said, the lender derives no benefit from the transaction. 7. All this I think to be true, provided that the mandatory or depositee has not himself been remiss; if such a person should have entrusted the slave with the care of silver or coins, when, in no circumstances, would his master have done so, a different opinion must be adopted. 8. I let you some land and (as is customary) it was agreed that its produce would be in pledge to me in respect of the rent. If you were stealthily to remove the produce, [Julian] used to say that I can have the action for theft against you. Equally, if you sold the standing crop to someone who took it away, we say that it becomes a stolen thing. Crops, while in the soil, are part of the land so that a tenant makes them his own, because he is regarded as gathering them with the owner's consent. One certainly cannot say the same in the case just put; for by what reasoning can they be held to become the tenant's property when the purchaser reaps them for himself? 9. In a noxal action, an heir defended a *statuliber* who was to become free if he gave ten; while the action was pending, the man, having given ten to the heir, became free; the issue was raised whether absolution in the action could be effected only if the heir gave the ten to the plaintiff. [Julian] thought it relevant to know whence the money came; if it came from a source other than the *peculium*, the heir should make it over because, if the slave had not yet attained his liberty, he would have been noxally surrenderable to the plaintiff; but if it came from the *peculium*, the decision would be the converse because he would be giving the heir money which, in other circumstances, he would not allow to be given him.

63 (62) MARCIAN, *Rules*, book 4: A man does not become a thief by pointing out the way to a runaway slave.

64 (63) MACER, *Public Prosecutions*, book 2: The provincial governor cannot bring it about that a convicted thief does not incur *infamia*.

65 (64) NERATIUS, *Parchments*, book 1: A slave, by legacy charged on the heir, Titius, to Seius, committed a theft from Titius before the latter had accepted the inheritance. If, after such acceptance, Seius wishes the slave to be his property, Titius can bring the action for theft against him in respect of the slave because the slave did not belong to Titius at the time of the theft and (for all that one may think that if a slave becomes the property of the person from whom he stole, the action for theft so disappears that even if he again be alienated, it will not be possible to bring proceedings on the theft) he did not become the property of Titius, on his acceptance of the inheritance, because things bequeathed pass directly from the testator to the legatee.

66 (65) ULPIAN, *Curule Aediles' Edict*, book 1: One who appropriates another's thing with a view to his own gain is a thief, even if, changing his mind, he later returns it to the owner; no one ceases to be guilty by his own repentance over such a wrong.

67 (66) PAUL, *Plautius*, book 7: Even though he owns the thing, if a man sell the thing which he has given in pledge, he commits theft, whether he actually delivered the thing to his creditor or charged it by special pact; and so thinks Julian. 1. Suppose that a man from whom something was stolen bequeathed it to me while it was in the thief's hands; if the thief subsequently handle it again, do I have the action for theft? According to the opinion of Octavenus, the action for theft will lie to me alone; for the heir does not have the action on his own account, because, whatever the ground of change of ownership, it is certain that it is the current owner who can sue for theft. 2. The older jurists held that a man who, with wrongful intent, summoned a muleteer before the magistrate was guilty of theft, if the mules disappeared. 3. Julian ruled

that if a slave cashier asked for payments after being manumitted, he was guilty of theft. *Mutatis mutandis*, the same may be said of a tutor to whom payment is made after the *pupillus* has reached puberty. 4. If you commend Titius to me as a suitable person to whom to advance money and I make inquiries about Titius and then you bring forward someone else as being Titius, you commit theft because I believe him to be Titius, that is, if the person you present is aware of all the circumstances; if he is not aware, however, you do not commit theft, nor can the other person be said to be an accomplice, because no theft has been committed; but an *actio in factum* will be given against the person who presented him. 5. If I stipulate from you that "it shall not be through your fault that the slave Eros is not given to me by the first of such-and-such month," although I have an interest in his not being stolen (for if he be stolen, you will not be liable on the stipulation, provided that it is not your fault that he has not been handed over), nevertheless, I do not have the action for theft.

68 (67) CELSUS, *Digest*, book 12: No one commits theft by denying a deposit (for the denial in itself is not theft, though it is close to it); but if a person takes possession of the thing deposited with a view to appropriating it, he does commit theft. It is irrelevant whether he wears the ring on his finger or has it in a jewelbox, if, when he holds it as a deposit, he decides to hold it as his own. 1. If something be stolen from you which you had promised under penalty to deliver by a certain date with the result that you have to pay the penalty, that can be taken into the assessment in the action for theft. 2. A stolen slave-child grew up in the hands of the thief; the latter was thief of the adolescent no less than of the infant, and the theft is all one. Hence, the thief will be liable for twofold the highest value that it has ever had in his hands. Granted that he can be sued only once for the theft, what is the relevance of that for the question before us? If the slave were stolen from the thief and he recovered him from the second thief, then, even though he has committed two thefts, he can be sued only once. I have no doubt that it is the value of the adolescent not of the child that should be looked to. What could be more absurd than to think that the thief's position is improved by the continuance of his offense? 3. When the sale of a purchased slave goes off, the purchaser cannot proceed for theft against the vendor in respect of something which the slave stole from him after the sale but before he was returned. 4. A runaway slave stole a stolen thing from the thief; it is right that the thief should have the action for theft on that account against the slave's owner so that the offenses of such slaves shall not bring them immunity and be a source of profit to their owner; for often by such thefts, the *peculia* of these slaves are increased. 5. If, after the five years of his lease, an agricultural tenant takes further crops without the owner's consent, can he be sued for theft of the corn and vintage? I have no doubt that he is a thief, and if he consumes what he steals, the value of it can be recovered from him.

69 (68) MARCELLUS, *Digest*, book 8: Julian said that there can be no theft of a thing, part of a vacant inheritance, unless, say, the deceased had pledged it or given it on loan

70 (69) SCAEVOLA, *Questions*, book 4: or someone has a usufruct in it.

71 (70) MARCELLUS, *Digest*, book 8: In these latter cases, he thought that there could be theft against the inheritance, the things could not be usucapted, and consequently, the heir could have the action for theft.

- 72 (71) JAVOLENUS, *From Cassius, book 15*: If a person steal a thing which he has borrowed, he can be sued both for theft and on the loan; but if the action for theft be brought, that on the loan is extinguished; if the action for loan were brought, it would be a defense to the action for theft. 1. Where someone possesses as heir a vacant inheritance, although he can usucapt, he will not have the action for theft if something be stolen from it, because a person can sue for theft who has an interest in the thing's not being stolen and he is regarded as having an interest when he stands to lose not to gain.
- 73 (72) MODESTINUS, *Replies, book 7*: Sempronia prepared a document to give to the centurion for transmission to the office, but she did not carry out her intention. Lucius recited its contents in court as if it had been delivered to the office; the document could not be found in the office, nor was it delivered to the centurion. My question is: What wrong may be asserted against one who had the temerity to read in a court a document, taken from a private house, which had not been given to him? Modestinus replied that if he took it by stealth, theft had been committed.
- 74 (73) JAVOLENUS, *From Cassius, book 15*: A person who sells a thing pledged to him, when no agreement had been made that he have a power of sale, or, his debt remaining unpaid to him, sells before the time when he would be authorized to sell it, makes himself guilty of theft.
- 75 (74) JAVOLENUS, *Letters, book 4*: I bought a stolen slave-woman in good faith for two gold pieces, and when she was in my possession, Attius stole her from me. Now both her owner and I are suing Attius for theft. I ask what should be the basis of computation for each of us? The reply is: For the purchaser, double his interest; for the owner, double the woman's value. We should feel no concern that a penalty for theft is to be awarded to two people; for where reparation is made in respect of one and the same thing, the purchaser's justification for an award is his possession of the thing, the owner's, his very title to it.
- 76 (75) POMONIUS, *Quintus Mucius, book 21*: If a man, pretending to be another's agent, contrive that I promise something to him personally or to someone to whom he requests me to do so, I am not able to sue him for theft because there is no thing which has been dealt with, with theftuous intent.
- 77 (76) POMONIUS, *Quintus Mucius, book 38*: One who uses a thing which he has borrowed or which was deposited with him otherwise than on the terms on which he accepts it, will not be liable for theft, if he believe that he is not acting contrary to the owner's will. In no way will he be liable on a deposit. On the question whether he be liable on a loan there will need to be an evaluation of fault on his part. Should he not have believed that the owner would allow what he did? 1. If someone steal another's thing and then someone steal what he has taken from him, it is the owner who can proceed for theft against the second thief, not the first thief; the reason is that it is the owner, not the first thief, who has an interest in the safety of the stolen thing. This is what Quintus Mucius says, and it is correct; for though the thief has an interest in its safety, since he will be liable to a *condictio* for its value, nevertheless, the interested party who brings the action for theft must have an honest interest. We do not follow the opinion of Servius who held that if no owner of the stolen thing is or will be forthcoming, the thief should have the action for theft; the thing is still not to be regarded as his who is profiting by it. In the result, it is the owner who will have the action for theft against both thieves in such wise that his commencement of proceedings against one does not obstruct the continued availability of an action against the other; the same applies to the *condictio*, since each defendant is liable in respect of a different act.
- 78 (77) POMONIUS, *Readings, book 13*: A person who takes a purse of coins is liable

also in respect of the purse, although it was not his intention to steal the purse.

- 79 (78) PAPIANIAN, *Questions, book 8*: A person gave another something to inspect; if the thing were at the recipient's risk, he could bring the action for theft if the thing were taken.
- 80 (79) PAPIANIAN, *Questions, book 9*: If a debtor steal the thing he gave in pledge, what he pays in the action for theft in no way reduces his debt.
- 81 (80) PAPIANIAN, *Questions, book 12*: If I have sold but not yet delivered a slave and, without my fault, he has been stolen, the better view is that I have the action for theft; I should be seen as having the interest in the slave because I am his owner or because I will be liable to yield up actions I have regarding him. 1. Although the action for theft never lies unless we have an interest in the thing, when it is brought on the ground of ownership, my interest must be related, unless it be greater, to the value of the thing; this is evidenced in the case of *statuliberi* and conditional legacies. Any other test would make the amount difficult to determine. And so mere interest is the basis of valuation only in those cases where the action is not grounded on ownership, where the action cannot rest on the full value of the thing itself. 2. If I brought the action for production to choose a slave bequeathed to me and one of the body of slaves from which I was to choose had been stolen, the heir would have the action for theft because he would have the interest; and it is irrelevant on what ground the obligation of safekeeping was due. 3. Since a robber in any case commits theft, he is to be regarded as a manifest thief. 4. But a person through whose wrongful conduct the thing was snatched away would be liable not in the action for theft but in that for things taken by force. 5. If Titius, in whose name a false procurator wrongfully accepts money, ratifies the transaction, Titius himself will have the action for unauthorized administration; the person who paid the money will have the *condictio* for money not due against Titius and against the false procurator the *condictio* for theft; if he choose to sue Titius, the latter may fairly plead the defense of fraud to require him to make over his *condictio* for theft. But if the money was due, the action for theft disappears because the debtor is released from his obligation. 6. A false procurator only steals the money when, posing as the genuine procurator whom the creditor has, he tricks another's debtor. The same applies to one who asserts that money is payable to him as the heir of Sempronius, when the heir is in fact someone else. 7. A person acting on behalf of Titius paid money in his name to the false procurator of his creditor, and Titius ratified the payment; Titius does not get the action for theft, which arose for the payer immediately the money was paid, because Titius had neither ownership nor possession of the coins; Titius will indeed have the *condictio* for what was not due and the payer that for theft; this latter will be surrendered to Titius by the judge's direction, if he be sued by the payer in the action for administration.
- 82 (81) PAPIANIAN, *Replies, book 1*: The action for theft, not the criminal charge of peculation, lies when money is stolen from civic funds.
- 83 (82) PAUL, *Views, book 2*: If a fuller or tailor who receives clothes for cleaning or repair should use them, he would be seen to commit theft of them by this improper use, because he does not receive them for that purpose. 1. When crops are taken from land, both tenant and owner can bring the action for theft because each has an interest in their recovery. 2. One who abducts a slave-woman, not a prostitute, out

of lust will be liable to the action for theft and, if he conceals her, will be liable to the penalty of the *lex Fabia*. 3. One who steals documents or contractual records will be liable in theft for the amount recorded in them; it does not matter whether they have or have not been canceled, because they are the simplest proof of payment.

- 84 (83) NERATIUS, *Replies, book 1*: If a man appropriates as heir things from the estate of one whom he thinks to be dead, when he is in fact alive, he does not commit theft. 1. When a person has been sued for theft on his own account, he will not, if an action lies against him, in respect of something else as the owner of a slave, be given a defense of theft once committed.
- 85 (84) PAUL, *Neratius, book 2*: Although a stolen thing cannot be usucapted unless it return into the owner's control, if its value, assessed in action, be paid or the owner sell it to the thief, it must be said that there will be no barrier to the right of usucapion.
- 86 (85) PAUL, *Handbook, book 2*: A person who has an interest in the thing's not being stolen will have the action for theft, if he holds the thing with the owner's consent, for example, if it be let to him. But someone who conducts affairs unasked or as a tutor, as also an actual tutor or curator, will not have the action in respect of a thing stolen through his fault. Again, a person to whom a thing is due under a stipulation or a will does not have the action for theft, although he has an interest in the thing's safety, nor does the verbal guarantor of an agricultural tenant.
- 87 (86) TRYPHONINUS, *Disputations, book 9*: If a thing, stolen or taken by force, return to the owner who is unaware of the fact, it is not regarded as returning into the owner's possession, and so, even if, after such possession by the owner, it be sold to a purchaser in good faith, usucapion will not follow.
- 88 (87) PAUL, *Decrees, book 1*: A creditor has the action for theft for the full value of the pledge, not simply the amount of the debt. But if it be the debtor himself who stole the pledge, it is accepted instead that he would be liable in theft for the amount of the debt and interest thereon.
- 89 (88) PAUL, *Concurrent Actions, sole book*: If someone proceed by the action for things taken by force, he cannot also take proceedings for theft; but if he first choose to proceed for twofold on theft, he can also have the action for things taken by force, so long as he does not recover more than fourfold over all.
- 90 (89) PAUL, *Civilian Penalties, sole book*: If a freedman or a client steal from the patron or a hired laborer from his employer, he commits theft but no action for theft arises.
- 91 (90) JAVOLENUS, *From the Posthumous Works of Labeo, book 9*: A fuller is released from the action on the contract [of hire by the owner]; Labeo says that he cannot then validly bring the action for theft. Again, if he brought theft proceedings before himself being sued on the contract and, before judgment in the action for theft, he be released from liability on the contract, the thief must be absolved as against him. But if none of this has yet happened, the thief must be condemned to him. All this, because he has the action for theft only insofar as he has an interest. 1. No one can give aid and advice to another, who cannot himself have a theftuous intent.
- 92 (91) LABEO, *Plausible Views, Epitomized by Paul, book 2*: If, when he knows that something is being stolen from him, a man does not prevent it, he cannot have the action for theft. PAUL. Quite untrue; for if someone knows that he is being robbed and, because he cannot prevent it, lies low, he can proceed for theft. But if he could prevent it and did not, he still can have the action for theft. It is in this way that a patron commits theft against his freedman or one held in awe from one who is restrained

from offering resistance by modesty in his presence.

- 93 (92) ULPIAN, *Edict, book 38*: It must be remembered that now criminal proceedings for theft are common and the complainant lays an allegation. It is not a kind of public prosecution in the normal sense, but it seemed proper that the temerity of those who do such wrongs should be punishable on extraordinary scrutiny. Still if that be the party's wish, he can bring civil proceedings for theft.

3

INCORPORATED MATERIAL

- 1 ULPIAN, *Edict, book 37*: The *Law of the Twelve Tables* does not allow one to extract a stolen beam from a building or to vindicate one connected with vines (the statute prudently thus effects it that buildings should not on this account be destroyed and that viniculture should not be disturbed); but the statute gives an action for twofold against one found to have made such an incorporation. 1. The term "beam" comprises any material from which buildings are constructed or which are necessary in a vineyard. Hence, some say that there are included also tiles, stones, bricks and so forth, if they be useful for buildings (for the term is derived from "covering"), so that, further, lime and sand are comprised in the definition. Again, in the case of vines, the term includes anything necessary for the vines, such as poles and supports. 2. But the action for production will also be given, for there should be no leniency for a person who built into or bound to a building something which he knows to be another's property. However, we proceed against him not as being in possession of it but as having deliberately contrived no longer to possess it.
- 2 ULPIAN, *Sabinus, book 42*: But if you assert that proceedings have been taken in respect of stolen materials incorporated into a building, there can be deliberation whether, quite separately, a *vindicatio* for them lies. I have no doubt that it does.

4

A SLAVE, DIRECTED IN THE WILL TO BECOME FREE, IS
ALLEGED TO HAVE STOLEN OR DESTROYED SOMETHING
AFTER THE DEATH OF HIS OWNER BUT BEFORE THE
INHERITANCE HAS BEEN ACCEPTED

- 1 ULPIAN, *Edict, book 38*: If it be alleged that through the guile of a slave, directed to be free, something be done, after the death of his master and before acceptance of the inheritance, whereby something from the estate of the manumitter does not come into the hands of the latter's heir, an action for twofold will lie against him for a year of days on which business can be done. 1. This action, as Labeo wrote, rests on natural equity rather than on the civil equity, there being indeed no civil action; it is by nature fair that he should not go without penalty who was made the bolder by the expectation that, as he judged, he could not be punished as a slave by reason of his imminent free status nor yet be condemned as a freeman because he had stolen from the inheritance, that is, of his mistress; a master or mistress cannot have an action for theft against his or her own slave, even though he later become free or be alienated, unless he thereafter deal wrongly with something. In consequence, the praetor took the view that the cunning and effrontery of those who despoil inheritances should incur a twofold penalty. 2. A freedman will be so liable only if he be alleged to have made away with something by deliberate wrongfulness. Remissness or negligence on the slave's part is

GOODS TAKEN BY FORCE AND ON TUMULT

- 1 PAUL, *Edict, book 22*: A person who forcibly takes something is liable for both non-manifest theft for twofold and for taking goods by force for fourfold. If the action for taking by force be brought first, the action for theft will be refused; but if the action for theft be brought first, the other will lie to recover the balance available.
- 2 ULPIAN, *Edict, book 56*: The praetor says: "If any loss be said to have been inflicted with deliberate wrongfulness by armed men on someone or if his goods be said to have been forcibly taken, I will grant an action against the person alleged to have done this. And if a slave be said to have done it, I will grant a noxal action against his master." 1. By this edict, the praetor makes provision against what is done by force. For if someone can show that he has been subjected to force, he can initiate a public prosecution for force; and there are those who think that a public prosecution should not be prejudiced by a private action. It seemed more advantageous, however, that although it be prejudicial to the *lex Julia de vi*, nonetheless, the action should not be refused to those preferring to seek private redress. 2. A person can act with deliberate wrongfulness (the words of the edict) not only when he seizes something himself but also when with premeditation he gathers about him armed men for the purpose of inflicting damage or of committing robbery. 3. Hence, whether the men he uses for robbery be gathered by himself or by someone else, a man is held to act with deliberate wrongfulness. 4. We must understand by "gathered men" men so gathered to do harm. 5. Nothing further is specified, such as of what type, whether freemen or slaves. 6. We use the plural even if only one man has been engaged. 7. Again, if you assert that only one person did harm, I do not think that the expression is incorrect; we should interpret the words to cover a man who uses force alone or with a gang and, in the latter case, whether they be armed or not, so that he is liable under this edict. 8. The mention of deliberate wrong here includes force; for a person who uses force acts deliberately; but a person who acts deliberately does not always use force. Hence, in the present case, deliberation includes force; and even if something be done by guile without force, it is equally covered. 9. The praetor says: "loss"; this term covers all loss, including that effected clandestinely. I do not think, however, that clandestine activity is meant, but loss which is accompanied by violence. It has also been rightly spelled out that if one person alone do something without force, he is not covered by this edict while, if anything be done with a gang, even without force but with intent, that is what concerns this edict. 10. Neither the action for theft nor those of the *lex Aquilia* are made available in this edict, although they sometimes lie also with this

edict; for Julian writes that a robber is a more reprehensible type of thief and that if someone inflict loss with a gang, he can also be sued under the *lex Aquilia*. 11. When the praetor says, "or whose goods are said to have been forcibly taken," we take this to be applicable even if only a single thing be snatched from among the victim's goods. 12. If someone does not himself gather a gang but, being one of the gang, takes something forcibly or inflicts some loss, he is liable to the present action. A question arises whether the edict applies only to loss inflicted or robbery with a gang raised by the defendant or also to such loss or robbery with a gang raised by someone else. The better view is that this latter also is covered, so that all robberies and loss inflicted with a gang raised by another are included so that both the ringleader and the members are liable to this action. 13. In this action, brought within a year of business days, it is the true value of the thing, not the plaintiff's interest in it, which is quadrupled. 14. Again, this action lies in respect of the gang without the requirement of proving which members did the robbing or inflicted the loss. The term "gang" includes slaves, that is, those who are in a condition of servitude, even though they profess to be free or are in good faith serving someone else. 15. I do not think that the plaintiff can proceed by this action against their master in respect of each individual slave; for it is enough that the master should offer the fourfold once. 16. Arising out of this action, there will be noxal surrender of not all the slaves but only of him or them found to have acted wrongfully. 17. This action is generally styled that for goods taken by force. 18. Only he is subject to this action who manifests wrongful intent. Hence, if someone take his own thing by force, he will not be liable to the action for things taken by force, but he will be otherwise punished. And even if he forcibly take back his runaway slave, possessed by another in good faith, he will still not be liable to this action because it is his own thing which he removes. What if it be something pledged to him? It must be said that then he is liable. 19. The action for things taken by force does not lie against an *impubes* who is not capable of the requisite intent; but if one of his slaves or the troop of them be alleged to have done it, he will be liable in either case to the action for things taken by force. 20. If a tax collector make off with my beast, thinking me to be guilty of some tax offense, then, although he be in error, Labeo says that this action does not lie against him; he obviously lacks wrongful intent. But if he should so impound it that it may not graze and so die of starvation, he will be liable to an *actio utilis* under the *lex Aquilia*. 21. If a person impound a beast forcibly driven off, he can be sued by the action for goods taken by force. 22. In this action we do not inquire whether the thing be among the plaintiff's assets or not, but if it be in fact, the action will lie. Hence, whether it be lent, let, or pledged to me, or deposited with me, so that I have an interest in its not being removed, or if I possess it in good faith or have a usufruct or other right in it, such that I have an interest in its not being forcibly taken, it must be said that I have the action under discussion, so that we do not look for ownership but only for the fact that a thing is alleged to have been removed from among my assets, that is, my possessions. 23. And generally, it is to be said that wherever I could have the action for theft for something done by stealth, I will have the present action. Now someone may say: "But we do not have the action for theft in respect of a thing deposited with us." That is just why I added: "if we have an interest in its not being forcibly removed"; for I also have the action for theft, if I have accepted liability for negligence in respect of a thing deposited or if I accept the cost of the deposit other than as a payment for services. 24. It is better said that, even if the action for theft in respect of the thing deposited should lapse, that for goods taken by force remains; for there is no small difference between one who acts stealthily and one who seizes a thing, since the former conceals his wrong,

while the latter flaunts it and also commits a crime. Hence, if someone establish that he has even only a modest interest, he has the action for goods taken by force. 25. If my runaway slave should buy some things to use for his own benefit and they are seized, I can bring the action for things taken by force, since those things are part of my assets. 26. Where goods are so seized, it is possible also to bring the action for theft or for damage wrongfully caused or the *condictio*, and, indeed, individual items may be the object of a *vindicatio*. 27. This action is granted to heirs and other successors; however, being a penal action, it is not given against such heirs and successors. But let us consider whether it should not be granted against them to the extent that they may have been enriched through the wrong. I myself think that the praetor did not promise the action against heirs in respect of what may have come to them, because he took the view that the *condictio* would meet the case.

- 3 PAUL, *Edict, book 54*: If a man seize goods as a slave and action be brought against him as a freeman, then, even though it was possible to bring proceedings against his former owner for a year after the manumission, proceedings cannot properly be instituted against the freedman himself after that year has passed because with whomever proceedings may be possible, the plaintiff is barred. If the action be brought against the erstwhile owner within the year and then proceedings are taken against the freedman, Labeo says that the plaintiff will be met with the defense of *res judicata*.
- 4 ULPIAN, *Edict, book 56*: The praetor says: "Where loss be said to have been inflicted deliberately in a tumult, I will, in the year when it first be possible to proceed in respect thereof, give an action for twofold against that man, thereafter the action will be for the value." 1. This edict is issued in respect of the loss that someone causes in a tumult. 2. Labeo says that tumult is named from the general category, disturbance, which itself comes from the Greek ἀπό τῶν θορυβεῖν (creating a disturbance). 3. What number do we require to recognize a tumult? If two get into a brawl, we do not regard that as a tumult because two persons cannot properly be held to create a tumult; but if there were several, ten or fifteen men, it would be held a tumult. What, then, if there were three or four? It would not be a tumult. Labeo very rightly says that there is a great difference between a tumult and a brawl; for a tumult is of a crowd of men who gather and make a commotion, but a brawl is between two. 4. It must be said that under this edict, not only the man who inflicts loss himself in a tumult is liable but also he who deliberately effects it, that loss be caused in such circumstances, whether he be personally present or not; for there can be the wrongful intent in one not there. 5. It must be said also that he is caught by this edict who comes along and is the instigator of the loss effected, if he be part of the tumult when the loss is occasioned and has the requisite intent; for it cannot be denied that what is done in such tumult is done with his intent also. 6. If, by his arrival on the scene, someone provoke or arouse a tumult by some shouting or act, accusing one person or seeking to arouse compassion for himself, assuming that damage be done by his design, he is liable, although he did not come to create the tumult. The fact is that loss is occasioned in the tumult with his intent. For the praetor requires not that a person summon the tumult but that in it, loss be inflicted through his intent. There exists this difference between the present edict and the earlier one; in that one, the praetor speaks of what is deliberately done with a gang or which is seized even without such gang; here he is concerned with that loss which is deliberately inflicted in a tumult, even though the defendant did not himself convene it, but it came together through his shouts or words or appeal for compassion or if someone else convoked it and he himself was part of it. 7. That is why the first edict, by reason of the gravity of the wrong, laid down a fourfold penalty, but the present one, twofold. 8. That again applies, however, only [in the case of both edicts] in the year when action could first be taken; after that, it is for the value. 9. Moreover, the present edict is concerned with loss inflicted and goods lost, not seized while, under the earlier edict, one may proceed in respect of things taken by force. 10. By goods lost we mean cases where something is left to a

person in a defective state, shattered, perhaps, or broken. 11. This is an *actio in factum* for double the value of the thing, meaning its real value; the assessment is as at the time of judgment and, within the year, is always for twofold. 12. The plaintiff must establish that loss was inflicted on him in a tumult, and if it occurred elsewhere, the action will not lie. 13. If, when Titius belabored my slave, a tumult gathered and, in the disturbance, the slave lost something, I could proceed against Titius because the loss was deliberately inflicted in a tumult; that applies where the beating began for the inflicting of loss. If there were any other reason for the thrashing, the action would not lie. 14. If a man himself convoked the tumult so that in its presence he might flog the slave with a view to insult not to causing loss, the edict applies. For it is true that he, who flogs to affront, acts deliberately and he, who gives occasion for the causing of loss, himself inflicts it. 15. The praetor gives the action against the owner in respect of his slave or the household of them. 16. What was said earlier, in connection with the action for things taken by force, may be repeated here.

5 GAIUS, *Provincial Edict*, book 21: It does not avail a robber, in order to evade the penalty, that he restores the thing before action.

6 VENULEIUS, *Stipulations*, book 17: The statute prohibits the usucapion of something seized or forcibly taken before it has returned into its owner's control.

9

FIRE, COLLAPSE OF BUILDINGS, SHIPWRECK, RAFT, AND SHIP TAKEN BY STORM

1 ULPIAN, *Edict*, book 56: The praetor says: "If a man be said to have looted or wrongfully received anything from a fire, a building that has collapsed, a wreck, or a stormed raft or ship or to have inflicted any loss on such things, I will give against him an action for fourfold in the year when proceedings could first be taken on the matter and, after the year, for the value. I will likewise give an action against a slave or household of slaves." 1. If it be indeed in the public interest that nothing should be looted from these disasters, the utility of this edict is patent and its severity most proper. And although there be criminal prosecutions arising from these crimes, the praetor is nonetheless right in propounding civil actions for such offenses. 2. How are we to interpret "from a fire"; is it the actual fire or the place where the fire breaks out? The better interpretation is "on account of a fire," that is, the looting takes place by reason of the confusion and alarm caused by a fire; in the same way, we speak of something lost in war, meaning lost by reason of the war. So also, if anything be pillaged from land adjacent to the scene of the fire, it must be said that the edict is operative; for it is true that the seizure arises out of the fire. 3. In similar manner, the term "collapse of buildings" refers to the time when the destruction occurs and covers seizure by someone not only from the building which comes down but also from adjacent premises. 4. If there be a suspicion of a fire or a collapse which does not actually happen, let us see whether this comes within the scope of the edict. The better view is that it does not, for nothing is seized from either a fire or a collapse. 5. The praetor also says: "if anything from a shipwreck." Here one may ask whether this concerns someone who takes something at the time of the wreck or also one who takes at another time, that is, after the wreck; for things are said to come from a wreck which lie on the shore after the wreck. The better view is that the edict applies to the time

sunt deducant sibique execrandam praedam parent, praesidis prouinciae re||ligiosa con- f. 381
stantia efficiat.

- 11 MARCIANUS libro quarto decimo institutionum. Si fortuito incendium factum [B. 60, 20, 4] S
sit, uenia indiget, nisi tam lata culpa fuit, ut luxuria aut dolo sit proxima. 4
- 12 ULPIANUS libro octauo de officio proconsulis¹. Licere unicuique naufragium suum im- S
1 pune colligere constat: idque imperator Antoninus cum diuo patre suo rescripsit. Qui
data opera in ciuitate incendium fecerint, si humiliore loco sint, [Coll. 12, 5, 1. B. 60, 39, 6]
bestiis obici solent: si in aliquo gradu id fecerint, capite puniuntur aut certe in insulam
deportantur².

X.

10

R DE INIURIIS ET FAMOSIS LIBELLIS R

ESP

- 1 ULPIANUS libro quinquagensimo sexto ad edictum. Iniuria ex eo dicta est, [B. 60, 21, 1] E
quod non iure fiat: omne enim, quod non iure fit, iniuria fieri dicitur. hoc generaliter.
specialiter autem iniuria dicitur contumelia. interdum iniuriae appellatione damnum culpa
datum significatur, ut in lege Aquilia dicere solemus: interdum iniquitatem iniuriam di- 15
cimus, nam cum quis inique uel iniuste sententiam dixit, iniuriam³ ex eo dictam, quod
1 iure et iustitia caret, quasi non iuriam, contumeliam autem a contemnendo. Iniuriam
autem fieri Labeo ait aut re aut uerbis: re, quotiens manus inferuntur: uerbis autem, quo-
2 tiens non manus inferuntur, conuicium fit⁴: omnemque iniuriam aut in corpus inferri aut
ad dignitatem aut ad infamiam pertinere: in corpus fit, cum quis pulsatur: ad dignitatem, 20
3 cum comes matronae abducitur: ad infamiam, cum pudicitia adtemptatur. Item aut per
semet ipsum alicui fit iniuria aut per alias personas. per semet, cum directo ipsi⁵ cui
patri familias uel matri familias fit iniuria: per alias, cum per consequentias fit, cum fit
liberis meis uel seruis meis uel uxori nuruiue: spectat enim ad nos iniuria, quae in his
4 fit, qui uel potestati nostrae uel affectui subiecti sint. Et si forte cadaueri defuncti fit 25
iniuria, cui heredes bonorumue possessores exstitimus, iniuriarum nostro nomine habemus
actionem: spectat enim ad existimationem nostram, si qua ei fiat iniuria. idemque et si
5 fama eius, cui heredes exstitimus, lacessatur. Usque adeo autem iniuria, quae fit liberis
nostris, nostrum pudorem pertingit, ut etiamsi uolentem filium quis uendiderit, patri suo
quidem nomine competit iniuriarum actio, filii uero nomine non competit, quia nulla in- 30
6 iuria est, quae in uolentem fiat. Quotiens autem funeri testatoris uel cadaueri fit iniuria,
si quidem post aditam hereditatem fiat, dicendum est heredi quodammodo factam (semper
enim heredis interest defuncti existimationem purgare): quotiens autem ante aditam here-
ditatem, magis hereditati, et sic heredi per hereditatem adquiri. denique Iulianus scribit,
si corpus testatoris ante aditam hereditatem detentum est, adquiri hereditati actiones du- 35
F(XYMOC). Petrus 3, 58 = l. 1 pr. (iniuria ... fiat et iniuriae appellatione ... significatur)

¹ de naufragiis et [incendiariis] add. Coll. ² Incendiariis lex quidem Cornelia aqua et igni
interdici iussit: sed uarie sunt puniti. nam qui data opera in ciuitate incendium fecerunt,
si in humillimo loco sunt, bestiis subici solent, si in aliquo gradu et Romae id fecerunt,
capite puniri: aut certe (exciderunt quaedam) adficiendi sunt qui haec committunt Coll.
³ nos dicimus accepisse a iudice. et puto iniuriam similiae ins. (u. i.) ⁴ conuicium fit del.
⁵ ipsi del.

1 parent] Taur., darent FXYMOC 4 luxo-
ria F 12 quinquagensimo sexto] FO, ui X,
uii M, ii Y, u Petr. | ex e'o' dicta est F²,
dicta est ex eo Petr. 13 fiat] fit Y 14 culpa]
sine culpa Petr. 15 dicemus F 16 nam
cum quis seq.] non plenius legerunt Graeci:
ὄτε τις δικάζων ἀδικῶς ἀποφαίνεται. καλεῖται
δὲ iniούρια ἢ ὕβρις BS (Dor.). cf. Inst. 4, 4 pr.:
cum enim praetor uel iudex non iure contra
quem pronuntiat, iniuriam accepisse dicitur
et Paulus l. sing. de iniuriis (Coll. 4, 5, 1): nam

cum praetor non iure (praetor noster codd.)
aduersus nos pronuntiat, iniuriam nos acce-
pisse dicimus | dictam] dictism F¹ 17 i'usti-
tia F² | contumendo F² 18 quotiens non
manus inferuntur conuicium fit F, quotiens
non manus inferuntur ut (sed C^b) cum conui-
cium fit XYMOC^b, inc. M^cC^o: ὄτε διὰ χειρῶν
διὰ λόγων ὕβριζει BS (Dor.) 23 fit iniuria]
uelit iniuria F^o 24 liberos F^o 31 testa-
ris F: τοῦ τεστάρωρος BS 33 pur'gare F²
35 detentu's m F²

shall ensure that night fishermen do not, by display of light, deceive those at sea as though guiding them to some port, thereby leading the ship and its complement into danger and preparing for themselves a damnable prize.

- 11 MARCIAN, *Institutes*, book 14: If a fire be caused by chance, it merits indulgence unless the carelessness be so great as to be rank and nearer to deliberate intent.
- 12 ULPIAN, *Duties of Proconsul*, book 8: It is established that it is lawful for anyone to collect with impunity his wrecked property; so ruled the Emperor Antoninus and his deified father in a rescript. 1. Those who deliberately start a fire in a city, if they be of lower rank, are usually thrown to the beasts; but if they be of some standing, they are subjected to capital punishment or certainly deported to an island.

10

CONTUMELIES AND DEFAMATORY WRITINGS

- 1 ULPIAN, *Edict*, book 56: Wrong is so called from that which happens not rightly; for everything which does not come about rightly is said to occur wrongfully. This in general. But, specifically, "wrong" is the designation for contumely. Sometimes again, by the term "wrong" there is indicated damage occasioned by fault, as we say in respect of the *lex Aquilia*; then, too, we sometimes call unfairness wrong; for when someone delivers judgment unfairly or unjustly, it is called wrong; for it lacks lawfulness and justice, as not being rightful; but contumely derives from despising or deriding.
1. Labeo says that contumely can be perpetrated by act or by words: by act, when an assault is made; by words, there is insult whenever there is no physical attack.
2. Every contumely is inflicted on the person or relates to one's dignity or involves disgrace: It is to the person when someone is struck; it pertains to dignity when a lady's companion is led astray; and to disgrace when an attempt is made upon a person's chastity.
3. Again, a contumely can be effected against someone personally or through others: personally, when a head of household or matron is directly affronted; through others, when it happens by consequence, as when the affront is to one's children or slaves, one's wife or daughter-in-law; for a contumely affects us which is suffered by those who are subject to our power or are the objects of our affection.
4. And if perchance the corpse should be contumeliously treated of a deceased to whom we are heirs or recipients of his estate, we have the action for insult in our own right; for it affects our own reputation, if any insult be directed at the corpse. The same applies if the good repute of one to whom we are heirs be damaged.
5. So far does an affront to our children affect our own honor that if someone should sell another's son, even with his consent, the father will indeed have the action for insult in his own right; but there will be no action on behalf of the son, because there is no affront where the victim consents.
6. Now whenever there be any affront at the testator's funeral or to his corpse, if it occur after the inheritance has been accepted, it must be said that in a sense, the insult is to the heir (for it is always the heir's obligation to vindicate the reputation of the deceased); but if it be before acceptance, the insult is rather to the inheritance itself and it is thus through the inheritance that the heir will acquire the action. Then Julian writes that if a testator's corpse be detained by someone before acceptance of the inheritance, there is no doubt that the action vests in the inheritance. He also thinks that the same is true if, even before the inheri-

labor be not exceeded. The same applies to thieves from the baths. But if thieves defend themselves with weapons, or burglars and their like strike someone, they are to be sent to the mines or, if of respectable rank, banished.

- 2 MARCIAN, *Public Prosecutions*, book 2: But if they commit a theft in the daytime, they are to be subjected to civil proceedings.
- 3 PAUL, *Military Penalties*, sole book: A soldier caught stealing in the baths is to be discharged with ignominy.

18

BREAKERS OUT OR IN AND ROBBERS

- 1 ULPIAN, *Duties of Proconsul*, book 8: The deified brothers, in a rescript to Aemilius Tiro, ruled that those who break out of prison and escape are to be punished. And Saturninus endorses the view that those who break out of prison, whether by breaking down the doors or through a conspiracy with others detained like themselves, are to be punished by death; but if they escape through the laxity of the jailers, their punishment should be less severe. 1. Robbers, who are more heinous thieves (that is, plunderers), are normally condemned to forced labor, whether in perpetuity or for a limited period, because those of better class are removed for a time from their civic rank or directed to quit the boundaries of the homeland. For them, no particular penalty is prescribed by imperial rescripts, and so their punishment is a matter for the discretion of the person conducting the *cognitio*, once the investigation is completed. 2. Cutpurses, pickpockets, and burglars are to be similarly punished. For the deified Marcus directed that a Roman knight, who was a burglar and who, having broken down and penetrated a wall, stole some money, should keep away from the province of Africa from which he came, the city of Rome, and Italy as a whole for five years. Punishment should, though, be inflicted on burglars and the others listed above after the hearing of the case, according to what comes out in the hearing, provided that, in the case of the lower orders, it does not go beyond forced labor and, for those of gentler rank, banishment.
- 2 PAUL, *Duties of Prefect of the City Guard*, sole book: The punishment for burglars varies. For nocturnal intruders are the more heinous, and so, having been cudged, they are usually sent to the mines. But those who break in by day, having been similarly beaten, are sentenced to forced labor for life or for a term.

19

THE DESPOILED INHERITANCE

- 1 MARCIAN, *Institutes*, book 3: If someone plunder the inheritance of another, he is to be punished by extraordinary process on being charged with such offense, as is laid down in a proposal of the deified Marcus.
- 2 ULPIAN, *Duties of Proconsul*, book 9: If a charge of despoiling an inheritance be laid, the provincial governor must arrange to investigate it; for, where no action for theft can be brought, there remains only the aid of the governor. 1. It is clear that

- any time should not be denied it, so much so that for that reason persons in custody may [have their appearance] deferred and postponed. 10. Persons in custody can be heard and condemned not only before the tribunal but also outside the court.
- 19 TRYPHONINUS, *Disputations, book 4*: A person to whom freedom is due under a *fideicommissum* may not be subjected to interrogation as a slave unless and only unless he is accused as a result of the interrogations of others.
- 20 PAUL, *Decrees, book 3*: A certain husband as his wife's heir was claiming from Surus money which he said the dead woman had lodged with Surus, while he himself was absent, and he had produced a single witness to this, the son of his freedman, before the procurator; he had also sought the interrogation under torture of Surus's handmaid. Surus continued to deny that he had received [the money], and [said] that the testimony of a single person should not be admitted, and that it was not customary to begin with interrogations under torture, even if the handmaid had belonged to a third party. The procurator put the maid to the torture. When the case came to the cognizance of the emperor on appeal, he pronounced that the torture had been conducted unlawfully, that reliance should not be placed on the evidence of one witness, and that therefore the appeal had been rightly lodged.
- 21 PAUL, *Punishments of Civilians, sole book*: The deified Hadrian wrote in a rescript that no one should be condemned for the purpose of putting him to the torture.
- 22 PAUL, *Views, book 1*: Persons taken into custody without accusers are not to be subject to torture unless there are any suspicions strongly attaching to them.

19

PUNISHMENTS

- 1 ULPIAN, *Disputations, book 8*: Whenever an investigation is made into an offense, it is accepted that [the accused] should suffer, not the punishment which his status allows at the time when sentence is passed on him but that which he would have undergone if he had been sentenced at the time he committed the offense. 1. Similarly, if a slave has committed an offense and is said subsequently to have attained his freedom, he ought to undergo that punishment which he would have undergone if he had been sentenced when he committed the offense. 2. On the other hand, too, if someone has been reduced to a meaner status, he ought to suffer that punishment which he would have undergone had he remained in his former status. 3. It is generally agreed that, in terms of the statutes which deal with criminal proceedings or private charges, prefects or governors conducting proceedings *extra ordinem* should impose punishment *extra ordinem* on those who escape a monetary penalty by their lack of means.
- 2 ULPIAN, *Edict, book 48*: We should understand a person condemned on a capital charge [as condemned] on grounds for which the appropriate [punishment] for the condemned is death or loss of citizenship or slavery. 1. It is agreed that since the time that deportation replaced interdict from fire and water, a person does not lose his citizenship before the emperor has ordered him to be deported to an island; for there is no doubt that a governor does not have the power to deport. However, the urban prefect does have the right of deportation, and immediately after the prefect has passed sentence, [the condemned man] is seen to have lost his citizenship. 2. A person who has not lodged an appeal we shall take to be condemned; but if he should appeal he is regarded as not yet condemned. If, however, a person be condemned by someone who does not have the right to condemn on a capital charge, he is in the same position [as if not yet condemned]. For a man is only condemned where the condemnation was valid.
- 3 ULPIAN, *Sabinus, book 14*: The punishment of a pregnant woman who has been condemned to death is deferred until she gives birth. Indeed, I know that it is the practice that she is not to be interrogated under torture so long as she is pregnant.
- 4 MARCIAN, *Institutes, book 13*: Those who have been relegated or deported to an island must stay away from prohibited places. We also use this rule to mean that a relegated

person should depart from forbidden places but should not leave his island; otherwise, a person relegated for a period is punished with permanent exile, someone relegated permanently with relegation to an island, a person relegated to an island with deportation, and someone deported to an island with capital punishment. It is the same if a person does not depart into exile within the time within which he should have gone, or if in any other way he fails to comply with [the terms of] his exile; for his contumacy increases the penalty. Nor can anyone give an exile leave of absence or the parole to return, except the emperor, for special cause.

5 ULPIAN, *Duties of Proconsul*, book 7: The deified Trajan wrote in a rescript to Julius Fronto that in criminal cases a person should not be condemned in his absence. He also wrote in a rescript to Adsidius Severus that neither ought a person to be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned. However, judgment ought to be pronounced against contumacious persons who fail to comply with the summonses or edicts of the governors, even in their absence, after the manner of private actions. It is possible to maintain that these principles are not contradictory; what, then, is the answer? It will be better to lay down that penalties involving money or affecting a person's reputation can be imposed on absent persons if, after frequent warnings, they fail [to appear] through contumacy, and this may go so far as relegation; but if there is any heavier penalty to be imposed, let us say condemnation to the mines or capital punishment, it must not be imposed on the absent. 1. For an absent accuser, however, it must be stated that more serious measures are sometimes provided than the penalty imposed by the *senatus consultum Turpillianum*. 2. The words of the rescript [are as follows]. Rightly, Taurinus, have you tempered the penalty on Marus Evaristos in accordance with the degree of his culpability; for it is relevant in more serious offenses whether any act was committed by design or by accident. Indeed, in all charges this distinction must either call forth the penalty of the law or allow mitigation.

6 ULPIAN, *Duties of Proconsul*, book 9: Should anyone, to avoid punishment, happen to say that he has something to tell the emperor concerning his safety, then one must consider whether he should be sent up to the emperor. The majority of governors are so timid that, even after sentence has been passed on the man, they suspend the punishment and do not dare to do anything; others have no patience at all with persons who make any such allegation; while some do not [make it a habit] either always or never to send them up, but inquire what they wish to bring to the notice of the emperor and what they may have to say concerning his well-being, after which they either suspend the punishment or do not. This appears to be the rational middle way. My own view, however, is that once persons have been condemned, they have absolutely no right to a hearing, whatever allegations they make. For who doubts that they have recourse to these [expedients] for the sake of escaping punishment, and that they deserve heavier punishment for having left unsaid so long that which they claim to have to say concerning the emperor's well-being? For they ought not to have been silent for so long over so important a matter. 1. If the proconsul finds that certain slaves of his staff or of his legate are guilty, should he impose punishment on them or reserve them for his successor? There are extant, however, many precedents [showing] that [governors] have punished not only the slaves of their officials and those who act under them, but even their own slaves; something which should indeed be done so that, deterred by this example, they may the less offend. 2. We must now set out the classes of punishment that the governors may inflict on someone. Now there are certain punishments that may take away life, or inflict slavery, or deprive of citizenship, or include either exile or corporal punishment,

- 7 CALLISTRATUS, *Judicial Examinations*, book 6: (such as *admonitio*, or beating with rods; *castigatio*, or a lashing; *verberatio*, or a flogging with chains)
- 8 ULPIAN, *Duties of Proconsul*, book 9: or a fine with infamy, or any degradation from a rank, or the forbidding of a particular action. Life is taken away if, say, a person is condemned to be put to death with the sword. But it must be punishment by the sword; for governors do not have the right of killing by the ax, or the javelin, or the club, or the noose, or in any other manner, much less by poison, in the same way that they do not have the right to allow a free choice of death. However, the deified brothers wrote in a rescript allowing a free choice of death. 2. Enemies [of the state] and also deserters to the enemy are punished by being burned alive. 3. Nor should anyone be condemned to death by flogging, or scourging, or by torture, although very many happen to die while being tortured. 4. There is punishment which takes away freedom; of this kind is, say, condemnation to the mines or the *opus metalli*. Mines are numerous, some provinces possessing them and others not; those that have not send [their condemned criminals] to those that have. 5. In a letter of the deified Severus to Fabius Cilo, it is clearly stated that the urban prefect has a special competence to condemn persons to the mines. 6. The only difference between those condemned to the mines and those to the *opus metalli* lies in their chains, that those condemned to the mines are weighed down with heavier chains and those to the *opus metalli* with lighter, and that any who abscond from the *opus metalli* are handed over to the mines, [while those who abscond] from the mines are more severely punished. 7. It is customary for anyone condemned to forced labor who absconds to be condemned to a double term: but the term doubled should be that which he would have had left to serve when he ran away, and, indeed, the term is not doubled from the time when he was arrested and imprisoned. And if he was condemned to ten years, his sentence should either be extended to life, or he should be transferred to the *opus metalli*. Clearly, if he was sentenced to a ten-year term and immediately ran away at the outset, one must consider whether the period is to be doubled, or extended to life, or whether he is to be transferred to the *opus metalli*; and the prevailing view is that he should be transferred, or sentenced to life. For it is generally said that, where a doubling [of the sentence] would take the period beyond ten years, the penalty should not be limited in time. 8. Women are customarily condemned to the service of convicts in the mines, either permanently or for a period; in a similar manner [they may be condemned] to the saltworks. If, indeed, they are sentenced in perpetuity, they are made, as it were, *servae poenae*; but if they are sentenced for a fixed period, they retain their citizenship. 9. Governors are in the habit of condemning men to be kept in prison or in chains, but they ought not to do this; for punishments of this type are forbidden. ~~Prison indeed ought to be employed for confining men, not for punishing them.~~
10. Persons are also customarily condemned to the lime quarries or to the sulphur mines; these punishments, however, are heavier than [condemnation] to the [ordinary] mines. 11. We must see whether all those who have been condemned to the hunting games are made *servi poenae*; of course, it is customary for the younger men to suffer this punishment. Therefore, we must see whether these are made *servi poenae* or whether they retain their freedom. The prevailing view is that they too are made *servi poenae*; for they only differ from the others in this, that they are set to be huntsmen or Pyrrhic dancers or [to provide] some other kind of pleasure by pantomime or other movements of their bodies. 12. There is no doubting that slaves are customarily condemned to the mines, or to the *opus metalli*, or again to the hunting games; and if they are handed over [for these] they are made *servi poenae* and will no longer belong to him whose property they were before their condemnation. In point of fact, when a certain slave, after being condemned to the mines, had been delivered from that punishment by the favor of the emperor, the Emperor Antoninus very correctly stated in a rescript that because the slave had ceased to be his master's property once he was made a *servus poenae*, he should not thereafter be returned to [that]

master's power. 13. If, however, a slave is condemned to fetters, whether permanently or temporarily, he remains the property of him who was his master before he was condemned.

9 ULPIAN, *Duties of Proconsul*, book 10: It is the practice for governors also to forbid [people] to act as advocates. Sometimes they forbid them permanently, sometimes for a fixed period, measuring that period either by years or by the term for which they govern the province. 1. A person can also be forbidden in such terms as to prevent his representing specified persons. 2. He can again be forbidden to plead before the governor's court, but not prohibited from conducting cases before the legate or the procurator. 3. If, however, he is forbidden to plead before the legate, I think that in consequence he will also have lost the right to plead before the governor. 4. Sometimes a person will be forbidden, not [just] the right to act as advocate, but the [entire] practice of law. It is a more serious business to forbid the practice of law than [to forbid] acting as an advocate, if, indeed, a person is absolutely prohibited from engaging in legal business. It is customary [as a penalty], however, to prohibit in this way law students, advocates, and those who draw up documents, or draftsmen. 5. They are customarily forbidden to frame any kind of legal documents, to draw up petitions, or to seal depositions. 6. It is also customary [to forbid them] to sit in any place where legal documents are publicly deposited, for example, a public record office or registry. 7. Again, it is customary [to forbid them] to draw up, write, or sign wills. 8. There will also be this penalty, that a person may not take part in public business; for in this case, he is able to take part in private business but prohibited from public, as are customarily those on whom sentence is passed *δημοσίων ἀπέχεσθαι* (to abstain from public affairs). 9. There are also other punishments: Someone may be ordered to abstain from commerce, or to take on one of those contracts which are let publicly, such as the *vectigalia publica*. 10. It is common to forbid persons [to engage in] a commercial transaction or transactions; but let us see whether one can condemn someone to take on a transaction. Punishments of this kind, if one wishes to treat the subject in general terms, are indeed contrary to the *jus civile* in ordering an unwilling man to do something which he cannot do; but to deal with the subject specifically, there can be just reason for compelling someone to [take on] a transaction; and if this be the case, the sentence must be followed. 11. These are in general the punishments which are customarily imposed. You must know, however, that there are distinctions between punishments, and not all persons can have the same one imposed on them. To begin with, decurions cannot be condemned to the mines or to the *opus metalli* nor subjected to the gallows nor burned alive. If, by chance, they are so sentenced, they must be freed. This, however, cannot be done by the person who pronounced sentence, but the matter must be referred to the emperor so that the penalty may be altered or remitted by his authority. 12. The parents and children of decurions are also in the same position. 13. We should take "children" to mean all their children, not only their sons. 14. We must, though, see whether only those children whom they have had after [their admission to] the decurionate are exempt from these punishments, or all their children, even those whom they had when their family was of inferior rank. I think the better view is that they all have this privilege. 15. Clearly, if the father ceases to be a decurion, any child born while he was still a decurion will have the privilege of not being [so] punished; however, should a man have a son after he has become of lower rank, that son will be liable to punishment as the son of one of lower rank. 16. The deified Pius wrote to Salvius Marcius in a rescript that a *statuliber* should be punished as a freeman.

10 MACER, *Criminal Proceedings*, book 2: In the case of slaves, the rule is observed that they are punished after the fashion of men of low rank. For the same reasons that a freeman is beaten with rods, a slave is ordered to be beaten with lashes and returned

to his master; and for those [reasons] that a freeman, after being beaten with rods, is handed over to forced labor, a slave, under the punishment of fetters for the whole of that time, is ordered to be lashed and returned to his master. If he is ordered, being under the penalty of fetters, to be returned to his master but is not taken back by him, he is ordered to be sold and, if he does not find a buyer, to be handed over to forced labor in perpetuity.

1. If any who have been sent to the mines for some reason have committed an offense thereafter, it is right to deal with them simply as men condemned to the mines although they have not yet been dispatched to the place where they have to labor; for they change their status as soon as sentence is passed on them.
 2. In the case of all persons, men of inferior rank as much as decurions, it is laid down that he who is inflicted with a heavier punishment than the statutes lay down does not become infamous. Therefore, if someone has been punished with a temporary spell of forced labor, or simply beaten with rods, then even if the action involves infamy, such as an action for theft, he must be said not to be infamous, because one single stroke of the rods is more serious than condemnation to a fine.
- 11 MARCIAN, *Criminal Proceedings, book 2*: It is for the judge to see that a sentence more severe or lighter than the case demands is not passed; for he should not strive for a reputation either for severity or for clemency, but should sentence with considered judgment, as each case demands. Clearly, in cases of less seriousness, judges should be more prone to leniency, while with more serious penalties they should conform to the severity of the statutes, tempered by kindness.
1. Domestic thefts, if of a more trifling kind, should not be the subject of public actions, nor should an accusation of this kind be permitted, where a slave is handed over for interrogation under torture by his master, or a freedman by the patron in whose house he lives, or a hired worker by the man to whom he has hired his services; for the term "domestic thefts" is used for pilfering by slaves from their masters, or freedmen from their patrons, or hired workers from those in whose houses they live.
 2. An offense is committed by design, by impulse, or by accident. Robbers who form a gang offend by design; those who drunkenly resort to fists or swords, by impulse; while a javelin launched at a wild beast in the course of a hunt which kills a man does so by accident.
 3. Capital punishment is to be thrown to the beasts or to suffer other punishments of the same kind, or to be executed [by the sword].
- 12 MACER, *Duties of Governor, book 2*: So far as the status of the condemned is concerned, it makes no difference whether their trial is public or not; for regard is paid solely to the sentence, not to the nature of the charge. Therefore, those ordered to execution or who are given to the beasts forthwith become *servi poenae*.
- 13 ULPIAN, *Appeals, book 1*: Nowadays [a judge] who is hearing a criminal case *extra ordinem* may lawfully pass what sentence he wishes, whether heavier or lighter, provided only that he does not exceed what is reasonable in either direction.
- 14 MACER, *Military Law, book 2*: Certain offenses, which bring no penalty, or a relatively light one, on a civilian, [are visited] more heavily on a soldier. For Menander writes that if a soldier takes part in stage plays or permits himself to be sold into slavery, he should suffer capital punishment.
- 15 VENULEIUS SATURNINUS, *Duties of Proconsul, book 1*: The deified Hadrian forbade the capital punishment of any who were classed as decurions, save for those who had killed their parents; and indeed it is very fully provided in [imperial] mandates that they are to be punished with the penalty of the *lex Cornelia*.
- 16 CLAUDIUS SATURNINUS, *Penalties of Civilians, sole book*: There are punishments for things done, such as thefts and killings, or for things said, such as insults or false pleadings, or for things written, such as forgeries and libels, or for things counseled, such as conspiracies and the guilty knowledge of robbers; and the scale of the crime is the same for those who aid others by advice.
1. These four categories, however, must be considered in seven aspects: the motive, the person, the place, the time, the quality, the quantity, and the outcome.
 2. The motive: for example, flogging, which goes unpunished if administered by a magistrate or parent, because it is inflicted for the purpose of correction not for the sake of insult; but it is punished when someone has been beaten up in anger by an outsider.
 3. The person is looked at in two ways: the person who did the act and the person who suffered [it]; for slaves and freemen are punished differently for the same crimes, and differently, too, someone who dares [to wrong] a master or parent as opposed to an outsider, or who [offends]

BOOK FORTY-EIGHT/PUNISHMENTS

a magistrate as opposed to a private person. In considering this matter, regard must also be had to age. 4. Place affects whether the same offense is theft or sacrilege and whether it calls for capital punishment or some lesser penalty. 5. Time distinguishes someone who absents himself without leave from a deserter, and a housebreaker or daytime thief from a thief by night. 6. Quality is when the act is either more or less grave, as manifest thefts are customarily distinguished from nonmanifest thefts, brawls from highway robbery, plundering from theft, impudence from violence. On this subject, Demosthenes, the greatest of the Greek orators, says as follows [in Greek]: "It was not then the blow which caused anger, but the dishonor; for what is terrible to freemen is not being beaten, although this is terrible, but the insult [of being beaten]. Gentlemen of Athens, the man who strikes the blow might do many things which the victim could not even report to a third party: by his manner, by his look, by his voice, as conveying an insult, as being an enemy, [hitting him] with his fist or open-handed. It is these things that move, that drive out of their minds, men who are themselves unused to contumely." 7. Quantity distinguishes a thief from a rustler; for the man who steals a single pig will be punished as a thief, he who steals a herd as a rustler. 8. The outcome is to be considered, even if [the act] was done by a most inoffensive man, although the law punishes the man who is in possession of a weapon for the purpose of homicide no less than him who kills. Therefore, also among the Greeks accidental happenings were expiated by voluntary exile, as is written by the archpoet [Homer]:

Me, when a child, Menoitius from Opys
led to your house, for miserable murder
on the day when I, foolish, inadvertent,
killed Amphidamas' son, angry over dicing.

9. It happens that the same crimes are punished more severely in certain provinces, for example, harvest-burners in Africa, those [who set light to] vines in Mysia, and those who debase the coinage where there are mines. 10. It sometimes happens that the penalties for some crimes are made tougher, [for example] whenever the excessive numbers of persons engaged in highway robbery need a lesson.
- 17 MARCIAN, *Institutes, book 1*: Some [convicts] are *servi poenae* such as those sent to the mines or to the *opus metalli*; and if anything is left to them in a will, it is treated as though it had not been written, as if it had been left not to Caesar's slave but to a *servus poenae*. 1. Again, some people are "stateless," that is, without a *civitas*, like those handed over for forced labor in perpetuity and those deported to an island, so that they have no rights under the *jus civile* but retain those which are of the *jus gentium*.
- 18 ULPIAN, *Edict, book 3*: No one is punished for thinking.
- 19 ULPIAN, *Edict, book 57*: Should slaves not be defended by their masters, they are not taken away for punishment on the spot, but will be allowed to be defended even by a third party, and [the judge] conducting the trial must inquire into their innocence.
- 20 PAUL, *Plautius, book 18*: If a penalty is imposed on anyone, it is accepted by a legal fiction that it is not to pass on to his heirs. The reason for this appears to be that punishment is laid down to correct men; and it ceases with the death of him on whom it is imposed.
- 21 CELSUS, *Digest, book 37*: Death is the only meaning we have for the extreme penalty.
- 22 MODESTINUS, *Distinctions, book 1*: Persons condemned to the mines, if they are found to be unfit for doing the work because of sickness or the infirmity of age, under a rescript of the deified Pius, can be released by the governor, who will consider their release provided only that they have relatives, by blood or marriage, and have served not less than ten years of their sentence.

- 23 **MODESTINUS**, *Rules*, book 8: If, through the inexperience of the person awarding [sentence], someone is sent to the mines without a predetermined time limit, it seems that his sentence is limited to ten years.
- 24 **MODESTINUS**, *Encyclopaedia*, book 11: We must know that persons who have been relegated or deported on the ground of treason are to have their statues pulled down.
- 25 **MODESTINUS**, *Encyclopaedia*, book 12: If anyone has been under accusation for a long time, his punishment is to be lightened to some extent; and it is so laid down, that those who have long lain under accusation are not to be punished in the same manner as those who receive their sentence promptly. 1. No one can be condemned to be thrown from the [Tarpeian] rock.
- 26 **CALLISTRATUS**, *Judicial Examinations*, book 1: The crime or punishment of the father cannot inflict any stain on the son; for each individual suffers his fate for his own crime, nor is he made the successor to the offense of another; as the deified brothers wrote in a rescript to the citizens of Hierapolis.
- 27 **CALLISTRATUS**, *Judicial Examinations*, book 5: The deified brothers wrote in a rescript to Arruntius Silo that it was not customary for provincial governors themselves to rescind the sentences pronounced by them. They also sent a rescript to Vetina Italicensis that no one could vary the sentence given by himself, and that this had become unusual. If, however, a person misrepresents himself or, lacking the documentary proof which he discovers later, has been sentenced to punishment, there are extant a number of imperial rescripts in which either the punishment of such persons is reduced or their original status is restored. This, however, can be done only by the emperors. 1. As to decurions and leading citizens of *civitates* who commit capital offenses, it is provided in mandates that if one of them should appear to have committed an offense for which he should be relegated to an island outside his own province, a letter must be sent to the emperor with a note of the sentence passed by the governor. 2. In another chapter of the mandates it is provided in the following words: "If any of the leading citizens of any *civitas* commit brigandage or any other crime such that they appear to have deserved the death penalty, you are to keep them in fetters and to write to me, adding what each of them has committed."
- 28 **CALLISTRATUS**, *Judicial Examinations*, book 6: The stages of capital punishments are more or less as follows. The extreme penalty is held to be condemnation to the gallows. There is also burning alive; this, however, though deservedly included in the term "extreme penalty," is yet regarded as following after the first, because this class of punishment was devised at a later time. Also there is beheading. Then, the next punishment after death is sentencing to the mines; after that, deportation to an island. 1. The remaining punishments relate to a person's reputation, not to the risk of his *caput*, such as relegation, for a period or permanently, or to an island, or when someone is handed over to forced labor, or punished by beating with rods. 2. It is not the custom for all persons to be beaten with rods, but only freemen of the poorer classes; men of higher status are not subject to beating with rods, as is specifically laid down in imperial rescripts. 3. Certain persons, who commonly call themselves "the lads," in certain towns where there is unrest play to the gallery for the applause of the mob. If they do no more than this and have not previously been admonished by the governor, they are beaten with rods and dismissed, or also forbidden to attend public entertainments. But if after such correction they are caught doing the same again, they should be punished with exile; or sometimes capital punishment may be imposed, for example, when they have too often been guilty of seditious and riotous behavior and after repeated arrests and over-lenient treatment persist in the same rash attitude. 4. It is the custom for slaves, after they have been beaten, to be returned to their masters. 5. If I may speak in general terms, all those who are forbidden to be beaten with rods must have the same respect for their rank [shown to them] as decurions have; for it is inconsistent to say that anyone whom the imperial constitutions forbid to be beaten with

- 31 MODESTINUS, *Punishments, book 3*: The governor should not, at the whim of the people, discharge persons who have been condemned to the beasts; but if they are of such strength or cunning that they can worthily be exhibited to the populace of Rome, he should seek the advice of the emperor. 1. The deified Severus and Antoninus wrote in a rescript that condemned persons should not be transferred from one province to another without the emperor's permission.
- 32 ULPIAN, *Edict, book 6*: If a governor or judge gives an interlocutory judgment: "You have committed *vis*," arising out of an interdict, the accused will not be branded [with infamy], nor will the penalty of the *lex Julia* follow; if, however, he does so arising out of a [criminal] charge, it is another matter. What if the governor fails to distinguish between the *lex Julia* on *vis publica* and the *lex Julia* on *vis privata*? That will have to be considered then in the light of the charge. However, if charges have been brought under both statutes, the milder, that is, the statute on *vis privata*, shall be followed.
- 33 PAPIAN, *Questions, book 2*: The imperial brothers wrote in a rescript that slaves condemned to temporary imprisonment may, when they have served their time, obtain their freedom and an inheritance or legacy; for punishment imposed for a period by a [court] sentence purges the penalty. If, however, the gift of liberty were to find them while they are actually in prison, the principle of the law and the words of the constitution thwart their freedom. Clearly, if a slave is granted liberty in a will and at the moment at which he enters upon the inheritance his time of imprisonment has elapsed, he will rightly be regarded as manumitted, just as if a debtor should have manumitted a slave given as a pledge and his inheritance had been entered upon after the redemption of the pledge.
- 34 PAPIAN, *Replies, book 16*: A slave is not handed over to forced labor in perpetuity, much less for a set period. Accordingly, when through a mistake a slave had been handed over to [forced] labor for a period, I gave the opinion that at the expiry of that period he should be returned to his master. 1. I also gave the opinion that in terms of the spirit of the *senatus consultum*, those who instigate an accuser through the agency of a man of straw are liable to the accuser's penalty.
- 35 CALLISTRATUS, *Questions, book 1*: In the mandates given by the emperors to provincial governors, it is provided that no one is to be condemned to permanent imprisonment; and the deified Hadrian also wrote a rescript to this effect.
- 36 HERMOGENIAN, *Epitome of Law, book 1*: Those condemned to the mines, as also to the service of the mineworkers, are made slaves, that is, *servi poenae*.
- 37 PAUL, *Views, book 1*: It is agreed that commodity hoarders may be punished *extra ordinem* according to the degree of their crime because of the false size of their measures; this is for the benefit of the people's corn dole.
- 38 PAUL, *Views, book 5*: If anyone has stolen anything from an imperial mine or from an imperial mint, he is punished by the penalty of [being sent to] the mines and exile. 1. Deserters to the enemy or those who betray our counsels are either burned alive or hanged on the gallows. 2. Those who are responsible for sedition and disturbance when a mob has been excited are, according to their social standing, either hanged on the gallows or thrown to the beasts or deported to an island. 3. Those who seduce underage virgins, if they are of lower rank are condemned to the mines, if of higher status, relegated to an island or sent into exile. 4. [A slave] who fails to prove that he has bought his freedom with his own money cannot claim his freedom; further, he is returned to the same master under penalty of fetters or, if the master himself prefers, condemned to the mines. 5. Those who administer an abortifacient or aphrodisiac draught, even if they do not do so with guilty intention, are still condemned, because the deed sets a bad example, if of lower rank to the mines, if of higher status to relegation to an island with the forfeiture of part of their property. But if for that reason a man or woman dies, they suffer the extreme penalty. 6. A will which is not according to law is suppressed without penalty; for there is nothing which may be

claimed under or based upon it. 7. Anyone who opens, recounts, or unseals the will of a person in his lifetime is liable to the penalty of the *lex Cornelia*; and generally those of lower rank are condemned to the mines; those of higher status, deported to an island. 8. If anyone proves that a document [relevant to] his lawsuit has been revealed by his procurator to his opponent, the procurator, if he is of lower rank, is condemned to the mines, if of higher status, forfeits half his property and is relegated permanently. 9. If anyone with whom documents have been deposited returns them to someone else in [the depositor's] absence or betrays them to his opponent, he is condemned to the mines or deported to an island according to his personal standing. 10. If judges delegate are alleged to have been corrupted with money, they are generally either removed from [their] court or sent into exile or relegated for a fixed period by the governor. 11. A soldier who has broken out of prison after being given a sword suffers capital punishment. Someone who has deserted along with the man whom he was guarding is liable to the same penalty. 12. A soldier who has attempted suicide but has not carried it through must suffer capital punishment, unless he did so because of unbearable pain or sickness or some sort of grief or for some other cause in which case he is to get a dishonorable discharge.

- 39 TRYPHONINUS, *Disputations*, book 10: Cicero, in his speech *pro Cluentio Habito*, wrote that when he was in Asia a certain woman of Miletus had been condemned for a capital offense because, after taking money from the substituted heirs, she herself aborted her own child with drugs. But if [a woman], because she is pregnant, does violence in some way to her womb after her divorce so as to avoid giving a son to her husband who is now hateful, she is to be punished by temporary exile, as has been written in a rescript by our most noble emperors.
- 40 PAUL, *Decrees*, book 3: It was decided to deport Metrodorus to an island, since he knowingly harbored a fleeing enemy, and to relegate Philoctetes to an island because, though he knew the man was being concealed, he kept the matter quiet for a long time.
- 41 PAPINIAN, *Definitions*, book 2: The sanction of the statutes, which in most recent times imposes a fixed penalty on those who fail to comply with the provisions of a statute, is not seen as applying to those special cases to which a penalty is specifically attached by the statute itself. There is no doubt that in all other [aspects] of the law the particular derogates from the general, nor indeed is it likely that a single offense should be punished on different assessments under the same statute.
- 42 HERMOGENIAN, *Epitome of Law*, book 1: In the interpretation of the statutes punishments should be mitigated rather than made harsher.
- 43 PAUL, *Replies*, book 1: The Emperor Antoninus wrote in a rescript to Aurelius Atilianus: "A governor cannot forbid anyone to practice his profession beyond the term of his own administration." 1. The same [emperor] gave the opinion that a person who by his own crime has lost the status of a decurion cannot claim the status of a decurion's son to avoid punishment.

20

PROPERTY OF CONDEMNED PERSONS

- 1 CALLISTRATUS, *Law of the Imperial Treasury and the People*, book 1: On [a man's] condemnation to lose life or citizenship or to be reduced to slavery, [his] property is confiscated. 1. Although [children] conceived before but born after condemnation take their portions from the property of their condemned fathers. 2. However, children